NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. West***, 2003 NSCA137

Date: 20031210
Docket: CAC 176667
Registry: Halifax

Between:

William Fenwick West

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Bateman, Saunders & Hamilton, JJ.A.

Appeal Heard: November 17, 2003, in Halifax, Nova Scotia

Held: Appeal allowed. New trial ordered pursuant to s. 686(5)(a) before a judge and jury, as per reasons of Saunders, J.A.; Bateman & Hamilton, JJ.A. concurring

Counsel: Luke Wintermans & Barry Whynot, for the appellant
Peter P. Rosinski , for the respondent

Reasons for judgment:

Introduction

[1] On December 18, 1998 the Bank of Montreal branch in Mahone Bay was robbed of a sum of money totalling $444,100. Some hours later the appellant, William Fenwick West, was arrested as a suspect. He was taken to the RCMP detachment where he remained from noon December 18 until the next day. During his time in custody Mr. West gave two inculpatory statements identifying himself as the robber of the bank. Both confessions were videotaped. Mr. West was charged in a nine count Indictment on charges that included armed robbery; unlawful confinement (of bank employees); car theft; and wearing a mask. After a *voir dire* his confessions were admitted as evidence. The *voir dire* evidence was applied to the trial by consent. At his trial the defence presented alibi evidence and challenged the voluntariness of West’s two confessions.

[2] On December 6, 2001 Mr. West was found guilty after his trial before Nova Scotia Supreme Court Justice Charles E. Haliburton. He was convicted of robbery of the bank; theft of a bank employee’s car; being masked in relation to the bank robbery and the theft of the vehicle; three counts of unlawful confinement involving the bank employees; two counts of using an imitation firearm while committing the bank robbery; and car theft. On December 28, 2001 Mr. West was sentenced to eight years’ imprisonment with a lifetime prohibition on weapons, and a fingerprinting order. He was given credit for having spent from December 24, 1998 to December 28, 2001 on house arrest as a condition of his bail.

[3] Mr. West now appeals to this court alleging multiple errors on the part of the trial judge concerning his admitting into evidence the appellant’s statements to the police and in failing to find that there had been a violation of his **Charter** rights. The appellant seeks an acquittal or, in the alternative, a new trial by judge and jury.

[4] The Crown acknowledges that the trial judge seriously erred in stating and applying the test for voluntariness of a confession. It now concedes that this error warrants a new trial. The Crown opposes the appellant’s request for an outright acquittal.

Issues

[5] The appellant lists seven grounds of appeal which in themselves raise a host of issues but which, in my opinion, may all be reduced to two principal points, each with its own remedial component. They are:

1. *Did the trial judge err in law in applying the wrong test on the voir dire with respect to the voluntariness of Mr. West's statements to the police, and if so does the record permit this court to undertake its own review and after correctly applying the proper test for voluntariness, decide that issue?*

2. *Did the trial judge err in law by failing to find that there had been a violation of the appellant's s. 7 and s. 10(b)* ***Charter*** *rights, and if so does the record permit this court to undertake its own review and after correctly applying the law, decide that issue?*

[6] Both counsel at trial and the trial judge dealt with these two issues as being interrelated. Even though they are now presented as discrete bases for allowing the appeal there will, on account of the way in which the case was presented and argued, be a certain crossover in the evidence and treatment of the arguments.

[7] To explain my reasons for the disposition I propose, it will be necessary for me to describe some of the material background of the case. I wish to emphasize that the description which follows is intended to lend context so as to better explain my disposition of the issues, and ought not to be taken as endorsing any particular version of disputed facts that may arise in a new trial.

Factual Background

[8] At approximately 8:00 a.m. on December 18, 1998, Terry Boutilier and Adele Smith, both employees of the Bank of Montreal in Mahone Bay arrived for work. As they prepared to unlock the door a completely disguised man confronted them, who is reported to have shown them the butt of a handgun in his coat pocket and demanded to be let into the bank before any other persons arrived. Both employees made excuses as to not having the proper keys to gain entry right away and, remarkably, persuaded the robber to join them in their vehicle where they waited until approximately 9:00 a.m. when Darlene Hirtle arrived. She was made aware of the situation and using her keys all four entered the bank. In a few

minutes the cash from treasury, month-end deposits in a courier bag and money from the automated banking machine totalling $444,100 were placed in a sports kitbag. The employees were tied with duct tape and left in the vault. The masked robber fled from the scene at approximately 9:20 to 9:30 a.m., stealing Darlene Hirtle's small red car in making his get away.

