
CANADA / JUDGMENT

R. v. Kinley

2009 BCCA 363

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 363 R. v. Kinley

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kinley,

2009 BCCA 363

Date: 20090819

Docket: CA034301

Between:

Regina

Respondent

And

Dean Evan Kinley

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Mackenzie

The Honourable Madam Justice Saunders

On appeal from: Supreme Court of British Columbia, February 20, 2006

(R. v. Kinley, 2006 BCSC 2048, Chilliwack Docket 49890-2)

Counsel for the Appellant:

R. S. Fowler

Counsel for the Respondent:

W. J. S. Bell

Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2009

Place and Date of Judgment:

Vancouver, British Columbia

August 19, 2009

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Saunders

- [1] Mr. Kinley appeals from his conviction of two counts of robbery contrary to s. 344(b) of the Criminal Code, R.S.C. 1985, c. C-46. The sole issue at trial was identification. For Mr. Kinley, it is said the reasons for judgment are insufficient in that they do not address key evidence or key submissions, and do not provide a basis for meaningful appellate review.
- [2] The reasons for judgment are indexed at 2006 BCSC 2048.
- [3] Mr. Kinley was charged with three robberies, one of the Envision Credit Union on February 23, 2005, one of the Empress Hotel Beer and Wine Store on February 28, 2005, and one of an Esso Station on March 4, 2005, all locations in downtown Chilliwack, British Columbia. He was acquitted of the robbery of the Credit Union and convicted of the robberies of the Beer and Wine Store and the Esso Station.
- [4] Each of the three robberies was recorded on videotape. The judge found the tape quality varied, but in no case was it sufficient by itself to conclusively identify the robber. Thus, the balance of the evidence was essential to the two convictions.
- [5] At trial, counsel for Mr. Kinley contended that the identification evidence had such flaws as to preclude a finding that Mr. Kinley's identity as the robber was proved beyond a reasonable doubt. On this appeal, counsel for Mr. Kinley submits the reasons for judgment fail to deal both with the key deficiencies in the evidence and Mr. Kinley's submissions on aspects of the

evidence and that they are conclusory in nature, with the result they do not meet the minimum required by cases such as *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, and there is no way to assess whether there has been misapprehension or disregard of material evidence so as to raise issues discussed in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. C.(R.)*, [1993] 2 S.C.R. 226, 81 C.C.C. (3d) 417; and *R. v. Norman* (1993), 87 C.C.C. (3d) 153, 16 O.R. (3d) 295 (C.A.).

- [6] Crown counsel submits the reasons for judgment, although spare, adequately explain the basis for the convictions, demonstrate a logical connection between the evidence and the verdicts, address the substance of the critical trial issues, and thus are sufficient.
- [7] In addition to the videotapes that the judge found insufficient by themselves to prove identification, witnesses present during the robberies and police officers provided identification evidence.
- [8] As to count 2, robbery of the Beer and Wine Store, the manager on duty at the time of the robbery, Ms. Harman, testified at trial. Ms. Harman said she had served the robber about five times before the day of the robbery but she did not know his name. She described the robber as a male with dark hair who was, on the day of the robbery, wearing a greyish-whitish wig. The hair was pulled back but she could not say if the hair of the wig was pulled into a long ponytail or if he had tattoos on his hands. At a photo line-up, she told the police officer there was one picture that looked similar to the robber "but I know it's not him". That picture was a photograph of Mr. Kinley. At trial Ms. Harman identified Mr. Kinley as the robber. Further, she testified that about two weeks after the robbery she saw the robber in downtown Chilliwack sitting on a bench. She testified she drove around the block to make sure she was not mistaken, and then contacted the police, observing the man from her parked car until she saw a police officer take him into custody. That person was Mr. Kinley. Ms. Harman also told the police she had seen the robber pictured in a Chilliwack newspaper. The newspaper was recovered, showing a man whose face was not visible, wearing dark clothing.
- [9] As to count 3, robbery of the Esso Station, the cashier on duty at the time of the robbery, Mr. Good, described the robber as someone he had seen in the store on a couple of previous occasions. Mr. Good testified that the robber entered the store and purchased items including a Mars bar, left the store, re-entered, picked up another Mars bar, waited for Mr. Good to finish serving a customer at the counter, and then pulled out a gun and demanded money. Mr. Good described the robber as a male with a long blonde ponytail and a scar in his chin area. Mr. Good did not see tattoos on the robber. Mr. Good testified that about a week after the robbery when a friend, Mr. Eccleston, was present, the same person entered the store and purchased a Mars bar, and that this person returned again on two other occasions, the last time when Mr. Eccleston again was present. The police then attended and arrested the person who was Mr. Kinley.

