CANADA / JUDGMENT

R. v. Ziegler

2010 BCCA 504

COURT
British Columbia Court of Appeal

DECIDED
5 November 2010

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2010 BCCA 504 R. v. Ziegler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Ziegler,

2010 BCCA 504

Date: 20101105

Docket: CA037842

Between:

Regina

Respondent

And

Ryan Glenn Ziegler

Appellant

RESTRICTION ON PUBLICATION: AN ORDER HAS BEEN MADE IN THIS CASE PURSUANT TO SECTION 486.4(1) OF THE CRIMINAL CODE THAT PROHIBITS ANY INFORMATION THAT COULD IDENTIFY THE COMPLAINANT[S] OR WITNESS[ES] BEING PUBLISHED, BROADCAST OR TRANSMITTED.

Before:

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Hinkson

On appeal from: Provincial Court of British Columbia, January 16, 2008

(R. v. Ziegler, Port Coquitlam Docket No. 77560)

Oral Reasons for Judgment

Counsel for the Appellant:

J.J. Blazina

Counsel for the Respondent:

S.J. Brown

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2010

Place and Date of Judgment:

Vancouver, British Columbia

November 5, 2010

[1] HINKSON J.A.: Mr. Ziegler appeals his conviction for sexual assault in the Provincial Court which occurred on January 16, 2008, and is indexed as 2008 BCPC 31. That conviction was based upon a ruling that certain statements made by Mr. Ziegler to witnesses that were called at trial were inadmissible. That ruling includes the commencement of the trial judge's decision convicting the appellant and is indexed as 2007 BCPC 446.

Background

[2] Around midnight on May 9, 2007 RCMP Constable Spencer was operating a police vehicle and observed the appellant, whom he stopped and asked to identify himself. The appellant did so, and reported that he had come from a bar where he had been drinking. The appellant proposed to Constable Spencer that he wanted to be taken to the police cells or the "drunk tank". Constable Spencer declined to accommodate that request as only those considered to be a safety problem to themselves or the public are taken to the "drunk tank", and he did not so consider the appellant.

[3] At approximately 1:30 am on May 10, 2007, the appellant telephoned the Emergency Health Service to report that he might have overdosed. An emergency unit staffed by a two member paramedic crew, one male and one female, was dispatched in response to his call. The Crown led evidence that the crew arrived at the address given by the appellant at approximately 1:40 am on May 10, 2007, and found him seated on the sidewalk, leaning against a building. On the arrival of the ambulance, the accused stood up and walked over to the ambulance. A brief conversation then took place in which the accused advised that he

had consumed cocaine and ecstasy some 20 minutes earlier, and was concerned about an overdose. It was apparent to the crew members that the appellant had consumed alcohol from the odour of his breath.

[4] In cross examination, the male paramedic S agreed that the appellant had told him that he had ingested six "caps" of ecstasy, two "lines" of cocaine and an unspecified amount of alcohol.

[5] The appellant was described by the female paramedic K, the complainant, in her evidence in chief as cooperative and personable, and easy to deal with at that point. The appellant told the crew members that his right ankle was sore, and that he thought he might have fallen earlier. K stated that the appellant displayed no signs that she expected from the victim of an overdose, and in her view, if scored on a Glasgow coma scale, would have received 15 out of 15. K was suspicious about his report of a potential overdose, but the appellant indicated that he wanted to go to hospital. It was decided that the appellant would be taken to the Ridge Meadows Hospital, with S driving and K accompanying the accused in the back of the ambulance.

[6] The appellant was described by K as walking to the ambulance, stepping up into the side door and sitting down on the jump seat without assistance. After a brief discussion with the appellant, K switched roles with S, and as she was doing so felt the appellant's hand contact one of her buttocks. That contact is not the subject of the charge against the appellant. The ambulance then proceeded to the hospital with K driving it.

[7] By the time the ambulance reached the hospital parking lot, the appellant had removed his shoes, and K reached into the ambulance and picked them up. K then stepped aside to allow the appellant to step out of the vehicle, which K believed he did unassisted. K's evidence was that as she proceeded toward the hospital building, the appellant turned and deliberately grabbed her breast, and then stated he was sorry several times. A verbal exchange between the appellant and K ensued, during which the appellant asked, "You're not going to call the police, are you?" .

