NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cain*, 2014 NSCA 26

Date: 20140320
Docket: CAC 417338
Registry: Halifax

Between:

Percy Cain

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Saunders, Beveridge and Bryson, JJ.A.

Appeal Heard: January 28, 2014, in Halifax, Nova Scotia

Held: Appeal from conviction dismissed; leave to appeal sentence granted but the appeal is dismissed per reasons for judgment of Saunders, J.A.; Beveridge and Bryson, JJ.A. concurring.

Counsel: Appellant in person
Mark Scott, for the respondent

Reasons for judgment:

[1] Mr. Cain is self-represented. Following a trial before Nova Scotia Provincial Court Judge Michael B. Sherar (adjourned twice when Mr. Cain dismissed his lawyers) he was convicted of break and enter and sentenced to five years' imprisonment. He appeals both his conviction and his sentence.

[2] Respectfully, I am not persuaded by any of the appellant's submissions. I would dismiss the appeal. I will begin these reasons with a brief summary of the facts gleaned from the Crown's factum and other materials in the record.

Background

[3] On June 16, 2012, police responded to a report of an attempted break and enter on Leeds Street in the north end of Halifax. While taking a statement from one neighbour, a police officer was approached by another neighbour who believed the person responsible was outside Jenny's Place Pub. Police went to the establishment, saw Mr. Cain there and arrested him for breach of his house arrest conditions. He made a number of spontaneous, exculpatory utterances which were disbelieved at trial.

[4] A search of Mr. Cain at the police station resulted in the discovery and recovery of most of the jewelry stolen from a home on Leeds Street that evening.

[5] At trial the appellant testified on his own behalf. His defence was one of alibi claiming that he had purchased the jewelry (which he surmised had been stolen) from an acquaintance in the pub just before his arrest.

[6] Judge Sherar rejected the appellant's testimony as both not believed, and not believable. The judge applied the inference available to him from the recent possession of stolen jewelry, when convicting the appellant.

[7] Mr. Cain was sentenced to five years' incarceration less credit for time spent on remand in light of the seriousness of the offence and the appellant's "formidable" record.

[8] For part of his trial (those days when Mr. Cain had not fired his lawyers) he was represented by counsel. The Crown called four witnesses. Each was cross-examined by Mr. Cain's defence counsel, or by him personally.

[9] This case is somewhat unusual in that Mr. Cain did not file a factum per se. Rather, his written submissions are contained in three discrete "packages" of handwritten material, those being his prisoner's Notice of Appeal dated July 3, 2013 (three pages); his "Notice of directions of Factums" dated October 16, 2013 (four pages); and his filings dated October 23, 2013 and date stamped by the Registrar on October 29, 2013 (nine numbered pages and three additional unnumbered pages). Besides these filings Mr. Cain also sent a one-page letter to the Registrar dated January 8, 2014 (received January 16, 2014); and an undated one-page letter to the Deputy Registrar received January 23, 2014.

[10] At the appeal hearing we were satisfied that these five separate "packages" comprised all of the appellant's written submissions wherein he raised a slew of complaints and alleged errors relating to his trial, conviction and sentence.

[11] Besides these written submissions Mr. Cain also raised a number of additional points during his oral argument.

[12] Owing to the way in which Mr. Cain has presented his case I will attempt to respond to each of his arguments point by point.

[13] But before doing that I wish to record Mr. Cain's agreement at the beginning of the hearing that the panel ought to proceed to hear his case on the merits that day as scheduled. This preliminary issue arose because in his letter to the Registrar dated January 8, 2014, Mr. Cain complained that in his opinion the Crown had not complied with its duty to disclose and had failed to respond to his earlier requests that certain police notes and statements be produced. Mr. Cain had repeated that complaint in his letter to the Deputy Registrar received January 23, 2014. As a panel we reminded the appellant that he had been explicitly directed by the Justice(s) presiding during earlier Chambers teleconferences that if he wished to seriously request such disclosure of "missing" evidence he would have to bring a proper motion, supported by affidavit, to accurately identify the evidence and satisfy the Court that it had any relevance to or bearing upon his trial and his appeal. In spite of those explicit directions Mr. Cain had never brought such a motion.

