
CANADA / JUDGMENT

R. v. Dunkers

2014 BCSC 1315

COURT

Supreme Court of British Columbia

DECIDED

27 March 2014

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dunkers,

2014 BCSC 1315

Date: 20140327

Docket: 154319-2

Registry: Victoria

Regina

v.

Anita Marianne Dunkers

Before: The Honourable Mr. Justice G.R.J. Gaul

Oral Reasons for Judgment

Counsel for the Crown:

K. Henders-Miller

(appearing as agent

for M. Murray)

Counsel for the Defence:

T. Russell

Place and Date of Trial:

Victoria, B.C.

November 26-27, 29-30,

December 3-7, 2012,

March 25-26,

October 7-11, 15-18, 2013

Place and Date of Judgment:

Victoria, B.C.

March 27, 2014

- [1] THE COURT: The Capital Families Association, the "CFA", was a non-profit organization that provided a wide range of social services to the Victoria community for approximately 30 years, until it closed its doors and ceased operations in the spring of 2011.
- [2] From April 2007 to January 2010, the accused was the CFA's bookkeeper.
- [3] In January 2010 the CFA was facing serious financial difficulties and was on the verge of insolvency. CFA programs and services were being reduced or eliminated and staff hours were being cut back. The CFA was clearly in a crisis.
- [4] In mid-January the accused resigned from her position with the CFA, following a dispute she had with the CFA's executive director. Shortly thereafter, the accused's replacement discovered a number of irregularities in the CFA's accounting records that pointed to a surprising and disturbing cause of its grim financial situation. The records indicated that a large number of CFA cheques had been issued to individuals associated with the CFA, when in actual fact those persons never received the cheques. Further investigation revealed the cheques had been made payable to the accused.
- [5] On 1 March 2010 officers of the West Shore detachment of the RCMP arrested the accused for allegedly defrauding the CFA of approximately \$200,000.00.
- [6] On 21 April 2010 the accused was formally charged that between 1 January 2008 and 15 January 2010 she defrauded the CFA of a sum greater than \$5,000.00, contrary to s. 380(1)(a) of the Criminal Code.
- [7] In order for the accused to be found guilty, the evidence presented at trial must convince me, beyond a reasonable doubt, that she deprived the CFA of monies that belonged to the Society and that she intentionally did so by means of falsehood or deceit.

- [8] The accused has admitted that between dates set out on the indictment, 270 cheques drawn on the CFA's bank account, totalling slightly more than \$204,000.00, were made payable to her and were deposited into her personal bank account. The issue before the court is not whether the accused received the cheques in question and the said \$204,000.00, but whether the funds were fraudulently obtained by the accused, resulting in the CFA's deprivation.
- [9] The accused says she regularly used her own personal funds to pay for CFA expenses, following which she would submit claims for reimbursement. She also maintains there once existed CFA expense files that contained her reimbursement claims and that these documents would have supported her contention that all of the 270 cheques were properly issued to her. I will say at this point, that on the evidence before me I am satisfied the accused did not have the authority or permission to pay for CFA expenses from her own money or to submit expense claims. Moreover, I do not believe that the records the accused says once existed ever actually did exist.
- [10] The Crown says the 270 cheques in question were fraudulently prepared by the accused. CFA cheques required co-signees and the Crown submits the accused forged the signature of the executive director or a board member, or both, as part of her deceitful scheme to defraud the Society. In its simplest form, the Crown contends the accused deceitfully prepared the cheques in question for her own personal use and benefit and not for any CFA-related purpose. The direct result of the accused's actions, says the Crown, was that the CFA was deprived of \$204,000.00 it needed for its programs and operations.
- [11] It is not disputed that during the time set out in the indictment it was the accused who managed the CFA's day-to-day finances and that she was the person who was principally responsible for administering the CFA's cash flow. That is, she was the person responsible for preparing and issuing CFA cheques to employees, contractors and suppliers and for handling any payments or incoming funds the CFA received. She was also responsible for processing the expense claims of the few CFA employees or contractors who had expense accounts. Finally, she was the person who managed the CFA's petty cash fund.
- [12] Shortly after the accused's departure from the CFA in January 2010, Ms. Ashley Xu was hired to act as the CFA's new bookkeeper. Ms. Xu is originally from China and has been living in Canada for the past 12 years. She is an accountant by profession, having earned an accounting degree at a university in China. Prior to immigrating to Canada, Ms. Xu worked as an accountant and auditor in China. She has been resident in Victoria since 2003 and now works as an accountant for an accounting firm. It was Ms. Xu who, upon reviewing the CFA's financial records, discovered a number of irregularities. In particular, she noted that a large number of cheques had been made payable to multiple individuals for unknown reasons. When Ms. Xu made further inquiries and spoke with these individuals, they uniformly claimed that they had not received the cheques in question.

