Citation: R. v. Rothgardt
2002 BCCA 607

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Docket: CA028026
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# COURT OF APPEAL FOR BRITISH COLUMBIA

## ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Ryan — November 1, 2002

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Thackray

Vancouver, B.C.

BETWEEN:

**REGINA**

RESPONDENT

AND:

**PARKER ASHLEY ROTHGARDT**

APPELLANT

D. Soga — appearing for the Appellant

K. Ker — appearing for the Respondent

[1] **THACKRAY, J.A.**: The appellant, Parker Ashley Rothgardt, was charged with robbery. It was alleged that on 30 July 1999, near Port Alberni, B.C. he stole, while armed with an offensive weapon, a motor vehicle from Velda Robinson. The offensive weapon was described as a

frying pan.

[2] Mr. Rothgardt was found to be not criminally responsible by reason of mental disorder. From this he now appeals.

**Proceedings in The Provincial Court of British Columbia**

[3] Mr. Rothgardt was not represented by counsel when he first appeared before His Honour Judge Klaver of the Provincial Court of British Columbia on 3 August 1999. Judge Klaver put the matter over until the next day with instructions that duty counsel should attend and interview the accused.

[4] On 4 August 1999 Mr. K. Jones attended with Mr. Rothgardt. He said that he expected to be retained. He said that he had had "some conversations " with Mr. Rothgardt and asked for an order pursuant to s. 672.11(b) of the ***Criminal Code***. He informed the Court that he was satisfied that the accused was fit to stand trial but that there were "reasonable grounds to believe that at the time of the offence that [Mr. Rothgardt] was suffering from a disease of the mind", that being schizophrenia.

[5] Section 672.11 (b) reads as follows:

> A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine:
>
> (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1).

[6] The Crown took no position on this application. The Court ordered the assessment and adjourned the matter to 8 September 1999. On that date Mr. Jones informed the Court that the assessment that was ordered was, in error, as to fitness to stand trial. Mr. Rothgardt, on that hearing, interjected to inform the judge that the error was committed intentionally by the Crown, and that, in his opinion, he "should be given a stay of proceedings." The Court re-ordered the s.

672.11(b) assessment and adjourned the court proceedings to 23 September 1999.

[7] On 23 September 1999 Mr. Jones informed the Court that it had a medical report from Dr. S. Lohrasbe, a psychiatrist with a specialty in forensic psychiatry. The report was dated 20 September 1999. Defence counsel waived the reading of the charge, elected trial in the Provincial Court, said he would "admit the facts necessary to establish the *actus reus* of the offence of robbery that is specifically the threat of violence and the taking [of the] consequences of the threat."

[8] Mr. Jones then asked the judge to make a finding pursuant to section 16(1) of the ***Criminal Code*** that Mr. Rothgardt was not guilty by reason of mental disorder. Pursuant to s.16(1) no person is criminally responsible for an act committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or of knowing that it was wrong. This is commonly referred to as NCRMD and I will do so in the course of these reasons.

[9] The Crown agreed to the filing of Dr. Lohrasbe's report "for Your Honour's consideration as to a finding of … criminal responsibility." The report was accepted by the Court and marked as an exhibit. Annexed to that report was a lengthy and detailed report from Dr. Barbara Kane, also a forensic psychiatrist, dated 22 October 1998.

[10] Crown counsel then narrated the circumstances of the theft. They included a swinging of the frying pan at the head of Ms. Robinson pursuant to which she "dropped the keys" to the car. In response, defence counsel said that Mr. Rothgardt disagreed with that portion of the narrative that stated he had swung a frying pan. However, Mr. Jones said that it was "appropriate" for the trial judge to find that Mr. Rothgardt was not criminally responsible due to mental disorder. Mr. Jones brought to the judge's attention those paragraphs summarizing Dr. Lohrasbe's conclusions.

[11] Mr. Jones, correctly, brought to the trial judge's attention that the finding that he was being asked to make, that is that the accused was suffering from a disease of the mind, was a decision to be made by the Court. That is because "disease of the mind" in the s. 16 context presents a legal, not a psychiatric question.

