NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. MacKenzie***, 2004 NSCA117

Date: 20040929
Docket: CAC 211367
CAC 213741
CAC 214462
Registry: Halifax

Between:

Daniel John MacKenzie

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Roscoe, Cromwell & Saunders, JJ.A.
Appeal Heard:	September 22, 2004, in Halifax, Nova Scotia
Held:	Appeals against conviction, and the imposition of a DNA order, and sentence are dismissed as per reasons of Saunders, J.A.; Roscoe & Cromwell, JJ.A. concurring
Counsel:	Daniel John MacKenzie, self-represented appellant Daniel A. MacRury & Nicole Holas, Articled Clerk, for the respondent

Reasons for judgment:

[1] The appellant was tried on a five-count indictment relating to a break and enter at a private dwelling on South Street in Halifax. He was charged with:

1. break and entry of a dwelling house and committing theft therein, contrary to s. 348(1)(b) of the ***Criminal Code***;

2. break and entry with intent contrary to s. 348(1)(a);

3. possession of house-breaking tools contrary to s. 351(1);

4. breach of recognizance contrary to s. 145(3); and

5. possession of stolen property having a value not exceeding $5,000 contrary to s. 355(b).

[2] The appellant was represented by counsel at his trial before Nova Scotia Supreme Court Justice Felix A. Cacchione who, after hearing the evidence presented over the course of a three-day trial and after considering the submissions of counsel, convicted the appellant on the charges of break and enter with intent; possession of stolen property; and breach of recognizance. Mr. MacKenzie was found not guilty of break, enter and theft; and possession of house-breaking tools. A pre-sentence report was ordered and sentencing was adjourned until January 6, 2004. The appellant was remanded until his sentence.

[3] On January 6, 2004 Cacchione, J. sentenced Mr. MacKenzie to two years incarceration for break and enter with intent and 30 days concurrent for both the possession of stolen goods and breach of recognizance convictions. The appellant was then given credit for 12 months remand time, having served six months in custody. As a result, the appellant was ordered to serve one year in custody as a result of the offences for which he was convicted.

[4] Cacchione, J. also authorized a DNA order pursuant to s. 487.051(b).

[5] Mr. MacKenzie is no longer represented by counsel. He has filed three handwritten notices of appeal: the first dated November 14, 2003 in which he appeals against his conviction; the second dated January 13, 2004 in which he appeals both his

conviction and his sentence, as well as the imposition of the DNA order; and the third dated January 15, 2004 in which he appeals sentence.

[6] In addition there are two handwritten submissions which were evidently sent by the appellant to the trial judge after his sentencing. Copies of these two handwritten submissions were forwarded to the Registrar by counsel for the Crown. At the hearing Mr. MacRury also provided us with a copy of the appellant's letter to Crown Attorney Kenneth W. F. Fiske, Q.C., dated June 5, 2004. We have reviewed all of this material as part of the record in our consideration of Mr. MacKenzie's appeal against both his convictions and his sentence.

[7] Before addressing the merits it would be helpful to briefly review the material facts leading up to Mr. MacKenzie's arrest.

[8] The appellant was observed departing from a house that had been broken into earlier that same day. The owner gave chase but the appellant sped away on a bicycle. The owner was unable to stop the appellant, but managed to flag down a passing motorist, Dr. Goodine, a dentist who pursued the appellant in his car. Dr. Goodine caught up with the appellant and persuaded him to stay put until the police arrived.

[9] When the police arrived at the scene, they arrested the appellant and searched him. Among other things they found a 10 Euro bill in the backpack he was carrying. A Euro note was missing from the house out of which the appellant had fled. A butter knife, a chisel and a set of Allan keys were found in a sack strapped to his bike.

[10] The appellant was taken into custody. A photo lineup was arranged by the police. Two of the witnesses identified the appellant.

[11] In my view the substance of the appellant's arguments and complaints as set out in his various submissions may be reduced to simply a repetition of his evidence at trial where he claimed that he was not the one who broke into and robbed the dwelling, that he just happened to pick up the 10 Euro bill while peddling his bicycle near the home, and that he did not take that or anything else from the residence.

