

CANADA / JUDGMENT

R. v. Jalifi

2016 BCCA 18

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 18 R. v. Jalifi COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Jalifi, 2016 BCCA 18 Date: 20160119 Docket: CA42957 Between: Regina Respondent And Rachid Ali Jalifi Appellant Before: The Honourable Madam Justice Bennett (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated June 24, 2015 (R. v. Jalifi, 2015 BCSC 1085, Kelowna Docket 75771). Counsel for the Appellant: N. Cobb Counsel for the Respondent: M. Scott Place and Date of Hearing: Vancouver, British Columbia November 24, 2015 Place and Date of Judgment: Vancouver, British Columbia January 19, 2016 Summary: The applicant applies for leave to appeal summary convictions for two counts of assault. The issue at trial was identification. HELD: Leave to appeal dismissed. There is no error of law that meets the test for leave to appeal. Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Mr. Jalifi brings an application for leave to appeal a summary conviction appeal that dismissed the appeal from his conviction on two counts of assault entered on January 6, 2014. The reasons for judgment of the summary conviction appeal judge are indexed at 2015 BCSC 1085.
- [2] The guiding provision is s. 839 of the Criminal Code, R.S.C. 1985, c. C-46:
839. (1) Subject to subsection (1.1), an appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone
- [3] The issue at trial was the identification of the assailant. The two victims were assaulted outside a nightclub in Kelowna, B.C. The assailant fled the scene. Mr. Jalifi was later arrested in a black Mercedes Benz, his photo was placed in a photo-pack and identified by some of the witnesses.
- [4] The applicant raised numerous ground of appeal:
- i) the summary conviction appeal judge erred by characterizing the trial judge's determination on the fairness of the photo-pack as a question of fact; ii) there were palpable and overriding errors made by the summary conviction appeal judge; and he misapprehended the evidence; iii) the summary conviction appeal judge failed to deal with the argument that the trial judge erroneously relied on hearsay evidence; and then fell into the same error; and iv)

that the summary conviction appeal judge failed to apply the correct legal principles in relation to eye witness identification.

- [5] The test to apply to whether leave to be appeal should be granted is found in *R. v. Winfiled*, 2009 YKCA 9 at para. 13:
- [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
- i) Photo-pack
- [6] Mr. Jalafi takes issue with the manner in which the photo-pack was prepared, arguing that the process did not follow the acceptable procedure for photo-pack identification. The evidence, in short, is that the photos were chosen by a civilian jail guard, who was aware that he was looking for photos similar in appearance to the suspect. The photo-pack was reviewed by the investigating officer. He determined that the suspect should not have his large earrings or chain on in his photo. This is argued to be an error, as no witness described the jewelry. In my view, there was no error in removing the very distinctive jewelry. Not to do so would likely have been a fatal error in the presentation of the photo-pack.
- [7] The officer organizing the photo-pack did not know who the suspect was. She also reviewed the photo-pack for similarities between photos. The officers who presented the photo-pack to the witnesses also did not know which photo was that of the suspect.
- [8] The trial judge found, at para. 17: In each case the photographs were presented one-by-one to the witness. The constable presenting the photographs did not know the particulars of the case nor the identity of the accused. Each interview was conducted objectively and fairly. In my view, the photos which formed the photo pack, fairly matched Mr. Jalafi's descriptors. In other words, the line-up was fair.
- [9] And at para. 30: I have carefully reviewed the evidence. I had an opportunity to review each of the videotaped photo pack interviews. They were procedurally correct and fair. In each case I was able to observe the witnesses' identification as well as the words and actions that accompanied the identification. This is not a case where there is only one eyewitness. This is not a case where the witnesses only had a fleeting glimpse of the accused. Three of the four civilian witnesses have identified Mr. Jalafi as the male who struck Mr. Scott and Mr. Drechsler. Although I place little weight on the in-court identification, I am satisfied that the photo line-up was conducted fairly and in accordance with the law. On the totality of the evidence I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Jalafi was the male who assaulted both Mr. Scott and Mr. Drechsler.

