
CANADA / JUDGMENT

R. v. Dixon

2018 BCCA 181

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 181 R. v. Dixon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dixon,

2018 BCCA 181

Date: 20180501

Docket: CA44406

Between:

Regina

Respondent

And

Kenneth Edward Dixon

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify the complainant referred to in these reasons for judgment.

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Dickson

On appeal from: An order of the Provincial Court of British Columbia dated December 20, 2016
(R. v. Dixon and Bird, North Vancouver Docket 61324-2-C)

Oral Reasons for Judgment

Counsel for the Appellant:

J.P. Desbarats

Counsel for the Crown Respondent:

B. Martland

Place and Date of Hearing:

Vancouver, British Columbia

May 1, 2018

Place and Date of Judgment:

Vancouver, British Columbia

May 1, 2018

Summary:

The appellant raises six grounds on his appeal from conviction of sexual assault of a complainant who was administered hydroxybutanoic acid (GHB) by his co-accused. Held: Appeal dismissed. The trial judge did not err in concluding the appellant's statement to the police was voluntary or in declining to grant a stay of proceedings on the basis that a video recording and an audio recording were no longer available at the time of the trial. Nor did the judge err in finding the appellant to have the requisite mens rea. Any failure of the judge to assist the appellant, who was largely unrepresented at trial, did not render the trial unfair so as to constitute a miscarriage of justice, and the judge's reasons for judgment were not insufficient.

- [1] TYSOE J.A.: The appellant and his co-accused, Glen Bird, were convicted after trial by judge alone of sexually assaulting the complainant on November 28, 2014. Mr. Bird was also convicted of administering hydroxybutanoic acid, commonly known as GHB or the date-rape drug, to the complainant with intent to cause her bodily harm. The appellant was found not guilty of this second charge.
- [2] The appellant's factum raised six grounds of appeal, one of which was abandoned at the outset of the hearing of appeal. As I would not give effect to any of the grounds, I would dismiss this appeal.

Evidence at Trial

- [3] The complainant testified as follows. In November 2014, she was seriously addicted to drugs and used crystal methamphetamine almost daily. Mr. Bird supplied her with drugs. She had a boyfriend who lived with his two children.
- [4] On November 27, Mr. Bird texted the complainant that he wanted to meet with her that night. He said he had "rented" her out to a friend for the night. The complainant was fearful of Mr. Bird, but felt that she had to meet with him because she was concerned about the safety of her boyfriend, particularly after receiving a text from Mr. Bird during the evening about coming to her boyfriend's place to "grab" her.
- [5] The complainant left her boyfriend's place in a taxi between 3:00 and 4:00 a.m. and, at the direction of Mr. Bird, went to a hotel where she met the appellant, who took her to his automotive shop where he lived in a loft. Mr. Bird subsequently arrived and the three of them consumed crystal meth.
- [6] Sometime between 6:50 and 8:30 a.m., Mr. Bird held up a cap of a cough syrup bottle filled with a clear liquid and put the cap to the complainant's mouth. He told her to drink it and it would make her feel better. The appellant said the same thing. The complainant felt compelled to drink it. Within 15 to 20 minutes, the complainant started feeling like she was drunk. Her vision was blurry and the room was spinning. She could not walk properly and her speech was slurred. She was in and out of consciousness.
- [7] The complainant woke up naked on the bed with Mr. Bird having sexual intercourse with her from behind. He did not stop despite her protest and finished by slapping her buttocks and saying that she was going to take care of his friend, referring to the appellant.
- [8] After the complainant had a cigarette downstairs, the appellant carried her back to the loft. The appellant then had sexual intercourse with her. At one point, she regained consciousness while he was penetrating her and choking her around the neck. She told him to stop but he continued.
- [9] The complainant left the automotive shop shortly before 9:30 a.m. and was picked up by her boyfriend and taken to a women's centre.
- [10] The police seized the cough syrup bottle from the automotive shop later that day, and the contents tested positive for GHB. The complainant's urine was also tested later that day and indicated that her level of GHB at the time of the events in question would have been higher than what would be considered to be a recreational dosage. A toxicologist testified at trial that the effects of GHB, which would become apparent within 10 to 15 minutes after ingestion, include disorientation, confusion, lack of balance, impaired memory and loss of consciousness.

