



THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2015 SKCA 32

Date: 2015-04-08

Between:

Docket: CACR1891

Gordon Shane Kennedy

Appellant

- and -

Her Majesty the Queen

Respondent

Coram:

Richards C.J.S., Caldwell and Whitmore JJ.A.

Counsel:

Bob Hrycan for the appellant

Andrew Davis for the respondent

Appeal:

From: Provincial Court

Heard: October 24, 2014

Disposition: Allowed

Written Reasons: April 8, 2015

By: The Court



The Court

I. INTRODUCTION

[1] Gordon Kennedy was convicted in Provincial Court of assault with a weapon. He now seeks to have the conviction overturned on a number of grounds, including one relating to the sufficiency of the trial judge’s reasons. We agree with Mr. Kennedy’s submission on the sufficiency of reasons issue. As explained below, his conviction must be set aside and a new trial ordered.

II. BACKGROUND

[2] This case concerns an attack that happened on a Regina street. A number of witnesses testified at the trial. We will refer to the testimony that is relevant to this appeal.

[3] T.J. Cheon, the victim of the attack, gave evidence that, on March 22, 2010, he received a call from Jason Stewart, an acquaintance. Mr. Stewart asked Mr. Cheon to come to his house on the 1200 block of Rae Street.

[4] Mr. Cheon said he drove to the house, pulled up in front of it and blew the horn. Nobody came out but the door opened partially and a hand—only a hand—motioned him to come in. Mr. Cheon exited his car, leaving the door open, and approached the house. As he moved toward the house, he heard a voice from inside “counting down” in a whisper. He turned his body halfway back to his vehicle. Then two or three men burst from the house. Mr. Cheon ran for his life. The men yelled threats as they pursued him. Mr. Cheon said they were aboriginal. One of the men swung a machete and narrowly missed him. That man then fell and the chase ended.

[5] Mr. Cheon was invited into the car of Jeffery Cannon, a bystander who had seen at least the latter part of the incident. The police were called. Mr. Cheon was agitated and did not, or could not, provide information as to the identity or appearance of his attackers.

[6] Mr. Cheon also testified that he later received a call from Mr. Stewart and that Mr. Stewart mentioned Mr. Kennedy's name. (Mr. Stewart was not called as a witness at the trial.) Mr. Cheon said he recognized the name because a year prior to the attack Mr. Kennedy and "a guy named Daryl" had raped Mr. Cheon's girlfriend. He said Mr. Kennedy had threatened to kill him if he did not prevent the charges from moving forward.

[7] Mr. Cheon was adamant that he had never met Mr. Kennedy and, before March 22, did not know what he looked like.

[8] Mr. Cheon said that, after speaking with Mr. Stewart, he thought "Oh, my God, I forgot about that a year ago, that happened" and went to the police station. He explained that he picked Mr. Kennedy out of a photo line-up. Mr. Cheon was unable to say whether it was Mr. Kennedy who had used the machete, but said he was nonetheless "a million percent" sure of his identification.

[9] On cross-examination, Mr. Cheon acknowledged that he had been running from his attackers and had only had time to look back at them quickly. He also confirmed that Ivana Cvijetinevich, Mr. Kennedy's common-law partner, had lived with him for a time.

[10] Jeffery Cannon had been on the street when Mr. Cheon was being pursued and had witnessed the final part of the chase. He took the witness

stand twice during the course of the trial. On the first occasion, he explained that he had seen Mr. Cheon being pursued by two men and had seen one of them swing a machete, narrowly miss Mr. Cheon and then slip and fall. The assailants then left. Mr. Cannon said he had offered Mr. Cheon shelter in his car.

