

CANADA / JUDGMENT

R. v. McCallum

2010 BCCA 587

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 587 R. v. McCallum

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McCallum,

2010 BCCA 587

Date: 20101210

Docket: CA038015

Between:

Regina

Respondent

And

Robert Laurie McCallum

Appellant

Ban on Publication pursuant to s. 486.4(1) of the Criminal Code

Before:

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Mackenzie

The Honourable Madam Justice D. Smith

On Appeal from: Supreme Court of British Columbia, December 15, 2009

(R. v. McCallum, Victoria Docket No. 141793-2)

Oral Reasons for Judgment

Counsel for the Appellant:

D. J. McKay

Counsel for the (Crown) Respondent:

M. Mereigh

Place and Date of Hearing:

Victoria, British Columbia

December 10, 2010

Place and Date of Judgment:

Victoria, British Columbia

December 10, 2010

- [1] HUDDART J.A.: The appellant was convicted of assault and sexual assault on 15 December 2009. He was sentenced on 8 March 2010 to 30 months in custody for the sexual assault and 30 days for the assault, to be served concurrently.
- [2] The only issue at trial was whether the assaults and sexual assault happened on 5 January 2008. Both the complainant and appellant had been drinking steadily from early that morning, first at several licensed establishments and then at the appellant's home with a man they met along the way ("Mark"). Both were intoxicated. Both testified.
- [3] The complainant said that, at some point, she changed into her nightgown, sat down and watched television, then lay down on the couch in the living room and fell asleep. She woke up because the appellant was touching her with one hand between her legs and stimulating himself with the other. She tried to push him away, swore at him, and told him to smarten up. He held her down, kneeled over her, spread her legs using his knees, entered her with his penis and had, or attempted to have, intercourse. She rejected this by trying to push him away, by telling him to stop and by struggling with him when he tried to take her to his bedroom. At some point during the struggle she got away and the two then scuffled in the living room. She was injured during the course of these events. She called 9-1-1 three times before the appellant, who was laughing at her, disconnected the telephone either from its base (in the bedroom) or the computer (in the living room). The police arrived shortly and took the appellant to the hospital where she was examined by a sexual assault nurse and her injuries were photographed. Photographs of the house and the complainant and a copy of an audio recording of the three very brief 9-1-1 calls were entered as exhibits at the trial.

- [4] The appellant testified that after having consumed too much alcohol he got dizzy and went to bed. When he woke up later that evening, he went into the living room where he found the complainant sitting at the computer making a telephone call. As a joke he hung up the phone on her; she got mad and left the room. He then sat down at the computer and had another beer. Then the police arrived and arrested him. He denied any physical contact with her that evening.
- [5] The trial judge heard the testimony of the appellant, the complainant and the police officer who attended the incident, accompanied the complainant to the hospital and drove her to a friend's house very early the next morning, as well as the sexual assault nurse who examined the complainant at the hospital. The essence of his reasons is that the evidence as a whole, particularly the recording of the complainant's 9-1-1 calls, not only corroborates her testimony about the core allegations, but negates any possibility of fabrication, just as it renders the appellant's testimony implausible.
- [6] Some facts are uncontested. The complainant had lived with the appellant intermittently for six months before the incident and had become significantly dependent on his generosity. When she stayed over, they sometimes slept in the same bed. Mark had left before the police arrived, probably before both the appellant and the complainant fell asleep. On examination in the hospital, the complainant evinced redness and bruising at various places on her body, and told the sexual assault nurse examiner she was sore between her legs, among other places. Although the blood analyst's certificate was not in evidence, it is not disputed that a test taken at the hospital around 1 a.m. on 6 January 2008 revealed a blood alcohol level of .237.
- [7] The appellant applied under s. 276.1 of the Criminal Code to determine whether evidence of the complainant's sexual relationship with the appellant was capable of being admissible under s. 276(2) at trial, then scheduled to begin on 1 June 2009 with a jury. Justice Ehrcke found the appellant had met the threshold required by s. 176.1 and directed that a hearing be held under s. 276.2 to determine whether the evidence would be admissible. The proposed evidence was said to be relevant to the complainant's motive to lie about the nature of her relationship with the appellant. That hearing was not held before the trial was adjourned and a new trial judge appointed. The application was not renewed at trial.
- [8] On appeal, the appellant alleges errors in evidentiary rulings made during the trial and errors of analysis in his reasons which render the trial unfair and the verdict unreasonable. Because I am not persuaded the trial judge made any material error, that the trial was unfair or that the verdict was unreasonable, I will consider each of the grounds of appeal seriatim as they were presented in his factum.

