COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Sharp***,
2004 YKCA 6

Date: 20040407
Docket: YU503

Between:

Regina

Respondent

And

Thomas Paul Sharp

Appellant

AN ORDER HAS BEEN MADE IN THIS CASE PROHIBITING PUBLICATION OF ANY INFORMATION THAT COULD DISCLOSE THE IDENTITY OF THE COMPLAINANT PURSUANT TO SECTION 486(4.1) OF THE *CRIMINAL CODE*.

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie

G.R. Coffin	Counsel for the Appellant
E.J. Horembala, Q.C. and J.W. Phelps	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2004
Place and Date of Judgment:	Vancouver, British Columbia April 7, 2004

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Southin
The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Ryan:

[1] This appeal was heard and dismissed from the bench on March 5, 2004 with reasons to follow. These are the reasons.

[2] On November 7, 2002 the appellant was convicted of one count of forcible seizure and one count of breach of recognizance. The offences were alleged to have been committed in Whitehorse on November 5, 2001.

[3] The appellant appeals his convictions on the ground that he did not receive a fair trial.

[4] At the outset of his reasons for judgment (reported at [2002] Y.J. No. 142 (Q.L.)) convicting the appellant, the trial judge said this, at paras. 1-20:

> Before I begin with my judgment, I wish to place on the record the description of the occurrences which happened on the first and second day of this trial. The trial was to commence on Monday, October 28th, and was scheduled to conclude on the Friday following, November 1st.
>
> When I entered the courtroom on the 28th and the case was called, present were counsel, Mr. Coffin for the defence and Mr. Horembala, Crown counsel. Mr. Horembala rose to make some preliminary remarks and the Court suggested that perhaps the accused should be arraigned first. The charge was read to the accused and he was asked if he understood it. The accused replied, mumbling at the time, that he did not understand it. I asked the defence counsel if the charges had been explained to the accused and when that was done, did he appear to understand it. Defence counsel replied in the

affirmative. Charges were again read to the accused one after the other and when asked for a plea, he said words to the effect that he was not going to answer that and I, therefore, entered, on his behalf, a plea of not guilty to each charge.

Before anything further could be done, the accused started shouting, swearing at persons in the gallery and kicking at the prisoners' dock. As he had stood to do this, I directed him to be seated. Security guards, members of the R.C.M.P., approached him as he was attempting to leave the dock by opening the door.

While the accused was making threats towards the gallery, shouting and failing to respond to the court's direction to be seated, attempts were made to restrain him. During the course of these attempts, the accused took his two hands and appeared to strike one of the guards. I say, "appeared" because the guard's back was to me. There was, however, a sound.

The accused was removed from the courtroom and after discussion with counsel in my chambers, I made an order under s. 650 that he be removed from the courtroom. Sometime thereafter, before the trial had recommenced, with counsel present, I directed defence counsel to go to the accused to inquire whether he was prepared to alter his conduct so as to allow the proceedings to continue without disturbance. Defence counsel returned and indicated that his instructions were that the accused would not make such a promise, and further, that he no longer wished to have Mr. Coffin representing him in his absence and indeed wanted no lawyer to be representing him. He stated his client did not want to be in the courtroom.

On considering that development, I determined to try and get those instructions to counsel in writing. Upon court recommencing, defence counsel informed the Court that the accused refused to put his instructions in writing, reiterated that he intended to discharge counsel, whereupon his counsel indicated to the court that the relationship of solicitor and client had broken down and he wished to withdraw.

I then ordered that the accused be brought to the courtroom to attempt to persuade him to promise to behave and to employ counsel. The accused indicated that he did not want to be in the courtroom while the trial proceeded and that he wanted to be taken to his cell. He further indicated that he did not want Mr. Coffin or any other government lawyer, or any lawyer, representing him while the matter proceeded.

When I started again to ask him if he would be prepared to sit quietly, he asked to be taken to his cell. The request was granted, and after again kicking the dock, he left.

The trial proceeded. The Crown counsel asked that the accused be brought to the courtroom for the purpose of being identified by a witness, the complainant.

He was brought to court, the witness indicated him as the man about whom she was testifying.

