SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Murphy, 2009 NSSC 167

Date: 2009/05/19
Docket: Cr. 296128
Registry: Halifax

Between:

Her Majesty The Queen

v.

Shawn Marcel Murphy

Judge:	The Honourable Justice N. M. Scaravelli
Heard:	May 19, 2009, in Halifax, Nova Scotia
Written Release of Oral Decision:	May 27, 2009
Counsel:	Peter Craig, Crown Kelly Serbu, Defence

By the Court:

[1] Let me reiterate what my understanding is of what I indicated to counsel on I believe it was May 13th. The Jury in this matter returned a verdict on May 12th of Guilty of Break, Enter and Theft. That verdict was entered on record. The Jury was thanked and discharged. Subsequent discussions ensued with respect to counsel regarding sentencing dates and potential hearing for bail or release revocation. I advised counsel that later the same day the Clerk advised me that upon obtaining the Exhibit envelope from the Sheriff from the Jury room that she checked the Exhibit envelope as part of putting all file materials together to ensure that the two exhibits that were entered into evidence were contained in the Exhibit envelope. She looked in the Exhibit envelope and determined that the two exhibits were there and in addition to the two exhibits were two sets of photographs. One set of photographs depicted a warehouse on Troop Avenue where the break and enter and theft occurred. They were multiple view planes of the warehouse. The second set of photographs were of the warehouse on Lady Hammond Road where the stolen goods were stored and again various view planes of the warehouse.

[2] I indicated to counsel that it appeared as though those photographs were in the Jury Room during deliberation and if that was the case, the issue of apparent

jury misconduct would be the concern. I then went on to advise counsel that, in my view, I was functus the verdict because the Jury had rendered its clear verdict, the verdict was recorded and the Jury was discharged. I also advised counsel, in my view, that I lacked jurisdiction to entertain or grant a motion for a mistrial. I appreciate that counsel were called in the following morning with this information as soon as was able to arrange them to come in with the accused and did not know the reason for calling them back until they appeared before me on the morning of the 13th when I reiterated the position and discussed the information with counsel. Following that date, Mr. Serbu had the opportunity to conduct some research and provided the Court with a brief and asked to be heard on the issue today, which I obviously agreed to do and to allow both counsel the opportunity to speak to the issue.

[3] I am not persuaded that my initial finding I am functus the Jury verdict and lack jurisdiction to entertain or grant a motion for a mistrial was wrong. Given the defence counsel's argument and brief, I feel it necessary to elaborate further on my position.

[4] I had previously reviewed the *R. v. Burke*, 2002 SCC 55, decision of the Supreme Court of Canada and I also had the case of *R. v. G.G.M.*, 2003 NSSC 258 [2003] N.S.J. No. 492, of the Nova Scotia Supreme Court, Justice Simon MacDonald. The defence seeks a mistrial on the basis of *R. v. G.G.M*. which was a 2003 decision of Justice MacDonald wherein he declared a mistrial after the Jury was discharged in circumstances where a deficiency in Crown disclosure came to light after the Jury had rendered its verdict. I, however, also referred counsel at the time to the case of *R. v. Henderson*, [2004] O.J. No. 4157 (Ont. C.A.) which was a 2004 Ontario Court of Appeal decision which also involved failure of disclosure that came to the Court's attention after the Jury had rendered its verdict. In that case the trial Judge's decision to declare a mistrial was set aside on appeal on the basis that he lacked jurisdiction to declare a mistrial after the Jury rendered a verdict.

[5] As counsel have acknowledged I am not bound by the decision of Justice MacDonald in *R. v. G.G.M.* In that decision Justice MacDonald relied heavily on the decision of *R. v. Burke* which was a 2002 Supreme Court of Canada decision. In that case Justice Major did, for an effective majority of the court, modify the law respecting the trial judge's ability to revisit a jury's verdict. However, in his

analysis he first restated the traditional rule as stated in *R. v. Head*, [1986] 2 S.C.R. 684, which is a Supreme Court decision of 1986, and that *Head* decision also involved a case where the Jury gave an incomplete verdict. Major, J. in referring to that case stated:

> On the return of the jury if a clear and unambiguous verdict is given it is the judge's duty to accept the verdict and, in accordance with the practice of his court, cause it to become a part of the record of the court.
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> ...
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> Where, on the other hand, there is ambiguity in the verdict ..., the trial judge should inquire into the matter to ascertain the true position. ... The judge has the discretion in such a case to accept a substituted or second verdict for the first one returned. This discretion, however, is one which is to be exercised during the course of the trial, that is, in the presence of the accused and his counsel, and prior to the dissolution of the court by the discharge of the jury. ... It is clear, in my view, that the power or duty of the trial judge to intervene when a jury verdict is returned and to make inquiries relating to the true nature of the verdict is one to be exercised prior to the discharge of the jury.

Major, J. goes on to say:

> For the majority in *Head*, discharge of the jury is the point of no return beyond which the trial judge in a criminal case cannot alter the recorded verdict.

