
CANADA / JUDGMENT

R. v. Lessard

2005 BCCA 395

COURT

British Columbia Court of Appeal

DECIDED

2 August 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCCA 395 R. v. Lessard

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lessard,

2005 BCCA 395

Date: 20050802

Docket: CA032321

Between:

Regina

Respondent

And

Michael Andre Lessard

Appellant

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

R.A. Ross

Counsel for the Appellant

K.S. Wikberg

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

26 May 2005

Place and Date of Judgment:

Vancouver, British Columbia

2 August 2005

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

- [1] On his appeal from conviction for robbery, the appellant argues that the trial judge erred in his application of the principles enunciated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, and erred in using propensity based reasoning to conclude that the incident was more likely to have occurred the way the complainant described it than the way the appellant described it because the appellant was a drug addict.
- [2] For the reasons which follow, I would not accede to the appellant's submissions on the grounds of appeal he has advanced and would therefore dismiss his appeal.

II. The evidence

- [3] The complainant, a sixteen year old student in grade eleven, testified that he was on his way home from school on 2 June 2004, at approximately 3:40 p.m., when he was accosted by a male, later identified as the appellant, just after he got off a transit bus at Joyce Station in Vancouver. He said that as he crossed Vanness Avenue, the appellant grabbed him by the left arm at the elbow and said: "Don't scream or I'll stab you in the neck."
- [4] The complainant said the appellant had a knife in his right hand. He described it as a kitchen knife with an orange handle and a jagged edge between six and eight inches in length. The complainant asked the appellant, "If I cooperate with you, do you promise to not harm me?" and the appellant replied, "Yes".

- [5] The pair walked across the street to a convenience store. As they were walking the appellant asked the complainant if he had any money. The complainant gave him \$20. The appellant then asked him if he had a debit card and the complainant said that he did. The appellant told the complainant to withdraw \$300 but the complainant told the appellant that he did not believe the account contained that much money. The appellant then asked the complainant how much he believed was in the account, to which the complainant replied, "About \$250." The appellant then told him to withdraw \$240.
- [6] At the convenience store the complainant attempted to withdraw \$300 but the transaction was denied on two occasions. They then left the store and crossed the street to the Community Savings Credit Union where there was an ATM. The appellant made an unsuccessful attempt to withdraw cash. He then asked the complainant what his withdrawal limit was and the complainant replied that it was \$100. After the appellant had withdrawn \$100, he asked the complainant if he was able to charge purchases on his card. After the complainant said that he could, they returned to the convenience store where the appellant selected several items from the shelves including a glass pipe, a Brillo pad, two cans of root beer, a few bags of chips and a package of cigarettes. The complainant stayed by the entrance of the store.
- [7] The complainant said that after they left the store, the appellant let him leave but kept his debit card. The appellant told the complainant that if he cancelled the debit card, he would find him and kill him.
- [8] The complainant went home and called the police.
- [9] Photographs taken by the police showed bruising on the complainant's left arm.
- [10] The clerk at the convenience store testified. He said that when the appellant and the complainant entered the store they proceeded immediately to the cash machine. He stated that while the complainant attempted three or four unsuccessful transactions, the appellant stood right beside him and appeared to be getting frustrated. The clerk testified that approximately ten minutes later, the pair returned to the store. The appellant selected some items and presented the debit card and entered the PIN number, while the complainant stood by the entrance door. The clerk testified that he questioned the appellant because of the Asian name on the debit card but the appellant told him that the complainant was a foreign exchange student and that he was taking care of him.
- [11] The clerk testified that the police arrived fifteen to twenty minutes after the pair had left the store and that he was questioned about the incident. The police asked him to call them if he saw the suspect again. The clerk saw the appellant approximately thirty minutes later on the corner of Joyce Street and Vanness Avenue talking on a cell phone and getting into a cab. The clerk called the police.
- [12] The appellant gave evidence. He testified that he is a drug addict and that the complainant, a total stranger, had approached him and asked for his help in buying drugs.

