

CANADA / JUDGMENT

R. v. Widdifield

2016 BCCA 322

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 322 R. v. Widdifield

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Widdifield,

2016 BCCA 322

Date: 20160722

Docket: CA42720

Between:

Regina

Respondent

And

Robert Frederick Widdifield

Appellant

Publication Ban: Section 486.5(1) Criminal Code: Unless an order has been made under s. 486.4, an order may be made under this section. An order under s. 486.5(1) bans publication of any information that could identify a victim or a witness.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated December 16, 2014 (R. v. Widdifield, 2014 BCSC 2482, Nanaimo Docket 74552-1).

Counsel for the Appellant:

J. Arvay, Q.C.

A. Latimer

Counsel for the Respondent:

P.W. Hogg

Place and Date of Hearing:

Vancouver, British Columbia

April 12 and 13, 2016

Place and Date of Judgment:

Vancouver, British Columbia

July 22, 2016

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

Summary:

The appellant was convicted of extorting J.H. as a party to a conspiracy between February and October 2010. The appellant asserts that: the judge erred by failing to direct himself to the test applicable in cases involving solely circumstantial evidence; the hearsay evidence implicating him in the conspiracy should not have been admitted because it was not necessary; there was only evidence of a conspiracy arising on October 27, 2010, and hearsay evidence prior to that date should not have been admitted, and; the judge erred in admitting evidence pursuant to the co-conspirator's exception to the hearsay rule. Held: The appeal is dismissed. The evidence against the appellant included direct evidence, and therefore the rule in cases involving solely circumstantial evidence does not apply. The appellant cannot raise the argument that the hearsay lacked the requirement of necessity for the first time on appeal, because there is an insufficient evidentiary record to resolve it. The judge's findings on the events of October 27, 2010 provided a foundation for his conclusion that the appellant was involved in a conspiracy, but do not equate to a finding that the conspiracy arose only on that date. The judge did not err in his application of

the co-conspirator's exception. None of the inferences supporting his conclusion that the appellant's guilt was proven beyond a reasonable doubt were plainly contradicted by the evidence, or incompatible with it.

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

- [1] The appellant Robert Frederick Widdifield was convicted of extortion, contrary to s. 346(1.1) (b) of the Criminal Code, R.S.C. 1985, c. C-46: 2014 BCSC 2482. The judge found that he participated with Rajinder Singh Sandhu, Robert Henry Louis Lajeunesse, and Jeffrey Andrew Benven in the common unlawful design to extort money and property from the complainant, J.H. Charges against the co-conspirators were dealt with in separate proceedings. There is no dispute that J.H. was extorted by these individuals.
- [2] The main issue on appeal is Widdifield's contention that the evidence implicating him in the conspiracy was "wafer thin and entirely circumstantial". Primarily, he says that the judge engaged in speculation in finding the facts upon which his conviction was based, and in determining that the exception to the rule against hearsay relating to acts and declarations in furtherance of a common unlawful design was satisfied. He raises ancillary issues relating to the admissibility of the hearsay even if it meets the exception, and the judge's failure to refer to the test to be applied in cases based solely on circumstantial evidence.
- [3] The Crown says that Widdifield asks this Court to reach a different interpretation or inference on the evidence than the trial judge. It submits that the judge's inferences and conclusions are entitled to deference.
- [4] For the reasons that follow, I would dismiss the appeal.

Background

- [5] As noted, the main issue in this appeal is whether, factually, Widdifield was a member of the conspiracy to extort money from J.H. What follows is a detailed review of the circumstances giving rise to the matters underlying this appeal.
- [6] Widdifield is a full patch founding member of the Nanaimo chapter of the Hells Angels, an organization notorious throughout North America for criminal activity. The chapter was formed on July 23, 1983.
- [7] Widdifield and the complainant, J.H., were close friends for many years. Widdifield was the best man at J.H.'s first wedding, and they were business partners for a number of years. In the years leading up to the events resulting in these charges, they had drifted apart, but they had not had a disagreement. While not a member of the Hells Angels, J.H. had a long association with the Club through Widdifield.

- [8] As for the other members of the alleged conspiracy, Sandhu was a fifteen-year full patch member of the Nanaimo chapter of the Hells Angels. The trial judge described Lajeunesse as a strong-arm "freelance debt collector". Benvin assisted Lajeunesse in his debt collection activities. Neither are members of the Club.

The Debt

- [9] The genesis of the events giving rise to these proceedings occurred in the early 1990s. J.H. borrowed \$62,000 from a woman named Kelly Crooks. He repaid about one-half of the debt, but (he testified) after about six years of regular payments, Crooks moved away, leaving no forwarding address. It is undisputed that J.H. did not repay the whole balance of the loan.

2000 Demand for Payment

- [10] In the early 2000s, Lajeunesse approached J.H. and demanded repayment of the Crooks loan, claiming that it was now "his debt". J.H. refused to pay, saying that he would deal with Crooks directly. He heard no more of it for about eight years.

