
CANADA / JUDGMENT

R. v. Heltman

2018 BCSC 2385

COURT

Supreme Court of British Columbia

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2018 BCSC 2385 R. v. Heltman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Heltman,

2018 BCSC 2385

Date: 20181211

Docket: 43980-1

Registry: Prince George

Regina

v.

Dustin Daniel Heltman

Before: The Honourable Madam Justice Church

On appeal from a judgment of the British Columbia Provincial Court (R. v. Heltman, 2017 BCPC 136, Information 43980-1) dated May 10, 2017

Oral Reasons for Judgment

Counsel for the Crown:

P.L. Schmit, Q.C.

Counsel for the Accused:

D. Borgia, Agent for J. LeBlond

Place and Date of Hearing:

Prince George, B.C.

November 6, 2018

Place and Date of Judgment:

Prince George, B.C.

December 11, 2018

- [1] THE COURT: This is an appeal from a judgment of the B.C. Provincial Court. In that judgment, dated May 10, 2017, the Honourable Judge T.S. Woods convicted Dustin Heltman of Counts 1, 2, 4, 5 and 6 on Information 43980-1 and thereby found him guilty of dangerous driving, failing to stop in order to evade a peace officer, failing to stop at the scene of an accident, driving while prohibited, and driving without due care and attention.
- [2] The offences arise out of events that occurred in Prince George on November 14, 2015, when a blue Dodge Caravan minivan (the "Caravan") was driven erratically and at a high rate of speed in the area of Highway 97 near the College of New Caledonia and the surrounding area.
- [3] The Caravan struck the rear of a utility trailer being towed by a small pickup truck and failed to stop. The driver of the pickup observed the driver of the Caravan to be a white male wearing a dark-coloured hoodie or sweatshirt. He reported the collision to the RCMP and followed the Caravan for a distance while on the phone with 9-1-1 dispatch.
- [4] The RCMP then gave chase with emergency equipment activated, but the Caravan failed to stop. An officer broke off high pursuit for safety reasons but continued to follow the Caravan without his emergency equipment activated. He observed the Caravan continue driving at a high rate of speed and drive on the sidewalk to avoid vehicles at a light-controlled intersection.
- [5] The officer saw the Caravan turn onto a side street and he decided to turn down another side street in an attempt to intercept the Caravan. The police vehicle emerged onto Quince Street, where the officer observed a male running towards him on Quince Street. Looking beyond the male, the officer observed what he believed to be the Caravan with no occupants, rolling down Quince Street with the driver-side door open.
- [6] The officer concluded that the approaching male was likely the driver of the Caravan and he attempted to block the male's path with his police vehicle. In the course of that manoeuvre, the officer observed the male at close range before the male slipped between a fence and the police vehicle and ran down an alley and out of sight.
- [7] As the trial judge noted in his reasons for judgment, there was no dispute that between 2:30 p.m. and 3:30 p.m. on November 14, 2015, a lone male suspect driving the Caravan "engaged in a spree of vehicular offending".

- [8] The key issue at trial was one of identification and whether Mr. Heltman was that lone male suspect.
- [9] The Crown evidence of identification came from Constable Moericke, who observed the suspect driving the vehicle at a high rate of speed and then subsequently saw the suspect vehicle abandoned on Quince Street and an individual he believed to be the suspect driver running down the middle of Quince Street.
- [10] Constable Moericke tried to block the suspect driver by activating his emergency equipment on his police vehicle and positioning it against a fence. During this time, he was able to observe the suspect at close range and for a reasonable length of time. Based on his observations, Constable Moericke believed that the male running down Quince Street was the same male he saw driving the Caravan. Constable Moericke observed that the male suspect running down Quince Street was wearing a black hoodie emblazoned with the same white crest he had observed on the driver of the Caravan. Constable Moericke subsequently identified that male as Dustin Heltman after police investigative inquiries led to a photo of Mr. Heltman taken in the course of earlier police proceedings.
- [11] After the Crown closed its case, Mr. Heltman elected to testify on his own behalf.
- [12] Early in his direct examination on August 3, 2016, the Crown expressed concern that she anticipated that Mr. Heltman's evidence would be about the events of November 14, 2015, and she was concerned that he might give alibi evidence, of which the Crown had received no notice. Defence counsel responded that the evidence that Mr. Heltman would be giving pertaining to his general whereabouts did not meet the criteria for alibi evidence because it lacked specific details and therefore notice was not required.
- [13] The trial judge told defence counsel to proceed cautiously, mindful of the fact that Crown counsel might object if she felt the evidence offended the rule requiring alibi notice.
- [14] Mr. Heltman then gave the following evidence in his direct examination:

