

The Effects of Evidence and Procedure Upon a Fair Trial

By Melanie Paddles

Although unrelated to the original intention in investigating the case, *R v Dowd* brings up some interesting concepts in relation to the jurisprudence surrounding evidence in trials. One of these includes the concept of trial by ambush. For some context, the case of *R v Dowd* involves a former police officer accused of sexual assault (indecent touching) on a nine-year old girl. During the trial proceedings, an error in procedure was made wherein the accused and defense counsel did not cross-witness two figures involved in the event – the adult women who initially requested that the accused accompany the victim to the bathroom whereupon the sexual assault occurred shortly after. Because of this error, the trial judge was open to make a decision at their own discretion to provide for a remedy. They ended up drawing two negative inferences against his credibility and ruled against him. Accordingly, while the appellate judges are well aware that the accused “was not entitled to a perfect trial; however, it would be more than simple irony to conclude that a law designed to prevent trial by ambush could itself be deployed to the surprise of the parties by the Court on its own motion in a manner that affected the result of the trial.” They ultimately gave a verdict of acquittal and ordered a new trial on the grounds that “the fundamental fairness of the accused’s trial was compromised by the trial judge’s application of the rule. In such circumstances, it was an error for the appeal judge to dismiss the accused’s appeal because of appellate deference”. Trial by ambush refers to some unknown element discovered at trial, typically a witness or piece of evidence that, during submission, is improperly listed or entered into submission shortly before the trial. This essentially means that the opposing counsel would not be aware of the existence of the evidence or witness and therefore not be prepared to counter it. Typically, “a party engaged in litigation... is generally required to disclose all materials in its possession, power, or control, which may prove or disprove a material fact.” Improperly listed evidence may be allowed in a trial on

the judge's discretion, so long as it is foreseeable and therefore applicable in the best interests of justice. The case of *Stone v Ellerman* outlined four principles to judge whether evidence should be admitted, which include:

1. whether the plaintiff would suffer prejudice if the use of the document were permitted.
2. whether there was a reasonable explanation for the failure to disclose the document.
3. whether excluding the use of the document would prevent the determination of the relevant issue on its merits.
4. whether, in the circumstances of the case, the ends of justice require that the use of the document be permitted.

Another interesting concept brought up in the case of *R v Dowd* is the curative proviso. This is the practice of allowing the dismissal of an appeal despite the presence of a legal error in the trial so long as the error is harmless. This is the crux of the issue in *R v Dowd* for the appellate court since the Crown asserted that the evidence against the accused was overwhelming to the point that had a legal error not occurred, he still would have been convicted. In other words, no harm was done and the curative proviso should be allowed for. The judges disagreed on the fact that the error was not insubstantial, and that in holding up the appeal, it would amount to a mistrial. Moreover, they also did not believe the Crown proved beyond a reasonable doubt that the accused was guilty. This is taking into consideration the absence of any admission, explicit evidence or witness testimony aside from the complainant's indicating that a sexual assault had happened. While this is often the case in sexual assault trials, the major discrepancy in this case between the perspective shared by the victim and accused is the timeline of when the two were alone (and thus the moment when the sexual assault occurred). However, this is only further proof that ensuring the credibility of both parties is critical, in order to give a fair deliberation upon their testimonies as that is what would

typically decide the outcome of a sexual assault trial. This is the motivation behind the appellate judge's reasoning for throwing out the curative proviso. Referring to the ruling of Arbour J in the case of *R v Khan*, "in every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice. In that case, no remedial provision is available and the appeal must be allowed." One last aspect of this trial which is of interest is the fact that there is a degree of notoriety involved owing to the accused's occupation as a former Mountie as well as the nature of the crimes. There has already been some news coverage. The impact of media on court cases have typically been reported as being detrimental – particularly when information results in bias from jurors prior to the trial. This results in the compromise of a fair trial, which is incidentally of concern in this case. There has been indications that when the media has played an active role in the case, convictions tend to be disproportionately against the accused. To further exacerbate this issue is the onset of social media; information about the accused and jurors can be discovered in mere seconds, and when disseminating the trial proceedings, context can be lost. It remains to be seen how the courts will come to handle this issue in the future.

Sources

Hastings, Brandon, "Trial by Ambush in BC", *The Canadian Bar Association: British Columbia Branch* (August 2016), online: <cbabc.org> [perma.cc/W79V-QM2M].

R v Dowd, [2020] MBCA 23