NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Beals***, 2011 NSCA 42

Date: 20110512
Docket: CAC 334813
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Kaylen Jermal Beals

Respondent

Judges:	Saunders, Fichaud and Beveridge, JJ.A.
Appeal Heard:	April 6, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Jeffrey S. Moors, for the appellant Roger A. Burrill, for the respondent

Reasons for judgment:

[1] The respondent Kaylen Jermal Beals stood trial before Nova Scotia Provincial Court Judge William MacDonald on a charge of possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19.

[2] At the close of the Crown's case defence counsel moved for a directed verdict.

[3] In an oral decision, MacDonald, P.J.C. granted the defence motion and directed that Mr. Beals be found not guilty.

[4] The Crown appeals arguing that the trial judge either applied the wrong test in granting the motion, or erred in finding that there was not some evidence upon which a reasonable jury, properly instructed, could convict.

[5] For the reasons that follow I would dismiss the appeal.

Background

[6] Jasmine Murphy and Kaylen Beals were jointly charged with possession of cocaine for the purpose of trafficking. They were tried together in Provincial Court, each represented by different defence counsel.

[7] The Crown's case was entirely circumstantial. The material facts may be described summarily.

[8] At approximately 10:30 p.m. on September 17, 2009, firefighters responded to a reported grease fire in Apartment #16, 5375 Rector Street in Halifax.

[9] No one was inside the apartment when firefighters first arrived. About 20-30 people were seen milling about outside.

[10] After gaining entry to the apartment, firefighters observed that the blaze had been put out by someone using a dry chemical extinguisher. They ventilated the

apartment to rid the space of smoke and chemical haze. While doing so they saw a Luger type handgun on a mattress, a roll of money on a stand, and a clear plastic bag with foil wrappings on the floor.

[11] They alerted their fire captain who disarmed the weapon by removing the magazine and a few rounds. The police were notified. The scene was secured and a search warrant was obtained.

[12] Following the search, a number of exhibits were seized including: a Nova Scotia identification card issued on March 13, 2009, in the name of Kaylen Beals; a Correctional Services work performance sheet listing the name Kaylen Beals; a utility bill in the name of Jasmine Murphy; a black hoodie; and a wallet containing identification showing a Nova Scotia driver's license in the name of Kaylen Beals with an address in Dartmouth.

[13] The baggie lying on the floor in the living room was found to contain 25 foil wrapped "stones" of crack cocaine. Also seized were pieces of tinfoil from a shoe box in the living room; two cell phones and a Blackberry phone in the living room; $105 in cash; .22 ammunition in a baggie on a dresser in the bedroom; and a roll of aluminum foil with jagged edges.

[14] The certificate of analysis established that the drug found was cocaine.

[15] After considering defence and Crown counsels' submissions on the motion for a directed verdict, the trial judge was not satisfied there was sufficient evidence to support a conviction. As a result Mr. Beals was acquitted. Five weeks later, at the continuation of the trial of co-accused, Ms. Jasmine Murphy, the Crown asked the court to acquit her. That motion was granted.

Issues

[16] The notice of appeal filed by the Crown lists two grounds:

(1) that the trial judge applied the wrong legal test in granting the respondent a directed verdict of acquittal at the conclusion of the case for the Crown; and

(2) that the trial judge erred in law in finding that there was not some evidence upon which a reasonable jury, properly instructed, could convict the respondent.

[17] I would distill the grounds of appeal and counsels' various submissions into a single question:

> Did the trial judge err in granting a motion for a directed verdict thereby resulting in the acquittal of the respondent?

[18] The question as I have framed it raises two issues. First, what is the correct test to apply when considering a defence motion for a directed verdict in a case involving circumstantial evidence? Second, did the trial judge properly apply that test? Each of these inquiries is a question of law to which a standard of correctness is applied. See for example, **R. v. Johnson**, 2010 ABCA 230 at ¶ 13.

Analysis

[19] Mr. Beals elected trial in the Provincial Court. At the end of the Crown's case he moved for a directed verdict. The basis for such a submission is not found in the **Criminal Code**. As Chief Justice Lamer observed in **R. v. Rowbotham; R. v. Roblin**, [1994] 2 S.C.R. 463, [1994] S.C.J. No. 61 (Q.L.) at p. 467:

> A directed verdict is not a creature of statute but rather of the common law.

