Citation: R v Dowd, 2020 MBCA 23 Date: 20200220
Docket: AR19-30-09312

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

B E T W E E N:

	)	***S. A. Inness*** *and*
	)	***R. M. Wood***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
(Respondent) Respondent	)	***S. L. Thomas*** *and*
	)	***J. W. Avey***
- and -	)	*for the Respondent*
	)	
ROBERT ALLEN DOWD	)	*Appeal heard:*
	)	***December 3, 2019***
(Accused) (Appellant) Appellant	)	
	)	*Judgment delivered:*
	)	***February 20, 2020***

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MAINELLA JA

Introduction

[1] The principal question raised by this appeal is whether a trial judge had the discretion to invoke the rule in *Browne v Dunn* (see *Browne v Dunn* (1893), [1894] 6 R 67 at 70-71 (HL (Eng))) (the rule) against an accused in assessing his credibility, in the absence of an objection by the Crown and the input of counsel, without compromising the fairness of the trial.

[2] The accused, a police officer, was tried summarily for sexual assault and sexual interference in relation to an off-duty incident involving a nine-year-old girl at a bonfire party in Manitoba's Interlake. He was found guilty of both offences; the conviction for sexual interference was conditionally stayed (see *Kienapple v The Queen*, [1975] 1 SCR 729). A sentence of one year's imprisonment and one year's probation was imposed.

[3] Twelve witnesses testified at the trial with the key evidence coming from the accused and the complainant. Not disputed is that, at one point during the evening in question, both the accused and the complainant were away from the bonfire party for a lengthy period of time and then seen to return together. The Crown alleged that is when the accused put his hands under the complainant's clothing, fondled one of her nipples and rubbed her genitalia for about three minutes. He categorically denied the allegation. He said the only time he was ever alone with the complainant was when he took her to his motorhome to use the bathroom at the request of one of the female adults at the bonfire party, Mrs. K. or Mrs. M.

[4] The trial judge applied the framework set out in *R v W(D)*, [1991] 1 SCR 742 at 758. She disbelieved the accused's denials, called his evidence "contrived" and was satisfied, based on the whole of the evidence, of his guilt beyond a reasonable doubt.

[5] To ensure credibility assessments are made as a result of a fair and orderly trial process, the rule requires that, where a party intends to later impeach a witness on a matter of significance to the facts in issue by contradictory evidence or in closing argument, the witness must be confronted

with the contrary position during cross-examination so that he or she may have the opportunity of responding to it.

[6] In *R v Lyttle*, 2004 SCC 5, the Supreme Court of Canada confirmed that application of the rule is not "fixed" but, rather, is an exercise of discretion that must be tailored "taking into account all the circumstances of the case" (at para 65) (see also *Palmer v The Queen*, [1980] 1 SCR 759 at 781-82; and *R v Paris* (2000), 150 CCC (3d) 162 at paras 22-23 (Ont CA), leave to appeal to SCC refused, 2001 CarswellOnt 2137).

[7] The Crown did not raise any objection as to the rule being breached by the accused's testimony at the trial. Nevertheless, without previously alerting counsel and giving them an opportunity to address the issue, in her reasons for decision, the trial judge found a breach of the rule and provided a remedy. As part of her adverse assessment of the accused's credibility, she drew two "negative inference[s]" against him for the failure to cross-examine either Mrs. K. or Mrs. M. about asking him to take the complainant to the motorhome bathroom.

[8] The accused's appeal from his convictions and sentence to the Court of Queen's Bench was dismissed. The appeal judge rejected the submission that the fairness of the trial was compromised because of a procedural error by the trial judge in applying the rule in reaching her verdicts in the absence of an objection by the Crown and without any input from counsel. He concluded that the manner in which she dealt with the rule in assessing the accused's credibility was not an "overstretch" of her discretion.

[9] Pursuant to section 839(1) of the *Criminal Code* (the *Code*), a judge of this Court sitting in chambers granted the accused leave to appeal his

convictions on the ground that the appeal judge failed to recognise the procedural error (see 2019 MBCA 80).

