

CANADA / JUDGMENT

R. v. Kooner

2023 BCCA 8

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 8 R. v. Kooner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kooner,

2023 BCCA 8

Date: 20230111

Docket: CA47465

Between:

Rex

Respondent

And

Amandeep Singh Kooner

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Justice Griffin

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated
January 27, 2021 (conviction) (R. v. Kooner, Surrey Docket 227597-2-C).

Counsel for the Appellant:

K.M. Lee

Counsel for the Respondent:

J. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 11, 2023

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Grauer

Summary:

The appellant appeals from his conviction for leaving the scene of an accident, knowing bodily harm was caused, contrary to s. 252(1.2). The evidence against him was circumstantial. Held: Appeal dismissed. The inferences drawn by the judge from the evidence were reasonable. There was sufficient evidence to support the inference that the appellant was the driver and that he knew bodily harm was caused.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

- [1] Mr. Kooner was convicted of leaving the scene of an accident, knowing bodily harm was caused. No one saw the driver of the vehicle at the moment of the collision, and so the evidence against him was circumstantial.
- [2] The collision occurred on April 14, 2017. The facts as found by the trial judge were that Mr. Kooner was driving a white truck at around 11 p.m. on Fraser Highway in Surrey, BC, when he rear-ended a vehicle causing such damage and force that it sent that vehicle into an oncoming lane of traffic. The propelled vehicle caused a head-on collision with another vehicle which flipped over onto its roof. Mr. Kooner carried on driving, taking a right turn at the nearby intersection and then pulling over at an angle onto the side of the road. He got out of the truck and then went into the woods. A police dog tracked him down, and he was

found in possession of a key to the truck.

- [3] The drivers of the other two vehicles were injured, but the most serious injuries were to the driver of the vehicle that flipped over.
- [4] Mr. Kooner appeals on the basis that the circumstantial evidence was not sufficient to establish: first, that he was the driver and, second, even if he was the driver, that he knew that the drivers of other vehicles suffered bodily harm as a result of the collision.
- [5] While Mr. Kooner attempts to characterize these grounds as errors of law, these arguments are challenges to the judge's factual conclusions based on inferences drawn from the circumstantial evidence. This Court must exercise considerable deference to findings of fact, as it is for the trial judge to decide if there are other inferences available that are sufficient to raise a reasonable doubt: *R. v. Villaroman*, 2016 SCC 33 at paras. 56, 71; *R. v. Nguyen*, 2020 BCCA 166 at paras. 23-25.
- [6] The charge for which Mr. Kooner was convicted was based on s. 252(1.2) of the Criminal Code, R.S.C. 1985, c. C-46 (since repealed and replaced by s. 320.16). At the time of the accident s. 252 provided:

252 (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with

(b) a vehicle

and with intent to escape civil or criminal liability fails to stop the vehicle give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

(1.1) Every person who commits an offence under subsection (1) in a case not referred to in subsection (1.2) or (1.3) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

(1.2) Every person who commits an offence under subsection (1) knowing that bodily harm has been caused to another person involved in the accident is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(1.3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life if

- (a) the person knows that another person involved in the accident is dead; or
- (b) the person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, and the death of that other person so results.

- (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.
- [7] As can be seen, there are increasing degrees of criminal culpability for a hit-and-run, starting with leaving the scene of an accident; leaving the scene knowing that bodily harm has been caused to another person; and even greater culpability for leaving the scene knowing death has been caused or reckless as to whether death resulted from the bodily harm.
- [8] Bodily harm is defined in s. 2 of the Criminal Code as meaning "any hurt or injury to a person that interferes with the health or comfort of the person and is more than merely transient or trifling in nature".
- [9] The law on the use of circumstantial evidence was explained by the Supreme Court of Canada in Villaroman. The judge below correctly instructed himself on the law, holding:
- [19] In *R. v. Villaroman*, 2016 SCC 33, the court provides guidelines in assessing circumstantial evidence in a trial. At paragraph 30, the court notes that inferences drawn from circumstantial evidence must be considered in light of all of the evidence, as well as the absence of evidence, assessed logically with reference to human experience and common sense. Later at paragraph 35, the court comments that the trier of fact should consider if there are reasonable inferences other than guilty when assessing circumstantial evidence. Further, at paragraph 38, the basic question is whether the circumstantial evidence viewed logically and in light of human experience is reasonably capable of supporting an inference other than the guilt of the accused. Lastly, at paragraph 41, to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative.
- [10] When considering the reasonable inferences that can be drawn from circumstantial evidence, the court is to consider inferences consistent with innocence, even if those inferences arise because of a lack of evidence or on something less than proven facts. However, any inferences drawn must be reasonable and assessed logically, in light of human experience and common sense: *R. v. Whitmore*, 2021 BCCA 302 at para. 58, citing *Villaroman*.

