SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Mohamad, 2012 NSSC 455

Date: 20121012
Docket: CR. Am. 390886
Registry: Amherst

Between:

Mustafa Khoder Mohamad

v.

Her Majesty the Queen

Judge:	The Honourable Justice J. E. Scanlan
Heard:	12 October 2012, in Amherst, Nova Scotia
Written Decision:	16 January 2013
Counsel:	Mr. Jim O'Neil, for the appellant Ms. Jill Hartlen, for the federal crown Mr. James Clarke, for the provincial crown

By the Court:

[1] This is an appeal in relation to a number of offences for which the accused was convicted by Judge Scovil on a decision that's, written release is March the 9th, 2012. Essentially the offences involve events that are alleged to have occurred, or were found to have occurred on November the 17th, 2010. During that incident, Mr. Mohamad was under surveillance, as he had been under surveillance on a number of prior occasions by the R.C.M.P., and those who assisted them in the various surveillances and eventual apprehension on November the 17th.

[2] The trial judge, in his decision, referred to some of that surveillance, which included, by the time the matter came for trial, copies of text communications, a number of recordings, et cetera, that were recovered pursuant to a search at the time of the arrest. In other words, some of the phones were recovered, texts and messages were recovered after the arrest. Although I did note that Mr. Mohamad's cell phone, he said, was not recovered on the night of the offence.

[3] The trial judge, in reaching his decision, considered not just the texts but also what was observed on the night of November the 17th. He talked about, and I'm referring to page 7, paragraph 13, in fact paragraph 12 he starts:

> In relation to the events of November the 17, 2010 the facts are far more complicated.

And he then goes through and refers in detail to the facts that he considered and found in relation to the incident of November the 17th. He talks of:

> The R.C.M.P. had obtained a Dial Number Recorder warrant in relation to Priscilla Basque...

Priscilla Basque, of course, was one of the occupants and drivers of the red truck that was witnessed later in the evening pulling into Mr. Mohamad's campsite.

> ...the R.C.M.P. were advised that Ms. Basque was about twenty minutes from the New Brunswick border. They were further advised at about 4:40 p.m. Ms. Basque had reached Sackville and would soon be in Nova Scotia.

> Ms. Basque was observed pulling into the accused's smoke shop in Aulac at about 6:00 p.m. By this time it was getting dark and the weather was rainy, wet and cold. Ms. Basque was driving the red Ford truck with Quebec license plates.

There's lots of evidence in terms of earlier observations and surveillance, wherein the R.C.M.P. were looking specifically for Ms. Basque and specifically for that red truck. They had reason to believe that Mr. Mohamad and Ms. Basque were jointly involved in dealing with contraband cigarettes.

[4] The trial judge referred to the way that they would describe, in the contraband business, white or brown filtered cigarettes. According to the evidence, when you're ordering cigarettes it would not be unusual to be referring to 15 cartons of white filtered cigarettes and five cartons of brown filtered cigarettes. He referred specifically to that at paragraph 18, and at paragraph 20 he referred to the November 15th order that Mr. Mohamad placed, and he says, at paragraph 20:

> Also produced were text messages to a Jessie Doiron where Mr. Mohamad on Monday, November 15, 2010 orders 15 w and 5 br for Wednesday evening. As well Mr. Mohamad expresses concern and fear of being followed. The evidence showed that during this period of time he was indeed under surveillance by the R.C.M.P.

[5] So Mr. Mohamad's explanation is well, "I was concerned I was being followed, but it was because of this wine and beer that I was supposedly getting". As pointed out by Ms. Hartlen for the crown, that was part of the explanation that was offered up so it could simply dovetail into what the evidence was. He had already heard the evidence, and he couldn't ignore the fact that there were texts for 15 w and 5 br on the 15th, preceding the night of the offence. There was lots of evidence that the trial judge referred to, which was real evidence. It wasn't evidence that Mr. Mohamad could or did deny existed. He just provided this incredible explanation, or series of explanations. The appellant suggested there was a sexual liaison as between he and Ms. Basque. It had nothing to do with cigarettes, that he had ordered wine and beer and was getting a second delivery.

The trial judge properly noted, “Well where was the wine and beer?” It didn’t show up with Ms. Basque.

[6] I suppose the trial judge could have given less credit for imagination and more blame for perjury, if he wanted to set it out that way, but that’s not the way he set it out. He said, in his decision, that he gave him credit for imagination, but not much credit in terms of credibility.

[7] *R. v. Henderson*, 2012 NSCA 53, paragraph 17 sets out the standard of appellate review on the question of law as being correctness. They say:

> Factual issues are reviewed for any palpable and overriding error. A trial judge’s application of the law to the facts is reviewed as a question of fact unless an extricable error of law is identified.

And they refer to *R. v. C.J.* , 2011 NSCA 77. At paragraph 18 they say:

> The standard of review of verdicts based on circumstantial evidence is whether a properly instructed jury, acting judicially, could have reasonably concluded that the guilt of the accused is the only rational conclusion to be reached from the whole of the evidence. Within such an inquiry, the standard of review for error is correctness. The standard of review of possible inferences that may be drawn from the evidence is palpable and overriding error.

They refer to *R. v. Shea*, 2011 NSCA 107.