Lines 41 and 42:

Q And on November 14, 2015, do you recall generally what you may have been doing?

A The entire time I was up here, I was spending time with friends and family. The whole reason I came up here, we did numerous activities. We went to the lake, out to the lake, we went to the movies. We did all sorts of activities while we were up here.

Q At any time while you were here during your stay did you ever drive a vehicle?

A No.

- [15] Mr. Heltman gave no further details of his movements on November 14, 2015, during his direct examination.

[16] In cross-examination, Crown counsel pressed Mr. Heltman for details about this evidence and Mr. Heltman's whereabouts on November 14, 2015.

[17] Mr. Heltman testified that he spent the night of November 13, 2015 at the home of his brother, Robert Heltman, and in the company of his brother and his brother's girlfriend, Leah Brisson. He could not recall what time he got up on November 14, 2015, but he said that he usually woke around 10:00 a.m. Mr. Heltman said that he assumed that he, his brother and Ms. Brisson went out for breakfast, as that was their usual practice. He believed that they probably went out for breakfast around noon and that his brother drove them all in his BMW 323i.

[18] He then gave the following evidence:

Q And were you in the company of Robert Gordon Heltman and Leah Brisson the entire time?

A Yes.

Q On November 14, 2015?

A Yes.

Q So you were altogether?

A Yes.

[19] Mr. Helman went on to testify that he could not recall how long it took for them to eat their meal, but it was maybe an hour. He then gave the following evidence:

Q Did you and Robert Gordon Heltman and Leah Brisson leave the restaurant at the same time altogether?

A Yes. We all took the same vehicle.

Q And who was driving?

A Leah.

Q Where did you go?

A We went out and we went back to the house. We visited Heather. I don't remember what else we did that day. Like I said, we did multiple events, going to casinos, going to the movies, going and visiting some of their friends.

Q You went back to the house you say? That's --

A I'm not saying that we did go back there. I'm saying that those are some of the events that we did while I was up there.

Q Do you remember where you went after having your meal?

A No.

Q At approximately noon on November 14, 2015?

A I can't say for sure where we went after that, no.

[20] Mr. Heltman also gave the following testimony in cross-examination:

Q But you left the restaurant after approximately an hour.

A Yes, roughly.

Q So what is the next memory that you have of your activities on November 14, 2015?

A I -- the next thing I remember was in the evening. We went to Heather's. That night we went to the casino.

Q Well, I'm asking you what is the next memory that you have, Mr. Heltman.

A I just told you. The next memory I have that I can recall was when we went to Heather's and then Heather drove us to the casino because we planned on having some drinks and we weren't going to drink and drive.

Q What vehicle did Heather drive?

A She drove her car.

Q What kind of car is that?

A It is a Dodge Avenger.

[21] Mr. Heltman testified that Heather's vehicle was silver in colour, and then went on to say, at lines 37 to 43:

Q What time did Leah drive you to Heather -- you and Robert Heltman to Heather's residence?

A In the evening.

Q Do you know what time?

A No.

Q Was it dark out?

A Yeah, I think so.

[22] At the conclusion of the defence evidence, the Crown once again raised the issue of alibi evidence and the failure to give notice of the alibi evidence. She applied for an adjournment of the trial to enable the Crown to investigate the alibi evidence and potentially to reopen the Crown case to call rebuttal evidence. In the alternative, she asked the court to draw an adverse inference in relation to Mr. Heltman's alibi evidence due to the failure to provide notice to the Crown.

