
CANADA / JUDGMENT

R. v. Garnot

2018 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 107 R. v. Garnot

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Garnot ,

2018 BCCA 107

Date: 20180314

Docket: CA43210

Between:

Regina

Respondent

And

William Garfield Garnot

Appellant

Restrictions on Publication: Section 486.4(3) of the Criminal Code: An order under this section provides that no person may publish information that could identify a witness who is under 18 years of age, or any person who is the subject of a representation, written material, or a recording that constitutes child pornography. This publication ban applies indefinitely unless otherwise ordered.

Section 16(4) Sex Offender Information and Registration Act: This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated August 19, 2011 (conviction) and August 4, 2015 (sentence) (R. v. Garnot, 2011 BCSC 1814 and R. v. Garnot, 2015 BCSC 2031, Prince George Registry Docket 31367).

Oral Reasons for Judgment

Counsel for the Appellant:

T.J. Russell

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

March 14, 2018

Place and Date of Judgment:

Vancouver, British Columbia

March 14, 2018

Summary:

The appellant seeks to quash his conviction of aggravated sexual assault on the basis that the judge erred in refusing to stay the proceedings as a result of the police losing certain evidence. He asks this Court to enter a stay or order a new trial. In the alternative, the appellant asks for an acquittal on the basis that the verdict was unreasonable. Held: appeal dismissed. The judge did not err in refusing to grant a stay of proceedings, as the equivocal and speculative nature of the lost evidence meant that the appellant's was not one of the clearest cases requiring a stay. The verdict was not unreasonable, and the appellant's arguments to the contrary are in substance an attempt to re-try the case on appeal.

[1] KIRKPATRICK J.A.: Mr. Garnot appeals his conviction in the Supreme Court on August 19, 2011, for aggravated sexual assault. He asks this Court to quash his conviction and enter a stay of proceedings on the basis that the judge erred in assessing the prejudicial effect of certain lost evidence on his s. 7 Charter rights. In the alternative, he asks for a new trial. In the further alternative, he says the verdict was unreasonable, and asks this Court to enter an acquittal.

BACKGROUND

- [2] In 2001, the complainant Ms. M suffered a violent sexual assault. According to her evidence, on November 20, 2001, she and a friend were drinking at a bar in Prince George. After the bar closed, Ms. M found herself "pretty drunk" and standing outside a Ramada Hotel with her friend. A man approached the pair. Ms. M asked him if he knew where to get a drink; he said he did, and together she and the man departed on foot. The two eventually left the road. They were walking down a narrow, treed trail when the man struck Ms. M twice. She was knocked unconscious. When she awoke, the man was having sexual intercourse with her from behind.
- [3] After the man left, Ms. M returned to the Ramada Hotel and there met Corporal Washbrook, a relatively inexperienced officer of the RCMP. When they met, Ms. M was crying and bleeding heavily from her face. She took Cpl. Washbrook to the location of the assault, at which time he recovered her sock from the middle of the road.
- [4] Ms. M was then taken to the hospital and examined by Dr. Byrne. The doctor found her nose and zygomatic arch fractured in a manner that would have required a strong physical blow. The doctor also conducted a sexual assault examination (or kit), finding injuries to Ms. M's rectal, anal, and vaginal areas that he considered were unlikely to have resulted from consensual sexual intercourse. He also swabbed these areas, but those swabs did not reveal the existence of motile sperm. Nor did Ms. M have any semen on her body. However, the doctor noted that this was, in his experience, not unusual. Finally, the doctor did not note the existence or testing of Ms. M's underpants in his record of the examination.
- [5] Cpl. Washbrook seized the kit and Ms. M's other clothing (a sock, jacket, jeans, bra, and T-shirt) and secured them in the RCMP detachment.
- [6] The RCMP forensic lab found the presumptive presence of semen on two areas of the crotch of Ms. M's jeans by using a fluorescent light source. One sample was microscopically examined and the presence of semen was confirmed; the other was not analyzed. The male DNA found could not be identified, and was placed in the crime scene index of the national DNA databank in case a match might later be found.
- [7] After securing the male DNA profile, Cpl. Washbrook returned Ms. M's clothing and her jeans, albeit with the sample areas cut out of them. His evidence was that he did so because, the sample having been recovered, the exhibits were no longer required.
- [8] On December 30, 2002, Cpl. Washbrook directed the exhibit custodian to destroy the sexual assault kit. As a result, the kit was never sent for further analysis. The custodian destroyed the kit on January 3, 2003, in accordance with various practices that had been instituted to increase the storage space available for refrigerated exhibits while minimizing the risk of destruction of needed evidence. The practices allowed, inter alia, for destruction to be requested or postponed by an investigating officer.

