

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

STEWART v ELK VALLEY COAL CORP 2017 SCC 30

Date released: June 15, 2017

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16679/index.do>

Facts

Mr. Ian Stewart was employed by Elk Valley Coal Corporation as a loader driver in a mine. A loader is a heavy, construction-type vehicle used for clearing debris. Elk Valley had a strict drug policy. Employees were required to disclose any drug addiction issues before any drug-related incident occurred. If they disclosed, they would be offered treatment. If an employee did not disclose and was then involved in an incident related to their drug use they would be fired. Mr. Stewart used cocaine and did not tell his employer. Subsequently his loader was involved in a workplace accident and he tested positive for drugs. Mr. Stewart then said he thought he was addicted to cocaine, but Elk Valley terminated his job.

Mr. Stewart argued that he was fired because of his addiction and that this was discrimination under s.7 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now called the *Alberta Human Rights Act*). Addiction is a recognized disability under the *Act*.

Procedural History

The case was heard by the Alberta Human Rights Tribunal and, while it affirmed that firing an employee on the ground of an addiction is

discrimination, the tribunal held that Mr. Stewart was not fired because of his cocaine addiction. Rather, he was fired because he breached the company's policy requiring disclosure of any drug addictions. The Alberta Court of Appeal upheld the tribunal's decision. Mr. Stewart appealed to the Supreme Court of Canada (SCC).

Alberta Human Rights Act

Discrimination re employment practices

7 (1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

Issues

1. Was Mr. Stewart fired because of his addiction or because he violated company policy?
2. Is Elk Valley's company policy that requires an employee to disclose his or her drug use valid?
3. Was the Human Rights Tribunal's decision reasonable?

Decision

The appeal was dismissed, and the tribunal ruling upheld. The SCC ruled 8-1 that Elk Valley did not discriminate against him because of his addiction. Two of the majority judges wrote a concurring opinion, deciding that although Mr. Stewart's addiction was a factor in his termination, Elk Valley had met its obligation to accommodate Mr. Stewart to the point undue hardship (on the company.)

Ratio

An employee who makes a claim of discrimination must establish a *prima facie* (a first impression) case of discrimination. To make a *prima facie* discrimination case the employee must establish all of the following: they have a protected characteristic under discrimination legislation; their job was negatively affected; and the protected characteristic was a factor in the negative effect. The Court held that the existence of addiction, by itself, does not automatically establish *prima facie* discrimination. In this case, the tribunal's finding that Mr. Stewart was terminated for breaching the company policy (and not for his addiction) was reasonable, as he was capable of complying with the company's disclosure policy and failed to do so.

Reasons

The SCC held that this case was about applying principles of discrimination law to the specific facts of the situation. They looked to determine if Mr. Stewart had established a *prima facie* case for discrimination based on his addiction. There are three parts to a *prima facie* discrimination case and Mr. Stewart easily satisfied the first two.

First, Mr. Stewart had to show that he had a **characteristic that was protected by legislation from discrimination**. Drug addiction is a protected ground in the *Act*, meaning that it is illegal to discriminate against someone because of their addiction. Second, Mr. Stewart had to show that **his employment was negatively affected**. Mr. Stewart's termination of employment was the negative affect he experienced. Third, Mr. Stewart had to show that his **protected characteristic was a factor in the negative impact**. He had to prove that his addiction was a reason he was fired.

Five judges in the majority held that Mr. Stewart had not satisfied the third requirement of the *prima facie* discrimination case because his addiction did not diminish his ability to comply with Elk Valley's workplace drug-use disclosure policy. While they noted that there could be some instances of addiction which would prevent an employee from complying with a disclosure policy, this was not true in Mr. Stewart's case. Therefore, the court reasoned, Mr. Stewart would have been fired if he was an addict or if he was a casual user, and thus his addiction (the protected ground) was not a factor in his termination – the only factor in his termination was his breach of Elk Valley's policy of disclosure.

