

CANADA / JUDGMENT

R. v. Ravelo-Corvo

2020 BCSC 1605

COURT

Supreme Court of British Columbia

DECIDED

28 January 2020

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2020 BCSC 1605 R. v. Ravelo-Corvo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ravelo-Corvo,

2020 BCSC 1605

Date: 20200128

Docket: 27730-2

Registry: Vancouver

Regina

v.

Renert Alexander Ravelo-Corvo

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Corrected judgment: The text of the judgment was corrected on the front page where changes were made on August 12, 2021.

Before: The Honourable Madam Justice Sharma

Oral Ruling on Application for Mistrial

Counsel for the Crown:

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T. Arbogast

K. Kirkpatrick, A/S

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2020

- [1] THE COURT: These are my reasons on the application by defence counsel for a mistrial.
- [2] The salient facts relating to the application are these. The accused is charged with sexual assault and unlawful confinement. Prior to the trial starting, there were two voir dres, one of which was pursuant to s. 276 of the Criminal Code. In that application, the accused sought to adduce evidence about interactions between him and the complainant which occurred in a bar in the hours leading up to the alleged sexual assault on the night in question. The alleged assault occurred in the accused's apartment.
- [3] In a ruling delivered in court on December 4, 2019, I dismissed that application: 2019 BCSC 2365 (the "276 Ruling"). The trial then commenced. The complainant began her testimony in chief the same day. Her direct evidence concluded just after the afternoon break. Cross-examination commenced immediately thereafter.
- [4] Problematic from defence counsel's point of view is a point in her direct evidence, at page 32 of the transcript, line 3 and following:

Q Do you recall what [the accused] said?

A Not in that moment, but throughout the night he kept saying -- I'm not supposed to talk about my previous sexual history though, right? Okay. He was trying to convince me that I should.

- [5] By "I should", she meant that the accused was trying to convince her to have sex with him. The complainant was then asked: "And how would you describe your relationship with [R.], at this point?". The court indicated the question may not be proper and the witness was excused. There was a short exchange and the court asked counsel to narrow the question. The witness was recalled, but excused very shortly thereafter.
- [6] Counsel sought some guidance from the court, appropriately, because counsel was aware that the next question she wanted to ask ["Why did you call R.?"] may result in the complainant inadvertently talking about sexual history.

[7] The exchange continued in the absence of the complainant. Counsel and the court were grappling with what types of questions are appropriate, given the s. 276 Ruling and the dictates of s. 276 generally. During that discussion the court mentioned it is not clear if what was said in the apartment would be prohibited by s. 276.

[8] Further exchanges took place between the court and counsel, which are relevant to my ruling, and those include the following.

DEFENCE COUNSEL: I think my friend has some concerns too from the perspective that he may have told the witness to stay away from the word [R] and so now it makes it look like she's been misleading the court technically.

THE COURT: Yes, and I mean that came out a little bit in some of her testimony.

[DEFENCE COUNSEL]: Right.

THE COURT: She said it a couple of times. I think, counsel, I just need a better foundation....

[9] At another the court commented:

THE COURT: And so because I did hear her say a few times, "I can't talk about" now she said, used a phrase that's a legal phrase, which is fine but it looked to me once or twice that she was stopping herself from answering the question all the way. And as long as it's not extrinsic sexual activity, which includes communications, she can talk about it. Okay?

[10] The other relevant extract happened the next day, when there continued to be an exchange between counsel and the court and Crown counsel says at one point (the "1st Extract"):

I mean what -- let me be frank with the court. What I told the witness, I don't exactly recall exactly the words I used, but along the lines as a result of the ruling --

THE COURT: Yes.

[CROWN COUNSEL]: -- there would not be any discussion about the -- her sexual history.

THE COURT: Yes.

[CROWN COUNSEL]: I said words to the effect I would not be asking her anything that happened in the club itself.

THE COURT: Yes.

[CROWN COUNSEL]: And I would not be asking questions about [R], but if she is asked about it by defence then she should of course answer fully and truthfully.

[11] In another exchange, the court and counsel, were again grappling with what type of evidence is caught or not caught by both s. 276 [the "2nd Extract"]:

THE COURT: Yes, and I think that was said yesterday, but if it's what's going on in the apartment there is no barrier.

[CROWN COUNSEL]: Well, it is, in that --

[DEFENCE COUNSEL]: Can't ask about prior sex.

[CROWN COUNSEL]: Sex or sexual -- well, because it's not just prior sex, but sexual activity, which could encompass sexual interest or communication about sexual interest.

THE COURT: Does it, communication about sexual interest is sexual activity?

[CROWN COUNSEL]: I would argue that, I have a submission on that, but I see....

