

CANADA / JUDGMENT

R. v. Wolf

2024 BCSC 959

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Supreme Court of British Columbia

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2024 BCSC 959 R. v. Wolf

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wolf,

2024 BCSC 959

Date: 20240308

Docket: 26894-1

Registry: Nelson

Rex

v.

Christopher Gerhard Wolf

Before: The Honourable Madam Justice Lyster

On appeal from: Provincial Court of British Columbia, Reasons for Judgment, June 6, 2023 (R. v. Wolf, Nelson Docket No. 26893-1-KA, 26894-1) and Reasons for Sentence, July 21, 2023 (R. v. Wolf, Nelson Docket No. 26894-1)

Oral Reasons for Judgment at Summary Conviction Appeal

Counsel for the Crown (Respondent):

O.J. Dudley

The Accused, appearing on his own behalf (Appellant):

C. Wolf

Place and Date of Trial/Hearing:

Nelson, B.C.

March 7, 2024

Place and Date of Judgment:

Nelson, B.C.

March 8, 2024

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Introduction

- [1] THE COURT: These are my oral reasons for judgment in this matter. Should a transcript be ordered, I will edit it to ensure that my reasons are clear, to add headings, and to ensure that any quotations and citations are complete and accurate.
- [2] I will begin by noting that I am aware that Mr. Wolf has represented himself in respect of this summary conviction appeal, and I will say that I do appreciate the challenges and stress that must be associated with doing so.
- [3] This is an appeal from conviction and from the imposition of a DNA order.
- [4] The Honourable Judge Sicotte convicted Mr. Wolf after trial of one count of common assault in reasons for judgment rendered June 6, 2023. Mr. Wolf had been charged with two counts of assault: one against his son O. and the other against his daughter C. He was acquitted of the count against C. and convicted of the count against O.
- [5] In essence, Mr. Wolf argues on this appeal with respect to conviction that the court below got it wrong and that he did not, in fact, assault O.
- [6] Mr. Wolf was sentenced on July 21, 2023. The court imposed a conditional discharge on Mr. Wolf. Mr. Wolf does not take any issue on appeal with respect to that conditional discharge. His sole ground of appeal is with respect to the DNA order. The cases show that a DNA order is not actually part of the sentence, but an ancillary order associated with sentence, imposed by the sentencing judge pursuant to s. 487.051(3) of the Criminal Code, R.S.C. 1985, R.S.C. 1985, c. C-46 [Code].

- [7] There were three witnesses at trial. The Crown called C. and O. Mr. Wolf testified in his own defence. In his testimony, he denied ever hitting either of the two children, a position which he maintains before me.

Standard of Review

- [8] As I have said, Mr. Wolf argues that the learned trial judge erred in his findings of fact, in particular, his assessment of O.'s credibility.
- [9] For alleged errors in the trial judge's findings of fact, including assessments of credibility, the standard of review is one of reasonableness. Under s. 686(1)(a)(i) of the Code, an appellate court, such as this court sitting on appeal of a summary conviction, can intervene to set aside a verdict that is unreasonable or cannot be supported by the evidence.
- [10] The Supreme Court of Canada addressed this test in the context of credibility assessments in *R. v. R.P.*, 2012 SCC 22, where it stated at para. 10:
- [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).
- [11] In *R. v. Burns*, [1994] 1 S.C.R. 656 [Burns], the court stated that appellate courts are entitled to review or re-examine the evidence:
- [14] In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. W. (R.)*, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.
- [12] Deference is given to the trial judge's findings in part because the trial judge has the advantage of seeing and hearing the witnesses give their evidence: *R. v. Francois*, [1994] 2 S.C.R. 827 at p. 835.
- [13] Findings of credibility are matters that properly involve the common sense of the trier of fact.
- [14] With respect to his appeal against the imposition of a DNA order, Mr. Wolf argues that the DNA order was unnecessary. He refers in this connection to the fact that he has no previous criminal record. He also says that the order affects his employment, although no details were provided about how that is so.