Two of the majority (Moldaver and Wagner JJ.) held that Mr. Stewart's addiction was a factor in his firing and that the tribunal's decision on this point was unreasonable. They held, however,

that although a connection existed between Mr. Stewart's addiction and the adverse effect (his termination), the company was justified in carrying out its termination policy. In the particular context of Elk Valley's dangerous workplace and the potential for devastating consequences, deterring employees from drug use was crucial. Requiring the employer to accommodate a drug-using employee in any other way would result in undue hardship to the employer.

Dissent (Gascon J)

Justice Gascon disagreed with the majority of the Court and held that Elk Valley had discriminated against Mr. Stewart. He found that any drug policy that results in the automatic firing of an employee who uses drugs *was* an example of *prima facie* discrimination against drug addicts based on their addiction. In Justice Gascon's opinion, the protected ground only needs to be one of the factors in an employee's termination, rather than the *only* factor. He found that Mr. Stewart's drug dependency *was* a factor in his termination.

Further, Gascon J. found that the Human Rights Tribunal's finding that no connection existed between Mr. Stewart's drug addiction and his firing was based on four conceptual errors: (1) it required the drug addict to make prudent choices to avoid discrimination, placing an improper burden on complainants, among other problematic effects; (2) it relied on principles of "formal" rather than "substantive" equality, wrongly equating casual drug users with addicts, as addicts would have unique challenges in complying with the disclosure policy; (3) it included certain legal tests that should not be part of the low threshold for establishing a case; and (4) Mr. Stewart had to prove a causal connection between his drug addiction and his termination, rather than simply proving his addiction was a factor.

DISCUSSION

1. Why might Elk Valley have created its drug-use policy?
2. In your opinion, would most drug users choose to disclose their drug use or keep it private even if they knew it could cost them their job?
3. Would the risks of disclosing be the same for addicts as for casual drug users? Why?
4. Is the general public perception of discrimination against drug users similar to the general public perception of discrimination against other characteristics noted in the law, like race or gender? How so?
5. This case hinged on whether or not Mr. Stewart was fired because of his addiction. Note the three different ways in which the judges of the Court responded to this question. Whose reasons make the most sense to you?

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R v JORDAN, 2016 SCC 27, [2016] 1 SCR 631

Date Released: July 8th, 2016

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16057/index.do>

Facts

Mr. Jordan was involved in a “dial-a-dope” operation and was arrested and charged with a number of drug-related offences in December 2008. Not only was he operating a phone line on which orders for cocaine and heroin were placed, he also oversaw the sale of these drugs through other persons.

After his arrest, Mr. Jordan remained in jail for two months while awaiting his trial. Then, he was released on house arrest with very strict conditions. His case worked its way through the justice system for over 49 months and he was convicted of the offences in February 2013.

Procedural History

In 2012, Mr. Jordan asked the trial judge to stay (not proceed with) all his charges, based on his claim that his s. 11(b) *Charter* right “to be tried within a reasonable time” had been violated. The process for evaluating whether a delay in the trial process infringes this right had been set out in an earlier case, *R v Morin*, in 1992. The trial judge dismissed Mr. Jordan’s application after applying the *Morin* framework.

The Court of Appeal for British Columbia dismissed Mr. Jordan’s appeal from this conviction, stating that the trial judge had applied a proper analysis of the s.11(b) rights using the applicable case law. Jordan appealed this decision to the Supreme Court of Canada (SCC).

Issues

1. Had the accused’s right under s.11(b) of the *Charter* been violated?
2. What is the appropriate analysis to decide a s. 11(b) *Charter* application?
3. If the accused’s right has been violated, what are the appropriate remedies?

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right (b) to be tried within a reasonable time.

Decision

The SCC allowed the appeal on the basis that Jordan's right to a trial within a reasonable time had been violated, set the convictions aside, and granted a stay of proceedings.

Ratio

The *Morin* framework to establish whether criminal proceedings have taken an unreasonable amount of time to reach their conclusion after trial should no longer be used. Instead, an objective timeline should be applied, with different guidelines for matters tried in provincial and superior courts. The new framework for deciding s. 11(b) issues will better address the real problems of delay in criminal courts. To avoid chaos and multiple reevaluations of cases that are already in the criminal justice system (as a result of this decision), the new framework will be applied contextually, to prevent negative effects on people charged under the old framework and to provide transitional flexibility.