- [23] Crown counsel reiterated her position that the evidence offered by Mr. Heltman was that he was in the company of his brother and Leah Brisson all day on November 14, 2015 and, despite his inability to say where he was between 2:30 p.m. and 3:30 p.m., the tenor of his evidence was that he could not have been the lone male suspect driving the Caravan because he was with his brother and his brother's girlfriend doing some other activities around Prince George that he could not precisely recall.
- [24] Defence counsel opposed the Crown application and argued that the evidence of Mr. Heltman in his direct examination did not constitute alibi evidence because his evidence in direct examination spoke in generalities rather than a specific averment that he was elsewhere and that his evidence did not make it impossible for the offence to have occurred.
- [25] In his mid-trial ruling, the trial judge considered the definition of alibi set out in *R. v. Tomlinson*, 2014 O.J. No. 930, a decision of the Ontario Court of Appeal, and referred to para. 49 of that decision, noting that in the context of the criminal prosecution, an alibi is a claim that a person -- usually a person charged with a crime -- was elsewhere when the allegedly criminal conduct took place, and thus it was impossible for him to have committed it.
- [26] The trial judge concluded that Mr. Heltman's evidence during the course of his direct examination, and then in cross-examination, was clearly alibi evidence. He said in para. 9 of his mid-trial ruling that:

Alibi evidence, and the court's approach to alibi evidence, reflects the basic and uncontestable human truth that a person cannot be in two places at once. If Mr. Heltman was elsewhere, carrying on activities with his brother and his brother's common-law partner, and not at the places where the offending occurred on November 14th, then he could not be guilty of those offences, and it matters not at all that Mr. Heltman is incapable of refining his evidence to say precisely where he was. It is enough that he contends that he was "elsewhere", in his testimony to qualify that testimony as alibi evidence.

- [27] The trial judge went on to note that because of defence counsel's erroneous belief that Mr. Heltman's evidence was not alibi evidence, no notice had been given to Crown counsel of such evidence. He considered whether to grant the adjournment sought by the Crown or whether to simply hear submissions about adverse inferences and he decided that "getting to the truth about the alibi evidence" that Mr. Heltman had introduced was a more worthy objective and that objective was more fully facilitated by giving the Crown the ability to carry out the investigation that it would inevitably have carried out had notice been provided to it.
- [28] The trial was then adjourned to February 10, 2017, at which time the Crown was permitted to call Ms. Heather Hall as a rebuttal witness.

[29] Ms. Hall's evidence was that after supper time on November 14, 2015, probably between 6:00 p.m. and 7:00 p.m., Mr. Heltman, Robert Heltman and Leah Brisson arrived at her residence and she drove them to the casino. She dropped them off and went back to pick them up at approximately 9:00 or 10:00 p.m. She testified that she drove them in her vehicle, which was a burgundy Impala that she owned at the time and she bought a silver Dodge Avenger in July 2016.

[30] Ms. Hall also testified that she thought that Mr. Heltman's vehicle was a van and she had heard about it but never seen it.

[31] In his trial decision of May 10, 2017, the trial judge found Mr. Heltman's alibi evidence provoked "suspicion and scepticism in the court's mind", in part because it was replete with details about certain events during the day but:

... for the period from 1:00 p.m. until the evening, i.e. a part of the day that includes the time during which the evidence shows the subject offences were committed, his memory failed him utterly.

[32] The trial judge said that Mr. Heltman's alibi evidence was neither adequately particularized nor was it the subject of timely disclosure and that his memory was "conveniently free of any recollection whatsoever of his whereabouts and activities at the material time on November 14th".

[33] At para. 46, the trial judge said:

On grounds both of lack of particularity and lack of timeliness, I turn a sceptical eye on Mr. Heltman's alibi evidence. Indeed, upon the authority of cases like Tomlinson, I consider that in this case I am justified in drawing an inference adverse to Mr. Heltman's credibility in relation to his alibi defence.