[20] It has long been understood that the test a trial judge is to apply on a motion for a directed verdict is the same as that which an extradition judge or a judge at a preliminary inquiry must employ. In **United States of America v. Shephard**, [1977] 2 S.C.R. 1067, [1976] S.C.J. No. 106 (Q.L.) Ritchie, J., for the majority, wrote at p. 1080:

> I agree that the duty imposed upon a "justice" under s. 475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is "sufficient" to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

[21] These directions were re-affirmed by Chief Justice McLachlin, writing for a unanimous court, in **R. v. Arcuri**, 2001 SCC 54.

> 21 The question to be asked by a preliminary inquiry judge under s. 548(1) of the *Criminal Code* is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *Shephard, supra*, at p. 1080; see also *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 160. Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction": *Shephard*, at p. 1080.
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> 22 The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pp. 842-43; *Monteleone, supra*, at p. 161. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. ...

I would point out that **R. v. Monteleone**, [1987] 2 S.C.R. 154 and **Mezzo v. The Queen**, [1986] 1 S.C.R. 802 were both directed verdict cases.

[22] Faced with such a motion, Judge MacDonald was obliged to consider the evidence offered by the Crown and decide whether it was sufficient to reasonably support a conviction. In conducting such an analysis he was required to weigh the evidence, to a limited extent. That task was described by Chief Justice McLachlin in **Arcuri**. While her comments were made in the context of a preliminary inquiry, we know that they are of similar binding authority when considering a motion for a directed verdict. The Chief Justice began her reasons:

> 1 ... For the following reasons, I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw. As this Court has consistently held, this task does not require the preliminary judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support a verdict of guilty.

[23] Here the Crown's case against Mr. Beals was entirely circumstantial. There were three items seized from the apartment and introduced as exhibits at the preliminary inquiry which would link the respondent to the premises where the cocaine and loaded weapon were found. A Nova Scotia ID card with his name and photograph on it was found on the kitchen table (Exhibit 21). A Correctional Services work performance sheet with his name on it was found on the top of a dresser in the bedroom (Exhibit 19). And a black wallet with Mr. Beals' Nova Scotia driver's license and other identification was found on a bedroom shelf (Exhibit 4). The apartment was rented by Mr. Beals' co-accused, Ms. Jasmine Jeanette Murphy. Mr. Beals' name was not on the lease. Mr. Beals did not offer evidence at his trial.

[24] Once Mr. Beals moved to have the case against him dismissed, the issue to be decided was one which is nicely summarized in his factum:

> All parties recognized that the issue was whether there was sufficient evidence of knowledge and control of the contraband to put the accused to his election to call evidence. All parties recognized that this was a circumstantial case of possession.

[25] In order to establish the respondent's guilt at trial the Crown would have to prove constructive possession pursuant to s. 4(3) of the **Code**. In this case, the requisite essential elements would require proof of knowledge, along with some measure of control. If there were no defence evidence presented, those would be the inferences the Crown would ask the judge to draw at the end of the trial.

[26] Following Chief Justice McLachlin's directions in **Arcuri**, Judge MacDonald's task was to determine whether the evidence led by the Crown was capable of supporting those inferences. To that extent he was obliged, in a limited sense, to weigh the evidence. Clearly, it was not for him to draw those inferences, or assess credibility, or ask himself whether he would conclude on such evidence that Mr. Beals' guilt had been established beyond a reasonable doubt. The judge explicitly recognized those confining parameters in fulfilling his judicial role.

[27] In this case, as I have already indicated, the Crown's case against Mr. Beals was entirely circumstantial. It did not produce direct evidence to establish the requisite elements of constructive possession. In **Arcuri**, Chief Justice McLachlin provided further guidance as to the approach to be taken by a trial judge when considering a motion for a directed verdict.

[28] First, she observed that whether the evidence is direct or circumstantial does not change the test. Rather, the nature of the judge's job will vary according to the type of evidence the Crown has presented:

> 22 The test is the same whether the evidence is direct or circumstantial [omitting citations]. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. ....
>
> 23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed: see *Watt's Manual of Criminal Evidence*, *supra*, at §9.01 (circumstantial evidence is "any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue"); *McCormick on Evidence*, *supra*, at pp. 641-42 ("[c]ircumstantial evidence . . . may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion"). The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

[29] While **Arcuri** and similar authorities were not mentioned by counsel in their submissions on Mr. Beals' motion for a directed verdict, I am satisfied that Judge MacDonald did exactly as Chief Justice McLachlin directed.

