

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. McCarthy, 2005 NSPC 5

Date: 20050216
Docket: 1342113
Registry: Bridgewater

Between:

R.

v.

Ellen McCarthy

Judge: The Honourable Judge Anne E. Crawford

Heard: September 21, 2004, in Bridgewater, Nova Scotia
December 9, 2004, in Bridgewater, Nova Scotia
December 10, 2004 in Bridgewater, Nova Scotia
January 20, 2005 in Bridgewater, Nova Scotia

Counsel: Lloyd Tancock, for the Crown
Tom Feindel, for the Defence

By the Court:

[1] Ellen Marie McCarthy is charged under s. 334(a) of the Criminal Code with theft of more than \$5000 from the Royal Canadian Legion Branch 24 between February 5, 2002 and July 8, 2003.

Facts

[2] In 2003 the Bridgewater Legion bingo was losing money and no one could quite figure out why. The nearby Curling Club bingo seemed to be as prosperous as ever, and Jim Bell, treasurer of the Legion and also a volunteer at the Curling Club, noticed that, on average, the Curling Club was making \$3 more in receipts per player than the Legion was. He noted a decline in revenue from the bingo over a 3 year period from a \$40,000 a year profit to a loss for the 2002 calendar year of \$1700.

[3] The matter was brought up at Executive meetings and Gary Wamboldt, a member of the Executive, volunteered to take over the operation of the bingo. The defendant, Ellen McCarthy, was one of the most dedicated bingo workers. She looked after sales of the regular game books, which were of three types: 1-ups, which sold for \$1 and had 15 pages of 1 card each; 3-ups, which sold for \$3 and had 15 pages of 3 cards each; and 9-ups, which sold for \$9 and had 15 pages of 9 cards each. Each page represented a single game of bingo, and 15 such games were played per evening.

[4] The defendant virtually ran the bingo, according to treasurer Jim Bell. She was responsible for the float of \$1500 from which all the workers made change. She distributed the float among the other workers and at the end of each bingo night she took the money, float and sales, from the other workers who sold special games, 50-50 tickets and other types of special event tickets, counted it, made up a report and deposit and gave it to the bartender who put it in the safe, from where it was collected by the treasurer for deposit to the Legion's bank account.

[5] She also ordered all the bingo supplies, including the bingo books, received them and put them in the bingo storage room to which she had a key. Bills for the supplies came to the treasurer, who left the invoices at the bar for the defendant to sign, indicating that she had received that inventory.

[6] On a Tuesday night in June, 2003 the regular bingo was being held as usual. Toward the end of the evening the defendant remarked to Gary Wamboldt that they

had sold over 800 regular books that evening. Mr. Wamboldt thought this seemed low, and as a cross-check he casually went around the room and counted the books that he could see on the tables. Although he could not be sure his count was completely accurate he counted more than 1100 books on the tables.

[7] Mr. Wamboldt did not mention this discrepancy to the defendant; and the evening concluded as usual with the defendant doing up her report and handing it to Mr. Wamboldt for photocopying.

[8] After discussing the matter with the Legion president and Mr. Bell, the treasurer, it was decided to do a count of the discarded books. They kept the bags of discarded pages and counted all the yellow sheets, as there was one and only one yellow sheet in each book. There were 237 more yellow cards than there should have been according to the defendant's report. No one could think of any explanation for that discrepancy.

[9] The next week they repeated the exercise and discovered that the defendant's report was 198 short, according to their count.

[10] They then contacted the police.

[11] After discussions with D/Csts. Feener and Cunningham of the Bridgewater Police Department, it was decided to let the next bingo, July 8, 2003, proceed as usual, but to do a complete inventory of the bingo room as close as possible to the time of the bingo. This count was conducted by Jim Bell, Gary Wamboldt and Kerry Himmelman. After the bingo D/Csts. Feener and Cunningham attended at the Legion Hall and conducted a second inventory of unused books. D/Cst. Cunningham was the scribe and D/Cst. Feener, Jim Bell and Gary Wamboldt did the counts. The police officers also seized five garbage bags of used cards which were counted the next morning at the Town Hall. The results of these counts, when compared with the defendant's report, revealed a shortfall in the defendant's report of \$245 for the July 8 bingo. The shortfall was entirely in sales of regular game books for which the defendant was solely responsible. No shortfalls were found in the sales of any of the other bingo workers.

[12] On July 11, 2003 the defendant was advised of the \$245 discrepancy.

[13] It was then decided to ask the defendant to return her keys and all documents relating to the bingo; Gary Wamboldt made the phone call and she returned the items requested the same day.

