NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Hobbs, 2010 NSCA 32

Date: 20100414
Docket: CAC 316120
Registry: Halifax

Between:

Kevin Patrick Hobbs

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Oland, and Beveridge, JJ.A.
Appeal Heard:	February 24, 2010, in Halifax, Nova Scotia
Held:	Application dismissed
Counsel:	Luke A. Craggs, for the appellant Ann Marie Simmons, for the respondent

Reasons for judgment:

[1] The appellant, Kevin Patrick Hobbs, sought an order for process to issue compelling the trial Crown Attorney to be examined concerning background information obtained by that attorney and used by him during the jury selection process. The application was dismissed with reasons to follow. These are our reasons.

BACKGROUND

[2] A jury found the applicant guilty of having in his possession, for the purpose of trafficking, in excess of three kilograms of cannabis marihuana, contrary to s. 5(2) of the *Controlled Drugs and Substances Act* and of unlawfully producing cannabis marihuana, contrary to s. 7(1) of that *Act*. Between the date of the jury finding and sentence, Crown Attorney James Whiting wrote to the defence. He advised that the police had conducted background checks on the jury pool at the request of the Crown. The letter from Mr. Whiting detailed the steps that were taken, the type of information gathered, and confirmed the information was used by the Crown in its exercise of peremptory challenges during jury selection.

[3] This disclosure prompted an application by Mr. Hobbs to the trial judge for a mistrial or a judicial stay of proceedings. The trial judge, the Honourable Justice C. Richard Coughlan, in a decision now reported (2009 NSSC 257), ruled he was *functus* and hence did not have jurisdiction to entertain the motion. The applicant was subsequently sentenced to 30 months incarceration.

[4] Mr. Hobbs has appealed to this court from conviction and sentence. The conviction appeal focuses on the gathering of background information by the police, and its use by the Crown during jury selection. The applicant contends that the trial judge erred in finding he did not have jurisdiction to consider the motion for a mistrial or judicial stay of proceedings and, in any event, there was a miscarriage of justice as a result of the Crown misusing police resources to obtain information about members of the jury pool, failing to disclose this information to the defence, and using the information in the exercise of its peremptory challenges.

[5] The applicant was granted bail pending appeal on this and another outstanding appeal before this court (2009 NSCA 101).

THE APPLICATION PROCESS

[6] The hearing of the applicant's appeal from conviction and sentence was scheduled for January 20, 2010. However, Mr. Hobbs was dissatisfied with the extent of the information concerning the gathering and use of the background information on members of the jury pool. He applied pursuant to s. 683(1) of the *Criminal Code* for two orders: the first, for production of documents in control of the Public Prosecution Service of Canada and the RCMP; the second, to compel trial counsel James Whiting and Cst. Slaunwhite of the RCMP to be examined, preferably before the panel hearing the appeal.

[7] Since only the court can grant the relief sought, the panel heard the application commencing January 20, 2010. No affidavit was filed in support of the application, nor in reply. Both parties filed written submissions. The court heard oral submissions on that date.

[8] As will be developed later in these reasons, it does not appear that the parties have any dispute over the basic facts. The Crown concedes that the record checks carried out by the police should have been disclosed to the applicant before the jury selection process. The Crown further acknowledged that the court should receive evidence to establish what happened and why. As of January 10, 2010, the Crown had not yet completed the process of gathering information, both documentary and otherwise, to shed light on these questions. Depending on what was eventually produced by the Crown in fulfilment of this process, it was at least possible there would be a formal agreed statement of facts. By consent, the application was adjourned to February 17 and then February 24, 2010.

[9] On February 15, 2010, the Crown respondent filed its own application for an order permitting the admission of fresh evidence on the appeal. In support of the application they filed a volume of materials. Included in the volume is an affidavit of an assistant employed by the Public Prosecution Service of Canada. She deposes that the volume of materials attached to her affidavit has been disclosed to the applicant.

