NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Jones, 2006 NSCA 136

Date: 20061219
Docket: CAC 263149
Registry: Halifax

Between:

Thomas Arnold Jones

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Roscoe, Hamilton and Fichaud, JJ.A.
Appeal Heard:	November 30, 2006, in Halifax, Nova Scotia
Held:	Appeal is allowed, the conviction is set aside and a new trial is ordered per reasons for judgment of Roscoe, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Luke A. Craggs, for the appellant Daniel A. MacRury, Q.C., for the respondent

Reasons for judgment:

[1] Thomas Jones was convicted of counselling a murder which was not committed, contrary to s. 464(a) of the **Criminal Code,** after a trial before Supreme Court Justice David Gruchy sitting without a jury. In accordance with a joint recommendation, Mr. Jones was sentenced to a period of three years imprisonment less 10 months credit for time served on remand.

[2] Mr. Jones appeals his conviction alleging a misapprehension of evidence which lead to a miscarriage of justice and seeks to have fresh evidence admitted on the appeal to support his submission.

[3] The chief witness for the Crown was George McCarthy who testified that he owns a roofing company, and that in late August 2005 he hired Mr. Jones as a foreman. The arrangement was that Mr. McCarthy would supply Mr. Jones with a truck and other equipment and assign him the roofing jobs. Mr. Jones was to hire other men to work on the crew. Mr. McCarthy also gave Mr. Jones a gas station credit card to use for buying gas for the truck and $2,000 to buy safety equipment for the crew. Mr. Jones and his crew did very little work but ran up a $5,000 debt on the credit card and pawned the gear they bought in order to get money to buy illegal drugs. Mr. Jones and others had spent the Labour Day weekend partying at Mr. McCarthy's expense. When Mr. McCarthy became aware of the scam, he attempted to recover his equipment and credit card from Mr. Jones. There had been numerous telephone calls between the two to discuss the situation. During these calls Mr. McCarthy learned that Joey MacDonald, one of the people who had been using the drugs with Mr. Jones, had threatened to kill both of them.

[4] Mr. McCarhty testified that on September 8, 2005 between 8:00 and 8:30 in the morning, Mr. Jones telephoned him at his office in Dartmouth and tried to enlist his help to kill "Jimmy" MacDonald. His testimony was that Mr. Jones said he was afraid of MacDonald and that MacDonald had again threatened to kill both Mr. Jones and Mr. McCarthy and his family. Mr. McCarthy's recollection of the conversation was (p.26 AB):

> ... He said, Well, I'm going to get him. He said, We should get him, right. He said, We should get him. He said, Yeah, he says, let's get together, he says, and figure it out how to kill him, right. I said, Tom, I said, I don't know what part of the conversation that we just had, right, but I'm not interested in killing Jimmy

> MacDonald, I'm really not, right. And then I ended my conversation ... then he said he was going to come over and I told him, No, don't bother. You know, if I need you, I'll call you, right. And then I ended the conversation.

[5] Mr. Jones testified on his own behalf. He admitted using Mr. McCarthy's credit card to get money to buy cocaine which he used with Joey MacDonald over the September long weekend. He testified that Joey MacDonald threatened to kill him and Mr. McCarthy. He indicated that on Wednesday, September 7th he stayed with his sister Livi Jones overnight and the next morning his sister Barbara Jones picked him up at Livi's around 8:30 in the morning. He denied talking to Mr. McCarthy about trying to kill Mr. MacDonald. He admitted calling Mr. McCarthy later that day about the pay for his crew.

[6] Mr. Jones' sister Livi testified and confirmed his evidence that he was with her until 8:30 a.m. on September 8th when Barbara picked him up. Livi testified that the only phone at her apartment was her cell phone, the number of which was 225-4348. Barbara testified that her brother was with her from 8:30 a.m. until about 10:00 a.m. and that he did not use a telephone while he was with her.