- [10] Mr. Good participated in a police line-up but did not identify the robber from the photographs presented. At trial, Mr. Good identified Mr. Kinley as the robber.
- [11] In addition to testimony from Ms. Harman and Mr. Good, a police officer, Sergeant Dahl, identified Mr. Kinley from the videotapes and an audio recording of the robbery of the Beer and Wine Store. Sergeant Dahl testified he had known Mr. Kinley since 1987 but had not had contact with him since 1990 or 1991, that is, fourteen or fifteen years before these robberies. He testified that in the years of his contact with Mr. Kinley, he met with him for approximately forty-eight hours over twelve meetings. Sergeant Dahl testified he reviewed still photographs from the Credit Union robbery, the videotapes of the robberies of the Beer and Wine Store and Esso Station, and the audio recording taken from the Beer and Wine Store. He testified he was not able to identify the robber of the Credit Union from the still photographs but in his opinion Mr. Kinley was the robber of the Beer and Wine Store and the Esso Station. He testified that he formed this opinion immediately upon viewing the tapes based on overall facial appearance and mannerisms, including abrupt movements, the robber's walk, the robber's deliberate action, and in reference to the robbery of the Esso Station, butterfly markings on the robber's left hand seen briefly on the videotape. He opined as well that the voice on the audio recording belonged to Mr. Kinley.
- [12] In addition to the positive evidence of identification, another officer, Constable Sullivan, testified that on February 2, 2005, she saw Mr. Kinley wearing a "bleach blonde wig" tied in a ponytail and revealing dark hair and sideburns under the wig.
- [13] The judge first addressed the Credit Union robbery. He noted the two tellers had identified Mr. Kinley from the photo line-up with 65 to 85 per cent confidence and had identified Mr. Kinley in court as the robber of the Credit Union. In that context he reminded himself of the frailties of in-court identification:
- [9] The two tellers from the credit union, Ms. [Pfeifer] and Ms. [Gordon], provide in-dock identifications of the accused, however, I am mindful of the frailties of such identifications and warnings provided in *R. v. Hibbert* [2002 SCC 39, [2002] 2 S.C.R. 445] and through the inquiry into the Sophonow case conducted by Mr. Justice Cory. There are deceptive and, in some cases, counter-intuitive features that can accompany such identification evidence.
- [14] The judge then discussed the identification evidence of the eyewitnesses:
- [10] The three robberies present an interesting array of identification evidence. The two tellers, witnesses to the credit union robbery both indicated the accused as the robber at the photo line-up. One of them provided the somewhat distinguishing feature of a tattoo on the left hand. Further, the robber used what appeared to be a wig similar to the one described by Constable [Sullivan], when she stopped the accused prior to the robberies.

- [11] The evidence relating to the next two robberies includes recognition of the robber from prior contact and identification on subsequent meeting of the accused, in each case, prompting the witness to call the police. However, in each case, the clerk involved could not identify the accused from the photo line-up.
- [15] Finally, he turned to the evidence of Sergeant Dahl and his conclusions:
- [12] The further distinguishing feature to the last two cases is the confirming evidence of the recognition witness, Sergeant Dahl, who was familiar with the accused from past experience with him. The defence notes that this was during a period from 1987 to 1991, primarily in 1987. This is 15 to 19 years ago, however, I note Sergeant Dahl had considerable contact with him, amounting to approximately 40 hours overall, and his observation at trial was that although he had aged, his appearance was otherwise the same. He noted the features of the accused's appearance, manner and speech from the videos, and the recognition was almost immediate, even though the two had no contact over the years to the point the sergeant viewed the video.
- [13] This feature of the evidence, along with the noted possession of a rather distinctive wig confirmed identification beyond a reasonable doubt in respect of Counts 2 and 3.
- [14] There remains uncertainty, however, in my view, in respect of Count 1. The reservations in the confidence levels expressed by the tellers do not allow proof to the criminal standard. Further, although there is insufficient basis for similar fact to be employed in support of a conviction, the defence can rely on some dissimilarity in the clothing used, adding a further element of uncertainty.
- [16] Mr. Kinley submits that this discussion of the evidence fatally omits discussion of exculpatory evidence of the eyewitnesses, Ms. Harman and Mr. Good. In relation to the robbery of the Beer and Wine Store, Mr. Kinley refers to Ms. Harman's failure to identify him in the photo line-up and her comment in relation to his photograph that he was similar "but I know it's not him", and her evidence she had seen the robber on five occasions when she dealt with him before the robbery but never saw tattoos on him although Mr. Kinley had tattoos on his left hand that were there to be seen. He contends these aspects of the evidence so excluded Mr. Kinley as the robber that the judge was required to advert to them in his reasons for judgment.
- [17] Likewise in relation to the robbery of the Esso Station, Mr. Kinley submits evidence of Mr. Good, not adequately dealt with by the judge, could have excluded him as the robber. Here he refers to Mr. Good's evidence that the robber had a permanent scar on his face, and that he was able to identify Mr. Kinley as the robber because of his scar, combined with evidence Mr. Kinley did not have a permanent scar on his face, and the failure of Mr. Good to identify Mr. Kinley from the photo line-up.