Reasons

In a 5-4 decision, the majority addressed the issue by looking at the problems with previous considerations of s. 11(b). The s. 11(b) analysis structure had been determined in *R v Morin*, [1992] 1 SCR 771, and had been the law for more than 20 years. The essence of that framework is still very important. It weighed four factors which the Court uses to identify a s. 11(b) violation:

- 1. Length of Delay** – Time between the charge and trial;
- 2. Waiver of Time Periods** – Whether any amount of the length of delay was due to actions taken on the defence side of the case;

3. Reasons for Delay – These may include inherent time restrictions presented by the case, how much of the delay was due to egregious conduct by either the accused or the Crown, and if resource limitations were a factor; and

4. Prejudice to the Accused – During the time of delay, what were the consequences for the defendant and the ability to have a fair trial (e.g. a witness dying in that time span of delay and fairness affected by that witness's absence)?

The majority of the Court in *Jordan* determined that this *Morin* framework is insufficient from a practical standpoint: it is too complex and does not promote diligence by justice system participants to point out improper conduct or resourcing issues that may lead to time delays. Instead, the SCC created a new framework for analyzing s. 11(b), one that has an objective timeline with a "presumptive ceiling" – a set period of time after which further delay is automatically presumed to be unreasonable.

Under the new framework any delay is presumed to be unreasonable if it is longer than 18 months for cases tried in provincial courts or 30 months in superior courts. Any delay that is due to or waived by the defence does not count towards the 18 or 30-month limit. If the presumptive ceiling is exceeded, the Crown must show that the delay was due to "exceptional circumstances" outside of its control that were reasonably unforeseen or unavoidable, and cannot be reasonably remedied. The "exceptional" circumstances are not a closed list; however, in general, they will fall into one of two categories – discrete events or particularly complex cases. If the exceptional circumstance is discrete, the time attributable to it will be deducted from the total time. If the case is

extremely complex, the delay is reasonable and no further analysis is required. If the presumptive ceiling is not exceeded, the defence has the burden to demonstrate that it took continuous and purposeful steps to achieve prompt justice, and that the case took an unreasonable amount of time as a whole.

The majority gave guidance on how to measure the reasonableness of delay for cases that were already in the system at the time of this decision, under a set of transitional rules.

Dissent

The SCC was sharply divided in this decision. In dissent, four judges said that the *Morin* framework should be revised, rather than replaced with a new, more fixed approach. A revised *Morin* framework was preferred because courts would continue to balance the many possible competing factors. The new framework would restrict a court's ability to assess all the factors that could define an unreasonable delay. The minority opinion also expressed the view that setting hard time limits might exceed the court's authority, since it makes a rule that is more appropriately made by democratically-elected legislators.

Both the majority and the dissenting judges agreed that, applying any framework, the delay experienced by Mr. Jordan was unreasonable and that proceedings against him should be stayed.

Additional Note: The Impact

This decision had immediate consequences. A number of serious charges, including murder charges were stayed as many persons who were facing trial had already experienced delays exceeding the "presumptive ceiling" – in spite of the decision's "transitional provisions". It has also had a dramatic impact on the administration of justice.

The Attorneys General of Ontario and Canada appointed additional judges to the courts under their respective jurisdictions, and Ontario hired new Crown prosecutors. Administrative procedures in the court system were amended to shorten waiting times for hearings, in particular because of high numbers of matters needing to be heard before their time limit expires and of accused persons who are seeking court hearings to determine whether their trial delays have been reasonable under the newly adopted framework.

DISCUSSION

1. Is it important to the justice system that persons accused of crimes should be tried within a reasonable time after being charged? Why?
2. Which is easier to understand: the *Morin* framework or the one established in this case?
3. In what ways might long wait times between charge and trial be problematic for both accused persons and for the administration of justice?
4. Why do you think the presumptive ceiling is different for crimes tried in the provincial courts than for those tried in superior courts?
5. Try to think of one benefit and one challenge for both defendants and prosecutors that might come as a result of this decision.

