NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. McAllister*, 2008 NSCA 103

Date: 20081029
Docket: CAC 292717
Registry: Halifax

Between:

William Randall McAllister

Appellant

v.

Her Majesty The Queen

Respondent

Judges: Oland, Hamilton and Fichaud, JJ.A.

Appeal Heard: October 9, 2008, in Halifax, Nova Scotia

Held: **Appeal against conviction dismissed; leave to appeal sentence granted but appeal dismissed per reasons for judgment of Oland, J.A.; Hamilton and Fichaud, JJ.A. concurring.**

Counsel: Robert L. Rideout, for the appellant
Mark Scott, for the respondent

Reasons for judgment:

[1] The Amherst Justice Centre was broken into between its closing on June 25, 2007 and its opening the following day. Cash and cheques were stolen from a safe on the third floor. On January 16, 2008 Provincial Court Judge Robert Stroud convicted the appellant, William Randall McAllister, of break and enter and theft contrary to s. 348(1)(b) of the *Criminal Code*, and of four breaches of a recognizance order (s. 145). He sentenced him to three years' incarceration in a federal institution for the break and enter and theft, and time served for the breaches.

[2] For the reasons which follow, I would dismiss Mr. McAllister's appeal against conviction. While I would grant leave to appeal against sentence, I would dismiss the appeal itself.

Background

[3] Deputy Sheriff John Davies and Sergeant Blakeney of the Amherst Police Department went through the Justice Centre to ascertain how the building was entered. They found two doors, on the ground floor, in an area that is somewhat dark, which showed evidence of prying. According to the Deputy Sheriff's testimony at trial, he and Sergeant Blakeney thought that two people might have been involved in the break-in.

[4] The police received information that implicated Mr. McAllister, James Titus, and another person, and that the three were at the Five Islands campground. Mr. Titus was arrested there, both as a suspect for the break-in and on outstanding warrants. When first questioned by the RCMP about the break-in, he denied any involvement and stated that he did not know who did it. Only after his breach charges were resolved in court did Mr. Titus give a statement that Mr. McAllister had told him that he and Jeremy Williams had broken into a courthouse. He repeated this statement at trial. Mr. Titus also testified that Mr. McAllister had told him that he used a pry bar on a back door of the building, that he broke into a safe, and that while the sensor did not go off when Mr. McAllister went in, it did when he left.

[5] At trial, the Crown called Jeremy Williams as one of its witnesses. Mr. Williams stubbornly evaded questions or was non-responsive. The judge ruled him to be a hostile witness. After being told that he could be cited for contempt of court, Mr. Williams testified that he broke into the courthouse. He maintained that no one was with him. Eventually he indicated that he knew Mr. McAllister, and had met him at a friend's house in Amherst. Mr. Williams' determined and continued refusal to co-operate led the judge to again consider finding him in contempt. However, he released the witness without sanction. The judge did not call upon defence counsel for cross-examination before Mr. Williams left the stand.

[6] Other than a single finger print attributable to Jeremy Williams, there was no physical evidence at the scene which tied anyone to the break-in.

[7] In his decision, the judge stated that, despite Mr. Titus' criminal record, his evidence had the ring of truth to it. He further stated that Mr. Williams was obviously protecting someone and that, based upon Mr. Titus' evidence, that person was Mr. McAllister. He found that Mr. McAllister was involved with Mr. Williams in the break-in, and that the Crown had proven all the elements of the offence beyond a reasonable doubt. At a sentencing hearing, he stressed deterrence and protection of the public in imposing a sentence of three years' imprisonment for the break and enter and theft.

Issues:

[8] The appellant identified the two main issues on the appeal against conviction, namely, whether the judge erred in law by not permitting the defence to cross-examine Jeremy Williams, and whether he erred by relying on the evidence of James Titus. In regard to the latter issue, the appellant submits that the judge failed to properly apply the principles of reasonable doubt, and failed to properly consider a *Vetrovec* warning in regard to the testimony of the Crown's key witness. His remaining issues submit that the judge failed to follow the correct procedure for declaring a witness hostile, and that he misapprehended the evidence and erred by accepting opinion evidence from a non-expert witness.