[7] The phone records from Livi Jones' phone were introduced as an exhibit by the defence. The records indicate that a total of six calls were made from the phone on the morning of September 8, 2005. Three calls were to numbers identified by the witnesses as Barbara Jones' phones, two to her home at 7:45 a.m. and 7:53 a.m. and one to her cell phone at 8:29 a.m. The details of the other three calls were as follows:

- a call to 463-8983 at 7:54 a.m.
- a call to 209-4741 at 7:56 a.m.
- a call to 209-4741 at 7:57 a.m.

Following the call to Barbara Jones' cell phone at 8:29 a.m. the next call made from Livi's phone was at 5:02 p.m.

[8] Mr. McCarthy testified that his office number was 469-2260 and that he did not recognize the numbers 463-8983 or 209-4741.

[9] The trial judge found Mr. Jones guilty of counselling murder. The decision under appeal is reported as 2006 NSSC 63; [2006] N.S.J. No. 74. The critical findings of credibility are as follows:

> [34] I found George McCarthy to be a credible witness. There were aspects of his testimony which were vague, but on the essential matters of the telephone call to him by the accused and the contents of that phone call I found him to be credible. I found the evidence of the accused's two sisters to be truthful. I do not know what is the precise explanation for the timing of the telephone call and conversation in question, but I am certain of its contents and that it did occur. The matter of the unexplained telephone calls as evidenced by the telephone log in Exhibit 1 may well have been the telephone calls described by McCarthy.
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> [35] The video taped and audio taped statement and questioning of the accused convinced me beyond a reasonable doubt that the accused was absolutely terrified by the alleged threats of Joey MacDonald. I have no explanation before me as to why Mr. MacDonald would have made the threats, if he did, as alleged by the accused. Whatever the reason, it was clear by virtue of that questioning the accused was so terrified of MacDonald that at one point during their drug binge the accused actually contemplated murdering Mr. MacDonald by cutting his throat.
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> [emphasis added]

Grounds of appeal:

[10] Mr. Jones raises one ground of appeal:

> The Honourable Justice misinterpreted the evidence and in doing so made a finding of fact that was not supported by the evidence. This finding of fact that was not supported by the evidence improperly bolstered the credibility of the Crown's witness and detrimentally affected the credibility of the accused which contributed to a finding of guilty by the Leaned Trial Judge.

[11] This is essentially a submission that there was a misapprehension of evidence which led to a miscarriage of justice.

[12] In addition, the appellant seeks to admit fresh evidence on the appeal pursuant to s.683 of the **Criminal Code** to support his contention that there was a misapprehension of evidence leading to a miscarriage of justice, pursuant to s. 686 (1)(a)(iii).

Fresh evidence:

[13] The new evidence which the appellant seeks to introduce are the affidavits of Tweena Bruce and Myrna Spidle who swear that they are the owners of the two phone numbers (209-4741 and 463-8983) called by Livi Jones' cell phone on the morning of September 8, 2005, and that they have no connection with Mr. McCarthy or his roofing company. As well, Mr. Craggs, appellant's counsel, has filed an affidavit explaining why he did not call Ms. Bruce and Ms. Spidle at the trial.

[14] In **R. v Wolkins**, 2005 NSCA 2, Cromwell, J.A. for the court set out the relevant principles for the admission of fresh evidence when there is a possibility of a miscarriage of justice, of the type alleged here:

> [58] Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.
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> [59] Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: **R. v. Palmer**, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process: **R. v. G.D.B.** , [2000] 1 S.C.R. 520 at para. 19. In that paragraph of **G.D.B.**, the Supreme Court adopted these words of Doherty, J.A. in **R. v. M.(P.S.)** (1992), 77 C.C.C. (3d) 402 at 411:
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> > While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the

> parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen, supra*, at p. 148.
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> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.
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> ...

[60] But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: **R. v. G.D.B.**, **supra** at paras. 17 - 21; **R. v. Lévesque**, **supra** at para. 15. The due diligence requirement is one factor to be considered in the “totality of circumstances”: **G.D.B**. at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: **G.D.B.** at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: **R. v. Warsing** , [1998] 3 S.C.R. 579 at para. 51.