[34] With respect to the rebuttal evidence called by the Crown, the trial judge said at paras. 48 and 49 that:

[48] The credibility of Mr. Heltman's evidence was further eroded by the inconsistencies noted between his account of certain facts, and the account given by Ms. Hall when she was called to give rebuttal testimony. For example, Ms. Hall testified that the vehicle she owned and operated when she drove Mr. Heltman, Robert and Leah to the casino during the evening of November 14, 2015, was a burgundy Impala whereas Mr. Heltman testified that it was a silver Dodge Avenger. Ms. Hall testified that she did ultimately, purchase a silver Dodge Avenger, but not until months later, in June or July of 2016: see Transcript, February 10, 2017, pp. 4-5.

[49] Ms. Hall also testified that she believed that Mr. Heltman had a vehicle and that it was a van: Transcript, February 10, 2017, p. 10. This calls into doubt Mr. Heltman's claim that at no time did he drive any vehicle when he was in Prince George and, a fortiori, his claim that "I have never driven a van in my life": see, Transcript, August 3, 2016, p. 19.

[35] He concluded at paras. 50-52 that:

[50] Altogether, an alibi defence (like any other defence) must have an "air of reality": see Tomlinson at para. 51 and R. v. Cinous, 2002 SCC 29. Mr. Heltman's alibi defence lacks an air of reality, in part because it is conveniently free of detail that would assist in its independent verification. When Mr. Heltman contended that he recalls unimportant details about his activities at certain times on the offence date, but nothing at all for several hours during which the offences with which he is charged were allegedly committed, he seriously undermined his own credibility. Beyond that, Mr. Heltman's alibi defence was, as I have noted, raised at the eleventh hour without proper advance notice to the Crown. These factors justify the drawing of an inference adverse to the credibility of his alibi defence.

[51] I have done so.

[52] I am mindful of the fact that Mr. Heltman is under no obligation to prove his alibi defence. His challenge in that regard is to use the defence to raise a doubt. I have no hesitation in stating that Mr. Heltman's alibi-related testimony was sufficiently wanting in credibility that it does not suffice even to raise a doubt. Altogether, and for the reasons I have outlined above, I reject that evidence and, thus, must now turn to consider the Crown's evidence of identification.

[36] The trial judge went on to consider the Crown's evidence of identification and concluded that it was compelling and, taken as a whole, was sufficient to establish beyond a reasonable doubt that Mr. Heltman was the suspect who committed the offences.

Alleged Errors by the Trial Judge

[37] In a notice of appeal filed November 23, 2017, Mr. Heltman appealed both his conviction and sentence and cited 11 grounds for appeal. At the appeal hearing, Mr. Heltman abandoned his sentence appeal and relied on only the following two grounds for appeal of his conviction:

- (a) the honourable trial judge erred in allowing the Crown to reopen its case and in so doing breached the principle that the defendant has the opportunity to respond to the case to meet and the principle of the right to silence; and
- (g) the honourable trial judge erred in law in determining that the evidence of Mr. Heltman constituted alibi evidence.

[38] The standard of review in an appeal of the summary conviction was described by Mr. Justice Romilly in Her Majesty the Queen v. Pomeroy, 2007 BCSC 142, starting at para. 25:

[25] The right to appeal from a summary conviction matter is governed by Part XXVII of the Criminal Code. Section 822(1) of the Criminal Code provides that in a summary conviction appeal pursuant to s. 813, ss. 683 to 689 relating to appeals of indictable offences, except s. 683(3) and s. 686(5), apply. Section 686(1) states:

686(1) On the hearing of an appeal against conviction ... the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or,
 - (iii) on any ground there was a miscarriage of justice;

[26] The function of the summary conviction judge is to determine whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt: *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.).

[27] In *R. v. Hay* (1990), 25 M.V.R. (2d) 121 (B.C.C.A.), Toy J.A., stated at 127, quoting Estey J. in *R. v. Harper*, [1982] 1 S.C.R. 2 at 14:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues

And Toy J.A. stated at 128:

The duty of the summary conviction appeal court judge is to examine not only the trial judge's reasons but also all of the evidence to determine whether the trial judge's findings and ultimate conclusion are unreasonable or can those reasons be supported on the facts as found by the trial judge?