[30] His reasons are not lengthy and I will repeat them here for ease of reference:

> THE COURT - DECISION:
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> There's an application in this matter at the close of the hearing of the evidence on a charge of possessing cocaine for the purpose of trafficking, an

application by counsel for Mr. Kaylen Beals, one of the two accused persons in this case, and the application is for what's commonly characterized as a directed verdict.

In other words, the request is to the judge to say, "Look, there is not the kind of evidence here which could support a conviction, it's not sufficient, and if this were a jury trial and the judge were presiding, the judge wouldn't even put the case to the jury."

It's not an application or motion where a judge decides do I believe this or do I believe that or do I give certain weight to this evidence or certain weight to that evidence, and I think Mr. Moors' comments about getting into a discussion about the size of the jeans and the hoodie and so on is fair comment, that you start looking at the details of the evidence and deciding what it establishes or what it doesn't.

In this case the evidence of the clothing is not tied to Mr. Beals. What is tied to Mr. Beals are three different exhibits, his wallet with a variety of identification cards, including banking cards, social insurance, drivers license and significant ID cards. That was found in what's been described as the bedroom and in a -- open on a -- almost like a bedside table.

And there was a photo ID, a provincial government photo ID, found on the kitchen table -- it's a small apartment -- and on a bedroom dresser there was some documentation relating to community service obligations which apparently are Mr. Beals'. The fact that it's something that may arise through a criminal court is, of course, not relevant, but the fact that his name is there and associated with the document, that's the key.

All of the evidence establishes everything it needs to in this case except the issue of knowledge and control. In order to have something in your possession, you have to know about it. It might be in somebody else's care but you've got to know about it and have some element of control or say over it.

And what the prosecution is saying is it was found in the apartment and Mr. Beals' ID was found in the apartment, therefore there is some evidence of his knowledge and control over the drugs. The drugs in this case were found in the living room area and there was a gun.

One of the things that we have experienced in this country is people have been put on trial for offences and been found guilty when they weren't, and the more serious the charge the more likely that that's going to happen. Somebody

should be accountable. The public is at risk. All of these things are factors that sooner or later can result in a wrongful conviction.

What we don't have in this case is the kind of evidence that would suggest that Mr. Beals was living in the apartment long enough and on a regular basis that if there are drugs there and a firearm there and they're on the living room floor, even if under a blanket or so, then he must have had some knowledge, and if it's his place maybe he had the ability to say, "That stuff can't be here."

But if you just say, well, here's a wallet, there's an apartment, it's in the lease is in the name of a young woman, he may be there, he may be staying there on some kind of a basis, he may be visiting there on some kind of a basis, it may be passing through, it may be whatever.

The suggestion about the presence of a wallet or a photo ID and papers does indicate either one of two things, either -- well, it does indicate that Mr. Beals -- well, two things, either Mr. Beals intended to return at some time, for some reason, for some length of time, or that he left in such a hurry that he didn't take things with him that he didn't intend to come back for, or that he later decided I'm not going to go back for because there's some other stuff there that I could get in trouble for.

And we don't have the kind of connection. I've seen in knowledge and control cases closets where there's men's clothing and women's clothing and sometimes clothing that can be identified with a particular person and there's just an indication with changes of clothing and so on that there's an intention to return so often that it's tantamount to living there even if they may have another address, and I agree people often will have both.

But in this case we've got a fire, everybody left the building, 20 or 30 people, there was smoke in the apartment, a fire extinguisher apparently was used by someone to put out the fire in this particular apartment, which was a stove fire, but there would be smoke and other things and people could leave without taking things with them.

If it's in the bedroom, it's likely that it wasn't just somebody who happened to be visiting for dinner or something but that things were not taken that might ordinarily be taken if you weren't living there. It just doesn't fit, and it's such a small connection.

The risk here that Mr. Beals could be held accountable for what's a very serious offence on evidence that is really, really flimsy is just too great, and I'm not prepared to say that there is sufficient evidence that it by itself could support a

> conviction. And, therefore, I'm going to grant the motion and direct that Mr. Beals be found not guilty.

