

CANADA / JUDGMENT

R. v. B.T.H.

2001 BCSC 392

COURT

Supreme Court of British Columbia

DECIDED

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Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

B.T.H.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR.JUSTICE S.R. ROMILLY

Counsel for the Crown Chris MacPherson

Lisa Ridgedale

Counsel for Accused D. A. Albert

Date and Place of Trial: March 5, 6, 7, 2001

New Westminster, BC

[1] The accused B.T.H., a young person within the meaning of the Young Offenders Act, is charged with the offence that:

Count 1:

B.T.H., a young person within the meaning of the Young Offenders Act, on or about the 19th day of April, 2000, at or near Surrey, in the Province of British Columbia, did attempt to commit the murder of Dat Nguyen, by shooting him, contrary to Section 239(b) of the Criminal Code.

And against the peace of our Lady the Queen Her Crown and Dignity.

- [2] The accused entered a plea of not guilty. At the outset of this trial the accused re-elected trial by judge alone and the matter proceeded before me.
- [3] The only issue in this case is the issue of identification of the accused as the shooter of the complainant, Dat Nguyen. In order to deal with this issue, it will also be necessary for me to deal with the circumstantial evidence led at the trial, the issue of credibility and the issue of reasonable doubt. Before I deal with these issues, it may be prudent for me to first canvass the facts as found by me at this trial.

FACTS

- [4] Before I proceed to make my findings of fact in this case I wish to state the obvious. The fact that I have not referred to a specific piece of evidence that was led at this trial does not mean that I did not consider it. In arriving at the facts in this case I have considered all of the evidence. Having said that I now proceed to make my findings of fact in this case.
- [5] At approximately 5:00 p.m. on the 19th day of April, 2000, Nina Nguyen, Linda Tong, Faith Nguyen and the victim Dat Nguyen, all of whom were approximately 15 years old, were walking in a westerly direction on 100th Street in Surrey towards the intersection of 154th Street. A car which was owned by the accused drove up to within a few feet of these four persons including the victim Dat Nguyen. Two 9 millimetre handguns were produced from the passenger side of the vehicle. Shots were fired from those guns at the complainant Dat Nguyen. A total of six bullets from two different guns entered the body of Dat Nguyen. He collapsed on the ground.
- [6] The car, which at the material time was owned by the accused, moved away to the East. Two of the bullets that were fired at Dat Nguyen were lodged in his spinal column. As a result Dat Nguyen is a paraplegic. He is paralyzed from just above the waist down.
- [7] I pause here to say that although Nina Nguyen and Faith Nguyen and the accused have the same last name, they are not related. At any rate, I found Nina Nguyen to be a very reliable witness and I accept her evidence in total. She testified that the only person she recognized in the car from which these 9 millimetre guns were produced and the victim shot was the younger brother of the accused. She testified that she knew the accused's younger brother because she "went around" with him for one month and she recognized his well cut figure. (I understand that "well cut" means muscular build.)
- [8] Nina Nguyen was also able to describe the clothes that both shooters were wearing. She testified that both shooters were wearing white tank tops and baseball caps at the time of the shooting. She testified further that the younger brother of the accused was in the front

passenger seat when he fired his revolver at Dat Nguyen. She also testified that even after B.T.H. fell to the ground, both the brother of the accused and the unidentified person in the passenger seat of the back of the accused's vehicle kept shooting at Dat Nguyen. I accept all of the evidence of Nina Nguyen.

- [9] All of the other eye witnesses who testified at this trial were able to corroborate the colour of the car and the fact that the shooting took place but no one else, with the exception of the complainant, was able to identify the accused as being one of the shooters. In fact, no one else was able to identify the accused as being someone who was in the car at the time of the shooting.
- [10] There was evidence that there were three, or possibly four persons in the car from which the shots were fired. I also find as a fact that the whole shooting episode lasted for no more than five or six seconds.
- [11] Before I get to the issue of the credibility of the complainant in this matter, Dat Nguyen, I wish to refer to evidence that was led of a three way telephone conversation that took place before the shooting between the victim, Dat Nguyen, Nina Nguyen and the sister of the accused, Chan. I am satisfied from the evidence and I find as a fact that during that three way telephone conversation the complainant said to the sister of the accused, Chan "Why did your brothers run off from Metrotown". To which Chan replied, "I don't know what you are talking about. I don't even know you". Chan then said to the complainant "Oh, why are you yelling at me? You don't even know my brothers, I don't even know you." This is the contents of the three way telephone conversation as related by Nina Nguyen and I accept her version of the conversation.
- [12] It would appear from the evidence of the complainant that shortly before this three way telephone conversation he was set upon and beaten by the accused and his younger brother, the same younger brother that was observed by Nina Nguyen shooting at the complainant, Dat Nguyen, on the 19th day of April, 2000.
- [13] I may say at this point that the contents of the three way telephone conversation which was related by Nina Nguyen is completely different to the conversation to which the complainant, Dat Nguyen, testified. Dat Nguyen admitted that a few days before he was shot he did indeed have a three way telephone conversation with Nina and Chan. His version of that conversation is, however, completely different from Nina's version. Dat testified that in the three way telephone conversation Chan told him that their whole crew (gang) were going to kill him. To which he replied "let's see who is going to do it first." Where there is a conflict between the testimony of Nina Nguyen and Dat Nguyen I accept the evidence of Nina Nguyen.
- [14] The day after the shooting, police set up a surveillance of the accused's home. The accused was seen leaving his mother's home in the same vehicle from which the shots were fired the previous day which almost fatally wounded the complainant. This vehicle was stopped by the police. At that time police found that the driver of the vehicle was the accused. In the

