

R v. Ellard
2003 BCCA 68

DONALD J: [1] The primary issue on this appeal is whether improper cross-examination of the appellant at her trial for murder so affected the fairness of the proceeding that a new trial should be ordered.

[2] The appellant was charged with the second degree murder of Reena Virk. After a 20-day trial in the Supreme Court at Vancouver, a jury returned a verdict of guilty of second degree murder. Warren Glowatski was also charged with the offence. He was tried separately and convicted [appeal dismissed: (2001), 160 CCC (3d) 525].

[3] It was a shocking crime. The victim was twice beaten and then drowned in the Gorge waterway. The first beating was by a swarm of teenagers. The second beating was carried out by Glowatski and, the Crown alleges, the appellant, who then drowned the victim in the Gorge waterway. The victim's body was found in the Gorge eight days later.

[4] The Crown's case against the appellant consisted of a number of young people who testified that the appellant had admitted to participating in the second and fatal assault. The appellant testified in her defence. She admitted being part of the first assault but denied any participation in the second. She denied making any of the admissions attributed to her. It was argued on her behalf that the evidence of the admissions was either deliberately false or the product of gossip, rumour, and innuendo generated after the event.

[5] **Credibility emerged as the crucial issue. Crown counsel at trial challenged the appellant to provide a reason why the Crown witnesses would lie about the admissions. It was a prominent feature of the cross-examination of the appellant.** Some objection was taken and upheld but Crown counsel persisted. No caution was given to the jury at that point. The trial judge gave an instruction to the jury in her charge in an attempt to neutralize any damage caused by the impropriety.

[6] For reasons which follow I have concluded the harm was not cured by the trial judge's charge and the appellant did not receive a fair trial. Mr. Budlovsky appearing for the Crown on appeal submitted that if the court was to reach that conclusion, resort to the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code* would not be appropriate. I would accordingly order a new trial.

[7] Mr. Donaldson, counsel for the appellant, argued four grounds of appeal. They are set out in his factum as follows:

1. **Crown counsel's cross-examination of the appellant was improper and resulted in an unfair trial.**
2. The learned trial judge erred in her charge regarding application of the rule of reasonable doubt to credibility.
3. The learned trial judge erred in failing to instruct the jury on the law which governs the use of prior inconsistent statements.
4. The learned trial judge erred in her instruction to the jury on intoxication.

[8] Each ground if given effect would result in a new trial. However, because I would grant that remedy on the first ground of appeal, I do not need to discuss the last three grounds.

Facts

[9] On the evening of 14 November 1997 a group of students left a social function at the Shoreline Secondary School and walked to a bridge crossing the Gorge waterway between Victoria and Saanich. There the appellant and two other girls, who bore some animosity towards the victim, attacked her. Others including Glowatski joined in the assault. One of the assailants stubbed a cigarette on the victim's forehead. The victim was repeatedly punched and kicked. The assault ended with the intervention of a student who persuaded the others that the victim had had enough. The group then dispersed. The victim was last seen alive walking on the bridge.

[10] This event occurred on a Friday. The victim's disappearance was widely publicized and so by the next Monday many rumours about the victim's fate circulated at the Shoreline school, particularly among those students who were present at the first assault.

[11] On 22 November 1997 Saanich police found articles of the victim's clothing in the Gorge and with the aid of a helicopter they spotted her body on the Saanich shore. An autopsy determined death by drowning. She had been severely beaten and was likely unconscious from head injuries before entering the water.

[12] The discovery of her body attracted enormous media attention. At trial the defence attacked the reliability of some of the Crown witnesses' testimony on the basis that they had either (a) confused the news reports, gossip and rumour with what the appellant had said to them about her involvement, or (b) that they had used those sources to make up the admissions. On credibility, the defence suggested to other witnesses that they were lying to protect Glowatski and that they gave inconsistent or false stories to the police.

[13] The appellant testified in her own defence and admitted that she struck the victim in the first assault but denied any involvement in the second assault. In my view, her cross-examination is central to the appeal. I will review the details of this aspect of the case in my analysis of the issues raised by the first ground.

Issues

[14] Those issues are:

1. Was the cross-examination improper?
2. Did the improper questioning go to an important issue in the case?
3. Did the charge cure the problem?

Discussion

1. Was the cross-examination improper?

[15] Crown counsel at trial asked the appellant to explain why witnesses would lie. There is no dispute that this is an improper line of questioning and Mr. Budlovsky did not try to defend it. His position was that the trial judge's charge corrected any problem arising from the questioning.