[14] Accordingly, at the commencement of the hearing we advised Mr. Cain that he could either proceed with his appeal on the merits based on the record as it exists and supplemented by his written and oral submissions, or we could consider a request by him to adjourn the proceedings, pending his bringing such a motion, and reschedule his appeal to a later date.

[15] After carefully considering his options Mr. Cain assured us that he was prepared and anxious to proceed with his appeal that day as scheduled, and not delay matters any further.

[16] It was on that basis that we then heard Mr. Cain's lengthy and very detailed oral submissions, as well as the Crown's submissions in reply.

[17] Following argument our decision was reserved.

Issues

[18] We are indebted to Mr. Scott, counsel for the respondent. His comprehensive and very helpful factum effectively groups Mr. Cain's five "packages" of "errors" and complaints into a manageable list of six issues. I would adopt counsel's list which I have refined slightly. Essentially the appellant says the trial judge erred by:

1. admitting portions of Ms. Trudy States' statements to the police for the truth of their contents;
2. failing to conduct a hearing with respect to the appellant's request for a mistrial based on Crown misconduct;
3. reaching a verdict that was unreasonable;
4. admitting and relying upon the evidence of Kenneth Green and Robert Kelbrat because their testimony related to an attempted break and enter at 6224 Leeds Street which was not the charge for which he was convicted;
5. relying upon the "doctrine" of recent possession in light of the appellant's explanation which might reasonably be true;
6. imposing a sentence that was demonstrably unfit.

Standard of Review

[19] These issues raise different types of questions which call for a different standard of appellate review. I endorse and adopt Mr. Scott's submission with respect to the appropriate standard of review for each of these six issues.

Issue #1 – This concerns the admissibility of evidence which involves a question of law to be reviewed on a standard of correctness. However, in applying the law to the evidence the trial judge's assessment of prejudicial impact versus probative value is a matter entitled to deference;

Issue #2 - This raises the issue of a judge's duty to assist an unrepresented accused, which falls within the judge's discretion and is entitled to deference;

Issue #3 - Deciding whether a verdict is unreasonable invites our review of a trial judge's findings of fact and inferences drawn from the facts, which often depend upon matters of weight and reliability or credibility of witnesses. In this, the trial judge's findings are entitled to deference;

Issue #4 - This also relates to the admissibility of evidence (see earlier commentary under Issue #1);

Issue #5 - This again relates to both the proper application of the law as well as assessments of credibility, findings of fact, drawing inferences, etc. The former amounts to a question of law which demands a standard of correctness. The latter is entitled to deference;

Issue #6 - This question relates to sentence appeals and the trial judge's exercise of judicial discretion. Considerable deference is paid in such matters. This Court will not intervene unless the judge erred in principle, over or under emphasized relevant factors, or imposed a sentence that is demonstrably unfit.

[20] These are the standards I will apply when considering all of the appellant's submissions. I will turn to them now.

Analysis

Issue #1 – That the trial judge erred by admitting portions of Ms. Trudy States' statements to the police for the truth of their contents

[21] On June 16, 2012, the appellant was bound by the terms of a Recognizance which effectively confined him to house arrest and only permitted him outdoors between 12 noon and 4:00 p.m. on Saturday to attend to personal needs, and excepting medical emergencies or scheduled appointments with his lawyer or probation officer.

[22] Ms. Trudy States was a former girlfriend of the appellant. Ms. States was called by the Crown as a witness at the appellant's trial. She testified that on June 16, 2012, she and the appellant lived together at 3381 Federal Avenue in Halifax, with her two children. She described being out that day and when she returned during daylight hours she discovered that Mr. Cain was not at home as he was required to be by the terms of his house arrest. She telephoned the police to discuss with them the concern she had about her liability as the appellant's surety. Sometime later, when the police attended at her residence, she gave them a statement. That statement was put to the witness at trial when she claimed to have little recollection of her conversations with the police officers in her home. Obviously the purpose in having Ms. States testify was to show that the appellant was not there when he should have been; the proximity between Ms. States' house and the homes on Leeds Street where the break and enter(s) occurred; and that she did not own any expensive gold jewelry.

