NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Liberatore, 2010 NSCA 82

Date: 20101029
Docket: CAC 316092
Registry: Halifax

Between:

Michael Vincent Liberatore

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Hamilton, Beveridge, and Farrar, JJ.A.
Appeal Heard:	October 7, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed, verdict set aside and new trial ordered.
Counsel:	J. Patrick L. Atherton, for the appellant Shaun O'Leary, for the respondent

Reasons for judgment:

[1] The appellant, Michael Vincent Liberatore, appeals on the basis the trial judge, the Honourable William B. Digby of the Nova Scotia Provincial Court, erred by misapplying the burden of proof and by giving reasons that are so deficient they constitute an error of law. The judge found the appellant guilty of possession for the purpose of trafficking (s. 5(2)) and trafficking cocaine (s. 5(1)).

[2] The judge gave his oral decision ten days after a three and one-half hour trial. He began by describing the Crown's evidence:

> The evidence is that members of the Street Crime Unit were conducting surveillance at a gas station and Tim Horton's in the Timberlea area as a result of citizen complaints.
>
> Officers observed a red vehicle come and back into an area where there were vacuums for cleaning cars. There was one occupant in the vehicle. No one got out of the vehicle. The vehicle sat there for a few minutes. One of the observing officers found that activity suspicious and alerted other officers.
>
> Mr. Liberatore then arrived in his black truck, drove up to the vehicle such that he was facing in the opposite direction and his driver's door was opposite the driver's door of the red vehicle.
>
> Constable Milton indicated that he observed the left hand of each of the drivers come out, the driver of the truck, of course, reaching down, the driver of the smaller, red vehicle reaching up. When the arms came out, the fists were closed and they met – that is, the fists. The fists opened, closed up again and the arms went back into the vehicles and, at that point, the police arrested each of the drivers.
>
> On Mr. Studley, that is, the driver of the red car, they found some marijuana and what's called a "dime bag," that referring to the size of the bag as far as cocaine goes, but not the price, but no cash of any significance.
>
> In Mr. Liberatore's truck they found a dime bag, which wasn't immediately obvious when the officer searched it. The dime bag showed when – just at the – the top corner was at the level of the driver's seat, wedged between the driver's seat and the center console of the truck. It, again, had cocaine.

> That bag was similar to the bag that was found in Mr. Studley's vehicle, and these bags were acknowledged by the police to be common, i.e., there was nothing unique about these bags.

[3] He correctly stated the Crown's case:

> The Crown's case is based on the inference that this was what the officers saw. It was a drug transaction, and that's supported by the fact that drugs were found in each of the vehicles, and that Mr. Liberatore had a significant amount of cash on him. The expert witness testified that often dealers will separate their cost of supply from their profit, keeping each in different pockets, and that is the reason why $300 (three hundred dollars) was found in one location and the rest [$930 CDN and $110 US] in a separate location.

[4] Referring to the evidence of the Crown's expert witness, the judge stated that everything the officers observed was consistent with a "dial-a-dope" transaction:

> I think it would be fair to say that everything the officers observed was consistent with what they term a 'dial-a-dope operation". A dial-a-dope operation is one where a customer calls a number, speaks to someone there, and then a driver meets at an arranged location with that individual and the transaction is completed.
>
> Usually, the driver carries small quantities of drugs for two reasons. One being that if caught by the police, they are insufficient quantities to support a charge of possession for the purpose of trafficking and two, to protect the individual from being relieved by others in the trade or otherwise of a significant quantity of drugs.
>
> Everything the officers testified to is consistent with a drug transaction.

[5] He then noted that none of the officers could say that they saw either money or drugs exchanged.

[6] The judge then described the testimony of Messrs. Liberatore and Studley:

> Mr. Liberatore and Mr. Studley both testified. They testified that they have known each other and been acquainted with each other for some number of years.

Mr. Liberatore has a business. His business deals with used pallets. He buys and sells used pallets. I believe he also indicated he may repair pallets as well.

He says that he was driving on the highway when he spotted Mr. Studley's vehicle parked where it was, and that he intended to give Mr. Studley some of Mr. Liberatore's business cards. Mr. Liberatore's reason for giving the business cards was that Mr. Studley was a driver for a transport or a delivery company that delivered goods on pallets, and that Mr. Studley would have contacts with people who either wanted pallets or needed to get rid of pallets, and that it would be a way of promoting Mr. Liberatore's business.

