

CANADA / JUDGMENT

R. v. Bergstrom

2008 BCCA 546

COURT

British Columbia Court of Appeal

DECIDED

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2008 BCCA 546 R. v. Bergstrom COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Bergstrom, 2008 BCCA 546 Date: 20081230 Docket: CA034993 Between: Regina Respondent And Lawrence Dean Bergstrom Appellant Before: The Honourable Mr. Justice Low The Honourable Mr. Justice Bauman The Honourable Mr. Justice Groberman M.A. Nathanson Counsel for the Appellant J.T. Campbell Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 5 December 2008 Place and Date of Judgment: Vancouver, British Columbia 30 December 2008 Written Reasons by: The Honourable Mr. Justice Low Concurred in by: The Honourable Mr. Justice Bauman The Honourable Mr. Justice Groberman Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] The appellant was convicted by a Supreme Court judge sitting without a jury of one count of assault causing bodily harm and a second count of assaulting a police officer in the execution of his duty. He contends that the verdicts were unreasonable and were not supported by the evidence, that the trial judge misapprehended and mischaracterized important evidence, that the judge made inconsistent findings about the reliability of the evidence of the victim of the assault, and finally that the judge's reasons were insufficient.
- [2] There is no dispute that the complainant, Cst. Maynard, was struck in the face during a confrontation between three members of the R.C.M.P. and a group of people outside a motel in Kamloops, B. C. in the early morning hours of 26 July 2005. There was no direct evidence as to which person in the group struck the blow. The defence position at trial was that the Crown had not proven beyond a reasonable doubt that it was the appellant who committed the assault. This position had two parts. First, it was said that it was not proven that the appellant was the person with whom the constable had direct dealings just prior to the assault. Second, it was said that it was not proven that the person with whom the constable had the direct dealings just prior to the assault was the same person who struck him in the face. I intend to focus on the second of these arguments. For the reasons that follow, I am of the opinion that it ought to have succeeded at trial and that the verdict on each count was unreasonable.
- [3] Section 686(1)(a) of the Criminal Code of Canada provides:

686. (1) On the hearing of an appeal against a 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, ...

[4] The test under this section is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered": *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 at para. 36, citing *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185, in which the quote is taken from *Corbett v. The Queen*, [1975] 2 S.C.R. 275. This applies equally to a judge-alone conviction.

[5] In *Biniaris*, the court further explained the appellate function under the Criminal Code section as follows: 40 ... acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

[6] The appellant was not previously known to any of the police officers who identified him in court as having been at the scene of the incident. He was not arrested at the scene. There was no evidence as to how the police officers later determined who he was or how he came to be before the court to answer to the charges that were laid against him. The descriptions given by the three police witnesses of the man with whom Cst. Maynard had been dealing just prior to the assault were somewhat different. I am unable to find a description on the record of the appellant as he appeared in the dock. The trial judge found the in-dock identifications of the appellant to be sufficient. Having regard to the whole of the evidence, I think this finding is problematic but, as I have indicated, I find it unnecessary to resolve the issue because it is my opinion that the determination that it was the appellant who punched the police officer is not sustainable. For convenience in discussing this second aspect of the identification issue, I will assume that the person with whom Cst. Maynard was dealing was the appellant.

[7] Around 3:30 a.m. on 26 July 2005, Cst. MacKenzie drove past the Riverland Motel in Kamloops. The motel is in a relatively isolated area. It is on a highway by a river and an industrial park. There was a group of people in the parking lot outside the motel, estimated by Cst. MacKenzie to be eight in number and later twelve in number. There may have been as many as fifteen. These people, men and women, were seated in lawn chairs or standing. Some of them were consuming alcohol. They were a noisy group but had not been the subject of a complaint to the police.

