NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Barry, 2004 NSCA 145

Date: 20041207
Docket: CAC 221556
Registry: Halifax

Between:

Shane Douglas Barry

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Cromwell and Hamilton, JJ.A.
Appeal Heard:	November 23, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; Cromwell and Hamilton, JJ.A. concurring.
Counsel:	Robert Gregan, for the appellant Dana Giovannetti, Q.C., for the respondent

Reasons for judgment:

[1] The appellant, Shane Douglas Barry, was charged by Indictment with offences contrary to sections 88 (possession of a knife for a purpose dangerous to the public peace) and 264.1(1)(a) (uttering a threat to cause death) of the **Criminal Code of Canada**, R.S.C. 1985, c.C-46, as amended. At the time of the offences, Mr. Barry was an inmate at the Springhill Institution. As a consequence of negotiations between the Crown and defence, Mr. Barry entered a guilty plea on December 5, 2003. Consistent with the joint recommendation of counsel, he was sentenced to nine months incarceration on each offence, running concurrently. He now asks that the guilty plea be set aside and further proceedings stayed, or, in the alternative, that a trial of the charges be ordered.

[2] As is the usual case, limited facts were presented at the sentencing. These were summarized by the sentencing judge as follows:

> The essential facts are that there was a fight in Springhill Institution involving a number of inmates, not including Mr. Barry. Mr. Barry did not initiate it and did not participate originally. His good friend received a serious blow and at that point Mr. Barry was observed with a sharpened piece of metal. He chased Mr. Chan who appears to have been the person who inflicted the blow upon his friend and Mr. Chan held a weapon, we know that, and he had certainly participated in the fight. There was no contact between Mr. Barry and Mr. Chan. Eventually the accused went to his cell and thus the situation was defused. In the course of all of that, Mr. Barry threatened to kill Mr. Chan also.

[3] Mr. Barry asks us to receive his affidavit on this appeal as fresh evidence. Section 683(1)(d) of the **Code** permits us to receive fresh evidence where it is in the interests of justice to do so. Where the fresh evidence impacts the guilt or innocence of the applicant, the governing test is that set out in **R. v. Palmer** [1980] 1 S.C.R. 759. As the appeal is directed principally to the validity of the process, the Crown, relying upon **R. v. Taillefer**; **R. v. Duguay**, [2003] 3 S.C.R. 307 and **United States of America v. Shulman**, [2001] 1 S.C.R. 616 agrees that the *Palmer* test does not apply. A part of Mr. Barry's affidavit outlines the procedural history of this matter in the courts below, attaches two letters, one from Crown attorney, Bruce C. Baxter, to Robert Gregan, defence counsel, and one from Mr. Baxter to Crown attorney, Peter Rosinski of the Appeals Division of the Public Prosecution Service and in one paragraph suggests that his pursuit of Mr. Chan was in defence of others. The Crown does not object to us considering those

portions of the affidavit necessary to complete the record, principally, the two pieces of correspondence and some of the narrative of the events of the proceedings in the courts below. I would agree with the Crown, however, that Mr. Barry's explanation of his purpose in pursuing Mr. Chan is directed at guilt or innocence, is therefore subject to the *Palmer* test and is not admissible. Mr. Barry's purpose was known to him at the time he entered the guilty plea.

[4] In order to contextually evaluate Mr. Barry's position on this appeal, I have considered, as well, the transcript of the preliminary inquiry which was provided by Mr. Barry. The Crown does not object to our considering this material. For the purposes of this appeal, the accuracy of the additional evidence contained in the preliminary inquiry transcript is not disputed by Mr. Barry.

[5] Drawing from that transcript, the circumstances of the offences were as follows. There was a fight in one of the Institution's yards involving several inmates. A number of guards were present as well. Mr. Barry was not in the yard at that time nor is there any evidence that he witnessed the events. Inmate Williston, who was a friend of Mr. Barry, was stabbed by Mr. Chan. Mr. Chan then issued a general challenge to others in the yard to fight. After the stabbing, Mr. Williston ran into Unit 11 where Mr. Barry was at the time. Seeing that Mr. Williston was injured, Mr. Barry, armed with a shiv (a homemade sharpened weapon) exited Unit 11, hid his weapon as he ran past the guards and chased Mr. Chan, threatening to kill him. Mr. Chan ran from Mr. Barry into Unit 8. They did not make contact before each was locked up. The Institution guards who testified at Mr. Barry's preliminary inquiry could not say whether Mr. Chan or Mr. Williston had been the aggressor in the altercation that saw Mr. Williston wounded.

[6] As indicated above, Mr. Barry entered guilty pleas to the resulting offences. Mr. Chan was charged with a number of offences, as well, including possession of a weapon for a purpose dangerous to the public peace (s. 88); assault on Williston (s.267(a)); and, assault on a correctional officer, by threatening to use a weapon (s.267(a)). None of the charges related to Mr. Chan's interaction with Mr. Barry. In April of 2004, after a trial by jury, Mr. Chan was acquitted of all charges. The Crown has appealed that acquittal.

[7] Upon completion of the Chan trial, Crown attorney, Mr. Baxter, who was also counsel at the sentencing of Mr. Barry, wrote Mr. Gregan, counsel for Mr.

