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Azubuike c. R., 2024 QCCS 1654

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SUPERIOR COURT

(CRIMINAL DIVISION)

2024 QCCS 1654 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

Nº : 500-01-207497-204

DATE : June 5, 2024

PRESIDING : THE HONOURABLE JAMES L. BRUNTON, J.S.C.

EKENS AZUBUIKE

Accused

v.

HIS MAJESTY THE KING

Prosecutor

CORRECTIVE JUDGEMENT

The Court RECTIFIES the judgement dated May 9, 2024, by modifying the term *Animus curiae* by *Amicus curiae*.

The Court reproduces the content of this judgment in its entirety :

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JUDGEMENT
DEFENCE EXPERT WITNESS – *VOIR-DIRE* 16
(Publication Ban – art. 648 Cr.C.)

2024 QCCS 1654 (CanLII)

A. CONTEXT

[1] Mr. Azubuike was charged in 2020 with a series of crimes arising from the allegedly fraudulent purchase of used automobiles from COPART Auction ("COPART").

[2] COPART holds auctions for cars that have been written off for insurance purposes. Between December 1, 2019, and January 30, 2020, 9359-7201 Quebec Inc. ("Quebec Inc.") purchased approximately $300,000.00 worth of vehicles from COPART. The company submitted a series of counterfeit bank drafts in payment.

[3] Quebec Inc. had been assigned COPART client number [...]. The company had submitted material which identified Mr. Karen Voskerchyan as its president with a telephone number - (514) [...] (exhibits P-1, P-2a, P-2b, P-4 and P-5 produced at trial).

[4] Mr. Azubuike was also a client of COPART Auction through his company, Ekens Foundation International. He had submitted material which identified himself as a director of the company with a telephone number – (514) 641-2419 (exhibits P-8, P-9 and P-10 produced at trial).

[5] The only live issue at trial is the identity of Mr. Azubuike as the person responsible for Quebec Inc.'s bids and its supplying of the counterfeit bank drafts. One of the elements relied upon by the prosecution to prove identity was a series of eight recordings made to COPART's customer service center located in Dallas, Texas, on behalf of client #[...] – Quebec Inc. The calls had been made by a male who identified himself as Karen Voskerchyan and who provided Quebec Inc.'s client number. They were made between October 16, 2019, and November 25, 2019, inclusively. They were made using telephone number (514) [...] which was identified in COPART's files to Mr. Azubuike and his company (exhibit P-11, documents 1 and 2 produced at trial). The lead investigator in the case, Lt.Det. Mélanie Gagnon, testified at trial that her familiarity with Mr. Azubuike's voice led her to believe that the male voice on the recordings was his.

[6] The recordings had been provided to the prosecution on February 13, 2020 (exhibit P-11, document 2, produced at trial). By notice dated January 10, 2024, Mr. Azubuike was advised that the prosecution would be producing the recordings at trial (exhibit J-2, Tab 1).

[7] Since Mr. Azubuike was representing himself, the Court provided him information on the trial process during a management hearing held on January 17, 2024. During that session, Mr. Azubuike was advised that he had to be vigilant should he desire to present a defence (exhibit J-1, Tab 7, paragr. 6, 7 and 8).

[8] On April 22, 2024, Mr. Azubuike's trial on one count charging fraud began with the formation of the jury. At the end of the day, on April 26, 2024, the Court held a first in-

2024 QCCS 1654 (CanLII)

camera *ex parte* hearing with Mr. Azubuike concerning the summoning of potential defence witnesses. He identified a Quebec resident who he desired to call who would speak to the use of an IP address. It was agreed that he would prepare a subpoena which the Court would sign. He referred to two potential witnesses who were COPART employees located in Dallas, Texas. Since they could not be compelled by a subpoena issued by the Court without going through the lengthy procedures contained in the Mutual Legal Assistance Act and related Treaty, the Court suggested that Mr. Azubuike communicate with counsel for the prosecution in an attempt to arrange a voluntary appearance by those persons via TEAMS.

[9] On April 30, 2024, a second in-camera *ex parte* session was held with Mr. Azubuike. The Court signed the subpoena of the witness identified during the previous in-camera *ex parte* hearing. Mr. Azubuike spoke of a potential second witness for the defence who would address the issue whether the male voice on the recordings had been cloned through Artificial Intelligence. During his cross-examination of Lt.Det. Gagnon, he had broached the possibility that the male voice had been cloned.

[10] On May 3, 2024, the prosecution declared its proof closed. In the absence of the jury, the Court discussed the schedule with the parties. It is at this point that Mr. Azubuike informed the Court that he had identified a witness to speak to the issue of cloning, Mr. Ahmed Mudasar, a Pakistani resident. He did not have the material described in s.657.3 Cr.C.

[11] The Court rendered the following orders:

- Mr. Azubuike was to serve the relevant documentation referred to in s.657.3 Cr.C. no later than noon, Tuesday, May 7, 2024.

- The Court and the parties would convene at 11h30 on Wednesday, May 8, 2024. The prosecution would have a maximum of 30 minutes to make argument concerning the non-respect of the notice requirements in s.657.3 Cr.C.

- A *voir-dire* to determine the status of Mr. Mudasar as an expert witness would be held at noon, on Wednesday, May 8, 2024 via TEAMS.

- In the event that Mr. Mudasar was granted expert witness status, his testimony before the jury would be scheduled.

