IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. G.G.M., 2003 NSSC 258

Date: 20031231
Docket: 115885
Registry: Sydney

Between:

Her Majesty the Queen

Respondent

v.

G. G. M.

Applicant

Editorial Notice

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

Restriction on publication: Name of Accused and Complainant

Judge: The Honourable Justice Simon J. MacDonald

Heard: November 20, 2003, in Sydney, Nova Scotia

Written Decision: December 31, 2003

Counsel: Darcy MacPherson, Esq., for the Respondent/Crown
Arthur Mollon, Q.C., for the Applicant/Defence

By the Court:

[1] This is an application by Mr. Mollon on behalf of Mr. M. for an Order declaring a mistrial in this matter.

[2] On April 24th, 2003 the Defendant, G. G. M. was found guilty by a court composed of Judge and Jury on three counts of gross indecency.

[3] After the verdict was delivered by the said Judge and Jury the Crown Prosecutor Mr. MacPherson, on the following day disclosed to the defence, Mr. Mollon, copies of correspondence that had occurred between Crown Prosecutor Ann Marie MacInnes and Investigating Police Officer Sgt. Neil MacKenzie. This correspondence if available at trial it is argued, could affect the credibility of the two chief crown witnesses as to whether the incidents took place as alleged in 1980 and 1981 or between 1983 and 1984.

[4] The Defence argues that the new correspondence can be described as late disclosure and this late disclosure may have very well contributed to the Defendant not receiving a fair trial.

[5] The Crown concedes the information in this correspondence likely would have affected the conduct of the trial and may have affected the verdict.

[6] The Defendant was scheduled to be sentenced on September 3, 2003, at the hour of 2:00 p.m. in the afternoon but it was adjourned by consent of all parties for the counsel to research and argue this application.

[7] The issue before the court is whether or not a trial judge has jurisdiction in a criminal jury trial to entertain a mistrial application for untimely disclosure by the Crown after the jury has rendered its verdict and has been discharged but prior to sentence.

THE LAW:

[8] The applicant argued *R. v. Lawrence*, [2001] N.S.C.A. 44; *R. v. Lessard*,(1976) 30 C.C.C. (2d), 70; *R. v. Burke* (2002) 164 C.C.C. (3d) 385; *Regina v. Antinello*, (1997) C.C.C. (3d), 195. His primary argument centered around the allowance of some remaining jurisdiction in the trial judge after the verdict has been recorded and the jury discharged as developed in R. v. Burke (supra).

[9] The Crown has argued the following cases of *R. v. Lawrence*, supra; *R. v. Lessard*, (supra); *R. v. MacDonald,* [1991], 107 N.S.R. (2d), 374; *R. v. Sarson*, [1992] 115 N.S.R. (2d) 445; *Head v. The Queen* (1986), 30 C.C.C.

(3d), 481. He argues there is no residual jurisdiction in the trial judge after a jury renders its verdict and it is recorded, to order a mistrial.

[10] In the case of *R. v. Gumbly*, [1996] NSJ No. 454 dealing with an issue of jury misconduct which arose after trial but before sentence, Pugsley, J.A. stated as follows at para 13 and 14:

> "The trial judge relied, in support of his conclusion that he had lost jurisdiction, on the decision of the Supreme Court of Canada in *R. v. Head* (1986), 30 C.C.C. (3d) 481.
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> In that case, McIntyre, J., on behalf of the majority, said at p. 485:
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> > '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 and, applying the words of MacCauley, C.J. in *R. v. Ford* (1853), 3 U.C.C.P. 209, "before it is too late'. It will be too late when the jury is discharged and the court created for the trial of the accused has been dissolved.'"

[11] Further at para. 21 the Court quoted with approval the words of Lamer, J. (as he then was) in *Head* where he said:

> "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."

[12] In another case dealing with possible juror bias, Flynn, J.A. said in The *Queen v. Lawrence* (2001) N.S.C.A. 44 as follows at para. 100:

> "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."

[13] These cases establish once the clear verdict is received from the jury and the jury discharged the trial judge is *functus offico* and has no jurisdiction to consider a motion for mistrial.

