2014 ABQB 174
Alberta Court of Queen's Bench

R. v. Donszelmann

2014 CarswellAlta 686, 2014 ABQB 174, [2014] A.J. No. 446

Her Majesty the Queen and Arnold Donszelmann, Accused

T.D. Clackson J.

Heard: March 21, 2014
Judgment: March 26, 2014
Docket: Edmonton 120484688Q1

Counsel: Robert Sera, Megan Rosborough, for Crown
Shawn Beaver, Michael Leebody, for Accused

Subject: Contracts; Criminal; Evidence

Headnote

Criminal law

Evidence

Table of Authorities

Cases considered by *T.D. Clackson J.*:

R. v. Arp (1998), 232 N.R. 317, [1999] 5 W.W.R. 545, [1998] 3 S.C.R. 339, 58 B.C.L.R. (3d) 18, 1998 CarswellBC 2545, 1998 CarswellBC 2546, 114 B.C.A.C. 1, 186 W.A.C. 1, 20 C.R. (5th) 1, 166 D.L.R. (4th) 296, 129 C.C.C. (3d) 321 (S.C.C.) — referred to

R. v. Handy (2002), 1 C.R. (6th) 203, 2002 SCC 56, 2002 CarswellOnt 1968, 2002 CarswellOnt 1969, 290 N.R. 1, 164 C.C.C. (3d) 481, 213 D.L.R. (4th) 385, 61 O.R. (3d) 415 (note), 160 O.A.C. 201, [2002] 2 S.C.R. 908 (S.C.C.) — followed

R. v. Kirk (2004), 22 C.R. (6th) 231, 188 C.C.C. (3d) 329, 189 O.A.C. 314, 2004 CarswellOnt 3377 (Ont. C.A.) — referred to

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***T.D. Clackson J.*:**

I. Summary

1 The Crown made application to have the discreditable conduct evidence of John Pettigrew and the evidence of Douglas Hennessy which I heard in a *voir dire*, heard in the trial proper. That application is granted.

II. Circumstances

2 In this jury trial, there has been a good deal of evidence heard about the sales of RVs made by the accused to various customers/complainants that Leisure RV did not own and had not purchased at the time of sale to the customers. Many of these customers have testified and confirmed that they bought, but never received property in nor possession of these RVs. There are more who will do so. We have also heard from many customers/complainants that Leisure RV received payment for the units that it did not provide. We have also heard evidence that many of these RVs were registered in a program where the RV could be rented out and the customer was to receive a rental income. Finally, we have heard evidence from some complainants about discussions they had with the accused after the fact concerning possible settlement or recompense.

3 The Crown alleges that the accused acted fraudulently in selling RVs that he knew Leisure RV did not have and had no title to and that he duped those customers who had registered their purchase in the management program by paying rent to them even though no such unit had been entered into the rental fleet or rented out. The Crown alleges that the accused covered up the fact that customers had been duped by making false excuses as to the location of the RV and why the customer could not see or use it.

4 There are also allegations that the accused defrauded financial institutions by taking money from them on conditional sales agreements relating to the RVs that he knew were not properly sold and by misleading the financial institutions on the risk associated with the loans made on such purchases. There are also allegations that the accused sold RVs on consignment but did not account to the bank for the sale proceeds.

5 Finally, there are allegations that the accused acted fraudulently in receiving funds from the financial institutions which should have been applied to outstanding liens on the RVs traded in by a purchaser, but were not.

6 The Crown seeks admission of the Pettigrew transaction as extrinsic similar fact evidence for the following purposes:

1. As further evidence of the scheme, or practice, or knowledge of the accused so as to counter potential defences of inadvertence;

2. As support for the counts in the Indictment which relate to the units manufactured by Glendale and sold by the accused but never actually purchased by Leisure RV from Glendale;

3. As evidence to establish a date by which the accused was fixed with knowledge that units had been sold which Leisure RV did not have a right to sell so as to make more compelling the inference that the accused acted knowingly or intentionally after that date in all similar sales.