[10] The function of this Court hearing a second level of appeal is to determine whether the appeal judge erred in law in deciding that the fairness of the accused's trial was not compromised by the trial judge's application of the rule because she acted within her discretion (see *R v Bagherli (A)*, 2014 MBCA 105 at para 59).

[11] The parties confirmed at the hearing of the appeal that, if the appeal judge erred in deciding the procedure followed by the trial judge in applying the rule fell within her discretion, this Court should consider whether this appeal should nevertheless be dismissed based on the curative proviso (see section 686(1)(b)(iii) of the *Code*).

[12] For the following reasons, I am satisfied that the convictions cannot stand.

Background

[13] The bonfire party took place between about 9:00 p.m. until approximately midnight at a fire pit located just to the west of the accused's motorhome. His motorhome was parked along the south side of a gravel road about 50 feet to the east of Mr. and Mrs. M.'s camper. A driveway from the road lay between the motorhome and the camper. The door to the motorhome was visible from the fire pit.

[14] Present at the bonfire party were the accused, Mr. and Mrs. M., Mr. and Mrs. K., Mr. B. and the complainant, her 11-year-old brother and

their father. The complainant's family had met the accused for the first time earlier on the day in question.

[15] During the bonfire party, the accused and Mrs. K. took the two children away from the fire pit to walk down the road and go stargazing. The complainant was not sexually touched at this time.

[16] During the bonfire party, the accused took the complainant from the fire pit to his motorhome to use the bathroom. The complainant was not sexually touched at this time. The timing of when the accused took the complainant to the motorhome bathroom was a key fact in dispute.

[17] After Mr. and Mrs. K. and Mr. B. had left the bonfire party, the complainant's father noticed that the complainant and the accused were not at the fire pit. He became concerned and sent his son to look for her. Mr. M. observed the accused and the complainant return to the fire pit at the same time from an area north of the motorhome. He saw them walking down the road, then up the driveway towards the fire pit. Mrs. M. and the complainant's father also noticed the accused and the complainant return to the fire pit at the same time from an area north of the motorhome.

[18] The complainant's evidence was that she left the fire pit with the accused for a second incident of stargazing as he wanted to show her a satellite in the sky. It is alleged at this time that the accused sexually touched her and then the two returned to the fire pit and were seen to do so by Mr. and Mrs. M. and the complainant's father.

[19] The accused denied there was a second stargazing incident. He testified that he was away from the fire pit at various times in the evening for

a number of reasons (stargazing with Mrs. K. and the children, taking the complainant to the bathroom, eating, changing the music, gathering firewood and urinating outside). His position was that the observation of him being seen alone with the complainant and returning to the fire pit, after they both had been away from the bonfire party for an extended period, was a coincidence of him being near her while he was doing something else and she was returning from using the motorhome's bathroom.

[20] The trial judge asked the accused's previous counsel during his submissions to address "the effect of the rule . . . with respect to putting to the complainant the facts." Counsel argued that the rule had not been breached in relation to the complainant. In her reasons for decision, the trial judge seemingly accepted the submission of defence counsel as she made no comment on a breach of the rule as to the cross-examination of the complainant.

Discussion

Trial Fairness Analysis

[21] I agree with the observations of the appeal judge that "[t]he extent of the rule's application is *within the discretion* of the trial judge" and that "[d]eference is owed to the trial judge's exercise of discretion, absent an error in principle" (see *R v RGB*, 2012 MBCA 5 at para 67; *R v Dexter*, 2013 ONCA 744 at para 41; and *R v Glays*, 2015 MBCA 76 at para 11). The difficulty here, however, is more fundamental.

[22] An accused person must receive a fair trial, "one which satisfies the public interest in getting at the truth, while preserving basic procedural

fairness to the accused" (*R v Harrer*, [1995] 3 SCR 562 at para 45). Questions of trial fairness are reviewable on a standard of correctness (see *R v Schmaltz*, 2015 ABCA 4 at para 13).

[23] When an overall view of the trial is taken, given the importance of the accused's credibility to decide the case, the procedure the trial judge embarked on to find a breach of the rule and to remedy the consequences of the breach, without objection by the Crown and any input from counsel, compromised the fairness of the trial. Because the fairness of the trial was compromised, the appeal judge erred in deferring to the trial judge's exercise of discretion.

