C.A.C. No. 121309

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Pottie, 1996 NSCA 105

Pugsley, Matthews and Bateman, JJ.A.

BETWEEN:

ALEXANDER JOSEPH POTTIE	)	Appellant in Person
Appellant	)	
- and -	)	
HER MAJESTY THE QUEEN	)	Robert E. Lutes, Q.C. for the Respondent
Respondent	)	
	)	Appeal Heard: March 21, 1996
	)	Judgment Delivered: April 9, 1996

THE COURT: Appeal is dismissed per reasons for judgment of Pugsley, J.A.; Matthews and Bateman, JJ.A., concurring.

Pugsley, J.A.

Alexander Pottie, while unrepresented, pleaded guilty in Provincial Court on September 19, 1995, to four charges:

- committing an assault on Bonnie Jean Pottie;
- committing an assault on Tammy Lynn Snow;
- knowingly uttering a threat to Bonnie Jean Pottie to cause death by stating, "I am going to kill you";
- knowingly uttering a threat to Tammy Lynn Snow to cause death by stating, "I am going to kill you";

All of the incidents occurred shortly after 4:00 a.m. on September 17, 1995.

Mr. Pottie was sentenced to a period of six months custody on each of the four charges to run consecutively, for a total of two years, to be served in a federal penitentiary.

Mr. Pottie appeals his conviction, and applies for leave to appeal, and if granted, appeals his sentence.

He sets out his grounds as follows:

> Well the charges I had against me were dropped but I plead guilty without knowing. I told a cop that my wife and her friend were in the courtroom I would plead guilty and get it over with and ask for a Federal sentence. So he told my wife she had to go to the courtroom. She said why do I have to go if I dropped the charges. And he said you just do that. And the cops took a statement when my wife was still drunk. We were all drunk and nobody knows what really happened.

Background

Mr. Pottie, 28, appeared in Provincial Court on September 18, 1995, and after the charges were read out to him, the Crown advised they were proceeding by indictment.

The following exchange occurred:

The Court: Those charges that I read are all very serious charges, I take it that you don't have a lawyer with you this morning?

Mr. Pottie: No, Your Honour, I was in the Correctional Center all weekend, JP signed me in there on Sunday morning.

The Court: I see. And again, Miss MacDonald, as far as his release the crown is seeking show cause?

Ms. MacDonald: Yes, Your Honour.

The Court: Mr. Pottie, the crown is objecting to release, you heard what I told Mr. Bernard. I'm going to put these matters over until tomorrow afternoon...

Mr. Pottie: Your Honour, like ah I was drunk that night, I was beyond drunk, I was ossified, and what I said during that time that was just liquor talk, you know what I mean. I'm very sorry for what I did but ah I don't think I should be kept out there just for shootin' my mouth off while I was drunk. That's more or less all it was.

The Court: Mr. Pottie that is the question that I'll have to resolve. Now that will be done at a trial if it comes to a trial, but it's not going to be done here this morning. My best advice...

Mr. Pottie: Well um, could I plead guilty to everything and get sentenced today and . . . Get it over with right now. I'll plead guilty right now and sentence me today to get it over with.

The Court: No I won't take a plea from you Mr. Pottie because these charges can land you in the federal penitentiary for ten years.

Mr. Pottie: Well your Honour I was there before, I'm afraid..ah it's never bothered me then, it's not going to bother me now you know.

The Court: Again Mr. Pottie, you ah you seem to have a knack for getting yourself in trouble..

Mr. Pottie: Well Your Honour it's over a few years, it's different when I was younger you know what I mean, but now it's been a few years since I've been in the federal...

The Court: I see, okay, my advice to you at the moment Mr. Pottie, my advice to you now is to be quiet, keep your mouth shut until you talk with a lawyer. You'll get a chance to say your piece tomorrow afternoon at two o'clock. But you are going to be held in custody until that time because I have little option at this point.

The following afternoon, ie. September 19, 1995, at two o'clock Mr. Pottie, still unrepresented, was asked by the Court:

The Court: Are you prepared to elect first of all I'll have to ask you to elect the court in which you want to be tried and then . . .

Mr. Pottie: I'd like to be tried right now and get it over with.

The Court: Alright, if that's your wish, it's the same wish that he expressed yesterday, and he's been cautioned already.