Sufficiency of Evidence that Mr. Kooner was the Driver

- [11] The appellant says that the evidence was not sufficient to establish that he was the driver of the vehicle that was involved in the accident and left the scene.

- [12] The judge recognized that the first question for him on the hit-and-run offence was whether the Crown proved beyond a reasonable doubt that Mr. Kooner was the driver. Since no one saw Mr. Kooner in the driver's seat, the judge instructed himself to determine whether the circumstantial evidence was capable of supporting any inference other than the inference that Mr. Kooner was the driver of the vehicle: at para. 20.
- [13] The judge then reviewed the circumstantial evidence with this approach in mind.
- [14] The key witness was another driver on the highway, Mr. Multani. He was returning from work at his restaurant. He was in the inner of two lanes of traffic, which were about to merge into a single lane. He saw a white truck pass him on the right, but could not see inside the vehicle.
- [15] After the merge, Mr. Multani saw the driver of the white truck pass other vehicles by pulling out across the center line into the oncoming lane (at that point there were no oncoming vehicles) before merging back into the proper lane for his direction of travel. Mr. Multani estimated that the driver passed him at a speed of between 40 and 60 km per hour in a 50 km per hour zone, and he described the manner of driving as aggressive.
- [16] Mr. Multani did not see the white truck continuously to the point of impact but, as he approached 140 Street, he heard the noise of an impact, saw dust and smoke, and a car rolled over in the oncoming lane. He then decided to pass by the accident and follow the white truck.
- [17] The drivers of the vehicles that were involved in the accident gave evidence, Mr. Wong and Ms. Baah. In summary, Mr. Wong was driving his red Honda CRV when it was struck from behind by the white truck, sustaining significant damage. The force propelled his vehicle forward into the oncoming lane of traffic, where he collided head-on with a car driven by Ms. Baah. Her vehicle flipped over onto its roof as a result of the collision.
- [18] The driver of the white truck turned right on 140 Street. Following the vehicle, Mr. Multani turned right as well and noticed that the white truck was stopped near the intersection with 96 Avenue. He saw a man outside of the truck standing on the sidewalk approximately 20 feet away. The driver side airbag was deployed in the white truck. The man walked a bit, looked like he tried to hide behind a tree, and then moved deeper into a wooded area. Mr. Multani did not see anyone else nearby. He parked his vehicle and called 911.
- [19] A police officer, Cst. McLuckie, arrived at the scene. He saw that the white truck was significantly damaged on the front driver's side, with dark red paint in the scratches. The vehicle was locked and unoccupied.
- [20] Mr. Multani spoke to Cst. McLuckie and told him about the person who fled into the bushes. Cst. McLuckie radioed for a dog tracker. Cst. McLuckie did not see any other pedestrians.