- [8] Cst. MacKenzie drove into the parking lot where she had a conversation with one member of the group, Patrick Royce Henry. She told him that the group would have to "dump the booze" and quiet down or go into the motel. Mr. Henry was co-operative but, as will be seen, he later became confrontational when dealing with Cst. Pelley. He was charged with assaulting Cst. Pelley while the constable was engaged in the execution of his duty. He and the appellant were tried jointly. Mr. Henry was acquitted.
- [9] Constable Pelley arrived at the motel parking lot in another police vehicle. Both officers approached the group on foot. After a discussion with Mr. Henry, Cst. Pelley told the group that they would have to dispose of the alcohol and quiet down or they might be charged with consuming alcohol in a public place or causing a disturbance.
- [10] The atmosphere changed. People in the group protested the police ultimatum. The appellant got up from his lawn chair and displayed an angry and aggressive demeanour. Mr. Henry tried to calm the appellant down. After more protest from the group, Mr. Henry told the officers that they should leave.
- [11] By this time, Cst. Maynard had arrived. He stood beside Cst. Pelley, removed his baton from its holster and stood with the baton on his shoulder in a standard readiness posture.
- [12] Mr. Henry began yelling at the officers to leave. Cst. Pelley told Mr. Henry that he was arresting him for causing a disturbance. He told the man to go to the police car but Mr. Henry did not comply. Cst. Pelley put his hand on the man's shoulder and Mr. Henry brushed it away. The trial judge rejected the evidence of Cst. Maynard that it appeared to him that Mr. Henry had tried to punch Cst. Pelley.
- [13] While these and subsequent events were going on between Cst. Pelley, Mr. Henry and Cst. MacKenzie, Cst. Maynard scanned the crowd, no doubt to be ready to protect his fellow officers. He stood slightly ahead of Cst. Pelley and Mr. Henry and to their left.
- [14] The group was getting more agitated, apparently in response to the arrest of Mr. Henry. Cst. Pelley put his hand on Mr. Henry's shoulder a second time and Mr. Henry again brushed it away. The constable stepped back and unsheathed his baton, but thought better of it and instead used pepper spray in Mr. Henry's face. As the man staggered around, Cst. MacKenzie shot Mr. Henry with a taser gun. He fell to the ground, got up and fell to the ground again after a second shot. He went into convulsions.
- [15] Constable Pelley physically subdued Mr. Henry on the ground. Constable Huschi arrived at the scene. He was able to handcuff Mr. Henry and put him in a police car.
- [16] While these hectic and fast-paced events were going on, as the trial judge said at para. 27 of her reasons, "other people in the crowd started to get up and were attempting to come closer to where Cst. Pelley and Mr. Henry were located. Cst. Maynard was endeavouring to keep those people away from Cst. Pelley and from Mr. Henry." According to Cst. Maynard, one of these people was the appellant.

- [17] The trial judge went on to describe the conduct of the appellant and Cst. Maynard:
- [29] When Mr. Bergstrom came up to Cst. Maynard, Cst. Maynard pushed him back with his left hand, away from Cst. Pelley and Mr. Henry. Not long after this, Cst. Maynard saw Mr. Bergstrom leave and go into the motel. He then saw him reappear. He appeared to be holding something in his hand. At that point, Cst. Maynard holstered his baton and he put his hand on his gun. By this time, Mr. Bergstrom was close enough to him that Cst. Maynard could speak to him and he said to him, "Show me what's in your hands". Mr. Bergstrom showed him his hands. There was nothing in them.
- [30] Cst. Maynard then took his hand off his gun and again took out his baton. As before, he rested it on his shoulder, ready to be extended. The situation was continuing between Cst. Pelley and Mr. Henry. It is unclear as to the amount of time that passed before Mr. Bergstrom again attempted to get past Cst. Maynard to reach Cst. Pelley and Mr. Henry. Again, Cst. Maynard pushed Mr. Bergstrom back. Shortly after that Mr. Bergstrom again attempted to get by Cst. Maynard. Again, Cst. Maynard pushed him back.
- [31] Then, Cst. Maynard while in his routine of rotating back and forth monitoring the situation was hit in the face. He described it as a jab punch, square to his lower lip. (Though there was an argument that because he did not see whoever punched him, Cst. Maynard could not have been hit straight on, I am satisfied beyond a reasonable doubt that he was hit in the manner that he described. He was hit by a punch that was square on to his lower lip. It was not a glancing blow nor did it just nick him. He was hit straight on with the full force of the fist that hit him).
- [32] The impact of that hit (and it may be partly because he was doing the routine of rotating his head from side to side), which came from the left side of the crowd propelled his head to his right. Though dazed, he immediately looked back and saw Mr. Bergstrom standing in the location from where this blow had been delivered. Although there were other people around, I am satisfied beyond a reasonable doubt that these people were not right next to Mr. Bergstrom. Rather, they were off to the sides of him to some degree. [Emphasis added.]
- [18] The trial judge noted that no witness, including Cst. Maynard, saw who punched him. However, she said at para. 43 that she was "satisfied beyond a reasonable doubt that the person who struck Cst. Maynard was [the appellant]." After discussing how she arrived at the conclusion that it was the appellant with whom Cst. Maynard had been dealing before the assault, she repeated her reasons for also concluding that it was he who punched the officer. She said this:
- [53] With respect to the location of the person who assaulted Cst. Maynard (I am just going to return to this momentarily), Mr. Bergstrom was at the right distance from Cst. Maynard and in the right location to administer this blow. He was in the right place. Cst. Maynard recognized Mr. Bergstrom because he had seen him on a number of occasions that evening. I am satisfied beyond a reasonable doubt that Mr. Bergstrom was the person who administered this blow. The evidence is not only consistent with this conclusion, it is

inconsistent with any other rational conclusion. There was not another person in that spot at that distance that could have administered it. [Emphasis added.]

