

CANADA / JUDGMENT

R. v. Howard

2022 BCSC 1904

COURT

Supreme Court of British Columbia

DECIDED

27 October 2022

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2022 BCSC 1904 R. v. Howard IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Howard, 2022 BCSC 1904 Date: 20221027 Docket: 180589 Registry: Victoria Rex v. Caleb Mark Howard Before: The Honourable Justice MacNaughton Oral Reasons for Judgment (Application for a Directed Verdict) Counsel for the Crown: M. Halston Counsel for the Accused: N. Acker Place and Date of Trial/Hearing: Victoria, B.C. October 24-27, 2022 Place and Date of Judgment: Victoria, B.C. October 27, 2022 Table of Contents Oral Reasons on application for directed verdict. 3 The Background to this Application.. 3 The Test for a Directed Verdict. 4 Oral Reasons on application for directed verdict.

- [1] Mr. Howard seeks an order that I direct the jury in this case to return a verdict of not guilty.
- [2] In support of his application, he relies on two cases. The first case is R. v. Arcuri, 2001 SCC 54, a case about the obligation of a preliminary inquiry judge to weigh the Crown's evidence against an accused's exculpatory evidence in determining whether the evidence was sufficient to commit the accused to trial. In her analysis, then Chief Justice McLachlin, writing for the Court, wrote that the question to be asked by a preliminary inquiry judge is the same as that asked by a trial judge considering a defence motion for a directed verdict namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty": at para. 21 citing United States of America v. Shephard, [1977] 2 S.C.R. 1067.
- [3] The second case is R. v. Villaroman, 2016 SCC 33, a case which discussed the ultimate burden of proof on the Crown in a case involving largely circumstantial evidence. The trier of fact is required to conclude that the accused's guilt is the only reasonable inference to be drawn from the circumstantial evidence.
- [4] In response, the Crown relies on the recent BC Court of Appeal decision in R. v. A.S.D., 2021 BCCA 119 concerning the well-settled test for a no-evidence motion in a judge alone trial or a directed verdict in a jury case.
- [5] To put this application in context, I will briefly review the proceedings to this stage and the evidence. The Background to this Application

- [6] Mr. Howard stands charged with breaking and entering St. Aidan's Church in Saanich BC (the "Church") on November 16, 2018, and committing mischief. He elected trial by jury. The jury trial is underway. The Crown has closed its case and Mr. Howard has not yet decided whether he will testify.
- [7] At my urging, based on the evidence from the Church employee who discovered the break in, and of the two officers from the Saanich Police who investigated the scene, the Crown and counsel for Mr. Howard entered into Admissions of Fact marked as Ex. 4. Those Admissions are:
1. On November 16, 2018, a break-in occurred at the St. Aiden's United Church, located at 3703 St. Aiden's Street, Saanich, BC.
 2. On November 16, 2018, the person or person(s) who committed the break-in referred to in paragraph 1 of this document, also committed mischief to the property of the St. Aiden's United Church.
- [8] As a result of the Admissions, the only element of the offence that remains to be proven by the Crown, beyond a reasonable doubt, is the identity of the person who broke in and damaged the property.
- [9] The only evidence connecting Mr. Howard to the break in and property damage at the Church is circumstantial. The Test for a Directed Verdict.
- [10] In A.S.D., the issue before the Court of Appeal was whether the test to be applied on a no-evidence/directed verdict motion required the trial judge:
- a) to consider whether the accused's guilt was the only rational inference that could be drawn from the circumstantial evidence. That test had been applied in R. v. Qiang, 2013 BCSC 1597 and was then followed in R. v. Carte, 2017 BCSC 2423 and R. v. Taylor, 2017 BCSC 1668; or
 - b) to consider whether, acting reasonably and following the law correctly, a finding of guilt could be found on the current evidence.
- [11] In A.S.D. the trial judge refused to follow Qiang, on the basis that it incorrectly set out the test, and dismissed the motion for a directed verdict.
- [12] The Court of Appeal said at para. 99:
- [99] In my view, there is no dispute that the test to be applied on a defence no-evidence motion in a circumstantial evidence case is the Shephard/Arcuri test. The Supreme Court of Canada was clear in Arcuri that the test for a no-evidence motion/directed verdict is the same test that governs committal following a preliminary inquiry: Arcuri at para. 21. The judge must ask whether there is any evidence upon which a reasonable trier of fact, following the law, could return a verdict of guilty. That exercise involves a limited weighing of the circumstantial evidence to assess whether it is reasonably capable of supporting the inferences the Crown asks the trier of fact to draw. However, the judge asks only whether the

Crown evidence, if believed, could reasonably support an inference of guilt. A judge may not engage in weighing for the purpose of assessing whether the only rational inference to be drawn from the evidence is the accused's guilt. That type of weighing is done at the end of the trial in determining whether the Crown has met its burden of proof.

- [13] The Court of Appeal made clear that on a no-evidence/directed verdict motion it is an error for a trial judge to fully weigh the evidence to decide whether guilt is the only reasonable inference to be drawn: at para. 101. A similar conclusion was reached by the Ontario Court of Appeal in *R. v. Pettipas-Lizak*, 2017 ONCA 963 at para. 6, and *Arcuri* at para. 21. At para. 104 the Court of Appeal said:
- [104] I am of the view that to the extent the Qiang and the cases that follow it seek to augment the test for a directed verdict, they misstate the law and should not be followed.
- [14] As the Supreme Court explained in *Arcuri*, the exercise engaged in by the judge involves a limited weighing of the circumstantial evidence to assess whether it is reasonably capable of supporting the inferences the Crown asks the trier of fact, in this case the jury, to draw.
- [15] In this case, the Crown submits that the evidence could support a finding of guilt. Two cigarette butts, on which Mr. Howard's DNA was found, were collected from the roof of the church. The first cigarette butt was found beside a skylight from which the plexiglass had been removed. That skylight led to the basement of the Church building, two stories down. In the photographs it appears to be more like a light tunnel.
- [16] The second cigarette butt was found beside the second skylight from which the plexiglass had been removed. A 2x4 had been placed across the skylight and a rope was tied around it. The second skylight opened onto the main floor of the Church in a hallway outside the Church offices. Debris was found on the floor below the skylight. The damage to the Church property was primarily found in the Church offices.
- [17] The Crown says that: the two cigarette butts, where they were found, the condition in which they were in (both were dry and one of them had residual flakes of ash), and the associated DNA connecting them to Mr. Howard (one of which solely had his DNA and the other of which had his partial DNA and the DNA of another unknown male) are capable of supporting an inference that Mr. Howard was on the roof of the Church smoking because he was engaged in breaking and entering. The photographs taken by Cst. Kubitza during his investigation did not show other debris on the roof.
- [18] If the jury accepts that evidence, based on the limited weighing that is appropriate in this application, it is reasonably capable of supporting an inference of Mr. Howard's guilt. The question is not whether the jury will find Mr. Howard guilty, but whether the circumstantial evidence, if the inferences sought are drawn, makes out that Mr. Howard was the person who broke and entered and damaged the Church.

[19] As a result, I am satisfied that properly instructed and acting reasonably, the jury could find Mr. Howard guilty based on the Crown's circumstantial evidence and I dismiss the application for a directed verdict. "MacNaughton J."

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Prepared on 25 October 2026 · Esheria