[28] In *R. v. Sall* (1990), 81 Nfld. & P.E.I.R. 10 (Nfld. C.A.) Goodridge C.J.N. drew a distinction between the functions of an appeal court judge with respect to primary facts and inferential facts. He stated at 54:

It was not open to the appeal judge to make a reassessment of the evidence and substitute his own findings of primary facts (as distinguished from inferential facts) for those of the trial judge. Once it appeared that there was evidence to support the expressed conclusion of the trial judge, the appeal judge was powerless to interfere.

[29] In *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189 (N.S.C.A.) Cromwell J.A. noted at [paragraph] 6:

Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.

As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is,

the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal, it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[39] Mr. Justice Romilly in *Pomeroy* went on to say at paras. 39 and 40 that:

[39] A judge is presumed to know and properly apply the law, and to have taken into account all aspects of all relevant evidence. Hence, as a general proposition, succinct analysis or silence on a particular issue is not an error in law. Where a comment is open to more than one interpretation, the interpretation consistent with the judge's presumed knowledge of the law prevails. That presumption can only be displaced if an error in law is manifest in the judge's comments.

[40] In *Housen v. Nikolaisen*, 2002 SCC 33, the comments of Iacobucci and Major JJ. are apposite to some of the issues raised on this appeal:

[T]rial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

...

[A]lthough the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged.

[40] I now turn to consider the errors that the appellant alleges were made by the trial judge in this case.

[41] Counsel for Mr. Heltman submits that the evidence of Mr. Heltman at trial did not constitute an alibi, but rather was a simple denial of the offence. He submitted that Mr. Heltman's evidence in direct examination lacked specificity and he was unable to say where he was at the time the alleged offences occurred. Counsel further submitted that defence counsel at trial made it clear that he was not seeking to establish alibi evidence.

[42] Counsel pointed to the transcript and the cautionary comments made by the trial judge which appear to have dissuaded defence counsel from exploring Mr. Heltman's evidence of his whereabouts at the time of the alleged offences in any detail.

- [43] Counsel distinguished that dissuasion with the cross-examination of Mr. Heltman by the Crown and the additional details provided by Mr. Heltman about his movements on November 14, 2015. He submitted that virtually all of the details were provided in the course of the cross-examination and thus the trial judge should not have concluded that this constituted alibi evidence, as it was not elicited by defence counsel in direct examination.
- [44] The Crown submitted that it does not matter that the details of what was found to be alibi evidence were not elicited by defence counsel during direct examination. She submitted that it is the duty of the Crown to confront the witness and to put the Crown theory to the accused in cross-examination.
- [45] She submitted that Mr. Heltman's evidence in direct examination, while very general, was essentially that he was doing other things with other people at the time that these offences were being committed, even though he could not necessarily recall the details of what he was doing during the precise time when the offences were taking place. Crown counsel submitted that in cross-examination of Mr. Heltman, she was confronting him about this evidence and putting to him the Crown's theory of events.
- [46] She further submitted that the trial judge was entitled to consider all of Mr. Heltman's testimony, both in direct and cross-examination, in determining whether his evidence constituted alibi evidence.
- [47] The Crown further submitted that the trial judge did not err in concluding that Mr. Heltman's evidence was alibi evidence despite its lack of specificity. She submitted that it was clear that Mr. Heltman was asking the court to conclude that the police witness was mistaken in his identification of Mr. Heltman because Mr. Heltman was elsewhere, in the company of other persons.
- [48] As the court noted in the Ontario Court of Appeal decision in *R. v. M.R.*, [2005] O.J. No. 883, "In order to constitute an alibi, the evidence at issue must be determinative of the final issue of guilt or innocence of the accused." The court noted at paragraph 31, that, "[i]n essence, such evidence contemplates that it was impossible for the accused to have committed the crime charged because, at the time of its commission, the accused was elsewhere."
- [49] In my view, the evidence in this case is reasonably capable of supporting the trial judge's conclusion that Mr. Heltman was advancing an alibi.
- [50] Contrary to the submission of the appellant's counsel, Mr. Heltman's evidence went beyond a simple denial of having committed the offences. Although he was unable to recall precisely where he was at the time the offences occurred, his evidence was clear that he was in the company of his brother and his brother's common-law spouse during the entire day of November 14, 2015, and he thus invited the trial judge to conclude that he could not have been the lone male suspect committing the vehicular offences and running down Quince Street between 2:30 and 3:30 p.m.