[9] The employees soon freed themselves and called 911. Ms. Hirtle's car was found within the hour, not far from the bank. A witness described a white Intrepid car that had been the only car parked in the same location where the red car was abandoned. Consequently the police began a search for a car described as a white Intrepid.

[10] At approximately 10:25 a.m. Mr. West appeared at the doorstep of the Smith residence on the North River Road in the Lake George area of Kings County and asked to use their phone. He said he needed to call a tow truck as his car had gone off the road into the ditch. He was driving his mother's white Intrepid.

[11] The RCMP came upon the tow truck and the white Intrepid. When Mr. West was apprehended he was a passenger in the tow truck which had already extracted the car from the ditch. After identifying himself he agreed to an officer's request to search the car. Nothing was found in the white Intrepid or his own clothing linking him to the robbery.

[12] At about 12:25 p.m. Corporal Blakeney, the senior RCMP officer at the scene, advised Mr. West that he was under arrest for suspicion of bank robbery. He was placed in a police vehicle. Corporal Blakeney asked West if he wanted to contact a lawyer to which the appellant said he did. The officer explained that he could call a lawyer once they reached the RCMP detachment in New Minas. Corporal Blakeney testified that he then gave West the police warning which West said he understood.

[13] On route to the detachment, Corporal Blakeney communicated with other officers by radio. He then stopped the police vehicle and advised Mr. West that he wished to obtain a warned statement from him then and there, whereupon West is reported to have said he wanted to speak to a lawyer. The police gave him their cellphone after reminding him that there was no guarantee of privacy when calling on a cellphone. There is a conflict in the evidence between the police and the appellant as to whether Corporal Blakeney, accompanied by Constable Stones,

actually got out of the police vehicle while West made his call. In any event Mr. West is reported to have communicated with a lawyer and after receiving certain advice, then declined to give Cpl. Blakeney a statement.

[14] They arrived at the RCMP detachment in New Minas at 2:28 p.m. where Mr. West's personal items were seized. A short time later he telephoned his mother and alerted her to his situation. At 4:16 p.m. he asked to speak to a lawyer and Constable Stones dialed the number for him to the Legal Aid office. There he spoke with an office employee who took note of his call and promised to pass it on to a staff lawyer. At 4:40 p.m. he asked to call a lawyer again and was given an opportunity to do so.

[15] He was placed in the only interview room equipped for video monitoring. In it were two chairs and a table. There it appears he remained for the most part until the afternoon of the next day. His clothes were taken and he was given a lightweight Mylar jumpsuit to wear. There is no dispute that the room was cold or that the appellant complained to the police officers how cold it was. Eventually he was given a blanket for added cover. Sometime between 9:00 - 10:00 p.m. a heater was placed in the room which improved the comfort level considerably. Evidence was presented by the Crown at trial from a professional mechanical engineer who confirmed the ongoing problems with the heating system in the detachment. There were "cold spots" throughout the building during the winter months. With only a single thermostat for the entire lower floor there was no effective way to control the temperature in the interview room.

[16] At approximately 10:22 p.m. on December 18, 1998 while conducting a search of and around the cottage property of the appellant's brother Malcolm West, an RCMP service dog and its handlers located the missing money hidden under an overturned boat on an adjacent cottage property 40 feet away. They found several items including a black and purple sports bag containing all of the money stolen from the bank, and a garbage bag holding the robber's clothes and pellet gun styled revolver. This cache was approximately 10 kilometers from the place where Mr. West had gone off the road that morning.

[17] When interviewed by the police the bank employees were not able to identify the appellant as the robber from either voice sampling or photographs.

[18] The appellant testified on the voir dire at his trial. He denied being properly informed of his right to counsel when placed under arrest. He alleged that when in police custody the officers further violated his **Charter** rights by deliberately or negligently thwarting his attempts to communicate with a lawyer. He said that because of the "harsh," and "oppressive" treatment suffered in custody together with the "inducements" and "rewards" offered to him, his statements were not voluntarily given and ought to have been excluded.

