
CANADA / JUDGMENT

R. v. Mizen

2005 BCCA 323

COURT

British Columbia Court of Appeal

DECIDED

2 June 2005

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2005 BCCA 323 R. v. Mizen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mizen,

2005 BCCA 323

Date: 20050602

Docket: CA032049

Between:

Regina

Respondent

And

Larry Robert Mizen

Appellant

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Hall

The Honourable Madam Justice Levine

Oral Reasons for Judgment

M.J. Brundrett

Counsel for the Appellant

C.S. Flerlage

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

2 June 2005

[1] HALL J.A.: The appellant, Larry Robert Mizen, was convicted by Lemiski P.C.J. on 19 February 2004 of three counts as follows:

Count 1

Larry Robert MIZEN, on or about the 20th day of March, 2003, at or near Surrey, in the Province of British Columbia, did commit extortion of Richard John KACHUR, contrary to Section 346(1.1)(b) of the Criminal Code.

Count 2

Larry Robert MIZEN, on or about the 20th day of March, 2003, at or near Surrey, in the Province of British Columbia, did commit extortion of Dennis Bruce ANDERSON, contrary to Section 346(1.1)(b) of the Criminal Code.

* * *

Count 4

Larry Robert MIZEN, on or about the 20th day of March, 2003, at or near Surrey, in the Province of British Columbia, in committing an assault upon Dennis Bruce ANDERSON, did cause bodily harm to him, contrary to Section 267(b) of the Criminal Code.

[2] On the date in question, the appellant and two individuals, a man identified as Art, and Darlene Murray, a woman known to the appellant, attended at a house occupied by Mr. Anderson, the complainant, and his common-law wife, Rebecca Heels. There had previously been some disagreement between Anderson and Ms. Murray over something relating to a drug deal and there was a suggestion in the evidence that Ms. Murray considered she had been ripped off by Anderson in a deal and that he owed her money.

[3] Anderson, who was a somewhat reluctant witness, gave evidence at the trial. He was ultimately found to be a hostile witness and the Crown was permitted to cross-examine him. What came out in his evidence was that he was approached in the yard of his house by Ms. Murray and Mr. Mizen, the appellant who asked him to go into the house. At that time, Mizen asked Anderson if he had anything in his pockets, any sharp objects and Anderson responded that he did not. Anderson said that Mizen then proceeded to tell him not to reach for knives or weapons and not to yell or scream or try to jump out of any windows. He said that Mizen had hold of his arm and led him into the living room and told him to sit on a

couch in the living room. Murray and Art, from whom Murray had apparently bought the drugs, were also there.

- [4] Thereafter, it is clear that a serious assault was committed on Anderson by Art in the presence of Mizen who sat in the room while this was occurring. There were also some blows aimed at Anderson by Ms. Murray. There was at this time another man and a woman present in the house in a bedroom area. This man was called Kachur and he was either a friend or a customer of the woman who was in the room with him. It was made clear to Anderson that he had to produce money to satisfy the debt allegedly owing arising out of the drug deal. Kachur also gave evidence for the Crown. He said he was sitting in the room with a woman whose name was Becky watching TV and he heard arguments and commotion. He gave this evidence:

A I first heard some loud arguments, some commotion, and then a gentleman poked his head into the room and said, "Is that him?" to me, and then some girl or a very rough looking female looked in and said, "No," and then they both left.

Q This person that stuck his head in your room, can you describe him?

A Tall, sort of very short blond, but bald hair, a big guy, muscular, heavy -- a big fellow.

Q Would you recognize him now?

A I believe so.

Q Is he present today?

A Yes, he is.

Q Where? Indicating Mr. --

THE COURT: Indicating the accused for the record.

MR. SKOLROOD:

Q And you said he -- I want to just get this straight. He (indiscernible) to say, "Is that him?"

A Yes, to me, like is that him, looking directly at me.

Q And the female said no?

A That's correct.

Q And then they left?

- [5] During the continuance of the assaults on Anderson, Mizen ascertained from Anderson that he would be able to get some money together by the evening of the day in question. Mizen then restrained the man Art from further assaulting Anderson. Art had been threatening to cut off one of Anderson's fingers if he did not pay up. The companion of Anderson, Ms. Heels, gave evidence indicative of the circumstance that Mizen was a directing mind of the enterprise that was ongoing in the house but the judge did not find her to be a wholly

credible witness. Ms. Murray testified for the defence but the judge did not find her to be a particularly credible witness. Her evidence certainly was susceptible of such a finding. She vigorously asserted that the appellant had nothing to do with the enterprise and she said that she had just met him on her way to the house and said he agreed to accompany her. She asserted he had nothing to do with the venture. Mizen did not testify.