[8] As I reviewed the transcript and considered the trial judge’s decision, he certainly set out correctly the law in terms of possession. He set out the law in terms of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and I could find nothing in the case to suggest to me that he made any error in application of *R. v. W.(D.)* (supra). He specifically noted in his decision that he did not find the accused at all credible. The evidence, I would suggest, would support that finding.

[9] He didn't stop at that point and say "Well, just because I don't find Mr. Mohamad credible, I find him guilty". There was a substantial review of the evidence in the decision wherein he talked specifically about what occurred on November the 17th, 2010. He talked about Constable Burcham and the fact that he had accessed the campground. He was in the bush near the white building when the Ford truck arrived. He began to go to get a closer look at the truck, and the male individual whom he believed to be Mr. Mohamad came by him, walking towards the truck. He said it was dusk with poor lighting, but Constable Burcham, who had seen Mr. Mohamad on various occasions, felt that it was Mohamad that he was observing. I'm referencing paragraph 14 of the judge's decision.

[10] The trial judge didn't make a mistake and say that he positively identified the accused at that passage, but he did then go on and talk about the male who had walked towards the red truck, which was parked by the small white building. He said a moment later the truck pulled away from the building and headed in the direction of a barn on the property. He heard a shout, and I understand that to be somebody shouting directions or something at the truck, but the judge's decision will speak for itself. He says he heard a shout, the truck stopped and then proceeded to the camping area on the property. The visibility he says was poor, with the darkness and the wet weather. Hearing voices, Constable Burcham felt some transaction was transpiring, and he radioed for the other officers to move in.

[11] Clearly Constable Burcham saw two people standing by the truck, and another one in the cab, or it turned out certainly that there was another person in the cab. Constable Burcham identified himself as an R.C.M.P. officer and he said that upon doing so, one individual slipped into the bush surrounding the campsite where the truck had parked. As I read the transcript, there is nothing in the evidence that suggests that the judge was wrong, or that there was any palpable or overriding error in terms of the evidence. It's for the judge to decide, to give weight to that evidence and decide whether Constable Burcham was being truthful or accurate in his evidence.

[12] He says then that,

> Constable Burcham drew his sidearm...

And I'm referencing paragraph 16.

> ...and he could hear the individual moving through the thicket.

In other words, the trial judge was satisfied that that was the individual who was moving through the thicket.

> He kept ordering the person out of the woods. He then advised the person that if he did not surrender he would shoot. He then heard a voice indicate that he was not doing anything and that it was his property. Mr. Mohamad...(lo and behold)...emerged from the thicket and was arrested. No other individuals were seen or heard in the area.

That was a finding of fact by the trial judge.

[13] All of the evidence before the court would suggest to me, and again I'm not weighing or reviewing the evidence, but none of it suggests a palpable or overriding error. In other words, it was a reasonable conclusion supported by the evidence that the individual who slipped into the woods is the one that was followed by Constable Burcham as he made his way a couple of truck lengths through the woods. That person who then emerged from the woods was Mr. Mohamad. Nothing in the evidence suggests to me, or nothing in the transcript suggests to me that the judge made any palpable or overriding error in reaching that conclusion.

[14] The judge, as I said, had made a comment that he found none of the evidence of the accused to be credible, and in that regard I understood him to be talking about...and I won't say none of the evidence be credible. He certainly didn't go on to say that he didn't accept that Mr. Mohamad owned the store, or had the smoke shop, or had a garage and the cardboard boxes that he would lay on. He didn't go through all of his evidence and do a detailed analysis, but certainly in terms of the important parts, Mr. Mohamad's evidence was not credible.

[15] The trial judge did go on to make some, I suppose gratuitous comments which the appellant now complains of. That is found in paragraphs 32 and 33 where the trial judge posed some questions about whether an experienced deer hunter would do what the appellant says that he did. But again I...and the same

types of comments were made in relation to the lovers' tryst. The trial judge referred to those things in paragraph 31. But I don't find that that's anything more than a comment that he added. There was lots of evidence that he had reviewed and assessed and weighed, all of which were used for his determination as to guilt or innocence, applying the proper standards, both in terms of the definition or meaning of possession, and in terms of credibility, *R. v. W.(D.)* (supra). I take the comments that the trial judge made in relation to the lovers' tryst and the deer blind as being somewhat superfluous, but also part of the trial judge trying to explain, in terms of his common sense analysis of the evidence, that a lot of what Mr. Mohamad was suggesting in the dovetailing of his evidence just didn't make common sense. I did not understand the trial judge to be reversing the onus, and placing an onus on Mr. Mohamad to prove anything. His reference in paragraph 31 where he says:

> The lack of testimony from Ms. Basque on this point is telling.

There was plenty of evidence in terms of what was going on at the campground that was sufficient to prove guilt or innocence. If there was any suggestion or possibility they were going to go on to have a lovers' tryst after the transfer of the contraband, so be it, but it wasn't essential to the findings of the trial judge. The same can be said of Mr. O'Neil's suggestion that this third person in the truck was part of a ménage à trois, or whatever it was he is suggesting. There's no evidence of that either. In that regard I note, Mr. O'Neil referred to it indirectly, some of those texts and e-mails, the ones that referred to the licking, et cetera, and I think that's what you were referring to in some of your comments.

[16] In the end I am satisfied, as a court sitting as an appeal court, that none of what the appellant suggests as errors were in fact errors committed by the trial judge, and the conviction should be maintained, as well as the sentence. The appeal is dismissed.

J.