I took the opportunity to again ask the accused if he was prepared to promise to not disturb the proceedings. Before I could finish, he again rose yelling. The officers again approached to restrain him. He refused to comply with the directions of the Court to be seated. As the officers attempted to restrain him, he picked up a chair, raised it over his head, at which time I adjourned court, but not until after I observed the accused head butt one of the officers violently. Three officers struggled to bring him under control. He was subdued and taken out of the courtroom but not without the sounds of violence being heard as he was taken away.

I was totally concerned with the safety of the public, counsel, staff, and witnesses, should the accused be entitled to remain in the courtroom. I determined the degree of risk was very high and renewed my order under s. 650(2) that he be removed and that he be kept away. I was of the opinion that to proceed with the accused in the same room with staff and guard, even with shackles and manacles, was to risk the safety of the persons in the room.

On the 29th and subsequent days, audiotapes were provided to the accused in his cell. Subsequently, written transcripts of the evidence heard in his absence were provided to the accused.

Crown's case finished on Thursday, the 31st. By this time, I had been able to arrange a video link to another courtroom and the accused was brought to it and I explained to him how the rest of the trial would proceed so that he could make his defence and final submissions.

As the record shows, the matter proceeded on that basis. Therefore, the accused was not in a position to cross-examine any of the witnesses brought forward.

I am guided by the conclusions reached in the case of *R. v. Fabrikant* (1995), 97 C.C.C. (3d) 544, and particularly the judgment of Mr. Justice Proulx in the Court of Appeal of Quebec. At page 11 of that decision, he says:

> I find that where, in exceptional cases, despite efforts by a trial judge to avoid the inevitable, an accused still persists in his disruptive conduct and therefore, abuses his rights, he can lose these rights. In such case, the trial judge in the exercise of his discretion, can take the appropriate measures to ensure the proper march of the trial, which can include the continuing of the trial in the absence of the accused, or the premature termination of the latter's defence, which may mean, as in the present case, that the accused would not testify in his own case.

I concluded, due to the level of the violence, to take the course that was taken and then took all reasonable steps to secure the accused his rights under s. 650(3) to rightful answer in defence.

I did give consideration to enabling the accused to view the proceedings by video while the Crown's case was going in, but proceeded otherwise upon viewing s. 650(1.2), which permits appearance by closed-circuit television but only "for any part of the trial other than a part in which the evidence

> of a witness is taken". I therefore, did not take that route.
>
> I therefore observe that the accused was prejudiced by not being able to cross-examine Crown witnesses or put to them perceived inconsistent prior statements and present other matters in cross-examination, or receive advice about that. This occurred as a result of his own conduct, his own choice to not be present in the courtroom, and his own choice to discharge his counsel. In my view, the Court is not obliged to make special rulings contrary to established rules to assist an accused who has so conducted himself. In this regard see also, *R. v. Thompson* [1996] O.J. No. 3555, a case very similar to these facts.
>
> On November 4th, the accused testified by video link and subsequently, as the record will show, made final submissions on his own behalf.

[5] Whether the reasons of the trial judge accurately describe the relevant events was not at issue on this appeal.

[6] As the trial judge noted in his reasons for judgment, after the Crown had completed its case and the appellant had had an opportunity to review audiotapes and transcripts of the witnesses, he was permitted to participate by way of video conference from another courtroom. The trial was adjourned over a weekend at which time the appellant requested and received the assistance of his girlfriend and Mr. Quiet, a chaplain at the Whitehorse Correctional Centre.

[7] The appellant chose to testify. Initially his statements to the court consisted of complaints about the way he had been

treated a few months earlier on his arrival in Whitehorse and while in jail after his arrest. These complaints were set out in a statement that was filed before the trial judge but was not reproduced for the purposes of this appeal. It is clear from the proceedings that these complaints did not touch on evidence relevant to the charges before the court.

[8] The appellant eventually turned to his account of what happened on the day in question, which I will address later in these reasons.

[9] The appellant raises four grounds of appeal:

1. The Learned Trial Judge should not have excluded the Appellant from the proceedings.

2. Having excluded the Appellant from the proceedings, the Learned Trial Judge should have made arrangements for him to cross-examine the witnesses, possibly by video conference, in the same way he was able to give his own evidence.