[12] In addition, I was informed that Crown counsel at trial had no notes about what he told the complainant regarding her testimony after I delivered the s. 276 Ruling.

[13] The accused argues the complainant was misdirected about what she could say on the witness stand, with the result that by omission, her testimony was not truthful. He submits his ability to make full answer and defence has been prejudiced. He says both the integrity of the trial process and of the evidence has been damaged. His position is that nothing short of a mistrial can remedy those flaws.

[14] Crown submits there was no misdirection by counsel, but even if there had been, remedies exist to cure any defect. Its position is that the test for a mistrial is high and the court has insufficient evidence or legal basis on these facts to order a mistrial.

ANALYSIS

[15] Crown referred to a number of cases, establishing that the test for a mistrial is quite high. Defence counsel did not dispute those principles of law.

[16] Before granting a mistrial the court must be satisfied no remedy short of that relief will adequately address the actual harm occasioned. In other words, it should be granted only as a last resort: *R. v. Toutissani*, 2007 ONCA 773. Moreover, it should only be used in the clearest of cases, where there has been a fatal defect impacting the administration of justice in a way that cannot be cured by remedial measures: *R. v. Paterson*, [1998] B.C.J. No. 126. In *R. v. Howley*, 2016 ONSC 2424, the Ontario Superior Court stated that the clearest case rule required a finding that what happened was catastrophic to the fairness of the trial and is incapable of being cured. In *R. v. A.G.*, 2015 ONCA 159, the Ontario Court of Appeal stated that mistrial is used only if it necessary to prevent a miscarriage of justice.

[17] I address a factual issue first: did Crown counsel misdirect the complainant about her testimony? That issue has two aspects: (1) what significance is it that Crown counsel kept no notes of his comments to the complainant, and (2), what does the transcript reveal about the instructions given?

- [18] As noted above, Crown kept no notes of his conversation with the complainant about her testimony after the s. 276 Ruling was delivered. Defence counsel suggests this represents a deficiency in Crown's position, although it was not clear to me that defence counsel was suggesting it was determinative.
- [19] Defence counsel relies on *R. v. Hamzehali*, 2017 BCCA 290. That was an appeal from a conviction based on ineffectual assistance of counsel. There were three bases for the allegation of ineffective counsel, one of which was an assertion that defence counsel at trial did not discuss with his client a plea offer made by the Crown.
- [20] Defence counsel in that case deposed he had a specific recollection of doing so and his client emphatically refused the offer, but counsel kept no notes of that discussion. The client denied the discussion took place.
- [21] At paragraph 76, the Court of Appeal stated:
- Remarkably, [defence counsel] has no notes of this discussion. One would expect basic training for new members of the legal profession to include emphasis on record keeping, and on obtaining critical instructions in writing. Whether or not such training was provided to [defence counsel], there is no excuse for such critical confirmatory evidence to be missing, as has happened in this case.
- [22] Ultimately the Court of Appeal held that the process of getting to verdict was flawed and therefore a mistrial was warranted.
- [23] The accused submits the lack of an affidavit and/or notes by Crown counsel, in the facts before me, weighs in favour of his position on this application. He submits it was incumbent upon Crown to adduce evidence specifically about what instruction, if any, he gave to the complainant. He further points out that it should concern the court that, despite the conversation happening the day before, Crown counsel stated to the court during submissions (2nd extract) recollection was poor.
- [24] I disagree with defence counsel's submission that Crown counsel's recollection is not good. He was put in a difficult situation during the court hearing on this application and was providing careful and helpful assistance to the court. He fairly stated he could not recall the "exact words" he used, but he did not say that his recollection was poor.
- [25] The situation in *Hamzehali* was different. That was a case on appeal where there had been a successful application to adduce fresh evidence. The Court of Appeal had before it contradictory evidence on a key issue. It was in that context that the absence of notes regarding a critical instruction was concerning.
- [26] More generally, I find *Hamzehali* can be distinguished. That case was more complex. The lack of notes was related to the appellant's claim that he was never told about a plea offer from the Crown. The offer was to enter a stay on the charge of sexual assault in exchange for a guilty plea on the charge of simple assault.