Alright, Mr. Pottie, you've been cautioned as to the severity of the charges and I'm going to then read the charges to you again. I'll read the charges, I'll ask you that you first elect your court, when we've done that then I'll go back over the matters...

Mr. Pottie: Are these indictable charges?

The Court: They are all indictable.

Mr. Pottie: Okay.

After reading the four charges, the court put Mr. Pottie to his election and he responded:

Mr. Pottie: Right here.

The Court: Thank you. Elects trial before a Provincial Court Judge.

Mr. Pottie: Can I get this done today?

The Court questioned Mr. Pottie again concerning his election and Mr. Pottie confirmed that he wished to be tried by a Provincial Court Judge.

The following occurred:

The Court: Alright on the charge then that you did on the 17th of September '95 that you did commit an assault on Bonnie Jean Pottie contrary to Section 266 of the **Criminal Code** of Canada, recognizing Mr. Pottie that you have been forewarned of the consequences that are possible and that you face extended periods, including a period of incarceration in the federal penitentiary, and having been given the option to consult with counsel are you prepared to enter plea at this

point?

Mr. Pottie: Your Honour, I'll plead guilty to all four charges if I'll end up in a federal bit today.

The Court: I can't, I didn't follow it. You plead guilty to all four charges?

Mr. Pottie: Right now I'll plead guilty to every one of them if I get a federal bit out of it.

The Court: Meaning?

Mr. Pottie: A federal sentence.

The Court: I see.

Mr. Pottie: I don't want to do any county time, I'll do the federal time.

Each of the charges were then read out in full to Mr. Pottie who pleaded guilty to each one of them.

Crown counsel then summarized the circumstances of the various offenses by reading from statements taken by Sgt. Myles Burke from Mrs. Pottie and Ms. Snow on September 17, 1995, summarized on the Crown sheet:

> . . . Bonnie Pottie indicated that she had arrived home at two in the morning, Alex woke up, grabbed her by the hair, smashed her head off the stairs. She said that she begged for her life, that to let her live for the kids, and he told her basically if she didn't keep her mouth shut he would kill her. . . . Tammy Snow, indicated that Bonnie was crying and that Bonnie had told her that Alex had grabbed her, banged her head off the steps and tried to kill her. Miss Snow then went downstairs, asked the accused if in fact he had hit Bonnie, he said "Yes". Tammy then called him an asshole and a woman beater and after that he grabbed her, pushed her into the wall, when she fell he dragged her by the hair to the stairs, started banging her head off the floor stating "I'm going to kill you, you bitch, I'm going to kill you." . . . She indicated that she did in fact think that he was going to . . . going to kill her. She says she doesn't know why he stopped. In response to the question, "What part of your body did he strike?", Mrs. Pottie responded, "My face, my neck, my neck and my face, he would choke me or grab me, snap me".

Crown counsel supplemented the foregoing by direct reference to the statement from Mrs. Pottie:

> There was a big fight started we were in the room it led to the stairs it it stayed on the stairs it went from the top stair probably right to the bottom stair, every single stair that was there I got my head whacked off of and as soon as I mentioned my kids that was how I got him to stop and leave me alone. . . . My face, my neck,

. . . he would choke me or grab me snap me.

The Court was advised that Mrs. Pottie referred to some "tiny marks" but that there were no physical injuries.

Crown counsel then related Mr. Pottie's previous criminal record of 15 convictions between 1984 and 1993, including three for assault and one for resisting arrest, for which he had collectively received 43 months incarceration together with probation for various periods.

Mr. Pottie made no complaint respecting the content of the information placed before the Court by Crown counsel.

Mr. Pottie was then asked by the Court:

The Court: Mr. Pottie you heard what the crown has had to say and you've heard the record that's alleged against you. Mr. Pottie you face an extensive period of incarceration, the only question is where you face it. You indicated you wanted to say something about where you wanted to go?

Mr. Pottie: Yeah, I wanted to go federal.

The Court: The principles of sentence, Mr. Pottie, indicate that I have as my first responsibility to protect the public. You have plead guilty to a series of very high profile and unfortunately very common offences before this court, all of them involving violence, and violence toward a person or persons which again or who again are not in a position to really defend themselves.