[11] At trial, when asked if he saw anybody in the courtroom who had been involved in the incident, Mr. Cannon said, “I don’t -- I don’t know for sure, no. I can’t say for sure. The gentleman [*sic*] had hats on so I can’t say for sure.” When pressed as to whether anyone looked familiar, he said, “The one in the black there. I don’t know for sure, to tell you the honest truth. I’d be just guessing.” (The trial judge, in her decision, noted that the man Mr. Cannon had singled out was Caucasian and looked nothing like Mr. Kennedy.) When pressed again, Mr. Cannon said, “No, don’t recall enough to say. I can’t see anyone that -- that resembled them.”

[12] Mr. Cannon was re-called as a witness and took the stand a second time some two months later. He testified that, on his first appearance in court, he could not see the person in the prisoner’s box because the sun had been reflecting on the plexiglass around it. He explained that, as he was leaving the courtroom, he had seen Mr. Kennedy in the prisoner’s box from a different angle and had been able to identify him as the man who had swung the machete. Mr. Cannon also indicated that, after he left the courtroom, he had spoken to Mr. Cheon to explain his failure to make an identification. On cross-examination, he acknowledged that Mr. Cheon had told him to return to the courtroom and “tell the people” about the reflection on the plexiglass and his inability to identify Mr. Kennedy until he was leaving the courtroom.

[13] Donald Livly testified for the defence. He had been outside the courtroom after Mr. Cannon had given evidence the first time. He said Mr. Cheon had appeared to be upset when Mr. Cannon told him that he had been unable to identify anyone. He said Mr. Cheon had cupped Mr. Cannon's shoulder with his hand and told him to go back and "tell the Crown that you recognized him on his [*sic*] way out. He's in the box." Mr. Livly said there was no mention of sunlight reflecting on the plexiglass or of Mr. Cannon recognizing Mr. Kennedy on his way out of the courtroom.

[14] Ivana Cvijetinevich was also called for the defence. She is Mr. Kennedy's ex-girlfriend. She said that she knew Mr. Cheon and had stayed with him and his wife for two weeks in 2009 when Mr. Kennedy was in jail and she had no place to live. Ms. Cvijetinevich said that, when she had departed Mr. Cheon's house, she had left behind her personal belongings including pictures of Mr. Kennedy and papers such as their birth certificates. She described Mr. Cheon's involvement in the drug and prostitution trades but did not connect any of that to the events of March 22. Ms. Cvijetinevich testified that she believed Mr. Kennedy and Mr. Cheon knew each other personally but acknowledged that she had never seen them together.

[15] Darrell Nagy was the third defence witness. He testified that, in January or February of 2010, Mr. Cheon and Mr. Cheon's girlfriend had gone to the police and falsely alleged that Mr. Nagy had raped the girlfriend. He said the police had not proceeded after he, Mr. Nagy, had successfully passed a lie detector test.

[16] Brian Wesaquate was also called by the defence. He indicated that he and Mr. Kennedy had been friends for several years and described their

activities together on the afternoon of March 22. Those activities consisted of visiting a number of residences to see friends and buying alcohol. Mr. Wesaquate said that he had been with Mr. Kennedy at the time Mr. Cheon had been assaulted and denied they were the people responsible for the assault. He confirmed he had not told police that he had been with Mr. Kennedy at the relevant time even though he had learned of his friend's arrest the day after it had occurred.

[17] Mr. Kennedy testified on his own behalf. He described his activities on March 22 and said that, at the time of the alleged assault, he had been with Mr. Wesaquate. Mr. Kennedy also testified that he knew Mr. Cheon and that the two of them had first been introduced in 2002 or 2003. He said they had encountered each other on and off after that because they moved in the same drug circles. He indicated that Ms. Cvijetevich had stayed at Mr. Cheon's house and that he had told her to move out because Mr. Cheon was "a pretty bad guy." He understood that Mr. Cheon had been upset about that. Mr. Kennedy also testified that Mr. Cheon and Mr. Cheon's girlfriend had laid a complaint with the police against him and a friend, alleging that the two men had raped Mr. Cheon's girlfriend on six occasions in 2008. Mr. Kennedy had not been charged because, at the time of the alleged rapes, he had been in jail.

