

CANADA / JUDGMENT

R. v. Jerace

2020 BCCA 326

COURT

British Columbia Court of Appeal

DECIDED

16 November 2020

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2020 BCCA 326 R. v. Jerace COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Jerace, 2020 BCCA 326 Date: 20201116 Docket: CA46064 Between: Regina Respondent And Michael Jerace Appellant Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Madam Justice Griffin On appeal from: An order of the Supreme Court of British Columbia, dated November 29, 2018 (R. v. Jerace, Vancouver Docket 27650-3). Oral Reasons for Judgment The Appellant, appearing in person (via videoconference): M. Jerace Counsel for the Respondent (via videoconference): C.L. Morgan Place and Date of Hearing: Vancouver, British Columbia November 16, 2020 Place and Date of Judgment: Vancouver, British Columbia November 16, 2020 Summary: The appellant challenges his conviction for failure to comply with a long-term supervision order. The Crown concedes that the conviction appeal should be granted and a new trial ordered. Held: Appeal allowed and new trial ordered. Crown counsel at trial erred by alleging in closing submissions, for the first time, that the appellant fabricated his testimony in response to police disclosure. The division did not address the grounds of appeal raised by the appellant.

- [1] WILLCOCK J.A.: On November 29, 2018, the appellant was convicted by a jury of an offence under s. 753.3(1) of the Criminal Code, R.S.C. 1985, c. C-46: failing to comply with long term supervision.
- [2] On April 8, 2019, he was sentenced to 18 months' jail. He appeals against his conviction on numerous grounds. For reasons that differ from those grounds, the respondent Crown properly acknowledges that the conviction appeal should be allowed and a new trial ordered. For the following reasons, we agree with the Crown's submission. It is, therefore, unnecessary to address the appellant's grounds of appeal.
- [3] On May 5, 2018, police officers observed the appellant drinking what appeared to be beer with a friend at a bar, while subject to a Long Term Supervision Order with a special condition that he not consume or possess alcohol.

- [4] In the course of pre-trial disclosure, the appellant received a police report that indicated he had been followed by the police from the place at which he had been residing, Harbour Light on East Cordova Street in Vancouver, to the bar along a route that included Carrall Street.
- [5] At trial, a police officer, Detective Miles, testified that there was an error in the police report: Columbia Street was mistakenly identified as Carrall Street. The appellant had not been seen on Carrall Street.
- [6] The appellant elected to give evidence and testified that he was drinking iced tea, not beer, when he was observed at the bar. He said that he had stopped into a convenience store on Carrall Street on the way to meet his friend and purchased a can of iced tea at that location, which he then consumed at the bar while his friend drank beer.
- [7] While addressing the appellant's credibility in her closing submissions, Crown counsel suggested to the jury the appellant had reviewed the police report and decided to fabricate a story that he had purchased iced tea while walking on Carrall Street. Crown counsel said: Now, the stores that Mr. Jerace said he went into are on Carroll Street. You heard him say at some point this morning about how he hadn't -- received disclosure and then how did he know what was happening in this case, and he did receive disclosure. And as part of that disclosure he told you it said Carroll Street in Detective Miles' statement. This is what Mr. Jerace told you today. And I suggest to you that the most likely thing that happened is Mr. Jerace looked at that police report and went, "Carroll Street. I will find some stores on Carroll Street and I will suggest to the court that I bought iced tea at the stores on Carroll Street". But then Detective Miles came to court and he said Columbia Street, and that's not a police trick, that was a mistake, and it's a mistake that Mr. Jerace was notified of in advance as well, but it's a mistake. He testified in court it was Columbia. That's where he went and now Mr. Jerace's story doesn't work. He was not on Carroll Street. He didn't go into a store to buy iced tea.
- [8] The jury was, thus, invited to conclude the appellant had tailored his testimony to conform with information in the police reports disclosed before trial.
- [9] As the Ontario Court of Appeal observed in *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.) at para. 20: As a matter of common sense, there may be considerable force to the suggestion that a person who gets full advance notice of the other side's evidence and testifies last is in a position to tailor his or her evidence to fit the disclosure. That inference, no matter how logical, cannot be drawn without turning fundamental constitutional rights into a trap for accused persons. Where any such suggestion seeps into the cross-examination of an accused, it must be eradicated by the trial judge.
- [10] It is "improper" and "unfair" for the Crown to allege a theory of concoction for the first time in closing submissions: *R. v. Peavoy*, (1997), 34 O.R. (3d) 620 (C.A.) at 625.

- [11] Where, as in this case, that occurs, an appropriate corrective instruction can be sufficient to cure the problems created by the Crown's address: *R. v. John*, 2016 ONCA 615 at paras. 63, 80, leave to appeal dismissed [2017] S.C.C.A. No. 101.
- [12] However, the accused was self-represented, and the trial judge was not asked to, and did not provide a corrective instruction to the jury. The Crown concedes that neither the appellant, the trial Crown, nor the trial judge were alive to the prohibited inference underlying the Crown's submissions.
- [13] The respondent concedes the trial judge was led into error. Crown also concedes the error cannot be saved by the curative proviso in s. 686(1)(b)(iii) of the Criminal Code. Credibility is the central issue in this case, there is no basis to believe, and the Crown does not contend, that the allegation of tailoring was an unimportant factor in the credibility assessment.
- [14] Mr. Jerace seeks to have us, in addition, address the argument set out in his factum of March 4, 2020 and the supplemental factum filed August 3, 2020.
- [15] The errors alleged are:
- a) Ground 1: The trial judge erred by usurping the jury in its exclusive fact-finding role.
 - b) Ground 2: The trial judge erred in misdirecting the jury on the elements of the offence.
 - c) Ground 3: The trial judge erred by failing to give the jury an adequate limiting instruction to address the prejudicial effect of Detective Miles' testimony that revealed Mr. Jerace was a sexual offender.
 - d) Ground 4: The trial judge failed to adequately assist Mr. Jerace, an unrepresented accused, to subpoena the witness Police Intake Nurse and to obtain full disclosure of the police statements made by the two officers who monitored his movements on the day of the alleged offence as well as denying Mr. Jerace to play the recorded phone calls to the jury while giving evidence.
 - e) Ground 5: The trial judge erred by unduly restricting Mr. Jerace's cross-examination of Detective Miles and probation officer Rode.
- [16] These grounds relate to specific instructions given in this case, and to admissibility and/or relevance of evidence at the trial, some of which the accused did not seek to adduce at trial. All of these matters, if they arise at a new trial, may be addressed without direction from this Court. In our view, it is neither necessary nor appropriate to address them now.
- [17] Accordingly, it is only necessary for us to make an order allowing the conviction appeal and ordering a new trial, and we do so. "The Honourable Mr. Justice Willcock" "The Honourable Madam Justice Fenlon" "The Honourable Madam Justice Griffin"

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