- [19] In my opinion, there was no evidentiary basis to support the conclusions I have emphasized in the passages above.
- [20] The Crown led the following evidence from Cst. Maynard: Q Constable Maynard, did you see who delivered that punch? A I didn't see the delivery of the punch. It was just -- like I said, it was when I was scanning back to Mr. Bergstrom, that's when I received the punch. Q All right, and who was in arm's length proximity to you when you received the punch? A Mr. Bergstrom was arm's -- arm's reach and that's where I received the strike in the face. Q Constable Maynard, you've testified that on the early morning hours of the 26th of July, 2005, at the Riverland Motel you received a jab punch square to your lower lip. When -- what was the first thing you saw after receiving the jab punch square to your lower lip? A I turned my head to the right, felt blood dripping, then I directly looked to the left where the jab came from and I seen Mr. Bergstrom standing there.
- [21] In cross examination, Cst. Maynard testified as follows: Q Now, when you hold your baton out, there were a number of people that were approaching you, I think you said the crowd was approaching you, right? A The crowd was closing in, that's correct. Q All right, and that's -- you said in your evidence in chief about nine to 10 people, correct? A That's correct. ... Q All right. I take it, Officer, what happens here happens very quickly, is that fair? A That's correct. I'm seeing clips of the event. Q All right, and that's because you're trying to see a number of different things at the same time, correct? A That is correct. Q You're trying to keep an eye on what your fellow officers are doing, correct? A That's correct. Q And Officer Pelley and Mr. Henry, correct? A That's correct. Q What the Crown [crowd] is doing, correct? A That's correct. Q And what I mean, by the "crowd," you're scanning back and forth between a number of people that are advancing on you or right in front of you, correct? A That's correct. Q . Now, the person that you described that you saw when you looked up after you'd been struck, there were a number of other people in the area, correct? A In the area, that's correct. Q Yeah, and the person that you looked up and you saw that you described as Mr. Bergstrom, he was to your left, is that right? A When I was struck or prior to being struck? Q When you looked up -- A Okay. Q -- he was to your left, is that right? A No, he was -- when I looked up he was right there. Q Okay. There was somebody else that was -- well, actually, Officer, let's just do this. Why don't we turn to page 111 of your evidence at the preliminary hearing? And before I read that to you, when you looked up you saw the person you described as Mr. Bergstrom. There was another person that was standing right close to Mr. Bergstrom, correct? A To the left of Mr. Bergstrom. Q Yeah, and then there was a group of other people that were to the right of him, correct? A One to the right and a couple to the left of him, sorry. Q All right. A It was to my left. One to my left and a couple to my right. Q Hard enough to cause you to be dazed for a couple of seconds as you've described, correct? A That is correct. Q And when you were sort of doubled over, if I can put it that way, after you were struck, did you say anything? A To? Q To anybody? Any of the other officers or

anything? A No, I didn't. Q Okay, and then after you come back, by "coming back" I mean you twist your body back again, that's when you see Mr. Bergstrom and some other people in that area in front, correct? A That's correct. Q Officer, there were a lot of different things happening at that time, correct? A That is correct. Q There were a lot of distractions, correct? A Lots of it, yeah. Q And -- A Like I said, it was chaotic, everywhere. Q All right, and you'd never been in a situation like that before, correct? A Not as a police officer, no.

- [22] The above is the totality of the evidence as to where the punch might have come from. No other witness saw the punch or its aftermath. I would emphasize that these events were fast-paced and that the crowd was advancing. To establish that it was the appellant who struck the officer and not another member of the hostile group, in the absence of eyewitness evidence, the Crown had to eliminate the reasonable possibility that somebody else could have done so. All the evidence was capable of establishing was that the appellant was in a position to throw the punch and that he might have done so. The evidence did not disclose that the appellant was the only person in such position.
- [23] It is apparent from the evidence of Cst. Maynard in particular that people were crowding around the location of this incident. But the constable was not asked by the Crown whether, from what he saw after the blow, the appellant was the only one in a position to have thrown the punch. It was established in cross examination that others were close by. It is obvious from the evidence of Cst. Maynard that he did not see the punch coming. He could not have known, therefore, from which side it came. In addition, he gave no evidence of the body attitude or position of the appellant as the constable saw him after the punch. In the absence of any witness seeing the punch thrown, the onus was on the Crown to prove that the appellant had an exclusive opportunity to strike the officer. The evidence does not permit the conclusion that only the appellant could have committed the assault.
- [24] The trial judge used the language of exclusive opportunity without using the phrase. It was not enough for the Crown to prove that the appellant had the best opportunity to throw the punch. It had to establish that no other person had an opportunity to do so.
- [25] The conclusion of the trial judge that it was the appellant, to the exclusion of all others in the crowd, who struck Cst. Maynard was more than an inference. It was a leap across a gap in the evidence. It led to an unreasonable conclusion not supported by the evidence and it rendered the verdicts unreasonable.
- [26] I would allow the appeal, quash the convictions and enter acquittals of the appellant on both counts. "The Honourable Mr. Justice Low" I agree: "The Honourable Mr. Justice Bauman" I agree: "The Honourable Mr. Justice Groberman"

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