[16] I propose to set out enough of the transcript of the appellant's cross-examination to give a sense of the problem, then I will reproduce a passage from the Crown address to the jury which highlights the theme that the appellant could not explain why witnesses would give false testimony against her.

[17] **In one or way or another, Crown counsel asked the offending question 18 times. I will set out the most significant instances:**

Q Now, all of those people have come and said that you told them essentially that you killed Reena Virk? You have to answer yes or no.

A Yes, I—

Q In particular, Courtney, Gail, Nicole hasn't given evidence, of course Chandelle, and then other people I named have come and given that evidence; you'll agree with that?

A Yes.

Q Why were they saying that?

A I don't know.

Q You don't have any idea?

A No.

Q Were they all—do you know whether they were collectively conspiring against you?

A No, I don't know anything about that.

A Was there anything about you that makes you important to frame in this murder?

A I don't think so, no.

[Emphasis added]

[18] In what follows Crown counsel invites the appellant to speculate:

Q Are you aware of any motive Fred Thomas may have to say such a thing about you?

A Possibly maybe rumours or loyalty to whoever, Warren maybe. I don't know.

[19] In the next series, defence counsel objects to questions eliciting opinion whether a witness was lying, but he does not object, nor does the trial judge intervene, regarding questions about why a witness lied.

Q You said you told Gail at that time what Warren had said to you the night before?

A Yes.

Q And then the next week everyone goes to school and you said that people are talking about this at school?

A Yes.

Q And people were actually coming up to you and saying, "I hear you were involved"?

A Yes.

Q And you're saying to this jury now that you denied that at that time?

A Denied?

Q You denied being involved in Reena's murder at that time?

A Yes.

Q To each and every one of those people?

A Yes.

Q Was Jodene Rogers one of those people?

A Yes.

Q So when Jodene Rogers told this jury that you told her you kicked Reena, you punched her, pushed her to the ground, took a stick, did something to her face, kicked her in the head, knocked her into the water, that Reena was bobbing in the water, and that you held her head under water for two to three minutes with your foot, *Jodene's just lying?*

A I guess so, yes.

Q Was Courtney one of the people who confronted you at school about killing Reena?

A I'm not sure.

Q Well, Courtney told the jury that you told her you caught up to Reena, smashed her head into a tree, that Reena fell. You twisted Reena's arm. You dragged her to the water. You broke her arms and legs and you held her head under water for half-an-hour until she stopped moving. *Is Courtney lying when she says that you told her that?*

A Yes.

MR. BROOKS: My lady, it's for the ladies and gentlemen of the jury to decide the truthfulness of other witnesses and it is not a proper question to ask this witness to comment on the truthfulness of other witnesses. She can be asked whether—she cannot be asked that question, "Is so and so lying?" because that's not a question that's proper for her to answer.

MS. PICHA: Well, with respect, there's two of them there in the conversation.

MR. BROOKS: But she's asking her to comment on the credibility of another witness.

THE COURT: I suppose another way of asking that is if that conversation ever took place.

MS. PICHA:

Q Did that conversation, which Courtney described, ever take place?

THE WITNESS:

A No.

Q *What reason does Courtney have for saying such things?*

A *I don't know.*

Q Rob Harbicht says that you told him on the night, on the 14th, that you had a fight with a girl in the water. It was in the Gorge, and that you held her head under water. Did that conversation take place?

A No. A conversation took place, but not that.

Q *Is there any reason that Mr. Harbicht would say that?*

A *May be, I don't know.*

Q Missies Pleich-Grace reported to the jury that on this date in question, on the Saturday that we've just been talking about, you told Kelly (sic) that you though you killed Reena, that you were mad because Warren wouldn't help you?

A I told—I told Missie, pardon me?

Q Yes.

A Oh, I thought you said, "I told Kelly"?

Q Oh, I'm sorry. Did I say that?

A Yes.

Q I must share my friend's name problem. Missie also said that you told her that you beat Reena up again and put her in the water and that she was dragged by her pants and then her pants were tied around her ankles. Do you recall that conversation?

A No.

Q Did that conversation take place?

A No.

Q Do you—*can you think of any reason why Missie would say such a thing?*

A *I don't know.*

Q Sorry?

A I don't know.

Q Gail Ooms told this jury that you told her that you'd followed Reena across the Craigflower Bridge and initially said you'd held her and then you started to hit her. That somehow you got into the water with Reena and Reena's pants were off and that you told Gail that you did it to finish it, to make sure Reena didn't rat. Did that conversation take place?