The trial judge erred by restricting cross-examination of the complainant on issues relating directly to her credibility

- [9] At issue under this ground of appeal, are three evidentiary rulings:

- (i) In response to an objection from Crown counsel during cross-examination of the complainant on her criminal record that counsel could not ask her about "charges" she might have faced, the trial judge ruled that defence counsel could "put to her whether she was convicted of a particular offence at a particular time and we'll see where that goes." The appellant submits this ruling unduly limited the scope of defence counsel's inquiry and resulted in trial unfairness by precluding cross-examination on the facts underlying three convictions for breach of conditions.

The transcript contradicts this assertion. It may be that defence counsel misunderstood the trial judge's ruling or that he anticipated an unfavourable ruling by the trial judge in the exercise of his discretion to keep questioning within "bounds of relevance and propriety". It is not and was not disputed at trial that defence counsel is entitled to cross-examine a witness on facts underlying a conviction to the extent they may be relevant to her credibility or to another issue: *R. v. Miller* (1988), 131 C.C.C. (3d) 141 (Ont. C.A.), at paras. 22 to 24. But trial counsel did not attempt to exercise that right in this case after he put the convictions to the complainant and she confirmed them.

- (ii) During cross-examination of the complainant, defence counsel requested permission to cross-examine her as to the nature of her relationship with the appellant. He argued this evidence would add context to their interactions on the evening in question. The defence theory, first put forward at the hearing of the s. 276.1 application, was that the complainant had kept her relationship with the appellant a secret from her boy friend and lied about the sexual assault and assault as a means of ending it, something she could not do on her own. On the basis that the court already had the context of the relationship, the appellant was not arguing consent or mistaken belief in consent, and that evidence about the relationship did not "rationally support a motivation to lie," the trial judge ruled this line of questioning not to be relevant. Defence counsel submits that this ruling was wrong; an exploration of the relationship was relevant to the primary issue in the case, the complainant's credibility.

My review of the transcript persuades me that the complainant did answer, without objection, questions about the nature of her relationship with the appellant and about what she had told her boy friend about it. What the trial judge precluded were questions about what she thought was in the appellant's mind as to the nature of their relationship.

- (iii) In response to Crown counsel's objection to questions about a physical altercation with "Shawn," a boy friend she had met some months after the incident in question, the trial judge ruled no foundation had been laid to establish the relevance of that altercation to "what happened on the occasion giving rise to the charges." At trial, defence counsel had submitted that evidence of the altercation was relevant to the complainant's physical ability and character. On appeal, defence counsel submits a line of questions being posed in good faith which strike at the heart of the main issue at trial does not require evidentiary ground work, citing in support *R. v. Lyttle*, [2004] 1 S.C.R. 193, at paras. 47-8 (S.C.C.).

- [10] The good faith purpose of the proposed cross-examination was to demonstrate the frailty of the complainant's evidence regarding the struggle the appellant was denying had occurred. The complainant, who had two previous assault convictions, had seriously injured Shawn during a fight. The inference to be drawn was that she was well able to defend herself, even inflict harm on others, and was unlikely to have been overpowered by the appellant in the way she described.
- [11] The transcript indicates that the trial judge was informed of defence counsel's reasons for wanting to question the complainant on her altercation with Shawn. He listened to the defence's theory and stated that both evidence of the complainant's physical capacity to inflict harm, and evidence of a subsequent fight with an individual named Shawn, would not aid him in assessing the veracity of the complainant's testimony regarding the incident in question. He then left it open for defence to bring the issue up later in cross-examination should a foundation for that type of questioning be developed. Defence did not pursue the issue at a later point.
- [12] The defence allegation is that these three restrictions on cross-examination effectively precluded the appellant from laying the ground work for his fabrication theory, particularly important in a case where the complainant's recall of the events of the evening during police interviews, at the preliminary inquiry and at trial varied as to timing and sequence.
- [13] In my view, the rulings of the trial judge in terms of cross-examination of the complainant did not effectively preclude the defence from advancing its theory. As noted above, the trial judge's ruling regarding the complainant's criminal record was not restrictive; it left open the possibility of further cross-examination depending on relevance and admissibility. The other two rulings of the trial judge were justified limits placed on cross-examination made after hearing defence counsel's theory and submissions on relevance of the issues. While evidence of the nature of the relationship between the complainant and the appellant, and of the complainant's other physical altercations and her capacity to inflict harm, may have been relevant to defence counsel's theory regarding the complainant's credibility, I am convinced the trial judge had sufficient information before him regarding these issues such that he did not err in limiting further cross-examination. The trial judge was aware the complainant had previously slept in the appellant's bed, had knowledge of her previous assault convictions and it is apparent from his reasons that he fully appreciated the inconsistencies in the complainant's statements. His findings of credibility were amply supported by independent evidence, including the testimony of the other witnesses, the medical evidence of her injuries and the 9-1-1 calls. I am thus not persuaded these limits on cross-examination amounted to a material error.