[14] On July 12, 2003 she brought in \$200 in twenty dollar bills to the treasurer with a letter explaining that she had found this money attached to a clipboard and that she had taken it from sales to get change for the float. Mr. Bell refused to accept the money, and advised her to take it to the police, which she did.

[15] Mr. Bell testified that it would be very unusual to take money from sales to get change for the float. The float was maintained at \$1500 and removing money from sales to get change would result in an unexplained increase in the float. There was nothing in her July 8 report to indicate that she had done this. The money the defendant turned in was in \$20 bills. She said that she had planned to change this for \$10 bills, but the count of the float done on July 12, 2003 showed ten \$10 bills, among other denominations.

[16] Mr. Bell also testified that, on previous occasions when the defendant had needed change for the float, she left money with the deposit with a note to him requesting that he get change for her.

[17] On August 13, 2003 the defendant gave a warned, videotaped statement to D/Cst. Feener, which was admitted by consent, the defendant waiving a *voir-dire*. In the course of that statement she denied any wrong-doing, but offered to purchase 9000 books and, when informed that she was being charged, wanted to know “what kind of figure am I looking at?”

[18] D/Cst. Feener gave her his calculation of the total loss sustained by the Legion.

[19] On or about August 22, 2003 treasurer Bell received an anonymous letter postmarked August 18, 2003 which contained \$45.00. On September 17 he received a second anonymous letter. Both these letters, signed “The Guilty One”, are purported confessions of guilt and attempt to exonerate the defendant. Each states that the writer was putting out books on the tables without the defendant’s knowledge. In summation the Crown stated that these letters were submitted for handwriting analysis in an attempt to determine if they had been written by the defendant, but that the results were inconclusive.

[20] D/Cst. Feener testified in detail as to his and the Legion's calculations of the losses suffered by the Legion. Bingo books were purchased from the supplier in lots of 9000 single 15 page books, but these could be broken up into 1-ups, 3-ups and 9-ups in any combination that added up to 9000. Thus each order, no matter what the break-down, represented a sale value to the Legion of \$9000. For the period from the first of April, 2003 when a new supply of 18000 "books" was purchased to July 8, 2003 when the defendant was relieved of her duties, she recorded sales of 10532 books. There were 3689 books left in inventory, which left 3779 books unaccounted for. This represented a loss to the Legion of \$3779.

[21] D/Cst. Feener then went back in time to attempt to establish earlier losses. This proved difficult, as there were no accurate records of inventory kept by the Legion. He was able to find a record of a purchase of 9-up books in February 2002, and he determined from the defendant's reports the date when they were sold out. He said that during that time she reported 616 books, which equates to 5544 single books, sold. This means that 384 9-up books, or 3456 single books, were missing. This represented a loss to the Legion of \$3456. On June 24, 2002 another 1000 9-up books were purchased. Between then and January 21, 2003 the defendant reported 7002 single books sold, which leaves 1998 books missing for a loss of \$1998. So the loss to the Legion from February 2002 to January 2003 was \$5454 from 9-up books alone. Obviously, if there was inventory still in stock in February 2002, the loss could have been greater. And this calculation does not include any losses from 1-up and 3-up book sales, for which no beginning point in inventory could be found.

[22] In total, then, Cst. Feener was able to calculate with certainty total losses to the Legion between February 2002 and July 2003 of \$9233 due to the defendant's apparent under-reporting of books sold.

[23] The defence called no evidence but in cross-examination and in summation, as well as in the defendant's videotaped statement to the police, pointed to the access which other persons may have had to the bingo supply room. The anonymous letters received by the treasurer also pointed in that direction.

[24] Gary Wamboldt testified that during the period in question, the bingo room was kept locked, except during bingo games. The defendant had a key to the bingo supply room and the only other key he knew of was kept behind the bar, with the other spare keys to other rooms in the Legion. He testified that, in addition to the bingo supplies, 50-50 draw supplies and poppy campaign supplies were also kept in that room. He

said that the bar steward was responsible for the keys behind the bar, but that he would give the keys to the chair of the 50-50 draw committee or to the Service officer in charge of the poppy campaign. He did not know if the bar steward ever let anyone else in there.

[25] During bingo, when the supply room was left open, the caller and anyone else on stage could see right into it, the people selling books were right there and there were floor-walkers watching. But any bingo worker could go in with no questions being asked. It would be assumed they were going in for supplies.