- [11] The appellant acted on his own behalf during most of the trial. An amicus curiae was appointed to cross-examine the complainant and to argue the issue of whether a statement given by the appellant to the police was voluntary. The appellant also engaged counsel to argue a stay application and to make closing submissions.
- [12] The appellant testified in his own defence. He said that the complainant had initiated sex with him, and that he asked her three times if she was sure she wanted to have sex with him. During cross-examination by the Crown, the appellant denied consuming any drugs. However, on cross-examination by Mr. Bird's lawyer, he admitted that he had used crystal meth. He denied that he encouraged the complainant to take the clear liquid which was later determined to be GHB.
- [13] There is other collateral evidence relevant to discrete issues raised by the appellant on appeal. I will refer to that evidence when discussing those issues.

Decision of the Trial Judge

- [14] The trial judge reviewed the evidence in some detail in his reasons for judgment. In his discussion of the issues, he sometimes used the technique of posing questions.
- [15] The judge noted on more than one occasion that the actions of the complainant, being a drug addict, were not logical and not what one would expect from a person not addicted to drugs. He asked himself whether her evidence was credible and reliable despite her ingestion of crystal meth and GHB.
- [16] The judge found the appellant's credibility to be stretched to the breaking point by his denial of using drugs and his professed ignorance about where the drugs came from. He wondered why the appellant felt compelled to ask the complainant three times if she was okay with having sex.
- [17] The judge held that the effect of the GHB given to the complainant vitiated any apparent consent. He rejected the defence position that the complainant voluntarily took the GHB in order to calm the effects of the crystal meth.
- [18] The judge concluded the complainant was, in large part, both credible and reliable, and he accepted her evidence that the two accused had non-consensual intercourse with her. He rejected the appellant's professed lack of awareness of the consumption of any drugs by the complainant.
- [19] As the appellant had testified, the judge referred to the decision in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, which sets out a sample three-part jury instruction for cases in which the accused gives evidence. He said he did not believe the appellant's evidence on the issue of consent, and he also found that it did not raise a reasonable doubt on that issue. He held the evidence did not support an honest but mistaken belief by the appellant that the complainant consented. The judge found the appellant knew he was involving himself in a questionable course of conduct, and he reiterated his question of why, if true, the appellant would have

asked three times if the complainant was okay with having sex. The judge rejected the appellant's evidence that the sex was consensual. He found both accused guilty of sexual assault and found Mr. Bird guilty of administering the GHB to the complainant.

Discussion of Grounds of Appeal

a) Voluntariness of Appellant's Statement

- [20] The first ground of appeal relates to a ruling during the course of the trial that a statement made by the appellant to the police had been voluntarily given. The Crown used the statement in its cross-examination of the appellant to establish some inconsistencies between what he told the police and his testimony at trial.
- [21] The appellant says the Crown did not prove the voluntariness of his statement beyond a reasonable doubt because the police offered him two inducements to make the statement. First, the police said he might be released in a few hours. Second, the police said the matter might be resolved here and now if the appellant made a statement.
- [22] On the voir dire during the trial dealing with the voluntariness of the statement, the appellant also argued that he was not properly told of his right to counsel before making the statement. Most of the judge's reasons related to this second issue. The judge referred to the fact that the appellant had essentially agreed during the voir dire that what he said was voluntary. At the end of his reasons, he concluded that the Crown had established the statement was freely and voluntarily made.
- [23] In *R. v. Oickle*, 2000 SCC 38, Mr. Justice Iacobucci gave the following summary with respect to inducements as they relate to the voluntariness of confessions:
- [57] In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

Thus, the offering of an inducement does not, by itself, make a statement involuntary. It is necessary to look at all of the circumstances to determine whether there is a reasonable doubt as to whether the will of the person has been overborne so that the statement cannot be regarded as having been voluntarily given.

