

CANADA / JUDGMENT

R. v. Antone

2015 BCSC 1243

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Supreme Court of British Columbia

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2015 BCSC 1243 R. v. Antone

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Antone,

2015 BCSC 1243

Date: 20150720

Docket: X078019

Registry: New Westminster

Between:

Regina

Respondent

v.

Braydon Dylan Sydney Antone

Appellant

Before: The Honourable Mr. Justice Bowden

On appeal from: A conviction by the Provincial Court of British Columbia, dated May 14, 2014 (R. v. Antone, Surrey Docket No. 199256-1)

Reasons for Judgment

Counsel for the Appellant:

D. Redekopp

Counsel for the Respondent:

N. Reithmeier

Place and Date of Hearing:

New Westminster, B.C.

April 8, 2015

Place and Date of Judgment:

New Westminster, B.C.

July 20, 2015

Summary of Evidence at Trial

- [1] On November 23, 2012, a group of young men boarded a Coast Mountain bus. The complainant, Jason Davie, was the driver. The young men refused to pay the fare and Mr. Davie asked them to get off the bus. One of the individuals said something obscene and, as he got off, he spat on Mr. Davie. Mr. Davie left the bus to follow the young man but was unable to reach him.
- [2] The learned trial judge correctly stated that the central issue in the case was identification. In other words, was Braydon Antone the individual who spat on Mr. Davie?
- [3] What I have just described was captured on a digital video camera attached inside the bus. The images from the video camera were formatted on a CD ROM disc which was played in court. Mr. Davie testified that after a short confrontation a person, who he identified as Mr. Antone, spat on him. He said that the video depicted what had taken place on the bus.
- [4] Constable Bowen testified that Mr. Antone was one of a group of individuals she stopped near a local high school shortly after the report of the assault. While she was talking to them Mr. Antone fled the scene.
- [5] Two police officers testified that they recognized the person shown in the video spitting on the driver as Braydon Antone. They were familiar with him from their work at the high school where Mr. Antone attended.
- [6] Mr. Antone testified. He denied that he was the person depicted in the video spitting on the driver. He said that he was in the town of Squamish with his father at the time that the incident occurred. His father, Owen Hubbard, also testified and said that Mr. Antone was with him in Squamish when the assault occurred.
- [7] The learned trial judge was not satisfied that the witnesses who identified Mr. Antone in the courtroom, including Mr. Davie, had a sufficient opportunity to observe the assailant and found their evidence of identification to be unreliable.
- [8] Referring to the test enunciated by the Supreme Court of Canada in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, the trial judge ruled that the video evidence was admissible.

- [9] The trial judge was satisfied that the video captured the events inside the bus without interruption or modification.
- [10] The learned judge said that he had watched the video a number of times during the trial and again while his decision was reserved. He said that he was left in no doubt that the person who boarded the bus first and then spat on Mr. Davie was Mr. Antone. He said that the assailant in the video, "looks remarkably like Mr. Antone."
- [11] Defence counsel at trial and in this appeal conceded that the perpetrator depicted in the video looks like his client.
- [12] The trial judge also found that the evidence of Constables Northrup and Vanherk that they recognized the perpetrator as Mr. Antone from their numerous interactions with him at his high school was compelling and supportive of his conclusion that Mr. Antone was the assailant.
- [13] In the end result, the learned trial judge convicted Mr. Antone of assault.

Alleged Errors by Trial Judge

- [14] The appellant says that the trial judge made the following errors:
1. Admitting the video surveillance footage.
 2. Failing to follow the proper procedure in reviewing the video.
 3. Giving inappropriate weight to the video and the recognition evidence derived from it.
 4. Misapprehending or ignoring evidence that was crucial to the defence.
 5. Rejecting the alibi evidence of the accused.
 6. Failing to provide sufficient reasons for convicting the accused.