passenger seat of this vehicle at the time was another young man by the name of Lam Van Tran. They were both arrested. Upon their arrest, a 9 millimetre hand-gun dropped from the waist band of Lam Van Tran. This hand gun was not one of the guns used to shoot the complainant in this matter.

- [15] Suffice it to say that on the facts of this case, there is absolutely no issue with respect to intention to kill. The only issue is the issue of identification and the issues to which I have already referred.

The issue of credibility

Credibility is a compendious issue comprising more or less subtle ingredients which may not be cumulatively and comprehensively expressed. One may say I accept, reject or have doubts about what I am told, all based on observations of the narrator. Yet each of those ingredients may be difficult if not impossible to describe or articulate. In *White v. The King*, [1947] S.C.R. 268 Estey J. wrote (at page 272):

The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law ... Anglin J. (later Chief Justice) in speaking of credibility stated:

By that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory - in a word, the trustworthiness of their testimony, which may have depended very on their demeanour in the witness box and their manner in giving evidence...

The foregoing is a general statement and does not purport to be exhaustive. Eminent Judges have from time to time indicated certain guides that have been of the greatest assistance but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility. [Emphasis added]

- [16] Although he was speaking in a civil case, the comments of O'Halloran J.A. in *Faryna v. Chorny*, [1951] 4 W.W.R. (NS) 171 (B.C.C.A.) nicely capture some of the considerations that come into play in assessing the credibility of a witness. He said at pp. 174-175:

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of

observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see *Raymond v. Bosanquet* Tp. (1919) 59 SCR 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept to the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

- [17] Again I note that while these comments are useful to consider, it must be borne in mind that O'Halloran J.A. was speaking in a civil case where the burden of proof is the balance of probabilities rather than beyond a reasonable doubt as it is here.
- [18] Bearing these principles with respect to credibility in mind, Dat Nguyen was very seriously wounded in the shooting. One shot grazed his skull and may have caused some brain damage. Quite a few bullets entered his body. The police were, however, anxious, to get a statement from the him. As a result they attended his hospital bed on at least eight occasions before he gave a statement on June 2,2000 which was videotaped.
- [19] These statements were, however, riddled with inconsistencies. He placed four people in the accused's car at the time of the shooting. Other witnesses seem to indicate there were three. He stated that the accused was sitting as the passenger in the rear seat in the vehicle at the time of the shooting. On another occasion he stated that the accused was the driver of the vehicle from which the shots were fired and on other occasions he stated that the accused was in the front passenger seat at the time he was shot. Apart from that, he seemed to believe that the accused was not wearing a tank top and a baseball cap as testified to by Nina Nguyen. His version of the contents of the three way telephone conversation between himself, Nina and Chan also are inconsistent with the evidence of Nina Nguyen. Although at trial the complainant seemed to insist that it was the accused and his brother who shot him, the inconsistencies in his testimony make it very difficult for me to attach much credibility to his identification evidence.

[20] I now turn to the identification issue.

The issue of identification

- [21] I have discussed the law on the issue of identification in the following cases: *R. v Auja* (1996), 47 C.R. (4th.) 385 (B.C.S.C.); *R. v. Sherman* (1997), 13 C.R. (5th) 173 (B.C.S.C.). I have reviewed those decisions and find that it is not necessary to repeat the principles that I stated in those cases. Suffice it to say that I am well aware of the frailties of the identification evidence. In this case, apart from the usual frailties of identification evidence, I have to consider the fact that all of the eye witnesses only had about five seconds to identify who did the shooting. Apart from that, the complainant who was the only person to identify the accused as being one of his shooters was not a very credible witness. The frailties of identification evidence together with the unreliability of the complainant's testimony makes it impossible for me to say that the Crown has proved the identity of the accused beyond a reasonable doubt.
- [22] Crown Counsel submit that there is a strong circumstantial case against the accused. They submit that when we consider the fact that there was a fight between the accused and the complainant a few days before the shooting; when we consider the contents of the three way telephone conversation which took place a few days before the shooting; when we consider that the shooting was from the accused car; when we consider that the day following the shooting, the accused was in company with another juvenile who had an identical type of gun that was used to shoot the complainant; there is a strong circumstantial case against the accused. In order to deal with this submission I intend to canvass the law with respect to circumstantial evidence and see if I could apply the law to the facts of this case.

