NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Reashore,* NSCA2002 167

Date: 20021230
Docket: CAC No. 160167
Registry: Halifax

Between:

Paul David Reashore

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Glube, C.J.N.S., Cromwell & Hamilton, JJ.A.
Appeal Heard:	November 25, 2002
Judgment Delivered:	December 30, 2002
Held:	Appeal dismissed as per reasons for judgment of Hamilton, J.A.; Glube, C.J.N.S. and Cromwell, J.A. concurring
Counsel:	Allan F. Nicholson & Patricia Fricker, for the Appellant Kenneth W. F. Fiske, Q.C. & Laurel Halfpenny MacQuarrie, for the Respondent

Reasons for judgment:

[1] The appellant appeals his conviction of first degree murder following a trial by judge and jury.

[2] The trial opened in Supreme Court on September 7, 1999. A ***voir dire*** was held pursuant to s.645(5) of the ***Criminal Code***, to determine the admissibility of statements made by the appellant to the police. The ***voir dire*** was lengthy, extending over ten days. The Crown called eight witnesses. The appellant called no evidence on the ***voir dire***. The last witness on the ***voir dire*** testified on September 16.

[3] On September 20, 1999, the jury panel assembled. The appellant was arraigned before the panel and entered a plea of not guilty. Counsel made their arguments to the judge on the ***voir dire*** on September 20 and 21, and the judge ruled the statements inadmissible. On September 22 a jury of 12 was selected. The jury was excused and another ***voir dire*** was held to determine the admissibility of evidence of post offence conduct. The judge ruled the evidence inadmissible.

[4] On September 23 the jury was brought in and the appellant was put in charge of the jury. The judge delivered his opening remarks and the Crown addressed the jury. During the Crown's address reference was made to the proposed testimony of a witness named John Gerald MacLean, as follows:

> John Gerald MacLean will also testify that in October of 1998, he received a telephone call from Paul David Reashore who at that time was at the Cape Breton County Correctional Centre awaiting his trial on a charge of committing first degree murder on the person of Daniel Lindsey Rogers.
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> Paul David Reashore identified himself and then John Gerald MacLean recognized his voice. Mr. MacLean will testify that Paul David Reashore spoke to him about the motorcycle and box liner which Daniel Lindsey Rogers had stored on Mr. MacLean's property. Mr. MacLean will testify that he told Paul David Reashore that these items had been left on his property by Daniel Lindsey Rogers and that after Mr. Rogers' death, Mr. MacLean advised the police of the fact that he had them on his property.
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> After he advised the police, Daniel Lindsey Rogers' friend, Joey Bennett, came to Mr. MacLean's residence and took these items off Mr. MacLean's property. Mr. Reashore told Mr. MacLean that his first lawyer got him down to 16 years. So

> they got rid of him because a lawyer from Halifax said he could get Mr. Reashore off with 10 to 12 years. **[Emphasis added]**

[5] After the Crown's address, counsel for the appellant argued that no reference to this testimony should have been made in the presence of the jury, but rather a ***voir dire*** should have first been held to determine admissibility. The judge then held a ***voir dire*** on the evidence of Mr. MacLean about the telephone call he had received from the appellant. Mr. MacLean testified on the ***voir dire*** on September 23, and Constable Aucoin of the Royal Canadian Mounted Police testified on September 27.

[6] The judge ruled the proposed testimony of Mr. MacLean inadmissible and queried what should be done since reference had been made to this evidence in front of the jury. Counsel for the appellant suggested that s. 644(1.1) of the ***Criminal Code*** permitted the judge to discharge the 12 jurors who had heard the impugned remark and empanel a second jury of 12 and continue with the trial without declaring a mistrial. He submitted this would not result in prejudice to the appellant when he said: "That's not prejudicing the Crown's position, that's not prejudicing the defence." Crown counsel favoured a limiting instruction to the jury to disregard the reference to the evidence of MacLean about the telephone call. A third option considered by the judge was a mistrial. Without further research, Crown counsel was not prepared to agree to the record of the ***voir dires*** that had already been held, being incorporated into a new trial, if a mistrial was declared. Crown counsel also indicated to the judge that she could not think of any reason why the Crown would not agree. She also stated: "My Lord, we're not standing here saying we want a mistrial and whatever that means. We're saying we want to continue." The judge did not favour the mistrial option and dismissed the limiting instruction on the ground the damage to the accused's fair trial interests could not be removed by an instruction. The judge agreed with appellant's trial counsel and on September 27 discharged the jury.

[7] The judge and counsel for the Crown and appellant gathered next on October 5, 1999. On that day, and on October 7, two further ***voir dires*** were held to determine the admissibility of evidence. On October 12 the new jury panel assembled. The appellant was arraigned before the panel and a plea of not guilty was entered. Jury selection began and was completed on October 13. On October 14 the judge addressed the jury and the accused was put in charge of the jury. The indictment was amended to allege the offence occurred between August 19 and

August 22, 1997. The Crown addressed the jury and the first witnesses were called.