[12] Seen in that light the thrust of Mr. MacKenzie's appeal against conviction would oblige us to consider whether the verdict ought to be set aside on the ground that it is unreasonable or cannot be supported by the evidence within the meaning of s. 686(1)(a)(i) of the ***Criminal Code***.

[13] In challenging the trial judge's verdict in this case the test is whether or not the verdict is one which a properly instructed jury acting judicially could reasonably have rendered. In making that assessment, findings of fact and credibility by the trial judge are owed great deference. In conducting our assessment we are obliged to review, analyse and within the limits of appellate disadvantage, weigh the evidence. See for example, ***Corbett v. The Queen***, [1975] 2 S.C.R. 275; ***R. v. Yebes***, [1987] 2 S.C.R. 168; and ***R. v. Biniaris***, [2000] 1 S.C.R. 381. Having subjected the record in this case to the requisite level of scrutiny, I am satisfied there is no merit to Mr. MacKenzie's appeal against conviction.

[14] Mr. MacKenzie testified that he found the 10 Euro bill on the ground and then folded it inside a crumpled up $20 bill and placed both bills in the small pocket of his blue jeans. In rejecting the appellant's explanation Justice Cacchione considered it a key piece of circumstantial evidence that the 10 Euro bill did not appear to be crumpled at all but simply creased down the middle. Thus the trial judge noted that the folding pattern he observed on the bill was not consistent with the appellant's explanation. The testimony of police officer Reid respecting finding the Euro note in Mr. MacKenzie's backpack, contradicted the appellant's evidence. There were other clear indications that the trial judge did not find the appellant to be credible, for example his acceptance of the testimony of Dr. Goodine over that of the appellant whenever there was a conflict. There was ample evidence to support the verdicts on the charges for which Mr. MacKenzie was convicted. It is significant that the trial judge chose to place little weight on the photo lineup identification evidence, having formed the conclusion that the process had been tainted by remarks made by one of the police investigators. The trial judge determined guilt based on a careful assessment of the remainder of the evidence. A review of the trial judge's decision in its entirety makes it clear that Justice Cacchione carefully reviewed the evidence, made clear findings of fact and credibility, and applied the proper standard of proof in satisfying himself that the requisite elements of the offences had been proved by the Crown beyond a reasonable doubt. I would therefore dismiss Mr. MacKenzie's appeal against his convictions.

[15] He also appeals his sentence. The several complaints included within his various submissions may be reduced to two main points, first that the sentence is too harsh and second that he was not given enough credit for time spent on remand.

[16] The appeal against sentence is taken pursuant to s. 687(1). Absent error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, an appellate court should only vary a sentence on appeal if the sentence is demonstrably unfit. See for example ***R. v. Shropshire***, [1995] 4 S.C.R. 227; ***R. v. M (C.A.)***, [1996] 1 S.C.R. 500; and ***R. v. W. (L.F.)***, [2000] 1 S.C.R. 132.

[17] I am satisfied there is no basis for interfering in the sentence imposed by Justice Cacchione. It is apparent that in sentencing the appellant who is a middle-aged career criminal, Cacchione, J. carefully considered the evidence, took into account the relevant circumstances including Mr. MacKenzie's extensive record of some 28 convictions, of which ten were property related, some for break and enter, and applied the proper principles of sentencing. He appropriately accounted for time spent on remand prior to sentencing. Accordingly the sentence should not be disturbed.

[18] Finally, having regard to s. 3 of the ***DNA Identification Act***, ***R. v. P. R. F. et al***, [2001] O.J. No. 5084 (C.A.), and this Court's decision in ***R. v. Jordan*** (2002), 200 N.S.R. (2d) 371, the learned trial judge properly imposed a DNA order in the circumstances of this case.

[19] In conclusion I would dismiss Mr. MacKenzie's appeals against his convictions, and the required DNA order, and sentence.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.