[6] In the *Burke* case Major, J. held that the general rule as described in *Head* should be affirmed and modified by the addition of a "rare residual jurisdiction to

inquire into the proper verdict in limited circumstances". The trial judge is authorized to consider whether this discretion should be exercised where an irregularity arises in a jury's verdict. However, Major, J. was clear on the type of situation that would not permit the trial judge to revisit the jury's verdict:

> The trial judge does not have the exceptional jurisdiction to inquire into the alleged error post-discharge when the alleged error is of the type such that its correction would involve the jury reconsidering its verdict or completing its deliberations. ... This limited residual jurisdiction may only be exercised where the errors do not 'challenge the "validity" of the verdict or the deliberation or mental processes of the jurors'. ... The rationale is that, once the jury has delivered its verdict, it should not be permitted to change its mind. If the error requires the jury post-discharge to reconsider its earlier conclusion or continue its cogitations on the matter, the error cannot be corrected, because the trial process has concluded and the judge is *functus officio*.
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> It is only where the error does not engage the deliberations of the jury that the exceptional jurisdiction may be exercised.

[7] These remarks appear to address the present circumstances. Where the questions is one of apparent jury error in the course of deliberations, possibly affecting the verdict, this would be an error that engages the deliberations of the jury, and the exceptional jurisdiction may not be exercised.

[8] I wish to refer counsel to a further case that neither one has noted and that's the *R. v. Halcrow,* 2008 ABCA, [2008] A.J. No. 1038, case. It's a 2008 Alberta

Court of Appeal decision. In that case the trial judge declared a mistrial several months after the jury gave a verdict and was discharged. The jury had delivered a note to the Judge on the last day of the trial expressing safety concerns with respect to the certain behaviour of an individual in the courtroom. Concluding that the jury was intimidated, the trial judge declared a mistrial relying on *Burke* as authority that he had jurisdiction to do so. The Court of Appeal allowed the Crown's appeal. The Court said at paragraph 23:

> The problem presented by this case is different than that in *Head* and *Burke*. Here, the question is whether the trial judge retained a residual discretion to declare a mistrial several months after the jury was discharged, in circumstances where he concluded that there may have been an apprehension of the jury being biased because of the respondent's brother's actions in the courtroom. In contrast, *Head* and *Burke* concerned juries rendering unintended verdicts. Major J.'s comments in *Burke* about a trial judge's post-verdict power to declare a mistrial must be taken in that limited context.
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> The weight of appellate authority both before and since *Burke*, on the other hand, suggests that a trial judge generally has no jurisdiction to hear a motion for a mistrial once the jury has been discharged.

[9] The Court went on in *Halcrow,* supra, to review post *Burke* decisions including *Henderson,* which counsel have referred to and also *R. v. Ferguson,* 2006 ABCA 36, which is a 2006 Alberta Court of Appeal decision. In *Halcrow* the Court in dealing with the *Ferguson* quoted as follows:

> A similar issue was determined by this Court in *R. v. Ferguson*. ... Several days after a guilty verdict was entered and the jury was discharged, the trial judge received a letter from one of the jurors stating that her agreement to convict Ferguson did not reflect her true feelings and requesting permission to withdraw her vote. The trial judge declined defence requests that he conduct a meeting with the juror because he was *functus officio*. This Court agreed as stated:
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> > Further, the trial judge was also correct in determining that he was *functus officio.* While a trial judge may retain a residual discretion in certain narrow and limited circumstances in which the proper recording of a jury verdict is in doubt, this is not one of such instances. The jury's verdict convicting Ferguson of manslaughter had been accurately recorded and the jury had been discharged. The trial judge's function relative to the verdict had ended.
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> > I accept that even though the trial court was functus, an appellate court may intervene if there has been a miscarriage of justice. However, for the reasons explained, it would be equally improper for this Court to engage in an after-the-fact evaluation of the intrinsic processes of the jury.

The Court in *Halcrow* went on to say:

> The Court's views in *Ferguson* are binding on this panel and the respondent's efforts to distinguish it are unconvincing. Also unpersuasive is his reliance on *Burke* and *Henderson*. As outlined above, the decision in the latter is contrary to his position. The former deals with a different situation and its language must be read in its very limited context.

Finally, the Court in *Halcrow* stated:

> The respondent outlines circumstances where the administration of justice could be brought into disrepute if a trial judge was required to proceed with sentencing after entry of a jury verdict. These include the trial judge discovering post-verdict, that a juror was bribed; that a juror had an intimate relationship with a prosecution witness; that some jurors were unqualified for jury duty; that jurors had accidentally been shown evidence that was excluded on a *voir dire*, or that jurors who were ordered to be sequestered had in fact been permitted to return home. Apart from the fact that we are bound by *Ferguson* and *Burke* does not support the respondent's argument, the facts here are quite different from those postulated. It is preferable for an appeal court (should the respondent choose to appeal) to consider whether a new trial ought to be ordered, after taking account of such matters as the position adopted by his counsel during the trial. It is doubtful that the trial judge was best positioned determine the matter. Indeed, the contrary is possible: it could be argued that the trial judge's objectivity may have been compromised by his overriding concern that he had mishandled an event during the trial.

[10] *Halcrow,* then in my view supports a narrow reading of *Burke* and one that I suggest is correct based on the language of Major, J. in that decision. The Supreme Court of Canada dismissed an application for leave to appeal the Court of Appeal's decision in *Halcrow.*

[11] As indicated, it is not for this Court to consider whether or not those photographs had any affect on jury deliberations. This Court is functus. With respect to Mr. Serbu's comments had we known of the photos before discharge, there would have been a mistrial, is not an issue before me.

[12] Accordingly, I have given more detailed reasons for my initial decision on the 13th for the record and in support of my conclusion that the Court is functus in respect to the verdict and that I lacked jurisdiction to entertain or grant a motion for a mistrial.

J.