Mr. Liberatore says that he carried the cash on him because, essentially, he was involved in a cash business. If he went to buy pallets, he would expect to pay cash and the companies would expect to be paid in cash immediately for the pallets. And then he bought pallets – when he bought them for prices ranging from $.25 (twenty-five cents) to $.75 (seventy-five cents) apiece, although on a number of occasions, he would get the pallets for free by firms that simply wanted to get rid of them.

He says that the $300 (three hundred dollars) was separate [from the $930 CDN and $110 US in his wallet] because he intended to put that in his bank account. ...

Mr. Liberatore says that he didn't conduct a so-called "closed fist to closed fist" or "closed fist or open hand" transaction. That when he . . . handed the business cards to Mr. Studley, he handed them holding them in his fingers as one would normally expect to hand an item such as a business card and that they weren't concealed.

No business cards were presented in evidence, . . . Mr. Studley or Mr. Liberatore didn't have any cards on their person when asked.

Normally, business cards are a standard size and, usually they're white. Mr. Liberatore says he gave Mr. Studley some dozen or so business cards to present – to promote Mr. Liberatore's business.

Mr. Studley really didn't have a very good explanation as to why he was simply sitting there in his car doing nothing during the period of time that he was observed by the police.

> The police were clear that at no time did he exit his vehicle or show any signs of exiting his vehicle to vacuum out his vehicle.

[7] The judge concluded:

> So, the key point in this case is whether or not I'm satisfied beyond a reasonable doubt of the accuracy of the police observation when I compare it to Mr. Studley and Mr. Liberatore's description of the transaction. One always has to be aware of the fact that oftentimes when one is expecting to see a certain thing, one tends to interpret what one sees as what one expects to see.
>
> However, these officers were there for a particular purpose. They were watching for something. They had been alerted to watch for it. They had an observation point which, in my view, should have allowed them to see a transfer of business cards, since business cards would be visible at that distance.
>
> I'm satisfied that, in fact, the officers did not observe business cards and, accordingly, I reject the explanation given by Mr. Liberatore and Mr. Studley, since had that explanation been true – was true in my view – the officers should have seen the business cards.
>
> That being the case, I'm satisfied beyond a reasonable doubt that Mr. Liberatore is guilty of the offences as charged.

[8] The appellant appeals pursuant to s. 675 of the **Criminal Code**, R.S.C. 1985, c. C-46, as amended. He states the issues as follows, and also alleges that the judge's reasons are so deficient that they constitute error:

> 41. It is respectfully submitted that the issues raised on this appeal may be stated as follows:
>
> 1. The learned trial judge misapplied the burden of proof by comparing the stories of the police officers and the appellant rather than by asking whether the Crown case had proved its case beyond a reasonable doubt in light of all of the evidence.
>
> 2. The learned trial judge's reasons for decision do not reveal any analysis of the elements of the offences charged and the evidence in relation thereto; hence they do not adequately perform the function for which they are required, namely to allow the appeal court to review the whether the judge properly applied the *W.(D.)* principle.

> 42. Although stated discretely, the Appellant respectfully submits that it is more convenient to argue the issues as different aspects of a single palpable and overriding legal error by the learned Judge – the failure to respect the burden of proof.

[9] The crux of the appellant's argument is that the judge failed to apply the principles set out in **R. v. W.(D.)**, [1991] 1 S.C.R. 742. This is a question of law. The standard of review to be applied is correctness.

[10] The judge made no reference to the **W.(D.)** principles in his decision. Both parties agree this, alone, is not an error. In **R. v. Lake**, 2005 NSCA 162, Fichaud, J.A. refers to this court's role when reviewing a judge's decision involving an allegation of a failure to follow the principles in **W.(D.)**. The Court must consider the whole of the judge's decision and determine if it is apparent that s/he did not apply the essential principles underlying the **W.(D.)** instruction. He there wrote:

> [15] *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. **She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)***. **The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction.** [Authorities deleted and emphasis added]

[11] The essential principles underlying the **W.(D.)** instruction are reviewed in **R. v. D.W.S.**, 2007 NSCA 16:

> [13] In **W.(D.), supra**, at p. 758 Cory, J. suggests the following jury instruction on the question of credibility:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do

> accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[14] In **R. v. P.S.B.** (2004), 222 N.S.R. (2d) 26; N.S.J. No. 49 (Q.L.), Cromwell, J.A. writing for this Court, explained the significance of the **W.(D.)** instruction in this way:

> [56] **W.(D.)** is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies. In brief, the trier must remember that the issue is not whether he or she believes the accused, but whether the evidence as a whole convinces the trier of fact of the accused's guilt beyond a reasonable doubt. If the trier of fact believes the exculpatory evidence of the accused, an acquittal must follow. However, even if the trier does not believe that evidence, the trier must ask him or herself if it nonetheless gives rise to a reasonable doubt. Finally, if the trier does not believe the accused and is not left in doubt on the basis of that evidence, the trier must still address and resolve the most critical, in fact, the only question in every criminal case: Does the evidence as a whole convince the trier of guilt beyond a reasonable doubt?

[15] **W.(D.) prohibits a trier of fact from treating the standard of proof as a simple credibility contest - in other words, discounting the evidence of the accused merely because it is inconsistent with that of the complainant, which evidence he prefers.** This does not mean, however, that a witness's credibility is assessed in isolation from the rest of the evidence. In conducting that assessment it is unavoidable that the evidence of witnesses be compared. (**R. v. Hull**, [2006] O.J. No. 3177 (Q.L.) (C.A.)). In that process, the evidence of the accused may be disbelieved. That evidence may nevertheless create a reasonable doubt about the persuasiveness of the Crown's evidence, in this case, that of the complainant. **In other words, the reasoning process is not complete with the rejection of the evidence of the accused.** [Emphasis added]

[16] Only where the absence of reasons for disbelieving the accused’s evidence leads to an inference that the judge has misapplied the burden of proof is it reversible error. As Fichaud, J.A. wrote for this Court in **R .v. Lake** (2005), 203 C.C.C. (3d) 316:

> [21] . . . The trial judge may discount the accused's testimony just because she has believed the Crown witnesses. The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both

> whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W.(D.)*'s first question.
>
> [22] The analysis of both the accused's testimony and the Crown's evidence is done with full knowledge of all the evidence that has been adduced at the trial. The first *W.(D.)* question does not vacuum seal the accused's testimony for analysis. In *W.(D.)*, p. 757, Justice Cory cited *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193, which, at pp. 354-55, 357-58, rejected the piecemeal analysis of individual segments of evidence for reasonable doubt. The point of *W.(D.)*'s first question is not to isolate the accused's testimony for assessment, but to ensure that the trier of fact actually assesses the accused's credibility, instead of marginalizing it as a lockstep effect of believing Crown witnesses.

[12] **W.(D.)** prohibits rejecting the appellant's evidence solely because it is inconsistent with the Crown's evidence, which he prefers, and making a finding of guilt without further consideration of reasonable doubt in light of the whole of the evidence – thus treating the standard of proof as a simple credibility contest. Regrettably, that is exactly what the judge did in this case. As earlier set out in paragraph 7 above, he reasoned:

> So, the key point in this case is whether or not I'm satisfied beyond a reasonable doubt of the accuracy of the police observation when I compare it to Mr. Studley and Mr. Liberatore's description of the transaction. ...
>
> . . .
>
> I'm satisfied that, in fact, the officers did not observe business cards and, accordingly, I reject the explanation given by Mr. Liberatore and Mr. Studley, since had that explanation been true – was true in my view – the officers should have seen the business cards.
>
> That being the case, I'm satisfied beyond a reasonable doubt that Mr. Liberatore is guilty of the offences as charged.

[13] In doing so he erred.

[14] In addition, this was a case based on circumstantial evidence. As such, the judge could only convict if he was satisfied beyond a reasonable doubt that the guilt of the accused was the only reasonable inference to be drawn from the proven facts; S. Casey Hill, David M. Tanovich & Louis P. Strezos, eds., **McWilliams'**

Canadian Criminal Evidence, 4th ed. Vol. 2, (Aurora, Ont.: Canada Law Book, 2010) 25:20.40. The Crown argues that it is implicit in the following portion of the judge's decision that he considered this requirement and was so satisfied:

> I think it would be fair to say that everything the officers observed was consistent with what they term a "dial-a-dope operation".
>
> . . .
>
> Everything the officers testified to is consistent with a drug transaction.

[15] I may have agreed with this argument if the judge had added, "and that is the only reasonable inference to be drawn from the proven facts". He did not. That being the case, I am satisfied the judge erred by failing to make the required analysis.

[16] Accordingly, I would allow the appeal, set aside the guilty verdict and order a new trial for Mr. Liberatore.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.