- [27] The appellant gave evidence that the plea offer was never discussed or put to him by his own counsel. In addition to that evidence, a translator who attended the meeting between counsel and the accused confirmed the appellant's recollection, which contradicted defence counsel's evidence. Thus, the Court of Appeal was faced with directly contradictory evidence about whether defence counsel raised the plea offer with his client. It is in that context that the lack of counsel's notes was discussed.
- [28] The context in this case is different, in that the complainant is not the Crown's client, even if she is its most important witness. There is no scenario in which counsel would be obliged to take instruction from the complainant, as defence counsel must when there has been a plea offer from the Crown.
- [29] I am not suggesting not keeping notes of important conversations cannot be problematic, but the gravity of the lack of notes in Hamzehali was far greater than in this case. It concerned a fundamental duty of criminal defence counsel, specifically to get instructions from a client about a plea offer.
- [30] The Court of Appeal concluded in that case that even if it accepted defence counsel's evidence that the plea offer was discussed, that discussion was not meaningful, because the evidence was undisputed that the accused did not understand the difference between a conviction for assault and conviction for sexual assault.
- [31] Accordingly, the comments in paragraph 76 of the decision are obiter, and the lack of notes did not animate the ultimate conclusion to grant a mistrial. This is made clear at paragraph 87:

It cannot be said, on the evidence presented, that the plea offer was explained to him in a "meaningful way". Clearly, in hindsight, [defence counsel] wishes he had taken basic steps in communicating the plea offer, including keeping careful notes and obtaining written instructions, but that failure is not the problem. The problem is that Mr. Hamzehali never understood his jeopardy, nor the plea arrangement offered.

[Emphasis added]

- [32] More significantly, the mistrial was premised on other events which, together with the appellant's not understanding the plea offer, were found to constitute ineffective assistance of counsel. Those other events included defence counsel informing Crown counsel that the appellant had text messages from the complainant. Furthermore, defence counsel gave those messages to the Crown before he knew what was in them and before he cross-examined the complainant. The Court found this conduct caused actual harm to the accused's position, because it foreclosed defence counsel's ability to juxtapose the complainant's vague evidence from the preliminary inquiry regarding the timing and content of those messages.

- [33] Apparently, defence counsel also stated off the record to Crown that text messages may have been manipulated. This breached solicitor-client privilege and put his client in jeopardy. The Court of Appeal specifically noted that conduct was a significant aspect of the conclusion that a mistrial was necessary.
- [34] Ultimately, the Court held that a new trial was necessary because of the cumulative effect of defence counsel's conduct that resulted in ineffective assistance of counsel.
- [35] Considering all of the issues that arose in that case, I am unable to conclude that in this case the failure of Crown counsel at trial to keep notes raises a significant concern.
- [36] I now turn to the second aspect of the accused's position: what instruction, if any, was given to the complainant? As noted in the extracts above, Crown counsel at trial informed the court the gist of what he said to the complainant and defence counsel in this application agrees that instruction was proper (1st Extract).
- [37] However, defence counsel submits I can infer an improper direction was given because of the 2nd extract. Defence counsel submits reading that extract, and recalling the testimony of the complainant where she stated, "I can't talk about my sexual history", I should infer Crown counsel instructed her not to speak about her potential romantic interest in R. Defence counsel says that direction was wider in scope than the s. 276 Ruling and therefore was improper and taints the complainant's evidence as to the extent that a mistrial is required.
- [38] Crown counsel argues I should not make that inference. He submits it is clear that in the 2nd Extract, Crown counsel was stating a position he would take about the evidentiary status of communications the complainant may have had about her interest in R if there was a s. 276 application.
- [39] I agree with Crown counsel. On its face, in the 2nd Extract, Crown counsel was telling the court of a legal position he might take, not recounting what he had said to the complainant. This application for a mistrial has arisen mid-trial during the cross-examination of the complainant. The 2nd Extract occurred during an exchange between the court and defence counsel. I am not satisfied that it would be reasonable nor appropriate to draw the inference sought.
- [40] I add that the most obvious source of information about what was said about the scope of her testimony is to ask the complainant on the stand, and that option remains.
- [41] However, even if I drew the inference suggested by defence counsel, which I explicitly do not, the comment was not necessarily improper. One must remember that as emphasized by the Supreme Court of Canada recently in both *R. v. Goldfinch*, 2019 SCC 38 and *R. v. Barton*, 2019 SCC 33, s.276 is meant to be applied robustly. Section 276(1) prohibits admission of evidence about sexual activity that does not form the subject matter of the charge, if the intention is to ask the court to draw an inference based on myths or stereotypes.