- [10] The summary conviction appeal court judge found that there was no basis to disturb the trial judges' findings. I agree with this conclusion. Whether the finding that a photo-pack is "fair" or properly conducted is a question of fact does not matter, as in this case, it is clearly not a question of law alone. The appellant disputes the findings of fact, not the conclusion of law reached on the basis of those facts. See *R. v. Morin*, [1992] 3 S.C.R. 286 at 294-296.
- [11] In my view, there is no basis to grant leave to appeal on this ground. The issue does not raise a question of law alone, it is not a question of importance and has little merit. ii) Palpable and overriding errors and a misapprehension of the evidence
- [12] Although raised as a separate ground, Mr. Jalifi raises errors made by the summary conviction appeal judge in the context of his analysis of the photo-pack process. If the judge misstated the evidence in the context of the photo-pack, it was not to the degree of palpable or overriding, nor did it materially affect his decision. For example, Mr. Jalifi repeats the fact that the summary appeal judge referred to the photo-pack as a photo line-up. He discusses what he refers to as misstatements with respect to the "physical descriptors" of the suspect, when what the officers relied on was the photo of the suspect, and whether the other photos were sufficiently similar. None of the alleged "misstatements", if they amounted to misstatements in relation to the photo-pack, were material. Indeed, most of the issues raised by Mr. Jalifi are trifling. The conclusion that the photo-pack was "fair" was based on general compliance with a process that has been recommended in the Sophonow Inquiry.
- [13] I would not grant leave to appeal on this ground.
- [14] In summarizing the evidence, the trial judge stated, at para. 12, "He describes seeing the male cross the street with his friends and get into a car which he believed to be a black Mercedes." The "he" was one of the victims, Brian Dreschler. Mr. Dreschler did not give this evidence. The evidence was hearsay evidence provided by the police officer from a witness at the scene who would not identify himself. Mr. Jalifi did not raise this misstatement, however, I sought further submissions from counsel on this point.
- [15] The summary conviction appeal court judge correctly stated the evidence of Mr. Drechsler, that he did not see where the assailant went after the assault. However, he did not consider this error in assessing whether the trial judge misapprehended the evidence. The issue of misapprehension of evidence was before the summary conviction appeal judge, however, it appears that this particular passage was not drawn to his attention.
- [16] A close examination of this misstatement reveals that it is not material; the trial judge did not rely on this evidence when he convicted Mr. Jalifi. See reasons for judgment at para. 10 noted above. Thus, although this is an error in law, it is not one that merits granting leave to appeal as it is unlikely to succeed. Nor does it raise a matter of importance. iii) Hearsay evidence

- [17] This issue refers to the evidence noted above in relation to the witness who refused to be identified. His evidence was used to base the officer's reasonable grounds for stopping the Mercedes Benz and arresting Mr. Jalifi. This is a non-hearsay purpose, and the evidence was admissible for this purpose.
- [18] Mr. Jalifi also argues that the summary conviction appeal judge relied on this evidence to support the police photo-pack as they had "descriptors" from this witness. The photo-pack was prepared primarily from what the suspect looked like, thus any reference to so-called descriptors from a non-witness is irrelevant.
- [19] There is no basis to grant leave on this ground. iv) Eyewitness identification
- [20] In his argument, Mr. Jalifi reviews each witness and their respective frailties. He does not identify how the trial judge or the summary conviction appeal judge erred in law in the analysis of the evidence. The trial judge reviewed the evidence, and the difficulties with each witness. He identified the problems with the frailties of eyewitness identification, specifically referring to the applicable case law (Reasons paras. 24-30).
- [21] The summary conviction appeal judge reviewed the various grounds of appeal relating to the photo-pack and was clearly alive to the identification issues at trial. I see no error in the reasons of the summary conviction appeal judge that would warrant granting leave to appeal on this basis.
- [22] The bottom line is that this was an eyewitness identification case. The trial judge carefully reviewed the identification evidence, the photo-pack evidence and turned his mind specifically to the issues relating to eyewitness identification.
- [23] The summary conviction appeal judge found no error in his approach. I find no error which meets the test to grant leave to appeal.
- [24] The application for leave to appeal is dismissed. "The Honourable Madam Justice Bennett"

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