
CANADA / JUDGMENT

R. v. Sunshine

2010 BCSC 44

COURT

Supreme Court of British Columbia

DECIDED

14 January 2010

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2010 BCSC 44 R. v. Sunshine

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sunshine,

2010 BCSC 44

Date: 20100114

Docket: 24803

Registry: Vancouver

Regina

v.

David Carl Sunshine

Before: The Honourable Mr. Justice Myers

Ruling on Application for Directed Verdict

Counsel for the Crown:

Elliot Poll

James Cryder

Counsel for the Accused:

John Gustafson

Place and Date of Hearing:

Vancouver, B.C.

November 9-10, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 14, 2010

Introduction

- [1] David Carl Sunshine stands charged with the second-degree murder of his step-daughter, Isabella Rain-Ayala, who was approximately two and a half years old at the time of her death in the early morning hours of December 18, 2005.
- [2] At the close of the Crown's case, the accused made an application for a directed verdict, arguing that the Crown's evidence was insufficient to establish the mens rea for second-degree murder. He argued that only a charge with respect to manslaughter should be left with the jury. I rejected the application of the accused, with reasons to follow. These are my reasons.

The Crown's Evidence and Argument

- [3] Isabella was the daughter of Robin Rain and Frank Ayala. Ms. Rain met Mr. Sunshine in January 2004 and they began living together approximately three months later. Ms. Rain and Mr. Sunshine had a child named Devina, who was born in March 2005.
- [4] Ms. Rain testified that in the evening of December 17, 2005, the children were put in a playpen in the living room. The children fell asleep in the crib while the family watched TV. Devina woke up, and Mr. Sunshine carried Isabella to her bedroom to put her to bed. Devina remained in the playpen. Ms. Rain did not hear any noises from the bedroom and Mr. Sunshine came back out of Isabella's bedroom a few minutes later.
- [5] Shortly after Mr. Sunshine came out of the room, Isabella screamed. Ms. Rain said she wanted to go and look in on Isabella but Mr. Sunshine said he would do it.
- [6] Ms. Rain heard another scream from Isabella's room a few minutes later and she ran to the room. Isabella was holding her stomach and said "boo-boo tummy". Her lips were turning blue and her eyes were rolling back in her head. Ms. Rain said she got hysterical and shouted at Mr. Sunshine to call an ambulance, which he did.
- [7] Isabella was taken to the B.C. Children's hospital where she was pronounced dead at 00:51.

- [8] An autopsy was performed by Dr. Lee who testified at the trial. He determined that the cause of death was blunt force abdominal injuries. Dr. Lee also opined that there had likely been recurrent injuries to the mesentery other than the fatal blow, based on evidence that he found of trauma in various stages of healing and scarring. Dr. Lee also testified that it was unlikely that the fatal injury to the mesentery could have occurred from falling on a plastic ring toy or on the edge of the bathtub.
- [9] Dr. Lee also found evidence of bruising on the sides of Isabella's head, although there was no accompanying fracture of the underlying skull. The bruises were covered by Isabella's hair which was removed during the autopsy. Therefore, they would not have been readily apparent prior to the autopsy, nor - in contrast to the burn marks - were they noted by anybody. Similar to the trauma to the mesentery, the bruises on the head were in various stages of healing. Dr. Lee's opinion was that these were likely caused by repetitive injuries.
- [10] With respect to the timing of the injuries, in Dr. Lee's opinion, the fatal blow to the abdomen occurred not more than six hours prior to Isabella's death. Additionally, based on his microscopic tissue analysis, Dr. Lee stated that some of the bruising to the sides of Isabella's head likely took place from six hours prior to immediately prior to Isabella's death.
- [11] The accused was a grown man, approximately 5'11 and 210 pounds at the time of the alleged offence. Isabella was a small child, approximately 3' tall and weighing 26 pounds - there was evidence that this is the bottom 10 percentile for her age. There was evidence that less force would be required to hurt a smaller child.
- [12] During the autopsy, Dr. Lee also found other evidence of trauma suffered by Isabella prior to her death. Dr. Lee identified several marks on Isabella's skin as burn marks. As he wrote in his report:

Other autopsy findings included multiple crescent and somewhat right-angled lesions on the skin characteristic of thermal injuries. Microscopic examination of these injuries are also characteristic of thermal burns. They appear to be in the process of healing, and therefore likely occurred several days prior to death. There was also was a similar-shaped crescentic scar on the upper right arm. The crescentic shape closely resembled the end of a disposable cigarette lighter.

