

CANADA / JUDGMENT

R. v. Gallagher

2023 BCSC 824

COURT

Supreme Court of British Columbia

DECIDED

12 May 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 824 R. v. Gallagher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gallagher,

2023 BCSC 824

Date: 20230512

Docket: 48395

Registry: Penticton

Rex

v.

Steven Marlo Gallagher

Corrected Judgment: The text of this judgment was corrected on May 16, 2023.

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

Counsel for the Crown:

K.J. Short

Counsel for the Accused:

J.H. Pennington

Place and Dates of Trial:

Penticton

May 3-4, 11, 2023

Place and Date of Judgment:

Penticton

May 12, 2023

I. Introduction

- [1] Mr Gallagher stands accused of breaking into and committing arson at the Remedy RX Pharmacy in Oliver just after 4 am on May 15, 2021, contrary to ss. 348(1)(b) and 434 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The only issue in the case is identification.
- [3] The primary evidence consists of four security camera video clips.
- [4] The first, from an exterior security camera operated by the Osoyoos Band, shows Sandpoint Drive, just down the road from the home of the accused. The second comes from an exterior security camera at a Petrocan gas station. The third, from a building supply store exterior security camera, shows the front of the pharmacy as well as a small park, commonly referred to as Triangle Park, roughly 100 metres to the west.
- [5] The fourth and most important video clip comes from the internal security camera of the pharmacy, mounted above a drinks cooler at the front door. It shows the cash and front area of the store, and the fronts of several aisles. The camera captured a brief partially obscured facial shot of the suspect, which the Crown argues is Mr Gallagher. The Crown also bases its case on circumstantial evidence, as set out below.

II. Facts

A. Relevant geography

- [6] I will start with a brief overview of the relevant geography.
- [7] At Oliver, Highway 97 turns into Main Street, running north-south. Triangle Park is located at the centre of town, where Fairview Road intersects Main Street. The pharmacy is located at Fairview and Station Street, as part of a larger building containing three other businesses.
- [8] Fairview continues northeast, crossing the Okanagan River. It turns into Park Drive, and then intersects McKinney Road. A half-kilometer east, at McKinney and Tucelnuit Drive, is the Petrocan gas station, administered by the Osoyoos Band. Another half-kilometre further east, McKinney intersects Sandpoint Drive, near the accused's home, on a large lot. The area, on the east side of the Okanagan River, is a sparsely populated, relatively quiet rural area, in the Osoyoos Band Reserve.

- [9] The RCMP detachment is located about a half kilometre south of Triangle Park, just off Main Street. The RCMP is the designated police force for the Osoyoos Band, including the area where Mr Gallagher resides.
- [10] The distance from Mr Gallagher's house to the pharmacy is about 2 kilometres.

B. The events on the morning of May 15, 2021

- [11] Around 1 am, the police received a call that gunshots had been heard coming from the residence of the accused. Corporal Symons and Constable Hubert attended, in separate police cars. Both officers were familiar with the accused and his residence; both had patrolled and visited the residence in past.
- [12] When the officers arrived, they noted various vehicles parked on the property: functional, non-functional, and collectible; on patrols around this time, police regularly observed 8 to 14 vehicles at any time on the Gallagher property. These vehicles included a 1990s model Ford Ranger pickup truck, in a distinctive dark green colour, with a second row of seats and a factory-printed wave decal. Both officers had seen the Ford truck at the accused's residence in past patrols; Corporal Symons in particular recognised the make as a rare vehicle, having formerly owned a similar truck himself.[1]
- [13] When the officers arrived, the accused was standing in his driveway, as if waiting for them. Police observed approximately two other males and three females; all were drinking. No one appeared particularly intoxicated.
- [14] The accused denied that there been gunshots at his house, and claimed that he had heard them coming from another direction. He was cooperative, and offered to give the officers a tour of his house in order to convince them; the officers took him up on his offer. The police found no evidence of criminal activity. During the tour, the spirit of cooperation suddenly turned. According to Corporal Symons, the accused said words to the effect of "I don't know why you cops don't like me", and listed off various complaints about the police. According to Constable Hubert, Corporal Symons asked the accused about "rumours" surrounding him. Either way, the accused became somewhat agitated, and ordered and escorted the officers off his property. They left at around 2:15 am.
- [15] Instead of driving back to the detachment, they parked about one half kilometre away to "wait-and-see what happens." They heard loud talking from the accused's property, and then the revving of car engines, with vehicles starting to leave at high speeds. Judging pursuit to be unwise, and hearing no further gunshots, they returned to the RCMP detachment.
- [16] The officers' shift was to end around 4 am. They were preparing to leave the detachment when they suddenly heard a loud "boom-boom-boom" outside. It sounded like gunfire, although they were not entirely sure; the later familiar smell of gunpowder, coupled with a discovery of bullet holes in a police car bumper, indicated that the sound was indeed likely gunfire.

