
CANADA / JUDGMENT

R. v. Quinones

2012 BCCA 94

COURT

British Columbia Court of Appeal

DECIDED

29 February 2012

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2012 BCCA 94 R. v. Quinones

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Quinones,

2012 BCCA 94

Date: 20120229

Docket: CA038009

Between:

Regina

Respondent

And

Albert Villacin Quinones

Appellant

BAN ON DISCLOSURE

pursuant to s. 486.4(1) C.C.C.

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, January 19, 2010

(R. v. Quinones, Victoria No. 142326-3)

Counsel for the Appellant:

D. McKay

Counsel for the Respondent:

Peter Juk, Q.C.

Place and Date of Hearing:

Victoria, British Columbia

January 16, 2012

Place and Date of Judgment:

Vancouver, British Columbia

February 29, 2012

Written Reasons by:

The Honourable Mr. Justice Hinkson

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] The appellant was charged by indictment with five counts of criminal conduct as a result of his sexual relationship in 2007 and early 2008 with a twelve year old girl who I will refer to as L. Specifically, he was charged with the following offences:

Count 1: Communicating with a person under the age of fourteen years for the purpose of facilitating the commission of an offence under s. 151 or s. 281 with respect to that person ("Internet luring") contrary to s. 172.1 of the Criminal Code;

Count 2: Sexual touching of a person under fourteen years of age contrary to s. 151 of the Code;

Count 3: Making child pornography contrary to s. 163.1(2) of the Code;

Count 4: Depriving a parent or guardian of their possession of a person under fourteen years of age ("abduction"), contrary to s. 281 of the Code; and

Count 5: Obstruction of peace officers, contrary to s. 129(a) of the Code.

- [2] The appellant was convicted by a jury of counts 2, 3 and 5 and acquitted of counts 1 and 4. He appeals his conviction on counts 2, 3 and 5, and seeks to have those convictions set aside and acquittals entered with respect to all counts of the indictment.

Grounds of Appeal

- [3] The appellant contends that the guilty verdicts on counts 2, 3, and 5 were inconsistent with the applicable law and with the acquittals on counts 1 and 4, and that they resulted from an error on the part of the trial judge in not providing the jury with an instruction as set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 with respect to counts 2 and 3. He further submits that the guilty verdicts on each of counts 2, 3 and 5 were unreasonable.

The Elements of the Offences Charged

- [4] The onus rested on the Crown to prove, beyond a reasonable doubt, the essential elements of the five counts in the indictment based on the provisions of the Criminal Code as they were at the time of the alleged offences. All five counts shared the first two elements:
- a) that the appellant was the offender;
 - b) the time and place of the offences as set out in the indictment;
- [5] Count 1 of the indictment also obliged the Crown to prove:
- c) that the appellant communicated with L. by means of a computer;
 - d) that L. was under the age of 14 or that the appellant believed her to be under the age of fourteen; and
 - e) that the appellant communicated with L. with the specific intent of facilitating the commission of the offence of sexual interference.
- [6] Count 2 also obliged the Crown to prove:
- c) that L. was under the age of fourteen at the time of the events alleged;
 - d) that the appellant touched L. and that that touching was for a sexual purpose.
- [7] Count 3 also obliged the Crown to prove:
- c) that the appellant made a video for the purpose of publication showing a person under the age of eighteen years engaged in explicit sexual activity or that the video was created exclusively for personal use, involving a participant younger than fourteen years of age.
- [8] Count 4 also obliged the Crown to prove:
- c) that L. was under the age of fourteen at the time of the events alleged;
 - d) that the appellant was not a parent or lawful custodian of L.;

- e) that the appellant took, enticed away, concealed, detained, received or harboured L.; and
- f) that he did so intending to deprive L.'s parents of possession of her.

[9] Count 5 also obliged the Crown to prove:

- c) that the complainant peace officers were members of the Victoria City Police;
- d) that at the relevant time the officers were in the execution of their duties;
- e) that the appellant knew that they were peace officers in the execution of their duties as peace officers at the relevant time; and
- f) that the appellant wilfully obstructed the complainant peace officers in the execution of their duties.

