

R v Pendl and The Application of the Vetrovec Warning

By J DeMerchant

The case of *R v Pendl* as heard in the Manitoba Court of Appeal for the conviction of a break, enter and commit robbery (section 348(1)(b) of the *Criminal Code*) and forcible confinement (section 279(2)). The accused wanted leave to appeal, and if admitted, to appeal his eight-year incarceration, while receiving credit for the three months previously served for his conviction. The accused wished to appeal his convictions based on the ground that the judge failed to take into consideration the case of *Vetrovec v The Queen*. Also, on the basis that she misapprehended the evidence, the lack of the W(D) analysis and an unreasonable verdict.

Facts

Three accomplices, these being the accused, Mr. Johnston and a driver, Mr. Ward, committed a break and enter the home of a man in rural Manitoba. After rendering the victim unconscious and tying his hands, the accused and Mr. Johnston proceed to ransack the house while combing for items to take. After approximately two hours, they left, after freeing the victim of his binding, cutting the phone lines and slashing the victim's tires. The victim was physically injured from the encounter (which was determined to be caused by the accused), which led to hospitalization and extensive PTSD, which barred the victim from returning to his home due to trauma. Among the items taken from the residence was a collection of hunting knives, which had ended up in the accused's possession, and were put in his truck.

There happened to be motion-activated cameras that took pictures of three individuals at the residence between the times of 8:22pm and 9:22pm. Due to the darkness of the night and the angle of the camera, only the faces of Mr. Johnston and Mr. Ward were identifiable. When asked, the accused stated that he was at Mr. Johnston's residence with his girlfriend at the time the incident occurred. However, Mr. Johnston and the girlfriend gave different accounts of the accused's whereabouts.

The accused's girlfriend stated that she was at work until 8:00pm, and gave her work schedule and pictures of conversations she had with the accused prior to her leaving work that stated he would not be at the place of their meeting (Mr. Johnston's residence) when she was able to arrive, as evidence as to her whereabouts at the time of the incident. She noted that hours after her shift, she came across the three indicted men and their vehicle. When she spoke to the accused, she noticed he had bloody and bruised knuckles.

The Vetrovec Warning

The accused's main reason for the appeal is based on the Vetrovec warning in regard to Mr. Johnston and the girlfriend of the accused. This states that the judge must give themselves and/or the jurors a clear warning in circumstances where there is a testimony received from a witness that may be suspect. This is to allow those to consider that although they are receiving such a statement that they need to make sure to look at the evidence as a whole and give special attention to the testimony from said witness. Such warnings can be placed upon witness's who have an involvement

in criminal activities, have a reason to lie due to connection to the crime, deeming themselves of an unsavoury nature. This specifically applies to Mr. Johnston in this instance, as any blame placed on the accused is potentially blame lifted from himself.

In any case, it is up to the judge to decide whether a witness is considered unsavoury in the relation to their testimony. As there are many applications of the Vetrovec warning, it is unclear as to the exact circumstances when a judge must apply the warning and when it is just to continue without it. It is also the duty of the defense counsel to request a Vetrovec warning or at least object to the lack of warning from the judge. Failure to do so on the defense counsel's part is grounds for the dismissal of the appeal. The judge stated that she found the testimony of Mr. Johnston and the girlfriend to be reliable enough as to not call for a Vetrovec warning, as there was just cause for the judge to come to these conclusions, based on the proof of the hunting knives as stated by Mr. Johnston and that the girlfriend was working based on the evidence she provided from her Facebook account.

Remaining Appeals

Other grounds for the appeal for the accused as listed above include the lack of the use of the W(D) analysis. The purpose of this test is to make sure that the testimony of the accused is not overshadowed by other testimonies, as it is wrong to when considering conflicting evidence to believe one story over another, however the accused did not testify so there is no reason for the W(D) analysis to be used. The purpose of the test is to ensure so that the verdict is not based on the choice between the accused's evidence and the evidence of the Crown. This analysis was decided by the judge was unnecessary, due to the analysis being used when the accused's evidence is being overwritten by other testimonies. The judge stated that the evidence provided was sufficient and "satisfied beyond any reasonable doubt of the accused's guilt".

Conclusion

It is my belief that the dismissal of the appeal is sound and just and there was no real need for the appeal in the first place, as the accused was likely just looking for a way he could possibly shorten his sentence. His counsel did a poor job with demanding the Vetrovec warning, though it was likely it would have been denied regardless. Although the accused was right in stating that the Vetrovec warning was not given, there was proper justification for the lack of the warning as the current application stands. It may serve a future purpose if the rules for using the Vetrovec warning were made to be clearer. This way there will be no need for appeal to be based solely on the absence or vagueness of that specific warning. I believe that the testimonies from both Mr. Johnston and the girlfriend were sensible enough to grant that the allowance of such evidence is irrefutable.