Analysis

- [15] The standard of review in an appeal of a summary conviction has been well and clearly described by Romilly J. in *Her Majesty the Queen v. Pomeroy*, 2007 BCSC 142, starting at para. 25:

(A) Summary Conviction Appeals

- [25] The right to appeal from a summary conviction matter is governed by Part XXVII of the Criminal Code, R.S. 1985, c. C-46. Section 822(1) of the Criminal Code provides that in a summary conviction appeal pursuant to s. 813, ss. 683 to 689 relating to appeals of indictable offences, except s. 683(3) and s. 686(5), apply. Section 686(1) states:

686(1) On the hearing of an appeal against conviction... the court of appeal

- (a) may allow the appeal where it is of the opinion that

- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or,
- (iii) on any ground there was a miscarriage of justice;

[26] The function of the summary conviction judge is to determine whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt: *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.).

[27] In *R. v. Hay* (1990), 25 M.V.R. (2d) 121 (B.C.C.A.), Toy J.A., stated at 127, quoting Estey J. in *R. v. Harper*, [1982] 1 S.C.R. 2 at 14:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues...

And Toy J.A. stated at 128:

The duty of the summary conviction appeal court judge is to examine not only the trial Judge's reasons but also all of the evidence to determine whether the trial Judge's findings and ultimate conclusion are unreasonable or can those reasons be supported on the facts as found by the trial judge?

[28] In *R. v. Sall* (1990), 81 Nfld. & P.E.I.R. 10, 54 C.C.C. (3d) 48 (Nfld. C.A.) Goodridge C.J.N. drew a distinction between the functions of an appeal court judge with respect to primary facts and inferential facts. He stated at 54:

It was not open to the appeal judge to make a reassessment of the evidence and substitute his own findings of primary facts (as distinguished from inferential facts) for those of the trial judge. Once it appeared that there was evidence to support the expressed conclusion of the trial judge, the appeal judge was powerless to interfere.

[29] In *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189 (N.S. C.A.) Cromwell J.A. noted at ¶6:

Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.

As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal, it is neither a simple review to determine whether there was some evidence to support the trial

judge's conclusions nor a new trial on the transcript.

(B) Unreasonable Verdict

[30] The test to determine whether the verdict was unreasonable and unsupportable by the evidence was set out in *R. v. Corbett*, [1975] 2 S.C.R. 275, (1973) 14 C.C.C. (2d) 385 at 389 and *R. v. Yebes* [1987] 2 S.C.R. 168. The test was described as follows in *Yebes* at 430:

The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence.

[31] In *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (Ont. C.A.), in discussing s. 686(1)(a)(i) *Doherty J.A.*, stated at 220:

In considering the reasonableness of the verdict pursuant to s. 686(1)(a)(i), this court must conduct its own, albeit limited, review of the evidence adduced at trial: *R. v. Burns*, supra, at pp. 198-9. This court's authority to declare a conviction unreasonable or unsupported by the evidence does not depend upon the demonstration of any errors in the proceedings below. The verdict is the error where s. 686(1)(a)(i) is properly invoked. A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to finding that a verdict is unreasonable.

[32] An appellate court must use the following test in reviewing a verdict for reasonableness: *R. v. Biniaris*, 2000 SCC 15, 1 S.C.R. 381 at ¶36:

Could a properly instructed jury, acting judicially, have reasonably rendered the verdict?

[33] "Acting judicially" means, in addition to acting dispassionately, applying the law, and adjudicating on the basis of the record alone, reaching a conclusion that does not conflict with the bulk of judicial experience. The appeal court is to look through the lens of judicial experience, importing its knowledge of the law and the expertise of the courts gained through the judicial process over the years, not simply his or her own personal experience and insight.

[34] The test requires the appeal court, within the limits of appellate disadvantage, to examine the weight of the evidence, rather than its bare sufficiency. However, it is insufficient for the Court of Appeal to refer to a vague unease, or a lingering doubt or a lurking doubt, based on its own review of the evidence. These feelings may trigger a thorough appellate scrutiny of the evidence. However, without further articulation of the basis for such doubt or unease, these feelings will not justify interfering with the findings of facts at trial: *Biniaris* at ¶36, 38.