- [51] Mr. Heltman's evidence was that he was elsewhere with other persons when these offences occurred, even though he could not precisely say what he was doing. His explanation would be determinative of the final issue, namely his guilt or innocence.
- [52] I agree with the Crown's submission that it matters not that the evidence of Mr. Heltman about being in the company of his brother and his brother's common-law spouse for the entire day on November 14th arose in cross-examination rather than direct examination. Mr. Heltman said, in response to a direct question in direct examination about what he was doing on November 14, 2015, that the entire time he was up here he was spending time with friends and family, doing all sorts of activities. In cross-examination, the Crown asked him specific questions about that evidence and for more specific details, some of which he provided.
- [53] The appellant's counsel was not able to direct me to any case authorities in support of his submission that alibi-like evidence given by a witness under cross-examination rather than direct examination should be treated differently in the analysis of whether it constitutes alibi evidence. All of Mr. Heltman's testimony, both in direct examination and cross-examination, was evidence given by him about his activities on November 14th and it was reasonable for the trial judge to conclude, based on all of that testimony, that it was alibi evidence.
- [54] The trial judge made no error in concluding that the evidence of Mr. Heltman was alibi evidence.
- [55] The second ground of appeal is that the trial judge erred in allowing the Crown to reopen its case and call rebuttal evidence. Although this ground of appeal set out in the notice of appeal referred to an error by the trial judge in allowing the Crown to reopen its case and thus breach the principle that the defendant had the opportunity to respond to the case to meet, at the appeal hearing. The appellant framed this ground of appeal as an error in allowing the Crown adjournment application and expanded to include the submission that the evidence called by the Crown in rebuttal was not truly rebuttal evidence and that it strayed into collateral issues and was therefore inadmissible.
- [56] Counsel for Mr. Heltman submitted that the trial judge erred in allowing the Crown application for an adjournment of the trial to enable it to investigate the alibi evidence of the accused. This submission was based, at least in part, on the submission that the evidence of Mr. Heltman was not in fact alibi evidence because of its lack of detail and specificity. As I have already noted above, on the basis of the evidence before him, it was reasonable for the trial judge to conclude that the evidence of Mr. Heltman was an alibi.

- [57] It is not disputed that the Crown did not receive any notice of Mr. Heltman's alibi evidence. It is also not disputed that, where an alibi arises in the course of the trial and there has been no notice of that evidence to the Crown, the trial judge may draw an adverse inference from the lack of notice to the Crown and the inability of the Crown to investigate the alibi evidence or may adjourn the trial to allow the Crown to investigate the alibi evidence and call rebuttal evidence to disprove the alibi.
- [58] In this case, the Crown applied for an adjournment of the trial at the conclusion of the defence evidence on August 3, 2016. The trial judge concluded that the failure to give alibi notice caused the Crown to be deprived of the ability to consider the alibi evidence and to carry out such investigations as it considered appropriate.
- [59] The trial judge concluded that an adjournment was a "regrettable necessity" and that the court's overarching concern was to come to "the right conclusions about Mr. Heltman's innocence or guilt". He further concluded that "getting to the truth about the alibi evidence" was a worthy objective and more fully facilitated by giving the Crown the ability to carry out the investigation that it would have done had notice been given.
- [60] It is in the discretion of a trial judge to grant an adjournment of the trial. In *Anderson v. Anderson*, an unreported decision of the Court of Appeal, Vancouver CA 012399, Wood J.A. said:

Of all the interlocutory matters that come before this court seeking leave to appeal, there is none more discretionary than that where one party seeks and is either granted or refused an adjournment of some proceeding at the trial level. Whether to grant or to refuse an adjournment of a trial is a question which the trial judge before whom the application originates is best suited to answer. To attempt to interfere with the exercise of a trial judge's discretion in such a matter is an exercise which is to be avoided at all costs unless there is evidence that the trial judge clearly misdirected himself in law or failed to act judicially in the exercise of his discretion.

