CANADA / JUDGMENT

R. v. Ha

2013 BCSC 2472

COURT
Supreme Court of British Columbia

DECIDED
21 November 2013

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2013 BCSC 2472 R. v. Ha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ha,

2013 BCSC 2472

Date: 20131121

Docket: X076607-2

Registry: New Westminster

Regina

v.

Thanh Chung Ha

Before: The Honourable Mr. Justice Bernard

Oral Reasons for Judgment

Counsel for the Crown:

C. McPherson

T. Quirk

Counsel for the Accused:

D. Redekopp

Place and Dates of Hearing:

New Westminster, B.C.

November 18-21, 2013

Place and Date of Judgment:

New Westminster, B.C.

November 21, 2013

THE COURT:

A. NATURE OF APPLICATION

[1] Mr. Ha seeks a directed verdict of acquittal on the basis of the frailties in the evidence identifying him as the perpetrator of the offences before the Court.

B. OVERVIEW

[2] Mr. Ha is charged with three counts of assault and one count of threatening death. The four charges arise out of an incident at the home of the three complainants. It is alleged that Mr. Ha was present for a birthday party at the complainant's home because he was the boyfriend of an invited guest named Tham. The complainants had not met Tham's boyfriend prior to the night in question.

[3] At the house party it is alleged that Tham's boyfriend created a scene and that during the course of the complainants' efforts to remove him from the house and property he assaulted and threatened them.

[4] At the close of the Crown's case, Mr. Ha sought a directed verdict. The essence of his position on this motion is that the evidence of identification arising solely from "dock" identifications by the three complainants is insufficient to support a guilty verdict from a properly instructed jury acting reasonably.

[5] It is common ground that the only evidence of identification of Mr. Ha as Tham's boyfriend and the alleged assailant are the dock identifications made by the complainants. The complainants were not shown photo-packs in the course of the police investigation and there is no evidence linking Mr. Ha to the complainants' friend Tham in any circumstance other than the birthday party.

C. EVIDENTIARY SUMMARY

[6] The complainant Choi Tran is the woman whose birthday was being celebrated on the night in question. She is the mother of the other two complainants.

[7] In brief, Choi Tran testified: that Tham and her boyfriend arrived at her party around 11:00 p.m. after most, if not all, the other guests had left; that the boyfriend went by the single name Jung (phonetic spelling); that Jung offered Ms. Tran a drink which she declined; that he sat at a table in a lighted room with Choi Tran, her daughter Vicki, and Tham, for perhaps an hour or more; that near the end of the visit when Ms. Tran declined the drink offered by

Tham's boyfriend, he stood up and flipped the table over, causing the food and drink on the table to crash to the floor; that shortly thereafter he struck and threatened Ms. Tran and her two daughters as they attempted to remove him from the property; and that after Tham and her boyfriend departed the police were called and attended to the house.

[8] In her trial testimony, Ms. Tran described Tham's boyfriend as a skinny, tall, bony-faced Vietnamese man in his forties. She pointed to Mr. Ha seated in the prisoner's box as Tham's boyfriend and the man who assaulted and threatened her.

[9] In cross-examination, Ms. Tran agreed that when she identified Mr. Ha at the preliminary inquiry he was seated next to defence counsel and was the only Vietnamese man in the courtroom.

[10] Vicki Huynh is Choi Tran's 22-year-old daughter. She testified: that Tham and Tham's boyfriend arrived at the birthday party at approximately 11:00 p.m.; that Tham introduced her boyfriend to her mother; that he was introduced by the name Jung (phonetic); that she, her mother, Tham and Tham's boyfriend sat around the table for one to 1.5 hours together; that she did not speak to Tham's boyfriend in this period; that the visit ended when Tham's boyfriend slammed a cup down on the tabletop twice and then cleared the table with a sweep of his arm; that at this point, she, her mother, and her sister, Cindy Nguyen, attempted to get him to leave the property; and that during the course of this attempt each of them was struck by him.

