NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Cain***, 2008 NSCA 49

Date: 20080603
Docket: CAC 285376
Registry: Halifax

Between:

Lewis Percy Cain

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Bateman and Saunders, JJ.A.
Appeal Heard:	May 27, 2008, in Halifax, Nova Scotia
Held:	Appeal from conviction dismissed; leave to appeal sentence granted but appeal dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	Eugene Y.A. Tan, for the appellant Mark Scott, for the respondent

Reasons for judgment:

[1] Mr. Cain appeals his conviction and sentence on a charge of break and entry (s. 348(1)(a) **Criminal Code of Canada**, R.S.C. 1985, c. C-46) and two charges of breach of a recognizance (s. 145(3) **Criminal Code**). He was tried in Provincial Court, Castor Williams, J.P.C. presiding.

BACKGROUND

[2] The circumstance of the offence are contained within the trial judge's reasons, a part of which I reproduce below:

> [11] There is no direct evidence that the accused was actually inside the building, only that he entered her house. However, there is a body of evidence that I reasonably could draw the conclusion that he did enter. First, Ms. Williams testified that she was alone working at home when she heard someone knocking at her front door and ringing the doorbell. The front door was locked and bolted and could only be opened without a key from the inside. You needed a key to open it if you were outside.
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> [12] Ms. Williams looked outside through a window and saw a male person wearing a dark jacket with yellow stripes on its sleeves and wearing khaki pants, leaving her front door. She saw the person walk towards the rear of her home but he disappeared from her view. She went upstairs to the upstairs bedroom. Next, she heard a noise at her back door deck and the smashing of glass coming from that area. Frightened, she first called her fiancé, Mr. Lorde, who was at a nearby location and then 911 to report the incident as a break and enter in progress.
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> [13] All of this occurred within minutes of Ms. Williams first observing the stranger. When Mr. Lorde arrived on the scene, also within minutes, he saw a stranger now identified as the accused apparently, on the position of his body, exiting the building as his back was towards the street. The front door of the building was now opened with one of the accused's feet inside the open door and the other on the outside landing. This stranger was wearing the same clothing as was observed by Ms. Williams.
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> [14] Second, the accused, when confronted by Mr. Lorde, gave no coherent reasons for his presence and raised suspicions that he might have been up to no good. During discussions with Mr. Lorde, the accused who had his hand in his pocket, took them out and in doing so, a handkerchief that Mr. Lorde later

recognized as his, fell from the accused's pocket. This handkerchief was used by the homeowners to prevent air from entering the building through a letter slot.

[15] Although it was a common pattern, the handkerchief, Mr. Lorde was certain that this particular handkerchief that was tendered as an exhibit was his. The one that they used to prevent the air from entering the building or the apartment or the home was missing and it was similar to the one that was in the possession of the accused when he was searched incidental to arrest.

[16] Third, the police seized the accused's jacket. On it, they observed what appeared to be slivers of glass. Also, as I said, that was found in the possession of the accused was a doo-rag or handkerchief which Mr. Lorde stated was his. Also, the evidence was that the slivers of the broken glass from the back door, most of it was on the inside of the building, which suggests that it was an external force that caused the glass to fall inwards and to the inside of the building.

[17] The back door was bolted with a deadbolt and, as similar with the front door, could only be opened from the outside with the key but from the inside with you using your hand to manipulate the bolts. So the theory is that the accused broke the glass, put his hand in, and manipulated the bolt and entered the building.

[18] Now there are some issues that also must be taken into consideration. There is the doctrine of recent possession where the accused, on the evidence, was found in possession of a stolen doo-rag. The doo-rag belonged to Mr. Lorde. I accept and find accordingly.

[19] Then there is also that it is reasonable to infer, and I infer and conclude, that the accused, when first seen by Mr. Lorde, was standing outside the front door. His hand was on the door, one foot was inside the open door on the threshold and the other foot was on the landing. His back was to Mr. Lorde.

[20] A reasonable inference could be, and I find on that undisputed fact, and I accept the testimony of Mr. Lorde to be credible, reliable and trustworthy when he said he saw the accused standing with his one foot inside the house and the other outside. A reasonable inference could be drawn on those set of facts that having entered the home through the back door, he was exiting through the front door. Both doors, as I said, were locked originally and they could only be opened from the inside by someone who was inside. So the logical conclusion is that if when Mr. Lorde arrived and saw the front door open with the accused standing there with one foot inside is that it was the accused and no other person who opened the front door having been inside the home itself. I so find.

[21] Also, I find that all of these set of circumstances, all of these undisputed facts, together they form a network of circumstances that inexorably point to the rational conclusion that it was the accused and no other person who opened the locked doors which draws the conclusion and a reasonable inference that he had to be inside to do so. Now he had no lawful excuse or lawful reason to do so . . .

. . .

