

CANADA / JUDGMENT

R. v. Baier

2016 BCCA 426

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 426 R. v. Baier COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Baier, 2016 BCCA 426 Date: 20161026 Docket: CA42994 Between: Regina Respondent And Tyronne James Nickolas Baier Appellant Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Frankel The Honourable Madam Justice Fenlon On appeal from: An order of the Provincial Court of British Columbia dated March 15, 2015 (R. v. Baier, Victoria Docket No. 161327) Oral Reasons for Judgment Counsel for the Appellant: D.J. McKay Counsel for the Respondent: J. Caldwell Place and Date of Hearing: Victoria, British Columbia October 26, 2016 Place and Date of Judgment: Victoria, British Columbia October 26, 2016 Summary: The appellant appeals his conviction on four offences arising out of an attack on the complainant with a tire iron while the complainant was engaged in a sexual act with the appellant's girlfriend. The trial judge found the appellant guilty based on the complainant's photo lineup identification of the complainant, and corroborative circumstantial evidence. The appellant contended the judge misapprehended evidence, incorrectly assessed evidence favourable to the defence, and improperly relied on hearsay evidence. Held: appeal dismissed. It is not the role of an appellate court to reweigh evidence. The trial judge made findings open to her on the evidence and did not rely on improper hearsay evidence.

Introduction

- [1] FENLON J.A.: On March 6, 2015, Tyronne Baier was convicted in Provincial Court of break and enter, assault with a weapon, assault causing bodily harm and uttering threats. He appeals from these convictions.

Background

- [2] The charges arose out of events that occurred in Victoria on November 4, 2013. The victim, Jan Jansen, was assaulted at the home of Kimberlie Gilbert who was involved in an intimate relationship with both Mr. Jansen and Mr. Baier.
- [3] Mr. Jansen and Ms. Gilbert were allegedly engaged in sexual activity when the assailant broke down the front door of Ms. Gilbert's apartment and began attacking Mr. Jansen with a metal bar. Mr. Jansen was threatened that if he returned, he would be killed.

- [4] Following the brief but violent attack, Mr. Jansen fled the apartment to the hospital where hospital staff subsequently called the police. Ms. Gilbert also left the apartment and was documented to be in the company of Mr. Baier at his apartment at 8:57 p.m. and again at a Thrifty's grocery store at approximately 11:06 p.m. on November 4, 2013. Mr. Baier texted Ms. Gilbert before the attack at 8:23 p.m. asking if she was having fun and again at 8:43 p.m., shortly after the attack, telling her to hurry up. At Trial
- [5] The sole issue in the case was identification of the assailant. It was admitted that Mr. Jansen had been assaulted with a weapon and that the assault had caused him bodily harm, including a broken nose and cheek bone. It was also common ground that the assailant broke down Ms. Gilbert's door and entered her apartment with intent to commit an indictable offence, and threatened Mr. Jansen.
- [6] Mr. Baier did not testify. Mr. Jansen was the main witness for the Crown. He described being attacked with a tire iron and getting a clear look at the assailant's face. He identified Mr. Baier in a photo line-up and again at trial. Although the Crown subpoenaed Ms. Gilbert, she did not attend the trial, and the Crown did not seek a warrant to compel her attendance.
- [7] The trial judge found Mr. Jansen had never met Mr. Baier and did not know what he looked like. She found it significant that Mr. Jansen readily identified Mr. Baier in the photopack procedure conducted 48 hours after the assault. The trial judge instructed herself on the frailties of identification evidence, but found the circumstantial evidence corroborative. In particular, the judge noted two pieces of such evidence: first, the presence of a tire iron found the morning after the attack in the front seat of the driver's side of Mr. Baier's car; and second, the pre-existing relationship between Ms. Gilbert and Mr. Baier, and their coming together immediately after the assault and staying together until their arrest the next day. On Appeal
- [8] Mr. Baier raises five grounds of appeal, contending the trial judge:
1. relied on hearsay evidence;
 2. misapprehended evidence;
 3. allowed the Crown to impeach its own witness;
 4. reversed the burden of proof; and
 5. reached an unreasonable verdict.
- [9] I will deal with each ground in turn.
1. Reliance on Hearsay Evidence