Background

- [10] In the spring of 2007, L. contacted the appellant on an Internet website by responding to the profile he had posted. The appellant was then twenty-four years of age and resident in Victoria, British Columbia. L. was then twelve years of age, resident in Vancouver, British Columbia, and attending grade seven at an elementary school there.
- [11] The appellant gave evidence that before first meeting L. in late May of 2007, he inquired over the Internet as to her age and that she told him that she was sixteen. The appellant gave evidence that he was aware that Internet users were not always truthful about their ages. He said that when they first met he again asked L. her age and that she confirmed that she was sixteen. The appellant's evidence was that at all times prior to January 19, 2008 he believed that L. was sixteen years of age.
- [12] The appellant agreed that he and L. engaged in a sexual relationship from the early summer of 2007 until January 19, 2008, and had sexual intercourse on a number of occasions both in Victoria and Vancouver. He also agreed that on January 18-19, 2008, he made a video showing himself engaged in explicit sexual activity with L.
- [13] The appellant gave evidence that he and L. made the January 18-19, 2008 video intending to watch it themselves and then destroy it in the morning of January 19, 2008, but that before they could do so, members of the Victoria City police arrived at the appellant's home.

Discussion

- [14] The first two elements of the five counts were admitted.
- [15] Insofar as count 1 is concerned, there is also no real issue with respect to the communication by computer or L.'s age, but the appellant denied knowing that L. was under the age of 14, or that he had the requisite intent of facilitating the commission of an offence under s. 151 or s. 281 with respect to her ("Internet luring") contrary to s. 172.1 of the Criminal Code.

- [16] The third and fourth elements of count 2; L.'s age and sexual touching were admitted.
- [17] The third element of count 3; that a video was created for personal use, involving a consenting participant younger than sixteen years of age was not in issue.
- [18] The third element of count 4; L.'s age, was established and the appellant was clearly not L.'s parent or lawful custodian. It is fair to say that there was no dispute that the appellant concealed, received or harboured L. The fourth and fifth elements of count 4 were thus met, but the sixth element of count 4; that the appellant concealed, received or harboured L. intending to deprive L.'s parents of possession of her, was not admitted.
- [19] The factual foundation for the third, fourth and fifth elements of count 5; that the appellant was aware that the complainants were peace officers with the Victoria City police, in the execution of their duties as peace officers at the time he was involved with them, were never in dispute. The sixth element of count 5 required an assessment of the evidence of the officers involved, and of the evidence of the appellant.
- a) The Defence of Mistaken Belief as to L.'s Age
- [20] In this case, the appellant gave evidence that he believed L. to be sixteen years old, raising the defence of mistaken belief as to L.'s age in answer to counts 1, 2, 3, and 4. The defence of mistaken belief of age may apply to each of those counts, but not necessarily in the same manner.
- [21] If the jury found that the appellant believed that L. was under fourteen years of age, his defence of mistaken belief would fail, but if the jury believed the appellant or had a reasonable doubt that he believed L. to be sixteen years old, then the Crown would be obliged to overcome the defence.
- [22] If the jury believed the appellant or had a reasonable doubt that he believed L. to be sixteen years old, in addition to proving the elements of count 1 of the indictment, the defence raised by the appellant at trial also obliged the Crown to prove, beyond a reasonable doubt, that the appellant did not take reasonable steps to ascertain L.'s actual age (s. 172.1(4) of the Criminal Code).
- [23] If the jury believed the appellant or had a reasonable doubt that he believed L. to be sixteen years old, in order to meet the defence of mistaken belief of age with respect to count 2, the Crown was obliged to prove, beyond a reasonable doubt, that that the appellant did not take all reasonable steps to ascertain the actual age of L. (s. 150.1(4) of the Criminal Code).
- [24] Similarly, if the jury believed the appellant or had a reasonable doubt that he believed L. to be sixteen years old, in order to meet the defence of mistaken belief of age with respect to count 3, the Crown was obliged to prove, beyond a reasonable doubt, that that the appellant did not take all reasonable steps to ascertain the actual age of L. (s. 163.1(5) of the Criminal Code).