2010 Demand for Payment

- [11] The question of repayment of the debt resurfaced in January or February 2010. The indictment alleges that the extortion began February 1, 2010. Sandhu and a man J.H. knew as "Arnie" came to J.H.'s home and demanded \$100,000. Sandhu said that the demand came from the Club. Part of the demand included a "stupid tax", payable because in previously resisting repayment, J.H. allegedly used (or "dropped") the name of the Club or Widdifield, presumably to ward off Crooks' attempts to enforce the loan.

- [12] Over the next month, Sandhu sent J.H. a number of threatening text messages. These messages include the following text, from February 4, 2010:

Oh by the way Kelly [Crooks] is going to put a lean [sic] on your house you owe her 140K I seen [sic] the paperwork I guess you won't be dropping the big guys name anymore robbie will be helping her. I could of made a lot easier for you but well I wouldn't want to be you. I guess your want a be a gangster days are over LOL.

[Emphasis added.]

- [13] The evidence is that "the big guy", "our big friend", "Fred", "Wally", and "Freddie" (sometimes spelled "Freddy") are all references to Widdifield. References to "the club" are references to the Nanaimo Hells Angels.

- [14] On March 2, Sandhu and J.H. met outside a pub, and J.H. surreptitiously recorded their conversation. Sandhu claimed to be the reluctant messenger of the Club's demand. He mentioned that Lajeunesse was working with Crooks. According to Sandhu, Crooks had complained that when she had pressed J.H. to repay the loan and threatened to place a lien on his house, J.H. told her that "Freddie" would come after her. J.H. denied ever using Widdifield's name. Mr. Sandhu told him that it was "never gonna go away" and that he had to

pay the "stupid tax" to the Club. J.H. resigned himself to paying the money, and agreed to sell his boat, the Dream Chaser. During the meeting, he gave Sandhu \$2,500 as a show of good faith. Following the meeting, he contacted the police, although he requested that they take no steps.

Transfer of the Boat in Satisfaction of the Debt

[15] J.H. unsuccessfully tried to sell the boat through a broker. On June 8, J.H. met with Sandhu and signed paperwork necessary to transfer the boat, on the advice that doing so would settle debt and the "stupid tax".

Renewed Demands for Money

[16] Notwithstanding Sandhu's assurance that the debt and "tax" were settled, Lajeunesse reinstated demands for additional money. He told J.H. that he only got "\$30,000 out of that", presumably referring to the settlement of the debt by transfer of the boat. He said that he would "start taking things", such as cars. In an effort to ward off the continued extortion, J.H. called Sandhu. Again, he recorded their conversation. Sandhu reassured J.H. that the matter was closed, stating, "me and Freddy are gonna go talk to him [Lajeunesse]". The recording continues as follows ("Buck" is Sandhu, and "Robbie" is Lajeunesse):

J.H.: You know, I know once Freddy's there then I know then it's all

Sandhu: All good, I was just, I went there before I came here and he told me he goes, Buck, get the paperwork and that, he goes you and I, we'll go talk to Robbie and he goes I'll tell Robbie the way it fucking is. He goes no, he goes I'll tell him.

[17] J.H. also recorded the next telephone conversation between himself and Sandhu. J.H. complained to Sandhu that the debt issue had not been resolved:

JH: Hey I thought you told me you and Wally [Widdifield] had talked to Robbie. Robbie got a hold of me and told me that he's gonna do somethin to me and then he wants me to sign things over

In response, Sandhu advised that they had not seen him yet, and that he would get a hold of Lajeunesse but he was going out of town. He told J.H. to refer Lajeunesse to Widdifield if Lajeunesse troubled him again. J.H. said that he felt he was being pushed too far. Again, Sandhu advised him to tell Lajeunesse to speak with Widdifield. In the same recorded conversation Sandhu told J.H. that he had discussed the issue with Widdifield:

I talked to our big friend [Widdifield] there and he said that guy's [Lajeunesse] a fucking weasel, he says don't worry 'cause I told them what he was saying about the interest and ... and that, he's like no, he says it was sixty, its sixty

After repeated references to Widdifield, Sandhu reassured J.H. that he would never hear from Lajeunesse again.

[18] A final recorded conversation, which occurred on June 21, also revolves around the persistence of Lajeunesse. Again, Sandhu assured J.H. that he would appraise Widdifield of the situation:

I'm gonna tell the big guy, everything that you're tellin' me right now I'm gonna tell him what's going on and, yeah this is fuckin', what a fuckin', what a idiot.