[23] On appeal the appellant says Ms. States had been drinking heavily that evening, admitted consuming a whole bottle of vodka, that the police were wrong to take a statement from her in such a state, and that the judge erred in placing any reliance upon her testimony.

[24] Respectfully, there is no merit to the appellant's complaint. Ms. States' condition when she was in the presence of the police officers was a matter for the trial judge to assess. He did exactly that. Two police officers testified that when she gave them her statement, she was not intoxicated but rather agitated by the appellant's breach of the terms of his Recognizance and her own potential liability as a surety.

[25] Judge Sherar was in the best position to assess Ms. States' testimony when she was questioned and cross-examined at trial. As we reminded Mr. Cain during his arguments on appeal, a trial judge may accept all, part or none of what any witness says. What prompted Ms. States to call the police and whether it was her concern over personal liability as Mr. Cain's surety is irrelevant. While the police officers acknowledged that there were signs Ms. States had been drinking, they were satisfied that she was capable of giving a meaningful statement. Given his advantage in being able to observe the witnesses first hand, Judge Sherar was in the best position to decide what weight, if any, he chose to give her evidence. The fact that she said she "could not recall" at certain points in her testimony, while acknowledging that she was "a straight shooter" and would try to be truthful and accurate when speaking to the police, were all matters for the trial judge to evaluate. He did precisely that. There is nothing here which would warrant our interfering with the judge's findings. It was certainly open to Judge Sherar, to conclude as he did, that while Ms. States had been drinking on the night in question, and could not remember every detail surrounding the events that transpired that night, she was not intoxicated when she spoke to the police and gave them her statement.

[26] Finally, there was no need for a *voir dire* to establish the admissibility of Ms. States' evidence, nor any requirement that the statement itself be made an exhibit. Defence counsel exercised its right to cross-examine the witness and no objection was taken to the procedure followed or the use the judge made of her evidence.

Issue #2 - That the trial judge erred by failing to conduct a hearing with respect to the appellant's request for a mistrial based on Crown misconduct

[27] This complaint by the appellant rests upon three principle assertions: first, he says Ms. States' treatment at the hands of both the police and the Crown was improper (I've already touched upon that to some extent); second, he says his own rights were breached by the police; and third, he says he was not given a fair trial because the judge refused to grant him an adjournment to get a lawyer, and failed to consider his application for a mistrial.

[28] Respectfully, there is no merit to any of these grounds. At the appeal hearing Mr. Cain told us that he was never given his "rights" or "Miranda" by Constable Gillis when she first arrested him at Jenny's Place Pub for the breach of

Recognizance. He said he was only “read his rights” relating to the charge of break and enter an hour or more later when he was being booked at the police station and questioned about the jewelry found in his pockets. He agreed that this was a new “ground of appeal” not raised in his Notice of Appeal, but said he had raised his “**Charter** rights” at trial and Judge Sherar rejected his arguments.

[29] In my view nothing at all turns on this submission. At trial the Crown did not lead evidence concerning any admissions made by the appellant while in the presence of the police. The only two “utterances” came from Constable Gillis’ testimony where she said Mr. Cain had told her that he was “only inside Jenny’s Place to use the telephone”, a statement which Mr. Cain denied making at his trial; and his comment to her at the police station when she questioned him about the jewelry and he said: “That’s my woman’s” which he did not dispute and said he might well have told this to the officer. Put simply, there was no **Charter** breach and this new complaint raised by the appellant in oral argument at the hearing had nothing to do with his conviction or sentence.

