NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. O'Brien***, 2007 NSCA 3

Date: 20070110
Docket: CAC 265652
CAC 267124
Registry: Halifax

Between:

Marty David O'Brien

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Cromwell and Hamilton, JJ.A.
Appeal Heard:	December 4, 2006, in Halifax, Nova Scotia
Held:	Appeal against conviction dismissed; leave to appeal sentence granted but appeal dismissed, as per reasons for judgment of Hamilton, J.A., Roscoe & Cromwell, JJ.A. concurring
Counsel:	Donald Murray, Q.C., for the appellant (CAC 265652) Marty David O'Brien, self-represented appellant (CAC 267124) William D. Delaney, for the respondent

Decision:

[1] The appellant, Marty David O'Brien, was convicted by Justice J. E. Scanlan of counselling Brandy Lynn Richard to rob a convenience store on December 10, 2004. The conviction decision is reported at [2006] N.S.J. No. 240. In a decision reported at (2006), 244 N.S.R. (2d) 522, the judge sentenced Mr. O'Brien to two years imprisonment, to be served consecutively to a sentence he was already serving. He appealed his conviction, sought leave to appeal his sentence, and if leave was granted, appealed his sentence.

[2] Mr. O'Brien was represented by counsel at trial, but not at his sentencing. On appeal, counsel represented him with respect to his conviction appeal. He represented himself on his sentence appeal.

Background

[3] Ms. Richard was a drug addict who bought illegal drugs from Mr. O'Brien from time to time. By the time of Mr. O'Brien's trial she had confessed to robbing Elliott's convenience store in Amherst, Nova Scotia on both November 16 and December 10, 2004 to get money to buy drugs. She was serving a total prison sentence of 65 months for several crimes including those two robberies. Fifteen months of her sentence were attributed to the December robbery. Ms. Richard bought drugs from Mr. O'Brien following the November robbery, but not following the December robbery. Mr. O'Brien had been picked up by the police for questioning in connection with a theft shortly after Mr. O'Brien left Ms. Richard's residence prior to the December robbery, and was being questioned by them. His statement to the police at that time was videotaped and was in evidence at his trial.

[4] On the night of December 10 Ms. Richard robbed Elliott's with the hood of her sweater up over her head, while wearing dark Halloween type "paint" on her face. The only person in the store at the time was a 16 year old female employee.

[5] Shortly before the robbery took place, Mr. O'Brien and William Lank were with Ms. Richard at her residence, according to the testimony of Ms. Richard and the police statement of the appellant. At different places in her evidence, Ms. Richard testified about the discussions that took place at that time about the proposed robbery. She testified that during these discussions Mr. O'Brien said that

with only a young girl working at the store at that time a robbery would be easy, that the robbery would be not be hard, that Ms. Richard did not have to worry, that no one would put themself at risk for minimum wage, and that he agreed with Mr. Lank that she should "paint" her face.

[6] Mr. O'Brien was charged with three offences; being a party to and being an accessory after the fact to the November robbery and with counselling Ms. Richard to commit the December robbery. At the same trial that Mr. O'Brien was convicted of counselling Ms. Richard to commit a robbery on December 10 contrary to s.22(2) of the **Criminal Code** [R.S., c.C-34, s.1], he was acquitted of the other two charges. His acquittal on the charge of being an accessory after the fact to the November robbery was suggested by the Crown and accepted by the judge on the basis there was no evidence to support this charge. The judge acquitted him of the charge of being a party to the November robbery because he found Ms. Richard to be dishonest and was concerned about convicting Mr. O'Brien based solely on her testimony:

> [6] . . . The court is cognizant, and I remind myself throughout, that Ms. Richard is obviously a person who has shown that she in fact is willing to lie, she's willing to steal. She attempts to deflect blame as much as she can to other people for her own actions. . . . But as I said, she has been shown to be a rather dishonest person in many ways. Before I convict based on her evidence, I must ask myself, is there corroboration?

[7] The judge convicted Mr. O'Brien of counselling Ms. Richard with respect to the December robbery because of the corroborating evidence he found in Mr. O'Brien's police statement:

> [10] Marty O'Brien offered words of encouragement for her to continue with the robbery. He said he heard it was just going to be a young girl, it would be easy, not to worry about it. Those, I am satisfied, are words of encouragement.
>
> [11] Again, as to the face painting, clearly Mr. Lank was present and made a statement in relation to the makeup, but Ms. Richard, and I accept her evidence in this regard, says Mr. O'Brien agreed with the face painting, and again echoed the words that nobody would jeopardize themselves for minimum wage. **I am satisfied Mr. O'Brien, based on his own evidence together with the evidence of Ms. Richard, that he was there, he was offering those words of encouragement, that reassurance, all in**

> **furtherance of his undertaking or enterprise.** He knew if she got some money, she could buy drugs from him. He was prepared to sell the drugs once she got the money, and it was going to be easy. . . .
> [Emphasis added]

[8] The judge was incorrect when he stated that Mr. O'Brien told Ms. Richard that only a young girl was working in the store. That statement was made by Mr. Lank. In responding to Mr. Lank's statement Mr. O'Brien made his statements concerning the ease of the robbery.