The Sale of the Dream Chaser

[19] In August 2010, Sandhu moved the Dream Chaser from Nanaimo to Ladysmith. Sandhu showed the boat to a potential purchaser, Nathan Churchill. On August 16, Churchill and his father met Sandhu on board the boat to complete the sale for \$80,000 in cash. Widdifield attended, although he arrived separately from Sandhu. He chatted with Churchill's father while Churchill and Sandhu attended to the transfer papers below deck. Sandhu and Widdifield left together with the bag of cash. J.H. testified during trial that he believed he recognized Widdifield's handwriting on the bill of sale.

October Demands for Money

[20] On October 25, Lajeunesse reappeared at J.H.'s home demanding money, this time accompanied by Benvin. Again, he referred to J.H. having hurt "the big guy". J.H. testified that he immediately called Sandhu, who reassured him that he would talk to Lajeunesse. Lajeunesse reappeared the following day to apologize. There was some discussion about letting Widdifield know that Lajeunesse had been there. J.H. testified as follows:

Later on in the day, after the next day Mr. Lajeunesse came, knocked on my door and apologized for coming to my house the night before. He said "You must have phoned somebody because I was told to come and apologize to you." And he said that Wally would like -- "Mr. Widdifield would like to talk to you" and I said okay, and he says "Come on, well let's go." I said, "No, I'll phone him, and I'll set it up." He goes "Okay, well, you've got the message" and he turned around and he walked away.

[21] J.H. phoned Sandhu and advised him that he was going to try to contact Widdifield. Eventually, J.H. was able to get in contact with Widdifield, who said it was nothing to do with him. Ultimately, they agreed that J.H. would come to Widdifield's home the following day at a specified time to discuss the matter. In cross-examination, J.H. testified as follows respecting his conversations with Widdifield and Sandhu:

A So [Sandhu] said "Try [Widdifield] in a while." And I did, and I got a hold of him.

Q Okay. And when you were speaking to Mr. Sandhu you told him that Lajeunesse had been there and that you felt or thought that you might as well sit down and talk to Wally about this and try and sort it out, or words to that effect. Is that correct?

A Yes.

Q You then in the evening, I suggest to you, phoned Mr. Widdifield to set up this meeting, is that right? Or do you remember when you called him?

A That afternoon.

Q And when you spoke to Mr. Widdifield -- the reason you wanted to go see Widdifield or to talk to him at that point, I want to suggest to you was because you had thought this whole thing was settled, now you're getting shaken down again by this thug, Lajeunesse, and -- and you wanted it to stop and you wanted to see him to see if you could sort this out. Right?

A Yes.

Q And you called him up and you said to him that -- you -- you told him you'd talked to Buck and Buck had said to you "Why don't we set up a time and meet and get to the bottom of this?" Buck had said to you. So as a result of that you phoned Fred Widdifield and you said to Fred, "I wouldn't mind talking to you about this stuff" and he -- his response -- his immediate response was it's got nothing to do with him. Right?

A Mm-hmm.

Q I'm sorry?

A Yes.

Q Well, you told him you would like to talk to him anyway about it. Right?

A Yes.

Q And he said okay and you suggested to him that you go for lunch and he said to you -- I want to suggest to you just to make sure I got it accurately ...

A He said, "Why don't you just come out to my place."

Q Yeah. He said -- you -- you called him and said "Let's go for lunch," and then he said, "No, no, I'll just be at my house, come out to my house." Right?

A Yes.

Q Now, the next day, October 27th -- but there was no specific time set in the phone call you had with him for you to go there, was there?

A Yeah, it was around 11:00, 11:30.

Q Okay.

A We had said that because I know I went an hour early.

Q Okay. Well, he said "Whatever, I'll be at the house, just come on out." Right?

A Yeah, but I had set a time because I know I went early.

Q Okay. So the -- the next morning, the 27th, you headed over there and -- and just so it's clear, at this point in time -- as a matter of fact as late as two days after the event when you were talking to the police, it was your view -- your -- your belief that Mr. Widdifield had nothing to do with any of this.

A Correct.

Q And as I said when you spoke to him, you told him one of the reasons you wanted -- you -- you told Buck you wanted to get to the bottom of this, you told Fred you wanted to talk to him about it, you -- you were looking, I suppose, for closure of some sort or another, just get this out of your life. Right?

A Yes.

Q And you thought maybe Mr. Widdifield could assist in that.

A When Robbie came to my place to apologize he told me that Widdifield wanted to talk to me.

Q Okay.

A And I told him -- and I said okay and he stood there and he said, "Well, come on, let's go." And I said, "No, I'll call him on my own time."

Q Yeah.

A And he said "Okay, you got the message." And he walked away.

Q Okay.

A So, you know, it was -- you know --

Q It was a two-way street, but --

A And -- and it was a two-way street, obviously he'd heard about it so, you know, once he said he wanted to see me, that's what set it all up.

Q Yeah, or to talk to you, right?

A Correct.

Q And you decided to go see him in person rather than just talk to him on the phone.

A Correct.