- [13] A paediatric burn specialist, Dr. Verchere, testified for the Crown. Her opinion and report were based on her examination of the autopsy photos. She agreed that the marks that Dr. Lee noted were burns. In her opinion, the likelihood of the burns being self-inflicted was low. She also noted that the burns had aspects of both contact with flame and contact with a hot object. Dr. Verchere she said that the timing of the burns was difficult to determine from photographs. At most they were two to three weeks old. Some could have been only one or two days old. It was difficult to determine if they were all inflicted at the same time (with varying degree of injury), or all at different times. Finally, Dr. Verchere stated that the shape of the burns was consistent with the shape of the cigarette lighter found at the Sunshine-Rain residence.

- [14] The main evidence relied upon by the Crown is a videotaped statement the accused made to undercover police officers during a "crime boss" or "Mr. Big" sting operation, in which he confessed to punching Isabella in the abdomen numerous times over a four- to five-month period. He also confessed to punching her in the abdomen on the night that she died. Finally, he also admitted to having burned Isabella with the lighter.
- [15] In the meeting Mr. Sunshine did not say he inflicted the bruises on the side of Isabella's head; rather, he said that an injury on Isabella's head may have been found because she fell and hit her head on the sidewalk.
- [16] In seeking to prove intent, the Crown particularly relies on the following statements made by the accused in his "Mr. Big" interview:

At the time I thought it was just gonna be me and Devina and Mom, unfortunately under the circumstances it's not, yeah, I did think, you know, but then I gotta think twice about that, and, I made a big fuckin' mistake, man.

[line 2160]

And at line 1806:

DS[unshine]: Basically just disciplining her. You know, hating, I just wanted for it to be us and Devena, you know?

P[eca]: You just wanted it to be you and Devena? What's us and Devena?

DS[unshine]: Well me, mom and Devena. Plus I (clears throat) her dad. Right urn, caused a lot of shit for me in the past, right? Uh, that's, that's a long story, 1'11- well, maybe I was trying to get back at him, right? Through his daughter.

- [17] The Crown also relies on the common sense inference that one intends the natural and probable consequences of one's actions. They argue that blows of the kind they allege Mr. Sunshine inflicted on the young child would naturally and probably cause her death, and thus the jury is entitled to infer that Mr. Sunshine subjectively knew that they would do so. This is especially so given the discrepancy in size between Mr. Sunshine and Isabella.
- [18] The Crown also argued that there was evidence of animus of the accused towards Isabella. The Crown submitted that this evidence could be used by the jury in assessing whether the accused intended to cause Isabella bodily harm that he knew was likely to cause her death. The Crown submitted that the jury could infer that an accused with more animus would be more likely to cause serious harm than on who harboured less animus. Evidence which indicates the accused had an intense animus towards Isabella is evidence indicating that he was more likely to have an intention to cause her bodily harm that he knew was likely to cause her death, for example, that he struck her harder, in a more vulnerable place, with a subjective understanding that what he was doing was likely to cause death.

The Test for a Directed Verdict

- [19] The test for a directed verdict is essentially the same test for committal to trial at a preliminary inquiry under s. 548 of the Criminal Code, R.S.C. 1985, c. C-41: the trial judge must inquire if there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty (*R. v. Arcuri*, [2001] 2 S.C.R. 828 at para. 21, 157 C.C.C. (3d) 21; *R. v. Charemski*, [1998] 1 S.C.R. 679 at para. 2, 123 C.C.C. (3d) 225). If there is any such evidence, then the application for a directed verdict cannot succeed.
- [20] If the case involves circumstantial evidence, the judge may engage in a limited weighing of the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown seeks to make (*Arcuri* at para. 23). This weighing does not involve consideration of the inherent reliability of the evidence itself (*Arcuri* at para. 30). The judge does not ask whether he or she would conclude that the accused is guilty, assess credibility, or draw factual inferences. However, any inferences relied upon by the Crown to prove an element of the offence must be both reasonable and reasonably based upon the evidence (*Charemski* at paras. 6-11). The question is whether there is evidence that, if believed, could reasonably support a guilty verdict. It does not matter if there is evidence supporting the opposite conclusion - it is the exclusive province of the jury to come to its own conclusions in the face of competing factual inferences (*Charemski* at para. 4).