- [24] In the present case, the appellant was not offered a quid pro quo in exchange for making the statement. While the appellant was told that he might be released later that afternoon, it was not offered as a quid pro quo. The remark was made independently of whether the appellant did or did not give a statement.

- [25] Similarly, the police did not offer the quid pro quo that the appellant might not be charged if he gave a statement. The police officer was simply explaining to the appellant that he was trying to find the truth and commented that, if the matter got resolved then it would end there, and that if a charge was laid it would end up in court. The comments of the officer could not reasonably be interpreted as a suggestion that the appellant may not be charged if he provided a statement, especially in view of the fact that he had already agreed to answer questions from the police.
- [26] The final submission on this ground is that the judge conflated the issues of waiver of counsel and voluntariness. The appellant asserts the judge noted that the accused declined counsel and, as a result, found the statement to have been free and voluntary. On my reading of his reasons, the judge did not conflate the two issues. In one sentence, the judge observed that the appellant declined a lawyer. In the next sentence, he observed that the appellant agreed the statement was free and voluntary "in effect". The judge was not linking the two sentences. His use of the words "in effect" was similar to his earlier comment that the appellant had "essentially" agreed what he said was voluntary.
- [27] In my view, the appellant has not demonstrated the judge erred in concluding the Crown had established the voluntariness of the statement.

b) Destruction of Evidence

- [28] The second ground of appeal relates to another pre-verdict ruling made by the judge. In that ruling, he dismissed the appellant's application for a stay of proceedings on the basis that his right to a fair trial under s. 7 of the Canadian Charter of Rights and Freedoms was violated as a result of the failure of the police to preserve two items of evidence.
- [29] The first item was video surveillance footage of the exterior of the appellant's automotive shop. The police were aware of the video surveillance and, in the evening of November 28, 2014, a police officer asked the appellant if he would provide the video recording to him. The appellant replied in the negative and said he would be providing it to his lawyer.
- [30] The second item was a short audio recording made by the complainant on her cell phone shortly before she left the appellant's automotive shop. There were admissions of fact regarding its deletion. When the police returned the phone to the complainant, the officer indicated that the police had gotten everything off of it and that she could delete the recording if she wanted to. The complainant then deleted it. The officer testified that his superiors told him not to submit the phone for forensic analysis. Two witnesses who had listened to the recording before it was deleted testified that they heard muffled female laughter on the recording and that the complainant may not have been slurring her words on the recording.

- [31] The judge dismissed the application on the bases that there had not been unacceptable negligence on the part of the police in failing to obtain or preserve the two items of evidence and that their unavailability was not so prejudicial to the ability of the two accused to make full answer and defence that it impaired their right to a fair trial.
- [32] The seminal decision in this area, which was cited by the judge, is *R. v. La*, [1997] 2 S.C.R. 680, where Mr. Justice Sopinka said the following:
- [20] This obligation to explain [the loss of evidence] arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe* (No. 2), *supra*, [*R. v. Stinchcombe*, [1995] 1 S.C.R. 754] recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the Charter. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.
- [21] In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure.
- [33] The determination of whether there has been a breach of s. 7 of the Charter is the first step in the analysis. If a breach is found, the second step is to determine whether a stay of proceedings is the appropriate remedy. This remedy was discussed by this Court in *R. v. Neidig*, 2015 BCCA 489:
- [61] A stay of proceedings is the most drastic remedy a criminal court may order, and will only be granted in the "clearest of cases", where state conduct has irreparably compromised trial fairness, or will cause irreparable prejudice to the integrity of the judicial process if the prosecution proceeds. The reluctance to grant a stay reflects the strong societal preference for a verdict on the merits. A stay of proceedings is an unsatisfactory result in that it denies both the accused and the community the legitimate expectation of such a verdict. Accused persons seeking a stay thus face a heavy onus. They must establish, first, that the alleged prejudice "will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome" and, second, that there is no alternative remedy that can redress the prejudice. If uncertainty remains, the court must balance the interests in favour of a stay with the societal interest in having a final decision on the merits: *R. v. Babos*, 2014 SCC 16 at paras. 30-32, 44; *Bero* [*R. v. Bero*, (2000), 151 C.C.C. (3d) 545 (Ont. C.A.)] at para. 43.