The circumstantial evidence issue

The law

- [23] In *Hodge's Case* (1838), 2 Lewin 227, 168 E.R.1136, Baron Alderson stated that in a case where the evidence is made up of entirely circumstantial evidence, before the accused could be convicted the jury must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."
- [24] The rule in *Hodge's Case* is no longer an inexorable rule of law in Canada. In *R. v. Cooper* (1977), 34 C.C.C.(2d) 18 (S.C.C.) Ritchie J. stated that the rule has no application with respect to proof of the intention of the accused and that the exact words of Baron Alderson must not necessarily be incorporated into a charge to a jury in a case where the evidence is entirely circumstantial. He stated at p.33:

This is not to say that, even where the issue is one of identification, the exact words used by Baron Alderson must necessarily be incorporated in a judge's charge. It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. [Emphasis added]

See also *R. v. Elmosri* (1986), 23 C.C.C. (3d) 503 (Ont.C.A.) at p.506; *R. v. Thompson* (1993), 83 C.C.C. (3d) 273 (B.C.C.A.) at p.278.

[25] As was pointed out in *R. v. Fleet* (1998), 120 C.C.C. (3d) 457 (Ont. C.A.) at 464-465, the formula referred to by the trial judge is but one of the ways of describing the essential test, that is, has the Crown proved the guilt of the accused beyond a reasonable doubt:

We read the object of both judgments in *Cooper* to be the eradication of any formulaic approach to such cases so long as the jury is clearly made aware of the necessity to find the guilt of the accused to be established beyond a reasonable doubt. This object may be achieved in more ways than one. Thus, the trial judge, reviewing the evidence and setting out the position of the defence and relating the substantial parts of the evidence to that position, may frame the requisite instruction in the manner he or she considers most appropriate in the circumstances, for example, by:

- a) charging the jury in accordance with the traditional language of proof beyond a reasonable doubt (per Laskin C.J.C. in *Cooper*);
- b) Charging the jury in accordance with that language and pointing out to the jury the other inferences that the defence says should be drawn from the evidence and the necessity to acquit the accused if any of those inferences raises a reasonable doubt (as the trial judge did in *Cooper* in the final portion of his recharge); or
- c) charging the jury that it must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts (per Ritchie in *Cooper* and Dubin J.A. in *Elmosri*).

The essential requirement is to impress upon the jury the need to find guilt proven beyond a reasonable doubt and to make plain to them the manner in which such a doubt can arise in the context of a case of proof of identity by circumstantial evidence.

[26] In *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.) Cory J. proposed a model jury charge on the issue of "reasonable doubt" at p.14 (amended January 30, 1998). With the amendments to that charge suggested in *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.) the charge should read as follows:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression "beyond a reasonable doubt" mean?

The term "beyond a reasonable doubt" has been used for a very long time and is part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. The standard of reasonable doubt is a special concept with special meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

In situating the criminal standard of proof, it falls much closer to absolute certainty than to proof on a balance of probabilities, consequently, even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the Court you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

This is not a magic incantation that needs to be repeated word for word. It is nothing more than a suggested form that would not be faulted if it were used. For example, in cases where a reverse onus provision must be considered, it would be helpful to bring to the attention of the jury either the evidence which might satisfy that onus or the absence of evidence applicable to it. Any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory.

As this is a trial by judge alone, it is necessary that I instruct myself on the above model charge.

CONCLUSION

[27] This is a very tragic case involving the senseless maiming of a 15 year old young man.

During the trial I had the opportunity to see the father of this young man bring his 15 year old paraplegic son, the complainant, into court in a wheel chair. It was not difficult to see the anguish and the pain that he is suffering as a result of this vicious, senseless attack upon his son. As a father myself, I understand the father's pain.

[28] The Crown does, however, still have a duty to prove its case beyond a reasonable doubt.

After instructing myself on the charge on which I should advise myself on the issue of reasonable doubt; after considering the frailties of identification evidence; after considering the short period of time that the complainant had to identify the accused; after considering

the lack of credibility of the complainant; after considering the numerous inconsistencies in the testimony of the complainant, I find that this is a case where it would be dangerous to convict the accused. Permit me to say that I have strong suspicions that the accused was involved in the shooting of this complainant. That, however, is not enough for a conviction. The Crown has simply failed to prove the identity of the accused as one of the shooters beyond a reasonable doubt.

[29] The charge against the accused is therefore dismissed.

"S.R. Romilly, J."

The Honourable Mr. Justice S.R. Romilly

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