
CANADA / JUDGMENT

R. v. Hopkins

2017 BCCA 268

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 268 R. v. Hopkins

OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hopkins,

2017 BCCA 268

Date: 20170630

Docket: CA44306

Between:

Regina

Respondent

And

Roy-Gene Hopkins

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon

On appeal from: An order of the Provincial Court of British Columbia, dated November 25, 2016 (conviction) and December 8, 2016 (sentence) (R. v. Hopkins, North Vancouver Docket No. 62883).

Oral Reasons for Judgment

Counsel for the Appellant:

J. Grenier

Counsel for the Respondent:

D.M. Layton, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 23, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 30, 2017

Summary:

The appellant appeals his convictions on two counts of possession of counterfeit money, two counts of using counterfeit money as if it were genuine, and three counts of fraud. He argues that his convictions are unreasonable because no trier of fact properly instructed and acting judicially would reasonably conclude that he knew the currency was counterfeit. Alternatively, he submits that certain of his convictions should be stayed based upon the rule against multiple convictions. HELD: Appeal dismissed save and except the conviction on Count 1 is set aside and count 1 is stayed pursuant to the rule against multiple convictions. The verdict was one that a properly instructed trier of fact, acting judicially, could reasonably have rendered.

INTRODUCTION

- [1] GOEPEL J.A.: The appellant, Roy-Gene Hopkins, was convicted on two counts of possession of counterfeit money, two counts of using counterfeit money as if it were genuine, and three counts of fraud. He argues that his convictions are unreasonable because no trier of fact properly instructed and acting judicially would reasonably conclude that he knew the currency was counterfeit. Alternatively, he submits that his three fraud convictions should be stayed, based upon the rule against multiple convictions, because they arise out of the same acts that ground his convictions for using counterfeit money.

BACKGROUND

- [2] On December 11, 2015, the appellant bought a prepaid MasterCard from a cashier at a Loblaws customer service desk. He paid using two counterfeit US \$50 bills.

- [3] At about 1:20 a.m. on December 12, 2015, Mr. Hopkins rented a room at the Comfort Inn. He attempted initially to pay the room deposit using the prepaid MasterCard but it was declined. He then paid for the room and provided the deposit using \$160 in counterfeit U.S. cash.
- [4] At about 2:30 a.m. on December 12, Mr. Hopkins attended at the next-door Petro-Canada station and, using two counterfeit US \$20 bills, acquired some grocery items and cigarettes. Within five minutes of Mr. Hopkins departure, the clerk at the Petro Canada station checked the bills on a detection machine and determined the bills were counterfeit.
- [5] At approximately 6:00 a.m. on December 12, the desk clerk at the Comfort Inn, thinking the \$160 he had earlier received was counterfeit, went next door to the Petro-Canada station to scan the bills on the detection machine which he knew they possessed and, in doing so, he too learned that the currency Mr. Hopkins had used to pay for his room was counterfeit.
- [6] The R.C.M.P. was called and Mr. Hopkins was arrested at the Comfort Inn at 8:06 a.m. for possession and use of counterfeit currency. On his arrest and following the search incidental thereto, Mr. Hopkins was found to have one counterfeit US \$50 bill and one counterfeit US \$10 bill in his possession. In addition, he had \$65 of non-counterfeit Canadian currency.
- [7] Following his arrest, Mr. Hopkins was taken to the North Vancouver R.C.M.P. detachment and released on an undertaking. Later the same day, he returned to Loblaws to the same service desk where the day before he had passed the two counterfeit US \$50 bills, to complain that the MasterCard he had purchased the day before was not working. He spoke with the manager. By this time Loblaws cash office had determined that the \$50 bills used the previous evening to purchase the Mastercard were counterfeit. The manager told Mr. Hopkins that he had used counterfeit \$50 bills to purchase the Mastercard and further told him he intended to call the R.C.M.P. so the accused could speak to them about where he got the counterfeit money. Mr. Hopkins then said his wife was in the car and he could not wait. He left the store without demanding the return of either his money or the prepaid Mastercard.

