
CANADA / JUDGMENT

R. v. D.(T.)

2002 BCCA 534

COURT

British Columbia Court of Appeal

DECIDED

19 September 2002

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R. v. T.D. (YO)

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Prowse

September 19, 2002

The Honourable Madam Justice Levine

The Honourable Mr. Justice Thackray

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

T.D. (Y.O)

APPELLANT

G.K. Martin

appearing for the Appellant

F. Tischler

appearing for the Respondent

- [1] THACKRAY, J.A.: Mr. D. was charged pursuant to s. 335(1) of the Criminal Code of Canada with being the occupant of a motor vehicle knowing that it had been taken without the consent of the owner. He was found guilty in the Provincial Court of British Columbia, and that conviction was upheld in the Supreme Court of British Columbia.
- [2] The appeal judge held that the trial judge did not err in his application of the relevant Criminal Code sections nor did he misapprehend or misunderstand the evidence. The appeal was dismissed.
- [3] It is from the order of the appeal judge that this appeal comes before this court. However, it is necessary to consider the reasons of the trial judge within the context of the evidence in order to decide this appeal.
- [4] Pursuant to the order emanating from the leave application, this appeal is narrowly grounded. Leave to appeal was granted on the following single question:

Was there any reasonable basis in the evidence for a finding that the appellant had knowledge that the vehicle was stolen in time to leave the vehicle within the meaning of section 335(1.1) of the Criminal Code?

- [5] Sections 335(1) and (1.1) of the Criminal Code read as follows:

335.(1) Subject to subsection (1.1), every one who, without the consent of the owner, is an occupant of a motor vehicle knowing that it was taken without the consent of the owner, is guilty of an offence

335.(1.1) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware that it was taken without the consent of the owner, attempted to leave the motor vehicle to the extent that it was feasible to do so

- [6] In that this appeal is limited to the issue of the amount of time in which the appellant had "knowledge" that the vehicle was stolen, I will refer specifically to evidence bearing on that issue. I will first deal with the element of time and then the one of knowledge.

[7] The evidence of B. L., a co-accused, is that as soon as he entered the vehicle the engine was turned on and "like a second later I heard sirens" and the vehicle went into reverse. He estimated that this sequence of events took about two seconds. The evidence establishes that the appellant entered the vehicle simultaneously with Mr. L.

[8] Police Constable Elson testified as follows:

Q. From the time the boys entered the car to the time when the sirens went off, I guess I'm again looking at the timeline, how soon did it take place? Just an estimate. I'm sure you're not timing, so. But, just give us an estimate.

A. Well, by the time that we got from three quarters of a block away, Your Honour, to the actual vehicle, the boys had just managed to get inside the vehicle. So that quite a short time.

Q. You said that was less than a minute?

A. Yes

Q. Now I'm looking from when they got into the car.

A. Yes.

Q. To the time the sirens start going off. How long was that?

A. Immediately, Your Honour.

Q. So ten seconds?

A. Well, as long as it takes to turn a switch. Under ---

Q. Two seconds?

A. - two seconds.

[9] The judge accepted that the appellant entered the car from the driver's side by way of the rear door and sat in a position that put him directly behind the driver. The vehicle sped away, nearly hitting the police vehicle in the process. While the vehicle was still in motion all of the occupants emerged and fled while the unoccupied car travelled into an adjacent park.

[10] I will now turn to the knowledge that can be attributed to the appellant. While the issue was defined as "knowledge" in the question emanating from the leave application, section 335(1.1) uses the words "becoming aware" in reference to knowledge of theft.

[11] In that the ignition cylinder had been removed from the steering column, there is the question as to whether the appellant saw the damage to the column. Police Constable Elson testified that the appellant would not have had a "good view of the ignition" from the position in which he was sitting.

- [12] It was also suggested by the Crown that the appellant saw the ignition mechanism that was on the back seat of the car, towards the middle of the bench seat. In cross-examination the appellant gave varying answers but the essence was that if he saw it he did not know what it was but that he does not remember seeing it. His final answer on this was that he was "pretty sure" that he did not see it. As earlier noted, he entered the rear passenger seat after Mr. L., who slid across the seat ahead of him.