[8] The appellant did not testify at his trial. In her submissions, Crown counsel argued that the evidence that she had adduced from the ambulance attendants about what the appellant had said had not been led for the truth of its contents, but simply as a part of the narrative, to explain the conduct of the witnesses.

[9] The trial judge ruled that the evidence of what the appellant said to the ambulance attendants was not admissible for the truth of its contents.

Issues on Appeal

[10] The appellant advances two grounds of appeal:

a) That the learned trial judge erred in ruling that his statements to the paramedics were not admissible for the truth of their contents; and

b) That the learned trial judge erred by deciding that his statements were inadmissible only after the Crown and the defence had closed their respective cases.

Discussion

[11] It is properly conceded by the Crown that the trial judge erred in ruling that the statements of the appellant to the ambulance attendants were not admissible for the truth of their contents. Portions of the statements in question were first introduced in evidence by the Crown. In R. v. Hughes, [1942] S.C.R. 517 at 521, the Supreme Court of Canada adopted the view expressed by Parke J. in Rex v. Higgins (1829), 3 C. & P. 603, at 604, also cited by Chief Justice Sir Charles Fitzpatrick in Eberta v. The King (1912), 47 Can. S.C.R. 1, at 31:

Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

[12] Once a portion of a statement by an accused is led by the Crown, the accused has the right to elicit other parts of the statement that were not adduced by the Crown, so long as they are all part of the same statement; see R. v. Allison, [1991] 68 C.C.C. (3d) 375 (BCCA).

[13] After the Crown closed its case, counsel for the appellant advised the trial judge that she would not call any evidence. The appellant's counsel argued that he might have stumbled due to either the alcohol or drugs he had ingested, or due to his sore ankle, or some combination of these difficulties. During the submissions by counsel for the appellant, Crown counsel objected to the appellant's reliance on his statements to the ambulance attendants as to his consumption of alcohol and drugs. The trial judge invited written submissions on the use that could be made of the statements, and adjourned the trial so that the submissions could be filed.

[14] When the trial resumed, the judge delivered his ruling that the appellant's statements to the ambulance attendants were not admissible for the truth of their contents and began to deliver his decision on the charge against the appellant. In the midst of the delivery of these reasons by the trial judge, the appellant was given a further adjournment to seek counsel to discuss the possibility that he might apply to reopen his case to give evidence. After further adjournments, the appellant applied to reopen his case to give evidence, but his application was dismissed by the trial judge. The trial judge then concluded his decision on the charge against the appellant. The appellant argues that the succession of events during the proceedings deprived him of his right to a fair trial.

[15] Does the error by the trial judge warrant a new trial, or is it one that could not have affected the verdict, thus bringing s. 686(1)(b)(iii) of the Criminal Code, R.S. 1985, c. C-46, into play?

[16] Section 686(1)(b)(iii) of the Criminal Code provides:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(b) may dismiss the appeal where

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[17] The subsection has two identifiable branches: one, where the error is so minor that it cannot reasonably be said to have had any impact on the verdict; or two, where the error is not harmless, but the case against the accused is so overwhelming that a reasonable and properly instructed jury would inevitably convict. See R. v. Van, 2009 SCC 22 at para. 34.

[18] Although he incorrectly ruled that the statements of the appellant to the ambulance attendants were not admissible for the truth of their contents, the trial judge did accept that the appellant had been drinking alcohol prior to 1:30 am on May 10, 2007. At para. 53, the trial judge rejected the argument that the appellant's consumption of alcohol, whether alone or in conjunction with other substances affected his "balance and bodily functions", and at para. 57 rejected the appellant's theory that "alcohol and/or drugs [created] difficulty with his motor skills". At paras. 68 and 83 the trial judge concluded:

[68] In my view, it cannot be said in the case at bar that the accused had no or insufficient time to concoct or fabricate a story. I cannot say that any of the statements sought to be admitted as part of the res gestae on any basis are such that I can so conclude on any basis at all. I do not even have a reasonable doubt that they may be true. Unlike the Gates case, in my view, there is no independent evidence supportive of the truth of the statements in issue, save possibly some evidence from Constable Spencer, who saw the accused in the street around midnight and who said that the accused said to him that he had been drinking but not how much. I have not admitted this evidence for the truth of its content. Unlike Gates, as I have pointed out above, the weight of the Crown evidence is against or inconsistent with the sense of the accused's statements relating to drug and/or alcohol ingestion and having a sore foot or ankle. All witnesses did not detect any impairment in his balance or physical function. When tested by Mr. C. on the Glasgow Scale, he got 15 out of 15 points, a perfect scale or test result.