- [35] When the Court of Appeal overturns a verdict for unreasonableness, it must articulate as precisely as possible what features of the case make the verdict unreasonable. For instance, the Court of Appeal will be justified to intervene when the trial judge was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached, or entered a verdict in conflict with the bulk of judicial experience: *Biniaris* at ¶37, 40, 41.
- [36] Again, simply concluding that on the whole of the evidence the conviction is unsafe will not form a proper basis for reversal. When a judge gives detailed reasons for judgment, as in the case at bar, and when the reasons reveal that he or she was alive to the recurrent problems of this field of adjudication, the Court of Appeal brings no special insight to the assessment of the evidence: *Biniaris* ¶37; *R. v. G.(A)*, 2000 SCC 17, 1 S.C.R. 439 at ¶29.
- [37] An appellate court can find a verdict reasonable even though the Crown's case is not overwhelming. *R. v. Lewis*, [2003] O.J. No. 4037 (Ont. C.A.) (QL) at ¶6.
- [38] In *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, Wilson J. stated at ¶26:
- [A]ppellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts". The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it. As this court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of testimony. An appellate court should not depart from the trial judges conclusions concerning the evidence "merely on the result of their own comparisons and criticisms of the witnesses".
- (C) A trial judge is presumed to know the law
- [39] A judge is presumed to know and properly apply the law, and to have taken into account all aspects of all relevant evidence. Hence, as a general proposition, succinct analysis or silence on a particular issue is not an error in law. Where a comment is open to more than one interpretation, the interpretation consistent with the judge's presumed knowledge of the law prevails. That presumption can only be displaced if an error in law is manifest in the judge's comments: *R v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193 at 199-200; *R. v. Wigman* (1997), 96 B.C.A.C. 161 at ¶7; *R. v. Manj*, [1995] B.C.J. No. 1059 (B.C.C.A.)(QL) at ¶33, 37, 40, leave to appeal to SCC dismissed, [1995] S.C.C.A. No. 373.
- [40] In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the comments of Iacobucci and Major JJ. at ¶22 and ¶24 are apposite to some of the issues raised on this appeal:

[T]rial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[A]lthough the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged.

[16] I now turn to consider the errors that the appellant alleges were made by the trial judge.

The Admission of the Video Surveillance Footage

[17] The trial judge held a voir dire to determine the admissibility of the digital video as formatted on a disk which was played on video screens in the courtroom. It was marked Exhibit A in the trial.

[18] While accepting that something had happened to the video recording from the camera on the bus to transfer it to a disk that was viewable on computers in the courtroom, the trial judge was not satisfied that the events that were depicted in the video had been altered.

[19] The appellant submits that when the trial judge said that he was "not satisfied that what has been depicted has been altered, in other words that the events that are recorded on this videotape have been altered", he erred by placing the onus on the accused to satisfy the court that the events recorded on the video had been altered.

[20] Citing a decision of this court, *R. v. Crawford*, 2013 BCSC 2402, the appellant argues that the onus is on the Crown to establish, on a balance of probabilities, "...the substantial accuracy of the video recording, taking into account the purpose for which the evidence is tendered and the relative need for precision or accuracy in the video recording." (para. 49).

[21] In *Nikolovski*, at para. 28, the Supreme Court said:

Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence.

[22] The Supreme Court did not discuss the onus of establishing that the videotape has not been altered or changed.

[23] Mr. Antone relies on a decision of the Newfoundland Court of Appeal in *R. v. Penney*, 2002 NFCA 15, as support for an interpretation of *Nikolovski* that would require a high threshold of proof by the Crown that the video evidence has not been manipulated. However, I note that the Court of Appeal in *Penney* suggests that the test in *Nikolovski* should be applied contextually. At para. 14 the court states:

- [14] When applying the decision in *Nikolovski* to other situations, it must be considered in context. In *Nikolovski*, the videotape was obtained by means of an automatic security camera located in a convenience store. The uncontradicted evidence of the clerk was that the video showed the entire robbery. The video clearly constituted relevant and probative evidence.
- [15] By contrast, where the camera is operated by a person who selectively chooses to film only portions of the events, the questions of whether the video depicts the scene of the crime, whether it is a silent, trustworthy, unemotional, unbiased and accurate witness, in short, whether it is probative evidence, must be carefully reviewed.
- [24] The contextual approach had been taken by the trial division in Newfoundland in *Browning Harvey Ltd. v. NLAPPE Local 7003 and Persons Unknown*, 2007 NLTD 10. In that case the court said that it may not be necessary to provide expert evidence in every case to show that a videotape has not been altered.
- [25] In *R. v. Crawford*, 2013 BCSC 2402, Madam Justice Bruce said that *Nikolovski* should be read in a purposive manner. At para. 47 Bruce J. states:

In my view, it was not the intention of the Supreme Court of Canada that its reference to "change or alteration" be interpreted so as to render inadmissible any videotape evidence that has undergone some alteration or change, regardless of how small or insignificant that change might be. The court should be reluctant to adopt a categorical approach to admissibility that does not take into account the particular context in which the evidence is sought to be admitted.