- [9] In 2008, the DNA databank identified a match between the above DNA and a sample found in an investigation from Alberta, in which Mr. Garnot was a suspect. In 2010, the police obtained a warrant and secured a known sample from Mr. Garnot. At trial, the defence admitted the fact that this known sample matched the one from Ms. M's jeans.
- [10] On October 27, 2010, Mr. Garnot was charged with one count of aggravated sexual assault and one count of uttering a threat to cause death or bodily harm.

TRIAL JUDGMENT

- [11] The judge convicted Mr. Garnot of aggravated sexual assault on August 19, 2011. The judge found Mr. Garnot not guilty of uttering a threat.
- [12] As the judge noted, the sole issue in the case was the identity of Ms. M's attacker. The key evidence capable proving identity was Mr. Garnot's DNA from the semen inside the crotch of Ms. M's jeans. The Crown called a number of witnesses, including Ms. M, Cpl. Washbrook, Dr. Byrne, and the exhibit custodian, all of whose testimony is largely summarized above.
- [13] Mr. Garnot raised essentially two defences.
- [14] First, he testified to his own version of the events of November 21, 2001, in which he said that a consensual sexual encounter occurred. He said that he paid a woman he had just met \$20 in exchange for her masturbating him to ejaculation, and that during that encounter she masturbated herself as well. Though he could not identify her from the photographs the police had previously shown him, he identified her as Ms. M in the courtroom.
- [15] The judge found that Mr. Garnot's version of the events of November 21, 2001 was fabricated. He did not believe Mr. Garnot's courtroom identification of Ms. M, was unable to accept that Mr. Garnot would have accepted an offer for sex when he said he had never done so before or thereafter, and, given Mr. Garnot's stated embarrassment regarding his erectile dysfunction (discussed below), found it unlikely that Mr. Garnot would expose himself to a stranger. The judge also noted Mr. Garnot had 26 previous convictions for offences of dishonesty.
- [16] Second, Mr. Garnot testified that had been unable to sustain an erection sufficient for intercourse since the age of 17. In addition to his own evidence, Mr. Garnot called Dr. Darby Cassidy (a urologist) and Ms. Angeline Cunningham (Mr. Garnot's romantic partner since 2001 and his wife since 2009).
- [17] The judge did not accept Mr. Garnot's claim of impotence. Dr. Cassidy was qualified as an expert and provided an opinion that supported Mr. Garnot's claim, but that opinion was predicated on the reliability of the history Mr. Garnot provided to him. The judge found that Ms. Cunningham, who also testified to Mr. Garnot's impotence, was not a believable witness.

- [18] However, the Crown still bore the burden of disproving Mr. Garnot's defence beyond a reasonable doubt. After the issue of Mr. Garnot's impotence emerged, the Crown applied to call rebuttal evidence. The judge granted that application such that the Crown could call evidence to show Mr. Garnot was in fact capable of sustaining an erection, granted an adjournment, and granted leave to the defence to reopen its case following the Crown's rebuttal evidence: see *R. v. Garnot*, 2010 BCSC 2039.
- [19] The Crown called five witnesses in rebuttal. Two testified to being sexually assaulted by Mr. Garnot. One testified to watching Mr. Garnot have sex with her mother's unconscious cousin. Another testified to seeing Mr. Garnot have an erection while standing over her sleeping 12 year old sister; on cross-examination, she said Mr. Garnot also threatened her with a gun at that time. The last witness was Ms. Sonja Arsenault, Mr. Garnot's former probation officer. She provided probation records that contained Mr. Garnot's numerous statements to her that he was quite sexually capable, the most important of which seem to have been from 1999 to 2001.
- [20] Aside from the evidence of the witness who testified about the gun, the judge found the Crown's evidence to be compelling and believable. Considering all the evidence, he found the Crown had disproved beyond a reasonable doubt that Mr. Garnot lacked the physical capacity to sexually assault Ms. M.
- [21] In addition to those defences, Mr. Garnot also applied for a stay of proceedings predicated on breaches of his ss. 7 and 11(d) Charter rights, which he said essentially resulted from the loss of certain evidence. In particular, he pointed to: the loss of Ms. M's underwear; the failure to forward the sexual assault kit to the forensic lab; the failure to photograph the exact locations at which the DNA sample was found on Ms. M's jeans; and the destruction of the sexual assault kit.
- [22] On the Charter application, the judge held that the essential question was the destruction of the kit and all of the potentially relevant evidence it contained. The judge found that the loss resulted from the inexperienced Cpl. Washbrook's failure to understand his responsibility to preserve evidence the defence could have used and the local detachment policy that persistently forced investigators to decide between preservation and destruction of evidence. With all the circumstances considered, the judge found that there was unacceptable negligence on the part of the police, and thereby a breach of Mr. Garnot's s. 7 rights.
- [23] However, the judge did not consider Mr. Garnot's to be one of the clearest of cases requiring a stay of proceedings. He proposed the following remedy, which is the focus of Mr. Garnot's arguments:
- [107] As in those cases, I think there is a remedy short of the most drastic one of a stay of proceedings that can still alleviate the prejudice caused by the lost evidence. Put another way, I do not think this is one of the clearest cases in which a stay is required.