[10] By way of overview, the material recounts the sequence of events leading up to and following the receipt of the information. The material consists of statements

prepared by two of the police officers involved in performing data base checks on the individuals on the jury list and a statement prepared by James Whiting outlining his involvement in the jury vetting process. Various pieces of correspondence and email messages are included.

[11] The Crown contends that the disclosure material provided to the applicant creates a sufficient foundation for him to argue, and for this court to decide, the ground of appeal alleging there was a "miscarriage of justice arising as a result of the lead investigator and the Crown Prosecutor mis-using police resources to obtain information about members of the jury pool, using this information during jury selection, and failing to disclose it to the defence".

[12] On February 24, 2010, the applicant refined his prayer for relief. He abandoned his request for an order for production under s. 683(1)(a) of the *Code*. He now seeks only to examine trial counsel, Mr. Whiting. In addition, he agreed that the volume of material filed by the Crown should be admitted before this court, with or without an examination of Mr. Whiting. Nonetheless, he still seeks an order directing that Mr. Whiting be examined either before the court or in some alternate manner, as permitted by s. 683(1)(b).

PRINCIPLES

[13] The only explicit statutory guidance in how the court is to exercise the power to compel a witness to be examined is that the court may do so where it considers it is "in the interests of justice". The relevant portions of s.683 (1) are:

> 683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> > (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
> >
> > > (i) to attend and be examined before the court of appeal, or
> > >
> > > (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

> (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[14] It is hard to imagine a broader scope to a discretion than one that is to be exercised "in the interests of justice". Nonetheless, it is not a discretion without limit. An examination can only be ordered for a witness who would have been compellable at the trial. In addition, the power is constrained by the context in which it is given, that is, for the exercise of the court's appellate jurisdiction. This is emphasized by the very words of s. 683(1) that stipulate that the enumerated powers are to be exercised "For the purposes of an appeal under this Part".

[15] It is a well recognized principle that trials are meant to be and, absent an appeal, are a final disposition of the specific charges against an accused. An appeal is patently not a re-hearing of the case for and against an accused. Appeals are limited to a review by an appellate court (where the appeal is from conviction) on grounds the verdict is unreasonable or unsupported by the evidence, or tainted by serious errors in law, or there was a miscarriage of justice.

[16] The primary function of a criminal appeal is to prevent wrongful convictions. Wrongful not just in the sense that the accused may be innocent, but also wrongful in the sense that the verdict may have been tainted by non-harmless errors in the factual or legal determinations underlying the result or by a miscarriage of justice. How an appeal court exercises its powers under s. 683 depends on the type of error being alleged on appeal and the extent to which the court will be able to fulfill its role with or without the relief being sought.

[17] The admission of fresh evidence itself is a power to be exercised "in the interests of justice". The principles are well known. Where the proffered evidence goes to the merits of the determinations made at trial, admission is governed by the four criteria set out in *Palmer & Palmer v. The Queen*, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193. If admitted according to these criteria, the verdict cannot stand (*R. v. Stolar* [1988] 1 S.C.R. 480, 40 C.C.C. (3d) 1).

[18] Requests to compel an examination of a witness in the context of an appeal challenging the merits of a trial determination were considered by this court in *R. v.*

Ross (1993), 119 N.S.R. (2d) 177, 79 C.C.C. (3d) 253, [1993] N.S.J. No.18, and in *R. v. Nickerson* (1993), 121 N.S.R. (2d) 314, 81 C.C.C (3d) 398, [1993] N.S.J. No. 188. In *R. v. Ross*, the applicant was convicted of sexual assault. He appealed. The complainant's psychiatrist learned of the trial proceedings through media reports. He contacted the Crown and expressed concerns over the complainant's credibility and raised the possibility that there had been a miscarriage of justice. His ethical obligations precluded, absent a court order, voluntary discussion with anyone the reasons for his views or the content of his file.