3. The Learned Trial Judge should have advised the Appellant of his right to have witnesses recalled and cross-examined on inconsistencies between their evidence at trial and previous statements made.

4. The Learned Trial Judge, on learning that possible inconsistencies existed, should have adjourned the matter to explore the possibility of engaging new counsel for the Appellant or have ordered a mistrial.

[10] In ***R. v. Darlyn*** (1946), 88 C.C.C. 269 (B.C.C.A.) Mr. Justice O'Halloran said this at 271-2:

> There are two traditional common law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain if they are not observed. The first is, that if the accused is without counsel, the Court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect. The second is, that it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point to emphasize, not until he is found guilty, but until he is found guilty according to law.

[11] There are times, however, when, in spite of the efforts of the trial judge, the self-represented accused rejects the helping hand of the court. In my view, this was one of those cases.

[12] Counsel for the appellant, Mr. Coffin, has submitted that the trial judge ought to have made more vigorous efforts to ensure that the appellant received a fair trial by assisting him to cross-examine witnesses, advising of his right to have witnesses recalled and exploring the possibility of engaging new counsel for him.

[13] In my view the record amply demonstrates that such measures would have been futile. It could not be clearer that

the appellant was determined to disrupt this trial no matter what assistance the court offered him. It was not until the case for the Crown was closed and the witnesses discharged that the appellant settled down to the point where he could testify on his own behalf.

[14] While the witnesses were in the courtroom the appellant was disruptive and violent. He insisted that he did not want to be represented by counsel. There is no reason to conclude that the appellant would have behaved any differently if the trial judge had once again suggested that he retain counsel or if the trial judge had ordered the witnesses back so that the appellant could confront them in cross-examination.

[15] The only issue of substance raised by this appeal is whether there were frailties in the evidence of identification, unexplored at trial, which would lead this Court to conclude that there has been a miscarriage of justice.

[16] In his opening at trial, counsel for the Crown began with this comment:

> Now, before we proceed with [the complainant], My Lord, this case involves identification. I think it's probably the only issue, real, live issue.

[17] The whole of the Crown's case was devoted to proof that the appellant was the person who assaulted the complainant after following her off a bus as she returned home from work.

[18] The complainant testified that she had taken the bus to a stop not far from where she lived in the Granger district of Whitehorse. She said that as she stood at the back of the bus waiting to get off, a man came up behind her and stood very close to her. She said that this made her feel uncomfortable. Once off the bus, she turned to her left and saw the man a distance of three to five feet away lighting a cigarette. She decided not to walk towards her home but to wait until he left. The man approached her, asked for directions and then grabbed her by the shoulder and tried to take her into some nearby bushes. After a difficult struggle, the complainant broke free of the man, ran to a nearby vehicle and sought help from the driver of the vehicle, Ms. Munro.

[19] Ms. Munro urged the complainant to go to a nearby convenience store to call 911.

[20] The complainant provided a detailed description of her attacker. She said that he was about six feet tall and clean shaven, had rough cratery skin and almond-shaped brown eyes, and was wearing a grey wool toque down to his eyebrows and a khaki-coloured ski-jacket with a stripe around the chest. She

said that she had a good opportunity to observe the man. She identified him as the appellant in a photographic line-up the next day, at the preliminary hearing five and a half months later and at trial.

[21] Although he did not provide this Court with transcripts of the preliminary hearing, counsel for the appellant advised us that the complainant agreed in her testimony at the preliminary hearing that there had been a photograph of the appellant posted at her place of work which she viewed daily before the attack. She apparently also agreed that the day after she picked the appellant out of the photographic line-up her boss at work showed her the office photograph and told her that it was a photograph of the person she had picked from the line-up.

[22] Neither the evidence of the office photograph nor the evidence of the discussion with her boss was put to the complainant at trial.

[23] These omissions aside, the trial judge carefully examined all of the other evidence of identity in this case and concluded that it was very strong.

[24] Perhaps the most important witness was Ms. Veillette, who had seen the appellant on the bus the complainant took the day of the attack.