Issue

[26] The defence called no evidence and pointed out in argument that this is a circumstantial case. Relying on the so-called rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136, the defence states that the Crown has not established beyond reasonable doubt that the only rational conclusion here is the guilt of the defendant. Defence counsel points to access to the supply room, problems with the Legion's book-keeping and the two anonymous letters saying the defendant was not responsible as indicating another rational conclusion – another, unidentified guilty party.

“Only reasonable inference”

[27] In *R. v. Cooper* (1977), 34 C.C.C. (2d) 18 (S.C.C.) Ritchie, J. stated in regard to circumstantial evidence:

It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. In this regard it will be seen that I agree with the Chief Justice in his rejection of the Hodge formula as an inexorable rule of law in Canada.

[28] The “proven facts” in this case include the following:

1. The defendant was solely responsible for sales of regular bingo game books and for ordering and receiving inventory.

2. All the discrepancies between reported sales and inventory were in the regular game books.
3. The losses established by the Crown in the total amount of \$9233 are minimum losses in that they do not include losses for any period before 2002 and they include only 9-up losses except for a three month period from April to July 2003.
4. The bingo storage room where supplies, including the game books, were kept was kept locked at all times except during bingo games.
5. The defendant was the only person who had a key to the bingo storage room, and thus was the only person who had unlimited access to the room.
6. Other persons who had limited access to the room were the bar steward, the Service Officer, the chair of the 50-50 draw, and, during bingo games, other bingo workers.
7. In the year following the defendant's removal from responsibility for the bingo the bingo operation went from a loss of approximately \$1700 to a profit of approximately \$30,000.
8. After the defendant was informed by the police of the \$245 loss for the July 8 bingo, she returned \$200 to the treasurer, and later \$45 was returned by way of an anonymous letter.
9. She explained that she had kept \$200 from sales to get \$10 bills for the float.
10. There were ten \$10 bills in the float when it was counted after she turned it in to the treasurer.
11. Getting change by taking money from sales without accounting for it is highly unusual and results in an under-reporting of sales and an unexplained increase in the float.
12. In the past when she had needed change, she left money in the deposit package she made up after each bingo night with a request to the treasurer to get change. There was no such request in the July 8 report.
13. Two anonymous letters were received by the Legion treasurer, Jim Bell, and turned over to the police. The first letter contained \$45 "for the books that were missing from Ellen's books on July 8/03". Each letter is a purported confession by the writer. Each says that the defendant knew nothing and that the writer put extra

books out without the defendant knowing. Each is laudatory of the defendant's honesty, although the second note accuses her of being "not real smart". Neither explains the writer's motivation in doing this, other than to say that it was a "game . . . which went further than what I planned."

14. These letters were submitted by the police for handwriting analysis, but the results were "inconclusive".

15. In her video statement the defendant offered to purchase 9000 books for the Legion, and when that offer was refused, asked, "what kind of figure am I looking at?"

[29] I draw the following inferences and conclusions from the foregoing facts:

1. The defendant was the only person who had access to the bingo supplies and also had access to the cash sales and reports. In other words, she was the only person who could profit from selling more books than were reported.

2. Although far from a confession, her post-offence conduct provides some evidence of consciousness of wrong-doing, both by bringing in the \$200 with an implausible explanation and by offering to buy an order of books, as well as by asking for details as to the amount of the Legion's loss.

3. Although the handwriting analysis was inconclusive, the content of the letters leads me to the conclusion that the "anonymous" letters were probably written either by or at the direction of the defendant. The \$45 amount – exactly the amount needed to make up the shortfall for the July 8 bingo – was an amount known by only a few people including the police, the executive of the Legion and the defendant. Although the letters claim responsibility for the offence, their main subject is the defendant, rather than the writer and the offence. They thus add nothing to the hypothesis of another guilty party and so by inference point back at the defendant as that party.

4. The state of the Legion's book-keeping provides no evidence for the involvement of an unknown thief. It obviously made it difficult for the Legion and the police to calculate exact losses; but this works only to the detriment of the Legion and the benefit of the guilty party, as the proven losses are less than the losses which might have been established if there had been complete inventory figures for the whole period in question.

Conclusion

[30] From all of the evidence in this case I find that the Crown has established beyond reasonable doubt that during the period in question the Bridgewater Legion branch lost at least \$9233 from sales of bingo books that were not accounted for.

[31] As to the circumstantial evidence against the defendant, I am satisfied beyond reasonable doubt that the only reasonable inference to be drawn from the totality of the facts is that the defendant is the guilty party.

[32] The defendant is guilty as charged.