[11] In her trial testimony, Vicki Huynh described Tham's boyfriend as a Vietnamese man in his mid-thirties who was taller than her and had black hair. She then identified Mr. Ha seated in the prisoner's box as Tham's boyfriend.

[12] In cross-examination she agreed that when she identified Mr. Ha at the preliminary inquiry he was seated beside his counsel and was the only Vietnamese man in the courtroom.

[13] Cindy Nguyen is Choi Tran's 28-year-old daughter. Due to an inability to testify at trial, her testimony from the preliminary inquiry was entered as her trial evidence.

[14] Cindy Nguyen said that she was at home in her bedroom while Tham and Tham's boyfriend were at the table with her mother and sister. Upon hearing two loud bangs she said she left her bedroom and observed Tham's boyfriend push everything off the table and then slap Tham on the face.

[15] Cindy Nguyen said she then became involved in the efforts to remove Tham's boyfriend from the property, in the course of which she said she was struck by him.

[16] At the preliminary inquiry Cindy Nguyen identified Mr. Ha as Tham's boyfriend. No physical description preceded the identification.

D. DISCUSSION

[17] The test on a motion for a directed verdict is well established. The question always relates to the ability of the evidence to support a verdict of guilt; in other words, whether there is sufficient evidence to permit a properly instructed jury to reasonably convict.

[18] The inquiry is not simply whether there is any evidence at all in relation to an essential element or averment; rather, it is whether whatever evidence there may be is such that it could reasonably satisfy a jury that the fact sought to be proved by the evidence has been established: R. v. Charemski, [1998] 1 S.C.R. 679.

[19] At para. 20 of Charemski, McLachlin J. (as she then was) in dissent made the following apposite remarks:

[20] A properly instructed jury acting reasonably is a jury that will convict only if it finds that the evidence establishes guilt beyond a reasonable doubt. To determine whether this could occur, the judge on the motion for a directed verdict must ask whether some or all of the admissible evidence is legally sufficient to permit the jury to find guilt beyond a reasonable doubt. In doing so, the trial judge is determining the sufficiency of the evidence. The question is whether the evidence is capable of supporting a verdict of guilt beyond a reasonable doubt. If it is not, the judge must direct an acquittal, since it would be impossible for a reasonable jury to convict legally on the evidence. The case against the accused has not been made out and there is no charge to answer. To permit the trial to continue would be to impinge on the accused's right to silence and right to be presumed innocent until proved guilty, and to risk a verdict that would necessarily be unreasonable.

[20] Applying the foregoing legal principles to the instant application, the simple question is whether the complainants' identification evidence is legally insufficient to support a reasonable guilty verdict. If it is, then the motion must succeed. A failure to grant the motion is unacceptable because it presents the untenable option of an unreasonable verdict on the evidence and, thus, an injustice.

[21] It is well established in our jurisprudence that an in-court or "dock" identification of an accused in circumstances where the perpetrator was a stranger to the witness is of virtually no probative value on the issue of identification; thus where it is the only evidence of identification it follows that such will not be legally sufficient to support a reasonable verdict of guilt.

[22] In R. v. Mooney, [1999] O.J. No. 2793 (C.A.) in a succinct judgment the court set aside a guilty verdict which was based solely on the complainant's dock identification in circumstances where the perpetrator was a stranger to the complainant. The court concluded as follows:

[5] In the result, there being no confirmatory evidence whatsoever to support the dock identification, it cannot serve as the foundation for the convictions.

[23] In R. v. Hibbert, [2002] 2 S.C.R. 445, Arbour J. delivering the majority judgment questioned, at para. 49, why in-court identification should be permitted to occur at all given its almost total absence of value as reliable positive identification. Arbour J. commented about the dangers associated with eyewitness in-court identification, noting at para. 50 that it was "deceptively credible" and expressing the view that a jury direction that the evidence should be accorded little weight does not go far enough to displace the danger that the jury would nonetheless give it undeserved weight.