- [6] The judge defined the issue as whether or not the appellant had crossed the line, namely was there evidence that his activity on the day in question did go beyond mere presence into the area of being a party to the offences of extortion and assault committed primarily by Art but to a lesser extent Darlene Murray. The judge concluded that the appellant was a party to these offences. He said this:
- [33] It is one thing to have evidence that somebody is ordered to do something; there is an equal inference to draw, and I draw it, with respect to somebody terminating something by ordering somebody to stop doing it. Why would Art listen to Mr. Mizen? If Art is acting alone, why bother about what Mr. Mizen is going to be saying? Clearly the inference to draw is that Mr. Mizen had some power over Mr. Art at that point, where Art was capable of giving directions to him, in particular to stop what was supposed to be the whole thrust of the extortion; namely, finger-cutting and other injuries.
- [34] Further in his evidence, Mr. Anderson again says that it was the accused who told him not to yell or scream or jump out any windows, and in cross-examination, he said he was sure it was the accused. That is not being a mere bystander, that is actively furthering what is a common design.
- [35] I conclude on the evidence that the accused was part of a common design, together with Ms. Murray and the man named Art, to extort money from Mr. Anderson. They were not aware that Mr. Kachur was in the house, but the initial common design was to intimidate, to extort and to use force, including assaulting Mr. Anderson, in order to get repayment of what might well have been a rip-off. There is no denying that, given the evidence of Mr. Anderson.
- [36] The first count of extortion for Mr. Kachur is clearly where he is told by Art that his finger is in jeopardy as well if he cannot come up with some money, and he said he was very fearful and came up with \$70. That is certainly extortion, obtaining money with threats of physical harm, and that action and statement by the man named Art is when the accused is present in the room, at least has his head poked into the room, according to Mr. Kachur. With respect to a common design to do certain things in the house, that action is to be attributed to the accused, together with s. 21 of the Criminal Code in terms of the party concept.
- [37] The extortion of Mr. Anderson in Count 2 is the main action in the house initially, and Mr. Mizen is not only present throughout then, he is part of the common design and is doing enough to involve himself as a party.

[38] With respect to Count 4, the assault causing bodily harm, it is clear that the common design contemplated that. It is clear that there was an assault on Mr. Anderson, that the man named Art did the dirty work, so to speak, and there was a broken nose and other bruises and sore testicles I think he testified, in effect, resulting from the attack, and constitutes the bodily harm. So the evidence supports that count.

[7] In the recent case of *R. v. Clark* (2005), 193 C.C.C. (3d) 289, Fish J. said this:

Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm

[8] Counsel for the appellant in argument said that the convictions in this case were unreasonable. He suggested that the evidence was consistent with Mizen simply being a mere bystander to all of the violence that was occurring in that house and the extortion that was occurring.

[9] The test concerning an unsafe verdict are well known and are referred to in a number of the leading cases from the Supreme Court of Canada, and I want firstly to refer to the case of *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1:

[40] When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

* * *

[42] It follows from the above that the test in *Yebe* [*R. v. Yebe*, [1987] 2 S.C.R. 168] continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence.

[10] That test was laid down by the case of *R. v. Yebe*, *supra*, and adopted in the case of *R. v. Burke*, [1996] 1 S.C.R. 474. In the case of *Burke*, the court said this:

The confusion concerning the standard of review was finally settled by the unanimous Court in *R. v. Yebe* (1987), 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424, [1987] 2 S.C.R. 168. In that case, McIntyre J. settled the issue as follows, at p. 430:

... to adopt literally the proposition that the appellate court could only consider whether the impugned verdict could possibly have been reached would render review on appeal under the subsection almost impossible. "Reasonably could have reached" must be the test, and from a reading of the whole of Pigeon J.'s judgment [in *Corbett*] [*Corbett v. The Queen*, [1975] 2 S.C.R. 275] I am of the view that it was what was intended.

As a result, the Court in *Yebe* concluded (at p. 430) that "curial review is invited whenever a jury goes beyond a reasonable standard".

Thus it can be seen that the test that is to be applied by an appellate court in considering this sort of matter is whether or not the conviction is reasonable.