- [21] Staff Sgt. King arrived with a police dog. The dog began to track from the sidewalk where Mr. Multani had seen the man walking, due to concern about contamination by others in the area between the truck and the sidewalk. Another police officer who arrived, Cst. Bucher, accompanied Staff Sgt. King with the dog. Picking up and following the track for about 50 meters, the dog led the police officers to a spot where, using a flashlight, the officers were able to see Mr. Kooner lying on his back on the ground in the bramble. They advised him that he was under arrest.
- [22] Another police officer arrived on scene, Cst. Tam. He said Mr. Kooner claimed that his back, leg, knee, and head hurt. Mr. Kooner asked Cst. Tam where was the driver. This latter statement was not admitted for the truth of it but rather, in support of an obstruction of justice charge which the judge found was not proven.
- [23] When the police officers asked Mr. Kooner for his identification, he produced his wallet and keys. One key had the same logo as the brand of the white truck and, when police officers tested the key, it unlocked and started the white truck.
- [24] On appeal, Mr. Kooner argues that the evidence was not sufficient to establish that Mr. Kooner was the driver. He points to certain "gaps" in the circumstantial evidence:
- a) Mr. Multani arrived at the location of the white truck at the side of the road after it was parked there and did not see the person on the sidewalk get out of the vehicle;
 - b) The police dog did not start tracking from the vehicle but, rather, started from the sidewalk;
 - c) The police did not check the DNA on the driver-side airbag and match it to Mr. Kooner;
 - d) There could have been multiple sets of keys to the vehicle, or the driver could have handed Mr. Kooner the key. Further, the police did not say whether the vehicle was a push start vehicle.
- [25] Mr. Kooner also says that the police never matched the red paint on the damaged part of the white truck with the paint on Mr. Wong's car; and Mr. Multani did not have a continuous view of the white truck to know that it was involved in the accident. However, the theory that the truck was not involved in the collision was not vigorously pursued on appeal. The judge's conclusion that the truck was the vehicle that caused the collision was well-supported by all of the circumstantial evidence.
- [26] In short, Mr. Kooner's key argument is that there was another available inference on the evidence, namely, that someone else was driving and Mr. Kooner was merely a passenger when the truck was involved in the collision. He says the judge erred in not recognizing this available inference which was inconsistent with guilt. He says inferences consistent with innocence do not have to arise from proven facts, citing Villaroman at paras. 35-36.
- [27] Respectfully, I am not persuaded by this argument.

- [28] As pointed out by the Crown, the judge was not required to identify, explore, and resolve every conceivable and imagined possibility; rather, he only needed to consider reasonable possibilities and plausible theories based on logic and experience, arising from the evidence or absence of evidence: Villaroman at para. 37.
- [29] The possibility that someone else might have driven the white truck and that Mr. Kooner was the mere passenger, is not plausible when all of the evidence is considered. There was nothing arising on the evidence that could suggest that someone else was in the vehicle with Mr. Kooner.
- [30] The judge's conclusion that he was satisfied beyond a reasonable doubt that Mr. Kooner was the driver was well supported by the evidence. After Mr. Multani followed the vehicle and noted that it pulled off the road, he saw Mr. Kooner standing near it and no one else in the vicinity. Mr. Kooner had a key that opened and started the vehicle. The white truck was badly damaged, with red paint marks in the damaged area, consistent with the colour of Mr. Wong's vehicle even though no forensics were performed. The arriving police officer did not see anyone else on the street either. The police dog tracked from the spot where Mr. Kooner was seen on the street to where he was hiding in the bushes.
- [31] Contrary to the appellant's arguments on appeal, it was unnecessary for the judge to consider the remote possibilities that there could be more than one key to the vehicle or the vehicle had a push start, and that, because of these factors, Mr. Kooner might have only been the passenger. Nor was it necessary for the judge to contemplate the existence of another person driving the truck, merely because the dog did not start tracking from the driver's seat of the vehicle. All of the evidence in combination was so compelling that it was simply not plausible that there could have been another driver.
- [32] The judge concluded that he was "satisfied that the only rational inference to be drawn from the totality of the evidence is that Mr. Kooner was the driver". Further, the judge added that there was "no other reasonable inference to be drawn from the evidence": at para. 25.
- [33] The judge's conclusion is a finding of fact and entitled to deference on appeal. The trial judge's role is to decide whether there are available reasonable alternative inferences that raise a doubt, or whether the arguments advanced simply amount to speculative possibilities and, ultimately, the trial judge's assessment can only be set aside where it is unreasonable: see Nguyen at para. 23; Villaroman at para. 71.
- [34] The judge's conclusion that Mr. Kooner was the driver was reasonable and it has not been shown that he committed a palpable and overriding error in his appreciation of the evidence: R. v. Clark, 2005 SCC 2 at para. 9.
- [35] Therefore, there is no ground to interfere with the judge's conclusion that the Crown proved beyond a reasonable doubt that Mr. Kooner had the care and control of a vehicle involved in an accident with another vehicle, and failed to stop his vehicle and provide assistance or identify himself, with the intent to escape civil or criminal liability.