- [61] There is no evidence before me that the trial judge misdirected himself in the law or that he failed to act judicially in exercising his discretion to grant the adjournment application. He was clearly aware of the options open to him in light of the lack of notice of alibi evidence and that it would be open to the Crown to make submissions about adverse inferences in the event that the adjournment application was dismissed.
- [62] After weighing those options, he decided that getting to the truth about Mr. Heltman's alibi evidence was a more worthy objective and that an adjournment was required in order for that to occur.
- [63] The trial judge did not err in granting an adjournment of the trial.

- [64] With respect to whether the trial judge erred in allowing the Crown to call rebuttal evidence, counsel for Mr. Heltman submitted that the evidence called by the Crown in rebuttal was outside the scope of permissible rebuttal evidence. He submitted that it was not relevant, and therefore not admissible, and in allowing the Crown to adduce such evidence, the trial judge allowed the Crown to split its case.
- [65] He submitted that the evidence of Heather Hall, called by the Crown in rebuttal, did not in any way rebut Mr. Heltman's alibi evidence. Ms. Hall testified about Mr. Heltman's whereabouts and activities several hours after the alleged offences occurred, and gave no evidence that contradicted his evidence that he was elsewhere when the offences occurred.
- [66] Counsel for Mr. Heltman submitted that her evidence was irrelevant and inadmissible and should never have been heard by the trial judge. He further submitted that the trial judge referred to and relied on the inadmissible evidence in his assessment of credibility of Mr. Heltman and this court cannot know how the inadmissible evidence of Ms. Hall affected the perception of the trial judge on the credibility of the accused.
- [67] Counsel for Mr. Heltman submitted that the trial judge erred in relying on that evidence in reaching his conclusion that Mr. Heltman was not credible and rejecting his evidence. He submitted that the trial judge erred in this regard and Mr. Heltman's conviction should be set aside and a new trial ordered.
- [68] The Crown submitted that no notice had been given that the defence intended to call alibi evidence, and it was open to the trial judge to permit the Crown to call rebuttal evidence in this case. She further submitted that the court must analyze whether the Crown established a basis for calling rebuttal evidence and that the trial judge did so in this case.
- [69] The Crown submitted that, with respect to the scope of the rebuttal evidence, the accused had testified at some length about going to Ms. Hall's residence earlier in the day on November 14, 2015, although she acknowledged that it was not at the precise time during which the offences were committed. She submitted that Ms. Hall was directed to the evidence of the accused regarding his activities and testified in this regard.
- [70] It appears that the application before the trial judge on December 16, 2016 was framed by the Crown as an application to reopen its case, when in reality the Crown was seeking to call rebuttal evidence. As the court noted in *R. v. F.S.M.* (1996), 93 O.A.C. 201, at page 208, applications to adduce rebuttal evidence and to reopen the case are "close cousins", but not "identical twins". Rebuttal evidence is properly admissible where the matter addressed arises out of the defence's case, where it is not collateral, and the Crown could not have foreseen its development. Reopening the Crown case after defence has called evidence is only allowed where the evidence arose ex improviso or unexpectedly and no one could have foreseen that evidence.

[71] In his ruling on December 16, 2016, the trial judge described the application as an application to reopen the Crown case in order to call rebuttal evidence. He referred to the concerns raised by defence counsel, that to permit the Crown to call Ms. Hall might afford the Crown an opportunity to fortify its case, and the submission of the Crown that the only purpose of calling Ms. Hall was to rebut the alibi evidence of Mr. Heltman. The trial judge said at para. 9 of his ruling:

The purpose of reopening would be solely to contradict the testimony of Mr. Heltman with respect to the particulars of his contention that he was elsewhere and could not be the person who committed the offences alleged against him.

[72] The trial judge granted the application and the Crown called Ms. Hall to testify on February 10, 2017.

[73] In my view, the trial judge did not err in allowing the Crown application to call rebuttal evidence in this case. In a case such as this, where the Crown did not receive any notice of the alibi, it was reasonable for the trial judge to allow the Crown to call rebuttal evidence because the matter addressed arose out of the defence evidence and the Crown could not have foreseen that development.