The Meeting at Widdifield's Home

[22] On October 27, J.H. went to Widdifield's home. He testified that he arrived early, because he felt that the meeting was a trap of some kind. He said:

Well, when a knothed like Robbie comes to my house and apologizes, it -- I knew it was a set up, so I was being lured there.

[23] After arriving, he spoke with Widdifield who told him that he did not know much about the Crooks debt. The judge described this conversation as follows (at para. 40):

[Widdifield] said that if J.H. owed the woman money, he should pay it. J.H. explained that he had paid and [Widdifield] said, "That's not the way [Sandhu] thinks about it." [Widdifield] then called Sandhu on a cellphone.

Shortly after Widdifield's call, Sandhu arrived in his truck, with Lajeunesse. At some point, Widdifield left the group to speak with someone else. While Widdifield was gone, Sandhu and Lajeunesse made demands for \$160,000, and Lajeunesse punched J.H. in the head. Widdifield returned, and at the behest of Lajeunesse, J.H. confirmed in front of Widdifield that he owed the money. Lajeunesse told him that they would be collecting another boat from his property as collateral. J.H. went to the hospital and telephoned the police, with whom he had been in regular contact.

Lajeunesse's Theft of the Boat from J.H.'s Home

[24] After leaving Widdifield's house, Lajeunesse went with Benven to J.H.'s home and, over J.H.'s wife's objections, towed away another boat. They were arrested shortly thereafter with the boat in tow. Sandhu and Widdifield were arrested several days later.

Reasons of the Trial Judge

[25] The judge began by noting the Crown's submission that liability attached to Widdifield not on the basis that he actually committed the extortion but because he participated with the others in a common unlawful design resulting in the commission of the offences of extortion and theft (at para. 4). He acknowledged that he had been asked to invoke the hearsay exception for acts and declarations made in furtherance of such an unlawful design, describing the necessary steps as follows (at para. 5):

- First, I must be satisfied beyond a reasonable doubt on all the evidence that the alleged common unlawful design existed.
- Second, if so satisfied, I must review only such evidence as is directly admissible against Widdifield and decide whether he was probably a member or participant in the common unlawful design.
- Third, if probable membership or participation is established, I must decide whether the Crown has proved Widdifield's participation beyond a reasonable doubt, and in doing so, I may consider the acts or declarations of other members or participants in the common unlawful design.

[26] The steps outlined above are derived from *R. v. Carter*, [1982] 1 S.C.R. 938, as refined in *R. v. Barrow*, [1987] 2 S.C.R. 694. I do not understand either party to argue that the judge applied the incorrect legal test.

- [27] After carefully reviewing the facts, the judge addressed each step in turn. First, he noted that hearsay evidence was not admissible as proof of the alleged common unlawful design. However, he found beyond a reasonable doubt that the common unlawful design to extort money or property from J.H. existed, and that at least two persons were part of it (at para. 56).
- [28] The judge then considered whether Widdifield was, on a consideration of the evidence directly admissible against him, probably a part of the common unlawful design. On the basis of the following factors, the judge held that Widdifield was probably a participant (at para. 67):
- 1) his long history of friendship and business association with J.H. and the unlikelihood that Sandhu and Lajeunesse would have embarked on a campaign of extortion against him without Widdifield's approval or direction;
 - 2) Widdifield's attendance at the Ladysmith dock when the boat was being sold, including on the second occasion when a large amount of cash was given to Sandhu in a bag with which he and Widdifield departed the scene together;
 - 3) the possibility, qualified though it is, that Widdifield's handwriting was on the bill of sale; and
 - 4) the events of October 27th, in which J.H. was subjected to abuse and violence by Sandhu and Lajeunesse on Widdifield's property and forced, in Widdifield's presence, to acknowledge that he owed another \$160,000. None of this, I find, would have occurred absent a probability that Widdifield was involved in the alleged common unlawful agreement.
- [29] Finally, the judge asked whether the Crown had proved Widdifield's participation beyond a reasonable doubt. Again, the judge was satisfied that this criterion was met. In support of this conclusion, he found that: Sandhu acted on orders from the Club; the "sin" J.H. had committed was "the use of [Widdifield's] name and reputation to ward off Crooks" (at para. 71); that Widdifield superintended the sale of the Dream Chaser, and had not attended as a mere bystander (at para. 72); and that the roughing up of J.H. at Widdifield's property could not have occurred without Widdifield's authorization (at para. 74).
- [30] He therefore found, on the totality of the evidence, that Widdifield participated in concert with Sandhu, Lajeunesse, and Benveniste, in the common unlawful enterprise of extorting and stealing from J.H. (at para. 75).

Positions of the Parties

The Appellant's Argument

- [31] Widdifield challenges each stage of the judge's Carter analysis.

