

CANADA / JUDGMENT

R. v. Veeken

2020 BCCA 54

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 54 R. v. Veeken COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Veeken, 2020 BCCA 54 Date: 20200117 Docket: CA45929 Between: Regina Respondent And Paul Peter Veeken Appellant Restriction on publication: A publication ban has been imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant in this matter. This publication ban applies indefinitely unless otherwise ordered. Pursuant to s. 16(4) of the Sex Offender Information and Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA. Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Fitch The Honourable Mr. Justice Grauer On appeal from: An order of the Supreme Court of British Columbia, dated December 12, 2018 (conviction) (R. v. Veeken, 2018 BCSC 2429, Prince George Docket 37730-2). Oral Reasons for Judgment Counsel for the Appellant: S.R. Wright Counsel for the Respondent: J.R.W. Caldwell Place and Date of Hearing: Vancouver, British Columbia January 17, 2020 Place and Date of Judgment: Vancouver, British Columbia January 17, 2020 Summary: The appellant challenges his conviction for sexual interference on various grounds including that the judge erred by: (1) editing the oral reasons for judgment after they were delivered; and (2) shifting the burden of proof. Held: Appeal allowed and a new trial is ordered. It is unnecessary for this Court to address the extent to which trial judges can edit their oral reasons for judgment after delivery. The edited reasons for judgment, standing alone, establish that the judge erred in law by shifting the burden of proof. The judge erroneously concluded that he could neither accept the appellant's evidence nor find that it raised a reasonable doubt in the absence of independent evidence that confirmed the appellant's denial of wrongdoing.

[1] FITCH J.A.: The appellant was convicted by a Supreme Court judge of sexual interference contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46. The offence arose out of incidents said to have occurred when the complainant was between 10-12 years of age. At the relevant time, the appellant was 38-40 years of age. The alleged incidents involved the appellant repeatedly touching the complainant's breasts and vaginal area, typically in the course of tickling her when the complainant visited the appellant at his family's cabin.

- [2] The appellant testified. He denied ever touching the complainant for a sexual purpose.
- [3] This was the second trial in this matter -- a new trial having been ordered by this Court in reasons for judgment indexed as 2017 BCCA 417.
- [4] There was no direct evidence confirming the complainant's testimony that the appellant repeatedly touched her breasts and vaginal area. The trial judge recognized that the resolution of the case turned on his credibility findings and the application of the framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, to the circumstances of this case.
- [5] The three-step *W.(D.)* analysis is designed to assist the trier of fact in properly applying the reasonable doubt standard to the issue of credibility. Where, as here, an accused denies the commission of the offence, a trier of fact must find the accused not guilty if they believe the accused's evidence or, even if they do not believe the accused's evidence, they are left in reasonable doubt by it. If the trier of fact does not believe the accused's denial and is not left with a reasonable doubt by the accused's testimony, a conviction can only result where the Crown discharges its burden of establishing guilt beyond a reasonable doubt.
- [6] In oral reasons for judgment indexed as 2018 BCSC 2429, the judge rejected the appellant's evidence, found that the appellant's evidence did not raise a reasonable doubt, and accepted the complainant's evidence that the appellant repeatedly touched her for a sexual purpose.
- [7] On appeal, the appellant submits that the judge erred by: (1) editing the oral reasons for judgment after they were delivered; (2) shifting the burden of proof; (3) misapprehending evidence; and (4) providing insufficient reasons for judgment.
- [8] The first ground of appeal raises an important question of practice concerning the extent to which trial judges are entitled to edit reasons given orally. This Court has addressed the point on several occasions: *R. v. Walton*, 2011 BCCA 535 at para. 21; *R. v. Pham* (6 September 2011), Vancouver CA038676 (B.C.C.A. Chambers). We have consistently held that while trial judges cannot edit or change their oral reasons "in an attempt to defeat an appeal", judges are entitled to edit their reasons "to a degree" as, for example, where words have been misspoken or some clarification is necessary. I should add that no suggestion has been made in this case that the judge undertook an editing process to defeat an appeal. In fact, the edited judgment was released before the notice of appeal was filed in this Court.
- [9] A similar approach to this issue was taken by the Alberta Court of Appeal in *R. v. Schell*, 2004 ABCA 143 at paras. 43 and 45. In that case, it was held that the judge did nothing impermissible by deleting a sentence from her oral reasons for judgment in circumstances where "the written reasons [did] not deviate from the general thrust of their oral predecessor": citing Roman N. Komar, *Reasons for Judgment: A Handbook for Judges and Other Judicial Officers* (Toronto: Butterworths, 1980) at 16.
- [10] It appears that a more restrictive view has been taken by the Ontario Court of Appeal: *R. v. Wang*, 2010 ONCA 435 at paras. 9-11. In that case, trial judges were cautioned against modifying, changing or adding to a transcript of oral reasons rendered in court except to

correct "punctuation, grammatical errors and the like." The court endorsed the proposition that reasons for judgment are not meant to be tentative and counsel who receive a transcript of oral reasons should not "be left to wonder whether it in fact reflects what was said in the court, or rather constitutes a version of the reasons as later modified by the judge."