I'm going to sentence you, Mr. Pottie, in keeping with those principles and that is to deter you and others who are inclined toward that direction. The request that you made is for a period of federal time, I see no reason in law or in fact to deny that to you.

Subsequent Events

Two weeks after sentence was imposed, Mrs. Pottie contacted the Crown to advise that the facts read out in Court were inaccurate.

At the request of the Crown, a subsequent statement was taken from her by Sgt. Myles Burke on January 15, 1996. Sgt. Burke took, as well, a second statement from Ms. Snow on March 11,

1996. He also deposed his own Affidavit on February 5, 1996.

In her second statement, Mrs. Pottie maintains that she was under the influence of alcohol at the time of giving her first statement and not all the information was true. She stated that several days after September 17, 1995, she recalled that she had started the altercation by kicking Mr. Pottie between the legs, as she suspected he was having an affair with another woman.

In her second statement, Ms. Snow felt that Mr. Pottie had served sufficient time, because alcohol was involved, but as far as her first statement was concerned, everything "is the truth".

Sgt. Burke deposed in his Affidavit that he "can say without reservation that Bonnie Jean Pottie was not impaired by alcohol at the time" the first statement was taken on September 17, 1995.

Hearing of the Appeal

Mr. Pottie appeared unrepresented before the panel. He advised that he had Legal Aid lawyers many times in the past and "I am better off going on my own".

He was candid in acknowledging that after he was jailed, "my wife and I started communicating, she is the one who told me to put in this appeal, I didn't really give a (expletive), I couldn't care less . . . we'll give it a shot, another try. . . ."

He also advised the panel that his wife told him she was drunk when she gave the first statement, but he recalled what happened, and he never assaulted his wife "as far as I'm concerned".

His representations respecting his state of recollection would appear to conflict with his comments on September 18 to the Provincial Court Judge.

When it was pointed out to him that he had requested federal time, he stated that his present

complaint was that he was not receiving any anger management control therapy or learning a trade.

Crown counsel made a motion, to which Mr. Pottie consented, for the introduction of fresh evidence, including the Affidavit of Sgt. Burke, the statements of Mrs. Pottie and Ms. Snow taken September 17, 1995, the statement of Mrs. Pottie taken January 15, 1996, as well as the statement of Ms. Snow taken March 11, 1996.

Analysis

The powers of this court respecting the introduction of fresh evidence are derived from s. 683 of the **Criminal Code**. The Supreme Court of Canada interpreted this section in **Palmer & Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 at 204 as follows:

> "Parliament has given the Court of Appeal a broad discretion . . . The overriding consideration must be in the words of the enactment "the interest of justice" . . . The following principles have emerged:
>
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: See **McMartin v. The Queen** [1964], S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

The Affidavits and statements we were asked to admit as fresh evidence were received at the hearing, but the panel reserved decision as to their admissibility, pending the hearing of the appeal, following the procedure recommended by the Supreme Court of Canada in **R. v. Stolar** (1988), 1 S.C.R. 480 at 491.

When considering the issue for the introduction of fresh evidence, it is appropriate to recall that Mr. Pottie has pleaded guilty to each of the offenses of which he was charged.

A guilty plea "is a formal admission of guilt". It also constitutes a "waiver of both the accused's right to require the Crown to prove its case beyond a reasonable doubt and the related procedural safeguards". (**Regina v. R.T.** (1993), 10 O.R. 514 (Ont.C.A.))

This is not a case where Mr. Pottie entered a plea of not guilty resulting in conflicting evidence concerning the issues raised in the four charges being given by the Crown witnesses and defence witnesses; rather, it is a case, where after pleas of guilty were entered on four charges, a description of each of the offenses was placed before the court in the presence of Mr. Pottie, and no objection was taken by him to the description.

An appeal court may permit the withdrawal of a guilty plea provided the appellant satisfies the court that there are "valid grounds" for doing so (**Adgey v. The Queen** (1975), 2 S.C.R. 426 at 431).

Without intending to be exhaustive, Dickson, J., in **Adgey**, listed some of the grounds that he considered would meet the test. They included the situation where the accused never intended to admit to a fact which is an essential ingredient of the offence, or a situation where the accused may have misapprehended the effect of a guilty plea, or where the accused never intended to plead guilty at all.