- [32] At the first stage, Widdifield contends that there was no evidence that Sandhu and Lajeunesse acted jointly at Widdifield's property on October 27, 2010. He submits that Lajeunesse acted alone in threatening and physically assaulting J.H., and in subsequently towing away the second boat. He says that Sandhu and Lajeunesse were operating at cross purposes, and could not have been acting jointly. Widdifield also submits that even if the common unlawful design was established, the trial judge's reasons suggest that he was only satisfied that it arose on October 27, 2010. This, Widdifield says, becomes relevant at the third stage of the analysis.
- [33] At the second stage, Widdifield contends that the trial judge speculated in considering whether Widdifield: (a) approved, authorized, or directed the extortion and assault of J.H.; (b) superintended the sale of Dream Chaser, and; (c) derived a benefit from the sale. Widdifield distinguishes permissible reasonable inferences from impermissible speculation. In his submission, an inference can be reasonably and logically drawn from a fact or group of facts established on the evidence. He says, however, that where there is an "evidentiary gap" between the primary fact and the inference, the inference cannot be drawn. He submits that in this case, there were evidentiary gaps that made a number of differing inferences available, such that choosing any was speculative.
- [34] Respecting the assault and extortion on October 27, 2010, Widdifield points out that even J.H. said Widdifield would not have condoned the events that occurred on his property that day. He further notes that Widdifield was not a witness to those events. Respecting the sale of the Dream Chaser, Widdifield says that Sandhu conducted the transaction out of his immediate presence. More generally, he points to uncontradicted evidence that Widdifield told J.H. he had nothing to do with the Crooks debt, and did not know much about it.
- [35] Regarding stage three of the analysis, Widdifield says again that the judge engaged in impermissible speculation on the issue of whether his membership in the common unlawful design was established beyond a reasonable doubt. In particular, Widdifield challenges the judge's conclusion that the "sin" for which Sandhu was sent to exact retribution was J.H.'s alleged use of Widdifield's name in warding off Crooks. He points to J.H.'s testimony that if he had used Widdifield's name in connection with the Crooks debt some 17 years prior, it would not have taken that long to come to Widdifield's attention. He likewise notes that J.H. cannot clearly identify the context in which the name-dropping was alleged to have occurred. Widdifield therefore submits that the "stupid tax" concerned more recent events unrelated to him. He points to evidence of tension between J.H. and another Club member, Lea Sheppe. He suggests that a reference in a recorded conversation between Sandhu and J.H. to the "worst person possible" finding out about J.H.'s name-dropping may be a reference to Sheppe. He says that the judge erred in failing to consider that Sheppe may have played a role in the extortion, not Widdifield.

[36] Widdifield contends that it was the events of October 27 that founded the judge's conclusion that a conspiracy existed and that he was part of it. In that regard, he refers to the judge's finding at para. 74:

I do not believe that Sandhu and Lajeunesse would ever have dared to enter onto Widdifield's property and to threaten and assault his very old friend and associate if Widdifield had not been part of the unlawful common enterprise alleged. I find Lajeunesse's behaviour in particular to be revealing. I reject the notion that this interloper, this non-member of the Club, would ever have had the temerity to act in the manner described without Widdifield's authorization given in advance. Viewed in this light, I conclude that the apologies of the day before were insincere and calculated to cause confusion, or to gull J.H. into a sense of false security, or both.

[37] Widdifield says that the judge misapprehended the evidence when he said (at para. 73):

I am satisfied furthermore that Mr. Widdifield knew that Lajeunesse was part of the plan. J.H.'s evidence was that on October 25, 2010, Lajeunesse had said, "You really hurt the big guy", meaning Widdifield

[38] Widdifield says that if the judge found the common unlawful design arose on October 27 then Lajeunesse's statement on October 25, and the recordings of conversations between J.H. and Sandhu that occurred between March and June, would not be admissible for the truth of their contents against Widdifield because they preceded the formation of the unlawful joint venture.

[39] Even if the evidence fell within the co-conspirator's exception to the exclusionary rule, Widdifield submits that it should have been excluded because it lacked the required indicia of necessity: *R. v. Mapara*, 2005 SCC 23. Mapara explains why the necessity requirement is generally met when a co-conspirator is being tried with the accused or is otherwise unavailable to testify. Here, the co-conspirators were tried separately, and may have been available to testify. Accordingly, Widdifield says that the necessity requirement was not met, and the exception does not apply. He submits that these were not circumstances where the Crown had to choose between tendering hearsay evidence or no evidence at all. He says that the Crown may have chosen to rely on hearsay to avoid the risk of discrediting its reliability through direct evidence.

[40] Finally, Widdifield says that the judge failed to direct himself on the test to be applied in a case based solely on circumstantial evidence. He says that in this case, there was no direct evidence that he perpetrated any crime, and therefore, the rule in *Hodge's Case*, as restated in *R. v. Cooper*, [1978] 1 S.C.R. 860, applies. He says that the judge must have been satisfied that the only reasonable inference to be drawn from the proven facts was guilt.

[41] Widdifield says the verdict is unreasonable and asks this Court to acquit him. Alternatively, he asks that the conviction be quashed and a new trial ordered.

