
CANADA / JUDGMENT

R. v. Dionne

2004 BCCA 274

COURT

British Columbia Court of Appeal

DECIDED

6 May 2004

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2004 BCCA 274 R. v. Dionne

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dionne,

2004 BCCA 274

Date: 20040506

Docket: CA030887

Between:

Regina

Respondent

And

Martin Jacques Dionne

Appellant

Before:

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Oppal

Oral Reasons for Judgment

P.C. Rankin

Counsel for the Appellant

K. Madsen

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

6 May 2004

- [1] OPPAL, J.A.: Martin Jacques Dionne and two others were convicted by a Supreme Court judge sitting without a jury of robbing a bank. Identification was the sole issue at trial. The only real evidence against the appellant was that when the police arrested him a short time after the robbery he had in his possession a significant amount of money including bait money in the sum of \$10.00. There was, as well, other evidence that the Crown relied on including DNA evidence and as well evidence of his association with two other people who were said to be involved in the robbery.
- [2] The general position of the appellant is that the conviction cannot reasonably be supported by the evidence. More specifically, the appellant has advanced the argument that the trial judge erred in relying on the doctrine of recent possession, and considering as well the other pieces of evidence that are said to be weak.
- [3] The circumstances are as follows. At approximately 11:30 a.m. on September 28, 2001, two men wearing masks entered a branch of the Bank of Nova Scotia in the city of Vancouver and demanded money from the tellers. They took the sum of \$4,117.00 which was made up of Canadian and American bills. The money that was taken included the usual bait money as well as dye-pack money. Dye-pack is a term that is used to refer to money which is not real and is intended to cause a minor explosion through a triggering mechanism. One man went behind the wickets and ordered the tellers to open their drawers. It is not in dispute that the men did not display a weapon and did not issue threats. While the robbery was being committed a third man was at the office of a nearby law firm asking to use a telephone in order to call a taxi that would be used as a getaway car.
- [4] A taxi arrived a short time after the phone call. The taxi driver testified that as he approached the appointed area where he was to meet his fare, he met one male person who told him to wait a few minutes. Approximately four to five minutes later two male persons ran from the rear of the cab and got into the taxi. The taxi driver then drove the three men to the Fraser Arms Hotel which is situated in south Vancouver, a short distance from the bank.
- [5] Shortly after the robbery Constable Wong, a police dog master of the Vancouver Police, attended at the bank with the assistance of the police dog. The officer was able to retrieve two face masks, two baseball caps and a jean jacket a few blocks from the bank. The dog could not find any other tracking. The Crown conducted a DNA analysis on the items. The Crown's expert witness testified that the appellant was only "a possible" contributor to the DNA found on one of the baseball caps. He specifically stated that the statistical match based

on his forensic analysis was 1 in 4400. He went on to state that there were multiple contributors to the DNA found on that particular baseball cap.

- [6] A few hours after the robbery the police attended at a residence at 2780 East 22nd Avenue in Vancouver and arrested the three accused including the appellant. That residence is situated approximately 11 kilometres from the Fraser Arms Hotel. When the police arrested the appellant he had in his possession \$630 in Canadian funds and \$165 in American funds. As well, he had in his possession a Canadian \$10 bill which was identified as a "bait bill" taken from the bank. It should be noted, however, that there was some evidence that the bait money actually came from a different bank and not from the Bank of Nova Scotia that was robbed on that particular date.
- [7] At trial the Crown called a number of witnesses who were in the bank when the robbery took place. None was able to identify the appellant or any other person involved. The Crown also called the receptionist from the law firm who gave a general description of the man who used the telephone in order to call the taxi. However, she was not shown a photo line-up. Moreover, she could not identify any of the three accused persons as the man who used the phone in order to call a taxi.
- [8] The police showed the taxi driver three photo line-ups on the day of the robbery. The taxi driver had given the police a description of the men that he transported to the Fraser Arms Hotel. The police showed three different photo line-ups to the driver. A photograph of the appellant was contained in one line-up. However, the taxi driver was not able to identify the appellant as one of the three men. In fact, he identified a person who was not one of the three accused. At trial he was unable to identify any of the three men as the men he transported shortly after the robbery. As well, it should be noted that the appellant had no connection to the house in which he was arrested other than the fact that he was there at the relevant time.
- [9] The appellant did not testify.
- [10] The trial judge appears to have considered the so-called doctrine of recent possession. However, it appears from her reasons that she also relied on other evidence that was before her. The case against the appellant, as against the other co-accused, was entirely circumstantial.
- [11] The defence argued that there ought to be an acquittal on the grounds that the Crown had not proved the identity of the accused. In convicting all three accused the trial judge noted that all three men were seen associating at the residence on East 22nd Avenue a few hours after the robbery and that a co-accused DNA was found in one of the face masks used in the robbery. In her reasons she stated at paras. 64 and 65:

- [64] Mr. Dionne was arrested with a large quantity of Canadian and American money in his possession including some bait money from the bank. A partial DNA profile was obtained from the blue baseball cap recovered from the robbery for which Mr. Dionne was a possible contributor. The logical conclusion to be drawn from Mr. Dionne's possession of the bait money shortly after the robbery, the DNA evidence and the association with the other accused, is that Mr. Dionne was involved in the robbery.
- [65] It follows that I find the Crown has proved its case against Mr. Dionne beyond a reasonable doubt, and I find Mr. Dionne guilty of Counts 1 and 4 of the indictment.
- [12] In this appeal the appellant has argued that the verdict was unreasonable. The test for determining whether a verdict is unreasonable or unsupported by the evidence is whether it is one that a properly instructed jury acting judicially could reasonably have reached. See *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.). In that case the Supreme Court of Canada stated that while that standard is equally applicable in the case of a judge sitting without a jury, the review is made somewhat easier because reasons for judgment are available to an appellate court. It is of course trite law that an appellate court cannot substitute its own decision for that of a trial judge who is in a unique position in that he or she has the advantage of seeing and hearing the witnesses who have testified at trial.
- [13] The specific objection taken here is that the trial judge erred in paying an inordinate amount of attention to the so-called doctrine of recent possession. As well, Mr. Rankin, counsel on behalf of the appellant, has argued that taken as a whole the circumstantial evidence was such that another reasonable inference other than guilt could be drawn on the proved facts.
- [14] An early case that enunciated the rule in the doctrine of recent possession is *R. v. Schama*; *R. v. Abramovitch* (1914), 11 Cr. App. R. 45. The so-called doctrine is essentially a presumption of fact and not of law that a court may, not must, draw an inference from unexplained possession of property that has been recently stolen, a person who possesses property is in law a person that stole that property. In *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1, the Supreme Court of Canada revisited the application of the doctrine of recent possession. Mr. Justice McIntyre at p. 7 made the following comments:

Before going further, it will be worthwhile to recognize what is involved in the so-called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in *Graham v. The Queen*, *supra*, said at p. 108 C.C.C., p. 215 S.C.R.:

The use of the term "presumption", which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is "inference". In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused.

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of the recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft.

- [15] The Crown's case was based wholly on circumstantial evidence. The law on circumstantial evidence is not in dispute. In *R. v. Cooper*, [1978] 1 S.C.R. 860 at 881, 34 C.C.C. (2d) 18 at 33, 37 C.R.N.S. 1 at 17-18, the court stated that before basing a guilty verdict on circumstantial evidence the court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn on the proved facts.
- [16] In my view, the Crown's evidence fell short of satisfying the requirements of *Cooper*, supra. The case against the appellant was weak. There was no direct evidence. In fact, the taxi driver who was in the best position to make an identification not only failed to identify the appellant but identified an unrelated party. As well, there is another reasonable inference that can be drawn on the proven facts and that is that the appellant could have been in the possession of the money without being involved in the robbery. In other words, it is just as logical that he was a possessor of stolen money and not a person who was involved in the robbery. Moreover, it is not altogether clear that the bait money came from that robbery. The most that can be said is that the appellant was in the company of two men who were convicted of robbery and he was in possession of a large amount of money. In the circumstances, it would be unsafe to find a conviction based on circumstances that are palpably weak. The Crown did not satisfy the test set out in *Cooper* and it follows from that the verdict is unreasonable.
- [17] Accordingly, I would allow the appeal, set aside the conviction, and enter a verdict of acquittal.

"The Honourable Mr. Justice Oppal"

- [18] LAMBERT, J.A.: The appellant was charged with two others on an indictment with four counts. He was convicted of the two counts which related to him: the first of which was a count of robbery, contrary to s. 344(b) of the Criminal Code; and the second of which was a count of knowingly having stolen money in his possession, contrary to s. 355 of the Criminal Code. The first of those counts is count 1 and the second is count 4 of the indictment.
- [19] In the course of her reasons Madam Justice Gerow discussed the doctrine of recent possession which arose in this case because of the facts already stated by Mr. Justice Oppal. What Madam Justice Gerow said is contained in these paragraphs:
- [45] I have been referred to the case of *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1 (S.C.C.), regarding what has been called the doctrine of recent possession. Mr. Justice McIntyre explains the inference which can be drawn when an accused is found in possession of stolen property, at page 12 of the Quicklaw version:

Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must - draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact, upon a consideration of all of the circumstances, to decide which, if either, inference should be drawn. In all recent

possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

- [46] The defence argues that no inferences should be made as a result of the possession by Mr. Dionne and Mr. Lamarche of money from the robbery because money is easily transferable and rely on the case of *R. v. Ravenstein*, [1995] B.C.J. No. 1266 (B.C.C.A.). The court referred to an earlier case of the court, which held that a trial judge was entitled to rely on the unexplained possession of stolen property eight-and-a-half months after the theft of cultured pearls; *R. v. Killam* (1973), 12 C.C.C. (3d) 114 (B.C.C.A.). *R. v. Ravenstein* involved a custom necklace which was found in the possession of the accused seven months after its disappearance. The court found that in the circumstances of the case no inference could be drawn from the possession of stolen property, as the necklace was easily transferable.
- [47] However, in this case, the accused were found with money stolen from the bank within hours of the robbery, not months, as was the case in *R. v. Ravenstein*. Based on *R. v. Kowlyk*, it is clear that I may draw an inference of guilt of theft or of offences incidental to theft, that is, possession, based on the accused's possession of the stolen money.
- [20] Madam Justice Gerow also referred to the proposition that all the evidence should be examined as a whole in deciding whether the case had been proved, rather than by weighing individual items of evidence one by one, and she said this with respect to that proposition:

- [49] The Crown referred me to *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.), for the proposition that in considering whether the Crown has proved its case beyond a reasonable doubt one should not weigh the individual items of evidence, but, rather, should examine the evidence as a whole and determine whether on the proved facts the accused is guilty.
- [50] In my view, the Crown's theory of the case against the three accused relies on natural and logical inferences to be drawn from the proven facts.
- [21] Madam Justice Gerow then went through the facts and reached her conclusion with respect to the charges against Mr. Dionne in these words:
- [64] Mr. Dionne was arrested with a large quantity of Canadian and American money in his possession including some bait money from the bank. A partial DNA profile was obtained from the blue baseball cap recovered from the robbery for which Mr. Dionne was a possible contributor. The logical conclusion to be drawn from Mr. Dionne's possession of the bait money shortly after the robbery, the DNA evidence and the association with the other accused, is that Mr. Dionne was involved in the robbery.
- [65] It follows that I find the Crown has proved its case against Mr. Dionne beyond a reasonable doubt, and I find Mr. Dionne guilty of Counts 1 and 4 of the indictment.
- [22] In my opinion, Madam Justice Gerow made no error in her description of the doctrine of recent possession. She made no error in describing how the evidence as a whole should be weighed, rather than the weighing of each item one by one, and she made no error in saying that that principle should apply even where part of the basis of the inference could rest on the doctrine of recent possession. So in my opinion, in para. 64 of her reasons, which I have set out above, where Madam Justice Gerow said: "The logical conclusion to be drawn from Mr. Dionne's possession of the bait money shortly after the robbery, the DNA evidence and the association with the other accused, is that Mr. Dionne was involved in the robbery" she correctly applied the principles that she had described to the circumstances of this case.
- [23] So, there being no error of law, that leaves only the question of whether the verdict was an unreasonable one. In my opinion, the principle that recent possession can call for an explanation is an aspect of the inference of recent possession. Sometimes the circumstances arising at the conclusion of the Crown's case, whether based on direct evidence or circumstantial evidence, or partly one and partly the other, can lead to a web from which the only reasonable inference is that the accused is guilty unless he or she offers an explanation. It is then incumbent on the accused, who never has to testify on his own behalf, to expect to be found guilty if no reasonable explanation is offered. That principle was applied by this Court in *R. v. E.R.*, 2002 BCCA 361, decided on 29 May 2002, where Mr. Justice Braidwood, for the Court, said this:
- [7] ... I observe that, in the case at bar, no answer was offered to otherwise convincing inculpatory evidence, and the appellant's silence may therefore be considered in assessing the reasonableness of the conviction.

- [24] I take that silence in this case into account as well as the reasons themselves of Madam Justice Gerow in reaching the conclusion that, in my opinion, the verdict was not an unreasonable one in this case, there was no error in law, and accordingly, that I would dismiss the appeal.
- [25] MACKENZIE, J.A.: In my opinion, the learned trial judge did not make any error of law in her application of the doctrine of recent possession and the circumstantial evidence that she considered was relevant and considered by her, as I read her reasons, in determining the strength of the inference. In the circumstances of this case, there being no error of law, I agree with my colleague Mr. Justice Lambert that the evidence cannot be said to be insufficient to support the verdict and it follows that the verdict was, in my view, not an unreasonable verdict with which this Court could interfere. Accordingly, I would dismiss the appeal.
- [26] LAMBERT, J.A.: The appeal is dismissed.
- "The Honourable Mr. Justice Lambert"
- "The Honourable Mr. Justice Mackenzie"

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