A No.

Q *What reason, if any, does Gail have to say such a thing?*

A *I don't know. I don't know what they're thinking.*

Q I'm sorry?

A I don't know. I don't know what they're thinking. I don't.

Q And Laura Taylor said that she overheard a conversation you had with Chandelle in which you told Chandelle that you and Warren went back after the first beating, took sticks and hit Reena, broke her arms, and had a smoke while you had her put on her face in the water. Did that conversation with Chandelle take place?

A No.

Q *Do you know of any reason why Laura Taylor would say such a thing?*

A No.

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Q *So any trees that Chandelle pointed out to this jury that you pointed out to her, she says, that's just totally made up?*

A *Yeah.*

Q *On Chandelle's part?*

A *Yes.*

Q *Any descriptions of indentations and grass or anything like that?*

A *No.*

Q *You don't know where that comes from?*

A *No.*

[Emphasis added.]

[20] Crown counsel closed her cross-examination by way of a summary and although an objection was taken and upheld she appears not to have understood what she was doing wrong:

Q Many of these witnesses have said that you told them essentially that you killed Reena Virk?

A Yes, they have said that.

Q And you've also known about this evidence for some time. You've been waiting trial for over two years now?

A Yes.

Q And you've been aware of that evidence?

A Yeah, I've been aware that people are saying it's me, yes.

Q And you've been aware of the details of that too?

A Pardon me?

Q You've been aware of the details of that too?

A Not all the details.

Q Well, you had access to statements if you had asked for them from Mr. Brooks?

A Yes.

Q In fact you told Leslie Zara, "How did your name get on the witness list?"

A Yes.

Q And that was back in December of 1997?

A Yes.

Q So you were well aware of the details of what these witnesses were going to say about you?

A Some of the details, yes.

Q *You can offer no explanation as to why they are saying these things?*

A *I could, but I—it's not my place to give an explanation because I don't know what they're thinking and why. So I don't know.*

Q *Well, you do have any credible explanation you can give this jury?*

MR. BROOKS: *Objection. That question is improper, in my submission.*

MS. PICHA: *Perhaps my friend can be a bit clearer about the impropriety.*

MR. BROOKS: *It's again asking this witness to comment on the motivations and the background of what other witnesses are doing and are saying and what ought to go into the assessment of other witnesses' credibility. In my submission, that's an improper question.*

MS. PICHA: Well—

THE COURT: *Unless, there's some basis that she would have some knowledge of that, Mr. Brooks, and perhaps some groundwork can be laid to see if there is any basis for that knowledge that you are asking her about.*

MS. PICHA:

Q *Certainly. Ms. Ellard, are you telling us that there is some kind of conspiracy between these various people to frame you?*

THE COURT: Well, I don't think that's the kind of groundwork I'm talking about, counsel. Maybe this might be a convenient time?

MS. PICHA:

Q Actually, My Lady, I'm fairly close to the end, so.

THE COURT: All right.

MS. PICHA:

Q Can you think of any motive that any of these individuals would have?

THE COURT: Ms. Picha, if you're going to ask her, I assume you are trying to ask her if she has any personal knowledge—

MS. PICHA: Certainly.

THE COURT: —of this.

MS. PICHA:

Q *Thank you. Ms. Ellard, do you have any personal knowledge of why these individuals would say this?*

THE WITNESS:

A *No.*

Q Do you have any personal knowledge as to why Warren Glowatski would be so angry at Reena Virk?

A *No.*

Q Those are my questions.

[Emphasis added.]

[21] Asking the accused about the veracity of a Crown witness has long been considered improper. The accused's opinion is irrelevant and the questioning could prejudice her and render the trial unfair. In his reasons for the majority in *R v. Markadonis*, [1935] SCR 657, Duff CJ agreed with the minority judgment below and quoted with approval the following passage from that judgment at p. 668:

The prisoner gave evidence on his own behalf and on his cross-examination he was repeatedly asked in effect what his opinion was as to the veracity of several Crown witnesses. The questions were I think irrelevant and should not have been asked, and it appears surprising that they were not objected to. The answers to such questions might prejudice the accused before the jury, and I cannot conceive of any legitimate reason for asking them. It is a method of cross examination which I think is unfair and should not be resorted to nor allowed especially in a case like the present: *Regina v. Bernard* [(1858) 1 F x F 240, at 249; 40 Cyc. 2509.]; *McMillan v. Walker* [(1881) 21 NB Rep. 31.]; *North Australian Territory Co. v. Goldsborough Mort & Co.* [[1893] 2 Ch. D 381, at 385.].