- [13] A videotape of the ATM area of the Community Savings Credit Union was introduced into evidence. Before the trial judge, defence counsel argued that the video showed a cooperative complainant seeking to get money to give to the appellant so that the appellant could go and get him drugs.
- [14] The appellant testified that the purchases made at the convenience store were made with the acquiescence or consent, even encouragement, of his new-found customer. It is common ground that some of the items purchased are accoutrements in certain drug use.
- [15] The appellant denied threatening to kill the complainant if he cancelled his debit card. The appellant denied that he knowingly possessed the bank debit card and said that he only discovered he had it shortly before he was stopped by the police. He testified that he had no intention of using the card.
- [16] The appellant admitted that what he had done amounted to a theft of money in that he had not intended to bring drugs back to the complainant.

III. The trial judge's reasons

- [17] After summarizing the evidence, the trial judge made reference to the submissions of counsel on R. v. W.(D.). He then gave his reasons for disbelieving the appellant and for concluding that the case against the appellant had been proved beyond a reasonable doubt. In finding the Crown's case had been proved to the criminal standard, the trial judge observed that there was no other explanation for the physical injury to the complainant's arm and that the complainant's conduct in reporting the incident to the police immediately after it occurred enhanced his credibility. The trial judge found the evidence of the store clerk to be more consistent with the evidence of the complainant than the evidence of the appellant. In rejecting the appellant's evidence, the trial judge stated, among other things, that the complainant's evidence made sense whereas the appellant's did not.
- [18] In the course of his reasons, the trial judge also stated:
- [15] And there's the evidence of motive which I alluded to earlier. Mr. Lessard, you are a drug addict. That doesn't make you a bad person. What it does mean is you are desperate often, or will be for drugs. You are likely prepared to threaten another person to get money to buy drugs. There is no reason if this were a mere theft of money, a drug rip-off, that [the complainant] would unquestioningly let you take his bank card knowing that you knew his PIN. This evidence makes it much more likely that his story is true and your story is untrue. It is not believable and I do not believe you.

IV. The grounds of appeal

- [19] On the first ground of appeal, the appellant asserts that the trial judge erred in his application of the W.(D.) principles by:

1. using equivocal evidence as corroboration of the complainant's evidence where the evidence could equally support the accused's testimony;
 2. engaging in a credibility contest regarding the evidence of the complainant and the accused, even though disbelieved; and
 3. failing to consider whether the appellant's evidence raised a reasonable doubt.
- [20] On the second ground, the appellant argues that the trial judge "erred in using propensity based reasoning to conclude that the incident was more likely to have occurred as the complainant described because the Accused was a drug addict."
- [21] On the first ground, the appellant submits that much of the evidence the trial judge relied on as corroborative of the complainant's evidence was also corroborative of, or at least consistent with, the appellant's evidence. The essence of the appellant's argument on the first ground of appeal is summarized in the following paragraph of his factum:
54. The Learned Trial Judge's conclusion that the complainant's version makes sense while the Appellant's does not is based on his reliance on evidence which he concludes is corroborative when in fact, viewed objectively is equivocal. The evidence is capable of corroborating both the complainant's and the Appellant's version of events. Therefore, the incident may have occurred as described by the complainant or it may have occurred as described by the Accused. When the equivocal circumstantial evidence is viewed objectively, the weight of the evidence does not support a conviction.
- [22] It is the appellant's submission that when the circumstantial evidence, viewed objectively, was capable of supporting both accounts, a proper application of the tests in W.(D.) ought to have led the trial judge to the conclusion that there was reasonable doubt as to which version of events was true and that an acquittal on the robbery charge ought to have followed.
- [23] On the second ground of appeal, the appellant argues that the fact that he is a drug addict is not evidence of a motive to commit robbery and his drug addiction ought not to have been used to infer that he was likely to have committed robbery. The appellant further argues that the fact that he uses drugs was capable of supporting his evidence that he initially planned to assist the complainant to obtain drugs, expecting to get a portion of the drugs.

V. Analysis

(i) Ground one

- [24] In my view, the appellant's argument on the first ground of appeal overlooks two well established principles. The first is that it is up to the trier of fact to determine what evidence is accepted and what inferences are to be drawn from the facts found. Moreover, evidence is not necessarily "equivocal" simply because there is another possible explanation advanced by the defence. Unless the facts found or the inferences drawn are unreasonable, there is no proper foundation for this Court to interfere with the verdict: *Housen v. Nikolaisen*, [2002] 2

S.C.R. 235, 2002 SCC 33.