- [25] As the Criminal Code makes no specific provision for a mistake of fact relating to s. 281 of the Code, count 4 has no requirement that the appellant take all reasonable or even reasonable steps to ascertain L.'s actual age; only that his belief was honestly held. If the jury believed the appellant or had a reasonable doubt as to his honest belief of L.'s age the defence of mistaken belief of age with respect to count 4 would succeed.
- b) Inconsistent Verdicts
- [26] The appellant contends that the guilty verdicts on counts 2 and 3 are inconsistent with the not guilty verdicts on counts 1 and 4. He argues firstly that the jury must have been confused by the instructions of the trial judge because they asked to have read back a portion of the instructions relating to a section of the Criminal Code that the trial judge then explained he had given to them in error. I find no merit with respect to this point, as the error, once corrected, had no bearing on the jury's verdict.
- [27] The appellant also argues that while there are different legal elements for each of counts 1 through 4, his conduct in relation to his determination of L.'s age is analytically the same and thus should lead to the same verdict of not guilty on all of those counts. He relies upon the reasoning of the Supreme Court of Canada in: *R. v. Pittman*, 2006 SCC 9, [2006] 1 S.C.R. 381; *R. v. Beatty*, [2008] 1 S.C.R.; and *R. v. J.F.*, [2008] 3 S.C.R. 215 in support of his position.
- [28] As Madam Justice Charron explained in *Pittman*, at paras. 7-8, the onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult onus to meet. A jury's verdict will not be considered inconsistent if it can be supported on any theory of the evidence consistent with the instructions of the trial judge.
- [29] The appellant contends that because the test to be employed with respect to counts 2 and 3 (all reasonable steps) to determine L.'s age is a higher test than that to be employed with respect to count 1 (reasonable steps), and count 4 (honest belief), the verdicts on counts 2 and 3 are inconsistent with the verdicts on counts 1 and 4.
- [30] Proof of intent was an element of counts 1 and 4, distinguishing those counts from counts 2 and 3 on that basis.
- [31] While there was evidence before the jury in this case that could have supported a finding that some of the appellant's email communications with L. involved discussions of meeting in order to engage in sexual activities, it is conceivable that the jury in this case was persuaded that the appellant had not met even the lower test (reasonable steps) with respect to the steps he took to determine L.'s age. It was open to the jury when considering count 1, to conclude that the Crown had not proven the necessary element of intent with respect to count 1; that in sending those emails, the appellant was communicating with L. with the requisite intent of facilitating the commission of the offence of sexual interference.

[32] With respect to count 4, while there was evidence before the jury upon which they could conclude that the appellant took, enticed away, concealed, detained, received or harboured L. in order to deprive her parents of possession of her, it is conceivable that the jury was persuaded that the appellant had not met even the lower test (honest belief) with respect to the steps that he took to determine L.'s age, but were not persuaded that the Crown had proven the necessary intent to deprive L.'s parents of their possession of her.

[33] In my view, therefore, the guilty verdicts on counts 2 and 3 cannot be seen as inconsistent with the applicable law, or the verdicts of not guilty on counts 1 and 4.

[34] I would not accede to this ground of appeal.

c) The Failure to Instruct the Jury on Counts 2 and 3 as set out in R. v. W. (D.)

[35] The suggested steps in W. (D.) are:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [p. 758]

[36] The suggested steps are intended to ensure that the trier of fact remains focused on the principle of reasonable doubt. Those steps are to ensure that triers of fact understand that the verdict should not be based on a choice between the accused's evidence and the Crown's evidence, but rather on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt

[37] A defence of mistaken belief to charges under ss. 151 and 163.1(2) of the Criminal Code at the time of the offences alleged can be defeated by the Crown if it proves, beyond a reasonable doubt, that an accused did not hold a mistaken belief as to a complainant's age or, in the alternative, if the Crown proves that although the accused had a mistaken belief as to the complainant's age, he or she did not take all reasonable steps to ascertain that age.