[9] In his police statement Mr. O'Brien indicated that he was at Ms. Richard's residence shortly before the December robbery. He indicated she was colouring her face black to rob the convenience store, named the particular store that was to be robbed, indicated she was getting dressed to commit the robbery when he left her residence, described the clothes she was wearing and indicated that she tried to get him to meet her after she robbed the store.

Conviction Appeal

[10] I will deal first with Mr. O'Brien's conviction appeal.

[11] His two grounds of appeal with respect to conviction are:

> 1. It is submitted that the trial justice erred in law in relation to the factual and legal requirements to establish "counselling" under s.22(2) of the Criminal Code; and
>
> 2. A miscarriage of justice occurred by reason of the omission of defence counsel at trial to lead evidence that the Crown's main witness (Brandy Lynn Richard) had denied under oath at the Preliminary Inquiry that the Appellant had encouraged or suggested that she commit the robbery of Elliott's on December 10, 2004.

[12] The standard of review with respect to an error of law is correctness and with respect to an error of fact is "palpable and overriding error;" **R. v. Van der Peet**, [1996] 2 S.C.R. 507, ¶ 81. The judge's application of the law to the facts is reviewed as a question of fact unless there is an "extricable" legal error. **R. v. Buhay**, [2003] 1 S.C.R. 631, ¶ 45.

[13] With respect to his first ground of appeal Mr. O'Brien did not dispute that "counselling" includes deliberate encouragement under s.22(2) of the **Code**. (**R. v. Hamilton**, [2005] 2 S.C.R. 432, ¶ 29) He argued however that the words he said when he was with Ms. Richard prior to the December robbery did not amount to counselling because they were only made as a passive observation about a pre-determined plan and did not amount to the necessary deliberate encouragement. He argued his words were not an attempt to persuade or increase the chance Ms. Richard would commit the robbery, because the crime would have been committed with or without his words.

[14] Section 22 of the **Code**, provides:

> 22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

[15] During Ms. Richard's testimony about her discussions with Mr. O'Brien in her residence prior to the December robbery, she testified:

> Q. Okay. So you mentioned that Marty dropped in. Did you have any discussions with him about some pills?
>
> A. No, not at this time.
>
> Q. Well, what . . .
>
> A. Just more about me and Will were . . . Me and Will had talked about the robbery **and I told Will that I don't think a second one will be good so close, because they already know about it. Thinking, you know, that cops already know that it's robbed.** And that Will said that he knew that there was another kid there and that there was nobody there. And then [the appellant] said, Well, it wouldn't be that hard then. . . . [Emphasis added]

[16] This suggests Ms. Richard had not made up her mind to rob Elliott's, that she was still in the process of deciding what to do at the time Mr. O'Brien made this and his various other comments to her, contrary to Mr. O'Brien's submission that the robbery would have occurred with or without his comments.

[17] The appellant also argued that the judge erred in finding that he had a motive to counsel Ms. Richard to rob the store; namely, that he would make money from subsequently selling drugs to her. He pointed to the fact that he did not sell drugs to her following the December robbery. While motive is not an element of counselling, it may be taken into account by the trier of fact in making findings with respect to the element of intent. This is what the judge did and I am not satisfied that he erred in doing so.

[18] The appellant has not satisfied me that the judge erred in concluding that his words, considered in context, were encouragement and hence counselling. Mr. O'Brien was a drug trafficker who made money selling drugs to addicts such as Ms. Richard. He had sold drugs to Ms. Richard previously, including following the November robbery. When he met Ms. Richard prior to the December robbery she was in the process of deciding whether to commit the robbery to get money to buy drugs. His discussion with her prior to the robbery was supportive. He was not available to sell drugs to her following the December robbery because he had been picked up by the police and was at the police station being questioned. In this context I am not satisfied the judge made an error of law or a palpable and overriding error of fact when he concluded that Mr. O'Brien counselled Ms. Richard to commit the December robbery. I would dismiss this ground of appeal.