[19] As noted earlier, the trial judge rejected these submissions and held that the appellant's two confessions, as videotaped, were voluntary. He admitted the videotapes in evidence. By consent the *voir dire* evidence became evidence at trial.

[20] Mr. West testified in his own defence. He denied responsibility. He said he was nowhere near Mahone Bay on December 18 and therefore did not and could not have robbed the bank. His knowledge of the robbery came, he said, from a man named "Jason" who met him in a bar and tried to conscript him a week earlier to carry out the robbery. The appellant said he declined.

[21] The explanation given by the appellant at trial was that he had borrowed his mother's white Intrepid and that in returning it to her, he encountered snow and slippery conditions and went off the road, forcing him to walk to a nearby residence in order to call for a tow truck. This and other alibi evidence presented by the defence was offered to show that it was inconceivable - or at least not beyond all reasonable doubt - for him to have been in Mahone Bay that morning robbing the Bank of Montreal.

[22] After considering counsels' submissions and all of the evidence presented at trial, Justice Haliburton was not left with any reasonable doubt about the guilt of the appellant and convicted him on all counts. Against this factual background I will now address the two principal points that arise on this appeal.

Issue No. 1

> *Did the trial judge err in law in applying the wrong test on the voir dire with respect to the voluntariness of Mr. West's statements to the police, and if so does the record permit this court to undertake its own review and after correctly applying the proper test for voluntariness, decide that issue?*

[23] Any out-of-court statement by an accused person to a person in authority must be proven by the prosecution to be voluntary beyond a reasonable doubt. In **R. v. Hodgson** (1998), 127 C.C.C. (3d) 449 (S.C.C.) Cory, J., speaking for the majority, stated at ¶ 37:

> Finally, something must be said about the respective burdens which must be borne by the accused and the Crown on a voir dire to determine whether a statement of the accused to a person in authority should be admitted. The Crown, of course, bears the burden of proving beyond a reasonable doubt that the statement was made voluntarily.

[24] In determining the voluntariness of the appellant's statements to the police at the conclusion of the *voir dire* the trial judge said:

> With respect to voluntariness, there is a substantial burden on the Crown to prove that a statement is voluntary, although that onus is not proof beyond a reasonable doubt. It is something less than that, as I understand it. I am satisfied on the basis of the evidence and of the statements, themselves, that the statements were voluntary in that traditional sense.

In this the trial judge seriously erred. He misstated the law and consequently misapplied the legal test required to determine the admissibility of a statement made by an accused to persons in authority. In **R. v. Oickle**, [2000] S.C.J. No. 38, at ¶ 71, Iacobucci, J. writing for a unanimous court reiterated the appropriate legal test for determining whether or not a confession is voluntary. It requires a court to:

> . . . strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness . . .

There can be no question that the Crown must prove that a confession is "voluntary" beyond a reasonable doubt.

[25] The Crown acknowledges this serious error of law and now concedes that it cannot rely upon the curative provisions of s. 686(1)(b)(iii) of the **Criminal Code** to remedy such a critical mistake. Consequently the Crown takes the position that pursuant to s. 686(2)(b) this court ought to order a new trial.

[26] The appellant, on the other hand, seeks an outright acquittal. He claims that the record at trial discloses compelling evidence of oppression, inducement, trickery and denial of counsel by the police sufficient to permit this court to rule that the voluntariness of his confessions to the RCMP cannot be established beyond a reasonable doubt. Mr. West submits that had his confessions not been admitted he would not have testified at his trial. The appellant argues that if one were to exclude his confessions through a correct application of the law, there would be "nothing left" with which to prosecute him on any of the charges related to the bank robbery.

[27] With respect, I cannot accept the appellant's submission. To do so we would have to conclude that if the confessions had been ruled inadmissible and excluded by the trial judge, there was no other evidence linking him to the robbery. In this case, based upon the entire record, I am not prepared to come to such a conclusion.