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R v OLAND 2017 SCC 17

Date Released: March 23, 2017

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16486/index.do>

Facts

On July 7, 2011, 69 year-old multi-millionaire Richard Oland's body was found at his office in Saint John, New Brunswick. He had been bludgeoned to death in what a police officer later described as, "one of the bloodiest crime scenes of his career", and had suffered over 40 blunt-force wounds.

Police quickly identified Richard Oland's son, Mr. Dennis Oland as the primary suspect. He was the last person to have seen his father and had visited his office three times the night prior. He was arrested and charged with second degree murder.

was a "contributing member of his community" who posed no future threat and would be able to successfully reintegrate into society.

Mr. Oland immediately appealed the decision. At the same time, he applied under s. 679 of the *Criminal Code of Canada* to be released on bail until the outcome of his appeal.

Procedural History

After a lengthy trial Mr. Oland was convicted second degree murder. He was sentenced to life imprisonment with no chance of parole for 10 years. During sentencing, the trial judge acknowledged that while the crime was "brutal", it resulted from a "spontaneous outburst" based on "a long-standing dysfunctional family dynamic and immense stress", and so it fell closer to manslaughter than to first degree murder on the continuum of moral culpability. Additionally, the trial judge found that Mr. Oland

Criminal Code of Canada

Release pending determination of appeal

679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

- a. in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
- b. in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
- c. in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the

court of appeal may order that the appellant be released pending the

determination of his appeal if the appellant establishes that

- a. the appeal or application for leave to appeal is not frivolous;
- b. he will surrender himself into custody in accordance with the terms of the order; and
- c. his detention is not necessary in the public interest.

A judge of the New Brunswick Court of Appeal denied Mr. Oland's request for release on bail pending the determination of his murder conviction appeal. The Chief Justice of New Brunswick directed a three-judge panel of the Court of Appeal to review the appeal judge's decision. On review, the three-judge panel confirmed the appeal judge's decision, denying bail. Mr. Oland appealed from the panel's decision to the Supreme Court of Canada (SCC); however, before the Supreme Court could hear the bail decision appeal, the New Brunswick Court of Appeal allowed Oland's appeal from his murder conviction and ordered a new trial. Consequently, the bail decision appeal was "moot".

Issues

1. Should the SCC hear the case, considering the issues are moot?
2. What factors, particularly in respect of “public confidence in the administration of justice”, must be addressed when an appeal judge considers granting bail pending appeal under s. 679(3) of the *Criminal Code*?
3. What is the standard of review for a court of appeal reviewing the initial appeal judge’s decision (under s.680 of the *Criminal Code*)?
4. How do the approved and necessary factors and review standards apply to Mr. Oland’s application for bail pending appeal?

Decision

The SCC determined that it would hear the appeal even though the appeal was moot at the hearing date, as Mr. Oland had already been released when the New Brunswick Court of Appeal ordered a new trial in his appeal from his murder conviction. The SCC unanimously allowed Mr. Oland’s appeal from the decision of the review panel of the Court of Appeal. The Court held that Court of Appeal was wrong in not intervening in the (original) appeal judge’s decision to deny bail, as that decision was erroneous.

Ratio

Based on the consent of all parties and their submissions that the existing law on applications for bail pending appeal was unclear, the SCC decided to hear the appeal although it was otherwise moot. When determining if someone should be released on

bail pending appeal it is necessary to consider both public safety and public confidence in the administration of justice. Public confidence consists of two competing values: ensuring that the law can be enforced (“enforceability”) and ensuring that incorrect legal decisions can be reviewed (“reviewability”).