III. THE TRIAL JUDGE'S DECISION

[18] The defence theory at trial was that there was a troubled history between Mr. Kennedy and Mr. Cheon and that, as a result, Mr. Cheon had a reason to falsely claim Mr. Kennedy was his assailant. Mr. Kennedy relied on an alibi to the effect he had been visiting friends with Mr. Wesaquate on the afternoon of

March 22. He also challenged the reliability of the eye-witness identification evidence tendered by Mr. Cheon and Mr. Cannon.

[19] The trial judge began by indicating that she accepted the basic outline of the assault underpinning the charge against Mr. Kennedy. She found that Mr. Cheon had driven to Mr. Stewart's house and that, as he approached the house, the door had burst open and he had run for his life while being pursued by at least two individuals, one of whom carried a machete. She also accepted that Mr. Cannon had witnessed part of the chase and had seen Mr. Cheon's pursuer swing the machete, narrowly miss and slip on the icy street.

[20] The trial judge then referred to the phone call between Mr. Stewart and Mr. Cheon following the attack. She said the evidence had not established the exact nature of their conversation but concluded that it had played "at least a part" in Mr. Cheon contacting the police again. She then recounted how Mr. Cheon had visited the police station and identified Mr. Kennedy in a photo line-up.

[21] The key issue at trial was the identity of Mr. Cheon's attacker. On this point, the trial judge quite properly cautioned herself about the reliability of eye-witness identification evidence, and, in this regard, referred to leading authorities such as *R v Hibbert*, 2002 SCC 39, [2002] 2 SCR 445 [*Hibbert*]. She indicated that the weight given to eye-witness evidence must depend on the circumstances in which the observations in question are made.

[22] With this basic framework in mind, the trial judge turned first to Mr. Cannon's evidence. She recounted his inability to identify Mr. Kennedy during his first trip to the witness stand and his comments about the reflection

of the sun on the plexiglass surrounding the prisoner's box. The trial judge appeared to accept that explanation and then, after cautioning herself about the weight to be given to eye-witness identification evidence, she listed various factors said to either detract from, or add to weight to, Mr. Cannon's testimony. Having done that, the judge made no further comment about how she would treat his evidence.

[23] Next, the trial judge turned to Mr. Cheon's evidence. She acknowledged the discrepancies in the testimony about whether Mr. Cheon and Mr. Kennedy had met personally before March 22, 2010 but said only that the evidence was not clear enough to allow her to make a finding on the point. She did not relate it to her assessment of the reliability or the credibility of either Mr. Cheon's evidence or Mr. Kennedy's evidence. The judge then proceeded to comment on how the photo line-up had been conducted and to list various factors said to either detract from, or lend weight to, Mr. Cheon's testimony.

[24] The trial judge next turned to the evidence of Ms. Cvijetinevich. She recounted Ms. Cvijetinevich's testimony, observed that Ms. Cvijetinevich did not like Mr. Cheon and concluded, "I did not find her to be a helpful witness."

[25] As for Mr. Livly, the judge narrated his evidence and observed that he had not heard all of the conversation between Mr. Cannon and Mr. Cheon in the courtroom hallway. She said that, where there were inconsistencies between Mr. Cannon's account of the conversation and Mr. Livly's, she preferred Mr. Cannon's account.

[26] The trial judge next summarized the evidence of Mr. Nagy and appeared to accept his testimony to the effect that he and Mr. Kennedy had been

subjected to a false allegation of sexual assault made by Mr. Cheon and/or Mr. Cheon's girlfriend. She said this disclosed a possible reason why Mr. Kennedy and Mr. Nagy would be unhappy with Mr. Cheon but did not relate this evidence to Mr. Kennedy's theory of the case.

[27] The trial judge then turned to Mr. Wesaquate's account of what he and Mr. Kennedy had done on March 22. She identified some inconsistencies between his account and Mr. Kennedy's, but made no findings about his credibility or about the reliability of his testimony.

