NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. McKenna***, 2007 NSCA 40

Date: Decision Date 20070410
Docket: CAC 269728
Registry: Halifax

Between:

Randall Bruce McKenna

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Cromwell, Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 5, 2007, in Halifax, Nova Scotia
Held:	Appeal from conviction for breach of undertaking allowed and conviction and sentence of four months associated with it set aside; appeal from conviction and sentence of theft charge dismissed
Counsel:	Appellant in person Dana W. Giovannetti, Q.C., for the respondent

Reasons for judgment:

[1] Mr. McKenna appeals his convictions and sentences for stealing a truck and breaching an undertaking.

[2] The Crown concedes, in my view properly, that the breach of undertaking conviction cannot stand as there was no evidence that it was in force at the time of the alleged breach. Accordingly, the conviction for breach of undertaking should be quashed and the four month sentence imposed with respect to that conviction should also be vacated.

[3] However, for the following reasons, the theft conviction and the sentence imposed for it should stand.

[4] At the appeal hearing, Mr. McKenna focussed his oral submissions to us on the sentence appeal. He was sentenced for the theft to two years imprisonment to be followed by a year of probation. Mr. McKenna is disabled as a result of what his doctor's letter referred to at the sentencing as "borderline mental retardation and mild Cerebral Palsy." He has a serious problem with alcohol and had been attending AA while on remand in the correctional centre. He provided us with letters concerning his medical condition and the support available to him to deal with his problems with alcohol and drugs on his release. He also advised us that he had full time employment available to him starting in May.

[5] However, I am not persuaded that the judge's sentence for the theft conviction should be varied. Mr. McKenna came before the sentencing judge as a 35 year old with over 60 previous convictions including many for property and motor vehicle offences. The current offence involved theft of a motor vehicle valued at more than $20,000, its destruction in an accident and injuries to Mr. McKenna himself. As the Crown points out, it is fortunate that no other vehicles or persons were involved.

[6] Given the appellant's lengthy record and the seriousness of the offence for which he was convicted, the sentence imposed is not manifestly unfit. I would dismiss the application for leave to appeal the sentence imposed for the theft conviction.

[7] I turn then to the conviction for theft of the truck. The grounds of appeal set out by the appellant are these:

> 1. There was not enough evidence to support a conviction of theft of the motor vehicle.
>
> 2. There was evidence at the trial that should have been raised and was not.
>
> 3. There was evidence that was contrary to the Crown's case that the Judge should have considered more, ie. footprints found at the scene which did not match mine.

[8] The second ground of appeal is frivolous and must be dismissed. The appellant has not sought to place fresh evidence before the court to support an argument that there has been a miscarriage of justice on account of missing evidence.

[9] The first and third grounds of appeal, in effect, allege that the verdict was unreasonable. However, a review of the record shows that there was ample evidence at trial to support the conviction and that the trial judge's reasons for conviction are not problematic. I will briefly outline the evidence.

[10] At trial, the only live issue on the theft charge was identification. The appellant did not testify or call evidence.

[11] At about 5:50 a.m. May 21, Donald MacDonald, who resides in Port Hood near Harbourview, woke to the sound of an accident and, looking out, he saw a truck, which was found to have been stolen, at rest in the middle of the highway. His neighbor, Darryl MacDonald, also noted the accident at about the same time.

[12] There was evidence from RCMP Constable Terry Densmore that, based on the physical evidence, the truck had been travelling southbound on Route 19, it crossed the centre line, hit a ditch and flipped back onto the highway.

[13] The vehicle was extensively damaged. There appeared to be blood inside the truck, the driver's door was damaged and could not be opened, and the passenger's door was found open with a footwear impression on the inside of the door.

[14] Forensic analysis found that the tread pattern of the footwear impression did not match the footwear worn by the appellant when he was arrested later that day. There was no DNA or fingerprint evidence.

[15] It was clear and uncontested on the evidence that the truck was owned by John MacEachern and he last saw it parked at his Mabou residence at 7:00 p.m., May 20. Someone stole it. That theft was unwitnessed.