The decision of whether to grant a stay is discretionary and an appellate court may interfere only if the judge misdirected himself or herself or if the decision is so clearly wrong as to amount to an injustice: see Neidig at para. 67.

[34] In my view, the judge was correct in finding that there was no breach of s. 7 in respect of the video surveillance evidence. This video recording was never in the possession of the police. The appellant had control of this recording and declined to give it to the police. If there was a failure to preserve the evidence, it lies at the feet of the appellant, not the police.

[35] Nor did the judge err, in my opinion, in concluding that the police were not guilty of unacceptable negligence in failing to preserve the audio recording. The police did not believe it was sufficiently important to submit the cell phone for forensic testing, and the judge is owed deference in his finding that this was not unacceptable negligence in the circumstances. In any event, even if there had been a breach of s. 7, trial fairness was not compromised because two witnesses testified with respect to the content of the audio recording. This would not have been one of the "clearest of cases" warranting a stay of proceedings.

c) Mens Rea

[36] The appellant says the trial judge misapplied the burden of proof with respect to mens rea as it related to the appellant's mistaken belief in consent. He maintains the judge accepted certain aspects of his evidence, including his testimony that he was unaware the complainant had been given any drugs and that he asked the complainant three times whether she was okay with having sex. He says the judge's reasons indicated that he was preventing the appellant from advancing the defence of mistaken belief in consent or that he was required to do more than make inquiries in order to raise the defence. Finally, the appellant submits the judge did not comply with the requirements of R. v. W. (D.) as it related to a mistaken belief in consent.

[37] On my readings of his reasons, the judge did not accept the appellant's testimony in these respects. The judge referred to the appellant being "a stranger to the truth". He did not accept the appellant's testimony that he was unaware the complainant was given GHB. In para. 92 of his reasons, the judge referred to the complainant's evidence that the appellant encouraged her to take the GHB and stated that he was satisfied beyond a reasonable doubt the GHB was used to facilitate the sexual assault despite the appellant's testimony there was consent. In addition, the judge found in para. 99 of his reasons that the appellant knew he was involving himself in a questionable course of conduct, which I interpret to be a reference to the use of the GHB.

- [38] Similarly, the judge did not accept the appellant's testimony that he asked the complainant three times if she was sure she wanted to have sex with him. He made comments in his reasons questioning why the appellant would have asked three times but he never accepted it. This is demonstrated in para. 99 of the reasons when the judge stated "[i]f true, one wonders why".
- [39] The paragraph of the reasons relied upon by the appellant for his position that the judge was preventing or limiting him in respect of the defence of mistaken belief reads as follows:
- [66] Can the accused Dixon argue innocent but mistaken belief in consent for his sexual conduct with [the complainant]? For example, he says that he, on three separate occasions, asked [the complainant] if she was okay with this. I have earlier alluded to this, but one wonders why he felt compelled to ask her three times. Dixon testified he suspected that he was getting sex in return for repairing a couple of tires earlier that night. Did he ensure that [the complainant] had freely given informed consent before the sex?
- [40] Although it was perhaps not very helpful for the judge to have expressed these thoughts in the form of questions, the reasons as a whole demonstrate that the judge was not preventing or limiting the appellant in respect of the defence. Later in the reasons, at para. 99, the judge expressly addressed the appellant's argument that he had an honest but mistaken belief in consent and gave reasons for rejecting it.
- [41] The final aspect of this ground relates to the R. v. W. (D.) instruction. The appellant says that while the judge applied the three-part instruction to the issue of whether the complainant had consented to the sexual activity, he did not apply it to the issue of whether it was proven beyond a reasonable doubt the appellant did not have an honest but mistaken belief that the complainant had consented.
- [42] On my reading of his reasons, the judge did apply the instruction to both issues. After referring to R. v. W. (D.) at para. 98, the judge found that the appellant was not believable and that his evidence did not raise a reasonable doubt "on the issue of consent". After referring to the complainant's incapacity to give consent, the judge then began para. 99 by stating that the evidence as a whole did not support an argument of an honest but mistaken belief in consent. This is the third leg of the instruction which, in my view, demonstrates that the judge's references to the first and second legs of the instruction in para. 98 related to the issue of an honest but mistaken belief in consent as well the issue of whether consent was given.
- [43] I am not persuaded that the judge made any error with respect to the mens rea of the offence.
- d) Failure to Assist a Self-Represented Accused