Reasons of the Trial Judge

- [13] The trial judge found it "somewhat difficult to reconcile that he [the appellant] did not notice anything in the car" with the appellant's evidence that he was aware that the car "was rather dirty." He then said:

If he had taken notice he would have found that the ignition had been extracted. If he had looked when he was getting into the car he would have seen that there was an ignition in the back of the car. In fact, he may not have seen it, as Mr. L., from my estimation of where he said he was sitting in the car, was sitting right on top of the ignition, and the belt buckles; neither of the two young persons affixed their belt buckles when they were driving. All he saw was A. N. fidget a little bit with the ignition and the car started and car reversed out of the lot and then the emergency lights came on almost simultaneously and A. N. appeared to take no notice and went over the grass purchase under the park, as stated by P.C. Stasiuk and others.

- [14] The trial judge then dealt with matters pertaining to the co-accused Mr. L. Immediately thereafter he said as follows:

Now, if I can believe that D. and L. did not notice anything about the car being stolen until it was in motion and wished to leave the motor vehicle to the extent it was feasible, then they did everything they could, except for their incredible action when the car stopped or slowed down to the extent that it was feasible for the occupants to leave. This to me is an obvious consciousness of guilt. Every bit of their stories is just about the same. Neither saw any of the damage to the car. T.D. had been to the side of the car, not to the side of the car which had been damaged, but surely on getting inside and Mr. L. certainly must have seen the damage to the car inside and that there were no keys in the ignition and it had obviously been stolen. Mr. T.D. did think about asking who owned the care but it was too late, he said

With respect, I find the Crown have proved their case beyond a reasonable doubt. I find overall, particularly because of their actions at the end and the fact that Mr. L. would come from Burnaby here to Killarney high School for an hour, just to go to the market with T.D. and see none of the friends who he came all the way to see. I find this not credible and I find that the Crown, as it has submitted, has proven its case beyond a reasonable doubt.

I find each of the young persons guilty as charged.

Discussion

- [15] I am compelled to observe that the trial judge appears to have grounded the conviction upon a finding of consciousness of guilt by the appellant arising from his flight from the scene. Flight from the scene cannot support an inference that the appellant had knowledge that the motor vehicle was stolen in time to exit the vehicle safely. Nor can it directly support a conviction and no doubt explains why the leave application resulted in the issue for this appeal being framed in the manner that it was.
- [16] As to time, the evidence establishes that the appellant had between two and six seconds to assess the situation, determine that the vehicle was stolen and exit the vehicle. There was not, in my opinion, any evidence upon which to find that this amount of time was sufficient, even accepting that the appellant had suspicions regarding ownership of the vehicle, for him to assess the situation, come to a conclusion, and attempt to leave the vehicle.
- [17] As to "becoming aware," or knowledge, of theft, there were only two items to alert the appellant. One was the condition of the steering column. There is no evidence that it came to the attention of the appellant. The other is the ignition mechanism being on the back seat. However, there is no evidence that the appellant saw it and the trial judge acknowledged that "he may not have seen it."
- [18] Indeed, the trial judge combined the issues of knowledge and time when he noted that all that the appellant "saw was A. N. fidget a little bit with the ignition and the car started and reversed out of the lot." This, to me, seems to be an acknowledgement by the trial judge that there was neither the time nor the knowledge required to ground a conviction.
- [19] I am of the opinion that the trial judge failed to properly interpret the evidence and to apply the saving provision of section 335(1.1) of the Criminal Code. In my opinion the answer to the question posed is that there was no reasonable basis in the evidence for a finding that the appellant had knowledge that the vehicle was stolen in time to leave the vehicle within the meaning of section 335(1.1) of the Criminal Code.
- [20] I would allow the appeal from the order of the Supreme Court of British Columbia, set aside the Provincial Court conviction and enter a verdict of not guilty.
- [21] PROWSE, J.A.: I agree.
- [22] LEVINE, J.A.: I agree.
- [23] PROWSE, J.A.: The appeal is allowed. The verdict of guilty is set aside and the verdict of acquittal will be entered.

"The Honourable Mr. Justice Thackray"

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