[31] On appeal to this Court, counsel for the appellant while acknowledging that Judge MacDonald was tasked with a "limited weighing" of the Crown's evidence, urged us to conclude that he had gone beyond his "limited" function and erred by, in effect, subjecting the Crown's evidence to a "qualitative" analysis. I respectfully disagree.

[32] From the judge's reasons quoted above, the Crown points to certain words or phrases which, in its submission, establish that the judge strayed into the role reserved for a decision-maker at the conclusion of a trial. I will provide a few examples to illustrate the Crown's complaint. The Crown argued that Judge MacDonald's reference to the public "risk" of wrongful conviction was an unnecessary and inappropriate remark having nothing to do with the analysis he was obliged to apply. The judge's comment that the case lacked the kind of evidence to suggest that Mr. Beals was living in the apartment "long enough" is said to reflect an evaluation of the quality of the Crown's evidence. The judge's words "It just doesn't fit, and it's such a small connection." demonstrates that he went well beyond his "limited weighing" assignment. The judge's postulation that the discovery of Mr. Beals' wallet, photo ID and papers might then suggest two or three different scenarios (some of which supported the Crown's theory that Mr. Beals took off in a hurry and was not likely to return because illegal drugs in the apartment could be traced back to him) showed he erred by evaluating and choosing between potential inferences, a role reserved for the trier of fact after a full trial. Finally, the Crown says the judge's reference to Mr. Beals facing criminal liability for "what's a very serious offence on evidence that is really, really flimsy..." suggests that he was subjecting the Crown's evidence "to a higher threshold", based on the judge's impression that the offence was "very serious". The judge was wrong to evaluate the Crown's evidence as being "really, really flimsy". In doing so, the judge went well beyond his "limited weighing" function.

[33] Respectfully, I am not persuaded by the Crown's vigorous submissions. In my view, Judge MacDonald recognized the limits of his assignment and did not trespass beyond the "limited weighing" which the law requires. It was perfectly appropriate for him to make reference to certain specific evidence and use meaningful descriptors to characterize it. Who better than he to assess the Crown's evidence and describe it as "really, really flimsy"? I would note that in her

dissenting reasons in **R. v. Charemski**, [1998] 1 S.C.R. 679 McLachlin, J. (as she then was) used much the same language as did Judge MacDonald here:

> 18 In my view the trial judge reached the correct conclusion. The Court of Appeal ([1997] O.J. No. 1942 (QL)) should not have disturbed his decision. Neither should this Court. The accused should not be subjected to another trial on evidence as flimsy as this.

His task was to assess the Crown's circumstantial evidence and determine whether it could reasonably support a conviction. Put another way, Judge MacDonald was faced with deciding whether the inferences of knowledge and control sufficient to establish constructive possession could reasonably be drawn from the Crown's circumstantial evidence. As Chief Justice McLachlin said in **Arcuri**:

> 30 ... It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

[34] I see nothing wrong in the judge's reference to the risk of wrongful conviction. His remarks seem to me to be nothing more than a recognition in the context of a request for a directed verdict at trial, of the parallel sentiments expressed by McLachlin, C.J.C. in **Arcuri** at ¶ 32 citing **R. v. Russell**, [2001] 2 S.C.R. 804 at ¶ 20, that one of the central purposes of the preliminary inquiry "is to ensure that the accused is not committed to trial unnecessarily".

[35] Judge MacDonald's comments concerning various scenarios surrounding the presence of Mr. Beals and other identification in the apartment was in response to Crown counsel's earlier submissions. The exchanges which ensued when those arguments were addressed are reflected in the transcript.

[36] There is no ready instrument one can use to gauge the parameters of "limited weighing" by preliminary inquiry judges when dealing with a committal decision, or by a trial judge on a motion for a directed verdict. No such assessment of the evidence can be plumbed with mathematical precision. Whether a motion will succeed or fail must depend upon the judge's evaluation of the evidence in that particular case. It seems to me that the approach we ought to take when such determinations are challenged on appeal, is to ask whether the trial judge stayed within the limited bounds of his or her assignment, or erroneously slid into the

jury's exclusive preserve. I see nothing here to suggest that Judge MacDonald strayed beyond what the law required him to do.

[37] In my view, Judge MacDonald understood and respected the judicial restraints tied to his analysis before ultimately concluding that the Crown's case was "really, really flimsy" such that he was "not prepared to say ... there is sufficient evidence that .... by itself could support a conviction." His articulation and application of the law was correct. I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.