- [13] Ms. Xu prepared a report from the CFA's electronic accounting system that she referred to in her testimony as the CFA's "General Ledger". This document was produced using Simply Accounting, the CFA's computer accounting software at the time. The General Ledger exhibits the payments made into and out of the CFA's general bank account for the period of 1 January 2008 to 12 January 2010. In particular, the General Ledger shows a multitude of cheques made payable to various CFA employees or contractors that in actual fact were made payable to the accused and deposited into her personal bank account.
- [14] The accused challenged the accuracy of the General Ledger and Ms. Xu's competency and ability to prepare such a report using the Simply Accounting software. The accused was also critical of Ms. Xu's familiarity with Simply Accounting and her ability to explain its operation and various uses.
- [15] The accused asserts there was additional information available from the CFA's Simply Accounting records that would have provided further relevant particulars with respect to each entry on the General Ledger and that this supplemental information could have explained why the names of individuals who did not receive the cheques appear on the General Ledger in place of her name.
- [16] Although Ms. Xu's first language is not English and at times during her testimony she had difficulty making herself understood, she did eventually succeed and I found her to be a credible and reliable witness who made a genuine effort to be as accurate and complete as possible. There were some inconsistencies between what she said at trial and what she said at the preliminary inquiry; however, in my view those inconsistencies were insignificant and likely attributable to language difficulties. They were not, in my opinion, instances of Ms. Xu being dishonest with the court. Ms. Xu was able to provide rational and cogent reasons for the inconsistencies and I was favourably impressed by her evidence in this regard. I am satisfied that Ms. Xu is an experienced accountant with a proficiency in the use and operation of the Simply Accounting software and I have no hesitancy in accepting her evidence that the General Ledger is an accurate reflection of the CFA's accounting records at the time she prepared the report.
- [17] Ms. Prairie Escallier, the CFA's executive director during the relevant time, testified about the CFA's operations, finances and budget process. Ms. Escallier had been associated with the CFA for more than 20 years before her resignation in the summer of 2010. She explained the accused's role as the CFA's bookkeeper and described how expense cheques and other payments were to be prepared by the accused. She also described her working relationship with the accused and how she had attempted to address deficiencies in the accused's work product. Ms. Escallier recalled the difficulties the accused appeared to have preparing complete financial reports for the monthly meetings of the board of directors and the serious anxiety that developed in 2009 and 2010, when to her great surprise it became apparent that the CFA's budget estimates were grossly inaccurate and that the Society was in financial trouble. Finally, she explained the steps she took to address the grave predicament the CFA was facing.

- [18] I found Ms. Escallier to be a very credible and reliable witness and on the whole, I have accepted her evidence. In particular I accept her evidence that the accused was not authorized and had no reason to have an expense file with the Society and that would it be highly abnormal for the accused to incur expenses for the Society that could not immediately be paid out of petty cash.
- [19] I also accept that when Ms. Escallier went looking for an expense file for the accused, after the financial irregularities involving the accused had come to light, she did so not because she believed such a file existed, but because she harboured a faint hope that she was wrong and that there would be a file of some sort with records explaining the situation. In my view, Ms. Escallier's evidence is credible in this regard and I accept that her searching for the file was wishful thinking on her part and not an indication that such a file actually ever existed.
- [20] Finally, I accept Ms. Escallier's evidence about her signature on the cheques that were deposited into the accused's bank account. Ms. Escallier insisted that she did not sign expense cheques for the accused, explaining that there would be no reason for her to sign such cheques as there was no reason for cheques of that nature to be issued to the accused. Ms. Escallier further explained that it was her general practice to sign a small number of blank cheques that the accused could use in the event Ms. Escallier was not available when an invoice or other CFA-related expense needed to be paid. As all CFA cheques required two signatories, one of whom was to be a board member, those blank cheques Ms. Escallier left with the accused still needed to be signed by another CFA official before its issuance.
- [21] During her testimony, Ms. Escallier reviewed the cheques payable to the accused that appeared to have Ms. Escallier's signature on them. In many instances Ms. Escallier was adamant that she had not signed the cheque and that her signature on it was a forgery. For some cheques she was not certain, as the signature bore a striking resemblance to her signature. In any event, Ms. Escallier maintained that she did not recall signing any expense cheques for the accused. During his cross-examination of Ms. Escallier, counsel for the accused conducted a random test with samples he had chosen from the CFA cheques that bore what appeared to be Ms. Escallier's signature. Having deleted the date and payee on each of the cheques, counsel asked Ms. Escallier if she could identify which had her real signature and which contained a forgery of it. Ms. Escallier was not able to correctly identify all of the cheques that she had previously said contained a forgery of her signature. I do not find this fact to be of major consequence in my assessment of Ms. Escallier's evidence. The fact that she could not with certainty always identify her real signature from a forgery does not, in my view, mean she actually signed any or all of those cheques and did so knowing they were expense reimbursements for the accused. The cheques that Ms. Escallier was unsure of may well have been good examples of a forged document. In my opinion, the important aspect of Ms. Escallier's evidence is that the accused did not have the authority to incur expenses for the Society, such as purchasing groceries for the various programs or administrative supplies for the office, and that Ms. Escallier did not sign any cheques payable to the accused to reimburse her for such expenses.

