

CANADA / JUDGMENT

R. v. R.S.B.

2020 BCCA 33

COURT

British Columbia Court of Appeal

DECIDED

23 January 2020

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2020 BCCA 33 R. v. R.S.B. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. R.S.B., 2020 BCCA 33 Date: 20200123 Docket: CA45663 Between: Regina Respondent And R.S.B. Appellant Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Fitch The Honourable Mr. Justice Butler On appeal from: An order of the Provincial Court of British Columbia, dated December 12, 2017 (R. v. R.S.B., Surrey Docket 221409-1-K). Oral Reasons for Judgment Counsel for the Appellant: R.T. Gill N.B. Wright, Articled Student Counsel for the Respondent: L.A. Chu Place and Date of Hearing: Vancouver, British Columbia January 23, 2020 Place and Date of Judgment: Vancouver, British Columbia January 23, 2020 Summary: The appeal is from conviction of one count of sexual assault, the appellant having been acquitted of five other offences charged on the same indictment. Credibility was the central issue at trial. In convicting, the judge relied upon text messages sent between the parties. The Crown agrees that the judge erred in his appreciation of the timing and content of the messages and relied upon the mis-appreciation in his credibility assessment of the complainant and appellant. Held: Appeal allowed, new trial ordered. The errors in respect to the text messages fatally undermined the credibility assessments and thus the verdict.

- [1] SAUNDERS J.A.: On December 12, 2017, the appellant was convicted of one count of sexual assault of the complainant and acquitted of five other counts: Counts 2, 3, and 5 of the indictment being assault of M.B. in three different time periods; and Counts 4 and 6, being uttering a threat to M.B. to cause death or bodily harm in two different time periods.
- [2] He appeals from the single conviction on Count 1.
- [3] Credibility was the central issue at trial. The complainant, M.B., testified that the events charged had occurred; the appellant testified, denying all of the allegations central to the charges. On Count 2, the judge found he was unable to decide who to believe, and acquitted the appellant. In respect to Counts 3 and 4, the judge did not accept the testimony of M.B. and acquitted the appellant. In respect to Counts 5 and 6, the judge accepted the evidence of the appellant and rejected the evidence of M.B., and accordingly acquitted the appellant.

- [4] On Count 1, the judge found the complainant "is a credible witness in relation to the circumstances of the sexual assault", rejected the appellant's denial, and found his testimony did not raise a reasonable doubt.
- [5] The judge's rejection of the appellant's evidence rested on two prongs:
1. he rejected the appellant's evidence that he did not go into a room in which the sexual assault was alleged to have occurred; and
 2. he rejected the appellant's evidence that he did not engage in sexual intercourse with the complainant after late 2015.
- [6] On the second of these prongs, the judge said the appellant's denial that he had engaged in sexual intercourse with the complainant after late 2015 was inconsistent with text messages the appellant had sent to the complainant on February 16, 2016, two months prior to the alleged offence. He explained the "inconsistency" by quoting portions of the text messages and then said: "This exchange of text messages is inconsistent with [the appellant's] testimony that he ceased having sexual relations with [M.B.] in late 2015. I do not accept his testimony on this issue." The judge also referred to other text messages sent by the complainant on April 13, 2016 and by the appellant on April 15, 2016, which the judge said were consistent with the evidence of the complainant that the sexual assault occurred in mid April 2016.
- [7] After conviction and before sentencing, the appellant applied to re-open the conviction phase of the trial, to allow him to cross-examine the complainant on statements made in her victim impact statement that he said were inconsistent with evidence she proffered at trial. The judge dismissed that application on the basis that the fourth criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 was not met.
- [8] On appeal, the appellant contends the judge made a palpable and overriding error of mixed fact and law in determining that the text messages between the complainant and the appellant were corroborative of the complainant's testimony and inconsistent with the appellant's testimony. He contends as well, that the judge erred in rejecting his application to re-open.
- [9] The Crown disputes error in the judge's ruling dismissing the application to re-open, but agrees the judge made palpable and overriding errors in his interpretation of the text message evidence that he relied upon in his credibility assessments of the appellant and the complainant.

- [10] Applying the *Housen v. Nikolaisen*, (2002 SCC 3) standard of review of palpable and overriding errors, described in *R. v. Steward*, 2018 BCCA 76, as errors that are "obvious or plainly seen, and which altered or may well have altered the result", I agree that fatal errors in respect to the text message evidence are established, and as they underpinned the judge's assessment of the critical issue of credibility, the assessments of credibility in respect to Count 1 are fatally flawed.
- [11] I will restrict myself to two errors in respect to the text message evidence. First, the judge said that the text messages in February 2017 were inconsistent with the evidence of the appellant that he last had sexual relations with M.B. in late 2015, and relied on that "inconsistency" in assessing the appellant's credibility.
- [12] On a plain reading of the February text messages, they simply are not inconsistent with the appellant's evidence as to when the parties last had sexual relations, contrary to the judge's finding of inconsistency that was one of the bases given for finding the appellant lacked credibility.
- [13] Second, the judge erred in finding that the April 15, 2016 text messages corroborated the complainant's testimony of the timing of the sexual assault. Examination of those text messages shows that they were not sent on April 15, 2016, as the judge said, but later in April, and were different in nature than the judge described. That erroneous interpretation of those text messages formed part of the judge's reasoning in assessing the complainant's credibility.
- [14] I consider that both errors fatally undermine the verdict because they are material to the assessments of credibility. I conclude that these are not harmless errors and the verdict cannot be saved by the curative proviso in s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46.
- [15] I would set aside the conviction and order a new trial.
- [16] FITCH J.A.: I agree.
- [17] BUTLER J.A.: I agree.
- [18] SAUNDERS J.A.: The conviction is set aside and a new trial is ordered. [Submissions by counsel re: bail conditions] "The Honourable Madam Justice Saunders"

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