[22] **The potential prejudice arising from this form of questioning is that it tends to shift the burden of proof from the Crown to the accused. It could induce a jury to analyze the case on the reasoning that if an accused cannot say why a witness would give false evidence against her, the witness's testimony may be true. The risk of such a course of reasoning undermines the presumption of innocence and the doctrine of reasonable doubt. The mind of the trier of fact must remain firmly fixed on whether the Crown proved its case on the requisite standard and not be diverted by the question whether the accused provided a motive for a witness to lie. I refer in this regard to the words of Finlayson JA giving judgment for the Ontario Court of Appeal in *R v. W.S.* (1994), 90 CCC (3d) 242 at 252-54 (Ont.CA), leave to appeal to SCC refused 93 CCC (3d) vi:**

The Crown on appeal conceded that it was improper for the Crown at trial to demand an explanation from the appellant as to why the complainant would make up what counsel referred to as "this horrendous lie." *There is no onus on an accused person to explain away the complaints against him or her. The trial judge should have resolutely rejected this approach. Instead he implicitly adopted it. He was favourably impressed with the complainant and the manner in which she testified and, consequently, he believed her. He then subtly shifted the onus to the appellant, as accused, to give some explanation as to why the complainant would lie. Why would she bring all this grief upon herself and risk jeopardizing the close relationship between the two families if it were not true? He also accepted that M. was necessarily lying to support her father. In this manner, the trial judge failed to properly apply the presumption of innocence, and to adequately found the conviction on the whole of the evidence.*

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The trial judge in the present case gave full reasons and he recited the evidence accurately. He also referred to the appropriate authorities. I cannot say that he misdirected himself in a material way. *His overall approach to this particular case, however, was wrong. Instead of questioning the veracity and accuracy of the witnesses who, because of the nature of the charge, were called to support a negative, he should have been more critical of the complainant who put forward the affirmative that the offences took place: see R v. Norman, [(1993), 87 CCC (3d) 153 (Ont. CA)],*

at pp. 172-3. This is another example of the way the trial judge shifted the onus to the appellant in spite of the Crown's burden to prove all elements of the crime beyond a reasonable doubt.

[Emphasis added.]

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[24] As was held in *R v. B.(R.W.)*, ... whether there exists a motive to lie can be a relevant consideration in assessing the credibility of a witness. The defence in this case attempted to raise a reasonable doubt on the motive issue. But that did not justify the Crown's tactic in cross-examination. If the appellant herself had evidence of motive, her counsel would have led it from her in her examination in chief and she could have been properly challenged on that evidence in cross-examination. However, in persistently questioning her about motive when she gave no such evidence, the Crown placed her in the unfair position of either answering as she did or arguing her defence. It was for her counsel to develop the case for the defence and to present argument at the appropriate time.

2. Did the improper questioning go to an important issue in the case?

[25] There appears to be little controversy over this issue as well. The Crown could offer no direct or circumstantial evidence of the appellant's participation in the killing; there was only the word of the young students, several of whom had joined in the first beating, that the appellant had admitted the crime to them. So the case came down to credibility.

[26] The impugned questioning was calculated to discredit the appellant and enhance the credibility of the Crown's witnesses.

[27] Because the defence presented evidence, the Crown had the advantage of arguing last. In the course of his address to the jury, senior Crown counsel (not the counsel who cross-examined the appellant) directly referred to the objectionable subject:

No, Ellard's defence in this case is, of course, one of flat denial. She was somewhere else when it happened, or an attempt to put this killing on somebody else, or to suggest that there must be some kind of conspiracy out there to get Kelly Ellard, even though there's not a thread of evidence to support that speculation. *Even Ellard can't offer you a motive.*

[Emphasis added.]

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[41] **I regret to say that given the prominence of the theme in cross-examination, the repetition of the questions, the reference to the subject in the Crown address to the jury, the lapsed time between the cross-examination and the charge and the inconsistent treatment of the subject in the charge, I am not satisfied that the ultimate admonition in the charge remedied the problem.**

[42] As mentioned, the killing of Reena Virk attracted significant media attention. The revulsion of community to the circumstances of the crime was palpable. It was therefore incumbent on the Crown to proceed with special care that the appellant receive a fair trial.

Unfortunately, the cross examination by the Crown on the question of motive crossed the line in a crucial issue and the Crown's tactic makes a new trial necessary.

Disposition

[43] For these reasons, I would set aside the guilty verdict and order a new trial.