Citation: R v Allen, 2017 MBCA 88 Date: 20170829
Docket: AR17-30-08729

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

HER MAJESTY THE QUEEN	)	***A. K. Gowenlock***
	)	*for the Appellant*
Respondent	)	
	)	***N. M. Cutler***
- and -	)	*for the Respondent*
	)	
BENJAMIN THOMAS ALLEN	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***August 29, 2017***

On appeal from 2016 MBPC 70

MAINELLA JA (for the Court):

Introduction

[1] This appeal is about the misapprehension of an alibi defence. The accused appeals his conviction for fraud exceeding $5,000 after a trial in Provincial Judges Court. It was alleged that he falsely reported the theft of his 2001 Pontiac Firebird Trans Am (the vehicle) for insurance purposes to cover up the fact that, while intoxicated, he was involved in a single-vehicle accident in the spring of 2013 which resulted in a total loss of the vehicle. After hearing the appeal, it was allowed with reasons to follow. These are those reasons.

Background

[2] The case against the accused was entirely circumstantial. On the day in question, he had been heavily drinking alcohol during a golf tournament and an after-dinner event. At 9:25 p.m., he sent a text message on his mobile phone to a friend, Derek Rewucki (Rewucki), for the purposes of getting together to smoke marihuana. At 9:27 p.m., a photo radar camera captured the vehicle travelling at a high rate of speed. At approximately 9:31 p.m., the vehicle went off the road and crashed into a hydro pole just outside of Winnipeg, approximately six kilometers from the golf course. The direction the vehicle was travelling at the time of the accident was in the path between the golf course and the Rewucki's residence.

[3] Eyewitnesses to the accident saw the lone occupant of the vehicle, the male driver, flee the scene. Police were called but could not locate him. Police first had contact with the accused about three hours after the accident at his residence which was approximately five kilometers from the site of the accident.

[4] Several facts relating to the vehicle are of importance. The accused's mobile phone was inside the vehicle at the time of the accident as it was later found there during an inspection for insurance purposes. The vehicle had an operational manufacturer's-installed anti-theft system (the VATS) and, according to the accused, the doors to the vehicle were locked when he left it in the golf course's parking lot. The vehicle could not be started unless the VATS was disarmed by the vehicle's key which had a unique encrypted code. The accused had the only known key to the vehicle which did not leave his possession on the day in question. Five days after the accident, he presented the key to the insurance adjustor when he made a sworn

statement, claiming the insurance monies ($16,612.50) for the loss of the vehicle after its alleged theft from the parking lot of the golf course by a person unknown.

[5] The main factual dispute at trial was the identity of the driver of the vehicle at the time of the accident. The accused answered the case against him in two ways. First, he said he had an alibi confirming that he was at the clubhouse of the golf course at the time of the accident and thereafter until 11:30 p.m. when his friend, Ryan Turk (Turk), drove him home. In addition to his testimony to that effect, he called a father and son (the Michalicks) as witnesses who were at the golf tournament dinner at the clubhouse. The evidence of the Michalicks, while somewhat supportive of the accused, suffered from a lack of precision as to what time they saw the accused that evening. The second aspect of his defence addressed his possession of the only known key at all material times, the fact that he locked the doors to the vehicle before it was apparently stolen, and the VATS. Through the evidence of Rewucki (who worked at a car dealership), the accused raised the suggestion that a motivated thief, who knew the vehicle's vehicle identification number, could have used that information with the assistance of a corrupt employee working at any General Motors' dealership to have a duplicate key made with the applicable encryption code.

[6] The judge referred to the analysis in *R v W(D)*, [1991] 1 SCR 742 at 758, and concluded that he disbelieved the evidence of the accused and that his evidence did not raise a reasonable doubt. In his reasons, the judge discussed inconsistencies between the accused's evidence at trial and the version of events he previously gave to the insurer in support of the insurance claim. One of the factors the judge took into consideration in assessing the accused's credibility was an adverse inference he drew from the fact that the

accused had failed to call Turk, who the judge described as his "principal alibi witness" (at para 26), to support the alibi defence. The judge stated (at para 33):

> Accordingly, I am of the view that the failure to call Mr. Turk does indeed in the somewhat exceptional circumstances of this case give rise to a negative inference against the accused as Mr. Turk's absence as a witness is inexplicable in the circumstances of the defence raised by the accused given the evidential context of this particular case. After all, it is only logical that an accused claiming an air-tight alibi that would definitely prove his innocence would call the person who could confirm and corroborate his testimony and thereby assure his acquittal by buttressing his credibility on such a key trial issue.
>
> [emphasis added]

[7] The judge then went on to conclude that, based on the evidence he did accept, he was satisfied beyond a reasonable doubt that the only rational and reasonable inference to be drawn from the evidence, and the absence of evidence, was that the accused was the driver at the time of the accident and was therefore guilty of the offence.

