NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacDonald***, 2008 NSCA 53

Date: 20080618
Docket: CAC 289353
Registry: Halifax

Between:

Craig Douglas MacDonald

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Bateman and Saunders, JJ.A.
Appeal Heard:	May 21, 2008, in Halifax, Nova Scotia
Held:	Appeal allowed, conviction set aside and acquittal entered per reasons for judgment of Bateman, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	Robert M. Gregan, for the appellant Mark A. Scott, for the respondent

Reasons for judgment:

[1] Mr. MacDonald appeals his conviction for theft over five thousand dollars contrary to s. 334(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Alternatively, he seeks leave to appeal sentence.

BACKGROUND

[2] The property stolen was a Nomad travel trailer, belonging to an American, Richard Metro. It was taken from Mr. Metro's beach front property in Fox Harbour, Cumberland County, Nova Scotia some time between the 11th and 13th of October, 2005.

[3] A second charge against the appellant relating to the theft of a garden tractor from Mr. Metro's property was dismissed when the Crown elected not to proceed.

[4] It was the Crown's theory that the appellant and a Joey Fagan, who was charged with the theft on a separate Information, together hatched a plan to steal the trailer and sell it to Rodney Nima, who lived in Cape Pelé, New Brunswick.

[5] It is uncontradicted that Rodney Nima "purchased" the trailer from Joey Fagan and, possibly, the appellant. At Rodney Nima's request, his father and a friend towed the trailer from Fox Harbour, Nova Scotia to Mr. Nima's home. It was recovered from that site by the RCM Police.

[6] The appellant admitted that at Joey Fagan's request he posed as the owner of the trailer. He purported to be a person by the name of "Craig Metro", who had inherited the trailer from his uncle. It was the appellant's evidence that he was not involved in developing the plan to steal the trailer. His role was limited to providing the receipt, in return for which he was to be paid $500 by Joey Fagan. The appellant says he thought the trailer rightfully belonged to Joey Fagan. He testified that he was told by Joey Fagan that he and his wife were moving to Fort McMurray and needed to sell their trailer. Fagan told the appellant that he had a buyer for the trailer but needed a receipt from a third party so that his family would not know he was selling property he had inherited from his uncle, whose name was Richard Metro.

[7] The appellant testified that he attended with Mr. Fagan at Rodney Nima's residence in Cape Pelé, New Brunswick, after the trailer had been taken there. He provided Mr. Nima's wife with a receipt. He further testified that Rodney Nima paid Mr. Fagan for the trailer in drugs, not cash. The appellant never received the promised $500 nor did he share in the drug payment.

[8] Key witnesses at the appellant's trial were Joey Fagan, Rodney Nima, his brother Wayne Nima (who had bought the garden tractor) and their father, Lloyd Nima, who transported the trailer from Fox Harbour to Cape Pelé. All these witnesses were charged, on separate Informations, with theft of the trailer.

ISSUES

[9] The appellant alleges the following errors:

> The learned trial judge erred in law in convicting the accused, given that any allegations against the accused of offence(s) committed, according to the evidence, are of offence(s) that occurred in the Province of New Brunswick.
>
> The learned trial judge misapprehended the evidence and assumed facts not in evidence.
>
> The learned trial judge failed to properly apply the principles of reasonable doubt.

STANDARD OF REVIEW

[10] A trial judge's factual findings and inferences from facts are insulated from review unless demonstrating palpable and overriding error. On questions of law the trial judge must be correct. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and, therefore, be subject to a standard of correctness (**Housen v. Nikolaisen**, 2002 SCC 33; **R. v. Buhay**, 2003 SCC 30; **R. v. Mann**, 2004 SCC 52; **R. v. Couture**, 2007 SCC 28; **R. v. Clark**, 2005 SCC 2).

[11] Where the appellant is claiming that the verdict is unreasonable the standard is that outlined by Fichaud, J.A. in **R. v. Abourached**, 2007 NSCA 109; [2007] N.S.J. No. 470 (Q.L.):

> [29] I will consider whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge. I will also consider the traditional *Yebes/Biniaris* [[1987] 2 S.C.R. 168 and [2000] 1 S.C.R. 381] test, preferred by Justice Charron in *Beaudry* [[2007] 1 S.C.R. 190], whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

ANALYSIS

[12] The trial commenced at 11:36 a.m. on September 20, 2007 with the evidence and closing submissions ending at approximately the same time the following day. Eleven witnesses testified. After recessing briefly the judge provided his oral reasons for judgment (now reduced to writing and reported as 2007 NSSC 385).

[13] The issues identified by the judge were: (i) the extent of the appellant's involvement in the offence charged; and, (ii) whether any element of the offence occurred within Nova Scotia (reasons for judgment, para. 2).

[14] The main evidence directly relating to the offence came from witnesses Joey Fagan, Rodney Nima, Wayne Nima and the appellant. Each witness had a different, convoluted story about the events and each professed to have difficulties with recall. The theft of the trailer occurred in October of 2005. The trial took place about two years later.

[15] Mr. Fagan was said to be the appellant's accomplice in disposing of the trailer. His evidence at trial was confused, internally inconsistent and, in large measure, incomprehensible. He testified that because he had a bad drug habit at the time of these events he could not remember details. He wholly disavowed his statement to the police, made shortly after the theft, testifying that the statement was unreliable because he was "completely messed up" at that time. He did not clearly implicate the appellant in the theft beyond his provision of the receipt. Nor did he acknowledge that there was an advance plan to sell the trailer. It seemed to be his evidence that the plan for the appellant to provide the receipt may have been

hatched when they happened by Rodney Nima's property in Cape Pelé, New Brunswick and saw the trailer there.