[14] The 2002 case of *R. v. Burke*, the Supreme Court of Canada took the opportunity to revisit the rule set forth in Head. The majority of the court in *Burke* stated that the common-law rule in *Head* should be reformulated indicating apparent absurdities might be the result if it was not. The Court determined with evolving jurisprudence that policy concerns warrant moving beyond *Head* to develop an exception to the general rule. They went on to determine they ought not to foreclose the possibility of a limited and exceptional jurisdiction remaining with the trial judge.

[15] Major, J. speaking on behalf of the Court in *Burke* said at para. 23:

> "There are four possible outcomes of a jury trial:

1. The jury renders the verdict that it intended. The Jury is discharged and the trial has concluded. This is the usual result.

2. The jury does not render the verdict it intended. The jury is not yet discharged. The trial judge retains jurisdiction to record the intended verdict.

3. The jury does not render the verdict it intended. The jury is discharged by the trial judge but, unlike the strict rule in *R. v. Head* [1986] 2 S.C.R. 684, 30 C.C.C. (3d) 481, 35 D.L.R. (4th) 321, the trial judge retains a narrow post-discharge jurisdiction to recall the jury for the purposes of an equally narrow inquiry into the alleged error, the focus of the inquiry being whether there is a reasonable apprehension of bias. This jurisdiction to recall the jury for an inquiry exists only for unintended errors; the trial judge cannot recall the jury to make any changes to the verdict that require further jury deliberation. If there is no reasonable apprehension of bias, the trial judge can and should correct the erroneous verdict.

4. The jury does not render the verdict it intended. The jury is discharged, the trial judge recalls them for an inquiry, and the inquiry establishes a reasonable apprehension of bias. Normally, such an apprehension is only likely to arise where the jury has dispersed. Dispersal of the jury means that the jury has ceased to operate as a single unit, and has separated and mingled (or had the opportunity to mingle) with the public. Dispersal is a crucial factor in determining whether or not there is a reasonable apprehension of bias. If the trial judge concludes that there is a reasonable apprehension of bias, the trial judge cannot record the intended verdict, because the trial, in a manner os speaking, has reached the end of the road. However, in order to prevent a miscarriage of justice, the trial judge retains the ability to order a mistrial or to maintain the originally communicated verdict."

[16] At para. 46 Major, J. said:

> "That being so, this appeal presents the Court with an opportunity to revisit the rule articulated by McIntyre, J. in light of the approach now used in various common-law jurisdictions. In my opinion, the common-law rule in Head, must be reformulated. Otherwise, apparent absurdities might result."

[17] At paras. 71 and 72 Major, J. said:

> "71. As in some cases a trial judge may possess a residual jurisdiction to conduct an inquiry into the verdict post-discharge, it is logical that there exists a concomitant remedial jurisdiction. The question is the content of this remedial jurisdiction.
>
> 72. In my opinion, the trial judge is, as is frequently the case, in the best position to select the appropriate remedy based on the particular circumstances of the case. Having seen the trial through to the discharge of the jury, the trial judge is in a superior position vis-à-vis appellate courts to determine the probable reason for the error and to assess the resulting damage, if any. The trial judge should have the discretion to settle upon the proper remedy for the irregularity that occurred under his or her supervision."

[18] And further at para. 77:

> "In summary, where the trial judge concludes, post-discharge, that the facts raise a reasonable apprehension of bias, then the trial judge should declare a mistrial, if that is the necessary remedy to prevent a miscarriage of justice. In making that order, the trial judge considers the rights of the accused, the public, and the effect of not ordering a mistrial on the administration of justice. On the other hand, if a mistrial is not necessary to prevent a miscarriage of justice, then the trial

> judge should uphold the verdict as given at trial. Where, however, the trial judge concludes that there is no reasonable apprehension of bias, the trial judge must correct the error in the verdict; a mistrial is not available as a remedy."

[19] In that case the Court was dealing with the fourth category namely, that the jury had mistakenly rendered an unintended verdict.