[28] The thrust of Mr. West's argument on this issue is that his treatment at the hands of the police during the many hours he remained in their custody completely undermined the reliability of the "confessions." He says keeping him in a very cold room, depriving him of sleep, limiting his meals, offering inducements concerning his family members if he were to cooperate, resorting to trickery and falsifying certain information purportedly linking him to the offences, and then effectively denying him any reasonable opportunity to meaningfully consult with a lawyer, enabled the police to extract from him conscripted evidence against himself that was truly involuntary.

[29] After very carefully reviewing the four videotapes showing the time West spent in police custody it is my opinion that a true characterization of the appellant's treatment is open to a variety of interpretations.

[30] It is my view that there are insufficient, clearly stated findings of fact by the trial judge that would permit this court to form and substitute a contradictory opinion of what transpired, to which we might then apply the proper test for voluntariness. Certain of the necessary factual findings at any new trial will require an assessment of credibility. I think it prudent not to say much more concerning the appellant's treatment in police custody. Contrary to the appellant's submission, it cannot be said that the Crown, on a new trial, would be unable to establish voluntariness of West's confessions beyond a reasonable doubt. In my

opinion the trial judge, on a new trial, after hearing and assessing the witnesses and considering the entire record will be in the best position to draw proper conclusions with respect to the circumstances surrounding Mr. West's statements to the police, and then after correctly stating and applying the law, reach a conclusion with respect to voluntariness and the admissibility of this evidence.

Issue No. 2

> *Did the trial judge err in law by failing to find that there had been a violation of the appellant's s. 7 and s. 10(b)* ***Charter*** *rights, and if so does the record permit this court to undertake its own review and after correctly applying the law, decide that issue?*

[31] As I observed earlier, there is a certain overlap in the appellant's two principle submissions. This second ground is advanced both as part of his challenge on the issue of voluntariness as well as an independent basis for claiming an outright acquittal.

[32] Reduced to its essentials, the appellant argues that whatever he was told by Cpl. Blakeney when first taken into police custody did not comply with the informational and implementational requirements of his right to counsel as directed by the Supreme Court of Canada in such cases as **R. v. Bartle**, [1994] S.C.J. No. 74; **R. v. Brydges**, [1990] 1 S.C.R. 190. He says that at no time after his arrival at the RCMP detachment in New Minas was he afforded the opportunity to meaningfully consult with counsel in a way that would satisfy the conditions laid down by this court in such cases as **R. v. Chisholm** (2001), 191 N.S.R. (2d) 369 and **R. v. Nickerson** (2001), 198 N.S.R. (2d) 251. The appellant contends that the police knew or ought to have known that he had not - in any of his previous telephone calls - been able to actually reach a criminal defence lawyer and that from what his mother had told him he could expect to hear back from Harry How, Q.C., a friend of the family whom his mother had contacted upon hearing that her son was in police custody. The appellant says that when Mr. How eventually called the detachment to inquire of Mr. West's situation, the call was never put through to him, nor was he ever told by the police that Mr. How had phoned. Thus, in the appellant's submission the police either deliberately, or "through a comedy of errors" in mis-communication effectively thwarted his constitutional right to counsel.

[33] The appellant says these initial breaches were perpetuated during the time spent confessing twice to RCMP Sgt. Oldford. In the appellant's submission there was a close temporal connection between the two statements. Both should have been excluded because, Mr. West argues, he was compelled as a result of breaches of his s. 7 and s. 10(b) **Charter** rights to participate in the creation of conscriptive evidence against himself. The admission of these statements rendered the trial unfair. He says that without the statements the Crown would have had no case to meet and he would not have testified. He repeats the assertion that since the confessions were the "only evidence" connecting him to the crimes, they were heavily relied upon in the verdict and he was seriously prejudiced, both tactically and with respect to the verdict. For all of these reasons the appellant seeks an order quashing the conviction and directing that a verdict of acquittal be entered pursuant to s. 686(2)(a) of the **Criminal Code**.

[34] I cannot accept the appellant's submission. It cannot be said with certainty that the appellant has met, or at a new trial will be able to meet, the burden of showing on a balance of probabilities that his **Charter** rights were violated. The circumstances here are unique and would have to be analysed very carefully by the presiding trial judge. There are real questions whether and to what extent Mr. West was advised about, or went on to exercise, his right to consult with a lawyer and as to Mr. West's own diligence in maintaining contact with counsel. It will be important to answer these and other ancillary questions concerning the communications back and forth between the appellant and the police and the various law offices contacted on Mr. West's behalf before any conclusions can be reached with respect to the alleged violation of Mr. West's **Charter** rights. These are determinations best left to the trial judge. I think it prudent not to be any more specific than this.