[38] Each of the suggested steps from W. (D.) was included in the instruction that was given to the jury in this case only with respect to counts 1, 4 and 5. These three counts each required proof of intent. The evidence with respect to intent on each of those counts was contentious, obliging the trial judge to give the W. (D.) instruction on each of those counts.

[39] The trial judge instructed the jury that if it was satisfied beyond a reasonable doubt that the appellant believed that L. was under the age of fourteen years, the defence of mistaken belief would not apply to counts 2 and 3. This instruction in effect combined the first two suggested steps from W. (D.).

- [40] The third suggested step from W. (D.) was not included in the instruction given to the jury with respect to counts 2 and 3. No objection to this aspect of the instructions was raised by counsel for the appellant at trial. Despite the absence of an objection, it remains open to this Court to order a new trial if the failure of the judge to properly instruct the jury could result in a miscarriage of justice; *R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1 at para. 37.
- [41] The appellant now contends that as a result of the absence of a full W. (D.) instruction on counts 2 and 3, the jury would have understood that their task in assessing the mistake of fact evidence was somehow different from what they were to do with respect to that evidence vis a vis counts 1, 4 and 5. I disagree.
- [42] In my view, the charge, as it relates to counts 2 and 3, makes the burden and standard of proof to be applied to those counts clear. The jury could not have been under any misapprehension respecting those matters.
- [43] In W. (D.) at page 758, Mr. Justice Cory pointed out that the failure to use the language of the suggested steps is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply.
- [44] The appellant explained his belief as to L.'s age as follows:

Q. What were the things that you saw that [L.] did, the things that caused you to believe that [L.] was being truthful when she told you that she was 16?

A. The friends that she told me that she was hanging out with, they were much older, her -- the way she talks, her -- the way -- the way she looks, the way -- how she dressed, how she walks, the way she hand -- the way she is with our relationship. There was -- no different than -- than the other ex-girlfriends that I had [aged 19-25]. ...

Q. With regards to your sexual relations with [L.], was there anything about that that cause [sic] you to believe that she was older than 12 years old?

A. I thought that she was much older.

Q. What was it about that?

A. The experience, the way -- the way everything -- the -- the way we kissed, the way we hold hands and everything. It was -- it was not new to her.

[45] This evidence was essentially confirmed by L., who agreed that she had sexual experience prior to that with the appellant, and was using birth control before and during the time she was sexually involved with the appellant.

[46] It was also clear from the evidence of the police witness, Det. Brown, that L.'s appearance and demeanour at the relevant time was consistent with a young woman of more than twelve years of age.

- [47] The appellant agreed that he falsely told L. that he was seventeen or eighteen years of age. He agreed that she later saw his driver's licence and learned that he was actually in his early twenties. The appellant also agreed that he lied to L.'s mother about his own age.
- [48] The appellant acknowledged that he received an email from one of L.'s former boyfriends dated June 3, 2007 advising him that L. was in grade 6. He also gave evidence that he did not respond to the former boyfriend by email and that the only step that he took in response to that email was to inquire of L. about that information. He said that he was told by L. that the information was untrue and that the former boyfriend was lying because he was jealous.
- [49] The appellant recounted an occasion in June or July of 2007 when he was told by L.'s mother that it was illegal for him to engage in sexual activities with L. He said that he responded to the mother by falsely denying that he was engaged in a sexual relationship with L., knowing that if he did not deny such a relationship, he would have worn out his welcome at L.'s home.
- [50] On another occasion shortly thereafter, the appellant agreed that L.'s mother told him that L. was only twelve years old. As on the first occasion, the only step that he took as a result of his encounters with L.'s mother's advice was to ask L. about it. He said that her response was that her mother was drunk and simply lying to try to break up their relationship.
- [51] When confronted with the three events during which L.'s real age was raised, the appellant gave the following evidence:

Q. So now you've been told by the ex-boyfriend that she's in grade 6, the mother on one occasion that she at least told you that it was illegal, and on this third occasion now she's told you she's 12, right?