- [15] As discussed during the course of the appeal, the real issue, as I see it, with respect to the DNA order is the adequacy of the learned sentencing judge's reasons for imposing the order. An order under s. 487.051(3) is discretionary. However, it imposes a mandatory requirement for a judge to give reasons for the decision whether to impose a DNA order or not.
- [16] In *R. v. R.E.M.*, 2008 SCC 51 [R.E.M.] at para. 15, the Supreme Court of Canada set out a functional test for assessing whether a judge's reasons are sufficient, stating:
- [15] This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.
- [17] As a result, an appellate court must read the reasons as a whole, in the context of the evidence, the arguments, and the trial, and with an appreciation of the purposes or functions for which they are delivered.
- [18] The purposes are fulfilled if the reasons show why the judge made their decision, not how. This does not require the trial judge to set out every finding or conclusion in the process of reaching a verdict.
- [19] At para. 53 of *R.E.M.*, the Court cited its earlier decision in *R. v. Sheppard*, 2002 SCC 26, for the circumstances in which appellate intervention would be warranted. There the Court wrote:
- [53] However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.

Analysis

Appeal Against Conviction

- [20] Mr. Wolf has, in my view, failed to establish any basis upon which this court could interfere with the learned trial judge's decision convicting him of one count of assault.
- [21] In his reasons for judgment, the learned trial judge properly instructed himself with respect to the applicable law, in particular, the Crown's obligation to prove guilt beyond a reasonable doubt, and the principles to be applied pursuant to *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)], in assessing evidence where, as here, the accused testifies. He further correctly instructed himself with respect to the assessment of evidence where the accused, as here, offers essentially a bare denial of all allegations.

- [22] Lastly, he correctly instructed himself as to the principles applicable in assessing the evidence of children, as C. was 12 and O. was 14 when they testified.
- [23] Having instructed himself on the law, the learned trial judge accurately summarized the evidence of each of the three witnesses. The learned trial judge then applied the principles from W.(D.) to the evidence. He assessed the evidence relating to each of the charges against each of the children separately.
- [24] In C.'s case, on a consideration of the evidence as a whole, the learned trial judge found that he was left with a reasonable doubt and accordingly acquitted Mr. Wolf of that charge. Of note, he held that C. was credible, but the passage of time and her admitted uncertainties left him unable to find that the Crown had proven that count beyond a reasonable doubt. In my view, this is indicative of a correct understanding of the concept of proof beyond a reasonable doubt on the part of the learned trial judge.
- [25] In O.'s case, the learned trial judge found him to be a credible and reliable witness. He found some degree of corroboration of O.'s allegations in C.'s evidence. He considered Mr. Wolf's evidence, and concluded that the Crown had proven that count beyond a reasonable doubt.
- [26] In his submissions before me, Mr. Wolf pointed to a passage in O.'s evidence at trial where O. said that he thought he had a black eye, suggesting, if I understood Mr. Wolf's submission correctly, that O. was unsure about his own evidence. It would be an error for me to take that passage out of context. The learned trial judge had the benefit of hearing and seeing all of the witnesses. He considered each of the witnesses' evidence in the context of the evidence at trial as a whole.
- [27] Returning to the principles that I set out earlier with respect to the standard of review, it cannot be said that the learned trial judge's conclusions with respect to credibility and his findings of fact cannot be supported on any reasonable view of the evidence. To the contrary, they were supported on a reasonable view of the evidence.
- [28] I therefore dismiss Mr. Wolf's appeal against conviction.

Appeal Against the DNA Order

- [29] The learned sentencing judge, who was also the trial judge, imposed a discretionary DNA order against Mr. Wolf. The applicable provision is s. 487.051(3). It provides, in relevant part, as follows:
- (3) The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make such an order in Form 5.04 in relation to

...

- (b) a person who is convicted . . . if that offence is a secondary designated offence when the person is sentenced or discharged.

In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

[30] The learned sentencing judge's reasons for imposing the DNA order are found at para. 26 of the reasons for sentence where the judge stated:

[26] With respect to the discretionary DNA order, Count 1 on this information is a secondary designated offence. After considering the factors set out in s. 487.051(3) of the Criminal Code, I am satisfied that it is in the best interest of the administration of justice to authorize the taking of samples of bodily substances from you.