[9] The issues on the appeal against sentence can be collapsed into one, namely, whether the judge erred in imposing a sentence that was demonstrably unfit in all the surrounding circumstances.

The Right to Cross-Examination

[10] In his decision, the judge described Jeremy Williams as the most difficult and defiant witness he had experienced in 21 years on the bench. It is clear from the transcript that his refusal to answer the prosecutor's questions in a straight-forward manner or at all frustrated the Crown counsel and the judge. After the Crown counsel asked, for the second time, that Mr. Williams be cited for contempt and allowed to consult with a lawyer before being brought back another day to complete his testimony, Mr. Williams interjected that, if he were brought back, "it's just going to be the same thing."

[11] The record shows the following exchange between the judge and Crown counsel:

> **THE COURT:** I don't really think . . . no matter how many times we cite him and put him in jail and bring him back and so on, he's not going to cooperate. So I guess there's no point in asking him any more questions, Mr. Baxter, unless you insist on trying to go ahead but . . . and unless you . . .
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> **MR. BAXTER:** No, I'll have my chance with Mr. Williams at a future date, Your Honour.
>
> . . .
>
> **THE COURT:** Yeah. We tried to do everything we could to help the situation, not to help convict Mr. McAllister because that's going to be my decision. That'll be based upon all the evidence when the time comes. But simply to speed up the process, it looks like the only way to speed it up is to release Mr. Williams under whatever commitment he's here today on. And I'm sure I'll likely be seeing him again.
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> **WITNESS WITHDRAWS: (TIME: 16:19 hrs.)**
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> **MR. BAXTER:** So that's going to be the evidence for the Crown, and I'm tendering the exhibits, Your Honour.

MR. RIDEOUT: The Defence will not be calling any evidence.

[12] As is apparent from the record, the judge did not call on defence counsel to cross-examine Mr. Williams, nor did he ask if he wished to do so, before allowing the witness to withdraw.

[13] The right of an accused to cross-examine witnesses for the Crown without significant and unwarranted constraint is an essential component of the right to make full answer and defence: see *R. v. Lyttle*, 2004 SCC 5 at ¶ 41 citing *R. v. Seaboyer,* [1991] 2 S.C.R. 577 at p. 608. It is a right protected by ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and, while not to be abused nor absolute, it is a right to be jealously protected and broadly construed: *Lyttle* at ¶ 43-45. The appellant argues that he was denied this right, and that a new trial should be ordered.

[14] It is noteworthy that in this case, defence counsel did not object to the judge allowing the witness to withdraw without cross-examination. He did not ask the judge to have Mr. Williams recalled for that purpose, nor did he insist on the right to cross-examine. After the Crown indicated that, with Mr. William's withdrawal, it was closing its case, defence counsel simply stated that the defence would not be calling any evidence.

[15] It being late in the afternoon when Mr. Williams left the witness stand, the hearing ended for the day shortly afterwards, and was adjourned for five days. At the outset of the resumed hearing defence counsel advised the court that the defence would not be calling any evidence. He did not ask then that Mr. Williams be recalled for cross-examination, nor did he object to the fact that the judge had not called on him. In the course of his closing argument, defence counsel merely noted that he had not gotten a chance to cross-examine Mr. Williams. He added that he did not know what weight the court wished to place on that witness' testimony, other than the fact that Mr. Williams had admitted to the break-in and said he had done it alone.

[16] The appellant's counsel at the hearing of the appeal had been his defence counsel at trial. He advised this court that, when the judge did not call upon him and allowed Mr. Williams to withdraw, he did not ask that the prosecution witness be recalled, request that he be permitted to cross-examine him, or make any objection, because he was so "shocked" and "very surprised" by what had

transpired. It seemed to him that the court did not want to hear any more from Mr. Williams. The appellant's counsel told this court that he had wanted to ask that witness questions to verify Mr. Titus' testimony of his interaction with Mr. Williams, which could go to the reliability of Mr. Titus' evidence. He did not know how the judge would have responded if he had asked to cross-examine Mr. Williams. He also agreed that the witness was within reach, still in the courtroom, when he advised the court that the defence would not be calling any evidence.