- [10] The hearsay evidence objected to by the appellant arose in cross-examination when defence counsel read out Mr. Jansen's answer to police as to why he thought he had been attacked by the accused. Defence counsel read the following answer: Because [Ms. Gilbert] had mentioned to me that he drives around with a tire iron and he would always threaten people with a tire iron.
- [11] On appeal, Mr. Baier argues the trial judge used this hearsay evidence as circumstantial evidence that he was the person who attacked Mr. Jansen with a tire iron.
- [12] Mr. Baier also submits he expected to be able to cross-examine Ms. Gilbert about statements attributed to her. However, it was defence counsel who elicited this evidence in support of his case, and relied on it to attack the reliability of Mr. Jansen. Further, the impugned evidence was elicited by defence counsel after Crown informed the Court that Ms. Gilbert would not be called as a witness.
- [13] As for the trial judge relying on the hearsay as critical evidence, in my view, read in context, her references to the evidence do not support that submission.
- [14] The trial judge first refers to it as part of the narrative of events at para. 3: Mr. Jansen testified that he saw the face of his assailant. It was a person he had never seen before. However, Mr. Jansen suspected it was Mr. Baier, whom he knew to also be involved with Ms. Gilbert. Mr. Jansen thought his assailant was Mr. Baier largely because he was certain his assailant's weapon was a tire iron, and he had been told by Ms. Gilbert that Mr. Baier both carried and threatened people with such a tool.
- [15] The next reference occurs at para. 44: Moreover, the reason Mr. Jansen thought you, Mr. Baier, attacked him, was because he was struck with a tire iron and had been told by Ms. Gilbert that you carried such a tool and used it to threaten others. The fact the police found a tire iron in the foot well of the driver's side of your car makes the connection to you all the stronger. It simply, I find, cannot be a coincidence.
- [16] Immediately following this reference, the trial judge said at para. 45: Again, I note the submission that Mr. Jansen either imagined the weapon was a tire iron or wanted to believe it was a tire iron, because he was convinced that you, Mr. Baier, assaulted him.
- [17] In my view, the trial judge is not relying on the hearsay to support identification, but is here addressing the defence theory that Mr. Jansen was connecting dots and assumed he had been attacked with a tire iron wielded by Mr. Baier because of Ms. Gilbert's description of Mr. Baier as someone who carried such a tool and used it to threaten people. This passage follows a lengthy analysis of the defence theory that, as in *R. v. Parsons*, [1999] Y.J. No. 3, Mr. Jansen either filled in the blanks and innocently convinced himself that Mr. Baier assaulted him, or intentionally tried to frame Mr. Baier out of jealousy-fuelled spite.

- [18] Further, in my view, even if the judge erroneously included the out of court statement of Ms. Gilbert in the basket of circumstantial evidence, she placed little weight on it. The reasons as a whole, and in particular at paras. 49-55, demonstrate that the trial judge placed significant weight on four compelling pieces of evidence:
1. Mr. Jansen's ready identification of Mr. Baier from a photo lineup despite never having seen him before;
 2. Mr. Baier's romantic relationship with Ms. Gilbert and his texts to her in the minutes just before and after the assault;
 3. Ms. Gilbert being with Mr. Baier immediately after the assault and making no attempt to help or contact Mr. Jansen thereafter; and
 4. the presence of a tire iron by Mr. Baier's driver's seat the morning after the attack, identical to the one described by Mr. Jansen as the weapon used by his attacker.
- [19] I would not accede to the first ground of appeal.
2. Did the Trial Judge Misapprehend the Evidence?
- [20] Mr. Baier argues the trial judge misapprehended several key pieces of evidence, including whether Mr. Jansen had fought back, his lack of consciousness during parts of the attack, and discrepancies in his description of the attacker's clothing.
- [21] There is a high test to be met by an appellant seeking to overturn a conviction on the basis of an alleged misapprehension of evidence. In *R. v. Lohrer*, 2004 SCC 80 at para. 2, the court described the test as a "stringent standard." A misapprehension must: 1) be on a question of substance; 2) be material to the judge's reasoning; and 3) play an essential role in the judge's reasoning: see also *R. v. Caron*, 2014 BCCA 111 at para. 44. In addition, an appellant will not succeed unless the misapprehension of evidence "could have affected the outcome of the trial": *Lohrer* at para. 7.
- [22] Mr. Baier contends the trial judge overlooked Mr. Jansen's evidence in cross-examination that he initially wrestled and fought with his attacker. This was important, he argues, as the trial judge relied on Mr. Jansen's evidence in direct-examination that he had not fought with his attacker as a way to explain the lack of visible injuries to Mr. Baier.
- [23] It is not the role of an appellate court to reweigh the evidence. The trial judge specifically referred to Mr. Jansen's initial attempt to defend himself by grabbing the tire iron (at para. 46). That brief attempt to hold the tire iron does not detract from the main point of his evidence which was that he did not strike his attacker. It was the lack of contact with the assailant that the trial judge relied on to explain why Mr. Baier had no visible injuries.
- [24] As for the other misapprehensions alleged, the trial judge addressed in detail both the circumstances of the assault and the discrepancies in Mr. Jansen's descriptions of the assailant's clothing.