[16] Wayne Nima's evidence was similarly confused and contradictory. He testified that Mr. Fagan and the appellant approached him outside his home in Port Elgin, New Brunswick about buying a tractor. It was Mr. Fagan who took him to Fox Harbour to see the tractor. His evidence is unclear as to how the "sale" of the trailer to his brother Rodney Nima came about.

[17] Rodney Nima testified that he heard about the opportunity to buy the trailer through his brother, Wayne. He did not know who was with him the night he went to see the trailer nor with whom he negotiated the price. He didn't recall seeing the appellant before he showed up at his home and provided the receipt. He could not recall to whom he paid the money for the trailer. He denied that he paid for the trailer with drugs.

[18] As reviewed above, the appellant testified that his only involvement in the matter was to provide a receipt, pretending to be "Craig Metro". He believed that the trailer belonged to Mr. Fagan. Mr. Fagan needed the appellant to supply the receipt because the Nima's, who were buying the trailer, were known to the Fagan family, and Mr. Fagan was concerned his family would find out about the sale. There was no evidence from the appellant as to where (as between New Brunswick and Nova Scotia) he and Mr. Fagan discussed his involvement in the transaction.

[19] The judge was understandably frustrated and dissatisfied with the quality of the evidence before him. He observed in his reasons for judgment:

> [9] Mr. MacDonald, just about everybody in this case has lied, and that includes you. You attempt to minimize your involvement in this case. You knew about the tractor. You knew about the trailer. You knew where they came from. You knew you were the cover for Joey Fagan. That's how you got involved. That's why you signed your name "Craig Metro". You could have signed it "Craig MacDonald". Mr. Metro's nephew didn't have to be Craig Metro. It could have been Craig MacDonald. You were surprised when you had to sign a receipt, because these people, even if you look at the receipt, it's not very sophisticated. It's about as bare bones a receipt as you ever want to see. They weren't very sophisticated in terms of getting the goods, but they insisted on a receipt. The father asked, "Do you have a receipt?" and he said yes, and it was signed by Craig Metro.

> [10] . . . As I said, as I listened to the evidence, it was a den of drug dealers and thieves scamming one another, and you were in it up to your broken neck.
>
> [11] I am satisfied, beyond a reasonable doubt, that that scheme was hatched in Nova Scotia, the property was removed from Nova Scotia, and you left Nova Scotia with Joey Fagan to go up and finish off the deal and pick up not the money, but the dope, so you could be paid. I am satisfied, beyond a reasonable doubt, as to your guilt, Mr. MacDonald. For the record, every time I refer to Craig Metro, I intended to refer to Craig MacDonald.
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> (Emphasis added)

[20] The essence of the appellant's argument is that the verdict is unreasonable in that the reasons for judgment do not resolve key credibility issues and, given the confusing and contradictory evidence, it is impossible to discern the path to conviction from the reasons for judgment (citing **R. v. Dinardo**, [2008] S.C.J. No. 24 (Q.L.)). He further submits that the record cannot support a conviction.

[21] In **R. v. Sheppard**, [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30 (Q.L.), Binnie, J., writing for the Court, discussed the ways in which reasons may be so deficient as to prevent proper appellate review. His comments are particularly apt here:

> 28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.
>
> (Emphasis added)

[22] In assessing the sufficiency of reasons, an appellate court must conduct a contextual assessment, asking whether the reasons respond to the live issues in the case (**R. v. Dinardo**, **supra**, *per* Charron, J., at para. 25). The issue is whether the reasons for judgment, considered in the context of the record, are so deficient as to prevent meaningful appellate review. The Court in **Dinardo** continued:

> 26 At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt":
>
> > Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
> >
> > This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt. [paras. 20-21]
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> 27 Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (*Sheppard*, at para. 55). Here, the complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal.

. . .

> 32 This Court emphasized in *Sheppard* that no error will be found where the basis for the trial judge's conclusion is "apparent from the record, even without being articulated" (para. 55). If the trial judge's reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record. This exercise is not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge. Where the trial judge's reasoning is not apparent from the reasons or the record, as in the instant case, the appeal court ought not to substitute its own analysis for that of the trial judge (*Sheppard*, at paras. 52 and 55).
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> (Emphasis added)

[23] Here, after observing that all of the key witnesses had lied during the proceedings, the judge did not indicate what, if any, evidence of the individual witnesses he accepted. I would agree with the appellant that it is impossible to ascertain from the reasons for judgment or from the record, the evidence upon which the judge relied in finding the appellant guilty of the offence. In fact, the evidence adduced at trial was so contradictory and lacking that, with respect, no reasonable trier of fact properly instructed could have returned a conviction (**R. v. Morrisey**, [1995] O.J. No. 639 (C.A.) at para. 87; **R. v. Reid**, 2003 NSCA 104 at para. 94; [2003] N.S.J. No. 360 (Q.L.)). I would conclude that the verdict is unreasonable. Thus the conviction cannot stand.

[24] The Court's power to quash a conviction derives from s. 686(1)(a) of the **Criminal Code**:

> 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

[25] This Court's options as to remedy are to direct a judgment of acquittal or order a new trial (s.686(2)). While a finding of insufficient reasons generally leads to a new trial, where the record cannot support a conviction, it is appropriate to enter an acquittal.

DISPOSITION

[26] I would allow the appeal, set aside the conviction and enter an acquittal.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.