[17] The appellant's counsel acknowledged that he was not still in shock from Mr. Williams' withdrawal as a witness, when the hearing resumed after the five day adjournment. He agreed that at that point, he had made a strategic decision not to ask the judge to recall the witness for questioning.

[18] The judge's failure to call upon defence counsel for any cross-examination of a prosecution witness is a clear procedural irregularity. Had the defence asked to cross-examine the Crown's witness and had the judge declined the request, I would have no difficulty allowing an appeal from conviction and ordering a new trial. It would not be for the appeal court to speculate what the witness would have said in response to the hypothetical cross-examination or how these answers would have impacted the judge's findings.

[19] However, here not only did defence counsel not ask the judge for that opportunity, but he made a conscious decision not to do so. Where, after deliberation and for strategic reasons, his own counsel decided not to object or to insist on the right to cross-examination of the Crown's witness, I cannot accept that the judge's oversight compromised trial fairness or that, as a result of this, the appellant suffered prejudice. See *R. v. Rose*, [1998] 3 S.C.R. 262 at ¶ 115. I would dismiss this ground of appeal.

Credibility and Reasonable Doubt

[20] I turn then to the appellant's second main issue, which pertains to the judge's acceptance of evidence of James Titus which implicated him. Mr. McAllister argues that the judge's finding that the testimony of Mr. Titus had a ring of truth to it is an unsupportable inference from that witness' evidence at trial, and that the judge failed to properly apply the principle of reasonable doubt. He emphasizes that Mr. Titus stated that he had a bad memory and was not sure of a number of

details, and that in one respect, his evidence appears to be contradicted by that of other witnesses.

[21] Mr. Titus did state that he had a poor memory and was uncertain as to various details. The judge, who heard the entirety of his evidence, including his responses under cross-examination as to those matters, assessed their significance and did not accept that he was not to be believed. Moreover, my review of the record shows that those matters where the witness stated that he was uncertain pertained to minor and peripheral, rather than to substantial, aspects of his evidence. Throughout his testimony, Mr. Titus maintained that Mr. McAllister had told him that he was involved in the break-in, and added particulars in regard to that event.

[22] The appellant also pointed out that, according to Mr. Titus, Mr. McAllister told him that a sensor had gone off when he left the building, but had not when he went in. The supervisor of court administration at the Amherst Justice Centre testified that it does not have an alarm system. According to Sheriff Davis' evidence, the building is equipped with an alarm system, but he did not know if it is or is not active.

[23] I reject the appellant's arguments that this showed that Mr. Titus was making assumptions in his testimony, or that the judge erred in not dealing with this in his decision. The issue was addressed in cross-examination and in defence counsel's closing argument, which the judge described as forceful and capable. It was open to the judge to conclude that this is what the witness had been told or that the witness was mistaken, and nonetheless convict. He is not required to deal with every aspect of the evidence in his decision.

[24] In the absence of a palpable and overriding error, a trial judge's findings of credibility are entitled to deference: see *R. v. Gagnon*, 2006 SCC 17 at ¶ 10 and *R. v. Dinardo*, 2008 SCC 24. Immediately before he gave his oral decision on the break and enter and theft, the judge heard the submissions of the Crown counsel and of defence counsel. It is evident that the judge was very much alive to the difficulties with Mr. Titus' evidence and arising from his background. In his decision, he referred to "the very forceful submission" of defence counsel which set out in detail why Mr. Titus' testimony should not be accepted, including the witness having himself been a suspect in the break-in and the fact that he did not implicate Mr. McAllister right away, and his criminal record. That he had considered – and

rejected – that vigorous closing argument is obvious from his decision when the judge stated that:

> In spite of that [very forceful submission], I was somewhat impressed by Mr. Titus. In spite of his criminal record, his evidence had a ring of truth to it to me. I did not get the impression he was trying to shift the blame to someone else to protect himself.