[35] Citing this court's majority decision in **R. v. Nugent**, [1988] N.S.J. No. 186, and **R. v. Hoilett** (1999), 136 C.C.C. (3d) 449 (Ont. C.A.) the appellant urges that absent his "unlawfully obtained" confessions there is no other evidence capable of supporting a conviction and that therefore this court ought to direct a verdict of acquittal on all charges. I reject that submission.

[36] **Hoilett** does not assist the appellant. There, a new trial was ordered. In **Nugent**, absent the inculpatory statement, there was no other evidence reasonably linking the accused to the crime. The same cannot be said for this case.

[37] In **R. v. P.L.S.**, [1991] S.C.J. No. 37, Sopinka, J., writing for the majority observed at ¶ 8:

> On the other hand, if the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trier of fact. (underlining mine)

[38] The question to be asked is this: Is there legally admissible evidence on which a conviction could reasonably be based? This court had reason to address this same question recently in **R. v. Reid & Stratton**, 2003 NSCA 104:

> [94] Having concluded that the trial judge erred in law in his directions to the jury and that it cannot be said that his error occasioned no substantial wrong or miscarriage of justice, s. 686(2) of the **Criminal Code** directs that the conviction must be quashed and either an acquittal entered or a new trial ordered. The choice between these two alternatives is left to our discretion. **R. v. Haslam** (1990), 56 C.C.C. (3d) 491 (B.C.C.A.). Where reversible error of law has occurred but the evidence led at trial is such that a properly instructed trier of fact acting reasonably could have convicted, it is usually appropriate to order a new trial. **R. v. More and Melville** (1959), 124 C.C.C. 140 (B.C.C.A.). After carefully considering the record of these entire proceedings it cannot be said that there is "no evidence" linking Reid or Stratton to the death of MacKay (**R. v. Levy** (1990), 62 C.C.C. (3d) 97 (Ont. C.A.)). Nor is this a situation where I can say I am satisfied there is "no realistic possibility of a guilty verdict on a new trial." **Haslam**, supra.

[39] Based on the record in this case I am unable to confidently conclude that there is "no realistic possibility of a guilty verdict on a new trial." From my review there is legally admissible evidence apart from the appellant's two statements to the police upon which a trier of fact may find that a conviction could reasonably be based. Such evidence is circumstantial and includes:

- the appellant fits the general physical description of the lone bank robber,

- the money, clothes and other items associated with the bank robbery were located approximately 40 feet from Mr. West's brother's cottage in the Lake Paul area,

- a white Chrysler was seen by the manager of the Pharmasave in Mahone Bay in the store's parking lot on the morning of the robbery. The vehicle was said to be the same style as Intrepids. Later that morning the white car was gone, its place taken by the red car stolen from the bank employee when the robber made his get away,

- Mr. West went into the ditch in his mother's car, a white Intrepid, a short distance from his brother's cottage in Lake Paul,

- Mr. West called for a tow truck to the North River Road at about 10:25 a.m. From the evidence that the bank robber fled the bank between 9:15 and 9:25 a.m. this would have allowed the appellant sufficient time to drive from Mahone Bay to his brother's cottage and hide the stolen money and other items before driving back and going off the road.

[40] The sufficiency of such circumstantial evidence is best left to the trier of fact to assess at a new trial. Since, on this record, it cannot be said that there is no realistic possibility of a guilty verdict on a new trial, I would decline to enter an acquittal.

Disposition

[41] The trial judge seriously erred in misstating and consequently misapplying the legal test required to determine the admissibility of the statements made by the appellant to persons in authority. Satisfied as I am that the curative provisions under s. 686(1)(b)(iii) of the **Criminal Code** cannot be relied upon to remedy the error, I would quash the convictions and for the reasons stated I would propose that this court ought to exercise its discretion by ordering a new trial pursuant to s. 686(5)(a) before a judge and jury, that being the forum requested by the appellant.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.