[30] The appellant’s complaint concerning the Crown’s use of Ms. States’ testimony is double-sided. On the one hand he says that Ms. States was treated unfairly because she felt “threatened” in having to give her statement to the police and she had only ever called them in the first place because of her alarm that she might be liable as a surety, and then she felt “pressured” again at the trial when the Crown got her to say things she did not intend. On the other hand, as an “alternative” argument Mr. Cain says that Ms. States “is a liar” and “should have been impeached”, and that despite what she said at trial, Mr. Cain could now produce proof that she did have a criminal record, and abused drugs.

[31] I have already explained that assessing the credibility and reliability of the witnesses who appeared at trial was entirely a matter for Judge Sherar. Ms. States was cross-examined by the appellant’s defence lawyer at his trial. Mr. Cain’s new attack on her character and credibility is without merit.

[32] Neither is there any substance to Mr. Cain’s complaint that the trial judge “forced” him to continue his trial with a lawyer he had dismissed after losing confidence in his representation. On the contrary, and as the transcript makes clear, Judge Sherar took the time to explain to Mr. Cain that his case had been delayed too long; that he had already had and dismissed two capable and experienced criminal lawyers; and that he was not going to grant another adjournment but would give the appellant half an hour to think about whether he

wished to proceed on his own, or have the lawyer (who as a courtesy had remained within the courtroom to assist if called upon) resume representing Mr. Cain's interests. Those directions clearly fell within the trial judge's broad discretion in managing the trial process. I note as well that there is no complaint of ineffective counsel listed as a ground of appeal in Mr. Cain's Notice of Appeal.

[33] Here, the record reveals the drawn out history of proceedings. There were a number of adjournments. Mr. Cain had ample opportunity to find alternate counsel, had he been dissatisfied with his second lawyer. Moreover, his own submissions to the Court demonstrated that he was sufficiently intelligent and astute to represent himself, if need be. The appellant's re-acquired representation by counsel was his choice alone after being given the chance and the time to carefully consider his options. Further, the Court had allowed the defence an adjournment of approximately two months in which to finish the trial. That was an opportunity for Mr. Cain to have acquired a third lawyer, had he been truly dissatisfied with his second.

[34] The appellant now complains that the trial judge failed to hear his application for a mistrial. As is apparent, the judge knew he was dealing with a person who appeared to be articulate, intelligent and experienced in trial procedures, considering that his criminal record goes back to the 1970's. Mr. Cain had brought it upon himself to file materials which would support his request for a mistrial . He did not appear to be, in any respect, a meek or inexperienced litigant. If anything, the record shows that he was outspoken, aggressive and at times defiant.

[35] Judge Sherar was well aware of Mr. Cain's outstanding mistrial application. The judge directed that Mr. Cain should have his witnesses subpoenaed for the next court appearance and that the Crown should consider alternate counsel, at least to respond to that application. Everyone understood these ground rules before the next appearance.

[36] At the next court appearance nothing further was filed by either the appellant or the Crown. There is no record of witnesses being subpoenaed or present. There is no suggestion that counsel for the Crown had arranged for alternate counsel. In short there is nothing to indicate that the appellant intended to pursue his application. Judge Sherar was entitled to assume that the matter had been abandoned. Ultimately this was an application for which the appellant himself was responsible. Given the circumstances of this case, Mr. Cain's considerable

experience with the criminal justice system, and his ability to represent his own interests, any failing in pursuing the matter was his alone.

Issue #3 - That the trial judge erred by reaching a verdict that was unreasonable

[37] The appellant repeats his attacks upon the character, credibility and reliability of the witness, Ms. Trudy States. As well, he challenges the times when neighbours claimed to have seen a suspicious male in the neighbourhood; he says there were improper "conjectures" on the part of the trial judge; and he points to other "flaws" in the police investigation, all of which he says raise a reasonable doubt and "prove" that the judge's verdict is unreasonable.