[23] So, when we consider the total evidence, both directly and circumstantially, the evidence which stands unchallenged, is that, in my view, points to the fact that the accused in all the noted circumstances was the one who Ms. Williams saw outside knocking, ringing her doorbell, and the person who Mr. Lorde saw coming in a position that would reasonably infer that he was exiting the building, that the accused was one and the same person.

[24] On the circumstances that I have noted, I would say without doubt that he entered the building. The proven facts do call for an explanation. The accused was in the unique position to provide such an explanation; however, he did not testify. Notwithstanding, it must be clear that his failure to testify is not proof of his guilt.

[25] The Crown is never relieved of the burden of proving his guilt beyond a reasonable doubt unless under the provisions of the **Act**. The **Criminal Code**, Sections 348 and 350 and the authorities do support the proposition that when an innocent explanation for a set of incriminating circumstances or facts is not offered by the accused, the Court can draw an inference unfavourable to him. This inference, however, must be linked not only to the strength of the Crown's case but also to the logical expectation of an innocent explanation that only the accused can offer.

[26] Therefore, on the evidence, I do not doubt and accordingly I conclude and find that the accused did unlawfully break and enter the dwelling at 3252 Albert Street in Halifax with intent to commit an indictable offence and he has conceded that he was in breach of his recognizance by not abiding by his curfew and as the substantive offence has been found he has failed to keep the peace and be of good behaviour.

[27] There is no foundation on which I could find a reasonable doubt as the accused offered no innocent explanation to the incriminating proven facts, which I have accepted and found to be credible, trustworthy, and reliable. I conclude and find that those proven facts inexorably lead to my finding that the accused is guilty as charged on all counts on the information tried before me.

> [28] In short, I am satisfied that the Crown has proved beyond a reasonable doubt the guilt of the accused. Accordingly, a conviction will be entered on the record.

[3] The appellant did not testify at his trial.

ISSUES

[4] The appellant, although represented by counsel at trial, was initially self-represented on this appeal. His Notice of Appeal raises a number of grounds:

> 1. Glass from scene did not match glass police said was found in my jacket.
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> 2. The [sic] ruled the Crown could not use this, yet the Judge used this evidence to convict me.
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> 3. The promissory note which the Crown knew existed owing me money, was never raised in Court.
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> 4. The witness stated that he did not know me or that he did not have a criminal record. Yes to both counts.
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> 5. The Crown kept telling the Judge that I was facing another charge.
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> 6. The Judge stated at the sentence that I would have lied if I would have taken the witness stand.
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> 7. The Judge would not let me address the Court.
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> 8. The Judge spoke of an impact letter from a witness, my lawyer or myself did not see or hear this content.
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> 9. The Judge stated that my criminal record did not reflect the sentence; yet he used my record to sentence me.

ANALYSIS

[5] Save for the allegation that the judge erred in taking into account certain evidence which he had determined not to be admissible, the appellant is claiming that the verdict is unreasonable. On this issue I will follow the approach outlined by Fichaud, J.A. in **R. v. Abourached**, 2007 NSCA 109, [2007] N.S.J. No. 470 (Q.L.), 259 N.S.R. (2d) 379:

> [29] I will consider whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge. I will also consider the traditional *Yebes/Biniaris* [[1987] 2 S.C.R. 168 and [2000] 1 S.C.R. 381] test, preferred by Justice Charron in *Beaudry* [[2007] 1 S.C.R. 190], whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[6] The appellant now has counsel who in his submission has focussed primarily upon the first and second grounds of appeal and added an issue which was not contained in the Notice of Appeal.

[7] Dealing first with the "glass evidence", so-called, Constable Jason Withrow, one of the Halifax Police officers who responded to the 911 call, testified that he saw sparkling particles consistent with glass on the jacket that the appellant had been wearing at the scene. There had been no forensic tests to determine whether the "sparkling particles" were, actually, glass.

[8] Upon hearing this evidence the judge expressed concern that the witness was offering an opinion that the "sparkling particles" were, in fact, glass. He commented that the officer was not qualified to give such opinion evidence. In a lengthy exchange with the judge, the Crown attorney stated that the Crown was not intending to present evidence that the particles were proved to be glass, nor was the Crown relying upon that evidence as central to their case against the appellant. It was the Crown attorney's submission that Constable Withrow's observation that the particles were consistent with glass was due little weight in the context of all of the evidence, but that it was some circumstantial evidence, subject to the weight assigned by the judge. Although the judge's final position is not entirely clear from the transcript, it appears that he was of the view that the evidence of the "sparkling particles" was not relevant to the issues before him and could not be offered by the lay witness.