- [17] Upon hearing the loud sounds, the officers looked out of the detachment window. They recognised the green Ford pickup truck from the accused's property, both from behind, and its side profile, as it headed towards Main Street.
- [18] A few minutes later, they received a call that a pickup truck was on fire in Triangle Park. When they arrived at the park, someone shouted that the pharmacy was also on fire. The green Ford pickup truck was in flames.
- [19] Volunteer firefighters arrived to deal with both fires. Corporal Symons then drove eastwards along Fairview Road. He looked up at the Petrocan gas station. There he saw the taillights of a parked vehicle. He again heard the "boom-boom-boom" sound. The parked vehicle then revved its engine and drove away eastwards. The officer was unable to see its ultimate destination, but given the few roads and sparse population in the area, one of the limited number of potential destinations would be the house of the accused.

C. The videos

- [20] At 3:58 am, the Sandpoint Drive security video shows a green pickup truck emerging from what is likely Mr Gallagher's property. The truck heads north, towards McKinney. The Petrocan video then shows a vehicle - it is not clear if it is the green pickup truck or not - parked and idling, illuminated inside by a phone or otherwise, from 4:00 to 4:04 am.[2]
- [21] At 4:07 am, the building supply store security camera captures a vehicle, which turned out to be the green pickup truck, mounting the curb and parking in the middle of Triangle Park. A tree and some shrubbery obscure the truck from the full camera view. At around 4:11 am, smoke is seen emerging from behind the shrubbery. At around 4:13 am, a figure is seen walking from the truck eastwards, towards the pharmacy. The figure is carrying what appears to be a large dark case. The figure walks past the pharmacy, heading towards a line of trees at the edge of the pharmacy parking lot. There the figure appears to stash the case. He heads back towards the front door of the pharmacy. He appears to squat down.
- [22] We now turn from external cameras to the security camera within the pharmacy.
- [23] At 4:15 am, a rock flies through the doorway, down the leftmost aisle. The figure then enters the pharmacy through the smashed glass door. He squats down beside the drinks cooler, in front of some sundresses displayed for sale. Within seconds, the dresses are aflame. The figure walks down an aisle and disappears out of frame. A few seconds later, he comes back, heading towards the front door.
- [24] Throughout the sequence, the arsonist's hoodie completely obscures his face. Even walking back towards the front door, his facial features are impossible to discern.

- [25] As he approaches the front door, however, the temptation of grabbing a refreshing post-arson drink proves too great. He turns towards the drinks cooler, and steals a beverage. With that turn he provides a decent view of his face, from eyes to chin, both straight-on, as well as at half-profile. He then leaves the pharmacy through the smashed door.
- [26] The pharmacy is soon choked in haze and floating embers. A few minutes later, the lights of firefighters are visible: it appears that at least four firefighters are combatting the flames. While the inventory was significantly destroyed, the building did not suffer structural damage.
- [27] Turning now back to the exterior surveillance camera, the arsonist leaves the pharmacy. He heads back towards the line of trees, where he disappears out of frame.

III. Decision and discussion

- [28] The Crown called three witnesses: Officers Symons and Hubert, and Sergeant Wigglesworth. The defence called no evidence.
- [29] The Court found all three officers to be credible and reliable. Officers Symons and Hubert were both careful and responsible in their recall of the events that morning. They made clear what they could or could not see or hear directly. For example, both officers admitted that they could not responsibly recall what Mr Gallagher was wearing at the time of the visit to his residence, and admitted that while they thought that the "boom-boom-boom" sound was gunshots, they could not be sure. They also guarded against overstatement. While Mr Gallagher had been drinking, they did not assert that he was inebriated or that his actions in any way were affected by his drinking. Officers Hubert and Wigglesworth were careful to emphasise that their estimates of total time spent with the accused were very much approximations.
- [30] The Court held voir dres to determine whether Constable Hubert and Sergeant Wigglesworth were qualified to serve as recognition witnesses with respect to the figure in the pharmacy video. After those voir dres, the defence conceded, and the Court determined, that both qualified as recognition witnesses under the jurisprudence usefully summarised by Devlin J in *R. v. Coban*, 2022 BCSC 263 at paras 12-18. Specifically, each officer had sufficient familiarity with the accused, based on multiple, including recent, past interactions, to serve as "a helpful witness who is in a better position than the trier of fact to identify the accused": para 16.
- [31] Sergeant Wigglesworth had spent between 1.5 and 2 hours in total with the accused, over seven or eight interactions, largely in the course of investigations: occasions requiring focus. These interactions included face-to-face conversations.
- [32] Constable Hubert also had had several up-close interactions with the accused. These included supervising his fingerprinting, as well as two search warrants, as well as attending at a car accident in which Mr Gallagher's older brother was killed. In other words, these were occasions of some intensity and proximity, that were likely reasonably memorable.

These incidents also included several face-to-face conversations. As an example, on one patrol past Mr Gallagher's house, Mr Gallagher said words to the effect that "the police should get off the Osoyoos band subdivision: you have no right to police there." These interactions totalled between 30 and 45 minutes.