[19] Chipman J.A., for the court, expressed the view that a reasonable person would conclude that when a psychiatrist who has treated the complainant has said there are concerns about her credibility, and about a possible miscarriage of justice, it is in the interests of justice to pursue the issues raised in order to clear the air. This could best be accomplished by an order for an examination of the psychiatrist before a chambers judge of the court pursuant to s. 683(1)(b)(ii) of the *Code*. It would then be up to the applicant to pursue, if he so chose, an application to adduce fresh evidence.

[20] A similar application was unsuccessful in *R. v. Nickerson, supra*. The applicant appealed his conviction for sexual assault on a 34 year old mentally handicapped complainant. After trial, information came to light that the complainant was diagnosed as suffering from a form of Multiple Personality Disorder, having as many as 30 or more different personalities. At the outset of the appeal hearing, the appellant made a motion for an order under s. 683 of the *Code*. Chipman J.A. again wrote for the court. He expressed the test to be as follows :

> **[21]** While the power of an appellate court to admit new evidence is broad and while the power under s. 683 to order the examination of a witness is equally broad, the power to admit fresh evidence is limited by the principles laid down in **Palmer** and **Stolar**, supra. **So too the power to order an examination should only have been exercised where there is a reasonable probability that such an examination will result in the discovery of evidence which can pass the test in Palmer.** In **Ross**, supra, it is clear that a psychiatrist had expressed reservations about the victim's credibility with reference to the very charge at issue and also expressed concerns about a miscarriage of justice. This court was obliged to act.
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> [emphasis added]

[21] The motion was dismissed. The court was not satisfied that the evidence could not have been adduced at trial through the exercise of due diligence, and

further, the medical evidence did not speak to concerns over the credibility or reliability of the complainant.

[22] Recently, the Ontario Court of Appeal in *R. v. Sihota*, 2009 ONCA 770, 249 C.C.C. (3d) 22 considered a request for an order to examine a witness preparatory to a motion to introduce fresh evidence. The appellant was convicted of sexual assault on his wife. The evidence of the complainant was the only evidence at trial. The appellant testified. He denied any assault, claiming it was a fabrication by his wife as part of her plan to gain custody of their children. She denied any attempt to deprive the appellant of a relationship with the children. After conviction she then claimed the appellant had sexually assaulted their daughter and filed a motion to vary the interim custody order to terminate access and to permit her to move from the jurisdiction with the children. Children's Aid investigated the allegation, but took no action.

[23] The appellant sought an order under s. 683(1)(b) of the *Code* to examine the complainant on the information about the timing and substance of the post conviction allegation to try to demonstrate a continuing malicious intent on her part to use the legal process to secure custody of the children.

[24] Sharpe J.A. wrote the decision of the court. He declined to accept the Crown's submission that the fresh evidence had no hope of success. In his view, the application was arguable and, accordingly, the appellant should be allowed the opportunity to make his case before the panel. The motion for an examination of the complainant, while unusual, was allowed since the Crown insisted that the material, in its current form, was not admissible – nor would the panel hearing the fresh evidence application be in a position to properly assess it without the benefit of a cross-examination of the complainant. Sharpe J.A. expressed his reasons as follows:

> [14] ...The scope of any examination should be carefully circumscribed and confined to what is fresh evidence. The appellant should not be allowed to rehash ground covered at trial or to proceed on a speculative basis or "fishing expedition" to uncover fresh evidence not yet identified, but must show - to paraphrase the test for ordering Crown disclosure set out in *Trotta* at para. 25 - **that there is some reasonable possibility that the cross-examination could assist on the motion to adduce fresh evidence by yielding material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence.**

> [15] In my view, that standard has been met by the appellant. While I express no view as to the likely outcome of the appellant's fresh evidence application, it is my view that it is in the interests of justice that the appellant be allowed to present it with the benefit of an opportunity to cross-examine the complainant on her post-conviction allegations and conduct.
> [emphasis added]

[25] In *R. v. Trotta* (2004), 23 C.R. (6th) 261, [2004] O.J. No. 2439, the appellants applied for an order of production of materials in the possession of the Crown that dealt with the internal and external review of case files where the Crown relied on the expert opinion of one Dr. Smith. Dr. Smith had been a key witness at the trial of the appellants. They sought the material to assist in gathering fresh evidence to challenge the competency and objectivity of Dr. Smith.