[74] There are, however, strict limits to rebuttal evidence. The rebuttal evidence must be confined to rebutting or contradicting the details asserted in support of the alibi, rather than collateral issues. It must be relevant.

[75] It is clear that the evidence of Ms. Hall did not contradict the details asserted by Mr. Heltman in support of his alibi that he was "elsewhere" when the offences occurred. Ms. Hall had no evidence to offer with respect to the whereabouts of Mr. Heltman at the time of the offences. Her evidence was that she saw Mr. Heltman and his companions on November 14, 2015 sometime after supper, between 6:00 p.m. and 7:00 p.m., which was several hours after the offences had been committed.

[76] Ms. Hall's evidence contradicted some of Mr. Heltman's evidence on collateral issues, such as the type of car she drove on November 14, 2015, and that she thought Mr. Heltman's vehicle was a van, having heard about that vehicle but never having seen it. Her evidence did not in any way rebut Mr. Heltman's alibi.

[77] I have concluded that the trial judge misapprehended the evidence of Ms. Hall in concluding that it was admissible rebuttal evidence. The evidence of Ms. Hall was evidence of collateral issues that were not relevant and therefore it was not admissible.

[78] Having reached that conclusion, I must next determine the significance of that misapprehension of the evidence on the trial judge's verdict. As the court noted in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, at page 202:

The trial judge's misapprehension of a part of the evidence does not, standing alone, render his verdicts unreasonable, constitute an error in law, or result in a miscarriage of justice. The impact of that error on the trial judge's reasoning process and the product of that process must be assessed.

[79] At page 221, Doherty J.A. continued:

When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[80] Generally speaking, with respect to credibility of witnesses, a trial judge's assessment of the credibility of witnesses "will not be disturbed unless it can be demonstrated that he committed a palpable and overriding error": see *R. v. Lavoie*, [2003] J.Q. No. 1474.

[81] In this case, the trial judge, at para. 46 of his reasons for judgment, said that he was justified in drawing an inference adverse to Mr. Heltman's credibility on the grounds of lack of particularity and lack of timeliness with respect to the alibi evidence. At paras. 48 and 49 of the judgment, the trial judge referred to some of the evidence of Ms. Hall as "further eroding the credibility" of the accused, but he then went on to say at paras. 50 and 51 that:

[50] ... When Mr. Heltman contended that he recalls unimportant details about his activities at certain times on the offence date, but nothing at all for several hours during which the offences with which he is charged were allegedly committed, he seriously undermined his own credibility. Beyond that, Mr. Heltman's alibi defence was, as I have noted, raised at the eleventh hour without proper advance notice to the Crown. These factors justify the drawing of an inference adverse to the credibility of his alibi defence.

[51] I have done so.

[82] Although the trial judge misapprehended the evidence of Ms. Hall in concluding that it was admissible rebuttal evidence, in the context of his analysis of the evidence, that misapprehension did not have any impact on his overall assessment of Mr. Heltman's credibility or the conclusions that he reached in that regard.

- [83] I do not agree with the appellant's submission that this court cannot be certain as to what degree the trial judge relied on the evidence of Ms. Hall in reaching the conclusion that Mr. Heltman was not credible. On the contrary, the trial judge was very clear in his reasons that the lack of particulars and lack of timeliness affected the weight to be given to Mr. Heltman's alibi evidence and the trial judge drew an inference adverse to Mr. Heltman's credibility based specifically on the lack of particularity and lack of timeliness.
- [84] The trial judge was entitled to draw such adverse inference in the circumstances even if the Crown did not call any rebuttal evidence and, in so doing, it is clear that the misapprehension of Ms. Hall's evidence had no impact on the trial judge's reasoning process.
- [85] I am not satisfied that Mr. Heltman's conviction depended on the trial judge's misapprehension of the evidence of Ms. Hall, or that such misapprehension rendered the trial unfair or resulted in a miscarriage of justice.
- [86] The appellant has not demonstrated that the trial judge made a palpable and overriding error in his assessment of Mr. Heltman's credibility and the appeal is therefore dismissed.

"The Honourable Madam Justice Church"

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