
CANADA / JUDGMENT

R. v. Kara

2004 BCSC 1082

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kara,

2004 BCSC 1082

Date: 20040812

Docket: 22564

Registry: Vancouver

Between:

Her Majesty the Queen

Respondent

And:

Waheed Moezali Kara

Appellant

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Crown Counsel:

G. Banning

Counsel for the Appellant:

D.M. Sudeyko

Date and Place of Hearing:

May 19, 2004

Vancouver, B.C.

Introduction:

- [1] Mr. Kara was convicted in Provincial Court on June 27, 2003 of an offence of breaching a peace bond under s. 811(b) of the Criminal Code of Canada. He was fined \$500 and placed under probation for a period of two years. He was acquitted of a second count of breach of the same peace bond. He appeals his conviction.

Proceedings at Trial:

- [2] Mr. Kara entered into the peace bond recognizance on September 5, 2002, requiring him "not to go within a two block radius of any place of employment of K.H." It replaced bail conditions, under which Mr. Kara had been released on unspecified charges, requiring him not to attend K.H.'s place of employment, identified by its name and address.
- [3] The evidence at trial was that K.H., who was 19 years old at the date of trial, had known the appellant for about two years and had dated him for some period of time. She testified that she had worked at a particular tanning salon as part of a school program whereby she did not work for wages but received free tanning. Mr. Kara was aware that K.H. had been employed there as part of the school program.
- [4] K.H. was in a serious automobile accident on May 27, 2002 in which she suffered a brain injury rendering her unconscious for a lengthy period and hospitalized for almost four months. She did not return to school until November 2002, or to the tanning salon employment until May 2003.
- [5] It was not disputed that Mr. Kara went within a two-block radius of the tanning salon on two occasions (May 1 and May 8, 2003) nor that on those dates the tanning salon was a place of employment of K.H. The defence, however, was that Mr. Kara did not know on the relevant dates that K.H. had recovered from her injuries and that the tanning salon had again become her place of employment.
- [6] The trial judge acquitted on the count relating to May 1, 2003.
- [7] With respect to the count at issue in these proceedings, K.H. testified that on May 8, 2003, she was at the tanning salon. She left the premises and as she was walking east on the street, Mr. Kara drove past her and then pulled over to the side of the road around 70 feet away. K.H. said that she stopped and waited for him to proceed and when he did not do so, she turned around and ran back to the tanning salon. She looked back and saw Mr. Kara do a U-turn and then pull over almost directly in front of the tanning salon. She telephoned the police. She testified that later, after the police arrived and while she was driving away with her mother and grandmother, Mr. Kara yelled at her.

- [8] Mr. A., who is the owner of the tanning salon, testified that he saw Mr. Kara outside his premises on May 8 after K.H. brought that fact to his attention. He testified that he saw a car parked and that Mr. Kara came out of the car and crossed the street with some friends. Mr. A. presumed that Mr. Kara went into one of the restaurants at that location.
- [9] Mr. Kara testified. He said that he was aware of the conditions of the peace bond and that he was not to be within a two-block radius of any place of employment of K.H. He testified that he was aware of the automobile accident and that K.H. had been in hospital for a number of months. His evidence was that he had received information about her ongoing condition from other persons, including his lawyer and his doctor. He said that her friends had told him that she was in bad shape and that he believed she was "in bad shape, not able to work or go to school for a long time".
- [10] Mr. Kara testified that on May 8, he was in the area of the tanning salon because he was eating at the donair place nearby. He stated that he could not recall specifically being there on May 1 but could have been. He testified that he was aware that K.H. had been employed at the tanning salon pursuant to the school program but that in May 2003, he considered that there was "no way" she would be working there because of what he had heard about her condition. He denied that he knew that K.H. was working at the salon in May 2003. In the light of K.H.'s evidence, the court asked Mr. Kara a question:

THE COURT: None of you have touched on this, but I have a question that obviously stands out and I'd like an answer. You sat here and listened to the young lady talk about the fact that she walked out and you drove past her and pulled over and she goes back and sees you do a U-turn and park across the street. Now, what do you say to that evidence?

A. I never saw her.

- [11] The Reasons for Judgment, which followed very brief submissions, were equally brief. The court stated as follows:

THE COURT: This case is one of deciding what evidence to accept and not accept and let me just stay this at the outset. I am satisfied this young lady says that she was walking from that place on 3rd. As she walked, this young man drove past her, pulled over. She doesn't see him move, he says he doesn't see her, she runs back to the place where she was employed, and phones 9-1-1. He then pulls a U-turn, she sees the U-turn, and he parks across the street. He says he goes in to eat, he may well have. Do I think he was there with knowledge, given what he knows from the past and the circumstances what occurred here? Yes, I do. I find him guilty as charged on Count 2. In other words, I accept her evidence about that incident over his on that very specific area. On Count 1, I find there could be a reasonable doubt and I find him not guilty. Do we deal with sentence now?

