Vetrovec warning deficient, new fraud case trial ordered

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The Court of Appeal for Ontario has ordered a new trial in the 2011 conviction of an alleged fraudster, arguing that the trial judge failed to adequately explain to the jury in her Vetrovec warning why the testimony of four accomplices required special scrutiny.

Named for a 1982 Supreme Court of Canada decision, Vetrovec warnings give judges the discretion to caution jurors about testimony from unsavoury witnesses, including accomplices and jailhouse informants.

In writing for the majority in *R. v. Kanagalingam* [2014] O.J. No. 4946, Justice Robert Blair said that the Vetrovec instruction issued by Justice Myrna Lack of the Ontario Superior Court of Justice pointed only to the witnesses' criminal background and "was completely silent with respect to a number of salient points underpinning the need to scrutinize very carefully" their testimony.

While conceding that the 2006 Ontario Court of Appeal decision in *R. v. Zebedee* frees judges from detailing every point that casts doubt on the testimony of unsavoury witnesses, Justice Blair noted that "nonetheless, the warning must provide sufficient detail to drive home why the evidence requires special scrutiny in the circumstances; otherwise it does not 'serve its intended purpose.' "

The appellant, Nirmalarasan Kanagalingam, was convicted in July 2011 of multiple counts of fraud arising from a credit and debit card scheme at a Whitby, Ont., gas station and two Toronto-area clothing stores. The jury also convicted him of conspiracy to commit fraud, fraudulent use and possession of credit and debit card data, and participating in the activities of a criminal organization involved in debit card fraud. Those involved in the conspiracy netted proceeds of about $500,000.

PHOTO: PHIL BROWN

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> **Ian Smith**
> Criminal lawyer

The Court of Appeal noted that the Crown's case against Kanagalingam relied almost completely on the testimony of his four accomplices. But the trial judge failed to inform the jurors that the favourable plea bargains the Crown negotiated with those witnesses gave them a clear incentive to lie and implicate the appellant in the scheme. In exchange for their guilty pleas and testimony, the Crown withdrew many charges, the sentences were generally lenient, and, in the case of one accomplice, the Crown abandoned an effort to estreat $105,000 for a pre-trial breach of bail conditions.

The four accomplices later recanted portions of the agreed statements of fact on which their guilty pleas had been based, as well as some other statements they had made implicating the appellant. At the Crown's request, the trial judge agreed to admit into evidence the relevant portions of the agreed statements of fact and the other statements, relying on the principles set out in *R. v. B. (K.G.)* [K.G.B.] [1993] S.C.J. No. 22.

Toronto criminal lawyer Ian Smith, who served as counsel for the appellant, told *The Lawyers Weekly* that the decision serves as an important reminder to lawyers and judges that Vetrovec warnings should be tailored to the specific facts of each case, and that juries should be carefully instructed as to why they are receiving the warning in the first place.

That's especially true, he remarked, when the Crown's case is heavily dependent on evidence from unsavoury witnesses.

"The problem is that, in some circumstances, it's not necessarily apparent to the average juror why someone's evidence should be treated with care," he added. "I think that's part of the reason why our appeal succeeded."

The 2004 Court of Appeal decision in *R. v. Trudel* [2004] O.J. No. 248 defined "four main foundation elements" of a proper Vetrovec warning. At a minimum, the judge has to identify to the jury the witnesses whose evidence requires special scrutiny, and explain the reasons why the evidence is subject to special scrutiny. The judge also must caution jurors about the dangers of convicting the accused on the unconfirmed evidence of the witness, and advise them to look for independent evidence that tends to confirm that the untrustworthy witness is telling the truth. The elements were confirmed in *R. v. Khela*, a 2009 Supreme Court of Canada case.

In the Court of Appeal's written decision, Justice Blair focused primarily on the second element, said Smith.

"We did have other complaints about the Vetrovec warning," he said, "but that one complaint was enough to do the trick."

The 1982 *Vetrovec* decision effectively overturned a number of old laws that imposed more technical requirements for corroboration that fit witnesses into certain categories, said Lisa Dufraimont, an associate professor in the Faculty of Law at Queen's University.

"Vetrovec stands for the proposition that we're not going to categorize witnesses in that way," he said. "Interestingly, over time, the categories have started to re-emerge."

The trend pertains especially to testimony from accomplices and jailhouse informants, Dufraimont said. In some cases, she noted, the Crown has no choice but to rely on evidence from unsavoury witnesses.

But some wrongful convictions have been caused, in part, by over-reliance on evidence from jailhouse informants, including the cases of Guy Paul Morin and Thomas Sophonow.

"Vetrovec warnings are important because they're the main courtroom protection against being wrongfully convicted on the basis of jailhouse informant testimony," said Dufraimont.