- The person named in the subpoena signed by the Court would testify on Thursday, May 9, 2024, at 09h30.

[12] On May 5, 2024, Mr. Azubuike sent documentation which he believes meets the requirements of s.657.3 Cr.C. concerning Mr. Ahmed Mudasar. The present judgement

addresses the *voir-dire* which has been held to determine whether Mr. Mudasar can be qualified as an expert in Artificial Intelligence, specializing in voice cloning and voice analysis.

2024 QCCS 1654 (CanLII)

B. THE VOIR-DIRE

[13] Justice Watt, on behalf of the Court of Appeal of Ontario, has helpfully summarized the principles related to the purpose of the *voir-dire* seeking the production of expert evidence in the case of *R.* v. *Evans,* 2019 ONCA 715:

> 133. The authorities teach that the admissibility of expert opinion evidence is to be determined in accordance with a two-step analysis. (…)
>
> 134. At the first step of the analysis, it falls to the proponent of the evidence to establish, on the balance of probabilities, the threshold requirements of admissibility. These include, but are not limited to, relevance and a properly qualified expert. (…)
>
> 137. Expert evidence on a subject must be given by an expert, that is to say, by a witness who is shown to have acquired special or peculiar knowledge of a subject through study or experience. Such evidence can only assist the trier of fact to the extent that the witness has acquired special knowledge about that subject that the average trier of fact lacks (…) If the proposed expert's special or peculiar knowledge of the subject on which he or she is tended to testify is minimal, he or she should not be qualified as an expert on the subject. (…)
>
> 138. At the second step, the gatekeeper stage of the admissibility analysis, the judge balances the potential risks and benefits of admitting the expert opinion evidence that has satisfied the threshold admissibility requirements. By this balancing, the judge decides whether the potential benefits of admitting the evidence justify the risks associated with its introduction. The relevance and reliability of the evidence and its necessity to assist the trier of fact in the correct disposal of the case, on the one hand, are measured against the counterweights of consumption of time, prejudice and confusion, on the other. The reliability versus effect factor is of special importance.

[14] The prosecution relies upon the lead investigator's identification of Mr. Azubuike's voice on the 8 conversations as one evidentiary element to establish his identity as the perpetrator of the alleged fraud. Mr. Madasar's expert testimony is proposed to challenge the investigator's opinion. He is proposed as an expert in Artificial Intelligence, specializing in voice cloning and voice analysis. Referring to the first step of an expert opinion *voir-dire*, the Court holds that Mr. Mudasar's proposed testimony would be *prima facie* relevant, would be *prima facie* necessary in assisting the jury, and would not be the subject of any exclusionary rule. The issue therefore becomes, is he a properly qualified expert?

2024 QCCS 1654 (CanLII)

[15] The proof led during the *voir-dire* clearly establishes that Mr. Mudasar is not remotely qualified to testify as an expert witness on Artificial Intelligence (AI), voice cloning or voice analysis. He is a pleasant and personable 22-year-old man who is a resident of Pakistan.

[16] His C.V. (exhibit VD-16-D-4) and testimony establish that, after finishing high school in 2017 (the C.V.) or 2019 (his testimony), he paused his studies because his marks were not high enough to contemplate university.

[17] During the pause, he worked with a relative who was free-lancing in the field of AI. He returned to high school during 2022. His grade improvement permitted him to be accepted at the University of Sindh as a student pursuing a Bachelor's degree in Library and Information Science and Archive Studies. He is in his second year.

[18] He also completed three online courses offered by Vanderbilt University (exhibit V-16-D-4) in the non-credit specialization of "prompt engineering". To quote from the Certificate he received:

> The specialization provides you with principles and templates for writing effective prompts that tap into the capabilities of systems like ChatGPT. You will gain skills for conversing with AI to harness its reasoning and creative potential.

[19] In summary, his educational background provides no basis to qualify Mr. Mudasar as an expert in detecting or identifying voice cloning.

[20] As for his practical experience gained from working with a relative or free-lancing on his own, it falls short of providing a basis to qualify him as an expert witness. He admits that he has used voice cloning software for less than a year, beginning in mid-2023. He has no special ability in the field of voice cloning as compared to any other young person who would consult YouTube videos on the subject.

[21] Considering that the Court has concluded that Mr. Mudasar is not a qualified expert witness, it is not necessary to analyze the non-respect of certain conditions provided by s.657.3 Cr.C. nor whether a cost/benefit analysis would lead to a determination of inadmissibility.

AS A RESULT, THE COURT:

[22] **DECLARES** that Mr. Ahmed Mudasar is not a qualified expert witness in the field of Artificial Intelligence specializing in voice cloning and voice analysis.

[23] **DECLARES** the testimony of Mr. Ahmed Mudasar and his report VD-16-D3 inadmissible.

2024 QCCS 1654 (CanLII)

[24] **PROHIBITS** any reference to Mr. Ahmed Mudasar or the conclusions of his report VD-16-D3 before the jury.

_____
JAMES L. BRUNTON, J.S.C.

Mr. Ekens Azubuike
SELF-REPRESENTED

Me Denis Trottier
COUNSEL FOR THE PROSECUTION

Me Stephen Angers
AMICUS CURIAE

DATE OF HEARING: MAY 8, 2024
SUMMARY ORAL JUDGEMENT: MAY 8, 2024