- [11] In this case, the judge amended his oral reasons for judgment by deleting from the transcribed version words said in court, including language the appellant says would have supported his second ground of appeal. The appellant submits that the amendments made were substantive in nature and exceeded the authority trial judges have to edit oral reasons.
- [12] In the alternative, the appellant argues that the edited reasons for judgment, standing alone, establish that the judge erred in law by shifting the burden of proof.
- [13] I agree with the appellant's alternative submission on this issue. In my view, reversible error in law is reflected in the edited version of the reasons for judgment. As a consequence, it is unnecessary for this Court to address the extent to which trial judges can edit their oral reasons for judgment to properly dispose of this appeal. In these circumstances, the issue is best left to be explored another day.
- [14] Further, as I am of the view that a new trial is required as a consequence of the error identified in the appellant's second ground of appeal, I consider it unnecessary to address the appellant's other grounds of appeal.
- [15] The reasons, as edited and transcribed, reflect the following application of the first two steps of the W.(D.) framework to the evidence in this case:
- [72] Accordingly, the first step in the analysis in the case at bar is whether I accept, as true, Mr. Veeken's testimony that he did not touch [the complainant's] breast and vaginal areas at any time. In this regard, the Crown characterizes Mr. Veeken's evidence as a "bare denial" and while the defence acknowledges that this is so, it points out that there is "not much else" that Mr. Veeken can do to meet the allegations against him. It is not controversial that there is no reliable evidence supporting Mr. Veeken's denial.
- [73] In these circumstances, I am satisfied that a finding that Mr. Veeken's denial is true cannot reasonably be made. I am mindful that the defence has urged me to rely upon Mr. Veeken's testimonial demeanour and manner, by submitting that Mr. Veeken was forthright, gave full answers, explained suggested inconsistencies, and was not shaken in cross-examination. I am not persuaded, however, that Mr. Veeken's demeanour and manner are a sound basis for accepting his testimony as true. Notably, the Crown did not agree with the defence's assessment; rather, it characterized Mr. Veeken as glib and evasive. These widely divergent views of the same testimony only serve to demonstrate the frailty of manner and demeanour as the basis for determining the truthfulness of a witness.

- [74] The next step, then, is whether Mr. Veeken's testimony raises a reasonable doubt as to his guilt. This is similarly problematic in the absence of reliable evidence that supports, directly or indirectly, Mr. Veeken's denial. Moreover, Mr. Veeken admits having [the complainant] on his lap and tickling her; he admits pulling her onto his lap while in the hot tub; and, he admits spending evenings and nights with only [the complainant] and her nine-year-old brother. [Emphasis added.]
- [16] In my view, these paragraphs support the appellant's submission that his evidence was rejected and found not to raise a reasonable doubt because it was not confirmed by any other reliable evidence. Beyond the obvious challenge of requiring the appellant to adduce evidence supporting his denial -- in effect, to corroborate a negative -- the trial judge's approach had the effect of erroneously shifting the burden of proof.
- [17] The judge was certainly entitled to reject the appellant's evidence and find that it did not raise a reasonable doubt about his guilt. The difficulty in this case arises because of the judge's conclusion that he could neither accept the appellant's evidence nor find that it raised a reasonable doubt in the absence of independent and reliable evidence supporting his account. To approach the issue this way was to erroneously shift the burden to the accused to adduce evidence that confirmed his denial of wrongdoing.
- [18] While I appreciate that the reasons for judgment must be read in their entirety and assessed as a whole, the error in law was the starting place for the judge's W.(D.) analysis and, in my view, one so fundamental that it taints his reasons as a whole.
- [19] For the foregoing reasons, I would allow the appeal, set aside the conviction, and order a new trial.
- [20] In light of the disposition, I propose it is unnecessary to resolve the application to admit fresh evidence.
- [21] SAUNDERS J.A.: I agree.
- [22] GRAUER J.A.: I agree.
- [23] SAUNDERS J.A.: The appeal is allowed, the conviction is set aside, and there is an order for a new trial. "The Honourable Mr. Justice Fitch"

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