[25] The appellant also submits that, since Mr. Titus was an unsavoury witness and a primary Crown witness, before the judge placed any reliance on his testimony he should have given himself the caution described in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. *Vetrovec* warnings were discussed by this court in *R. v. T.L.*, 2003 NSCA 44. It is readily apparent from his decision that this experienced trial judge was alive to the issues raised by Mr. Titus' criminal background and his testimony implicating the appellant. Even where, as here, it may be appropriate to approach evidence with caution, it is not essential that the judge verbalize the warning to himself. As *R. v. Morrissey*, [1995] O.J. No. 639 (Q.L.)(C.A.) states at ¶ 30:

> 30 A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.

[26] In summary on the several aspects pertaining to this issue, I am not persuaded that the judge erred by failing to include a self-caution in accordance with *Vetrovec* in his decision or that, in assessing Mr. Titus' evidence, he failed to properly apply the principles of reasonable doubt. Nor do I see any palpable and overriding error which would permit appellate intervention in regard to the judge's finding as to the credibility of that Crown witness. I would dismiss these grounds of appeal.

Hostile Witness

[27] According to the appellant, the judge did not follow proper procedures with regard to the declaration of a hostile witness. He says that there was no prior

inconsistent statement and no hearing on the basis of s. 9(1) of the *Canada Evidence Act*, R.S. 1985, c. C-5 which reads:

> 9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

[28] At trial, none of the Crown, the defence counsel, nor the judge referred to that provision, and Mr. Williams was not confronted with a prior inconsistent statement. The Crown simply sought leave to cross-examine Mr. Williams on the basis that it was clear from both his demeanor and answers that he was a completely hostile witness. The judge agreed. The Crown and the court were operating under the common law regarding a hostile witness, which was summarized in *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.J. No. 562 (Q.L.)(C.A.), appeal dismissed in [1963] S.C.J. No. 8, [1963] S.C.R. 154 on other grounds, as follows:

> 127 ...
>
> (2) Whether a witness is hostile in mind is a question of fact. To determine this collateral issue a trial Judge should hear all and any evidence relevant to that issue. The fact that a witness has made a previous contradictory statement is relevant, admissible and most cogent evidence on that issue and that evidence alone may be accepted by the Judge as sufficient proof of the hostility of the witness irrespective of the demeanor of and manner of the witness in the witness-box. (It is also of course open to a trial Judge to rule that a witness is hostile solely by reason of his manner of giving evidence and demeanour in the witness-box.)

(Emphasis added)

[29] Where the Crown and the court were operating under the common law regarding a hostile witness, the judge made no procedural error in declaring the witness hostile. I would dismiss this ground of appeal.

Expert Evidence

[30] The appellant candidly acknowledges that his submission that the judge misapprehended the evidence and erred by accepting the opinion of Deputy Sheriff Davis as to the possible number of persons involved in the break and enter, is not a significant one. I agree with his assessment.

[31] Deputy Sheriff Davis had been a Deputy Sheriff for approximately 19 years and was the Site Supervisor for Sheriffs at the Amherst Justice Centre. At trial, he indicated that he and Sergeant Blakeney, a police officer for over 30 years, discussed the possibility that "maybe there were two people" at the two doors that showed signs of prying. The Deputy Sheriff testified:

> I'm not an investigator . . . but there are certain common-sense things that I think you don't need to be a professional to figure out, okay. Some of these areas are dark, so obviously somebody had to hold a light or they had to have a headlamp on or something. So there might even have been another person with him; I don't know. They had to see to do some of this work, okay. You got two doors pried, and one finished the job by opening one. So . . .

[32] In response to defence counsel's immediate objection that the Deputy Sheriff's evidence amounted to speculation, the judge agreed that there was a certain amount of speculation. In his decision, he stated that he did not feel it was expert testimony:

> It was just based upon their observations and experience and, as Deputy Davis said, it made common sense to him that it would take more than two people to do it. I agreed with that common-sense approach or observation.

