COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***R. v. Hummel***,
2003 YKCA 4

Date: 20030502
Docket: YU450

Between:

Regina

Respondent

And

Daniel Hummel

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

K.M. Eldred — Counsel for the Appellant

E.J. Horembala, Q.C.
W.B. Smart, Q.C. — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
25 February, 2003

Place and Date of Judgment: Vancouver, British Columbia
2 May, 2003

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Chief Justice Finch

The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The appellant applies to re-open the appeal against his conviction for first degree murder. He proposes to argue new grounds of appeal. On 26 June 2002 we handed down reasons for judgment dismissing his appeal: 2002 YKCA 6. Because of an administrative oversight the formal judgment order was not entered prior to the filing of the application to re-open.

[2] I frame the issues before us as follows: Do we have jurisdiction to entertain the application? If we do, what factors govern the exercise of that jurisdiction? In light of those factors should we re-open the appeal?

[3] I have concluded that we have jurisdiction, that it is an extraordinary power to be exercised rarely, and that it should not be exercised in this case.

Background

[4] Our reasons sketch the facts of the case adequately for the purpose of this decision and I need not repeat them. It is sufficient to say that the jury found the appellant killed the deceased in the course of a sexual assault or a forcible confinement. The new grounds proposed to be argued are aimed at achieving a substitute verdict of second degree murder on

the basis that the jury could not have reasonably found sexual assault or a forcible confinement on the evidence.

[5] The hearing of the appeal took place in Whitehorse on 10 June 2002. Appellant's then counsel argued four grounds. The first alleged that the trial judge erred in disallowing questions to the jury panel concerning possible bias about the likelihood of consensual sexual relations between an aboriginal man and a non-aboriginal woman. In the course of developing his argument on that ground, counsel canvassed the facts at some length. He sought to persuade us that the Crown's case on absence of consent and forcible confinement was so weak that the alleged error concerning the jury questions could have made a difference to the outcome. Counsel's treatment of the evidence was so extensive that the Chief Justice asked him whether he was arguing unreasonable verdict, to which he replied he was not.

[6] The appellant has new counsel to argue this application. She filed an affidavit of her predecessor, in which he deposed that he should have raised the issue of the reasonableness of the verdict.

[7] At the appeal hearing the Crown also went through the evidence in detail, not only in relation to the first ground discussed above, but also concerning the fourth ground which

challenged the DNA warrant. Those submissions carefully laid out the facts tending to support the Crown's theory in a rebuttal of the argument that the prosecution case was weak and that the DNA warrant was not properly supported.

[8] In disposing of the jury question issue, I said at para 21 of the reasons:

> ¶21 The appellant did not testify. The Crown marshalled a powerful circumstantial case against him. The theory that intercourse was consensual and unconnected with the fatal beating is, without some evidence to support it, wholly unrealistic. If that is so, then there was no practical purpose to be served in posing the disputed question at jury selection, and in the end, it cannot be said that the appellant's right to a fair trial was compromised by refusing the question.

[9] The new grounds of appeal are:

1. The verdict is unreasonable given the absence of evidence regarding a temporal and causal connection between the murder and the sexual activity.

2. The jury's verdict is unreasonable given the absence of evidence regarding lack of consent beyond the crown's reliance on myths and stereotypes.

Jurisdiction

[10] It has been definitively determined both in Ontario: ***R. v. H. (E.F.)***; ***R. v. Rhingo*** (1997), 115 C.C.C. (3d) 89 (Ont.C.A.) and in British Columbia: ***R. v. Garcha*** 2000 BCCA 550, that if the appeal has been heard on the merits and judgment has been entered, the Court of Appeal has no power to re-open an appeal. In ***Garcha*** the Court said at ¶9:

> We are all of the view that, in the circumstances of this case, when the conviction appeal was heard and dismissed on the merits and the order dismissing the appeal has been entered, this Court does not have jurisdiction to re-open the appeal.

[11] The court is *functus officio* on the entry of the judgment but not at the time reasons are issued: ***Rhingo***, footnote 10 at p. 106.