- [42] Defence counsel stated she wanted to ask questions about the complainant's raising concerns with the accused about having sex with him, because of her interest in his friend, R.
- [43] However, defence counsel's question was open ended and simply asked what the nature of the complainant's relationship with R. That clearly could have elicited prohibited information. During submissions on this application, defence counsel conceded the court's direction to narrow that question was not improper.
- [44] Defence counsel's application seems to have proceeded on the basis that the only proper limits on the complainant's testimony resides in the s. 276 Ruling. From there, defence argues further restrictions must be improper, because it unfairly constrained the complainant, which could impact the effectiveness of cross-examination.
- [45] I disagree, because the issue is much more nuanced. Section 276 makes inadmissible certain evidence unless a properly framed application is brought and is successful. In the most recent amendments, Parliament has made the section more rigorous, both procedurally and substantially.
- [46] Importantly, it is only on an application under s. 276 that evidence which falls into the category of sexual activity extrinsic to the charge must be assessed. Whichever party wants to adduce that evidence, must bring an application in advance of the trial. The application must be in writing and must be precise in explaining how the evidence either does not run afoul of s. 276, or in consideration of all of the factors in that section, ought to be admitted, notwithstanding the overarching prohibition on eliciting evidence about extrinsic sexual activity.
- [47] The importance of those procedural aspects cannot be overstated. This is made clear by Justice Moldaver, who, wrote for two judges but concurred with the majority judgment in *Goldfinch*. He suggests that the impugned evidence in that case may have been ruled admissible, but the application brought by the accused was deficient. Therefore, he agreed with the majority in upholding the Court of Appeal's overturning of the acquittal, based on the trial judge's admission of the impugned evidence.
- [48] In this case, Crown counsel chose not to ask the complainant about R., and consistent with that strategic decision, alerted the court during the exchange the court had with defence counsel, that a s. 276 application may be necessary to elicit the evidence sought by defence counsel's question. Given the question that was actually asked by defence counsel at that point, ["What is the nature of your relationship with R."] that position was sound.
- [49] It is important to note that the defence application under s. 276 did not seek to adduce evidence about the complainant's relationship with R. The accused's affidavit supporting the application is silent on that issue, too. Because the complainant has a right under the Criminal Code to participate and be represented at any s. 276 application, the court cannot simply amend or widen the scope of the s. 276 application on the fly.

- [50] Thus, the fact that during his testimony on the voir dire the accused talked about what the complainant said to him about R. during the walk home, cannot expand his application. In other words, the court has not been asked and has not ruled on whether any evidence about the complainant's romantic history or interest in R. is prohibited by s. 276.
- [51] Given the complainant's testimony, "I can't talk about my sexual history," there is at least some indication that it is *prima facie* inadmissible. It is then incumbent on whoever wants to adduce that evidence to bring an application.
- [52] To view the matter from another perspective, had there been no 276 Ruling, it is clear defence counsel's question was improper because it raised the specter of adducing inadmissible evidence. That does not mean the evidence cannot be admitted, but the court is obliged to consider that issue not during the course of cross-examination but in a properly framed and timely s. 276 application.
- [53] In this case, Crown counsel made a decision not to ask the complainant about R. Crown correctly points out it is not obliged to adduce any specific piece of evidence. Crown must live with the consequences of its decision. Thus, it is open to defence to argue that the complainant's evidence in chief was stilted and not detailed, and on that basis, defence is entitled to make submissions that the complainant is either less reliable or credible.
- [54] I do not agree with defence counsel that the effectiveness of its cross-examination or ability to challenge the complainant's credibility has been negatively impacted by the choice made by Crown. More importantly, it is unreasonable to suggest that I could make that decision now, when the cross-examination has only started.
- [55] Even if I am wrong regarding my conclusion about whether there was a misdirection given to the complainant, that would fall far short of justifying a mistrial. As noted above the test is high. This is a judge-alone trial and there is no reason why any improper direction given to the complainant cannot be cured by a direction from the court.
- [56] Defence says the reason why the misdirection cannot be cured within the trial is that the effectiveness of cross-examination has been greatly diminished. Even if the complainant is directly cross-examined about why she stopped herself from providing details of her conversation with the accused in the apartment, defence counsel said she has an "out" for why she did not fully answer the question.
- [57] As I have already discussed, however, that "out" does not arise at law from anything Crown said or the s. 276 Ruling. Section 276 raises a red flag, requiring the trial judge to proceed carefully whenever questions are asked that may elicit evidence of sexual activity extrinsic to the substance of the charge.

- [58] I add that while defence counsel's position that the effectiveness of cross-examination has been curtailed, where the complainant has a reasonable explanation for not giving a more thorough answer to some questions during chief, that is not an inevitable result. It is simply too early in this trial to know how the complainant's self-censoring impacts her credibility.
- [59] Lastly, a mistrial is only available in the clearest of cases, where no other curative measure is available. I cannot see how, even if I agreed with the defence that the witness was misdirected about her evidence, that it amounted to a fatal flaw that is incapable of being cured.
- [60] For all of those reasons, I dismiss the application.

"Sharma J."

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Prepared on 26 October 2026 · Esheria