To determine bail pending appeal the judge should consider the following factors:

1. The seriousness of the crime;
2. the strength of the grounds of the appeal (ensuring that they are not frivolous);
3. the risk to public safety; and
4. whether the appellant is a flight risk

Reasons

In adopting this approach, the SCC referenced the public confidence considerations for bail decisions made **before** a trial. In *Oland*, however, the Court also expanded on the concepts of enforceability and reviewability: public confidence in the administration of judges has an interest in making sure that the punishment of crimes can be enforced and an interest in ensuring that appeals are available, at minimum, for cases that are not frivolous. The latter interest is assessed on the strength of the appeal, by its plausible legal basis and the appeal’s foundation in the trial record.

Then the SCC described how these factors should be balanced. They held that the factors should be measured through the eyes of a **reasonable person**, described as “someone who is thoughtful, dispassionate, informed of

the circumstances of the case and respectful of society's fundamental values." Thus, to determine if a person should be granted bail pending appeal the judge must determine if public confidence will be eroded by granting bail pending appeal, from the perspective of a reasonable person, knowledgeable about the circumstances of the case. An additional required consideration is the anticipated delay in deciding an appeal, relative to the length of the sentence. The "reviewability" factor is affected when a sentence will be served before the appeal is heard. Despite setting out the required considerations, the SCC indicated "there is no precise formula that can be applied to resolve the balance between enforceability and reviewability."

The court determined that a panel reviewing a decision of a single appeal judge under s. 680(1) should be guided by three principles: deference to the judge's findings of fact, where there is no "palpable and overriding error"; intervention "where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome"; and intervention where it concludes that the decision was clearly unwarranted. In the last two circumstances, the reviewing court may substitute its own decision for the appeal judge's. In applying its substantive reasoning to Mr. Oland's case, the SCC found that the appeal judge did not apply the correct test in his assessment of the strength of Mr. Oland's appeal.

The SCC allowed the appeal and determined that Mr. Oland's release would not undermine public confidence in the administration of justice. The court's decision was based on the appeal judge's original assessment that Mr. Oland presented no safety or flight risks, on the particular facts and circumstances that underpinned his conviction, and on the finding that his grounds for appeal were sufficiently strong. If the appeal had not

been moot, the SCC indicated that it would have ordered Mr. Oland's release pending appeal. Mr. Oland's new trial is scheduled for the fall of 2018 in New Brunswick.

DISCUSSION

1. Which are more difficult to prove: claims of mental injury or physical injury? Why?
2. Which do you think receive more stigma and more sympathy from society?
3. Should they be treated differently under the law? Consider the perspectives of claimants, defendants and insurers as you think about your answer.
4. Why do you think the presumptive ceiling is different for crimes tried in the provincial courts than for those tried in superior courts?
5. How is this ruling from the SCC helpful for other courts in Canada?

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SAADATI v MOORHEAD 2017 SCC 28

Date released: June 2, 2017

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16664/index.do>

Facts

Mr. Saadati's truck was hit by a vehicle driven by Mr. Moorhead. This was the second of five accidents that Mr. Saadati was in before the case came to court, and he had been experiencing chronic pain since the first one. Mr. Saadati sued Mr. Moorhead for non-pecuniary loss (losses such as pain and suffering that are difficult to quantify in dollar amounts) and income lost. Due to the subsequent accidents, Mr. Saadati had been declared mentally incompetent in the interim, and was not available to testify at trial. The trial judge found (based on the testimony of Mr. Saadati's friends and family, and not based on the expert evidence that was also presented) that Mr. Saadati had psychological injuries, such as personality changes and cognitive difficulties, caused by the second accident specifically. Mr. Moorhead admitted liability for the accident, but opposed Mr. Saadati's claim for damages.

Procedural History

The trial judge awarded Mr. Saadati \$100,000 in damages. The Court of Appeal for British Columbia overturned the trial judge's decision on the ground that Mr. Saadati had not

demonstrated any psychological injury through expert medical advice. Prior to this case, it was not unusual for courts to require this with respect to claims of mental injury.

Issues

1. How should a claim of mental injury be decided?
2. Does a claim of mental injury need to be proven by expert medical evidence?
3. Should a claim of mental injury be treated differently from a claim of physical injury?