[12] In *obiter dicta*, Esson J.A. preferred not to close the door upon the entry of judgment if refusing to open would result in a miscarriage of justice. He said in ***R. v. R.F.*** 2000 BCCA 139 at ¶5:

> ¶5 The Crown's submission that there is no jurisdiction is based on four cases: Menzies v. Harlos (1989), 37 B.C.L.R. (2d) 249 (B.C.C.A.); R. v. Henry (I.W.M.) (1997), 100 B.C.A.C. 183; R. v. Hanna, Unreported, November 24, 1998, Vancouver Registry #CA013877; Regina v. H.(E.F.); Regina v. Rhingo (1997), 115 C.C.C. (3d) 89 (Ont. C.A.). There is no case which clearly holds that there is jurisdiction to hold a re-hearing after entry of judgment where there has been a hearing on the merits. Nevertheless, having regard to the circumstances of this case and speaking only for myself, I think it unlikely that we would not hold that we have jurisdiction to conduct a re-hearing if persuaded that there is a significant risk of a miscarriage of justice attributable to a misapprehension by the court of the evidence and findings.
>
> [emphasis added]

[13] Esson J.A. could not find a valid ground for a re-hearing and so in the end, he did not decide the issue of jurisdiction.

[14] The source of the power to re-open is in the inherent jurisdiction of the court to control its processes and prevent an injustice: ***R. v. Blaker*** (1983), 6 C.C.C. (3d) 385 at 387 (C.A.).

[15] In the present matter, although there was a full hearing on the merits, the court’s jurisdiction was not brought to a close by the entry of judgment and it is, in my view, open to us to consider the application.

[16] I turn now to discuss what principles ought to guide the use of our jurisdiction.

Relevant Factors

[17] Broadly speaking, two principles are in opposition. On the one hand, and favouring a restrictive approach, is the need for finality in criminal litigation; on the other hand, and supporting a more open approach, is the prevention of a miscarriage of justice, particularly where the court's decision manifests a mistake on the evidence. When such a mistake occurs, it seems better for the court itself to correct the error than to leave it to the Supreme Court of Canada or to the executive clemency and review processes in ss. 690 and 749 of the ***Code***.

[18] The principle of finality was eloquently addressed by Charron J.A. in ***Rhingo***, at p. 101:

> There are sound policy reasons for so limiting the power to reopen appeals. An unlimited discretion to reopen appeals that have been heard on their merits is not only unjustifiable as an ancillary power of the court, but would do significant harm to the criminal justice system. Finality is an important goal of the criminal process. Statutory rights of appeal provide a carefully crafted exception to the general rule that trial decisions are final. By providing broad rights of appellate review in criminal matters, Parliament recognizes that fairness and justice interests require that the accused have a full opportunity to challenge a conviction even though that opportunity will prolong

> the process. Once those broad appellate rights have been exercised and the merits of the appeal decided, then absent an appeal to a higher court, finality concerns must become paramount. Those affected by the process should be entitled to rely on the appellate decision and conduct themselves accordingly. The appellate process cannot become or even appear to become a never closing revolving door through which appellants come and go whenever they propose to argue a new ground of appeal.
>
> [emphasis added]

[19] This court examined the two competing principles in ***Blaker***, where Craig J.A. said at p. 392:

> However that may be, the *Watson* case and the *Danielson* case are authorities for the principle that an appellate court has jurisdiction to vary or to set aside an order disposing of an appeal in a criminal case if the order disposing of the appeal was made on a basis other than on the merits and if in all the circumstances the court thinks that the order should be varied or be set aside, that is, if it is in the interests of justice that the order should be varied or set aside. I hasten to add that the phrase "interests of justice" involves a consideration of several things, not simply the interests of the accused. It involves, also, the interest of the State in insuring that people who commit offences are duly convicted and punished and the interest of the State in having finality to a proceeding.
>
> [emphasis added]

[20] In a civil case, ***Menzies v. Harlos*** (1989), 37 B.C.L.R. (2d) 249 (C.A.), Esson J.A. gave fuller expression to the interests of justice factor in accepting a more liberal approach. He said, speaking for the court at p. 255:

> For the purposes of deciding this application, I am prepared to accept that the scope for re-argument should be wider than in the past. Without attempting to state a definitive rule, I approach the matter on the basis that if it appears that the court overlooked or misapprehended the evidence in a significant respect, and that a risk of miscarriage of justice ensued, there should be a rehearing.