7 Initially in the application, the Crown also sought to have the evidence of the December 2005 confrontation between Mr. Pettigrew and Douglas Hennessy and the resulting settlement with Pettigrew received as evidence of motive. The Crown has resiled from that position.

III. Analysis

A. Is the Evidence Discreditable to the Accused

8 The application was described as a similar fact or similar act evidence application. I do not think that is an accurate description. I prefer to use the label "discreditable conduct evidence" as suggested by the editors/authors in "*McWilliams Canadian Criminal Evidence*" 5th ed. c. 10 paragraphs 10:40 and 10:50 pages 10-33 to 10-82 inclusive. Indeed, chapter 10 of that text offers a highly informative explanation of the development of the similar fact evidence rules and in my view, chapter 10:40 of the text has made an important contribution to the understanding and application of the principled approach to the rule. I will follow the structure the authors rely upon as suggested by the Supreme Court of Canada in *R. v. Handy*, [2002] 2 S.C.R. 908 (S.C.C.).

9 In this case, the evidence, even without the evidence relating to the settlement of Pettigrew's claim, could be considered to be discreditable conduct evidence. Firstly, the evidence is clearly tied to the accused. Secondly, it could be interpreted as demonstrating that the accused had committed a fraud on Mr. Pettigrew with which he is not charged, and I think it is reasonable to conclude that reasonable people would view Mr. Donszelmann's actions in covering up the transaction with opprobrium. Thirdly, it is evidence caught by the rule. I will explain:

(a) It is not evidence which is the subject matter of the charge. There is no count in the indictment arising out of the Pettigrew transaction. The evidence does show that Glendale was not paid for the unit that was sold to Pettigrew, but that evidence will be admitted and captured on the counts which encompass sales of unpurchased Glendale RVs. So the fact of a sale to Pettigrew of a Glendale unit which Leisure RV had not purchased will, to that limited extent, inexorably be in evidence. As a result of that and other evidence I have heard, it is my intent to give the jury a limiting instruction respecting the twin prejudices (moral and reasoning) both in relation to the number of counts and in relation to the sales which the evidence discloses but for which there is no corresponding count in the indictment. I understand the Crown will seek to have the jury rely upon the evidence on one count as probative of the essential elements of one or more of the remaining counts. I understand that application to be forthcoming. As a result, if that application is granted, then the Pettigrew circumstances might be evidence similarly applied.

(b) It is not evidence of habit or physical state.

(c) Ordinarily, despite a likelihood that this evidence would encourage a reasoning prejudice, if the evidence is proffered for motive or is evidence of after the fact conduct, it is not subjected to the "*Handy*" analysis. As to motive, although one could infer that the settlement was made by the accused because he was motivated by a desire to avoid discovery on the other transactions, the Crown does not seek the evidence for that purpose and therefore it cannot escape the exclusionary or "*Handy*" analysis on that basis. As to the categorization of the evidence as after the fact evidence, my view is that, a probative value, prejudice analysis which is the ultimate analysis that is required when dealing with discreditable conduct evidence should be undertaken. After the fact conduct can lead to reasoning errors which is why a no probative value instruction is sometimes necessary in relation to such evidence and a caution is always necessary with respect to such evidence. While strictly speaking, the reasoning prejudice is not the same as the reasoning prejudice which is of concern with discreditable conduct evidence, there is reasoning prejudice both in terms of jumping to conclusions and drawing unsupported or otherwise explicable inferences, both of which are common sense errors, which is also a feature of the

reasoning prejudice concern in discredible conduct cases. As a result in this case, I prefer to treat this evidence as falling within the "similar act" rule.

10 Therefore, since none of the circumstances exist which would shield this evidence from the presumption of inadmissibility, the presumption applies.