Decision

The Supreme Court of Canada (SCC) allowed the appeal and restored the trial judge's award. Mr. Saadati had established that the accident with Mr. Moorhead had caused psychological injury for which he should be compensated.

Ratio

The law of negligence causing mental or physical injury requires claimants to meet the same criteria. A finding of legally compensable mental injury does not require a diagnosis of a recognized psychiatric illness. Rather, the person claiming mental injury caused by negligence must establish:

1. That the defendant owed him or her a duty of care;
2. a breach of that duty;
3. damage; and
4. a legal and causal relationship between the breach and the damage.

Reasons

The SCC unanimously held that the trial judge's finding of negligence causing mental injury and the \$100,000 damage award were correct and that Mr. Saadati was entitled to be compensated accordingly (without referring the matter back to the Court of Appeal). In coming to this decision, the court confirmed the law of negligence and described how courts should apply it to cases of mental injury rather than physical injury.

The SCC stated that like a claim of physical injury for compensation, the person claiming mental injury needs to show that there was a duty of care owed to the claimant, a breach of that duty, damage, and a relationship between the breach and damage.

The Court then found that the ordinary duty of care analysis – used for physical injury and damages – should be applied to mental injury. Expert evidence is not required by law to establish

a physical injury so it should not be required to prove a mental injury. The claimant needs to meet criteria that show the mental injury is **serious, prolonged, and rises above ordinary annoyances**. The SCC did not bar expert evidence, saying that it could be used to show mental injury. However, where a psychiatric diagnosis is unavailable, the judge can still find the occurrence of a mental injury on a balance of probabilities through other evidence.

The Court then applied this reasoning to Mr. Saadati's case. They found that there had been a duty of to take reasonable care to avoid causing foreseeable mental injury which Mr. Moorhead had breached. The Court then concluded that Mr. Saadati had suffered a mental injury based on the evidence of friends and family at trial, even though no expert evidence of a recognized psychiatric diagnosis was provided. Lastly, the SCC confirmed the trial judge's finding that this injury was caused by Mr. Moorhead's breach of the duty of care.

DISCUSSION

1. Which are more difficult to prove: claims of mental injury or physical injury? Why?
2. Which do you think receive more stigma and more sympathy from society?
3. Should they be treated differently under the law? Consider the perspectives of claimants, defendants and insurers as you think about your answer.
4. Why do you think the law requires claimants of mental injury to show the injury is “serious, prolonged and rises above ordinary annoyances”?
5. How is this ruling from the SCC helpful for other courts in Canada?



TOP FIVE 2017

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R v VILLAROMAN, 2016 SCC 33, [2016] 1 SCR 1000

Date Released: July 29, 2016

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16078/index.do>

Facts

Oswald Villaroman brought his laptop to a repair shop to have the power button and the battery fixed. The laptop was not password protected. Mr. Villaroman provided his contact information and he authorized the repair work. After troubleshooting, the repair technician performed a random check of the software to see if it was working properly, and accidentally discovered child pornography in the music folders of the iTunes library. The repair technician called the police, who seized the computer. A forensic analysis established that only one user account (named "oswaldvillaroman") had been set up on July 1, 2007, and that the computer was used almost every day from then until a few days before the computer was brought to the repair shop on November 9, 2009. In response to his charge for possessing child pornography, the defendant claimed that the police had breached his Charter rights by seizing the computer without first obtaining a warrant and argued that this breach should result in the evidence found there being excluded.

Procedural History

The respondent was found guilty at trial for possession of child pornography, with no violation of his ss.8 right against unreasonable search or seizure under the Charter of Rights and Freedoms.

He appealed, citing again the Charter grounds as well as arguing that the evidence against him was too circumstantial to prove his guilt beyond a reasonable doubt. The Court of Appeal for Alberta set aside the conviction, stating that the trial judge had not applied the proper tests to the circumstantial evidence to prove guilt beyond a reasonable doubt.

As the Court of Appeal entered an acquittal the court did not need to consider the Charter issues. The Crown appealed this decision to the Supreme Court of Canada (SCC).