[38] Again, there is no merit to the appellant's complaints. Simply to illustrate, Mr. Cain says the trial judge erred in concluding that he had gone into Jenny's Place Pub to sell the jewelry, having stolen it from Ms. Vicki Clark's home. Mr. Cain reasons: "The judge wasn't there ... so how could he know?" Obviously this complaint has to be seen in context. The judge rejected the appellant's testimony that he had gone to Jenny's to buy stolen property, preferring instead to infer that the appellant had walked over to (or gone into) the pub to sell the jewelry he had just stolen. In other words, in the mind of the judge, that was the far more likely explanation for Mr. Cain being there. That was a perfectly reasonable and logical inference to draw. But nothing turns on the point because by Mr. Cain's own admission he was inside the pub "buying" a bag of jewelry from his friend in the men's toilet stall.

[39] Similarly, the fact that Ms. Clark's residence was dusted for fingerprints and the police never found Mr. Cain's prints anywhere is irrelevant. When testifying in his own defence the appellant admitted that he was in possession of stolen property and so the only real question was how he came to have it. The fact that his fingerprints were not found inside Ms. Clark's residence is immaterial. What is important is that when he was being booked at the police station most of Ms. Clark's jewelry was found in his pockets and clothing, within a short time of the reported break and enter.

[40] The circumstantial evidence produced by the Crown was very strong. Having disbelieved Mr. Cain's "alibi" and not been left with any reasonable doubt upon the whole of the evidence, a conviction was inevitable. The judge did not err

in his careful assessment of the evidence or in his application of the doctrine of “recent possession”.

[41] While, as is so often the case, there were inconsistencies in the evidence of witnesses regarding times, it must be emphasized that their testimony could only be seen to be approximations. Trial judges are not obliged to reconcile every piece of contradicted evidence or recreate to a certainty the events as they unfolded that evening. Rather, Judge Sherar was required to consider whether the Crown had proved all of the essential elements of the crime beyond a reasonable doubt. He did exactly that.

[42] On appeal Mr. Cain also complained that the judge erred in looking at his criminal record when deciding credibility. While acknowledging that it was perfectly appropriate for any accused person who decided to testify, to be asked whether he/she had a criminal record, and that the fact a person had a criminal record was a legitimate factor to take into account when assessing that individual’s credibility, Mr. Cain’s present complaint is that Judge Sherar actually had a paper copy of his very lengthy criminal record before him during the trial. In reply Mr. Scott said there was absolutely no evidence to suggest that the trial judge actually had a hard copy (CPIC) of Mr. Cain’s criminal record during the course of the trial. But even if he did, I agree with the Crown’s submission that there is no suggestion in this record that the judge used that information for any improper purpose.

[43] For all of these reasons I would reject the appellant’s complaint that the verdict is unreasonable

Issue #4 - That the trial judge erred by admitting and relying upon the evidence of Kenneth Green and Robert Kelbrat because their testimony related to an attempted break and enter at 6224 Leeds Street which was not the charge for which he was convicted

[44] Mr. Cain complains that the evidence of Messrs. Green and Kelbrat should not have been “allowed” because their testimony concerned 6224 Leeds Street and the attempted break and enter at that location, and not the break and enter at the residence of Ms. Vicki Clark at 5621 Leeds Street. Mr. Cain says he was “acquitted” of the attempted break and enter, and the evidence given by Messrs. Green and Kelbrat “had nothing to do with this appeal”.

[45] I disagree. Messrs. Kelbrat and Green had relevant, probative evidence to give. They describe the suspicious man seen in the area of 6224 Leeds Street, and

how they alerted Constable Gillis. She later saw the appellant at Jenny's Place Pub. Mr. Cain matched the description. She knew that he was subject to house arrest and was breaching its terms by being out at night. Their evidence was also very relevant, as to the times he was seen, especially after he brought out his "alibi" about being home barbequing shish kabobs. The judge did not err in admitting and relying upon this evidence. This was not a case where similar fact evidence was invoked. This was not a case where a trial judge mistakenly utilized evidence from one count to another. Rather, this was a case where a number of fortuitous coincidences coalesced and Mr. Cain found himself caught in a circumstantial net of his own making.