[26] Doherty J.A. wrote the reasons for the court. He accepted that the Crown's disclosure obligation continued through the appellate process. While the nature and rationale of the obligation remained the same, the resolution of disputes about disclosure required a different analytical framework. He reasoned that although there is no longer a presumption of innocence, or right to make full answer and defence, the accused has broad rights of appeal under the *Criminal Code*. These include the right to pursue legal and factual challenges arising from the record of the trial, as well as the ability to adduce fresh evidence under s. 683(1), if the interests of justice dictate reception. All of which, he noted, were designed to maximize protection against wrongful conviction.

[27] In terms of the correct approach, where the applicant is requesting disclosure, he proposed that the applicant had to demonstrate a reasonable possibility that the information being requested may assist the accused in the prosecution of the appeal. This was to be assessed using a two-step approach.

[28] The first is the applicant must demonstrate a connection between the request for production and the fresh evidence he or she proposes to adduce. Then the applicant must demonstrate there is a reasonable possibility the material sought may be received as fresh evidence on the appeal. He wrote:

> [25] The Crown's disclosure obligation on appeal must recognize and give full value to an accused's broad rights of appeal and the rationale underlying those rights. The Crown's disclosure obligation on appeal must extend to any

> information in the possession of the Crown that there is a reasonable possibility may assist the accused in the prosecution of his or her appeal. In the present case, the applicant seeks disclosure in aid of a proposed fresh evidence motion. To obtain production, the applicant must first demonstrate a connection between the request for production and the fresh evidence he proposes to adduce. The applicant must show that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence. By assist, I mean yield material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence. The applicant must next demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal. Unless the appellant can make both links, there is no reasonable possibility that the material sought could assist in the prosecution of the appeal and consequently, no reason for this court to require the Crown to disclose it.

[29] Doherty J.A. concluded that, while he was satisfied the applicants met the first test, he was not satisfied there was a reasonable possibility that the evidence questioning Dr. Smith's competency and objectivity in other cases could possibly affect the verdict in the case under appeal. The analytical approach articulated by Doherty J.A. was tacitly approved by this court in *R. v. James*, 2006 NSCA 57, (2006) 243 N.S.R. (3d) 349, [2006] N.S.J. No. 189 (see para. 50 *et seq*).

[30] In this case, we are faced with an announced motion to adduce fresh evidence, not to directly challenge the verdict, but to assess a claim by the appellant that there was a miscarriage of justice arising from the trial process. The principles that guide a court in the exercise of its jurisdiction under s. 683(1)(d) to admit evidence relevant to such claims are somewhat different.

[31] It seems to be increasingly common for this and other courts to be faced with allegations of ineffective assistance of counsel, lack of disclosure by the Crown, or some other aspect of the trial process that are said to have compromised the integrity of the trial to such an extent that there was a miscarriage of justice. Claims of a miscarriage of justice can sometimes be determined by an examination of the trial record. Allegations of ineffectiveness of counsel or failure by the Crown to disclose frequently require the admission of evidence for the court to properly assess the claims. It is well accepted that the admissibility of evidence dealing with these issues is not assessed by the *Palmer* criteria (see *R. v. Gumbly* (1996), 155 N.S.R. (2d) 117, 112 C.C.C. (3d) 61, [1996] N.S.J. No. 454 at para. 37-40; and more recently, *R. v. West*, 2010 NSCA 16 at para. 53 *et seq.*)

[32] It is by no means certain from the available authorities the exact test to be applied where production or examination of witnesses is sought to assist an appellant in advancing a claim that the trial verdict is undermined by a miscarriage of justice. In *R.v. Wolf*, 2007 ONCA 327 the accused appealed from conviction. He alleged there was an abuse of process by the Crown resiling from its original offer to withdraw charges if restitution was made. The trial file was lost. Three crown attorneys swore affidavits setting out their respective recall. Two of these had already been examined before a special examiner. The third resisted, arguing since he had been appointed to the bench, his examination should be by way of written interrogatories. The court wrote:

> [6] It is unnecessary to consider in this case the scope of the pre-conditions for such an examination because both Mr. Graham's counsel and the respondent conceded in oral argument that Mr. Graham could have been a compellable witness at the trial. Since the Crown's trial brief is missing and because the prosecution approach is at issue, they also acknowledged that **Mr. Graham's evidence is both "likely relevant" and "necessary" to the appeal**. Accordingly, it is in the "interests of justice" both that his affidavit be adduced as evidence and that he be examined in some fashion on the contents of that affidavit. [emphasis added]

[33] In *R.v. Singh,* 2010 ONCA 11, the appellant applicant sought an order under s. 683 compelling disclosure of records from the Crown relating to the interpretation services provided by five interpreters at his trial. The application was dismissed on the basis that there was nothing to suggest there was even a possibility of a problem with the interpretation that occurred at his trial. Simmons J.A. wrote for the court. She expressed the approach to be followed as:

> [39] I agree with the moving party that the second prong of the *Trotta* test does not strictly apply in a case such as this where the proposed fresh evidence relates to the integrity of the trial process and there is therefore no question concerning the admissibility of the proposed fresh evidence. However, I do not agree that this means that the second prong of the *Trotta* test should simply be eliminated.
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> [40] **The second prong of the *Trotta* test is aimed at requiring that the moving party show a reasonable possibility that a production order will assist in developing a successful ground of appeal**. Considered in that context, the problem with the moving party's material is that he has **failed to demonstrate even an air of reality to his claim** that some form of interpretation problems

> existed in *his* case in circumstances where it is reasonable to believe that he should be able to do so. [emphasis added]

[34] Not infrequently, the purpose of proposed fresh evidence can be characterized as either going to the merits of the trial verdict or to trial fairness and hence a potential miscarriage of justice. (See for example, *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 (C.A.), [2000] O.J. No. 4544.) The respondent seeks to characterize the issue on this appeal as a failure by the Crown to disclose the information gathered by the police about prospective jurors. The appellant sees it as a misuse of police resources that permitted the Crown to select a jury that may have been more inclined to convict. The parties have not yet filed the appeal book let alone facta and made oral submissions. It is therefore premature to make any comment on these divergent views.

[35] In *R. v. MacInnis*, 2006 NSCA 92 the appellant sought to compel further disclosure from the Crown to pursue his claim that the authorities had hidden a sweetheart deal for a key witness from the accused and the trial judge, causing a miscarriage of justice which merited sanction and a new trial. The appellant was convicted of drug charges and dangerous driving arising out a drug deal that went awry. At trial the Crown closed its case, only to be permitted to re-open it for the purpose of calling the appellant's co-accused, Jayson Deleski, who had originally been identified as a defence witness. He was anything but.

[36] Deleski testified not just to the details of the drug transaction between he and the appellant, but also to being intimidated by the appellant and others into attempting to obstruct justice by giving perjured testimony. The Crown and Deleski assured the trial judge absolutely no favourable treatment had been offered to Deleski in exchange for his cooperation with the authorities. After the appeal process was underway, the appellant could find no information as to what happened to the outstanding charges against Deleski. Eventually he was advised that Deleski had been sentenced in British Columbia and had received a suspended sentence.

[37] The appellant sought to introduce letters authored by the investigating officer that had been introduced at Deleski's sentencing hearing, as well as other documentary material. The respondent also tendered evidence for consideration.

[38] The Crown took the position that the circumstances surrounding the case demanded an explanation as they went to the "very integrity of the process" and therefore the proffered fresh evidence did not invite a strict application of the *Palmer* criteria. The applications by the appellant appear to have been heard at the same time as the appeal. Saunders J.A. wrote for the court. He accepted that the fresh evidence should be admitted on the basis identified by LeBel J. in *R. v. Taillefer* (2003), 179 C.C.C. (3d) 353 (S.C.C.) – whether the non-disclosure of relevant information may have affected the right to a fair trial.