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search or seizure. 24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Issues

1. Did the trial judge make a legal error when he considered the use of circumstantial evidence given that proof of Mr. Villaroman's offence relied mostly on circumstantial evidence?

Decision

The appeal was allowed and the acquittal was set aside. The case was returned to the British Columbia Court of Appeal to address the Charter issues raised by Mr. Villaroman. The SCC found that the trial judge had not made a legal error in his reasons about circumstantial evidence.

Ratio

To prove guilt beyond a reasonable doubt, the Crown does not have to disprove every single explanation that could be drawn from circumstantial evidence and could support a finding of innocence. This is especially true if explanations are not reasonable or are rely on speculation. In assessing circumstantial evidence, inferences that are consistent with innocence do not have to arise from proven facts. However, a trial judge does not make an error simply because he or she does not consider reasonable inferences that are inconsistent with guilt that could have arisen from a lack of evidence. Inferences may be drawn from circumstantial evidence but must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

Reasons

In order to establish possession of child pornography, the Crown had to prove the following elements of the offence beyond a reasonable doubt:

1. The defendant knew the nature of the material;
2. The defendant had the intention to possess it; and
3. The defendant was able to exercise control over it.

Direct evidence (for example, a video of Mr. Villaroman saving the files or a credible witness testifying that Mr. Villaroman had admitted guilt to them) of this crime would be very difficult to obtain. The evidence against him was circumstantial in that nothing in it proved definitively that Mr. Villaroman had knowingly come to possess it. While it is possible to imagine ways that the illegal materials came to be on Mr. Villaroman's computer without his knowledge, there was nothing in the evidence to support such a conclusion, meaning that these explanations would only be speculative. Although all the evidence before the trial judge was circumstantial, all three elements of the offence could be proven beyond a reasonable doubt. The court explained the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt.

Reasonable doubt is a state of mind. The reasonable doubt instructions that judges give to jurors are all directed to describing how sure they must be of guilt in order to convict.

The issues about relying on circumstantial evidence focus, instead, on the dangers of the path of reasoning involved in drawing conclusions from circumstantial evidence. In assessing circumstantial evidence, explanations that suggest innocence do not have to arise from proven facts; that approach would put an improper obligation on the defendant to prove facts.

A good way for the trier of fact to consider making an inference of guilt from circumstantial evidence (while guarding against overlooking reasonable alternative inferences) is if the inference of guilt drawn from circumstantial evidence is “the only reasonable inference”.

The SCC found that the Court of Appeal incorrectly assumed that the trial judge had made a mistake by not considering reasonable inferences that were consistent with innocence, which could have been drawn from the gaps in evidence. Put another way, the kinds of explanations that the Court of Appeal found the trial judge should have considered were unreasonable given the circumstantial evidence in this case: that Mr. Villaroman had control of the computer, that only one user profile had used the computer, that the username for that profile was similar to the defendant’s and that the files had been organized and accessed.

In this case, the facts and contextual factors that could infer the three elements of the offence, listed above included: an analysis of how much the laptop was used with the specific account; how long the defendant was in possession of the laptop when comparing the download data; and whether anyone other than Mr. Villaroman had potential access to the laptop. On the facts of this case all reasonable inferences other than guilt were excluded.

In June of 2018, the Court of Appeal for Alberta ruled on Mr. Villaroman’s Charter application. It found that while the police seizure and search did violate his rights under s. 8 of the Charter, the seriousness of this violation was outweighed by the public interest in prosecuting a serious crime and his appeal was dismissed.

DISCUSSION

1. In your opinion, how strong was the evidence against Mr. Villaroman?
2. What is the difference between direct and circumstantial evidence? Give an example of each to support the statement, "it rained today".
3. If you bring a computer in for repairs and leave it in the shop, do you still have a reasonable expectation of privacy about the information it might contain about you?
4. Why might direct evidence be difficult to come by in a case like this one?
5. What is the difference between a reasonable and a speculative explanation? Give a hypothetical example of each that could account for the presence of the illegal files on Mr. Villaroman's computer without him engaging in criminal activity.