[12] His Honour Judge Klaver held that, irrespective of the disagreement over the use of the frying pan, the *actus reus* had been made out. After a few more remarks on that subject the trial judge gave his reasons as follows:

> On the basis of what has been presented then, the facts as admitted, the report that's filed, the recommendation in the report, the fact that the finding be made and that he be transported as soon as possible to the Forensic Psychiatric Institute for a thorough risk assessment and treatment, I find under section 672.34 that he is not criminally responsible due to a mental disorder and that – but I do find that he committed the act.

[13] The trial judge went on to order that Mr. Rothgardt be remanded in custody and transported to the Forensic Psychiatric Institute and to appear before the Review Board.

**Issues on this appeal**

[14] The judgment was on 23 September 1999. The Notice of Appeal was not filed until 29 December 2000. The time for the filing of the Notice of Appeal having expired, a motion for extension of time is before the Court.

[15] The only issue raised by the appellant that emanates from the trial is that the reasons of the trial judge were inadequate and as such amount to a miscarriage of justice.

[16] The other matters before this Court are applications by the appellant and by the Crown for the introduction of fresh evidence.

**Extension of time**

[17] There was a significant delay in bringing this appeal but in the circumstances, which will become clearer as I proceed with these reasons, I am of the opinion that the extension should be granted.

[18] There is an arguable issue to be made and, in my opinion, it is in the interests of justice that it be heard.

**Inadequacy of the reasons of the trial judge**

[19] The legal foundation for this submission is to be found in ***Regina v. Sheppard*** (2002), 162 C.C.C. 298. In particular the appellant relies upon point 6 made by Binnie J., on behalf of the Court, at 320:

> Reasons acquire a particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

[20] I do not find it necessary to review ***Sheppard*** in any detail in that, as will be seen from my remarks later in these reasons, I do not agree that the reasons in the case at bar transgress anything said in the above-noted paragraph. I do not see that there were any troublesome principles of unsettled law before the trial judge, there was no contradictory evidence on a key issue and the basis of the trial judge’s conclusion is apparent.

[21] In this case Mr. Rothgardt was not left in any doubt as to why the verdict in question was rendered. Indeed, he was the one who initiated it. I adopt point 8 from the reasons of Mr. Justice Binnie that the “trial judge’s duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed.” That duty being to articulate reasons which are intelligible to the parties and which are sufficient for appellate review.

[22] I would dismiss this ground of appeal.

**Introduction of fresh evidence**

[23] These motions were initiated by the appellant who wishes to introduce into evidence on this appeal a psychiatric report prepared by Dr. Elisabeth Zoffmann, a psychiatrist, dated 20 October 1999. This report was prepared for the Disposition Hearing that took place on 1 November 1999.

[24] The Crown brought its motion which asks that many other reports emanating from Mr. Rothgardt’s continued hospitalization be admitted as well as a letter from Dr. Lohrasbe in reply to the appellant’s submission that Dr. Lohrasbe’s medical examination was no more than 25

minutes in length.

[25] The key findings in Dr. Zoffmann's report that are relied upon by the appellant appear in the opening paragraphs. She first notes that the psychiatric history of the appellant is contradictory and confusing. She notes that the "most consistent diagnosis" given over the years was one of severe personality disorder. She said that inconsistent symptoms are suggestive of psychosis but that "the pattern … would negate such a diagnosis."

[26] She then reports, and this is significant relative to Dr. Lohrasbe's report, that Mr. Rothgardt reported, presumably to her, that he had been involved in extremely heavy use of cocaine in the month prior to the robbery. Then there is this key statement:

> It is hard to give an analysis of the index offence as Mr. Rothgardt's current reportage of the offence is significantly different than the information given to Dr. Lohrasbe. His description of his thoughts and feelings at the time of the offence would indicate that he knew the nature and quality of his acts and he was also capable of knowing that those acts were wrong.

[27] Defence counsel submitted that given the "caveats" in Dr. Lohrasbe's report, and given the above-noted suggestion of Dr. Zoffmann, if the report of Dr. Zoffmann had been available to the trial judge, "it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result." This is the last branch of the test as articulated in ***R. v. Palmer*** (1980), 50 C.C.C. (2d) 193 at 205.