- [108] When I consider all of the evidence, I conclude that the potential harm to Mr. Garnot's right to full answer and defence can be mitigated in a meaningful way by my instructing myself explicitly, when I consider whether the inferences from the current circumstantial evidence are sufficient for the Crown to meet its burden of proof beyond a reasonable doubt, that the failure of the police to preserve the evidence in this case must figure prominently in that analysis.
- [109] Specifically, I must ask myself whether the absence of what could have been additional confirmatory evidence from the sexual assault kit or the reasonable possibility that the analysis of one of the samples from the kit could have pointed to another person mean that the guilt of Mr. Garnot beyond a reasonable doubt is not the only rational inference to be drawn from the evidence.
- [24] Bearing in mind the remedy he had crafted, the judge addressed the "critical issue" of identity, which turned on whether Mr. Garnot's semen on the inside crotch of Ms. M's jeans was consistent with no other rational explanation than Mr. Garnot's guilt beyond a reasonable doubt. The judge noted that other evidence suggested the semen was left on Ms. M's jeans at the time and under the circumstances she described. The judge found the semen was placed on her jeans during the time period of the sexual assault, either during the assault itself or after leaking out of Ms. M's vagina or anus and onto her jeans following it. He was supported in this latter conclusion by the evidence of the doctor. The judge also accepted Ms. M's evidence denying the suggestion she had a previous encounter with Mr. Garnot, and her evidence the jeans were new. Finally, the judge considered the effect of the lost evidence and expressed his ultimate conclusion as follows:
- [139] The significance of all of this evidence is that I feel confident, based on these individual pieces of evidence, finding as a fact that the semen was placed on the crotch of the jeans during the time period of the sexual assault described by Ms. M., and at no other time.
- [142] It is trite to say that a reasonable doubt can be based on the absence of evidence. However, even giving the loss of this evidence its maximum possible weight, I find that it does not lead to a reasonable doubt based on the existence of another rational explanation.
- [143] On the facts as I have found them, there was no earlier sexual encounter between Mr. Garnot and Ms. M., and no other viable third party assailant emerged on the evidence. Given her condition at the time, I do not consider Ms. M.'s indication to the police that the male who assaulted her identified himself as "Jack", a name Mr. Garnot disavows, to rise to the level of implying the existence of an alternative suspect. That being the case, the possibility of the lost exhibit leading to the identification of anyone except Mr. Garnot recedes to the level of speculating that someone else did the things that Ms. M. described without leaving any physical trace of himself, while Mr. Garnot left his semen without having been the assailant. As a result, the absence of this evidence does not leave me in a state of any reasonable doubt.

[Emphasis added.]

[25] The judge found Mr. Garnot guilty of the aggravated assault of Ms. M.

ON APPEAL

[26] In my view, the alleged errors framed by Mr. Garnot can be restated as the judge: failed to grant a stay of proceedings; adopted an inappropriate remedy; and, in the alternative, delivered a verdict that was unreasonable.

[27] I am not persuaded the judge fell into error and would dismiss the appeal.

[28] In my opinion, the judge made no error in concluding that a stay of proceedings was not justified in this case. The judge's discretionary decision to refuse a stay of proceedings was made under s. 24(1) of the Charter, and, as the authorities demonstrate, is owed considerable deference: *R. v. Regan*, 2002 SCC 12; *R. v. Neidig*, 2015 BCCA 489; *R. v. Nicholas*, 2017 ONCA 646. Indeed, "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice", and cannot substitute its own decision because it takes a different view of the facts: *Regan* at para. 117.