There are circumstances where guilty pleas may be withdrawn if there is an appearance of unfairness (**Regina v. Stork** (1975), 24 C.C.C. (2d) 210).

This case does not meet any of the above requirements. Mr. Pottie does not submit that he did not understand the process, or that he did not intend to plead guilty, or that he was treated unfairly. The apparent complaint he makes in his Notice of Appeal is that he plead guilty without

knowing that his wife had "dropped" the charges, on the apparent belief that it was her prerogative to cancel the charges.

This submission is without merit. The discretion remained solely with the Crown, and not Mrs. Pottie, as to whether or not the charges should proceed.

I consider the following matters to be relevant:

- Mr. Pottie was familiar with the workings of the court system, including the significance of the Crown proceeding by way of indictment. His previous convictions, and sentences, bear on the "quality" of his four guilty pleas that he now wishes to withdraw;
- Mr. Pottie was advised to secure legal counsel and had ample opportunity to do so, but declined the invitation in view of his past experiences;
- Mr. Pottie's plea was not accepted by the Provincial Court Judge at the first appearance, notwithstanding that he wished his plea to be taken. He repeatedly expressed the wish to be sentenced as soon as possible;
- Mr. Pottie made no objection to the Crown's summary of the statements of Mrs. Pottie and Ms. Snow;
- Mr. Pottie advised this Court that he couldn't "care less" about the appeal, but that his wife wished him to bring it and he might as well give it a "shot, another try".

In **Regina v. R.T.**, Justice Doherty on behalf of the Court, said that "to constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea. . ."

I am satisfied from my examination of the record that Mr. Pottie's four pleas were voluntary, unequivocal, and that he was fully informed.

It is common knowledge that victims or witnesses in spousal assault cases are often influenced to change an initial statement given to the police (see comments of Cory, J., in **R. v. B (K.G.)** (1993), 1 S.C.R. 740 at 826).

The comments of Sidney Smith, J.A., in **R. v. Sanders** (1953) 106 C.C.C. 76 at 82, are appropriate to this appeal:

> On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead "guilty" before a magistrate and then, because he found the sentence unexpectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the county court and, without explanation, blandly plea "not guilty", and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice.

Crown counsel submits that the fresh evidence should be admitted, that while Ms. Snow's second statement is confirmatory of Mr. Pottie's guilt on three of the charges, there is no independent corroboration that Mr. Pottie uttered a death threat against his wife; counsel has advised that it does not wish to proceed with a new trial on this issue and accordingly submits that we should set aside the plea of guilty to uttering a death threat against Mrs. Pottie, and quash the conviction.

The Crown suggests, further, that we should confirm the three sentences of six months consecutive for the remaining three offenses, and attach to them an order for probation for a term of six months requiring Mr. Pottie to attend at the outpatient Mental Health Department at the Cape Breton Regional Hospital for anger control therapy.

The submissions of Crown counsel, particularly if they are consistent with what may be said to be in the best interest of the accused, are entitled to great weight. I am not convinced, however, that the threshold for the introduction of the fresh evidence as set out in **Palmer and Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 has been met.

The fresh evidence proposed to be introduced does not assist in establishing valid grounds justifying the withdrawal of the guilty pleas.

I conclude that the guilty pleas are valid and that no valid grounds have been established by Mr. Pottie to require their withdrawal.

I would dismiss the application for introduction of fresh evidence.

There is no substance to any of the other arguments raised by Mr. Pottie respecting his appeal from the four convictions, and I would, accordingly, dismiss those appeals.

With respect to the application for leave to appeal his sentences, the duty of this court is to consider the "fitness" of the sentences appealed against and to determine if the Provincial Court Judge applied wrong principles, or if the sentence was clearly or manifestly excessive (**R. v. Shropshire** (1995), 119 N.R. (S.C.C.)).

I have reviewed the record, and in my opinion, the sentences were fit and not clearly or manifestly excessive.

I would dismiss the application for leave to appeal sentence.

Pugsley, J.A.

Concurred in:

Matthews, J.A.

Bateman, J.A.

C.A.C. No.121309

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

Alexander Joseph Pottie		
	Appellant	
- and -		R E A S O N S FOR
		JUDGMENT BY:
Her Majesty the Queen		PUGSLEY, J.A.
	Respondent	