[8] Over the following three weeks the jury heard the testimony of 49 witnesses. The appellant called no evidence and he did not testify. The jury heard from the final witness on October 29. On November 1 counsel addressed the jury, and the judge commenced his charge to the jury. The following day, November 2, the judge completed his charge to the jury and the jury retired to deliberate its verdict. On November 4, the jury returned with a verdict of guilty as charged. The judge sentenced the appellant to imprisonment for life without parole until he has served at least 25 years of his sentence.

[9] The appellant's ground of appeal is as follows:

> That the learned trial judge erred in law in his interpretation and application of Section 644 of the *Criminal Code* as providing the legal authority to discharge all 12 jurors, after the accused had been placed in the charge of that jury, and then select 12 new jurors without first calling a mistrial.

[10] The issue as I see it, is whether, on the unusual facts of this case, the appellant was tried by a properly constituted jury, and, if so, whether the judge erred in incorporating into the trial before the second twelve jurors, the voir dire record created pursuant to s.645(5) of the ***Criminal Code*** in connection with the trial commenced before the first twelve jurors.

[11] For the following reasons I am satisfied the appellant was tried by a properly constituted jury, and that while the judge may have erred in incorporating this voir dire record into the trial before the second twelve jurors, that error should be cured pursuant to s.686(1)(b)(iii) of the ***Code***.

[12] On appeal the respondent did not support the judge's interpretation of s.644(1.1) of the ***Code***, allowing him to discharge the first twelve jurors, select twelve new jurors and continue the trial without there being a mistrial. Paragraph 44 of its factum states:

> With respect to s.644(1.1) of the **Code**, it will be recalled that the Crown at trial was adamant the provision could not be invoked to replace one jury with another and the trial then "continue" (VII, 1333-35). The Crown at trial was uncompromising in its approach to the particular subsection of s.644 which the

> appellant had urged the trial Judge employ. The Crown on appeal will not take a position in conflict with that advanced by the Crown at trial in respect of the interpretation of s.644(1.1) of the **Criminal Code**. Such a change in position should only occur in the rare case, and on a solid legal foundation. This is not one of those cases.

Accordingly, in this decision I have assumed without deciding, that the judge could not continue the trial commenced with the first twelve jurors, after discharging them and selecting twelve new jurors.

[13] The reason I am satisfied the appellant was tried by a properly constituted jury, is that I am satisfied the judge, contrary to the words he used, effectively and constructively terminated the first trial when he discharged the first twelve jurors after the appellant was put in their charge, but before any evidence was called, by stating:

> Therefore, it is with very great regret that I must advise you that I am discharging you as jurors in this case.
>
> . . .
>
> In a moment I will excuse you and then I will meet with counsel and discuss with them the date and procedure involved in selecting another 12 jurors to continue this trial. You are now excused with the thanks and appreciation of the Court.

[14] Once this was done, he then effectively and constructively commenced a new trial with the second twelve jurors, following the requirements of the ***Code***, so that the appellant was tried by a properly constituted jury. Additional ***voir dires*** were held. The appellant was arraigned in front of a new jury panel and recorded his plea of not guilty. Twelve new jurors were selected, the trial judge made his opening remarks, the appellant was placed in their charge, the indictment was amended, the Crown made its opening remarks, evidence was introduced and the trial proceeded as outlined earlier.

[15] The appellant was not deprived of his right to be tried by a jury of twelve which was the circumstance in several of the cases referred to by counsel. ***Basarabus v. The Queen*** (1982), 2 C.C.C. (3d) 257 (SCC).

[16] Where the judge may have erred, was in incorporating into the trial before the second twelve jurors, the record of the ***voir dires*** conducted in connection with the trial that commenced before the first twelve jurors. When the judge was deciding what to do after determining the trial should not continue before the first twelve jurors, he sought the respondent's agreement to incorporate this record into a new trial to begin as soon as a new jury could be selected, if he declared a mistrial. The respondent indicated to the judge it could not agree to this without doing further research, but indicated it could not at that time think of any reason why it would not agree. The appellant's agreement was not specifically sought by the trial judge because appellant's trial counsel made it clear in his submissions that the procedure eventually followed by the trial judge, which he suggested in the first place, would not result in any prejudice to the appellant. It must be remembered that each of the trial judge's decisions on the ***voir dires*** was in favour of the appellant.

[17] Neither the appellant nor the respondent objected to the record of these ***voir dires*** being incorporated into the trial before the second twelve jurors.

[18] The incorporation of the record of these ***voir dires*** into the trial before the second twelve jurors may have been an error, but it is one that should be cured under s.686(1)(b)(iii). Section 686(1) provides in part:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (*a*) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (*b*) may dismiss the appeal where

> . . .
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> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .
>
> **(Underlining mine)**

[19] Given that the trial judge's decision on each of the ***voir dires*** in question were in favour of the appellant, not the respondent, I am satisfied there was no prejudice to the appellant as a result of this action by the trial judge. I am satisfied therefore that the incorporation of the ***voir dire*** record into the trial before the second twelve jurors, did not result in a substantial wrong or a miscarriage of justice, so that the curative provisions of s. 686(1)(b)(iii) should be applied.

[20] Accordingly, I would dismiss the appeal.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.