Sufficiency of Evidence that Mr. Kooner Knew the Accident Caused Bodily Harm

- [36] It was proven that persons were injured in the collision caused by Mr. Kooner's driving. Mr. Wong's evidence was that, immediately after the collision, he was feeling sore all over but particularly in both knees and his right hip. His right hip was badly bruised, turning purple and black in colour, which he assumed was from the pressure of the seatbelt in the collision. Also, his knees were sore for a few weeks, with the left knee continuing to cause him some trouble. He had no broken bones or a head or neck injury. Mr. Wong's injuries constitute "bodily harm" within the definition of the Criminal Code.
- [37] Ms. Baah's injuries were more serious, which included broken ribs and injured fingers requiring surgery. These injuries also constitute "bodily harm".
- [38] This gives rise to the next question on appeal, namely, whether the evidence was sufficient to establish that Mr. Kooner knew that the accident caused bodily harm, a necessary element of s. 252(1.2). The appellant says that the evidence was not sufficient and, at most, if unsuccessful on the first ground of appeal, he should only have been convicted of leaving the scene of an accident, contrary to s. 252(1).
- [39] The judge's conclusion regarding Mr. Kooner's knowledge was succinct. He found at paras. 38-39:
- [38] It would have been clear to Mr. Kooner that he had been involved in a serious motor vehicle accident. Mr. Multani described hearing the sound of the accident and observing dust and smoke. The vehicle driven by Ms. Baah flipped over onto its roof. The vehicle driven by Mr. Wong was damaged in the accident. There was extensive damage to the front of Mr. Kooner's vehicle.
- [39] I am satisfied that Mr. Kooner's actions of driving away from the scene of the accident, parking on 96 Avenue and fleeing into the wooded area is consistent with his knowledge of the accident. It would have been clear that the drivers of the other vehicles suffered bodily injury due to the extent of the accident.
- [40] Mr. Kooner argues that, in using the language "it would have been clear" at paras. 38 and 39, the judge applied a "must have known" test, which wrongly applied objective knowledge rather than finding that Mr. Kooner, subjectively, had actual knowledge.
- [41] I disagree. The judge did not have the benefit of testimony from Mr. Kooner so he had to draw conclusions about what he actually knew based on the whole of the evidence as to the nature of the accident and Mr. Kooner's conduct. The fair reading of the judge's reasons shows that the phrase "would have been clear" was used by the judge to indicate that he was drawing an inference when concluding that Mr. Kooner had actual knowledge.
- [42] Trial reasons should be read generously, as a whole, with the presumption that the judge knows the law: *R. v. Gerrard*, 2022 SCC 13 at para. 2; *R. v. G.F.*, 2021 SCC 20 at paras. 69, 74.