Barry, and advised that he felt an injustice had occurred to Mr. Barry in that Mr. Chan was acquitted of all charges. He said: "I am prepared to join in a defence motion to allow Mr. Barry to withdraw his guilty plea and have the warrant of committal vacated. I will then withdraw the Indictment."

[8] It was Mr. Baxter's view that Chan's assertion at trial that he was using the weapon in self defence was pivotal to the acquittal. It was the defence theory, at Chan's trial, that possession of a weapon by an inmate in a prison setting, where attacks by fellow inmates are commonplace, does not constitute possession "for a purpose dangerous to the public peace". Mr. Gregan submits that neither he nor Mr. Baxter had considered that such a "defence" might be open to Mr. Barry should he proceed to trial.

[9] The parties appeared before a Supreme Court judge who determined that he did not have jurisdiction to permit the withdrawal of a guilty plea after sentence and that the matter should be heard by the Court of Appeal. Mr. Baxter then wrote to the Appeals Division of the Public Prosecution Service, recited the history of the matter and proposed that the Crown consent to the late filing of a defence appeal, consent to Mr. Barry's release pending appeal, and await this Court's determination of the Chan appeal. He suggested in his letter to the Appeals Division of the Public Prosecution Service:

> . . . We can then wait for the Chan appeal to be decided. If the Court of Appeal says the Judge was incorrect and sends the matter back for re-trial, defence may choose to abandon the appeal. On the other hand, if the Court of Appeal upholds the instructions we could consent to the appeal and have the matter returned here for re-trial. Since Mr. Barry has served most of his sentence, I would most likely withdraw the Indictment.

[10] The Crowns in the Appeals Division of the Public Prosecution Service were of the view that the Chan acquittal had no link to Mr. Barry's offences. It was Chan's interaction with others in the yard, not with Mr. Barry, that gave rise to the charges. Accordingly, the Appeals Division took the position that there was no legal basis upon which to ask this Court to set aside Mr. Barry's guilty pleas. As a result, the Crown opposed the late filing of the Notice of Appeal and opposed Mr. Barry's release on bail. While the time for filing the Notice of Appeal was extended by this Court, Mr. Barry remains incarcerated. At the time of the bail application he was serving a sentence on another offence, which term did not

expire until June, 2004. He is now serving the nine month concurrent sentences on the two offences at issue here.

[11] It is Mr. Barry's submission that the Crown has improperly resiled from an agreement to facilitate this appeal. The Crown responds that there is no prejudice to Mr. Barry in that he had not contemplated an appeal until his counsel was contacted by Mr. Baxter. Further, the Crown says, on the record that is before us, Mr. Baxter's reasoning that the Chan acquittal speaks of an injustice to Mr. Barry is inexplicable and not founded in law. I would agree. The facts of Mr. Barry's offences and the circumstances from which the Chan charges arose are not based upon the same transaction.

[12] Mr. Baxter undertook to the defence that he would support the withdrawal of the guilty plea. He did so, although the Supreme Court determined that it was without jurisdiction to accommodate. He then urged the Appeals Division to consent to the allowing of the appeal. The determination of the merits of the appeal is for the Court, not counsel. A Crown attorney cannot, as an officer of the court, consent to the setting aside of the guilty pleas or the allowance of the appeal unless such is supported by the law. Nor would it have been appropriate, in these unusual circumstances, for the Crown to remain silent, in effect, to take no position on the appeal. I am not persuaded that the Crown has acted improperly here.

[13] Mr. Barry does not complain of ineffective assistance of counsel in the negotiation of the plea agreement but says that his guilty plea was founded on a misapprehension of the law. He says that the Supreme Court of Canada decision in **R. v. Kerr**, [2004] S.C.J. No. 39 (Q.L.) (decision released subsequent to his plea and sentencing) makes it clear that possession of a weapon for deterrence and defence is not possession "dangerous to the public peace". The accused in **Kerr** was an inmate who armed himself in response to specific and credible death threats and who, when subsequently confronted by members of a prison gang, used his knife in self defence and caused the death of the inmate. His acquittal on the charge of murder was not before the Supreme Court, but the Court of Appeal had overturned the acquittal on the dangerous possession charge and that was the issue on the ultimate appeal. The Supreme Court of Canada (Binnie, J. dissenting) restored the acquittal.

[14] There is no evidentiary foundation for Mr. Barry's assertion that the law, as enunciated in **Kerr**, assists him. It is not contested that Mr. Barry was not in the

yard or otherwise a part of the brawl that involved the confrontation between Mr. Williston and Mr. Chan. Nor is it disputed that Mr. Barry exited Unit 11, armed and pursued Mr. Chan, threatening to kill him. There is no evidence that, at the time in question, Mr. Barry armed himself in response to a threat of injury from Mr. Chan nor that Mr. Chan confronted him. Indeed, Mr. Barry was the aggressor, chasing Chan into the lockup while at the same time threatening to kill him. Mr. Barry quite properly acknowledges that the above factual circumstances do not provide any defence to the s. 264(a) charge. Thus, even assuming that **Kerr** changed or clarified the law and that such could be a basis for setting aside a guilty plea, I am not persuaded, on the record before us, that Mr. Barry should be permitted to withdraw his guilty plea. There is no evidence before us that Mr. Barry's plea was based upon a misapprehension of law.

[15] Accordingly, I would dismiss the appeal.

Bateman, J.A.

Concurred in:
Cromwell, J.A.
Hamilton, J.A.