[33] Opinion evidence is not restricted to persons declared experts. If able to accurately express the facts he perceived, a lay witness is permitted to testify in the form of an opinion, provided the probative value of the evidence is not outweighed by policy considerations such as the danger of confusing issues or misleading the jury, unfair surprise to a party, and undue consumption of time in adducing the evidence: see *Graat v. The Queen*, [1982] 2 S.C.R. 819 at pp. 14 - 15 (Q.L.).

[34] I would dismiss this ground of appeal.

Sentence Appeal

[35] In his sentencing decision, the judge described the appellant's young offender record as "horrendous", without a doubt the worst he had seen. He saw no mitigating factors other than the fact that this break and enter and theft was Mr. McAllister's first offence as an adult. After referring to three years as the starting point for this type of offence and considering various cases, he continued:

> As I started to say, deterrence and protection of the public must be stressed in this case. Deterrence to a person who breaks and enters, especially someone who breaks and enters for the eighth time, in this case, is a paramount consideration, and also to others who commit this kind of crime.
>
> However, with his dismal Youth Court record, some hope must be held out for the accused in his first conviction as an adult, especially when one considers his age. There is always hope that someone in the future or sometime in the future, Mr. McAllister may be rehabilitated and returned to society as a useful citizen.
>
> It may very well be that in a federal institution, some rehabilitation can take place with this young man. He can receive help, including psychiatric help and hopefully, if he is a strong-willed person, he can straighten himself out.

The judge sentenced the appellant to three years incarceration in a federal institution. The appellant submits that the judge erred in imposing a sentence that was demonstrably unfit in all of the surrounding circumstances, by placing too much emphasis on a concept equivalent to general and specific deterrence rather than rehabilitation, and by imposing a sentence which was harsh and excessive in the circumstances. I am unable to agree.

[36] The standard of review on a sentence appeal was set out in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28 (Q.L.). There, Lamer, C.J.C. , for a unanimous court, said:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. . .
>
> [91] . . . The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while

> at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[37] In reviewing sentences imposed by trial judges, Appellate courts must show great deference and intervene only where the sentence is demonstrably unfit: *R. v. L.M.*, 2008 S.C.C. 31, [2008] S.C.J. No. 31 (Q.L.), at ¶ 14 and 15.

[38] The starting point of three years' imprisonment for break and enter and theft which the judge mentioned in his decision derives from *R. v. Zong*, [1986] N.S.J. No. 207 (Q.L.)(N.S.S.C.A.D.). There, Clarke, C.J.N.S. for a unanimous court stated:

> This Court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years' imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant.

The sentencing judge correctly noted that the benchmark could be offset one way or the other for mitigating or aggravating circumstances.

[39] The appellant's criminal record includes three break and enters and a theft in 2002-2003, three break and enters in 2005, and one in 2006. He has also been sentenced for other offences including assault, assault with a weapon, possession of stolen property, and for numerous breaches of court orders. The majority of the convictions and sentences arose when Mr. McAllister was a mature young person, that is 16 or 17 years old. He has been incarcerated several times as a youth. In her victim impact statement, the supervisor of court administration at the Amherst Justice Centre recounted that, earlier that year, she had participated in a restorative justice healing circling which involved the appellant who had been involved in a previous break-in at the courthouse, and he had expressed his remorse for that offence to her then.

[40] The sentencing judge was cognizant of the three year benchmark and that that guideline could be adjusted for particular circumstances. He considered mitigating and aggravating circumstances, and the appellant's record as a young offender. As the appellant acknowledges, the judge was entitled to look at failed efforts of

rehabilitation in determining sentence. While he stressed deterrence and protection in this case, the judge expressly stated that some hope must be held out for Mr. McAllister on his first conviction as an adult, and especially in view of his age.

[41] I am not persuaded that the sentencing judge erred in principle, failed to consider a relevant factor, or overemphasized appropriate factors or, that the sentence he imposed at trial is demonstrably unfit.

Disposition

[42] I would dismiss the appeal against conviction. While I would grant leave to appeal against sentence, I would dismiss the appeal against sentence.

Oland, J.A.

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