- [33] Both Constable Hubert and Sergeant Wrigglesworth identified the figure in the pharmacy video as Mr Gallagher. They saw the video soon after the arson. They recognised him immediately. They had no doubt that the figure was Mr Gallagher. Sergeant Wrigglesworth, who has served in Oliver for many years, added that he is unaware of anyone amongst Mr Gallagher's circle of associates and family, or, for that matter, anyone in Oliver, who looks like the figure in the video.
- [34] Defence argues that their recognition evidence should be given little or no weight: the recognition arises from confirmation bias and "groupthink", given Mr Gallagher's past history with the RCMP and suspicions that he was the arsonist. Defence cites *R. v. Collins*, 2008 CanLII 36899 (NLPC) and *R. v. Hudson*, 2020 ONCA 507.
- [35] The circumstances in both of those cases clearly tainted the process, and may be distinguished from the present case.
- [36] Collins concerned identification, rather than recognition evidence: the accused's photograph jumped out amongst the other eleven, with a unique wall background; further, a police officer had profoundly tainted the identification exercise by describing it out loud as concerning the "Collins matter".
- [37] In Hudson, an officer had already started active investigation of the accused, and then proceeded to taint the other recognition officer, by "planting the seed" that the video showed the accused, before that officer had viewed and identified the accused in the video. Further, the Court of Appeal found that the trial court had erred in qualifying the initial officer as a recognition witness, given his limited interactions with the accused. In the end, however, the accused's appeal was dismissed, as the trial judge was entitled to rely upon the second officer's recognition evidence, and as the trial judge himself would have been able to identify the accused without reliance on either officer's evidence, as the idiosyncratically distinct appearance of the accused matched the figure in the surveillance videos: paras 45 and 47.
- [38] In the present case, both officers were solely asked, independently and neutrally, if they recognised the person in the video. The defence's argument would bar recognition evidence wherever surveillance video shows an ostensible crime, or wherever police, reasonably, have initial suspicions as to the culprit. It would particularly bar such evidence in a smaller population centre such as Oliver, with a finite number of people who could have committed such a crime, and where recognition evidence would often be more reliable.
- [39] In any case, as in Hudson, even without these police officers' experienced recognition of Mr Gallagher as the figure in the surveillance video, the Court is convinced beyond a reasonable doubt that the video shows Mr Gallagher to be the arsonist.

- [40] Mr Gallagher has very distinctive facial and bodily features. Although he has a markedly round face and strong jawline, he has a relatively sharp chin. His nose is sharp, pronounced, and slightly curved. His eyes stand in dark contrast to his relatively pale skin. His mouth is distinctively slightly agape when in a resting position. He has broad, hunched shoulders. He is squat and heavy set. All of these features are clearly discernable in the pharmacy video, and in zoomed-in screenshots showing the suspect's face straight on, and in partial profile.
- [41] The identification of Mr Gallagher in the pharmacy video is bolstered by the totality of the circumstantial evidence surveyed above. It is unlikely that many people were up and active in the metropolis of Oliver at 4 am: the exterior videos confirm the lack of other vehicles and people in the heart of Oliver. Apart from his history with the police, Mr Gallagher had had a confrontation just hours before the arson, and the police visit was followed by vehicles squealing away from the Gallagher residence. Gunshots were fired before the early morning police visit to the Gallagher residence, then just before the arson, at the police station, and then just after the arson, just before Corporal Symons saw a vehicle speed away from the PetroCan station.
- [42] The distinct green Ford Ranger pickup truck ignited and abandoned at Triangle Park, from which truck the arsonist emerged, provides a compelling lynchpin. Officer Symons had seen the truck at the Gallagher residence before the morning in question, and he saw it there during his morning visit. The truck is seen on the Sandpoint Drive camera minutes before it is seen near the RCMP station, just after the sound of gunfire, and just before its abandonment at Triangle Park. Shell casings were found in the truck the next morning, consistent with the trio of gunshot sounds.

IV. Conclusion

- [43] Mr Gallagher, please stand.
- [44] The Court finds you guilty of both counts.
- [45] I understand from the testimony and statements of counsel that Mr Gallagher is a member of the Osoyoos Band; he lives on the reserve.
- [46] I direct that a Gladue Report be prepared as swiftly as reasonably possible. Counsel should also set down the earliest convenient date for sentencing.
- [47] Apart from any input into the Gladue Report, I would also direct that the Ministry of Justice provide a copy of these reasons to the appropriate contact person in the leadership structure of the Osoyoos Band. The organisation will also be advised of the date of the sentencing, and be invited, as an organisation or individuals, elders or otherwise, to provide written or oral submissions or statements with respect to Mr Gallagher's sentencing.

"Crerar J"

- [1] The green truck is not registered in Mr Gallagher's name; its actual owner or even its jurisdiction of registration or origin remain unknown.
- [2] Crown and defence agree that the time stamps on the videos are reasonably accurate, and consistent with the testimony of the officers, and agree on the summary of these times.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/08/2023BCSC0824cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-gallagher-2023>

Prepared on 28 October 2026 · Esheria