[9] The appellant therefore, understandably, takes issue with the trial judge's reference to the particles in his reasons for judgment. The judge mentions the particles at two points in his reasons:

> [6] Also, it was observed at the scene that the broken glass from the back of the door was inside the dwelling and also that in the clothing of the accused, that is his jacket, when it was seized by the police, were some shiny material which they opined appeared to be fragments of broken glass.
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> . . .
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> [16] Third, the police seized the accused's jacket. On it, they observed what appeared to be slivers of glass. Also, as I said, that was found in the possession of the accused was a doo-rag or handkerchief which Mr. Lorde stated was his. Also, the evidence was that the slivers or the broken glass from the back doors, most of it was on the inside of the building, which suggests that it was an external force that caused the glass to fall inwards and to the inside of the building.
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> (Emphasis added)

[10] It is the Crown's submission that the judge was clearly wrong if he ruled that Constable Withrow was not competent to testify that the sparkling particles on the appellant's jacket "appeared to be" consistent with glass.

[11] Citing **R. v. Graat**, [1982] 2 S.C.R. 819, the Crown submits that it was within the competence of the lay witness, Withrow, to provide evidence that the particles appeared to be consistent with glass. It was for the court to decide what weight to assign to the lay opinion.

[12] The Crown has not cross appealed on this issue nor filed a notice of contention.

[13] In my view, if the trial judge, rightly or wrongly, did determine that this portion of Constable Withrow's evidence was not admissible, it was inappropriate for him to rely upon it in his reasons for judgment.

[14] That said, as is obvious from the extensive evidence review and findings recited above, the circumstantial case against the appellant was overwhelming. Nothing turned upon the judge's acceptance or rejection of the "sparkling particles" evidence. Indeed, in an exchange during defence counsel's submissions

at trial, the judge referred to the evidence of "shiny slivers" on the appellant's jacket as "weak", which is further confirmation that it did not figure materially in the finding of guilt. This was a minor error having no impact on the verdict. I would apply the *curative proviso* in s. 686(1)(b)(iii) (**R. v. Khan**, [2001] 3 S.C.R. 823 at paras. 26 to 31).

[15] Counsel for the appellant raises an additional ground of appeal - that the judge's inference that the appellant was inside the dwelling was not supported by the evidence.

[16] The judge recognized that there was no direct evidence of the appellant's entry into the house. However, I am satisfied that the inference of entry is a reasonable one taking into account the fact that both the back and front doors, which had been locked, could only be unlocked from the inside; that the glass in the back door had been broken from the outside in; that an interior door which was left open, had been closed; and Mr. Lorde's evidence that he found the appellant at the front door of the house, with both the interior and screen doors open and one foot inside and one outside the house. The judge expressly accepted Mr. Lorde's evidence in that regard as "credible, reliable and trustworthy".

[17] The appellant says, as well, that the judge improperly relied upon post-offence conduct (the appellant gave the police false identification information). The judge did refer to the appellant's post-offence conduct in his reasons for judgment but acknowledged the defence submission that there was a possible innocent explanation for the appellant's attempt to conceal his true identity. In the face of the strong circumstantial case outlined in the judge's reasons, I am not persuaded that his reference to the appellant's post-offence conduct was material to his finding that the appellant was guilty of the offence charged.

[18] While the remaining grounds of appeal were not developed in detail in the appellant's submissions, I have reviewed them and find none to have merit. I will deal with each only briefly.

[19] The appellant complains that Mr. Lorde was indebted to him on a promissory note and was not truthful in his evidence when he denied knowing the appellant. During a vigorous examination by defence counsel, it was Mr. Lorde's evidence that the appellant was unknown to him and that he did not owe him

money. No contradictory evidence was offered by the defence. At sentencing the appellant attempted to offer his own evidence that Mr. Lorde knew him and was indebted to him on a promissory note. This gives rise to the appellant's additional complaint that the judge would not let him speak at his sentencing. The judge appropriately told the appellant that his opportunity to present evidence in his defence was at trial, not sentencing. The appellant had elected not to testify at trial, as is his right.

[20] The appellant has a lengthy criminal record. He is known to use aliases. He denied that he was the perpetrator of several of the offences which were attributed to him on his criminal record. I am satisfied that the judge, in sentencing the appellant, eliminated from consideration those offences which were disputed by the appellant.

[21] There is no support in the record for the appellant's submission that the victim impact statement presented at the sentencing took him by surprise or was not made available to his counsel.

[22] In summary, the appellant has not demonstrated that the findings essential to the decision are demonstrably incompatible with the evidence that is neither contradicted by other evidence nor rejected by the trial judge. The verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered (**R. v Abourached**, **supra**).

[23] Finally, I have considered the fitness of sentence, although not directly raised by the grounds of appeal. Taking into account the deferential standard of review applied to sentencing orders, given the nature of the offence and the appellant's extensive criminal record, I am not persuaded that in sentencing the appellant to four years imprisonment (which was reduced to thirty-four months after double credit for time spent on remand), the judge erred in principle or that the sentence is clearly unreasonable (**R. v. Shropshire**, [1995] 4 S.C.R. 227; **R. v. C.A.M.**, [1996] 1 S.C.R. 500).

DISPOSITION

[24] I would dismiss the appeal from conviction. While I would grant leave to appeal sentence, I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Roscoe, J.A.
Saunders, J.A.