[28] Finally, the trial judge dealt with Mr. Kennedy's evidence. She went through it in some detail as it related to his account of what he had done on the afternoon of March 22 and concluded that his evidence on that front was "vague and evasive." She noted that he and Mr. Wesaquate had moved from place to place during the day and, at one point, had been on the 1200 block of Rae Street. The judge also observed that there was "some history" between Mr. Kennedy and Mr. Cheon. Again, she did not relate that history to Mr. Kennedy's theory of the case.

[29] All of this done, the trial judge concluded as follows:

Having heard the evidence and having observed the witnesses and having considered the matter very carefully, the accused's evidence together with that of the defence witnesses does not raise a reasonable doubt in my mind.

[30] Then, the trial judge turned to consider whether she had been left with a reasonable doubt about Mr. Kennedy's guilt by the evidence she had accepted. In this context, she again emphasized that eye-witness identification evidence must receive "very special scrutiny." In the result, the judge found

Mr. Kennedy guilty of assault with a weapon by relying on the combined effect of the evidence given by Mr. Cheon and Mr. Cannon:

That far from ends the matter however. The Court must still consider whether the Court is left without a reasonable doubt on the basis of the evidence the Court does accept. Eyewitness identification, as I have said, does not end the matter either. This type of evidence must receive very special scrutiny from the Court. I have given ...

Mr. Cheon testified as a complainant. The incident involved great stress for him. He was face to face with the men exiting 1205 Rae Street; however, this was momentary.

Mr. Cannon was an independent bystander. In daylight, he had a good vantage to observe the incident as it progressed towards him and ended not far in front of him. He observed the one individual fall, he also observed him rising, as it took a bit for that person to get up. He also noted the men leaving.

Having considered all of the evidence, I find I am satisfied beyond all reasonable doubt that on March the 22nd, Gordon Kennedy, armed with a machete, chase Hannil Cheon, attempted to strike Hannil Cheon with the machete, and threatened to kill him. I find him guilty as charged.

IV. ANALYSIS

[31] Mr. Kennedy submits both that the verdict entered at the trial was unreasonable in light of the evidence as a whole and that the trial judge failed to provide an adequate explanation of how she reached her decision. As indicated at the outset of these reasons, we conclude this appeal should be resolved on the latter basis. Our particular concern is grounded in the trial judge's failure to deal with the arguments about Mr. Cheon's credibility.

[32] The seminal case with respect to adequacy of reasons is *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869 [*Sheppard*]. There, the Supreme Court identified a number of propositions which were said, in the context of possible appellate intervention in a criminal case, to summarize the law. The most

directly applicable of those propositions, for present purposes, are set out at para. 55 as follows:

...
2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

...
6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

...
8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

...

[33] We, of course, appreciate that these concepts operate in a specific context. More particularly, appellate courts must not hold trial judges to unreasonable or abstract standards of perfection when it comes to judgment writing. Nor should they let “lurking doubts” about an unsafe verdict stand as a basis for finding reasons to be inadequate. See: *R v Braich*, 2002 SCC 27 at para 39, [2002] 1 SCR 903; *R v Boucher*, 2005 SCC 72 at para 29, [2005] 3 SCR 499; *R v R.E.M.*, 2008 SCC 51 at paras 17-18, [2008] 3 SCR 3.

[34] With those principles in mind, and before dealing specifically with the issue of Mr. Cheon's credibility, we note it is common ground that Mr. Kennedy's conviction rests solely on the eye-witness identification evidence provided by Mr. Cheon and Mr. Cannon. While a conviction can be founded on such evidence, its frailties are well understood. See, for example: *R v Goran*, 2008 ONCA 195 at para 19, 234 OAC 283; *R v Hay*, 2013 SCC 61

at para 40, [2013] 3 SCR 694; *R v Bigsky*, 2006 SKCA 145, 217 CCC (3d) 441 [*Bigsky*].