Did the trial judge err in finding no basis for the court to take notice of the inferences to be drawn from the blood analyst report of the blood alcohol reading of the complainant?

- [14] During the presentation of the Crown's case and again before he opened the appellant's case, defence counsel sought to have the court admit the blood analyst's report without the presence of the blood analyst or the agreement of Crown counsel under s. 657.3 of the Criminal Code so the trial judge might infer from the .237 reading at 1:24 a.m. on 6 January 2008 that the complainant was highly intoxicated at the time of the assaults, during the 9-1-1 calls and during her dealings with the police and nurse, contrary to her claim that she was no longer intoxicated at the time of the assault. This inference would then inform the assessment of the complainant's credibility. In support of this proposition, counsel cites *R. v. Spence*, 2005 SCC 71, 3 S.C.R. 458, and criticizes the trial judge for not referring to that decision. It was not cited to him by trial counsel (not counsel on appeal).
- [15] On both occasions, Crown counsel had no objection to the admission of the report, but opposed inferences being drawn without expert evidence and had so advised defence counsel several months before the trial. On each occasion, the trial judge left the matter with defence counsel, after ruling he would not draw the inferences requested without expert guidance, on the basis that drawing such an inference was not within the scope of common knowledge.
- [16] The blood analyst report was not placed in evidence. No expert was called. It is not disputed that the inferences sought relate to the central issues in the trial - the credibility of the complainant and, to a lesser extent the nurse who examined her. I am not persuaded the trial judge made this alleged error. Certainly, his reading of *Spence* and earlier jurisprudence referred to in those reasons would not have changed his ruling in this case. As can be seen from para. 37 of the trial judge's reasons, he was alive to the probable effect of the evidence of her alcohol intake on the complainant's credibility and the need for corroboration of her testimony on the core issue. He set out the corroborating evidence as follows:
- [38] Understandably, the exact sequence and timing of the events may have gone unnoticed or not be remembered with precision. [The complainant's] core evidence about the nature of the sexual touching and her lack of consent remained constant. The physical examination at the hospital provided important corroboration that she was involved in an altercation that led to signs and significant discomfort, including reddish skin areas consistent with the initial phase of bruising, as well as tenderness and pain in the genital and surrounding area. [The complainant] also had visible signs of injury to the chin and forehead areas that I find to be consistent with her account of the events.
- [39] Albeit less important, [the complainant] also showed signs of discomfort when walking that were consistent with her account. Finally, the tape of the 9-1-1 calls is also consistent with her description of the immediate aftermath and her emotional condition.

Did the lack of timely disclosure of the investigating police officer's notes in relation to her questioning of the sexual assault nurse examiner irreparably prejudice the conduct of the defence case on a central issue before the court - the credibility of the complainant?

- [17] The trial judge refused a defence application to recall the complainant after electronic notes of Cst. Brandsma's interview with the sexual assault nurse were disclosed during her cross-examination. The court permitted the re-examination of the nurse but refused to permit the complainant to be further examined. The nurse was recalled. Defence counsel alleges that ruling resulted in the appellant's inability to make full answer and defence, because the nurse's recollection was affected by strong pain medication she was taking following an injury suffered in a motor vehicle accident following her first appearance as a witness.
- [18] The undisclosed electronic notes apparently revealed some notes additional to the disclosed notes. The key difference was the omission of two notes from the disclosed document:

[The nurse] stated that at the time when [the complainant] cried out and appeared to be in pain, [the nurse] wasn't in fact touching her.

* * *

[The nurse] stated she didn't observe any overt signs of sexual assault.

- [19] I agree with Crown counsel the record does not support a conclusion that there was any effect of the nurse's recollection from the pain medication she was taking. During her cross-examination before the motor vehicle accident, she had no recollection of her communications with the complainant beyond her notes. On the further cross-examination she testified she had no independent recollection of her conversation with Cst. Brandsma, that she was able to refresh her memory from the police officer's notes. She was able to articulate two occasions when the complainant cried out when she was not touching her. When asked about whether it was part of her task to look for overt signs of sexual assault, she replied that she would be looking for signs of any injury.
- [20] Defence counsel did not articulate any basis for the recall of the complainant for further cross-examination after hearing this evidence. I am not persuaded the trial judge erred in refusing to permit her recall.