[24] In the instant case, the evidence establishes that the perpetrator was a stranger to the complainants prior to the night in question. In the one to one-and-a-half hour period preceding the alleged assaults and threats, the evidence establishes that the complainants were in the company of this man, yet there is a dearth of evidence of any meaningful interaction or observation of him.

[25] In these circumstances, the evidence is not capable of supporting an inference that Tham's boyfriend remained anything other than a virtual stranger to them. While I suspect that this is not so, suspicions cannot support reasonable inferences. A line of questioning that might have established otherwise was not pursued. It may be that there was nothing more that the complainants could say; however, this evidentiary lacuna is critical in circumstances where the only identification evidence is dock identification.

[26] The unsatisfactory evidence in relation to the complainants' familiarity with Tham's boyfriend, notwithstanding the time spent in his company, is echoed in their generic descriptions of him. Not one of the complainants described this man in detail sufficient to lend some weight to their in-court identifications. The complainants' general descriptions were consistent with the physical characteristics of innumerable Vietnamese men between the ages of 30 and 50.

[27] It is noteworthy that none of the complainants claimed to have seen their alleged assailant at any time between the evening in question and the preliminary inquiry, or at any time between the preliminary inquiry and trial. For each complainant, the first identification was at the preliminary inquiry where Mr. Ha was quite obviously the accused and the only Vietnamese man in the courtroom. The second identification was in virtually the same circumstances, at the trial. These in-court identifications were without elaboration or explanation.

[28] It is also noteworthy that it was clear from the trial's outset that identification was an issue, yet witness examinations were conducted in a manner more consistent with the opposite understanding.

[29] Where it is known that the sole evidence of identification will be the dock identification of a virtual stranger to the perpetrator, it is expected that the Crown will attempt to elicit a body of evidence to show that the witness has an independent recollection of the perpetrator's appearance. This may be demonstrated through, for example, detailed evidence of the witness's opportunities to observe the perpetrator, a description of any unusual

characteristics that would permit the witness to distinguish the alleged perpetrator from other similar looking persons, and a comprehensive description of the alleged perpetrator as he or she appeared at the time of the alleged offence. All the foregoing will precede the dock identification if it is to be given any weight at all.

[30] In the absence of the aforementioned approach, there will be an over-arching concern that the witness has merely identified the man in the prisoner's box because he or she is quite obviously the accused and fits within the general description of the perpetrator.

D. CONCLUSIONS

[31] The totality of the evidence of identification consists of three unsatisfactory in-court identifications made by persons who fall into the category of strangers to the alleged perpetrator.

[32] I am satisfied that nothing turns on the fact that there are three such identifications; indeed, the Crown concedes that it would be inadvisable to "bootstrap" one such identification with another if they should be found to be of the same faulty character.

[33] In light of all the foregoing, I am satisfied that virtually no weight can be given to these in-court identifications. Given that: (a) these in-court identifications are the only evidence of identification; and, (b) it is well established in our law that such dock identifications have, in the words of Arbour J. in Hibbert, almost a total absence of probative value as reliable positive identification, I must conclude that the evidence is not legally sufficient to permit a jury to return a reasonable verdict of guilt; accordingly, I am satisfied the test for a directed verdict has been met.

[34] I am not persuaded that the evidentiary shortcoming which exists in the instant case should be addressed through judicial cautions about the frailties of eye-witness identification, given in final jury instructions. In my view, in matters of identification the Court should be reluctant to favour the option of leaving the decision to the jury for the reasons noted by Arbour J. in Hibbert.

[35] In any event, if this issue were deferred to the stage of final instructions, I am satisfied that the required cautions would have to be so strongly worded that they would be tantamount to a directed verdict on the issue of identification, so as not to risk the injustice of a verdict not reasonably supported by the evidence.

E. DISPOSITION

[36] The application for a directed verdict is granted.

"Bernard J."

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