[28] I will first refer to Dr. Lohrasbe's report and to the suggestion that a significant portion was uncertain and contained caveats. Those portions defined by appellant's counsel as caveats are, for the most part, contained on page 5 of Dr. Lohrasbe's report. My reading of these leads me to conclude that they are not, in the usual meaning of the word, caveats. Rather, they represent Dr. Lohrasbe's explanation of the information and clinical findings upon which he was relying.

[29] A medical practitioner has an obligation to articulate the foundation of his diagnosis. Dr. Lohrasbe's narrative does not, to me, suggest that his opinion was equivocal or uncertain. His reliance on certain information together with his assessment of the reliability

of what he had been told by Mr. Rothgardt, cannot, unless the information or his assessment of credibility be shown to be flawed, ground an attack upon his opinion.

[30] In my opinion Dr. Lohrasbe's report, as with any medical report, would have been weakened and subject to attack if it had failed to reveal the information relayed to the doctor by the patient and what reliance, if any, the doctor placed upon it.

[31] I will further note that Doctor Lohrasbe came to a conclusion that was, in itself, unequivocal. He said that his assessment "supports a legal consideration for finding Mr. Rothgardt NRCMD." The wording of this reveals Dr. Lohrasbe's understanding that the legal decision was one for the trial judge.

[32] Mr. Rothgardt was not only satisfied with the opinion of Dr. Lohrasbe, but in having it presented to the Court he was, in my opinion, verifying that what he had told Dr. Lohrasbe was correctly recorded by the doctor and that it was true. Consequently, it is not obvious to me that the trial judge should have treated the report with any particular caution. Nor does it suggest that further investigation of the mental state of the accused should have been undertaken in order for a judicial decision to be reached.

[33] I further find it significant that Dr. Lohrasbe, counsel and the Court all had available to them the report of Dr. Kane. This extremely detailed report gave to Dr. Lohrasbe and the Court professional insight into the accused's history and mental condition. Dr. Lohrasbe specifically said that her report was "comprehensive" and that he would "try to avoid repeating the same material."

[34] The appellant now wants to introduce a report in which the interviewer was given, by Mr. Rothgardt, a different narrative as to his actions and history at and about the time of the robbery. Having avoided a guilty verdict through, at least in part, his narrative account to Dr. Lohrasbe, he now wants to introduce a report, prepared for a different purpose, that contains a different account of his activities at the relevant times.

[35] Not only was Dr. Zoffman's report prepared for a different purpose than the report of Dr. Lohrasbe, but it was known by the appellant that it was being prepared for a different purpose. Even if it had been available on 23 September 1999 it might well have been found not to be admissible on the issue of NCRMD. Dr. Zoffman's

retainer was specifically directed to the issues to be determined at the Disposition Hearing. These did not include the issue of whether Mr. Rothgardt had been correctly found to be NCRMD. It is not open to this Court to speculate as to what her report would have said if she had been so retained.

[36] That being the case, I cannot accept that now, some three years later, it should be admitted as fresh evidence on the appeal and as evidence that might have changed the trial verdict.

[37] As to the introduction of the material referenced by the Crown, these are the innumerable assessments done on Mr. Rothgardt during his hospitalization since the trial decision. They contain varying conclusions as to the correct medical diagnosis. While they are not consistent in their findings, they all acknowledge significant mental problems on the part of the appellant resulting in his continued confinement.

[38] The term “mental disorder” is defined in the ***Criminal Code*** as simply “a disease of the mind.” The courts have found delirium tremens, cocaine induced psychosis and mental retardation, in addition to other mental illnesses, to meet the legal concept of “disease of the mind.” See for examples ***R. v. Malcolm***, (1989) 50 C.C.C. (3d) 172 (Man. C.A.); ***R. v. Mailloux***, (1985) 25 C.C.C. (3d) 171 (Ont. C.A.) affirmed 45 C.C.C. (3d) 193 (S.C.C.L); ***R. v. R.(M.S.)***,(1996) 112 C.C. C. (3d) 406 (Ont. Gen. Div.).