[35] Against this background, we turn now to Mr. Cheon's evidence. As indicated above, in reviewing his testimony, the trial judge listed various factors that she saw as either detracting from or supporting its weight. It is clear from the context that, by "weight", the trial judge meant "reliability". This is confirmed, among other things, by the fact that her list of considerations contained only factors which would go to reliability.

[36] At no point in her decision did the trial judge speak to, or consider, the question of Mr. Cheon's *credibility*. In our respectful view, this was a significant oversight given the defence theory that Mr. Cheon was not telling the truth about the identity of his attacker and given defence counsel's submission that Mr. Cheon was attempting to get Mr. Kennedy into criminal law difficulties just as the evidence suggested he had done on an earlier occasion.

[37] The importance of directly addressing Mr. Cheon's credibility was underlined, in our view, by the combined effect of several considerations. First, given the frailty of Mr. Cannon's evidence, it was particularly important for the trial judge to adequately explain her assessment of Mr. Cheon's testimony. As noted, her decision was grounded on the eye-witness identification evidence of those two men and those two men only.

[38] Second, as the trial judge herself found, there was evidence of bad blood between Mr. Cheon and Mr. Kennedy. She commented at one point in her decision that this could be a reason why Mr. Kennedy might have had issues

with Mr. Cheon. However, as contended by the defence, the relationship between Mr. Cheon and Mr. Kennedy *also* gave Mr. Cheon a motive to lie about the identity of his attackers. This theory had some arguable cogency because of the fact Mr. Cheon apparently had gone to the police in the past and falsely accused Mr. Kennedy of raping his girlfriend.

[39] A third factor confirming the importance of dealing with Mr. Cheon's credibility was that Mr. Cheon denied knowing what Mr. Kennedy looked like before the attack. By way of contrast, Mr. Kennedy testified that the two men had met face-to-face several times before and that they were known to each other from the local drug scene. The fact that Mr. Kennedy's girlfriend, Ms. Cvjetinevich, had stayed with Mr. Cheon at one point also tended to suggest that Mr. Cheon may have known Mr. Kennedy by more than just his name. Certainly Ms. Cvjetinevich thought the two men had met face-to-face. All of this also served to highlight the importance of dealing directly with Mr. Cheon's credibility.

[40] The fourth point which underlines the need for the trial judge to have dealt with Mr. Cheon's credibility was Mr. Cheon's arguably curious level of certainty ("one million percent") that Mr. Kennedy had been his attacker even though he claimed never to have seen Mr. Kennedy before, his assailants had worn winter hats and clothes, his opportunity to see the attackers had been limited as he ran for his life and he was not sure if it had been Mr. Kennedy who had swung the machete.

[41] In short, given the defence theory in this case, and given the nature of the evidence before her, it was incumbent on the trial judge to deal directly with the question of Mr. Cheon's credibility. Her failure to do so means the

trial decision was not responsive to the central argument of the defence or to the “live issues” in the case. See: *R v Dinardo*, 2008 SCC 24 at para 25, [2008] 1 SCR 788. It also means that it is not possible for this Court to properly discharge its appellate review function.

[42] That said, there was evidence—albeit by no means strong evidence—on which a conviction could have been entered in this case if the trial judge had accepted the testimony of Mr. Cheon and found him to be credible. As a result, we conclude that this is a case, like *Sheppard* itself, where it is appropriate to order a new trial rather than to enter an acquittal. In this regard, this appeal yields a different result than cases such as *Bigsky*.

V. CONCLUSION

[43] We respectfully conclude, for the reasons given above, that Mr. Kennedy’s conviction must be set aside and a new trial ordered.

DATED at the City of Regina, in the Province of Saskatchewan,
this 8th day of April, A.D. 2015.

“Richards C.J.S.”
Richards C.J.S.

“Richards C.J.S.”
for Caldwell J.A. (as per authorization)

“Whitmore J.A.”
Whitmore J.A.