- [11] In the case of those counts relating to Mr. Anderson, it seems to me that the judge did not err in the conclusion he reached. I consider that it is significant that Mizen directed the comments he did to Anderson. He effectively asked Anderson if he had money and as the judge points out, if he was not part of the enterprise, it seems odd that he would direct such a question to Anderson. The fact that he was able to direct the man Art to cease in his assaultive behaviour towards Anderson indicates a measure of control over the situation on the part of the appellant. It is also of considerable significance that he looked into the room where Kachur was with the other woman and inquired apparently from Ms. Murray whether Kachur was the man and received a negative response. This evidence emanates from an independent source, namely the witness Kachur, and is indicative of the circumstance that the appellant was playing a directing role in what was going on in the house at the relevant time.
- [12] It seems to me that there was a considerable body of evidence that permitted the trial judge to draw the inference he did that Mizen, the appellant, was part of a common design to go to the Anderson residence, in order to obtain money from Anderson relating to a disputed drug deal and that the appellant exercised a measure of control over these people, Murray and Art, who actually engaged in behaviour amounting to assault and extortion of Anderson. In my view, there was evidence that the appellant was involved in this transaction well beyond mere presence at the scene and accordingly, I would not accede to the argument of the appellant that the trial judge erred in concluding that there was proven a common design to assault and extort money from Mr. Anderson and that Mizen was part of the enterprise to achieve those ends. I would dismiss this appeal from conviction on the counts involving the complainant Anderson.
- [13] However, with respect to the complainant Kachur, counsel for the appellant puts his case on a somewhat different footing. He says that even if one assumes for the sake of argument that there was some involvement of Mizen in the enterprise involving Anderson, that does not necessarily carry over in the case of the count involving the man Kachur which is Count 1 in

the indictment. Again, one has to apply to this charge the test enunciated by the Supreme Court of Canada in Yebes. There was evidence emanating from the witness Kachur to this effect:

A They were -- they wanted to get some money out of him and Bruce asked me well, do you have any money to give these people to me. After which, the fellow who had the black scraggly hair says well, if you owe me money, you're -- you know, basically you're in for the same treatment to me.

Q If you owe me money, you're in for the same treatment?

A I would be in for the same treatment that Bruce is getting. Needless to say, I was scared out of my wits. And then --

Q So as a result of that, then what did you do?

A So as a result of that, I gave them what I had in my wallet. I was afraid that I was going to be the subject to a beating next to -- based on what was happening in front of me.

Q How much did you have?

A I gave him -- I think I had -- I didn't have much in my wallet, like \$70 or so was what I had in my wallet at the time.

Q And who did you give that to?

A The short fellow, the fellow that was doing all the hitting and argue -- and talking, the fellow who's not here.

Q And then what happened?

A And then they took the money and they left.

[14] Counsel for the appellant argues that it was pure happenstance that Kachur was on the premises. He submits that Mizen could not have contemplated that there would be somebody like Kachur who had nothing to do with Anderson who would be on the premises. Counsel for the appellant argues that to find that there was a common intention with respect to the individual Kachur goes beyond the permissible in the drawing of inferences. Counsel for the appellant has set out in his factum the provisions of s. 21(2) of the Code:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[15] The Crown relies upon that subsection and it also relies upon s. 21(1), suggesting that there was an element of Mizen either being a co-principal or an aider or abettor in the charge concerning Kachur. Counsel for the Crown points to certain evidence that Kachur gave indicative of the fact that Mizen was apparently a short distance behind Art when Art came

into the room and began to threaten Kachur. The Crown submits that this should lead the Court to conclude that the finding of the learned trial judge was a sustainable one with respect to Count 1.

- [16] With respect, I am not convinced that this is so. In my analysis, applying the test enunciated by the Supreme Court of Canada in the Yebes test, it seems to me that the evidence is not substantial enough to support the inference drawn by the judge. I point out that it does not appear that the case was argued in precisely the way in front of the trial judge as it has been argued before us today. There, I think, it was generally argued that Mizen was simply not part of any wrongful enterprise. But here argument has been focussed a bit more precisely on his involvement, if any, in the crime involving Kachur.
- [17] It seems to me that it would be going beyond permissible inference to find that Mizen should be found to be liable to conviction on this offence either on the basis of s. 21(1) or s. 21(2). I do not consider that the evidence in the case reasonably supports that conclusion. Therefore, on the count involving Kachur, I would allow the appeal from conviction by the appellant on that count, namely Count 1. In the result, I would dismiss the appeal of the appellant from the convictions registered on Counts 2 and 4 and allow the appeal of the conviction on Count 1.
- [18] ROWLES J.A.: I agree.
- [19] LEVINE J.A.: I agree.
- [20] ROWLES J.A.: The appeal with respect to Count 1 is allowed and the appeal in relation to counts 2 and 4 is dismissed.

"The Honourable Mr. Justice Hall"

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