- [44] Although the appellant had the assistance of counsel for parts of the trial, he represented himself for most of it. The law is clear that a trial judge has a duty to assist self-represented accused persons. Any such failure is not a free-standing ground to allow an appeal from conviction, and the question is whether the failure to assist rendered the trial unfair such that there was a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Criminal Code: see *R. v. Schiel*, 2012 BCCA 440 at para. 55.
- [45] The appellant says the trial judge failed in his duty to assist him when he was testifying in his own defence. His examination-in-chief was very brief. He denied any knowledge of drugs being given to the complainant and he said the sex between them was consensual. During his cross-examination by Crown counsel, the appellant gave his evidence that he asked the complainant three times if she was sure she wanted to have sex with him.
- [46] After Crown counsel finished her cross-examination, the judge permitted counsel for Mr. Bird to examine the appellant and then allowed Crown counsel to re-examine him. When this re-examination was completed, the judge did not invite the appellant to clarify anything that had arisen during the questioning by the lawyers. This is where the appellant submits the judge failed in his duty. The appellant says his evidence about asking the complainant three times was important because the judge relied heavily on it in his assessment of his credibility and in finding that the appellant did not have an honest but mistaken belief that the complainant had given her consent.
- [47] In my opinion, this ground of appeal fails for two reasons. First, there was nothing to clarify about the appellant's evidence in this regard. He was clear in his cross-examination by the Crown that he had asked the complainant three times if she was sure she wanted to have sex, and this testimony was not brought into doubt by further questioning. There is no reason to believe that the appellant would have said anything further about the point.
- [48] Second, the fact the appellant was not given an opportunity to testify further about this point could not have resulted in a miscarriage of justice. The trial judge accepted the complainant's evidence, which included her testimony that she told the appellant to stop when she regained consciousness while he was penetrating her and choking her around the neck. Even if the appellant had an honest belief that the complainant initially consented to having sex with him, he continued having intercourse with her after she voiced her objection and was thereby committing the offence of sexual assault. Hence, even if the appellant had somehow clarified his evidence about asking her three times if she was sure she wanted sex, there was no miscarriage of justice because it could not have resulted in a different verdict.

e) Insufficient Reasons

- [49] The appellant maintains the judge's reasons were insufficient because he did not make reference to certain aspects of the evidence. He refers to a lack of reference by the judge to the complainant answering affirmatively in answer to the question of whether she was okay with having sex and a failure to deal with the complainant's demeanour and problems with her unreliability.
- [50] This submission lacks merit in my view. Viewed from a functional point of view, the judge's reasons are reasonably intelligible to the parties and are sufficient to permit appellate review: see *R. v. Sheppard*, 2002 SCC 26 at paras. 25 and 55. The reasons provided a pathway to the guilty verdict, and it was not necessary for the judge to address every piece of evidence.
- [51] It was not necessary for the judge to have made a specific finding as to whether the complainant answered affirmatively to the appellant's alleged question of whether she was okay with having sex because he found that the GHB, administered with the knowledge of the appellant, rendered her incapable of consenting and that this knowledge also undermined his argument that he honestly believed she gave her consent. The judge commented on the effects of the crystal meth and GHB on the complainant and nevertheless found her evidence, in large part, to be credible and reliable. In my view, the judge did not leave unresolved contradictory evidence on a key issue.

Conclusion

- [52] It is for these reasons that I would dismiss the appeal.
- [53] KIRKPATRICK J.A.: I agree.
- [54] DICKSON J.A.: I agree.
- [55] TYSOE J.A.: The appeal is dismissed.
- "The Honourable Mr. Justice Tysoe"

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