The Respondent's Argument

- [42] The Crown begins by noting the standard of review is whether, on the whole of the evidence, the verdict is one that a properly instructed trier of fact acting judicially could reasonably have rendered: *R. v. Yebe*, [1987] 2 S.C.R. 168 at 186; *R. v. Biniaris*, 2000 SCC 15 at paras. 36-37; *R. v. R.P.*, 2012 SCC 22 at para. 9.
- [43] As to the first stage of the test, the Crown points to the judge's conclusion, based on J.H.'s unchallenged and uncontradicted testimony that Sandhu extorted him for property and money during the time period set out in the indictment (see para. 65). It notes that the judge reached similar conclusions respecting Lajeunesse and Benveniste. The judge resolved the question of Sandhu and Lajeunesse's "cross purposes" on the basis of the events of October 27 (at para. 55):
- although it appeared at first that Lajeunesse and Benveniste appeared to be acting independently of or at cross purposes with Sandhu, any doubt on that score was decisively eliminated by J.H.'s unchallenged version of what happened on October 27, 2010, at Widdifield's place.
- [44] In the Crown's submission, there was ample evidence upon which the judge could be satisfied that a common unlawful intention existed. In the time leading up to October 27, it says that both Sandhu and Lajeunesse demanded money from J.H., and that both demands related in part to the Crooks debt. It also points out that both invoked Widdifield's name and "deferred" to him with respect to settling the "stupid tax".
- [45] The Crown says that to the extent Widdifield argues the judge was satisfied that the common unlawful design arose only on October 27, it is based on a misunderstanding of the judge's conclusions. The Crown says that the judge's reference to October 27 should not be understood as a conclusion that the enterprise was conceived on that day, but rather that it already existed and that their joint actions on that day made it clear they were acting in concert and had been doing so all along, notwithstanding that Sandhu and Lajeunesse appeared to be making overlapping demands.
- [46] On the second stage of the analysis--whether or not, on a balance of probabilities, Widdifield was a member of the conspiracy--the Crown notes that the "probable membership" determination requires a contextual assessment of what the person said and did against the backdrop of the surrounding circumstances: *R. v. Tran*, 2014 BCCA 343 at para. 116. The Crown says it was reasonable for the judge to conclude that Sandhu would not extort money from J.H. (Widdifield's old friend) on Widdifield's property without his approval. The Crown also emphasizes that the reason Sandhu and Lajeunesse met J.H. on Widdifield's property was because Widdifield called Sandhu to the meeting. The Crown says that the purpose of the meeting was readily apparent, and J.H.'s personal opinion of Widdifield's involvement was not determinative of the question. Although Widdifield absented himself from the meeting when the assault occurred, the Crown notes that upon his return, J.H. was required to admit to the debt in his presence.

- [47] As to Widdifield's participation in the sale of the Dream Chaser, the Crown submits that based on Widdifield's attendance at the dock when the sale occurred, and his departure with Sandhu and the bag of cash, it was reasonable for the judge to conclude that the evidence supported the finding of Widdifield's probable membership in the common unlawful enterprise.
- [48] On the third stage, the Crown submits that the judge made no error in concluding that Widdifield's participation in the common unlawful enterprise was proven beyond a reasonable doubt. It says that substantial evidence supported the judge's finding that the "stupid tax" was exacted for J.H.'s forbidden use of Widdifield's or the Club's name. In particular, the Crown points to the February 4 text message in which Sandhu explicitly refers to J.H. having dropped Widdifield's name.
- [49] The Crown notes that there was no evidence to support the assertion that Sandhu's reference to the "worst person possible" was a reference to Sheppe and not Widdifield. Sandhu refers to Sheppe only once as having offered to accompany him to confront J.H. Contrasted with the repeated references to Widdifield, the Crown says there is no merit to Widdifield's argument.
- [50] Widdifield's attendance at the sale of the Dream Chaser is, according to the Crown, only one factor that weighed in favour of the judge's ultimate conclusion. It summarizes the totality evidence implicating Widdifield as including the following (I quote from its factum):
- Sandhu was demanding payment from J.H. that related in part to his unauthorized use of the appellant's name in thwarting a debt owed to Crooks.
 - Lajeunesse was also demanding payment from J.H. in relation to the debt to Crooks.
 - Notwithstanding payment made by J.H., Lajeunesse continued his demands for payment. When J.H. complained to Sandhu, Sandhu promised him that he and the appellant would take care of the matter.
 - On October 25, 2010, in the course of demanding payment of money, Lajeunesse told J.H. you really hurt the big guy.
 - October 26, 2010, Lajeunesse apologized to J.H. and told him to call the appellant, adding "let's go".
 - On October 27, 2010, while J.H. called the appellant to arrange a meeting for lunch, it was the appellant who dictated the time and place of that meeting.
 - In the course of the meeting, the appellant called Sandhu to come to his home to meet with J.H. Lajeunesse arrived with Sandhu.
 - Immediately upon their arrival, Sandhu raised the topic of the debt in the appellant's presence, before the appellant left to speak to Marks.