- [26] In *R. v. Terezakis*, 2005 BCSC 1174, Madam Justice Holmes rejected an argument by the accused that *Nikolovski* places an obligation on the Crown to provide evidence that a video has not been altered in all contexts and circumstances. At para. 52, Holmes J. states:

... *Nikolovski* did not intend to establish a threshold for the admission of videotape evidence in every case regardless of the basis on which the evidence is offered.

- [27] While it remains for a trial judge to scrutinize the video evidence before him or her to ensure that it has not been altered and that it depicts the scene of the crime, in my view a trial judge must consider the context in which the video was taken.
- [28] In *Crawford*, Bruce J. admitted video evidence for the purpose of identification on the basis that: it depicted the entirety of the events in question; a witness to the incident testified that the video accurately depicted the events as he recalled them; the Court found that there were no apparent distortions or editing nor was there any evidence of tampering. The Court did not rely on expert evidence.

[29] As in Crawford, the video in this case was recorded by a security camera affixed inside the bus. It was not hand held. Thus, the level of authentication for admitting the evidence is relatively low. In my view, the testimony of Mr. Davies that the video depicted the events as he recalled them on the bus is sufficient to satisfy the level of authentication in this case. In the circumstances of this case the trial judge was entitled to make an objective assessment of the authenticity of the video evidence without requiring expert evidence.

[30] A similar conclusion was reached in R. v. Jamieson, [2004] O.T.C. 369 (S.C.J.) where the court admitted both an original video and an enhanced version of it. At para. 36 the Court states:

I did not observe any indication of distortion, editing, tampering or any other factor which might impair the accuracy of either videotape.

[31] No expert evidence was relied upon in Jamieson.

[32] In this case, in ruling on admissibility, the trial judge states in para. 5:

...I am not satisfied that what has been depicted has been altered, in other words that the events that are recorded on this videotape have been altered. When the courts talk about alteration of a video, in my view what they're talking about is an alteration that changes what we're actually looking at, as opposed to some alteration to make the video viewable in court.

[33] In my view, the trial judge did not place the onus on the accused of showing that the video had been altered. The onus was on the Crown to authenticate the video however in the context of this case the level of authentication was low.

[34] The fact that the video was recorded by a camera affixed to the interior of the bus, the absence of any apparent editing or distortions in the video together with the testimony of the bus driver that the video as played in court accurately depicted the events that unfolded before him provided a sufficient basis for the trial judge to admit the video evidence.

[35] With regard to s. 31.1 of the Canada Evidence Act, R.S.C. 1985, Chap. C-5, assuming the video recording in a disc format is an "electronic document" then the evidence at trial supports a finding that what was depicted thereon is that which it is purported to be.

[36] The trial judge did not err in admitting the video evidence.

The Procedure in Reviewing the Video Evidence.

[37] The appellant submits that because the trial judge did not assess the quality of the video and failed to invite counsel to make submissions on the issue of identification based on the video, he was not given the opportunity to make full answer and defence and was deprived of a fair trial. He cites R. v. T.A.K., 2006 BCCA 105, as support for that argument.