[31] Although I had the vast majority of the transcripts in this matter before me, I did not have a transcript of the proceedings of the sentencing hearing. However, I am advised by Crown counsel that defence counsel opposed a DNA order in his submissions at the sentencing hearing, relying on the fact that Mr. Wolf did not have a criminal record.

[32] It will be seen from the reasons for sentence that the judge understood that a DNA order for a secondary designated offence is discretionary. He said that he had considered the factors and that he was satisfied that it was in the best interest of the administration of justice to make a DNA order.

[33] In *R. v. R.C.*, 2005 SCC 61, the Supreme Court of Canada considered s. 487.051(2), the provision that applies to primary designated offences. At para. 20, the majority held that Parliament had created a sharp distinction between primary and secondary designated offences. In the case of secondary designated offences, the burden is on the Crown to show that an order is in the best interests of the administration of justice. By contrast, in the case of primary designated offences, the burden is on the offender to show that a DNA order would adversely affect their privacy and security interests in a manner that is grossly disproportionate to the public interest.

[34] At para. 30, the majority stated that, in considering that question in relation to primary designated offences, the factors listed in subsection (3), that is the provision dealing with secondary offences, may be relevant.

[35] At para. 47, the majority stated that the decision under both subsection (2) and subsection (3) is discretionary, although that discretion is more limited with respect to primary designated offences.

- [36] Clearly a judge deciding whether to make an order under subsection (3) has broad discretion. In exercising that discretion, they must, however, consider the listed factors, that is: the person's criminal record, whether they have been previously found not criminally responsible by virtue of mental disorder, the nature of the offence, the circumstances surrounding its commission, and the impact such an order would have on the offender's privacy and security.
- [37] I appreciate that DNA orders are often dealt with in a summary way in sentencing decisions. I also acknowledge that judges are presumed to know the law and do not have to demonstrate that they know the law or that they have considered all aspects of the evidence: Burns at p. 644.
- [38] However, the difficulty here is that the learned trial judge has given no indication in his reasons of his assessment of the factors a judge is required to consider as set out in subsection (3). The reasons contain only a bare conclusion that, having considered those factors, it is in the best interests of the administration of justice for a sample to be obtained. The reasons fail to show why the judge decided a DNA order was in the interests of the administration of justice. They do not permit me to engage in meaningful appellate review of the DNA order. They fail the functional test set out by the Supreme Court of Canada in Sheppard and R.E.M.
- [39] The question remains what order should be made with respect to this aspect of the appeal? This issue was considered by the Alberta Court of Appeal in R. v. North, 2002 ABCA 134 [North]. There the trial judge had denied the Crown's application for a DNA sample, but had failed to provide any reasons. At para. 33, the court held, relying on the decision of the Nova Scotia Court of Appeal in R. v. Murrins, 2002 NSCA 12 [Murrins], that a DNA order is not a sentence and that an appeal from a DNA order is not a sentence appeal. At para. 34, the court said that the failure to give reasons, when statutorily obligated to do so, raises a question of law on which the standard of review is correctness.
- [40] At para. 35 of North, the court noted that the failure to give reasons is an error which requires a remedy. At para. 36, the court referred again to Murrins, where the Court of Appeal had remitted the matter to the court of first instance for a new hearing.
- [41] At para. 37, the court in North took a different route and itself considered the matter afresh and decided the issue itself. In doing so, it noted that the issues were argued before it and the relevant facts were not in dispute, leaving it in as good a position as the sentencing judge to decide the matter.
- [42] In the case at bar, judicial economy argues in favour of this court itself deciding whether to order that a DNA sample be obtained, rather than remitting it to the sentencing court for a new hearing. However, I have not, as I have said, been provided with a copy of the transcript of the sentencing hearing, nor was the question of whether a DNA sample ought to be ordered fully argued before me.

[43] In the circumstances of this case, and not without some reluctance, I think it is better to proceed as in Murrins, and remit the matter to the court below for a new hearing with respect to whether a DNA sample should be ordered. For these reasons, Mr. Wolf's appeal against the imposition of a DNA order is allowed. The Crown's application for a DNA order is remitted to the Provincial Court.

[44] That concludes my reasons for decision.

"L.M. Lyster J."

LYSTER J.

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