Did the trial judge err by not admitting the prior consistent statement of the appellant into evidence for the truth of its contents?

- [21] On a defence application to have a prior exculpatory statement admitted for the truth of its contents and to support the inference that the appellant was "more likely to be truthful," the trial judge held the statement should not be admitted because it was nothing more than an attempt to boost the credibility of his testimony.
- [22] At trial, counsel relied on R. v. Small, [1991] O.J. No. 3693 for the proposition, at para. 54, that any statement of an accused made to a person in authority is admissible at the instance of the accused provided the accused introduces the statement by giving evidence under oath in the presence of the jury.

[23] The trial judge refused to adopt that proposition, in my view with good reason, as the law currently stands. See *R. v. Rojas*, 2008 SCC 56, 3 S.C.R. 111. On appeal, defence counsel asks this Court to adopt the exception to the general rule recently developed in *R. v. Edgar*, 2010 ONCA 529, 260 C.C.C. (3d) 1, at paras. 66-73, as stated by Sharpe J.A., at para. 72:

I conclude, therefore, that it is open to a trial judge to admit an accused's spontaneous out-of-court statements made upon arrest or when first confronted with an accusation as an exception to the general rule excluding prior consistent statements as evidence of the reaction of the accused to the accusation and as proof of consistency, provided the accused takes the stand and exposes himself or herself to cross-examination.

[24] In support of this exception, counsel argues that "it is manifestly unfair to the accused that the complainant can muster support for his or her credibility through the observations of the police and in this case the Sexual Assault Nurse Examiner, but the defendant cannot use the only means of support available to him or her, the prior consistent statement made to the police."

[25] It is not disputed that the content of the appellant's statement to the police the next afternoon was a denial that anything had happened the night before, stated over and over again as the police officer persisted in questioning him on the basis of information in his possession from the complainant and fellow officers. It also contained his recollection of the events of the evening, and his statement that he had no explanation for why the woman he loved would have lied.

[26] However, in *Edgar*, the appellate court concluded the trial judge's ruling would have been the same under its analysis; the statement would have been excluded because defence had sought its admission before the accused testified, and even if it should have been admitted, it would not have altered the result of the trial as the statement contained nothing not already in the accused's trial evidence.

[27] In this case, defence sought admission of the statement after the accused had given evidence in court; the contents of the statement did not offer any additional information. The trial judge excluded the appellant's statement as it had little or no probative value. Admission of the statement would not have altered the findings of credibility at trial. That being so, this is not the case in which to consider whether this Court should adopt the obiter views expressed in *Edgar*.

Did the trial judge err in his consideration of the evidence by shifting the burden of proof to the appellant?

[28] There is no merit to this submission. However one reads the reasons for judgment, it is clear the experienced trial judge understood the concept of reasonable doubt and followed the analysis set down in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).

- [29] The trial judge had good reason for finding the appellant's version of the events not to be credible and directed his mind to the question of whether the appellant's evidence, considered in the context of the evidence as a whole, raised a reasonable doubt about his guilt. After concluding it did not, he looked at the evidence as a whole to determine whether the Crown had proved the assaults beyond a reasonable doubt. In doing so, he considered the frailties of the complainant's testimony, but was persuaded of the truth of the core allegations of fact by the corroborative evidence -- the 9-1-1 calls and the independent evidence of injuries.
- [30] The fact he explained his conclusions about the appellant's credibility near the end of his reasons does not reveal error. The appellant's version of events was clearly inconsistent with the 9-1-1 call and with Cst. Brandsma's observations of the complainant throughout the seven hours she spent with her that night. The real question at trial, on which the trial judge focused his reasons, was whether the complainant's testimony was sufficiently reliable to convict.
- [31] In reaching the conclusion that this Court cannot interfere with the trial judge's finding of fact because no palpable and overriding error on the part of the trial judge was shown, I have taken into consideration the prejudice alleged to have flowed from the lack of timely disclosure of the electronic notes of Cst. Brandsma's questioning of the sexual assault nurse.

Is the verdict unreasonable?

- [32] As will be apparent from my consideration of the other grounds of appeal, I am not persuaded that a properly instructed trier of fact, acting judicially, could not have convicted the appellant. There was sufficient evidence before the trial judge to found his verdict. The trial was fair.
- [33] I would dismiss the appeal.
- [34] MACKENZIE J.A.: I agree.
- [35] D. SMITH J.A.: I agree.

"The Honourable Madam Justice Huddart"

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