...

[62] The fresh evidence put forward by Mr. Wolkins is of both types. On the one hand, the transcript of evidence given at the second trial is directed to showing that there was evidence available that, if adduced at the trial of this charge, may have resulted in an acquittal. This evidence goes to an issue decided at trial and is therefore subject to the **Palmer** due diligence requirement, which may be relaxed to prevent a miscarriage of justice. The evidence called by the defence at the second trial was available to be called at the first. Therefore, Mr. Wolkins cannot meet the due diligence requirement. The issue is whether that requirement should be relaxed and the evidence admitted to prevent a miscarriage of justice.

[15] The fresh evidence tendered by Mr. Jones is directed to an issue decided at trial. Therefore it is necessary to examine the **Palmer** test (**Palmer and Palmer v. The Queen**, [1980] 1 S.C.R. 759) which mandates that proposed new evidence satisfy four criteria:

> (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.
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
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> (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.

[16] The Crown does not contest the third principle, that is, that the fresh evidence is credible.

[17] With respect to the first principle, due diligence, Mr. Craggs in his affidavit explains why he did not present the evidence of Ms. Bruce and Ms. Spidle at the trial. He received the call log for Livi Jones' phone from the Crown on February 8th 2006, five days before the commencement of the trial. On the first morning of the trial the investigating officer gave him a copy of the call log in another format which showed Myrna Spidle as the owner of the 463-8983 number, Barbara Jones as the owner of her two numbers, and that the owner of 209-4741 was unknown. He was personally aware that the 209 exchange is a cellular exchange and he was not so concerned about that number because the call to Mr. McCarthy was to a land phone with a 469 prefix meaning it was a Dartmouth number. His affidavit continues:

> 8. Based on the summary provided to me by Detective Constable Marshall Hewitt, it was my understanding that the Crown was alleging that Mr. Jones made the phone call in question to George McCarthy at his office number and not to any cellular phone. It was my understanding that the Crown was requesting the court to reject the alibi evidence provided by Livi Jones, Barbara Jones, or alternatively find that Mr. Jones could have made the phone call from a different phone at 8:30 a.m. on September 8th,

> 2005 or from a different phone at a different time. Finally, it was my understanding that the Crown was not alleging Mr. Jones made the phone calls from the 225-4348 cell phone for which a call log was available.
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> 9. At the time of this trial I made a decision not to attempt to locate and Subpoena either Myrna Spidle or Tweena Bruce as witnesses. My reason for doing this was because Mr. Jones was remanded at that time and, based on my understanding of the Crown's theory of the case, I did not see the merit in extending his remand for witnesses who did not appear necessary at the time.

[18] The appellant submits that the Crown's theory of the case was that either Mr. McCarthy was wrong about the time of the calls or that the alibi evidence of Mr. Jones' sisters ought to be rejected. Based on that theory, his counsel submits that it was not reasonable for him to subpoena witnesses to refute a theory not being advanced: that there were unexplained calls from Livi's phone the morning of September 8th. Mr. Craggs says that if the Crown had been arguing that one of the "unexplained" calls on Livi's cell phone log could have been the call to Mr. McCarthy, the application for admission of the fresh evidence on appeal to explain the calls would have less merit.

[19] The respondent argues that the evidence existed prior to trial and the appellant's counsel made a tactical decision not to call the witnesses to identify their phone numbers. Therefore, it is submitted, the evidence does meet the first requirement of the **Palmer** test.

[20] In my view, the explanation provided by Mr. Craggs satisfies the somewhat relaxed diligence requirement in the circumstances of this case. His decision not to call the witnesses at trial, in view of the Crown's pre-trial theory, does not appear to have been a deliberate tactic. If the fresh evidence passes the other thresholds of **Palmer**, that is whether it is relevant and could reasonably have affected the result, it would not be in the interests of justice to reject it on the basis of the due diligence criterion.