[39] I cannot visualize any useful purpose that would be served by introducing this material into the judicial process. It is only supportive of the treatment program that Mr. Rothgardt is now undergoing.

[40] There are other matters that mitigate against re-opening this case. There was no issue but that Mr. Rothgardt was fit to stand trial. As such, he was fit to instruct counsel. He did so and the transcript suggests that he was the initiator of the concept of NCRMD. He showed his acumen when, in spite of having counsel present, he submitted that the charge should be stayed because the Crown “deliberately” ordered a fitness report.

[41] The appellant thereby obtained the judgment that he sought. His subsequent confinement has proven to be lengthy and arduous for all parties. Some fifteen months into this hospitalization process the appellant initiated this appeal – an appeal designed to take him out

of hospital confinement and, in the likely event that a new trial would result in a finding of guilty, *simpliciter*, that he would receive a sentence definite as to time if incarceration was ordered.

[42] This suggests to me that on reflection the appellant thinks that he took the wrong route. He wants a new trial, not because of judicial error, not because of a misdiagnosis by Dr. Lohrasbe, but because of his perceived ill-advised choice of sentence presentation.

[43] I also observe that the appellant had counsel and there should be no shadow cast upon him for his professional conduct. The transcript makes it obvious, as Mr. Jones did in his own words, that he was acting pursuant to his client's instructions. Indeed, I see those instructions as being forceful and unequivocal.

[44] As a principled matter in the circumstances of this case, the timing and procedure followed by the appellant on this appeal does not deserve support.

[45] I would dismiss the appeal.

[46] **RYAN, J.A.**: I agree with my colleague Mr. Justice Thackray that this appeal should be dismissed. I agree with all that he has said about the value of the fresh evidence and the conduct of the appellant and his counsel at the NCRMD hearing.

[47] I also agree that the trial judge did not fail to give adequate reasons for the NCRMD verdict. In doing so, I take a slightly different approach from my colleague.

[48] Section 672.34 of the ***Criminal Code*** provides:

> Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on the account of mental disorder.

[49] The verdict in this case was rendered on the basis of admissions made by counsel for the appellant and accepted by the Crown. The

hearing began with counsel advising the trial judge that the *actus reas* of the offence of robbery was admitted. As my colleague has noted, counsel then asked the trial judge "to make a finding pursuant to s. 161(1) of the ***Criminal Code*** that on the basis of the report of Dr. Lohrasbe, that on the 30th of July (the offence date] Mr. Rothgardt was not guilty by reason of insanity." The Crown then read in the facts of the offence. The Crown said he consented to the filing of the report of Dr. Lohrasbe. It was marked as an exhibit. The Crown agreed with the submission of counsel for the defence that the special verdict be found.

[50] In these circumstances the trial judge had an obligation to ensure that the facts admitted amounted to the *actus reas* of robbery, and to ensure that the expert report did in fact support the finding under s. 16(1). Because the appellant was represented by counsel the trial judge was not required to determine whether the appellant understood the nature and consequences of his plea. The record reveals that the trial judge did all that was required of him. In my view he was not required to do or say anything more than he did.

[51] In ***R. v. Sheppard*** (2002) 162 C.C.C. (3d) 298 Mr. Justice Binnie, writing for the court, said at paragraph 24:

> [24] In my opinion the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

[52] In the case at bar the appellant initiated the plea of not criminally responsible by reason of mental disorder. He admitted to the facts which would give rise to the plea. In these circumstances there is no need for the trial judge to explain the result in his reasons for judgment.

[53] The appellant is seeking to set aside his plea on the basis that there has been a miscarriage of justice. The appellant was fit to instruct counsel. He chose to plead in the way he did. In my view there is no basis which would permit this court to set aside the verdict and order a new trial. I too, would dismiss the appeal.

[54] **MACKENZIE, J.A.**: I agree that the appeal should be dismissed for

the reasons given by Mr. Justice Thackray.

[55] **RYAN, J.A.**: Extension of time to appeal is granted. The fresh evidence is admitted. The appeal is dismissed.

"The Honourable Madam Justice Ryan"

"The Honourable Mr. Justice Thackray"