- While the appellant was absent from the meeting both Sandhu and Lajeunesse were demanding payment of the debt, in the course of which Lajeunesse assaulted J.H.
- When the appellant returned to the meeting both ordered a frightened J.H. to admit to the debt in the appellant's presence.

[51] The Crown objects to Widdifield's pursuit of the argument that the conspirator's exception should not apply because of the absence of necessity. The Crown says that at trial, Widdifield failed to raise the argument and agreed that the three-stage Carter analysis was applicable. The Crown says it led no evidence on the necessity requirement because of Widdifield's position at trial. It relies on *R. v. Brown*, [1993] 2 S.C.R. 918 for the proposition that an appellant cannot raise issues that were not plead or argued at trial unless he can satisfy the following three prerequisites (at 927):

First, there must be a sufficient evidentiary record to resolve the issue. Second, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.

[52] Because there is no evidence about the nature or quality of the evidence purportedly available from the co-conspirators, the Crown says that the first criterion cannot be satisfied, and Widdifield ought not to be able to raise this argument.

[53] Finally, the Crown responds to Widdifield's submission respecting the circumstantial nature of the case against him. The Crown addresses this argument by noting that evidence of the acts and declarations of Widdifield, Sandhu, and Lajeunesse constituted direct evidence implicating the appellant. The Crown therefore submits that the test with respect to a conviction based solely on circumstantial evidence was inapplicable in this case: *R. v. Bullington*, 2014 BCCA 358 at para. 21.

Issues

[54] I would identify the issues as follows, and address them in the following order:

- a) Did the judge err by failing to direct himself to the test applied in a case based solely on circumstantial evidence?
- b) If the Carter exception was met, should the hearsay not have been admitted because it was not necessary?
- c) Was there only evidence of a common unlawful design arising on October 27, 2010?
- d) Was the verdict unreasonable?

Discussion

Did the judge err by failing to direct himself to the test applied in a case based solely on circumstantial evidence?

[55] While Widdifield correctly describes the modern approach to circumstantial evidence as requiring the trier of fact to be satisfied, beyond a reasonable doubt, that guilt of the accused is the only reasonable inference to be drawn from the proven facts, I disagree that the evidence implicating him is solely circumstantial. J.H.'s evidence as to Widdifield's acts and declarations on October 27, 2010 are direct evidence of his involvement in the extortion. In such circumstances, the rule in Hodge's Case (as modified by Cooper) has no application: Bullington at para. 21. There is no merit to this ground of appeal and I would not accede to it.

If the Carter exception was met, should the hearsay not have been admitted because it was not necessary?

[56] I turn next to Widdifield's argument that the hearsay evidence against him lacks the element of necessity, and should therefore not be admitted. I agree with the Crown this argument cannot be raised in this case for the first time on appeal. The trial proceeded on the agreed basis that the evidence would have to meet the Carter test. Allowing Widdifield to advance the argument puts the Crown in the impossible position of having to meet it without an evidentiary record. While it is possible that argument could have been made at trial--I do not express a view on that question--it cannot be pursued on appeal in these circumstances. It fails to meet the first requirement of the Brown test.

Was there only evidence of a common unlawful design arising on October 27, 2010?

[57] Third, I turn to Widdifield's contention that the indictment charges that the common unlawful enterprise to extort J.H. covered the period February 1, 2010 to October 27, 2010, but the judge found only a conspiracy on October 27.

[58] I agree with the Crown that Widdifield's argument misinterprets the judge's reasons. What happened on October 27 provided the judge with a firm evidentiary basis for his conclusion that Widdifield was involved in the conspiracy. This is clear from the judge's reasons at para. 73:

[O]n October 25, 2010, Lajeunesse had said, "You really hurt the big guy", meaning Widdifield, but putting that to one side, I consider that Widdifield's collusion is conclusively proved by what happened to J.H. two days later on Widdifield's property.

[Emphasis added.]

[59] That evidentiary foundation does not equate to a finding that there was only evidence of a conspiracy on that date. To the contrary, the judge considered all the evidence of the acts and declarations of Sandhu and Lajeunesse implicating Widdifield leading to the final meeting of October 27 to satisfy himself that the alleged common unlawful design existed. Again, this is explicit in the reasons for judgment (at para. 75):

[75] On the totality of the evidence, therefore, I find beyond a reasonable doubt that within the dates set out in the indictment Widdifield participated, in concert with Sandhu, Lajeunesse, and Benvin, in the common unlawful enterprise of extorting and sealing from J.H.

[Emphasis added.]

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

Was the verdict unreasonable?