- [43] In my view, the judge's choice of words "it would have been clear", read in the context of the reasons as a whole, indicate that the judge decided that Mr. Kooner's actual knowledge of bodily harm was based on the circumstantial evidence of the force of the accident as well as Mr. Kooner's choice to flee.
- [44] Driving his own vehicle aggressively, Mr. Kooner hit a vehicle that was travelling down the same road. The impact had great force, as proven by the extensive damage to his own vehicle (made clear by photographs in evidence) and by the fact that it propelled Mr. Wong's vehicle into oncoming traffic, colliding with another vehicle. A driver who hits another vehicle with significant force knows that he has done so. The judge's finding that Mr. Kooner had this knowledge did not need amplification.
- [45] Actual knowledge was also consistent with wilful blindness in these circumstances. The judge was aware of the principles by which actual knowledge can be found based on wilful blindness, noting in his discussions with counsel during submissions that this Court had discussed it in a recent hit-and-run case, the case of *R. v. Edwards*, 2020 BCCA 253.
- [46] As explained in *Edwards*, an accused can be found to have the requisite actual knowledge to establish mens rea where the circumstances make the accused aware of a need to make some inquiry, but the accused fails to make the inquiry because the accused does not wish to know the truth: at para. 74. In *Edwards*, Willcock J.A. held:
- [67] The test is stated nicely in *R. v. Farmer*, 2014 ONCA 823 by Sharpe J.A. (at para. 26): the accused must have "shut his eyes because he knew or strongly suspected that looking would fix him with knowledge" or because he became "aware of the need for some inquiry [yet] decline[d] to make the inquiry because he [did] not wish to know the truth".
- [68] In *R. v. Morrison*, 2019 SCC 15, Moldaver J. for the majority described the heightened level of suspicion as follows:
- [98] Wilful blindness exists where an accused's "suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries": *R. v. Briscoe*, ... at para. 21 (emphasis in original). Wilful blindness has been characterized as "deliberate ignorance" because it connotes "an actual process of suppressing a suspicion": D. Stuart, *Canadian Criminal Law: A Treatise* (7th ed. 2014), at p. 261. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew": *Briscoe*, at para. 23, citing G. Williams, *Criminal Law: The General Part* (2nd ed. 1961), at p. 159. This Court has repeatedly held that if an accused is found to be wilfully blind, that state of mind may substitute for actual knowledge: *Sansregret v. The Queen*, ... at pp. 584-85; *Briscoe*, at para. 21. Indeed, it is "equivalent to knowledge": *Briscoe*, at para. 23, citing Williams, at p. 159. [Emphasis in original.]
- [69] The hit-and-run cases referred to by counsel suggest a suspicion sufficient to cause the accused to believe he should make further enquiries before leaving the scene of a collision meets the "heightened suspicion" test.

- [47] This was not a case of a driver hitting a parked vehicle, not knowing that there was someone inside the vehicle. Nor was it a case where there was a minor bump between cars moving slowly, such as when navigating around a parking lot.
- [48] For purposes of considering the appellant's best argument on this ground of appeal, I will presume that Mr. Kooner may not have seen the vehicle he hit collide with another vehicle, causing the second vehicle to flip over. Nevertheless, the noise and smoke of the collision, Mr. Kooner's decision to keep driving away despite knowing he hit the first vehicle as it was moving and having had no sign that the vehicle had safely stopped, and Mr. Kooner's decision to flee, all support the conclusion that Mr. Kooner was wilfully blind to all the indications that he caused a serious accident in which people were injured.
- [49] It was reasonable for the judge to infer from these facts alone that Mr. Kooner knew he caused bodily harm to the occupant of Mr. Wong's vehicle. It is common sense and common experience that a motor vehicle impact with this degree of force leads to injury.
- [50] Importantly, the definition of bodily harm in the Criminal Code is any hurt or injury that interferes with the health or comfort of a person and is more than merely transient or trifling. Minor injuries interfering for a short time with a person's comfort were found to constitute bodily harm, including small bruises, swelling and headaches: *R. v. Dixon*, (1988), 42 C.C.C.(3d) 318, 1988 CanLII 2824 (Yuk. C.A.) at para. 45, cited in *R. v. Bulldog*, 2015 ABCA 251 at para. 44; *R. v. C.K.*, 2001 BCCA 379 at paras. 7-9.
- [51] In conclusion, even if only his vehicle's impact with Mr. Wong's vehicle is considered and Mr. Kooner is presumed not to have seen the consequential collision with the vehicle driven by Ms. Baah, in my view, it was open to the judge to infer that Mr. Kooner knew that the other person in the car he directly hit suffered some injury and discomfort that met the test of bodily harm within the definition of the Criminal Code. At a minimum, the force of the collision made it obvious to Mr. Kooner that he should stop and make inquiry, and he did not do so because he did not want to know the truth. On the facts as found by the judge, Mr. Kooner can be deemed to have actual knowledge.
- [52] I am of the view that the appellant has not established a basis to interfere with the judge's conclusion that Mr. Kooner was guilty of leaving the scene of an accident, knowing that bodily harm was caused to another person, contrary to what was then s. 252(1.2) of the Criminal Code.

Disposition

[53] I would dismiss the appeal.

"The Honourable Justice Griffin"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Grauer"

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