- [25] The second principle the appellant's argument overlooks is that each piece of evidence, standing alone, does not have to prove the guilt of the accused. An argument similar to the one put forward here was considered in *R. v. Jeng*, 2004 BCCA 464, [2004] B.C.J. No. 1884 (Q.L.). In that case, the appellant argued that the trial judge had erred in relying on equivocal, circumstantial evidence in arriving at his verdict. In rejecting that argument, Ryan J.A. said, at paragraph 46:

Fifth, the appellant submits that the trial judge erred in relying on the circumstantial evidence of the water bottle, earring, and plastic roll found in the hallway without taking into account its equivocal nature. The trial judge found that the placement of these items in the hallway supported the complainant's version of the struggle. This was a fair inference. Further, it is trite law that each piece of evidence standing alone need not prove the guilt of the accused. The question is whether the whole of the evidence establishes the guilt of the accused on each element of the offence beyond a reasonable doubt. The trial judge did not misapprehend or misuse the physical evidence produced in this case. I would dismiss this ground of appeal.

- [26] In the case before us, the appellant does not and could not plausibly argue that all of the circumstantial evidence relied on by the trial judge in arriving at his verdict was capable of supporting either version of events. That is particularly so of the physical injury to the complainant's arm noted by the police shortly after the incident and the complainant's call to the police immediately after he arrived home.
- [27] In assessing the evidence, the trial judge also relied on the store clerk's description of what he had observed when the appellant and complainant were in the store, including the several attempts to obtain money from the machine and the appellant's later use of the complainant's debit card to buy items in the store. Other evidence the trial judge took into account in accepting the complainant's version of events and rejecting the appellant's version included the store clerk's testimony that the complainant appeared to be "scared"; the age of the complainant and the difference in the ages of the complainant and the appellant; the evidence of motive to obtain money for drugs drawn from the appellant's admission that he was a drug addict; the fact that the complainant let the appellant take his bank card knowing that the appellant knew his PIN; and the video from the Credit Union showing the appellant standing close to the complainant by the ATM.
- [28] In argument the appellant took issue with certain of the trial judge's findings. For example, he submitted that the store clerk's observations of what occurred in the store were entirely consistent with the appellant's version of events and that the clerk's evidence showed that the complainant was not participating against his will because he had ample opportunity to leave the store or to alert the clerk. The appellant also pointed out that while the store clerk said in his evidence in chief that the complainant looked afraid, he agreed in cross-examination that the complainant may have been avoiding eye contact due to embarrassment or to avoid being recognized. He also submitted that the appellant's physical

proximity to the complainant at the ATM in the Credit Union was equally consistent with the pair working together to obtain cash to be used to purchase drugs and was therefore consistent with the appellant's testimony.

[29] An examination of the transcript undermines the appellant's submissions regarding the evidence of the store clerk. In direct examination the clerk stated that when the pair first entered the store, the complainant appeared to be scared. During cross-examination, the clerk was asked whether the complainant could have been embarrassed instead of scared:

Q: But what he might have been as well was afraid that you would recognize him. He was not looking at you directly, correct? He might have been afraid or embarrassed about what he was doing. You can't really say based on the actions that you've described; is that fair?

A: Yes.

Q: But what you've described is consistent with being scared or being embarrassed perhaps; is that right?

A: Most scared.

Q: Okay. Well, you think scared now, but at the time did you think that or did you just think there was something weird about his behaviour?

A: It's a kind of weird as well, too.

Q: Okay. Okay, going back to where I was, it might well have been just that he was embarrassed to be there. That would explain the weirdness of his behaviour. You don't know what he was thinking, do you.

A: Well, the guy actually basically was with Oriental, he was not acting like a normal basically. He was moving a lot, a kind of wanted just quick do something and run away and that guy was a kind of just calm and looking at me kind of the corner of eyes and I assume he's as scared, there's something weird going on here.

[Underlining added.]

[30] As the transcript shows, when the clerk was pressed on the point during cross-examination, he did not resile from his earlier evidence that, to him, the complainant had looked scared.

[31] The appellant also argues that the clerk's evidence establishes that the complainant had ample opportunity to leave the store or to alert the clerk to what was happening, but did not do so. The clerk agreed that the complainant had the opportunity to alert him but "nothing happened". However, when the complainant was asked whether he could have alerted the clerk and received assistance from him, the complainant responded that the clerk was not a friend or acquaintance and that he could not be sure that the clerk could assist him. The trial judge accepted the complainant's evidence, having found that, in the circumstances, it was not unreasonable for a young person dealing with an older person who was carrying a weapon to behave as he had.