Analysis

[8] The defence of alibi (Latin for "elsewhere") arises where there is an air of reality that, at the time of the commission of the offence, the accused was not present at the scene of the crime (see *R v Cleghorn*, [1995] 3 SCR 175 at para 6). As Professor Wigmore explains, "the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged and therefore with personal participation in the act" (John Henry Wigmore, *Evidence in Trials at Common Law*, revised by Peter Tillers (Toronto: Little Brown and Company, 1983) vol 1A at 1719; see also *R v Tomlinson*, 2014 ONCA 158 at paras 48-53). To constitute an alibi, the evidence must be

determinative of the final issue of the guilt or innocence of an accused by excluding any "window of opportunity" for an accused to possibly have committed the offence (*R v C(TW)*, 2006 CarswellOnt 2284 (CA) at para 2; see also *R v Sgambelluri*, 1978 CarswellOnt 1223 (CA) at para 9, leave to appeal to SCC refused, [1978] 2 SCR x (note)). The requirements of an alibi are strict; evidence that an accused had only a limited opportunity to commit a crime is not an alibi (see *Tomlinson* at para 55). Once properly raised, the Crown must refute the alibi beyond a reasonable doubt or the accused is entitled to be acquitted (see *Lizotte v The King*, [1951] SCR 115 at 131).

[9] At the hearing of the appeal, the Crown conceded that Turk was not an alibi witness as there is nothing in the record to suggest that Turk could testify as to where the accused was at 9:31 p.m. when the accident occurred (see *Cleghorn* at para 6). According to text messages from Turk to the accused, shortly before and after the time of the accident, he was not at the golf course and, thus, could not give evidence as to whether the accused was there as he claimed. In our view, by characterizing Turk as an alibi witness, the judge erred by misapprehending the evidence.

[10] In *R v Lohrer*, 2004 SCC 80, the Supreme Court of Canada described when a trial judge's misapprehension of the evidence will give rise to a miscarriage of justice for the purposes of section 686(1)(a)(iii) of the *Criminal Code*. Binnie J stated (at para 2):

> *Morrissey* [*R v Morrissey*, 1995 CarswellOnt 18 (CA)], it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an

> essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

See also *R v Sinclair*, 2011 SCC 40 at para 56.

[11] We have been persuaded that the mistaken characterization of Turk as an alibi witness meets the stringent test for a reversible error discussed in *Lohrer* and *Sinclair*.

[12] To begin, whether Turk was or was not an alibi witness was a matter of substance in the trial. It cannot be said that the accused's whereabouts immediately after his text message to Rewucki at 9:25 p.m. is a mere detail of the case. As previously stated, whether the accused was the driver of the vehicle at the time of the accident was the key fact in dispute.

[13] In terms of the materiality of the error, in our view, the error played an essential part in the reasoning process that resulted in the conviction. The material link between the error and the judge's reasoning was his inflation of the importance of Turk's evidence to his assessment of the veracity of the accused's alibi. The importance of Turk being an alibi witness to the judge's reasoning in disbelieving the accused is evident as the judge used Turk's status as the "principal alibi witness" as the basis to draw an adverse inference against the accused in his credibility assessment because Turk was not called as a witness. The judge did so, acknowledging in his reasons that such a step by a trial judge is reserved for an exceptional situation. Ultimately, we have been satisfied that striking the judge's error in his assessment of the evidence regarding Turk leaves the trial judge's reasoning as to the veracity of the accused's alibi on "unsteady ground" (*Sinclair* at para 56).

[14] Based on our examination of the record, it appears that the circumstantial case against the accused is a compelling one. Also, without drawing an adverse inference against the accused for failing to call Turk as a witness, there were several pieces of evidence at the trial that could have allowed a properly instructed trier of fact to be satisfied beyond a reasonable doubt that the Crown had refuted the alibi raised. Finally, it strikes us that the defence's theory that this was a premeditated theft of a 12-year-old used car based on a clandestine conspiracy to obtain a duplicate key borders on the realm of conjecture. While the Crown conceded that the duplicate key theory meets the test for an air of reality to have been considered, in our view, it does so only by a whisker.

[15] Despite the fact that the evidence was capable of supporting the conviction, a new trial is required because the judge's flawed *W(D)* analysis of the accused's alibi defence undermined the fairness of his trial and gave rise to a miscarriage of justice (see *R v GJB*, 2012 MBCA 43 at paras 27-29; and *Lohrer* at para 1).

Disposition

[16] In the result, the appeal is allowed, the conviction is set aside and a new trial is ordered.

Mainella JA

Burnett JA

Pfuetzner JA