[25] Having considered all of the discrepancies alleged, in my view, the trial judge did not misapprehend the evidence; she made findings of fact that were open to her on the evidence.

3. Did the Crown Try to Impeach Its Own Witness?

[26] The appellant contends that Crown counsel improperly impeached her own witness when she questioned Katarina Nolla, a witness called on behalf of the Crown. In her evidence in chief, Ms. Nolla described seeing two or three men in the driveway outside Ms. Gilbert's home shortly after the assault, but she had originally told police she saw no one but Ms. Gilbert. The prosecutor asked the witness to refresh her memory by reading her police statement. Defence counsel did not object.

[27] On appeal, Mr. Baier contends the police statement should not have been before the Court. However, it is permissible for a party who has called a witness who gives evidence inconsistent with a prior statement, to have the witness review the statement if the purpose is to not to contradict, but to refresh the witness's memory in the hope that the prior statement might be adopted: *R. v. Coffin* (1956), 114 C.C.C. 1 (S.C.C.) at 19-20 per Taschereau J. & at 22-23 per Kellock J.; *R. v. Muise*, 2013 NSCA 81 at paras. 25-26. Moreover, in such situations the trial judge has discretion to permit some leading questions of the witness regarding the prior statement without the need to invoke the procedure in s. 9(2) of the Canada Evidence Act: *Coffin* at 19 per Taschereau J. & at 22 per Kellock J.; *Muise* at para. 25.

[28] In my view, there was no attempt to impeach, discredit or contradict Ms. Nolla, but only an attempt to refresh the witness's memory so as to determine which version of her evidence was correct. In this context, it was not improper for Crown counsel to ask Ms. Nolla to review her statement to police. Further, the trial judge put no weight on Ms. Nolla's evidence because overall she gave her evidence in a meandering, incoherent way and was not reliable. That assessment did not depend on the police statement.

4. Did the Trial Judge Reverse the Burden of Proof?

[29] Mr. Baier contends the trial judge dismissed all of the evidence that favoured him, and addresses three examples:

1. The absence of the accused's or complainant's DNA on the tire iron;
2. An alternative explanation for Ms. Gilbert leaving the apartment and not calling police - i.e., that she was being assaulted by Mr. Jansen, fled in fear and was afraid to call police; and
3. Ms. Pappas' evidence that there was a male of similar physical description to the appellant seen outside Ms. Gilbert's apartment just before the assault occurred - a man wearing a hoodie like the one Mr. Jansen said was worn by the assailant but was not seen on Mr. Baier.

- [30] Mr. Baier contends that the cursory dismissal of this evidence by the trial judge effectively reversed the onus of proof, requiring Mr. Baier to provide evidence that excluded him as the person responsible for the assault.
- [31] In my view, this submission lacks merit. The trial judge thoroughly addressed the evidence favourable to the defence, in the context of assessing whether it raised a reasonable doubt in her mind despite the photopack identification and other circumstantial evidence supporting a finding of guilt. She correctly applied the burden of proof.
5. Was the verdict unreasonable?
- [32] In light of the conclusions I have reached on the errors contended by the appellant, I would not find that the verdict was unreasonable.
- [33] Mr. McKay has said all that properly may be said for the appellant. Nonetheless, in my view, no error is established that would allow us to interfere with the verdict.
- [34] In the result, I would dismiss the appeal.
- [35] SAUNDERS J.A.: I agree.
- [36] FRANKEL J.A.: I agree.
- [37] SAUNDERS J.A.: The appeal is dismissed with thanks to counsel. "The Honourable Madam Justice Fenlon"

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