Issue #5 - That the trial judge erred by relying upon the "doctrine" of recent possession in light of the appellant's explanation which might reasonably be true

[46] The trial judge cited and properly applied the law in assessing Mr. Cain's explanation. When Judge Sherar said that he did not believe Mr. Cain's version of events and that his explanation for the possession of the jewelry was "unbelievable", he obviously concluded that the appellant's version did not raise a reasonable doubt and could not reasonably be true. These were findings of fact, premised in part on his findings of credibility, to which considerable deference is afforded. In these circumstances, a rejected explanation amounts to no explanation at all. The judge did not err in the way in which he applied the doctrine of recent possession to the circumstances of this case.

Issue #6 - That the trial judge erred by imposing a sentence that was demonstrably unfit

[47] Mr. Cain will soon be 60 years of age. He has spent much of his life behind bars. In submissions at the sentencing hearing the Crown Attorney Mr. Woodburn said:

> Mr. Percy Cain has a record and it starts back in 1973 ... You'll see he has break and enters, he's served federal time for break and enters, virtually his entire life. He has spent more time in jail than he has been on this earth, I think. ... it appears the way he operates, he prefers to be in jail more than he does (sic) be out, because as soon as he gets out of jail, he spends very little time before he's either recommitted after parole violations or he simply commits more crimes until he's thrown back in jail again. ...

> None of his life, from what I can see, back from 1973, has been crime free. Mr. Cain is a chronic perpetrator of crime. He has multiple break and enters, which go back years and years, and he's served anywhere from six months to federal sentences for each of those.

At the time of his arrest on these charges Mr. Cain was subject to a Recognizance following another recent conviction for unlawfully being in a dwelling.

[48] In 2008 Mr. Cain's conviction and sentence on yet another charge of unlawfully being in a dwelling house was upheld by this Court on appeal (2008 NSCA 49). In dismissing his appeal Justice Bateman, writing for a unanimous Court, said :

> [20] The appellant has a lengthy criminal record. He is known to use aliases....
>
> [23] Finally, I have considered the fitness of sentence, ...given the nature of the offence and the appellant's extensive criminal record, I am not persuaded that in sentencing the appellant to four years imprisonment (which was reduced to thirty-four months after double credit for time spent on remand), the judge erred in principle or that the sentence is clearly unreasonable ...

[49] From the record in this case it appears that Judge Sherar gave Mr. Cain a 1.5:1 remand credit at the request of his defence counsel. In sentencing Mr. Cain, the judge said:

> Mr. Cain has a formidable record dating back many years and including several offences involving break and enter. ...
>
> Something has got to happen to Mr. Cain to make sure that he doesn't continue to violate the public trust by way of breaking and entering into people's residences. I'm sure Mr. Cain wouldn't countenance or accept his friends, his relatives, his mother in particular, [having] their homes being broken into and things being taken from those persons. ...
>
> The court is faced with very few options with regards to Mr. Cain to try and resolve and deter his continued antisocial behaviour by various breaches of court orders, and also by various further acts of criminal activity. Mr. Cain is going to have to be removed from society for a significant period of time to bring home to him the importance of maintaining the law.

[50] Given Mr. Cain's extensive criminal record, continued criminal activity, and virtually nothing positive to say by way of mitigation, a sentence of five years'

imprisonment less credit for time spent on remand cannot be said to be demonstrably unfit.

[51] At the appeal hearing Mr. Cain said that at his sentencing he had wanted to challenge the accuracy of his criminal record the Crown introduced, but that he was “tired” and “frustrated” and “did not want to wait another 60 days to have that record proven”. So he went ahead with it because he “just wanted to get it overwith”. I reject that submission. The transcript clearly records defence counsel’s explicit stipulation based on the appellant’s instructions to counsel that he admitted his criminal record, excepting a single charge of perjury and that Crown counsel had agreed to that stipulation.

Conclusion

[52] I would dismiss the appeal from conviction. While I would grant leave to appeal sentence, I would dismiss that appeal as well.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.