[20] In the case before me that is not the situation. It was obvious at trial the verdict was clear, unambiguous and properly recorded. The jury was discharged. Mr. Mollon argues this application falls under the first category. It was after court concluded Crown Counsel became aware of the undisclosed correspondence and advised Mr. Mollon.. It is also clear in the present case the correspondence was caused by events which were external to the jury deliberation.

[21] The law is well established particularly since *R. v. Stinchombe, No. 1*, (1991), C.C.C. (3d) 1, the Crown is obligated to provide full disclosure to the Defence of materials within its possession. There is no doubt the Crown whether police or prosecutor must disclose every piece of information it has, respecting which there is a reasonable possibility that it would assist an accused in making full answer and defence.

[22] In the matter before me it has been agreed as common ground between Crown Attorney MacPherson and Defence Counsel Mollon the Crown in this case had a duty to disclose to the defence the correspondence between Crown Prosecutor Ann Marie MacInnes and the investigating police officer, Sergeant Neil MacKenzie. This was not done.

[23] It is also common ground this correspondence likely would have affected the conduct of the trial and may have affected the verdict.

[24] The problem that arises in this particular application is the jury has rendered its verdict and the Court is between the verdict and the sentencing phase. The Court is satisfied, as agreed by both counsel as well, this correspondence came to light only after the trial and verdict was entered.

[25] The Court must be aware of the policies animating the general rule of "discharge" as "too late". The Court should also as well consider the newly formulated rule permitting exceptional jurisdiction of inquiry on the occurrence of certain errors during the course of the trial, even when they only come to light after the recording of the verdict. There is no doubt as stated in Burke that the trial judge should have the discretion to settle upon the proper remedy for the irregularity that occurred under his or her supervision. This is so according to *Burke* because the trial judge will be

the person in the superior position who would have seen the trial from beginning to the jury discharge whereas the appellate courts would have to determine a probable reason for the error and to assess the resulting damage, if any.

[26] Mr. Mollon argues that surely if there can be a proper remedy for an irregularity under *Burke*, the Court here ought to be able to order a mistrial because of the impact this correspondence will very likely have on the credibility of two of the key Crown witnesses, namely the complainant, J. V. M. and his aunt J. M..

[27] During the trial the dates of the alleged offence were very much in issue. I was able to observe the direct and cross examination of the main witnesses, J. V. M. and J. M.. I concur in the agreed position of Crown and Defence Counsel that had the correspondence been made available it would have affected the conduct of the trial and may have affected the verdict.

[28] The correspondence between the police and crown attorney was extremely material as it indicated the alleged incidents took place in 1983 and 1984 as opposed to when the key witnesses said they occurred namely, 1980 and 1981. The Court is concerned that not to grant a mistrial would formulate a real danger of prejudice to the accused at this stage. I say that because I am

now asked by Crown Counsel to impose the appropriate sentence and stay any sentence assessed on the understanding the Defence will file an immediate notice of appeal and make application for a stay of execution pending the hearing or determination of that appeal.

[29] Given the remarks of counsel as to the effect of the late disclosed correspondence and their agreement thereto, and my observations from observing the trial, it seems to me to be unfair to the accused that I ought to impose sentence in these circumstances. To do so, would be to place the accused in a position where he is publicly sentenced for an offence which it might turn out he did not commit, or at least be found not guilty. It also, from the remarks of counsel, leads me to believe that forcing him to go through the steps as suggested by Crown Counsel would be to add another hurdle for him to overcome in his pursuit of a fair trial. After all it was the Crown Counsel who failed to disclose (albeit unknowingly) and placed the accused in the position in which he finds himself today.

[30] I am satisfied this is one of those exceptional cases where both Crown and Defence concur in the effect the correspondence would have on the trial. Analyzing the surrounding circumstances, to force the accused to be

sentenced and then the sentence to be stayed would be an injustice to everyone, including the accused.

[31] I have considered all the factors in this case and have balanced them against other matters such as the seriousness of the offence, the protection of the public and the bringing of the guilty to justice, I am not prepared to allow the verdict to stand in the present circumstances.

[32] I am therefore setting aside the conviction and ordering a mistrial.

J.