[18] Mr. Kinley further contends other portions of the evidence were inadequately considered in the reasons for judgment, including Mr. Good's evidence as to the robber's statements on purchasing a Mars bar, Ms. Harman's identification of a person sitting on a bench outside as the robber after she had failed to identify him in the photo line-up, evidence Ms. Harman recognized the robber in a picture in the newspaper when the person's face in that picture was not visible, and issues surrounding the wig and its "distinctive" nature. Mr. Kinley also complains that the judge did not address frailties in Sergeant Dahl's identification of Mr. Kinley from the videotapes and voice recording, including the dated nature of his prior acquaintance with Mr. Kinley.

[19] The issue for this Court is whether these omissions in the reasons for judgment give rise to a reviewable error. The seminal authority on the effect of deficiencies in trial reasons upon the appeal process is Sheppard. At para. 21, Justice Binnie, writing for the court, framed the question this way:

The task is not so much to extol the virtues of giving full reasons, which no one doubts, but to isolate those situations where deficiencies in the trial reasons will justify appellate intervention and either an acquittal or a new trial.

[20] He observed at para. 23:

[W]ithin the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented [citations omitted]. The absence of reasons, however, does not necessarily indicate an absence of such concentration. We are speaking here of the articulation of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former.

[emphasis of Binnie J.]

[21] In his thorough exposition of the issue, he observed, at para. 28:

It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. ... The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

[22] Drawing from the jurisprudence, Justice Binnie rejected the proposition that inadequacy of reasons is a free-standing ground of appeal, and articulated instead an approach that ties an assertion of insufficiency of reasons to s. 686 of the Criminal Code as an unreasonable verdict or an error of law in the sense that the deficiency precludes meaningful appellate review of the correctness of the decision, or possibly a miscarriage of justice in that one may conclude the judge failed to appreciate important evidence. He then set out an approach he

summarized in ten propositions (at para. 55), including:

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

* * *

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.

* * *

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.

[emphasis added]

- [23] The Supreme Court of Canada addressed the issue of sufficiency of reasons for judgment in the context of eyewitness identification evidence in *Braich*. This Court (2000 BCCA 184, 143 C.C.C. (3d) 467) allowed an appeal from conviction because of frailties and inconsistencies in the identification evidence which, this Court said, had not been subjected to sufficient analysis by the trial judge. In allowing the appeal, the Supreme Court of Canada affirmed the approach described in *Sheppard*, saying, at para. 25:

Enough was said in the trial judge's reasons to show that he came to grips with the issues thus defined by the defence. His decision ought not to be reversed simply because he did not advert to all of the secondary or collateral circumstances that the respondents say had a bearing on the main issue.

and, at para. 39:

McEachern C.J.B.C. considered that the "frailties" of the identification evidence should not only be mentioned but analysed. I agree, but I conclude, with respect, that the analysis here was sufficient to satisfy the functional requirements of the parties and for appellate review. The issue of identification turned on the credibility of eyewitnesses who knew the suspects. The trial judge had to weigh those factors against the possibility that their evidence may have been tainted. The trial judge does not have to exhibit the novelist's touch for character delineation and motivation. The respondents launched a massive attack on the credibility of their accusers. The trial judge acknowledged the attack and, giving reasons, rejected it....

- [24] The *Sheppard* approach has been affirmed again in subsequent cases including *R.E.M.*