THE TRIAL

- [8] The only witness at trial was the R.C.M.P. officer involved in the investigation. The evidence of the civilian witnesses being the employees of Petro-Canada, Loblaws, and the Comfort Inn came in by way of will say statements. The civilian witnesses were not cross-examined. The defence did not call evidence.
- [9] The sole issue at trial was whether or not Mr. Hopkins had knowledge that the various bills that he possessed were counterfeit. The trial judge concluded that he did. In that regard, he reasoned:

- [29] In my view, the evidence in this case is very strong and I am prepared to draw the inference that was drawn by the trial judge and confirmed in the Court of Appeal in *R. v. Mak* that the accused before the court did know the nature and quality of what was on his person or passed to others which was really all the counterfeit money in question in this action because the videos certainly make it clear, as does the evidence, that the source of the funds for the three transactions I have referred to in each case came from the accused, notwithstanding the fact that the videos, as I have tried to explain, only showed, really, two \$50 bills being proffered by the accused and, at Petro-Canada, two \$20 bills.
- [30] I am, therefore, satisfied that Crown, on the evidence that is before me, which does not include any evidence from the accused, has also proven the mens or criminal intent aspect of each of the charges before the court beyond a reasonable doubt and I convict the accused on all the counts on the Information.

ON APPEAL

- [10] The appellant submits that the guilty verdict was unreasonable and therefore should be set aside, pursuant to s. 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46. Alternatively, he submits, pursuant to the rule in *R. v. Kienapple*, [1975] 1 S.C.R. 729 that the three fraud convictions should be stayed because the very same acts grounded his convictions for using counterfeit money.

DISCUSSION

A. Unreasonable Verdict

- [11] In *R. v. De Aquino*, 2017 BCCA 36, this Court recently reviewed the law in relation to unreasonable verdicts:
- [16] Section 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46, provides, in relevant part:
- 686 (1) On the hearing of an appeal against a 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
- [17] In *R. v. Villaroman*, 2016 SCC 33 at para. 55, Cromwell J. for the Court described the characteristics of a reasonable verdict as follows:
- [55] A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question

becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: Yebes, at p. 186; R. v. Mars (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; R. v. Liu (1989) 95 A.R. 201 (C.A.), at para. 13; R. v. S.L.R., 2003 ABCA 148 (CanLII); R. v. Cardinal (1990), 106 A.R. 91 (C.A.); R. v. Kaysaywaysemat (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31.

- [56] The governing principle was nicely summarized by the Alberta Court of Appeal in Dipnarine, at para. 22. The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."
- [18] The test to be applied under s. 686(1)(a)(i) in determining whether a verdict is reasonable is whether the verdict is one that a properly instructed trier of fact acting judicially could reasonably have rendered. This test is the same for a judge-alone trial: R. v. Sinclair, 2011 SCC 40. The application of this test involves some element of subjective assessment, as this Court re-examines and to some extent reweighs and considers the effect of the evidence. This Court is required to bring its judicial experience to bear: Biniaris at paras. 40-42. However, while this Court may engage in a re-examination and reweighing of the evidence for the limited purpose of deciding whether the verdict is reasonable, it is not the function of this Court to substitute its views for those of the trial judge. It is for the trier of fact to distinguish between reasonable doubt and speculation, and such an assessment is only set aside if it is unreasonable.
- [12] To obtain a conviction for the possession and use of counterfeit money, the Crown must prove beyond a reasonable doubt that the accused knew the money was counterfeit: R. v. Freng, (1993) 86 C.C.C. (3d) 91 (B.C.C.A.) at para. 21. The trial judge is permitted to examine the counterfeit money in determining whether on all of the evidence, the Crown has proven the knowledge necessary to ground a conviction: R. v. Mak, 2000 BCCA 418 at paras. 4 - 5. Based on such an examination, the trial judge may conclude that the nature and quality of the money support the inference that the accused knew it was counterfeit.
- [13] In this case, the trial judge did review the original exhibits. He concluded that the bills "do appear to be counterfeit" and did not "feel like real money". I should add that consistent with the procedure followed in Mak, the members of the division also examined the bills and were similarly of the view that the bills did not feel genuine.
- [14] In addition, several of the civilian witnesses provided evidence concerning the currency. The evidence of Mr. Ghorashitabrizi, the desk clerk at the Comfort Inn, was that it was "pretty obvious" the money was fake and it did not feel like real cash. Ms. Peria, an employee of the Comfort Inn, who examined the money after it was found to be counterfeit, said that the money was obviously fake. Mr. Kumbhar, the clerk at the Petro-Canada station, checked the authenticity of the money within minutes of having received it.

[15] This was a strong and compelling circumstantial case where the judge was entitled to draw the inferences he did. The verdict was one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. I would not accede to this ground of appeal.