Intention for Second-Degree Murder

- [21] The mens rea for second-degree murder is set out in s. 229(a) of the Criminal Code, which reads as follows:

229. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;

- [22] At the outset of the trial the Crown advised that it would be relying only on s. 229(a)(ii).

- [23] The leading case on intent under s. 229(a)(ii) is *R. v. Cooper*, [1993] 1 S.C.R. 146. In *Cooper*, Cory J., for the majority, wrote at 155-6 as follows:

The intent that must be demonstrated in order to convict under s. 212(a)(ii) [now s. 229(a)(ii)] has two aspects. There must be (a) subjective intent to cause bodily harm; (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. It is only when those two elements of intent are established that a conviction can properly follow.

Cory J. reiterated the principle from *R. v. Nygaard*, [1989] 2 S.C.R. 1074 that the intent requirement under s. 229(a)(ii) is only a "slight relaxation" of the requirement under s. 229(a)(i), saying at 155:

[I]t is not sufficient that the accused foresee simply a danger of death, the accused must foresee a likelihood of death flowing from the bodily harm that he is occasioning the victim.

[24] Cooper also stands for the proposition that the requirement to prove recklessness will almost invariably be superfluous. As Cory J. reasoned at 154-5:

The aspect of recklessness can be considered an afterthought since to secure a conviction under this section it must be established that the accused had the intent to cause such grievous bodily harm that he knew it was likely to cause death. One who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not.

[25] The required intention for murder is subjective, as contrasted with intention for manslaughter, which is objective (*R. v. Williams*, 2001 BCCA 648). However, in the absence of direct evidence as to what the accused's subjective knowledge was at the time of the alleged offence, the trier of fact is permitted to draw the common sense inference that a sane and sober person intends the natural and probable consequence of his or her actions. As the Supreme Court of Canada said in *R. v. Seymour*, [1996] 2 S.C.R. 252, at para. 19:

Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.

Position of Mr. Sunshine

[26] Mr. Sunshine has conceded that the evidence of the Crown, if believed, satisfies the *actus reus* of assault, as well as the subjective intent to cause bodily harm component of *mens rea*. The thrust of Mr. Sunshine's argument is that even if it is believed that he punched Isabella in the head and abdomen, there is insufficient evidence presented by the Crown to establish that Mr. Sunshine subjectively knew that the bodily harm he intended to cause, and did in fact cause, was likely to result in the death of Isabella.

[27] Mr. Sunshine argues that even taking the Crown's case at its highest, the most that has been proven is subjective knowledge of a "danger" of death, not a "likelihood" of death. According to *Nygaard*, this is not enough to satisfy the knowledge component of s. 229(a)(ii). Further, Mr. Sunshine submits that when he was asked during the "Mr. Big" statement specifically about his subjective knowledge, he never admitted to knowing that Isabella was probably or likely going to die from the blows he admitted to administering:

P[eca]: Did ya think that, y'know what it's gonna to get to a point where she's not gonna to be able take it anymore?

DS[unshine]: Urn, (clears throat) there were times, y'know, I had thought about (thumping) that, urn, but then she's a really strong little girl to and she could-

P[eca]: - So you thought maybe she's not gonna to be able to handle this anymore, that she might die, or she might - did ya ever think she might die because of this?

DS[unshine]: Y - there were sometimes that I did think that, right?

P[eca]: Yeah, sometimes you did think that, eh? Yeah. 'Cause you're a smart guy, right? Like it makes sense, right.

DS[unshine]: Yeah

[lines 2130-2140]

[28] The defence also pointed out that Dr. Lee stated that the injuries to Isabella's abdomen were unusual, and that not every blow to the abdomen will rupture the main vein in the mesentery, or injure the mesentery at all. It requires a certain amount of force and a hit at a specific location. Dr. Lee agreed during cross-examination that the same type of blow that caused Isabella's injury could have, under slightly different circumstances, caused different damage and may not have injured the mesentery at all. He agreed when it was put to him that the severing of the major vein "is a matter of luck", at least in part, and that it cannot be predicted whether a particular blow will cause a particular type of damage. However, he did say that the same force could - and more often does - injure other organs such as the liver, and that such injury could be life-threatening.