- [32] The appellant also argues that the physical proximity of the complainant and the appellant in the ATM area of the Credit Union was consistent with the pair working together to obtain cash to purchase drugs but the trial judge rejected that inference. The trial judge found that if the incident were a mere drug rip-off, as the defence had characterized it, it was unreasonable that the complainant would let the appellant take his bank card knowing that the appellant knew his PIN number. Further, the trial judge found that the appellant had threatened the complainant and their proximity at the bank machine was indicative of that.
- [33] Finally, the appellant argues that the trial judge's finding that the appellant's drug addiction provided a motive to commit robbery is equally consistent with the appellant's version of events that he planned to assist the complainant to obtain drugs. I do not agree that on this point the evidence supports the appellant's version of events.
- [34] According to the appellant's evidence, it was the complainant, not the appellant, who initiated the contact and the appellant simply took advantage of the situation. However, on the appellant's evidence, the incident could not have come about simply because he is a drug addict. As the following extract from the transcript of the appellant's cross-examination shows, the appellant did not know the complainant and the complainant would have had no reason to know that the appellant was a drug addict:

Q: So this person approaches you, you've never met him before, correct?

A: That's correct.

Q: You've never done any of these deals with him before.

A: No.

Q. And you just assume he'll know.

A: Well, hey drug addicts know. Go down the street, ask a drug addict.

Q: [The complainant] doesn't look like a drug addict, does he.

A: Well, nobody looks like a drug addict. Do I look like a drug addict? No.

- [35] Based on the foregoing testimony, the fact that the appellant was a drug addict had no relevance to how the incident began and he had no motive to speak to or initiate any contact with the complainant.
- [36] The trial judge rejected the appellant's version and found that the appellant's addiction to drugs had prompted his contact with the complainant. The trial judge found that the appellant's addiction meant that he would often be desperate for drugs and that provided an impetus or motive for the appellant to threaten another person to get money to buy drugs. That was a fair inference to draw.
- [37] It was open to the trial judge, as the trier of fact, to draw the inferences he did from the evidence and, in my view, the inferences he drew could not be said to be unreasonable.

- [38] While each piece of evidence to which the trial judge referred would not be capable, on its own, of supporting the complainant's version of events, it was the whole of the evidence that had to be considered by the trial judge in deciding whether the case against the appellant had been proved beyond a reasonable doubt.
- [39] I turn now to the other points raised by the appellant as part of the first ground of appeal. The appellant contends that the trial judge, in arriving at his verdict, engaged in a credibility contest between the complainant and the appellant, and, further, that he erred by failing to consider whether the appellant's evidence, even though disbelieved, raised a reasonable doubt.
- [40] In my view, the appellant's arguments on these points must fail.
- [41] In the course of his reasons for judgment, delivered orally immediately following the submissions of counsel, the trial judge said the following:
- [10] That is the evidence, the two stories that [defence counsel] says must be measured according to the standards set out in *R. v. W.D.* and cases following it with the enhanced principle set out by Mr. Justice Wood in the B.C. Court of Appeal. I'm very familiar with that law and I do apply it here.
- [42] The "enhanced principle" to which the trial judge was referring was stated by Wood J.A. in *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146, 3 B.C.A.C. 205 [cited to C.C.C.] as follows at 155:
- I would add one more instruction in such cases, which logically ought to be second in order, namely: "If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit."
- [43] While it is true that the trial judge did not repeat the formula set out in *W.(D.)*, that alone does not constitute reversible error. However, it must be clear from an examination of the reasons that the trial judge did have regard for the principles underlying the *W.(D.)* instruction: *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542, 68 O.R. (3d) 577 (Ont. C.A.) at paragraph 22.
- [44] In light of the argument made by the appellant on these points, I think it is helpful to refer to the reasons for judgment of Ryan J.A. in *R. v. Jeng*, at paragraph 37, in which she explains that what is referred to by counsel as a "credibility contest" may actually be a description of the process involved when the trier of fact is resolving credibility issues:
- [37] The appellant's first point in his factum is that the trial judge characterized the issues as a credibility contest. Where a complainant and an accused give two different versions of an event, the trier of fact must attempt to resolve the issue of credibility. To convict, the trier of fact must not only believe the complainant, she must reject the evidence of the accused. To that extent what confronts the trier of fact may be called a "credibility contest". But it is not merely a credibility contest. If the evidence of the accused is not believed, it may nonetheless raise a reasonable doubt. What the trier of fact cannot do is assume that she

must choose between the witnesses as to whom she believes.