- [22] The evidence of the other CFA witnesses was equally consistent when it came to the question of whether expense cheques were ever issued to the accused. Marjorie Schmidt, Clarice Dillman, Shelley Langille and Roberta Mason were members of the CFA's board of directors during the relevant period of time. At one point or another they were responsible for co-signing CFA cheques. All four witnesses testified that they did not sign expense claims for the accused. Much like Ms. Escallier, Ms. Dillman had difficulty identifying whether the signature on some of the cheques was hers or a forgery. That did not diminish the credibility or reliability of her evidence, and I accept the fundamental thrust of her evidence that she did not sign expense cheques for the accused. That is, in my opinion, the key point. Equally important in my view is that all of the witnesses were consistent and firm in their evidence that the accused would have no reason to have an expense file, and to their knowledge did not have one.
- [23] Against the evidence presented by the Crown, the defence relies upon the evidence of the accused. While the determination of guilt or innocence is not a simple matter of picking one version of events over the other, the process of assessing the accused's testimony is no different than that of any other witness who testified at trial.
- [24] The accused denies committing the offence charged. In doing so, she maintains she never forged anyone's signature on any CFA cheque and that the 270 cheques that were made payable to her and deposited into her bank account were simply reimbursements, properly authorized by CFA officials, for legitimate expenses she had incurred on behalf of the CFA.
- [25] The accused insists that she was an active participant in the day-to-day operations of the CFA and that her involvement went far beyond simply being the Society's bookkeeper. In her testimony at trial, she claimed she often paid for groceries, office supplies, and other CFA-related expenses from her own personal funds that she carried with her. At times these were significant expenses, but according to the accused, she always had sufficient cash on hand to pay for them. The accused says she always used cash when paying for CFA expenses, as opposed to using personal cheques or her credit or debit cards, and consequently there are no records of the transactions such as cancelled cheques, or credit or debit card statements to corroborate her position. The accused contends she was able to make these payments on behalf of the CFA because she had a large quantity of cash at home, stored in a box of some sort.
- [26] After considering the accused's testimony in the context of all of the other evidence at trial, I find large portions of her evidence to be unworthy of belief.
- [27] In 2008 the accused was working between 35 to 40 hours a week, earning approximately \$16.00 an hour. Her gross annual salary was approximately \$31,000.00. She had no other source of income. She had a teenage daughter living with her who was financially dependent on her. She made monthly payments on outstanding credit card debt and a personal line of credit. She had other monthly expenses as well, including her rent. It would appear the accused's limited income should have compelled her to live a reasonably frugal lifestyle.

However, while there is no evidence the accused regularly indulged in lavish expenses or hobbies, her banking records that were entered as evidence at trial do indicate that often after depositing one or more of the CFA cheques in question into her bank account, she would go on what could be categorized as minor shopping sprees.