[25] Ms. Veillette testified that she had arrived at the bus stop on Olgilvie Street in downtown Whitehorse at about 2:50 p.m. on November 5, 2001. She said that a man was sitting on a bench at the bus stop, smoking. Ms. Veillette said that she recognized the man from a photograph that she had seen in the local newspaper, the Whitehorse Star, on July 11 or July 31. She also recognized the man from a photograph posted in the hallway of her daughter's elementary school. She waited at the bus stop for about three or four minutes before the bus arrived. She said that when she got on the bus she sat on the front bench beside the door. The man she had earlier observed sat at the back on the left side of the bus. Ms. Veillette said that she continued to observe the man as she rode the bus. When she got off the bus on Falcon Drive, the man was still there.

[26] Ms. Veillette described the man on the bus as about five feet, 11 inches tall, with a long face, pointy chin, almond-shaped eyes, "a pokey face kind of", wearing jeans, perhaps cowboy boots, a beige ski jacket and a toque to his eyebrows.

[27] The complainant left the bus several stops past Falcon Drive on Thompson Road.

[28] When the complainant stopped Ms. Munro after the attack on Thompson Road, she pointed out the assailant to her. Ms. Munro testified that the man the complainant indicated wore a grey, light grey or beige toque and a light grey or beige ski jacket. She saw him walk down Thompson Road and then turn into a driveway.

[29] The complainant made her call to 911 at 3:28 p.m. At 3:40 p.m. two police officers observed the appellant near his home on Sandpiper Road, not far from the location of the attack. The officers described the appellant as wearing blue jeans, a two-tone dark blue and tan snowboarding jacket, and running or hiking shoes. According to their description, he was not wearing a hat at this time.

[30] Also, a school bus driver observed the appellant a short while earlier, crossing in front of his bus. He testified that the appellant was wearing orangey yellow boots, jeans, a light-coloured jacket and something on his head.

[31] The appellant testified that he had been near his home at the time of these observations and had seen the bus driver and the police officers. The appellant said that he had been in

downtown Whitehorse earlier that day but took the 1:20 p.m. bus from the Olgilvie Street bus stop, not the 3:00 p.m. bus. He said that when he was seen by the bus driver and the police officers he had been out for a walk around the area in which he lived.

[32] The police searched the appellant's home the next day and seized a number of different boots, jeans, a dark blue and beige ski jacket, and a beige toque.

[33] On cross-examination the appellant agreed that he was a smoker.

[34] The trial judge also considered other evidence which he found to be equivocal with respect to the issue of identity: footprints that may or may not have been those of the appellant and an inconclusive search by a tracking dog.

[35] In the end, the trial judge found that the Crown had demonstrated the appellant's identity as the man who had attacked the complainant.

[36] Counsel for the appellant submitted that had the trial judge encouraged the appellant to obtain counsel, the evidence of identity would have undergone rigorous scrutiny. Not only would the complainant's previous acquaintance with the appellant's photograph have been examined in detail, but other

inconsistencies explored as well. No doubt this is so. But as the respondent Crown submits, an accused who chooses to discharge counsel and represent himself cannot later complain on appeal that his conduct of the trial did not reach the level of a competent lawyer. In discharging his lawyer the accused assumes the risks and disadvantages of appearing without a lawyer.

[37] The real issue is whether in all the circumstances the appellant received a fair trial. In my view the record demonstrates that the trial judge did not err in the manner in which he conducted the trial. In spite of the appellant's actions the trial judge fairly and properly weighed the evidence against the appellant and rendered a verdict according to law.

[38] Counsel for the appellant did not go so far as to say that the Crown ought to have placed the evidence of the complainant's prior experience with the appellant's photograph before the trial judge for his consideration. Nonetheless, with the limited material before this Court, I have attempted to address whether that evidence would have made any difference to the verdict. For the reasons I have earlier expressed, I have concluded that it would not.

[39] I would dismiss the appeal.

“The Honourable Madam Justice Ryan”

I Agree:

“The Honourable Madam Justice Southin”

I Agree:

“The Honourable Mr. Justice Mackenzie”