A. The third occasion?

Q. Sorry, the third -- third indication I should -- you had one indication from the ex-boyfriend?

A. Yeah.

Q. You had two conversations with the mother?

A. Yes.

Q. So now we've had -- you've had three indications that she's possibly lied to you about her age, correct?

A. Yes.

Q. And you didn't stop having sex with her, did you?

A. No.

Q. In fact, you didn't do anything about it but have another conversation with [L.], correct?

A. Yes.

Q. So now you've got three indications that your girlfriend's probably lied to you about her age and all you do to check up on it is ask her again?

A. I asked her again, yes.

Q. But nothing else?

A. Nothing else, yes.

...

Q. So you've had three indications that a girl you're in a sexual relationship with might be 12 and you don't take the step of actually finding out for yourself for sure how old she is, right?

A. I guess not.

[52] It was, of course open to the members of the jury to reach their conclusions on guilt or innocence by accepting or rejecting specific evidence, so long as they were unanimous in their conclusions: *R. v. Morin*, [1988] 2 S.C.R. 345 at para. 36.

[53] The evidence left the jury with the choice of whether or not to accept the appellant's evidence as to his belief of L.'s age. If the members of the jury did not accept that the appellant believed that L. was sixteen years of age and had no reasonable doubt as to such a belief, under *W. (D.)*, they would then be obliged to consider whether on the basis of the evidence which they did accept, they were convinced beyond a reasonable doubt of the guilt of the appellant.

[54] But in this case there was no issue as to what the appellant had been told by L.'s former boyfriend or by L.'s mother, and thus no evidence to reject on the issue of why the appellant might have had cause to reconsider belief as to L.'s age. Thus there was no need to provide the jury with the third step of the *W.(D.)* instruction, unless it was required to resolve whether the appellant had taken all reasonable steps to determine L.'s age.

[55] If the jury accepted that the appellant believed that L. was sixteen years of age or had a reasonable doubt as to such a belief, then, in order to determine if counts 2 and 3 had been proven, the jury would have had to decide whether the appellant took all reasonable steps to ascertain L.'s age.

[56] The trial judge instructed the jury as to what would constitute "all reasonable steps" in accordance with this Court's direction in *R. v. P. (L.T.)* (1997), 86 B.C.A.C. 20, 113 C.C.C. (3d) 42 at para. 20. The trial judge told the jury on several occasions that the onus borne by the Crown was one of proof beyond a reasonable doubt, and there was no complaint about the trial judge's instructions on the standard of proof to be applied to counts 2 and 3.

[57] The appellant accepted the evidence of the Crown witnesses as to the indications he was made aware of, that L. might not be sixteen years of age. There was no competing or contradictory evidence as to the steps he took to ascertain L.'s age. Even if the members of the jury were not left in doubt by the evidence of the appellant, there was no competing evidence for them to accept or reject, in order to determine whether the appellant had taken all reasonable steps to ascertain L.'s age. The third step in the W. (D.) instruction on counts 2 and 3 was thus unnecessary for the resolution of that issue in this case.

[58] I am therefore satisfied that the trial judge committed no legal error in deciding not to provide the third step of the W. (D.) instruction to the jury with respect to counts 2 and 3, and would not accede to this ground of appeal.

d) Unreasonable Verdict

[59] It is open to this Court to set aside a guilty verdict under s. 686(1)(a)(i) of the Criminal Code if it is unreasonable or cannot be supported by the evidence.

[60] The appellant contends that the guilty verdicts on counts 2 and 3 are unreasonable as a matter of law because they are inconsistent with the facts before the jury and inconsistent with the law. He contends that the guilty verdict on count 5 is unreasonable because it is unsupported by the evidence before the jury.