...

[83] By way of summary, then, I find on this evidentiary argument that the accused's statements recorded by the attendants in the crew report are not admissible for their truth, pursuant to Ares v. Venner. The various statements said to be indicative of his state of mind or physical condition could go in not as hearsay evidence or an exception to it, but as original circumstantial evidence from which a bodily feeling or state of mind might be inferred. I do not infer any particular or general bodily feeling or state of mind from these various

> statements. I do not accept that they are truthful. Even if I did, I would not speculate and take what I consider a large leap and find on any basis that, for example, if the accused took some or all of the drugs he said he did, his motor function must have been or might have been so affected so as to result in an accidental touching of K.'s breast. I prefer to accept these statements as in Samuel, and as argued by Crown only as evidence they were made and to explain a mode of conduct by others, for example, to show why the attendants took him to the hospital. These statements are not admissible as part of the res gestae or pursuant to the principled approach to the admission of hearsay evidence and not to cure overall trial fairness or to alleviate it, as per R. v. Allison.

[Emphasis added.]

[19] In the light of the trial judge's finding that, even if true, the appellant's alleged consumption of the drugs and alcohol did not affect his balance or motor skills, I am unable to accept that the trial judge's error in ruling that the statements of the appellant to the ambulance attendants were not admissible for the truth of their contents can reasonably be said to have impacted the verdict on either branch of the s. 686(1)(b)(iii) analysis.

[20] While he did not specifically address the appellant's sore ankle, I am satisfied that the reasoning of the trial judge in paras. 68 and 83 of his reasons for conviction applies with equal force to the argument that the appellant's sore ankle affected the appellant's balance or motor skills. The uncontradicted evidence before the trial judge was that the appellant displayed no balance difficulties or motor dysfunction that could account for an accidental contact between his hand and K's breast, and thus, the theory offered by the appellant at trial provided no basis upon which to acquit him . I would not, therefore accede to the appellant's first ground of appeal.

[21] The appellant's second ground of appeal concerns the timing of the trial judge's evidentiary ruling. The appellant argued that the curative provision of s. 686(1)(b)(iii) of the Criminal Code should not be applied where the error of the trial judge forced a decision upon him as to how to conduct his defence, relying on R. v. Humphrey, [2003] 172 C.C.C. (3d) 332 (Ont. C.A.), R. v. Allison, supra, and R. v. Underwood, [1998] 1 S.C.R. 77 (SCC).

[22] Humphrey was a case where a new trial was ordered due to an erroneous jury charge because the Ontario Court of Appeal was unable to conclude that the jury would have delivered a guilty verdict had they been correctly charged.

[23] Allison was a case where an erroneous evidentiary ruling curtailed cross examination. In the result, an exculpatory statement by the accused was not admitted into evidence. The accused then testified in order to put his exculpatory position into evidence. A new trial was ordered because the British Columbia Court of Appeal was unable to conclude that the accused would have been convicted, had he not testified.

[24] In Underwood, the accused intended to testify in his own defence, but changed his mind when the trial judge erroneously declined to make a ruling with respect to the exclusion of his criminal record until after he gave evidence. Chief Justice Lamer for a unanimous Court ordered a new trial as he was unable to conclude that the accused would have been convicted had he given evidence as he had intended.

[25] Clearly, in this case, had the trial judge admitted the statements of the appellant to the ambulance attendants for the truth of their contents, the appellant would have been content not to give evidence. Unlike the three authorities relied upon by the appellant for his second ground of appeal, there is no uncertainty in this case with respect to what would have occurred had the trial judge not erred. The appellant would not have given evidence, the trial judge would have engaged in the same analysis that he did at paras. 68 and 83 of his reasons for conviction and the appellant would have been convicted.

[26] I would thus not accede to the appellant's second ground of appeal.

Conclusion

[27] I would dismiss the appeal.

[28] MACKENZIE J.A.: I agree.

[29] LOWRY J.A.: I agree.

"The Honourable Mr. Justice Hinkson"

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