- [45] As explained in *Jeng*, a "credibility contest" may merely refer to the acceptance by the judge of one version and the rejection of the other. It does not necessarily mean that the judge has failed to consider whether an accused's evidence raises a reasonable doubt.
- [46] It is not uncommon for counsel, during submissions, to frame the credibility issues as a choice that must be made between two versions of events. For example, I note that in the appellant's factum, his review of the law begins with the phrase, "The issue before the Trial Judge was which version of events was the truth."
- [47] If it is implicit in the reasons as a whole that the trial judge applied the principles underpinning the instruction in *W.(D.)*, the fact that one of the steps in the formulation is not articulated in the reasons is not fatal. This issue was referred to by the Ontario Court of Appeal in *R. v. Nelson*, [2004] O.J. No. 3103 (O.C.A.) (Q.L.) at paragraph 19, as follows:

In light of the jurisprudence recently developed by this court, which the summary conviction appeal judge did not have the benefit of, a trial judge ought to generally articulate in his reasons that he has considered the middle ground of *W.(D.)*. In this case, however, it was not essential that the trial judge do so. It was implicit in her reasons that she found the appellant's testimony incredible and that it did not therefore leave her with a reasonable doubt. Unlike *Y.M. [R. v. Y.M.]*, (2004), 186 C.C.C. (3d) 247, 187 O.A.C. 101], the appellant knew why his denials were disbelieved and the reasons provide an adequate basis for appellate review.

- [48] In his reasons in this case, the trial judge averted to the submissions of defence counsel, including the submissions on the need to consider the steps in the *W.(D.)* formulation. His reasons make plain that he rejected the appellant's evidence completely. While he did not say so explicitly, it is implicit in what he did say that the trial judge had excluded any possibility of there being a reasonable doubt on the evidence. In other words, although he did not specifically articulate each step of the *W.(D.)* instruction, it is clear from the judgment read as a whole that the trial judge followed the necessary reasoning in arriving at his verdict.
- [49] I would not accede to the appellant's arguments on the first ground of appeal.

(ii) Ground two

- [50] In the second ground of appeal, the appellant contends that the trial judge erred by engaging in propensity reasoning.
- [51] At the start of the direct examination of the appellant, the appellant admitted to having a criminal record and his counsel filed the record with the court. He admitted to "getting high" after the incident with the complainant and was about to "get more dope" when he was arrested. On cross-examination, he admitted that heroin is his drug of choice and that he is a drug addict.

- [52] It is not an error for a trial judge to consider evidence of bad character where the evidence relates, not to propensity, but to a motive to commit the offence: R. v. Holtam (2002), 165 C.C.C. (3d) 502, 2002 BCCA 339; R. v. Dupras (2003), 173 C.C.C. (3d) 55, 2003 BCCA 124.
- [53] The trial judge was careful to state that he was not engaging in propensity reasoning in his use of the appellant's "bad character". He stated the following in the reasons for judgment:
- [15] And then there's the evidence of motive which I alluded to earlier. Mr. Lessard, you are a drug addict. That doesn't make you a bad person. What it does mean is you are desperate often, or will be for drugs. You are likely prepared to threaten another person to get money to buy drugs.
- [54] The trial judge was using the fact that the appellant is a drug addict, not to show that he is of bad character, and therefore, more likely to commit the crime, but to draw the inference that someone addicted to drugs needed money to obtain them and therefore had a motive and was more likely to engage in activity, including illegal activity, that would get him money to support his drug habit.
- [55] I would not accede to the second ground of appeal.
- [56] In the result, I would dismiss the appeal.
- "The Honourable Madam Justice Rowles"
- I Agree:
- "The Honourable Mr. Justice Donald"
- I Agree:
- "The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/05/03/2005bccca0395.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lessard-2005>

Prepared on 29 October 2026 · Esheria