[24] The paradox here is that, while the trial judge was concerned about the unfairness of the accused's testimony breaching the rule, the Crown was not. In fact, while the Crown describes the accused's evidence that the only time he was alone with the complainant was when he took her to the motorhome bathroom, at the request of either Mrs. K. or Mrs. M., as "important", at trial, no objection about the rule being breached was made, even after the trial judge raised a potential breach of the rule in relation to the complainant during closing arguments.

[25] Giving less weight to an accused's evidence simply because of a failure to cross-examine other witnesses on aspects of that evidence must be done cautiously by a trial judge (see *R v Pilkington (No 2*), 2013 MBQB 86 at paras 50-52, aff'd 2016 MBCA 96).

[26] In my respectful view, the Crown's silence should have given pause to the trial judge before she invoked the rule in the way that she did. It is part of the duties of a prosecutor to make timely objection about potential breaches

of the rule by an accused's evidence and, when that has not occurred, to provide the Court with an explanation as to why timely objection was not made (see *Dexter* at para 37; and *R v Quansah*, 2015 ONCA 237 at para 124, leave to appeal to SCC refused, 37013 (22 September 2016)). In this case, no explanation from the Crown has been given as to why there was a lack of timely objection.

[27] For a trial judge, timely objection by the Crown as to an accused's testimony breaching the rule is a relevant and important consideration in fashioning an appropriate remedy because "the accused should not be held responsible for defence counsel's inadvertent or even deliberate failure to observe the rule" (*Dexter* at para 34). In *Quansah,* Watt JA stated (at para 124):

> . . . Absence of a timely objection to an alleged breach of the rule is a factor for the trial judge to consider in determining the nature of the remedy, if any, best suited to respond to the breach. On appeal, the absence of a timely objection is also a factor to be taken into account in determining whether the lateness of the objection, coupled with the remedy applied, caused sufficient unfairness that a miscarriage of justice resulted.

(See also *R v Wapass*, 2014 SKCA 76 at paras 32-33; and *R v Martin*, 2017 ONCA 322 at para 13.)

[28] In *Chandroo c R*, 2018 QCCA 1429, Healy JA observed that, generally speaking, in the absence of a formal objection by a party as to a breach of the rule, before invoking the rule, a trial judge should solicit the submissions of counsel on whether the rule was breached or in deciding on an appropriate remedy for such a breach (see paras 15, 21). I agree.

[29] There are parallels here to *R v Abdulle*, 2016 ABCA 5. In that case, during closing arguments, the trial judge, on his own motion, raised with counsel several possible violations of the rule during a robbery trial and asked for submissions as to whether the rule was breached. In reaching his verdict, the trial judge gave less weight to the accused's evidence partly because of a breach of the rule in relation to an issue not put to counsel—the accused's evidence that his friend was the sole robber and he merely watched what happened. The Alberta Court of Appeal concluded that the trial judge made an error in principle that compromised the fairness of the trial by "not affording counsel an opportunity to respond to an issue of significance to the trial judge's findings on credibility" (at para 19).

[30] It was entirely appropriate for the trial judge to raise with counsel a potential breach of the rule on her own motion provided that a fair procedure occurred thereafter. In addition, like a jury, a trial judge deciding a case does not have to convey to counsel his or her impressions about the evidence or matters that the law requires must be considered before making findings of fact. However, the problem here is that the first time the parties learned about the application of a legal rule against the accused (which involves the exercise of considerable discretion) being relevant to the trial judge's findings of fact was when she delivered her reasons for decision.

[31] The Crown's submission that it was "unrealistic" for the trial judge to recall witnesses or hear further submissions after the closing arguments is unpersuasive. The trial judge could have advised counsel of her concern about a breach of the rule and possible remedies and decided on a procedure, bearing in mind the requirements of sections 650(1) and 800(2) of the *Code*. The Crown's submission that it would have been inconvenient to reconvene the

trial at all because it took place in the town of Ashern (roughly a two-hour drive from Winnipeg) is unconvincing.