Issues:

- [12] Counsel for the appellant argued that there was no evidence to support the conclusion that Mr. Kara had knowledge or was reckless or wilfully blind to the fact that K.H. was employed at the tanning salon on May 8, 2003. Mr. Sudeyko argued that the learned trial judge erred when he based his conclusion on his preference for the evidence of K.H. over that of Mr. Kara. He argued that such preference did not explain or justify the conclusion because, in fact, the evidence of these two witnesses was not contradictory but entirely consistent: all that it established was that Mr. Kara was in the area of the tanning salon. He argued that Mr. Kara was aware of K.H.'s serious medical condition and had no reason to expect her to be back at the tanning salon in the school year following the accident. Mr. Sudeyko argued that it was not necessary for the learned trial judge positively to believe Mr. Kara's evidence in order to find that the Crown had failed to prove knowledge on his part, and in any event, neither did the learned trial judge give a basis for rejecting Mr. Kara's evidence nor did the record support a rejection of that evidence.
- [13] The appellant relied on *R. v. Docherty*, [1989] 2 S.C.R. 941. That case related to an alleged breach of s. 666(1) of the Criminal Code, failure to comply with probation order. The Court held that "a relatively high level of mens rea" is required for the offence, given the use of the word "wilfully", in contrast with lesser forms of guilty knowledge such as "negligently" or even "recklessly".
- [14] In *R. v. Montrose* (1998), 19 C.R. (5th) 359, (Que. Sup. Ct. (Crim. Div.)), Boilard J. discussed the nature of the mens rea requirement in s. 811 of the Criminal Code, and held that s. 811 requires subjective knowledge of the existence of the condition that was breached. After referring to *R. v. Docherty*, the court stated at ¶ 17:

It is therefore my considered opinion that in cases of breach of a recognizance under ss. 811 or 145(3) or a probation order (s. 733.1) guilt may not result from mere carelessness or negligence or forgetfulness. In my view, the mental element that is required for a breach of s. 811 is the wilful action of an accused knowing that it is contrary to the terms of an existing recognizance.

Boilard J. also referred to the principle that it is always possible that the testimony of the accused or another witness would raise a reasonable doubt in the mind of the trier of fact even if the trier of fact does not necessarily believe the testimony. He concluded on this point at ¶ 19:

In the case at bar, if the trier of fact had a reasonable doubt that the accused honestly believed he was no longer bound by the terms of his recognizance he was obliged to acquit him.

- [15] *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542 (Ont. C.A.) and *R. v. Brown* (2002), 61 O.R. (3d) 619 (C.A.) are recent discussions of the sufficiency of reason for judgment. They both illustrate applications of the principles enunciated by the Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869, and *R. v. Braich*, [2002] 1 S.C.R. 903. In *Sheppard*, Binnie J. sets out a number of propositions summarizing the duty of a trial judge to give reasons. Among them are the following at ¶ 55:

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.
7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

[16] In *Minuskin*, Rosenberg J.A. stated, with reference to the "W.(D.) formula", at ¶ 22 that:

It is important to stress that trial judges in a judge alone trial do not need to slavishly adhere to this formula. This suggested instruction was intended as assistance to a jury and a trial judge does not commit an error because he or she fails to use this precise form of words. Nor is the trial judge expected to approach the evidence in any particular chronology, for example, looking first at the accused's evidence and then at the rest of the evidence. It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the W. (D.) instruction. One of those principles is that it is not necessary for the trier of fact to believe or accept the defence evidence for there to be a reasonable doubt. Even if the trier of fact believes the prosecution witnesses, the evidence as a whole may leave the trier of fact with a reasonable doubt. As it was put by Cory J. in *W. (D.)* at p. 757, the trier of fact must acquit even if he or she does not believe the accused's evidence because they have a reasonable doubt as to the accused's guilt "after considering the accused's evidence in the context of the evidence as a whole".

[17] The Crown argued that in the circumstances of the case as a whole, there was an evidentiary basis for the trial judge's conclusion that the appellant saw the complainant on May 8, 2003 at the tanning salon. Ms. Banning referred to Mr. Kara's previous knowledge of K.H.'s work place and to the fact that he, in daylight when the complainant was there to be seen, drove

past her, pulled over some 70 feet later, waited for a while, made a U-turn and then parked across the street from the tanning salon. The Crown argued that the trial judge was entitled to conclude that the appellant had the requisite mens rea for the breach as a result of that conduct. The Crown emphasized that although an appellate court may take a different view of the evidence that is not sufficient to interfere with a verdict. The Crown referred to *R. v. G. (A.)*, [2000] 1 S.C.R. 439 and *R. v. Biniaris*, [2000], 1 S.C.R. 381.

- [18] It is not apparent from the trial judge's Reasons what his basis was for rejecting the appellant's evidence. Nor is such a basis obvious from a review of the testimony. The appellant was not cross-examined at all on his statement that he did not see the complainant when he drove past her and then made a U-turn. Mr. Kara's evidence was consistent with the evidence of Mr. A. that Mr. Kara was with some other people and that there are restaurants across the street from the tanning salon.
- [19] The trial judge's Reasons do not state the evidentiary basis for his conclusion that Mr. Kara had knowledge or was reckless or wilfully blind to the fact that K.H. was employed at the tanning salon on May 8, 2003 nor is such a basis apparent from the record. A preference for the evidence of the complainant over that of the appellant does not suffice to resolve that question. It is not clear from the Reasons that at the end of the day the trial judge had regard for the basic principles underlying the W.D. instruction.
- [20] The Crown had the burden to prove beyond a reasonable doubt that the accused wilfully acted contrary to the terms of the recognizance. I find that the learned trial judge erred in that he did not place that burden on the Crown and did not assess the evidence in a manner consistent with the principles in *R. v. W. (D.)*, [1991] 1 S.C.R. 742.
- [21] The appropriate remedy in this case is to order a new trial, and I so order.

"L. Smith, J."

The Honourable Madam Justice L. Smith

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