B. Multiple Convictions

[16] The rule in Kienapple was not raised in the court below. On appeal, Mr. Hopkins submits that the rule prevents an accused from being convicted of "two or more charges encompassing the same act". He argues that his three fraud conviction should therefore be stayed because the very same acts grounded his convictions for using counterfeit money.

[17] Mr. Hopkins was charged with the following counts:

Count 1

Roy Gene HOPKINS, on or about the 11th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, without lawful justification or excuse had in his possession counterfeit American currency contrary to section 450(b) of the Criminal Code.

Count 2

Roy Gene HOPKINS, on or about the 11th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, did, without lawful jurisdiction or excuse, use counterfeit money, as if it were genuine, contrary to section 452(a) of the Criminal Code.

Count 3

Roy Gene HOPKINS, on or about the 11th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, did by deceit, falsehood or other fraudulent means, defraud Loblaw's City Market of a prepaid Mastercard and lottery tickets, contrary to section 380(1) of the Criminal Code.

Count 4

Roy Gene HOPKINS, on or about the 12th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, without lawful justification or excuse had in his possession counterfeit American currency, contrary to section 450(b) of the Criminal Code.

Count 5

Roy Gene HOPKINS, on or about the 12th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, did, without lawful justification or excuse, use counterfeit money, as if it were genuine, contrary to section 452(a) of the Criminal Code.

Count 6

Roy Gene HOPKINS, on or about the 12th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, did by deceit, falsehood or other fraudulent means, defraud Petro-Canada of merchandise, contrary to section 380(1) of the Criminal Code.

Count 7

Roy Gene HOPKINS, on or about the 12th day of December, 2015, at or near North Vancouver, in the Province of British Columbia, did by deceit, falsehood or other fraudulent means, defraud Comfort Inn and Suites of accommodation, contrary to section 380(1) of the Criminal Code.

- [18] The rule against multiple convictions is only engaged where there is a factual and legal nexus between the offences in question. Counts 1 and 2 concern the possession and use of counterfeit money on December 11, 2015 being the date on which Mr. Hopkins used two counterfeit US \$50 bills to obtain the prepaid Mastercard from Loblaws.
- [19] There is a factual nexus between Counts 1 and 2 because the same act grounds both crimes, i.e., the appellant was in possession of the fake bills when he used them at Loblaws. There is also a legal nexus, because the lesser offence of possessing counterfeit money contains no additional and distinguishing element going to guilt, when compared with the offence of using the counterfeit money. The Crown concedes that *Keinapple* applies to these two counts and Count 1 should be stayed.
- [20] Count 4 charges Mr. Hopkins with possession of counterfeit money on December 12, 2015. It is not restricted by its wording to any particular incident of possession on this date and the Crown did not particularize this Count at trial. Count 4 encompasses Mr. Hopkins' act of possessing counterfeit money when arrested. There is no factual nexus between his act of possessing the counterfeit money when arrested and the acts of using counterfeit money at the Comfort Inn and Petro-Canada earlier the same day. The latter incidents occurred at different times that involved different counterfeit bills. Those acts are encompassed in Count 5 of the Information. Accordingly, the rule in *Keinapple* does not apply to the appellant's conviction on Count 4 and it should stand.
- [21] Counts 3, 6 and 7 charge the appellant with committing fraud against respectively Loblaws on December 11, and Petro-Canada and Comfort Inn on December 12. The three fraud counts have a close factual nexus to the two counts of using counterfeit money. The same transactions grounds Count 2, using counterfeit money on December 11 and Count 3, fraud against Loblaws on December 11. The same two transactions ground Count 5, using counterfeit money on December 12, and Counts 6 and 7, fraud against Petro-Canada and Comfort Inn on December 12.
- [22] However, the required legal nexus is not established between the offences. This is so because the crime of fraud in using counterfeit money has different elements and describes different criminal wrongs. In particular, the lesser offence of fraud requires proof of

deprivation: R. v. Riesberry, 2015 SCC 65. Deprivation is not an element required for a conviction for using counterfeit money. Accordingly the offence of fraud has an additional and distinguishing element not present in the offences of using counterfeit money, and the rule against multiple convictions does not apply.

[23] In the result therefore I would dismiss the appeal, save and except I would set aside the appellant's conviction on Count 1 and in regard to count 1 I would order a stay of proceedings.

[24] SAUNDERS J.A.: I agree.

[25] FENLON J.A.: I agree.

[26] SAUNDERS J.A.: The appeal is dismissed with the exception of the Count 1. The conviction on Count 1 is set aside and Count 1 is stayed.

"The Honourable Mr. Justice Goepel"

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