B. What is the Probative Value of the Evidence

11 Discreditable conduct evidence raises a paradox. It is generally inadmissible because it could lead to the finder of fact reasoning that the person who did what is described in the evidence is a bad person or has done bad things and, therefore, has the propensity to do bad things including the things he is charged with. That is moral prejudice. Reasoning prejudice describes the notion of the fact finder being overwhelmed by the impugned evidence so as to be distracted from performing the analysis required to determine if the Crown has in fact proved the offence charged. However, we accept these dangerous potential reasoning processes because the propensity demonstrated by the impugned evidence is more probative than prejudicial. This application is therefore best understood as an application to have the evidence led as circumstantial evidence of the accused's propensity to commit the crimes he is charged with having committed.

12 Again, the lucid analysis in *McWilliams* on the subject of probative value is very helpful. I accept that the cogency of discreditable conduct evidence derives from the improbability of coincidence and the connection between instances: *McWilliams, supra* p. 10-52; *R. v. Arp* (1998), 129 C.C.C. (3d) 321 (S.C.C.); *R. v. Kirk* (2004), 188 C.C.C. (3d) 329 (Ont. C.A.).

13 In this case, it is possible that because of the connectedness of the Pettigrew transaction to the other transactions, the inference of accident or mistake becomes less likely to be a reason to doubt the accused's knowledge and intent. The similarity between the Pettigrew transaction and the other transactions is obvious, the fact that it occurred in the same period as many of the other transactions supports the notion of a scheme or pattern of behaviour. It is possible to infer from the Pettigrew transaction that the accused demonstrated a specific propensity to knowingly sell what Leisure RV did not have to sell which is probative of whether he knowingly did so on one or more of the other transactions. That is, that these are simply coincident is improbable. Furthermore, the issue of the accused's knowledge and when he had it is a live one and Hennessey's evidence in relation to the settlement and the accused's apparent knowledge of the details of the circumstances of the Pettigrew deal and the Glendale connection are cogent. The evidence also has a purpose unrelated to similarity or connectedness, except tangentially. That purpose is to fix in time when the accused could be taken to have had his eyes opened to the potential illegality of his practices. Additionally, there is nothing in the evidence before me that serves to undermine the credibility of Mr. Pettigrew, Mr. Hennessy or the evidence they gave on this subject. Therefore, there is nothing that undermines the probative value in relation to the issues identified.

C. Prejudicial Effect

14 In the course of argument, I expressed the opinion that the evidence of settlement appeared to be necessary to understanding the impugned evidence which the Crown sought to lead. The Crown advised that it would not rely upon that evidence for motive and if it had to be received, it could be received as part of a narrative. However, later in argument the Crown advised that the evidence of settlement was admissible as going to knowledge and intent.

15 From that, I formed the impression that the Crown does seek to have the jury hear all of Mr. Pettigrew's evidence and Mr. Hennessy's evidence including the evidence respecting settlement. However, it does not seek to justify the admissibility of the evidence of settlement as going to motive. Implicitly, therefore, the Crown accepts that the entirety of the proffered evidence including the evidence respecting settlement is discreditable conduct evidence and subject to the *Handy* analysis.

16 The prejudice in the evidence proffered, except for the settlement evidence, is miniscule. The moral prejudice is not especially increased by the admission of the settlement evidence and the jury will be given a limiting instruction in any event because of the number of counts on this indictment.

17 There is however a significant potential that the settlement evidence will create the kind of distraction which engages reasoning prejudice concerns. The degree of reasoning prejudice will be reduced by the instructions the jury will be given on the use of after the fact conduct evidence. In short, they will be cautioned to look for explanations inconsistent with consciousness of guilty knowledge or guilty intent. As such, the distraction will be somewhat ameliorated.

18 As well, there were other instances of allegedly proffered settlements which the jury has heard and which will also be the subject of an after the fact evidence caution when the jury is charged. Therefore, the additional distraction caused by this evidence would, in that context, appear to be much less significant.

19 As a result, despite the presumption of inadmissibility, I am satisfied on a balance of probabilities that the probative value of the evidence outweighs prejudicial effect and it is admissible in its entirety.

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