[21] The formulation in ***Menzies*** was applied to a criminal appeal in ***R. v. Radok***, [1992] B.C.J. No. 1023 (C.A.) (Q.L.).

[22] It is not enough to allege an error within the narrow range described in these cases, the applicant for a re-opening must discharge a heavy onus at the threshold stage: ***Blaker*** at p. 393. Taylor J.A. for the majority in ***Mayer v. Mayer***, [1993] B.C.J. No. 1818 (C.A.) (Q.L.), required the demonstration of "a clear and compelling case" at ¶22:

> In the present case I am not persuaded that the court overlooked or misapprehended the evidence in any respect. It seems rather that the appellant seeks now to raise a point of law not raised or argued in the original appeal. <u>If this court were willing to order a re-hearing so that a new point might be argued, it would surely be only in the most extraordinary circumstances, and those in which the appellant could establish both a clear and compelling case in law on the point concerned and that some very serious injustice might otherwise occur.</u>
>
> [emphasis added]

[23] The rationale for such a stringent threshold test is the concern that litigation will otherwise never end. In

expressing caution in the application of the liberal approach to re-opening, Esson J.A. said at p. 255 of ***Menzies***:

> Clearly, if that approach is to be taken, it must be taken cautiously to avoid the danger of opening the floodgates and immersing the court in a flood of new work which, in the end, may serve mainly to add to the already intolerable cost and delay of litigation.

[24] I will attempt a summary of the factors relevant to a re-opening application based on the above authorities.

1. Finality is a primary but not always determinative factor.

2. The interests of justice include finality and the risk of a miscarriage of justice.

3. The applicant must make out a clear and compelling case to justify a re-opening.

4. If the case has been heard on the merits the applicant must show that the court overlooked or misapprehended the evidence or an argument.

5. The error must go to a significant aspect of the case.

Application of the Factors

[25] The new grounds of appeal proposed to be argued do not fall within the category described in ***Menzies***, that is: “a misapprehension by the court of the evidence and findings.” Rather than correcting an alleged error in the reasoning of the court, the application to re-open seeks to make up for an error of counsel. I do not think ***Menzies*** intended to limit our jurisdiction to the above formulation; the touchstone is the concept of miscarriage of justice. I am therefore prepared to leave open the possibility that if it were shown that counsel missed a crucial point and that a miscarriage would surely result if the point was not considered, the court could re-open the appeal to consider it.

[26] But this is not such a case. The examination of the evidence at the hearing was extensive. As the facts were discussed, they did not suggest, much less urge, an inquiry under s. 686(1)(a)(i) of the ***Code*** into the reasonableness of the verdict. It was necessary to look at the strength of the Crown’s case on the issues of consent and confinement in order to deal with some of the appellant’s grounds and our assessment in that regard is reflected in the remarks quoted at ¶8 of these reasons. In short, the Crown had a strong case. It cannot be said that the new grounds were deeply

buried in the record and have now been brought to light by diligent search. They were available and obvious to counsel at first instance, discussed briefly with him at the hearing, and consciously not pursued, I think, with respect, as an exercise of good judgment.

[27] The present matter offers a classic illustration of the need for finality: the unsuccessful appellant loses his appeal, engages new counsel who then takes a different angle and proposes what is essentially a new appeal. If permitted, this course would be taken by many disappointed appellants and the flood predicted in ***Menzies*** would occur.

[28] Moreover, there is an aspect of the second ground, the allegation that the Crown relied on racial stereotypes, which rehashes an argument we heard at the hearing and expressly rejected. Since it is not alleged that we misapprehended the argument, a possible ground for re-opening mentioned in ***Radok***, at p. 8, I can see no justification for allowing the appellant a second chance at an unsuccessful submission.

[29] The applicant has failed to demonstrate a clear and compelling case that a miscarriage of justice will result if the proposed arguments are not considered. I would accordingly dismiss the application for the reasons stated.

The Honourable Mr. Justice Donald

I AGREE:

The Honourable Chief Justice Finch

I AGREE:

The Honourable Mr. Justice Low