- [25] I turn now to Mr. Kinley's contention the reasons for judgment run afoul of the requirement to give reasons for judgment from which it can be seen evidence was not overlooked, which explain the basis of the verdict to the accused, and which provide an opportunity for adequate appellate review.
- [26] With respect, I do not agree that the reasons for judgment, terse as they are, demonstrate reversible error.
- [27] I do not read the reasons for judgment as ignoring the dated nature of Sergeant Dahl's contact with Mr. Kinley (see para. 12 replicated above), the absence of photo line-up identification (see para. 11 replicated above), or the "wig" issue (see para. 10 replicated above). Although the judge did not spend many words on these issues, I consider that in the context of the record, the reasons for judgment are sufficient to acknowledge the submissions made on the weight that should be given to Sergeant Dahl's evidence, the fact neither Ms. Harman nor Mr. Good identified Mr. Kinley in the photo line-up, and discrepancies in the various descriptions of the robber's hair and the wig Constable Sullivan testified she saw on Mr. Kinley a short time before the robberies occurred. It is clear, I consider, from the reasons for judgment that the judge did not see these aspects of the evidence as raising a reasonable doubt, that he gave considerable weight to Sergeant Dahl's evidence, that he considered the evidence of Ms. Harman and Mr. Good as generally describing the same head covering, and that he considered Constable Sullivan's evidence as circumstantial evidence tending to confirm the identification of Mr. Kinley as the robber.
- [28] Counsel for Mr. Kinley at trial raised Mr. Good's memory of comments made by the robber and the timing of his identification of Mr. Kinley as the robber when Mr. Kinley entered the Esso Station after the robbery had occurred. These were aspects of the evidence plainly before the court. They do not rise, however, in my view, to issues that required comment by the judge. As was said in Sheppard, a trial judge is not required to address each detail in his reasons, provided the basis for his conclusion is apparent.
- [29] Likewise, the evidence that Ms. Harman identified the person she saw sitting on a bench, who turned out to be Mr. Kinley, as the robber after failing to identify him in the photo line-up, and said she saw his picture in the newspaper, were matters argued at trial as undermining the reliability of her identification, but do not rise to matters that were required to be individually addressed. They were, in my view, sufficiently encompassed in the judge's brief analysis of the evidence, and are matters best described in the words used in *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193, as "collateral aspects of the case".
- [30] More was made at the hearing of the appeal on the absence of any discussion in the reasons for judgment on Mr. Good's reference to the robber having a distinguishing mark - a facial scar, which Mr. Kinley does not have, and Ms. Harman's positive assertion that the similar photo (of Mr. Kinley) was not of the robber. The question is whether the absence of discussion on either or both of these matters is a fatal error. I conclude the answer is no.

- [31] Eyewitness identification evidence is often fraught with discrepancies and inconsistencies. In this case, Mr. Good testified the robber had a chin scar. At the time Mr. Kinley was arrested, he had marks on his face from an assault that occurred after the robbery. Whether this explains the inconsistency between Mr. Good's description of the robber and the appearance of Mr. Kinley with injuries healed is not for this Court to determine. Likewise the photograph that Ms. Harman said was not of the robber depicted a person with dark hair, that is, not wearing the whitish-greyish wig she described. Again, whether this explains the inconsistency in her identification evidence is not for this Court to determine. Both of these aspects are examples of the difficulties that may be presented in eyewitness identification. But they are not matters, in my view, that required individual discussion. Instead, they are not unlike the matters this Court considered should have been discussed in Braich but which the Supreme Court of Canada said did not require that expanded attention.
- [32] This was entirely a factual case, and reasons for judgment were delivered after only a brief recess following completion of counsel's submissions. With the evidence and submissions fresh in his mind, the judge, faced with discrepancies in the eyewitness identification on count 1 and without evidence of recognition from prior contact, post-robbery/pre-trial identification or supporting evidence of Sergeant Dahl, acquitted Mr. Kinley. In doing so he demonstrated his appreciation of the effect inconsistencies may have on the issue of identification by eyewitnesses. On counts 2 and 3, however, there was more to the case against Mr. Kinley. It is plain from the reasons for judgment that the convictions on those counts rest upon the pre-robbery knowledge the witnesses had of the robber, their post-robbery recognition of the robber, and the evidence of Sergeant Dahl. In so explaining his conclusion, the judge satisfied the minimal requirements described in Sheppard, in my view. I consider the reasons for judgment are sufficient to advise Mr. Kinley why he was convicted, to connect the evidence to the verdicts and to permit appellate review, and thus I would not accede to the grounds of appeal relating to the sufficiency of reasons for judgment.
- [33] Mr. Kinley also raised in his factum the possibility the judge used Sergeant Dahl's evidence that he recognized Mr. Kinley from his voice on the audio recording (of the Beer and Wine Store) to support the conviction on count 3, robbery of the Esso Station, although there was no audio recording of that robbery. This, he said, would be an error.
- [34] I have earlier replicated paras. 12 and 13 of the trial judge's reasons for judgment. In para 12 the judge said:

He noted the features of the accused's appearance, manner and speech from the videos, and the recognition was almost immediate, even though the two had no contact over the years to the point the sergeant viewed the video.

- [35] In para. 13 he said:

This feature of the evidence, along with the noted possession of a rather distinctive wig confirmed identification beyond a reasonable doubt in respect of Counts 2 and 3.

[36] With respect, I do not read the reasons for judgment as applying evidence of Sergeant Dahl's recognition of the audio recording to both counts. The record of the trial demonstrates the judge considered he could not use evidence on one count as evidence on another. Read correctly, these passages show the judge first addressed the reliability of Sergeant Dahl's recognition evidence based on the videotapes. Having found it reliable, he went on in para. 13 to say Sergeant Dahl's evidence supports conviction on counts 2 and 3. That is, I read the phrase "this feature" as referring to Sergeant Dahl's evidence based on the video recordings, as to which it was correct to say it confirmed identification on both counts 2 and 3.

[37] In conclusion, notwithstanding the full and able submissions on behalf of Mr. Kinley, I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Mackenzie"

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