SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Hobbs, 2009 NSSC 257

Date: 20090811
Docket: CRH 287874
Registry: Halifax

Between:

Her Majesty The Queen

v.

Kevin Patrick Hobbs

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	August 11, 2009, in Halifax, Nova Scotia
Decision Rendered:	August 11, 2009 (Orally) (Issue of *Functus Officio)*
Release of Written Decision:	August 27, 2009
Counsel:	James M. Whiting, for the Attorney General of Canada Luke A. Craggs, for the applicant, Kevin Patrick Hobbs

Coughlan, J.: (Orally)

[1] On June 1, 2009, a jury found Kevin Patrick Hobbs guilty of unlawfully having in his possession for the purpose of trafficking in excess of three kilograms of cannabis marihuana, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, and also of unlawfully producing cannabis marihuana, contrary to s. 7(1) of the *Act*.

[2] Following the reading of the verdicts, the jury was discharged and sentencing scheduled for July 20, 2009. As set out in the Crown's pre-hearing submission, on July 14, 2009 Mr. Hobbs' counsel was advised by Crown counsel the Crown was in possession of information which may be subject to disclosure. On July 20, 2009, Mr. Hobbs sought an adjournment of the sentencing in order to address some issues raised in the updated pre-sentence report dated July 10, 2009. The sentencing was rescheduled for August 11, 2009.

[3] On July 21, 2009, the Crown provided Mr. Hobbs' counsel with the material first mentioned to the defence on July 14, 2009. In his written submission, Crown counsel refers to the information as follows:

> Specifically, criminal record checks had been carried out on members of the jury pool list and the Crown had had this information in its possession at the time of jury selection.

[4] In its pre-hearing submission, the defence referred to the information as follows:

> After Mr. Hobbs was convicted by the jury, the Crown disclosed further information about the police conducting background checks on the jury pool on behalf of the Crown. Mr. Whiting provided a letter detailing the steps that were taken, the type of information that was gathered, and confirmed that the gathered information was a factor in the peremptory challenges that were exercised during jury selection. ...

[5] Mr. Hobbs applies for a mistrial or for a stay of the proceeding to be entered on the basis of abuse of process. The issue for the Court is whether I am *functus officio* for the purpose of hearing Mr. Hobbs' motions for a mistrial and a judicial stay of proceedings.

[6] *R. v. Gumbly (D.)* (1997), 155 N.S.R. (2d) 117 (C.A.) was a case where six weeks after conviction by a jury, the accused applied for a mistrial on the basis of possible juror misconduct. The trial judge held he had lost jurisdiction to hear the application for a mistrial. In giving the Court of Appeal's judgment, Pugsley, J.A., stated at p. 122:

> If a conviction had been entered in *Lalich*, and the jury discharged, then I respectfully disagree that Justice Leggett would retain any jurisdiction to consider the motion.
>
> The words of McIntyre, J. in *Head* are clear. To the same effect is the concurring opinion of Lamer, J., who stated at p. 492:
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> > But once the jury verdict has been recorded and the jury has been discharged, the assessment of guilt is, subject of course to an appeal, final. The judge, by then sitting alone, cannot reopen the case. All that remains, where the accused has been found guilty, is for the judge to sentence the accused.

[7] The Court of Appeal came to the same conclusion in *R. v. Lawrence*, [2001] N.S.J. No. 83 where Flinn, J.A., in giving the Court's judgment, stated at para. 100:

> This matter came to the attention of counsel for the defence on July 2nd, the day following the jury's verdict. Counsel for the defence spoke with counsel for the Crown and indicated that he was going to make an application before the trial judge for a declaration of mistrial. The application was made on August 13th and heard by the trial judge on September 7th. The trial judge decided, correctly in my view, on the basis of the decision of this court in *R. v. Gumbly* (1996), 155 N.S.R. (2d) 117 that a verdict having been rendered and the jury having been discharged, he had no jurisdiction to consider the motion for a mistrial.

[8] The Alberta Court of Appeal dealt with this issue in *R. v. Halcrow*, [2008] A.J. No. 1038 where in its judgment the Court stated at para. 23-24:

> The problem presented by this case is different than 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.
>
> 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] And at para. 29:

> A similar issue was determined by this Court in *R. v. Ferguson*, 2006 ABCA 36, 384 A.R. 318. Several days after a guilty verdict was entered and the jury 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:
>
> > 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.*
> >
> > 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. *(emphasis added)*

[10] I find I am *functus officio* and do not have jurisdiction to hear a motion for a mistrial or a judicial stay of proceedings.

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Coughlan, J.