[61] Whether a verdict is unreasonable falls to be determined on the test of whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381.

i) Sexual Touching and Making Child Pornography

[62] In my view, the guilty verdicts on counts 2 and 3 are sustainable on the evidence. The appellant's real contention on this ground of appeal pertains to his defence of what he argued was his mistaken belief of L.'s age at sixteen years.

[63] It was open to the jury to reject the appellant's evidence as to such a belief or to conclude that he did not take all reasonable steps to ascertain L.'s actual age. If they reached either conclusion, their verdict could not be considered unreasonable.

[64] In my view, the jury were entitled, as the Crown asked, to reject the appellant's evidence as to his belief as to L.'s age. Further, even if the jury did not reject his evidence of his belief, it was open to it, after considering the evidence quoted above, to find that the appellant had not taken all reasonable steps to ascertain the actual age of L. In either event, the jury's verdict on counts 2 and 3 could not be said to be unreasonable. I would not accede to this ground of appeal with respect to those counts.

ii) Obstruction of Justice

[65] The offence of obstruction of justice does not require proof that a peace officer has been prevented from the execution of his or her duties. In *R. v. Soltys* (1980), 56 C.C.C. (2d) 43 the accused was involved in a motor vehicle accident. Following the accident he went to his home. A police officer arrived at the home of the accused sometime later and commenced making a demand for a breath sample upon the accused. According to the officer, he was partially through the making of that demand when the accused suddenly reached out and grabbed a glass containing rye whiskey. The officer testified that he said to the accused "I'll take that" and thereafter the glass was smashed against the officer's right hand.

[66] The accused was charged, amongst other charges, with obstructing a public officer or peace officer in the execution of his duty. At p. 45, the following definition of the word "obstruct" was adopted by this Court:

Black's Law Dictionary, now the 5th edition, gives a number of definitions of the word "obstruct". One is: "To impede; to interpose impediments to the hindrance or frustration of some act or service; as to obstruct an officer in the execution of his duty."

[67] The appellant's contention that what he asserted to be his mistaken belief as to L.'s actual age afforded him a defence to this count 5 is, with respect, untenable. He initially contended that on the morning of January 19, 2008, the police advised only that they were looking for a missing child, and as he did not consider L. to be missing or to be a child, he did not wilfully obstruct the officers in the execution of their duties.

[68] The appellant did not maintain that position throughout his evidence. He subsequently said that he was awoken that morning by a banging on his door and that before answering the door, he sent L. into the bathroom where his father was planning to have a shower. His initial explanation for doing so was to keep her safe.

[69] The appellant agreed that when he answered his door, the officers entered the home, and once inside the officers told him that they were looking for [L.]. His evidence was:

Q. Right. You lied to the police three times at least and told them that [L.] wasn't there, didn't you.

A. I told them, yes.

Q. And you got worried after they stuck around and waited to see who was in the bathroom, didn't you?

A. When they told me her age, that's when I -- yeah, that's when I opened the door -- let them open the door.

Q. Sir, she was in there with your father for between 20 and 25 minutes, wasn't she?

A. My -- yes.

Q. And all the time you were waiting there for your father to -- telling them you were waiting for your father to come out of the washroom, you knew that they were looking for [L.], didn't you, 'cause they had told you.

A. Yes.

Q. And you lied to them and said she wasn't?

A. Yes.

Q. And you were hoping that if your father stayed in that bathroom long enough, that they would just go away and not look in there, correct?

A. Yes, I was hoping they'd leave ...

[70] In my view it was open to the jury to conclude that the appellant wilfully caused the members of the Victoria City police who attended at his home on January 19, 2008, to delay their search of his bathroom for twenty-five minutes, in the hope that they would abandon their search for the person he knew to be L., and if so concluding, to find that he was guilty of count 5, regardless of his belief as to L.'s actual age.

[71] I would not, therefore accede to this ground of appeal with respect to count 5 of the indictment.

Conclusion

[72] I would dismiss the appellant's appeal.

"The Honourable Mr. Justice Hinkson"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Neilson"

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