[21] While the proposed evidence may not have appeared to be very relevant prior to trial, given that one of the alternative reasons for the finding of guilt is that there were unexplained phone calls, the relevancy of credible evidence that those calls were not made to Mr. McCarthy or his place of business is intensified. The second part of **Palmer** is thus met.

[22] Could the fresh evidence, if believed, reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result? In my opinion, the evidence fulfills the fourth prerequisite. The alibi evidence of Mr. Jones' sisters was believed by the trial judge, but it was incomplete because of the two phone calls shown on the log, one of which the trial judge thought could have been the one that Mr. McCarthy said he received from Mr. Jones on the morning in question. Therefore the new evidence showing that those calls were not to Mr. McCarthy could have reasonably affected the result.

[23] I would allow the application for the admission of fresh evidence on the appeal.

[24] As noted, the trial judge accepted the truthfulness of Mr Jones' sisters. The sisters said that the only phone to which Mr Jones had access was Livi's cell phone until 8:30 a.m. and no phone from 8:30 a.m. to 10:00 a.m. As mentioned above (¶ 9), the trial judge (¶ 34) cited two alternatives for his finding of guilt: (1) either the call was one of the "unexplained calls" from Livi's cell phone shortly before 8:00 a.m. shown on the log, or (2) the call may have been at some altogether different time of day, presumably when Mr. Jones would have access to another phone.

[25] Regarding the first alternative, the evidence of Mr. Jones' sisters did not leave the trial judge with a reasonable doubt because Mr. Jones could have used Livi's cell phone to make one of "the unexplained calls as evidenced by the telephone log". With the newly admitted evidence, the formerly "unexplained" calls are now identified as calls to Ms. Bruce and Ms. Spidle, not to Mr. McCarthy. So this alternative is not a basis for a conviction.

[26] This leaves the second alternative mentioned by the trial judge - that Mr. Jones called Mr. McCarthy at some entirely different time of day. There are two difficulties with this hypothesis. First, the trial judge made no finding. He said "I do not know what is the precise explanation for the timing of the telephone calls." Second, Mr. McCarthy said on six occasions that the call was between 8:00 a.m. and 8:30 a.m., and was never asked at the trial if the call could have been at another time. With these factual and evidentiary lacunae in the logic of the time line, the findings of guilt were, in my respectful view, based on a misapprehension of evidence.

Miscarriage of Justice:

[27] In **R. v. S.D.D.** 2005 NSCA 71; [2005] N.S.J. No. 200 (Q.L.), Justice Cromwell explained the meaning of miscarriage of justice:

> [9] This Court may allow an appeal in cases such as this if persuaded that there has been a miscarriage of justice: see s. 686(1)(a)(iii) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. A trial judge's misapprehension of the evidence may result in a miscarriage of justice, even though the record contains evidence upon which the judge could reasonably convict.
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> [10] What is a misapprehension of the evidence? It may consist of "... a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence ...": **R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an "unsupportable inference" from the evidence or characterizes a witness's evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: **Morrissey** at p. 217; R. v. C.(J.) (2000), 145 C.C.C. (3d) 197 (Ont. C.A.) at para. 11. In **Morrissey**, for example, the trial judge stated that the evidence of two witnesses was "essentially the same", a conclusion not supported by the record. This was held to be a misapprehension of the evidence. In **C.(J.)**, the trial judge was found to have erred by characterizing the accused's evidence as "internally inconsistent" when this conclusion was not reasonably supported by the record: at para. 9.
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> [11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. A conviction is a miscarriage of justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction: see **Morrissey**, **supra**, at 221; **R. v. Lohrer**, [2004] 3 S.C.R. 732; S.C.J. No. 76 (Q.L.) at paras. 1-2.
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> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

[28] It is clear that with the hindsight provided by the effect of the new evidence, there was a misapprehension of the evidence and that the misapprehension was material since it was an essential part of the judge's reasoning, as it was one of two alternate bases for founding the conviction. As such, I am persuaded that there has been a miscarriage of justice and a new trial is required.

[29] For these reasons I would allow the appeal, set aside the conviction and order a new trial.

Roscoe, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.