[16] Donald MacDonald and Darryl MacDonald left their residences to investigate. There was no one in or near the vehicle. Didda MacDonald, an elderly lady who did not testify at trial, advised them that the driver of the truck was inside her residence.

[17] At her residence, the MacDonald men saw an injured stranger identified by each at trial as the appellant. Donald MacDonald testified that the injured man said that someone else was in the truck. The injured man was complaining of sore ribs, he had blood on his face and he did not want an ambulance. The observations inside the residence were a few minutes in duration.

[18] Shortly thereafter the injured man was seen to be hitchhiking. He was picked up by Keith LeBlanc, a Port Hood resident who was driving to his work at the power plant in Point Tupper, and dropped off in Port Hawkesbury, a 35-40 minute drive. The man was in pain and had blood on his face and was intoxicated. LeBlanc continuously engaged him in conversation because he was worried that the man might go into shock.

[19] Mr. LeBlanc testified that the injured man admitted to him that he was the driver of the truck, that he was driving at excessive speed and lost control, and that it was not his truck. He identified the appellant in court as the hitchhiker.

[20] At the accident scene Constable Densmore obtained a description of the injured man and learned that he was en route to Reynolds Street in Port Hawkesbury. He contacted the R.C.M.P. Detachment in Port Hawkesbury and was advised that the description and the address matched Randall Bruce McKenna, the appellant. He requested that they try to locate Mr. McKenna.

[21] Constable Densmore then obtained a computer photo of Mr. McKenna and immediately recognized him as the intoxicated man seen by him to be speaking with his partner, Constable Janice Roberts, at a dance in Mabou at about 1:45 that morning. Constable Roberts corroborated that evidence, adding that the highly intoxicated Mr. McKenna, identified by her in Court, had asked for a drive home, which she refused. Neither officer was questioned and neither testified as to whether Mr. McKenna had any injuries at that time.

[22] R.C.M.P. Constable Mason located and arrested Mr. McKenna near a tavern on Highway 320 Louisdale, Richmond County at about 12:15 p.m. He noted that the appellant had bruises, scratches, and marks on his face. He transported and turned him over to Constable Densmore who testified that the description he had earlier received from the civilians matched the appellant in a number of particulars: "...he had the same bushy hair, same dark complexion, he had injuries to the left side of his face, he had a black eye, a bruised cheek wherein you could see he was notably cut on his chin". The officers felt that these injuries were consistent with having been in a vehicle accident.

[23] The judge specifically cautioned himself about the risks of relying on eye-witness identification evidence. He found the evidence of Mr. LeBlanc particularly strong, given that he had been with the appellant for 35 to 40 minutes in his vehicle and had conversed with him throughout that time. The judge also referred to the circumstantial evidence that tended to confirm the appellant’s identity including his injuries and the fact that others had identified him as a person associated with the truck shortly after the accident.

[24] In sum, the judge cautioned himself about the dangers of eye witness testimony, evaluated the opportunity of each witness to observe the appellant and the circumstances under which they did so, and gave cogent reasons for convicting the appellant. The verdict is one which a reasonable trier of fact, acting judicially, could reach on this record. The judge’s findings of fact are not inconsistent with evidence which was neither contradicted nor rejected by him.

[25] The judge did not refer to the evidence establishing that the tread pattern on the footwear impression inside the vehicle did not match the tread pattern of the appellant's shoes when he was arrested. This was not particularly probative evidence and there was no requirement in law for him to do so.

[26] In the result, I would allow the appeal from the conviction for breach of undertaking, set aside both that conviction and the sentence of four months associated with it. The judge gave the appellant four months credit for his time on remand pending trial. The appellant, therefore, must serve a sentence of 24 months, less 4 months credit, for a total of 20 months beginning on July 20, 2006.

[27] A new warrant of committal should be prepared to reflect this and I would request the Crown to prepare a draft and submit it to the Court forthwith.

Cromwell, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.