[29] The onus on Mr. Garnot in seeking a stay was a heavy one. The authorities make clear that a stay of proceedings is an exceptional remedy and should only be granted in "the clearest of cases": *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 68; *R. v. La*, [1997] 2 S.C.R. 680. As the Court stated in *R. v. Bero*, (2000) 151 C.C.C. (3d) 545 (Ont. C.A.):

[43] The reluctance to stay criminal proceedings reflects the strong preference for a verdict on the merits. A stay of proceedings is sometimes necessary, but it is nonetheless an unsatisfactory result which denies both the accused and the community their legitimate expectation of a true verdict based on the merits.

[44] The integrity of the judicial process will generally be put at risk where the conduct of the state involves a deliberate attempt to compromise an accused's ability to make full answer and defence, otherwise undermines the fairness of the trial process or deliberately frustrates the court's ability to reach a proper verdict: *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at 310-312 (S.C.C.).

[30] It must be also remembered that in assessing trial fairness in the context of s. 24(1) of the Charter, the accused's interests must be balanced with society's interests: *R. v. Bjelland*, 2009 SCC 38.

[31] This Court provided a useful summary of the above principles in *Neidig*:

[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* at para. 43.

- [32] The judge did not consider the deprivation of Mr. Garnot's rights to have risen to the degree necessary to warrant a stay. This was in part because the judge's evaluation of the prejudice said to have resulted from the lost evidence had regard to the reality that that evidence was largely speculative. In other cases where identity was in issue and exhibits were lost before they could be forensically tested, courts have held the speculative or equivocal nature of the lost evidence to be a relevant and appropriate consideration: see *R. v. Knox* (2006), 209 C.C.C. (3d) 76 (Ont. C.A.). The judge's approach was consistent with those cases, as he found:
- [104] there is a reasonable possibility that the analysis of the contents of the kit, including the panties, would have assisted the defence. However, also as in *Bero* and *Nicholas*, it is also possible that analysis of the contents of the kit would only have confirmed the identity of Mr. Garnot, to even a greater degree of certainty than the more remotely circumstantial deposit of semen on an unspecified area of the crotch of Ms. M.'s jeans that is currently the basis of the case against him.
- [105] Viewed in that light, the destruction of the kit may have impaired the Crown's case more than Mr. Garnot's defence, and the breach would be, in some respect, self-punishing. Or, as indicated in *Bero*, there is also the possibility that the results could have been of no assistance to the Crown or the defence.
- [33] Furthermore, in my view, the approach adopted by the judge to address the prejudice created by the lost evidence was appropriate and in accord with the authorities. This answers Mr. Garnot's claim that the judge did not adopt an appropriate remedy. As the Court in *Bero* observed, the prejudice to the accused can be addressed by other means:
- [57] The absence of evidence can, in some cases, be an important consideration in determining whether the Crown has proved its case beyond a reasonable doubt. As Cory J. said, in *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 14 (S.C.C.), a reasonable doubt may be "derived from the evidence or absence of evidence." The absence of evidence may be particularly important to the defence where, as here, no defence evidence is called. Prior to the Charter, many an acquittal could be attributed [to] the police failure to preserve evidence or otherwise to conduct a proper investigation.

- [58] The Charter has not diminished defence counsel's forensic arsenal. The defence is still entitled to demonstrate inadequacies or failures in an investigation and to link those failures to the Crown's obligation to prove its case beyond a reasonable doubt. In this case, the trial judge prohibited that line of defence.
- [34] Contrary to Mr. Garnot's submission, in my opinion, the judge properly considered the lost evidence in the third step of the analysis contemplated by *R. v. W.(D.)*, [1991] 1 S.C.R. 742, in finding that the Crown had met its burden of proof.
- [35] Finally, I am not persuaded that the verdict was unreasonable. Mr. Garnot challenges the judge's factual findings, including Dr. Byrne's evidence that he found no semen on Ms. M's body, and his acceptance of Ms. M's evidence.
- [36] In my opinion, Mr. Garnot's arguments amount to no more than an attempt to re-try the case. The submissions generally rest on speculation. They do not establish that the judge's findings were "clearly wrong, unsupported by the evidence or otherwise unreasonable", the requisite standard for appellate interference: *R. v. Clark*, 2005 SCC 2; *R. v. Binairis*, 2000 SCC 15.
- [37] Everything that could be said on behalf of Mr. Garnot has been said by Mr. Russell.
- [38] In the result, I would dismiss the appeal.
- [39] NEWBURY J.A.: I agree.
- [40] FISHER J.A.: I agree.
- [41] NEWBURY J.A.: The time for appealing was extended and the appeal is dismissed.
- "The Honourable Madam Justice Kirkpatrick"

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