[32] The accused was not entitled to a perfect trial; however, it would be more than simple irony to conclude that a law designed to prevent trial by ambush could itself be deployed to the surprise of the parties by the Court on its own motion in a manner that affected the result of the trial. The fundamental fairness of the accused's trial was compromised by the trial judge's application of the rule. In such circumstances, it was an error for the appeal judge to dismiss the accused's appeal because of appellate deference.

Curative Proviso Analysis

[33] The Crown argues that, if there was an error in the application of the rule at the trial that the appeal judge failed to recognise, while such an error could not be described as "harmless", this appeal should nevertheless be dismissed on the basis of the curative proviso because the evidence of guilt is so overwhelming that, despite the error, a trier of fact would inevitably convict the accused (see *R v Khan*, 2001 SCC 86 at paras 26-31; and *R v Sekhon*, 2014 SCC 15 at para 53).

[34] I would not accede to the Crown's submission for two reasons.

[35] First, I question whether the curative proviso is available to this Court as an option on these facts as the error compromised the fairness of the trial. As Arbour J explained in *Khan* (at para 27):

> In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was

> a miscarriage of justice. In that case, no remedial provision is available and the appeal must be allowed.

[36] Second, even if the curative proviso is available, I am not persuaded the Crown has met its heavy burden to demonstrate that a conviction was inevitable (see *R v Trochym*, 2007 SCC 6 at para 82; *R v Van*, 2009 SCC 22 at para 36; *R v White*, 2011 SCC 13 at para 94; and *R v Mayuran*, 2012 SCC 31 at paras 45-50).

[37] It is well settled that the curative proviso should only be used for serious errors "in exceptional cases and then with great care" (*R v McKelvey*, 1995 CarswellMan 135 at para 10 (CA)). It may not be relied upon simply because the Crown has a "'very strong' case" or where it is "highly unlikely [for the error] to have affected the result" (*R v Sarrazin*, 2011 SCC 54 at para 26; see also *R v Scott*, 2013 MBCA 7 at paras 47-53; and *R v McDonald*, 2017 MBCA 72 at para 45).

[38] In furtherance of its submission, the Crown points out that the trial judge cited several reasons for disbelieving the accused's evidence apart from a breach of the rule in relation to the evidence of Mrs. K and Mrs. M.:

- The accused was an experienced police officer well aware of the significance of evidence establishing his opportunity to commit the crimes.

- There were inconsistencies in his versions of events between his direct and cross-examination.

- Parts of his evidence were nonsensical on their face given the geography of the area where the bonfire occurred and the chronology of the party.

- Some of his testimony conflicted with evidence from independent witnesses.

- There were significant discrepancies between his statement to police and his testimony at trial.

[39] This was a case where the central issue was the credibility of the witnesses—the accused did not confess, he was not caught in the act and there is no inculpatory physical evidence. It is not the role of this Court in considering to apply the curative proviso to reweigh or reconsider the effect of evidence, but only to examine the record and decide if a conviction was inevitable. In my view, it cannot be said with the necessary degree of certainty how significant each of the trial judge's concerns with the accused's evidence was to her assessment of his credibility. The negative inferences she drew because of the breach of the rule certainly played a part, but it is "impossible to know" from the tenor of her reasons to what degree (*R v B (FF)*, [1993] 1 SCR 697 at 737).

[40] What the trial judge did say was that she reached her credibility assessment of the accused based on "the evidence as a whole". The accused cited two portions of the transcript where he submits inferences could be drawn from the evidence that may have influenced the trial judge's application of the rule had his counsel been given an opportunity to make submissions. While it would be speculative for me to accept that the trial judge would have

changed her mind about how she applied the rule, I cannot simply dismiss the argument out of hand. One need only look at the fact that, when given an opportunity to respond to a potential breach of the rule in relation to cross-examination of the complainant, defence counsel's submissions about the evidence led the trial judge to not find a breach of the rule.

Disposition

[41] In the result, I would allow the appeal, quash the convictions and order a new trial on both counts.

Mainella JA

I agree: Pfuetzner JA

I agree: Spivak JA