[29] In the submission of the defence, Isabella's death was a matter of "bad luck", and thus Mr. Sunshine could not have known that death was likely to ensue from his actions - simply because, on the evidence of Dr. Lee, death was not a natural and probable consequence of such actions. In response, the Crown argued that it is for the jury to decide what the natural and probable consequences of a set of actions are. In the Crown's submission, Dr. Lee, though he is an expert witness, is still only a witness, and the jury is entitled to rely on his opinion to whatever extent it deems appropriate. The Crown argued that it was a matter of common sense that a beating of the severity alleged, inflicted by a grown man on a young and small child, was likely to result in the death of the child.

[30] In response to the Crown's submissions on how animus could be used to prove intent for murder, the defence argued that while animus may be relevant towards the question of whether the accused intended to inflict bodily harm, it was an irrelevant consideration to the knowledge component of the mens rea requirement for murder.

[31] Finally, the defence pointed to several parts of the "Mr. Big" statement where Mr. Sunshine specifically stated that he did not intend to cause Isabella's death.

Analysis

- [32] Mr. Sunshine does not dispute that the evidence presented by the Crown, if believed, would allow a reasonable jury to conclude that the accused committed an unlawful assault on Isabella and thereby caused her death, nor do I think there can be any issue with respect to that. The issue is the required mental element for murder.
- [33] In my view, the Crown's evidence is sufficient to allow a reasonable jury to conclude that Mr. Sunshine knew that the harm he inflicted on Isabella was likely to cause her death, and that he was reckless whether death ensued or not.
- [34] As I have set out above, in his "Mr. Big" interview Mr. Sunshine stated that he committed the assault because he "thought it was just gonna be me and Devena and Mom..." and "Basically just disciplining her. You know, hating, I just wanted for it to be us and Devena, you know." The jury is entitled to regard that as an admission that Mr. Sunshine intended to kill Isabella at the time he committed the assault. It is not for me to balance that against the other statements which Mr. Sunshine made which may be taken by the jury as indicating that he did not intend to cause her death. That is up to the jury.
- [35] From Cooper, it is clear that there are two components to intent under s. 229(a)(ii). What is less clear from the jurisprudence is whether evidence of animus can go towards proving the second "knowledge" component of mens rea under s. 229(a)(ii). The conclusion that I have reached is that when the accused's knowledge of whether a particular act was likely to cause death is in issue, animus alone is not enough to prove subjective knowledge; rather, there is a real risk of its presence being a distracting factor in the analysis.
- [36] However, there is still the common sense inference described in Seymour. The jury might reasonably find that death would be a natural and probable consequence of a particular act, and infer that the accused knew that death was likely to ensue. But care must be taken not to import an objective standard into the analysis. The jury must make the logical inference that this particular accused knew the natural and probable consequences of his actions, and the jury must determine what the natural and probable consequences of a particular action are, this being a question of fact. Thus, while the "thin skull" analogy presented by the defence is very compelling, its flaw in the context of this application is in its assumption that it is for the judge to determine what the ordinary consequences of a particular action are. The jury is entitled to hear evidence, if it exists, of the act allegedly committed by the accused. Within the bounds of reasonableness, the jury is entitled to decide whether death was an ordinary or probable consequence of that action, and then make the inference that the accused subjectively knew that.

- [37] In the case at bar, the Crown is entitled to ask the jury to rely on the common sense inference that Mr. Sunshine knew and intended the natural and probable consequences of his actions, namely the death or likely death of Isabella. Based on the evidence (in particular the nature of the blow and the relative size of Mr. Sunshine and Isabella), the inference is not so far-fetched that it should not be left to the jury.
- [38] Further, it is open to the jury to find that Mr. Sunshine caused the bruises to Isabella's head by punching her and that some of the blows to her head were done at the same time as the fatal blow to the stomach. (As mentioned above, Dr. Lee said that both the fatal abdominal injury and some of the injuries to the sides of the head were inflicted sometime up to six hours prior to Isabella's death.) If that is so, then the jury is entitled to regard the punches to the head and the abdomen as part of one beating in determining whether Mr. Sunshine knew and intended that the likely consequence of the beating would be the death of Isabella. This is so irrespective of the fact that only the head injury was the actual cause of death.

Conclusion

- [39] Because there was some evidence presented by the Crown which, if believed, could support the conclusion that the accused meant to cause bodily harm to Isabella that he knew was likely to cause her death, and was reckless as to whether death ensued or not, the jury is entitled to conclude that the accused was guilty of second-degree murder, pursuant to s. 229(a)(ii) of the Criminal Code. Thus, there will be no directed verdict of acquittal on that charge. The application is dismissed.

"E.M. MYERS, J."

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Prepared on 29 October 2026 · Esheria