[19] Mr. O'Brien's second ground of appeal was that a miscarriage of justice occurred because his lawyer failed to lead evidence at trial of Ms. Richard's denial at Mr. O'Brien's preliminary inquiry, that he encouraged her to commit the December robbery. Mr. O'Brien argued that this failure denied the judge the opportunity to take Ms. Richard's denial into account and resulted in an unfair trial since the judge made his decision on less than all of the available evidence. He argued the lack of that evidence could have made a difference in the outcome.

[20] Ms. Richard's testimony at the preliminary inquiry included:

> Q. Okay. What about the December 10th robbery? Did, did Marty O'Brien encourage you in any way to or suggest to you to rob Elliott's on December 10th?
>
> A. No.

[21] In **R. v. Wolkins** (2005), 229 N.S.R. (2d) 222, this Court explained that a miscarriage of justice can occur either because the trial was unfair or because the conduct of the trial shakes public confidence in the administration of justice:

> [89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula ... to determine whether a miscarriage of justice has occurred": **R. v. Khan (M.A.)**, [2001] 3 S.C.R. 823; 279 N.R. 79; 160 Man. R.(2d) 161; 262 W.A.C. 161, per LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: **Fanjoy**, supra; **R. v. Morrissey** (1995), 80 O.A.C. 161; 97 C.C.C. (3d) 193 (C.A.) at 220-221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: **R. v. Cameron** (1991), 44 O.A.C. 278; 64 C.C.C. (3d) 96 (C.A.), at 102; leave to appeal refused [1991] 3 S.C.R. x; 137 N.R. 77; 55 O.A.C. 395.

[22] The important question on appeal is not simply whether Ms. Richard's preliminary inquiry testimony should have been brought to the attention of the judge, but whether the failure to do so, gave rise to a miscarriage of justice, in other words whether the appellant's trial was unfair without this testimony being brought to the judge's attention.

[23] Mr. O'Brien no longer asserts that his counsel was incompetent. The notice of appeal was previously amended to withdraw that ground of appeal.

[24] Pursuant to **R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) the appellant has the burden of showing the failure to bring this testimony to the judge's attention amounted to a miscarriage of justice since it does not arise from an error of law. The appellant asks this court to infer that the failure to present this testimony to the judge was an oversight. However he has not produced any evidence that it was an oversight as opposed to a strategic decision by his counsel.

[25] The appellant has not provided us with any case law suggesting that a single oversight of this nature has been held to give rise to a miscarriage of justice. Given the record before us and the judge's clear finding that Ms. Richard was dishonest, going so far as to acquit the appellant of the charges relating to the November robbery without evidence to corroborate her testimony of the appellant's involvement, I am satisfied this failure did not give rise to an unfair trial resulting in a miscarriage of justice. I would dismiss this ground of appeal.

Sentence Appeal

[26] I will now deal with Mr. O'Brien' s sentence appeal.

[27] Mr. O'Brien set out several grounds of appeal in his factum but at the hearing his only argument was that his sentence was too long given the small role he supposedly played in the December robbery. He argued that he was sentenced as though he had committed and benefited from the robbery, which no one testified he had. He argued that his sentence was too long in relation to that of Ms. Richard.

[28] In its factum, the respondent correctly outlined this Court's function on a sentence appeal such as this:

> 9. The Court of Appeal's function in considering the "fitness of sentence" is to determine whether there was an error in principle, a failure to consider a relevant factor, an over-emphasis of appropriate factors, or that the sentence is "demonstrably unfit" or "clearly unreasonable".
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> **R. v. C.A.M.**, [1996] S.C.J. No.28 (S.C.C.) at para.90.
>
> 10. Where there is no issue of error of principle or a failure to properly consider sentencing factors then the only area of review on appeal is the unreasonableness or unfitness of sentence. In that situation the review is based upon a determination of whether the sentence falls outside an acceptable range.
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> 11. In **R. v. Shropshire**, [1995] S.C.J. No.52 (S.C.C.) the following statement by Hallett, J.A. (Roscoe, J.A. concurring) in **R. v. Muise** (1995), 94 C.C.C. (3d) 119 (N.S.C.A.) was quoted with approval by the Supreme Court of Canada at paragraph 48:

> The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts.... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.

[29] Mr. O'Brien has not satisfied me that his sentence was clearly excessive and hence demonstrably unfit or clearly unreasonable. To compare his sentence to that of Ms. Richard for the December robbery is not helpful because of the significant differences in the circumstances of the offenders. Mr. O'Brien's criminal record goes back over 25 years with 68 convictions, one of which was a robbery for which he was sentenced to three years in prison. Ms. Richard was a first time offender and her fifteen month sentence was part of a 65 month sentence which included several other offences, engaging the totality principle of sentencing.

[30] Accordingly, I would dismiss the appeal from conviction, grant leave to appeal sentence and dismiss the appeal from sentence.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.