- [28] Notwithstanding a gross monthly income of approximately \$2,600, the accused says she was regularly able and willing to spend large sums of her money on CFA expenses. For example, in June 2008, the accused says she spent \$5,750.00 of her own cash for CFA expenses. These payments, says the accused, explain why there were seven CFA cheques issued to her that month totalling \$5,751.95. When asked in cross-examination how it was that a single parent like her, who earns a modest monthly salary and who has a dependent child living with them, could afford to pay such significant expenses on behalf of their employer, the accused responded that she dated wealthy men and had the cash box at home that contained "thousands and thousands of dollars". Puzzlingly, for someone with an accounting background like the accused, she says she never kept track of how much cash was in the box or how much she took from it. When asked why that was so, the accused could not articulate a reason. She also explained in a very cryptic and unconvincing manner that she had proceeds from a 2005 divorce settlement, but that those funds were deposited with a financial institution that she could not or would not identify.
- [29] My decision in this case is guided by a number of fundamental principles that govern every criminal trial.
- [30] The first principle is the presumption of innocence. The accused before me was presumed innocent at the outset of this trial, and that presumption remains in place unless I am satisfied that the Crown has proven her guilt beyond a reasonable doubt. It is the Crown that must prove the accused's guilt. The accused has nothing to prove. The presumption of innocence ceases to apply only if, at the conclusion of the trial and after assessing all of the evidence, I am persuaded that the Crown has proven the accused's guilt beyond a reasonable doubt.
- [31] The second fundamental principle is the requirement of proof beyond a reasonable doubt. A reasonable doubt is based on reason and common sense, and it can arise at the end of the case based on the evidence or lack of evidence. Believing the accused is probably or likely guilty is insufficient to found a conviction. In the present case, I must be sure, after considering and assessing all of the evidence, that the accused defrauded the CFA as alleged in the indictment. If I am not, then I must find her not guilty.
- [32] Although I have only reviewed some of the evidence in these reasons, I have carefully considered everything that was presented at trial to determine how much or how little of the testimony of each witness I believe and accept. I have done so, keeping in mind that I am entitled to accept or reject some, none, or all of the evidence given by a witness. Some factors that I have kept in mind are whether the witness seemed honest, whether there was any reason why a witness would not be telling the truth, whether the witness appeared to

have an interest in the outcome of the case or any reason to give evidence more favourable to one side than the other.

- [33] If I believe the accused's evidence that she did not deceitfully produce the 270 CFA cheques in question and, in fact, properly received those cheques on account of the CFA expenses she had paid from her own money, then I must find her not guilty.
- [34] Even if I do not believe the accused's evidence, if it leaves me with a reasonable doubt about her guilt, then I must find her not guilty.
- [35] If I am not convinced whose evidence to believe, then that means I have a reasonable doubt and I must find the accused not guilty.
- [36] Finally, even if the accused's evidence does not raise a reasonable doubt about her guilt, if after considering all of the evidence I am not satisfied beyond a reasonable doubt of her guilt, then I must find her not guilty.
- [37] In my respectful view, the Crown's evidence against the accused is solid, compelling and persuasive. The evidence is consistent on the important issues and the Crown's witnesses were not shaken on cross-examination. The same cannot be said of the accused's evidence. She presented little evidence to corroborate what she asserted, even when such evidence was likely available. For example, something as simple as the cash box that allegedly contained the large sums of money the accused used to pay the CFA-related expenses, could have been produced to at least confirm the box existed. The accused had no explanation why the box or even a picture of it was not produced at trial. I found the accused's evidence contrived, and on the whole I found her explanations of her personal spending habits and banking practice unconvincing. Moreover, her answers on cross-examination were often vague or confusing, and I did not get the sense she was attempting to be completely forthright with the court.
- [38] After considering all of the evidence, I am satisfied beyond a reasonable doubt that the 270 CFA cheques issued to the accused and deposited into her bank account were either cheques that had been pre-signed by Ms. Escallier and upon which the accused had fraudulently obtained or forged the second signature, or were cheques upon which the accused forged Ms. Escallier's signature and then either forged the second signature or obtained it by deceitful means. However it was that the cheques were prepared, I accept there was no justifiable reason for them to be issued to the accused and that they were not reimbursement cheques for expenses she incurred on behalf of the Society. Finally, I find the accused intentionally and deceitfully made journal entries into the CFA's electronic accounting system, as exhibited in the General Ledger prepared by Ms. Xu. In my opinion, the only rational inference that can be drawn from this is that the purpose of those entries was to create an incorrect and dishonest record and leave the false impression that the cheques had been issued to other CFA employees when, in fact, they had been surreptitiously and deceptively issued to the accused.

[39] The accused will stand.

[40] Ms. Dunkers, I am satisfied that during the time period set out in the indictment, when you were an employee of the CFA, you used falsehoods and deceitful action to fraudulently deprive the CFA of over \$200,000.00.

[41] In my opinion, the Crown has proven its case against you beyond a reasonable doubt and, therefore, the presumption of innocence that you have enjoyed since the outset of this proceeding has been displaced.

[42] I find you guilty as charged.

"G.R.J. Gaul J."

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Prepared on 29 October 2026 · Esheria