IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. W. H. A., 2011 NSSC 167

Date: 20110429
Docket: CRAT-336695
Registry: Antigonish

Between:

Her Majesty the Queen

v.

W. H. A.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Section 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 27, 2011, in Antigonish, Nova Scotia

Counsel: Catherine Ashley and Darlene Oko, for the Provincial Crown

Coline Morrow, for the Accused

By the Court:

Introduction

[1] A successful application for a mistrial is an acknowledgement that a fundamental flaw in the trial process has arisen. In such cases, there is no remedy but to prematurely conclude the trial, with a view to starting from scratch at some future point. It is therefore a remedy to which especially serious consideration must be given.

[2] In my considered opinion, this is not such a case.

Background

[3] Mr. A. is charged with two counts of sexual assault on K.F. One of those alleges a “rape” as it was previously known. He was detained in custody following a Show Cause Hearing. He therefore will remain in custody for the duration of his trial.

[4] His trial process began April 26, 2011. The pool of potential jurors arrived for 9:00 a.m.

[5] I find as a fact that at 9:00 a.m. or shortly thereafter, Ms. Morrow enquired of Deputy Sheriff MacRae, about whether Mr. A., who was in shackles, would remain in shackles—to which the Deputy responded in effect that yes, he would until they received directions to the contrary.

[6] At 9:15 a.m., counsel met with me in my Chambers to discuss any issues of concern. We discussed the seating position of Mr. A. in the courtroom/safety, but did not discuss the "shackles" issue as it did not arise.

[7] The poll of the pool of potential jurors present began at 9:44 a.m. and all counsel left my office to attend that procedure. I remained there until court was opened at 10:06 a.m.

[8] I find that Ms. Morrow, having returned to view the polling, would clearly have noticed Mr. A. was **still** wearing leg shackles at that time. It is uncertain whether this was before he entered the courtroom, or in the courtroom itself.

[9] Nevertheless, having become aware of that situation she did not bring it to the Court's attention until late in the day and after the conclusion of the jury selection process. That process ended at 2:25 p.m.

[10] Before the challenges for cause were tried and peremptory challenge process began, the accused was read the challenge at 11:10 a.m. in the following form:

> "W. H. A., the persons who will now be called, will be the jury which decides, upon trial, whether you are guilty or not guilty. If you wish to challenge any of them, you must do so before each is sworn or affirmed."

[11] Ms. Morrow in her submissions to me on April 27th **argued** that although she was aware that Mr. A. was shackled from the time that the jury polling was going on, she did not feel it appropriate to interrupt the process for fear of drawing attention to the shackles.

[12] Not having alerted me any earlier, regrettably, the issue is now therefore squarely before me.

[13] I might indicate that I share responsibility for this—my attention was significantly diverted by the lateness of some of the motions in this case, and the hecticness associated with a jury selection process, especially one involving challenge for cause.

[14] It is not disputed that Mr. A. was wearing leg shackles, which, though generally not prominent while seated (which he was doing most of the day), on the several occasions that he walked, their presence was notably visible.

[15] Similarly when the challenges for cause and peremptory challenges were conducted in a separate room, the jurors who all attended there to be challenged, had a clear view of Mr. A.'s leg area.

[16] Therefore it is likely that all jurors could have seen the shackles, if they looked specifically in the direction of Mr. A..

[17] Mr. A. testified on this *Voir Dire* that he felt that any jurors who saw him in shackles would consider him "guilty" as a result.

[18] On April 27th, 2011, Mr. A. raised the issue formally in open court, and after discussion and recess he filed a written Motion requesting that the Court declare a mistrial.

[19] The motion is opposed by the Crown.

Position of Defence

[20] Mr. A. argues that it is improper for there to be any restraint on him in the courtroom without a hearing having been held, and the Crown having demonstrated that there are reasonable grounds for the restraint to be imposed.

[21] Mr. A. claims in his brief that:

> "The only remedy is a mistrial."

Position of Crown

[22] Due to the shortness of time, the Crown responded only by oral argument and provided cases to the Court in addition to those provided by the Defence.

[23] Its argument is to the effect that, given the jurors only would have seen Mr. A. on the first day of the trial with shackles on, any prejudice to his fair trial rights can be remedied by an instruction to the jurors to disregard their having seen the shackles, as it is a matter of no importance and they should be reminded of the presumption of innocence and that the jurors should decide the case only on the evidence.

[24] They argue only in the “clearest of cases” should a mistrial be granted.

Analysis

[25] Each juror has taken an oath that they:

> “Will well and truly try the Accused, and give a true verdict...”

[26] As Dickson, C.J. reminded us in *R. v. Corbett*, [1988] 1 S.C.R. 670:

> [Speaking about whether jurors should be made aware of an Accused's criminal record]
>
> "In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information...it is preferable to trust the good sense of the jury...so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value." [Paragraph 35. See also paragraphs 38-41]

[27] Is it not therefore reasonable to expect jurors to follow an explicit instruction to ignore the fact that Mr. A. was shackled the first day and not let it in any way affect their assessment of the evidence?

[28] Cases from Courts of Appeal have considered such situations:

> *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193 (Ont. C.A.) at paras. 118-119 [where an explicit instruction overcame any prejudice of jurors seeking Gagnon shackled].
>
> *R. v. Roy*, [2004] O.J. No. 3940 (Ont. C.A.) at paras 77-80 [where the Court found that the:
>
> > "...standard instructions concerning the presumption of innocence were adequate to alleviate any potential for prejudice that might have arisen from one or more jurors obtaining a fleeting glimpse of [*Roy*] in shackles."
>
> *R. v. Younger* (2004), 186 C.C.C. (3d) 454 (Man. C.A.) at paras. 70-76 where the court observed:

> "Given the inevitability of jurors seeing accused persons in custody, I can see no inherent unfairness in an accidental encounter. Any unfairness there might otherwise have been is removed by the presumption of innocence which was later fully discussed with the jury."

R. v. Smith 2007 NSCA 19 (2007), 216 C.C.C. (3d) 490 at paras 84-89 where Justice Cromwell (as he then was) adopted the comments in *Roy* at para 80 and also noted:

> "There is a strong presumption that jurors will act in accordance with their oaths, and follow the instructions of the trial judge to render a true verdict according to the evidence."

Conclusions

[29] Although the opportunity to observe Mr. A. in shackles on April 26, 2011 was lengthy, I do not believe that any actual or perceived unfairness arising therefrom, which might rise to the level of miscarriage of justice otherwise, could not be cured by an explicit instruction to the jury.

[30] The jurors had just taken their oaths and have not yet heard any evidence. They will see that Mr. A. is not restrained during the remainder of the trial. They have already seen him sitting at counsel table in close proximity to counsel. He is not hand cuffed and has been treated with dignity otherwise.

[31] Each juror was challenged for cause and found to be impartial as between Mr. A. and the Crown. I gave them an opening statement in which I reminded them that:

> "At the risk of repeating myself, I must ask that you banish from your minds, all present information and bias that you may have about this case...you must rely solely on the evidence given in this courtroom...
>
> There are two basic principles which are fundamental to your role as jurors. These are the requirement for proof beyond a reasonable doubt, and the presumption of innocence...
>
> Our system of law requires that an accused person be presumed innocent...the law presumes the accused to be innocent until you decide otherwise. For this reason you should avoid forming opinions too soon."

[32] In the circumstances of this case, though troubling, I am satisfied that an express instruction will remedy any perceived or actual unfairness, and I therefore dismiss the Motion to declare a mistrial.

J.