- [38] In T.A.K., the Court of Appeal held that the trial judge had erred by considering the evidence of a video, which was the sole evidence of identity in that case, without giving counsel the opportunity to argue the matter. (See comments of the Court of Appeal in R. v. Nagy, 2013 BCCA 134 at para. 14).
- [39] This case is distinguishable from T.A.K. Here, defence counsel had ample opportunity to make submissions regarding both the admissibility of and the weight to be given to the video evidence.
- [40] As stated in Nikolovski, the clarity and quality of the video evidence and, to a lesser extent, the length of time during which the accused appears on the video, will go towards the weight that the trier of fact may place upon the evidence. I take from the trial judge's comment that, "The assailant in the video looks remarkably like Mr. Antone." that he was satisfied with the clarity and quality of the video evidence.
- [41] Having viewed the video evidence during the appeal I consider that the clarity and quality of the video is excellent. I can also say that there was no apparent editing or distortions in the video played before me. The person who the trial judge determined was Mr. Antone was clearly depicted for a sufficient period of time for an identification to be made by the trial judge.
- [42] I note also that there was recognition evidence given by two witnesses who were familiar with the appellant.
- [43] The trial judge did not err in the procedure he followed in admitting the video evidence and the appellant was given an opportunity to make full answer and defence.

Weight Attributed to the Video and Recognition Evidence

- [44] Although the trial judge did not describe the degree of clarity of the video it is apparent from his finding of identity that the quality and clarity were sufficient to be compelling.
- [45] The viewing of the video evidence during the appeal satisfied me that it was of sufficient quality and clarity to allow the trial judge to make the finding that he did and such finding is entitled to some deference.
- [46] The recognition evidence of the two officers served to further reinforce the implicit good quality of the video.
- [47] I do not consider that the trial judge erred by giving inappropriate weight to the video and recognition evidence.

Misapprehending or Ignoring Crucial Evidence Including the Alibi Evidence

- [48] The appellant submits that the evidence of his father that the assailant was not his son was ignored. He says that when he took the stand the trial judge commented that he had a soft speaking voice. He says that the assailant's voice was distinguishable from his.

[49] While the trial judge did not specifically refer to Mr. Hubbard's evidence of the tone of his son's voice, it is not necessary that a trial court discuss all aspects of the evidence when assessing the weight to be afforded to the testimony of a witness. Further, as stated in *R. v. Vuradin*, 2013 SCC 38, in reference to the trial judge's failure to explain why he accepted the evidence of the complainant and his failure to address the appellant's evidence or explain why it was rejected, at para. 17:

He was not obliged to discuss all of the evidence on any given point or answer each and every argument of counsel: *R.E.M.*, at paras. 32 and 64; and *Dinardo* at para. 30.

[50] As to the argument by the appellant that the trial judge did not consider that while the assailant in the video looked like him, everyone has someone who looks like him or her, I need only say that if that argument were accepted it would apply whenever the issue of identification was before a trial court. Unless there were evidence before the court, for example, that the appellant had an identical twin brother, that argument is purely speculative and not one that need to have been considered by the trial judge.

Rejection of the Alibi Evidence

[51] The trial judge clearly rejected the appellant's alibi evidence when he stated in para. 33:

His bald assertion that he was in Squamish with no details raised no doubt in the face of the compelling case presented by the Crown with the video evidence and the recognition evidence to which I have already referred.

[52] He also rejected the appellant's father's evidence in para. 34 where he said:

this general non-specific evidence does not raise any doubt in the case presented by the Crown establishing that Mr. Antone is the person who boarded Mr. Davie's bus and assaulted Mr. Davie by spitting on him.

[53] The rejection of the appellant's alibi evidence was reasonable in the context of the objective evidence of a video recording which the Court found showed the appellant committing the assault.

Sufficiency of Reasons

[54] The appellant submits that the trial judge's failure to address the quality and reliability of the video, his failure to articulate the facial features of the appellant that he found similar to the perpetrator and his failure to address the evidence of voice recognition renders the trial judge's reasons insufficient for appellate review.

[55] The law with respect to sufficiency of reasons was stated in *R. v. Vuradin*, at para. 10:

An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25.

[56] At para. 13 of *Vuradin* the court stated:

In *R.E.M.*, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).

[57] In my view the trial judge's reasons, read as a whole and in the context of the evidence and the arguments, show why the judge decided as he did on the charge before him. The trial judge looked at a video recording of the crime and found as a fact that the person shown in the video committing the crime was the appellant. The evidence of the appellant and his father was rejected for the reasons given by the trial judge and he stated that he had no reasonable doubt that the appellant assaulted the complainant.

[58] The reasons for judgment by the trial judge clearly show why the appellant was convicted and allow for meaningful appellate review.

Conclusion

[59] The appeal is dismissed.

"Bowden, J."

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