[61] I now turn to what I view as the main ground of appeal: whether the evidence against Widdifield is "wafer thin", and, as a result, the judge's verdict is unreasonable. I would summarize the evidence implicating Widdifield, at large, as follows.

[62] The extortion began in February 2010, when Sandhu informed J.H. that he owed \$100,000. The debt was a combination of money owed to Ms. Crooks and a "stupid tax." In a text message to J.H., Sandhu links the demand to "dropping the big guy's name". The uncontradicted evidence is that "the big guy" is Widdifield.

[63] On March 2, 2010, J.H. recorded his meeting with Sandhu. In that conversation, Sandhu linked the demand to J.H. having told Crooks that "Freddie" would come after her if she tried to collect the debt. The evidence is that "Freddie" is Widdifield.

[64] In June of the same year, Lajeunesse began demanding payment. J.H. complained to Sandhu about Lajeunesse's demands because he had already transferred the Dream Chaser to Sandhu in satisfaction of the debt. Sandhu tried to mollify J.H., saying "me and Freddy are gonna go talk to him."

[65] In the next recorded conversation, J.H. complained that Lajeunesse continued to make demands. Sandhu continued to reassure him with references to Widdifield. Sandhu told him to tell Lajeunesse to "talk to the big guy." The last of the June recorded conversations is likewise replete with references to Widdifield.

[66] In August 2010, the Dream Chaser was sold to Churchill for \$80,000 in cash. Widdifield attended the boat at the closing of the transaction. He did not involve himself in the conversation between Churchill and Sandhu, but left with Sandhu and the bag of cash. The judge found his attendance significant.

[67] On October 25, 2010, Lajeunesse returned with repeated demands for more money or property. He returned the next day to apologize, and told J.H., "Mr. Widdifield would like to talk to you". J.H. called Widdifield and agreed to go to his home to sort it out. The following day, October 27, J.H. went to Widdifield's house. He testified that he arrived one hour early because he was apprehensive and thought he was being lured there. Widdifield summoned Sandhu, who arrived with Lajeunesse. Sandhu and Lajeunesse roughed J.H. up. Widdifield was absent during the assault. However, when he returned, J.H. was told to admit to the debt in his presence.

[68] I have set out at length the arguments of the parties above. The thrust of Widdifield's argument is that his attendance at the sale of the Dream Chaser is consistent with that of a bystander, and that there was other evidence suggesting he knew little of the Crooks debt.

[69] In *R. v. R.P.*, 2012 SCC 22 at para. 9, the Court set out the applicable standard of review where it is contended that the verdict is unreasonable:

To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R.

[Emphasis added.]

[70] I address the stage one of the Carter analysis first. In my view, there was ample evidence to support the judge's conclusion that both Sandhu and Lajeunesse extorted J.H. during the period set out in the indictment. I agree with the Crown that J.H.'s evidence concerning the events of October 27, 2010 allowed the judge to conclude reasonably that Sandhu and Lajeunesse were not in fact acting at cross-purposes. I see no error in the conclusion that the Crown had proven beyond a reasonable doubt that a common unlawful design existed, and that its membership included at least two of the persons named in the indictment.

[71] I turn to the second and third stages of the Carter analysis, which form the main basis for this appeal. Again, on the evidence, it is my view that the judge reasonably inferred: (a) that, on the basis of the evidence directly admissible against him, it was probable Widdifield was a member of the common unlawful design to extort money and property from J.H. and; (b) that his membership was proven beyond a reasonable doubt. Neither of these inferences is plainly contradicted by the evidence, or incompatible with it.

[72] As to the second stage of the Carter analysis, I agree with the Crown's assertion that it was reasonable for the judge to conclude that Sandhu would not extort money from J.H. on Widdifield's property without Widdifield's approval. Sandhu and Lajeunesse attended the October 27 meeting at Widdifield's request. The purpose of the meeting was readily apparent and J.H.'s personal opinion of Widdifield's involvement was not determinative of the question. Although it is true that Widdifield was not present for the assault, following it, J.H. was, as the judge put it "promptly paraded in front of Widdifield, forcing him to acknowledge his greater indebtedness," (at para. 65). These factors are consistent with Widdifield's probable involvement. There was evidence to support the judge's conclusion that "Widdifield was in on the plan," (at para. 66).

[73] As to the third stage of the Carter analysis, again I agree with the Crown's submission at para. 50 of these reasons. I would note in particular that between February and October 2010, through repeated references to his name and person, Widdifield loomed in the background as someone capable of curbing Lajeunesse's supposedly excessive demands. The evidence is likewise consistent with the inference that the root cause of the demands of both Sandhu and Lajeunesse was J.H.'s unauthorized use of Widdifield's name. Widdifield's two attendances at the boat as well as the events leading up to and including October 27 support the judge's conclusion that Widdifield participated with the others in the extortion of J.H. and that Widdifield facilitated the further demand for money. In my view, the verdict reached by the judge was not unreasonable.

[74] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Harris"

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