[39] However, Saunders J.A. was not convinced that the fresh evidence demonstrated a need to compel further disclosure from the Crown or was such to trigger an entitlement for the appellant to examine the investigating officers or others, as the appellant contended, to shed light on a list of specific "important questions". It is unclear if the issue of entitlement to examination was in relation to doing so at a new trial or as part of the appeal process. In any event, the court concluded there were insufficient reasons to intervene.

ANALYSIS

[40] Here, the appellant and respondent agree fresh evidence should be admitted to inform the court what happened and, at least to some extent, why data was requested and assembled with respect to prospective jurors. In our view, to obtain the extraordinary remedy of an examination of a witness during the appeal process, the applicant must satisfy the court that there is at least a reasonable possibility, if not probability, that the proposed examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal. Paramount in making this determination will be the court's views as to the extent to which the applicant will be able to produce the intended fresh evidence with respect to the alleged miscarriage of justice, with or without the proposed examination. In other words, absent an examination, will the applicant be unfairly hindered in being able to meaningfully exercise the appeal rights set out in the *Criminal Code*?

[41] There are some parallels between the circumstances in *MacInnis* and the case at hand. In both, the appellant and respondent agree fresh evidence should be admitted in order for the parties to be able to assert their positions about what occurred and what remedy may or may not flow. The parties also agree that the

fresh evidence in the form being tendered is admissible on consent. The only issue in dispute is the request to examine Mr. Whiting.

[42] The applicant does not dispute that the respondent has provided all of the relevant documents and information in its possession surrounding the requests of the police, and their performance to carry out "criminal records checks". Nor does the applicant take issue that Mr. Whiting has provided a rather fulsome account of his role or the facts he sets out.

[43] The applicant was asked as to what additional information he hoped to gain by an examination of Mr. Whiting. He replied that there were "a lot of unanswered questions". When pressed, he identified these unanswered questions as being, when Whiting was requesting criminal records checks, was he aware of: the provisions of the *Juries Act* that set the parameters for disqualification to serve as a juror due to having a criminal conviction; the *Criminal Code* section that creates the ability to challenge for cause based on a criminal conviction; the Supreme Court of Canada's decision in *R. v. Latimer*, [1997] 1 S.C.R. 217 that referred to the impropriety of Crown counsel utilizing the police to poll prospective jurors about their attitudes in a number of areas relevant to the trial issues.

[44] The respondent's answer is that Mr. Whiting is presumed to know the law, and having him questioned about these issues would add nothing to the appellant's ability to argue the import of the fresh evidence. We agree.

[45] The request to examine a witness in anticipation of an application to admit fresh evidence on appeal is an extraordinary remedy. It is to be exercised by the court where it considers it to be in the "interests of justice". While the discretion is broad, it must be tied to the purpose created for its exercise – to permit an appellant to be able to meaningfully prosecute the broad appeal rights granted by Part XXI of the *Criminal Code*. The court must be convinced on a balance of probabilities that the appellant will be prevented or unfairly hindered in his or her prosecution of those rights before the requested remedy should be considered to be in the "interests of justice". We need not choose whether the more stringent test of 'reasonable probability' as opposed to 'reasonable possibility' is the appropriate test to assist in that assessment. In our view the application fails on either.

[46] Here the applicant not only consents to, but desires the admission of the volume of materials gathered by the respondent as fresh evidence, whether process is or is not issued to examine Mr. Whiting. The applicant does not dispute what Mr. Whiting says happened. In these rather unique circumstances, the applicant has not persuaded us that he will be prevented or unfairly hindered in prosecuting his appeal absent an examination of Mr. Whiting. The parties should not take anything said in these reasons as any indication as to our views on the conclusions that may or may not be drawn from the proposed fresh evidence, should the court admit the materials so far assembled.

[47] It is for these reasons we have dismissed the application.

Beveridge, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.