NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Godron, 2008 NSCA 109

Date: 20081204
Docket: CAC 292656
Registry: Halifax

Between:

Huey Newton Godron

Appellant

v.

Her Majesty The Queen

Respondent

Judges: Roscoe, Hamilton, Fichaud, JJ.A.

Appeal Heard: November 17, 2008, in Halifax, Nova Scotia

Held: Appeal is dismissed per reasons for judgment of Roscoe, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel: Huey Newton Godron, the appellant in person
Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Huey Newton Godron appeals from his convictions on charges of assault and uttering threats after trial by Judge William B. Digby of the Provincial Court. Mr. Godron also pled guilty to charges of breaching his recognizance by drinking and violating a curfew arising out of the same incident. Although he was represented by counsel during part of his trial, he is now self represented.

[2] On the first day of the trial the Crown presented its evidence. Jessica Poirier and Alyson Rangeley testified that while waiting for a Metro Transit bus at the Mumford Road terminal around midnight on August 14-15, 2007 they were approached by the appellant. Ms. Poirier testified that the appellant grabbed her arm three times and shouted several times that he was going to rape and kill them. Both young women testified that Mr. Godron seemed to be intoxicated. Ms. Poirier called 911, the police arrived and arrested the appellant. One of the arresting officers, Constable Michael Carter also testified. He identified Mr. Godron and indicated that on the evening in question he appeared to be intoxicated and was uncooperative during the arrest and booking.

[3] Mr. Godron was represented by Mr. Roger Burrill during the presentation of the evidence on behalf of the Crown and he cross examined the two complainants. Mr. Burrill then asked for an adjournment for the purpose of attempting to access Metro Transit security videotapes. The trial was adjourned for that purpose. On the continuation Mr. Burrill advised Judge Digby that the tapes were no longer available. He also indicated that there had been a breakdown in the solicitor-client relationship and sought to withdraw as counsel of record. The application was granted and after several further court appearances, the trial continued with the appellant advising the court that he would “rather represent himself”.

[4] Mr. Godron testified that he did not assault or threaten the complainants. He indicated that he shook hands with Ms. Poirier and had some discussions with them.

[5] In his brief oral decision, Judge Digby indicated that he accepted the evidence of the complainants, that Mr. Godron may not have remembered the events because of intoxication, and that he was satisfied beyond a reasonable doubt

as to his guilt. The sentence imposed was 10 days custody for each offense, to run concurrently.

[6] Mr. Godron states the grounds of appeal as follows:

> The main reason(s) that I feel that my case should be re-tried is the facts that I was incarcerated during most of the time awaiting trial. Plus on the grounds of the improper handling of the video cassette as evidence on my behalf. I feel that the video would have made a drastic change in outcome. I want to have the chance to call witnesses to the stand. Access to proper procedures of the court, i.e. legal transcripts (law books). All of the court documentation on this matter be given for my disposal. At one point I did ask for this such documents, only to be given a portion of one of my preliminary hearings. I started taking medication Imovane & Seroquel so wasn't fully alert. I will discontinue during retrial to have a fresh mind.

[7] At the hearing of the appeal Mr. Godron made an application for the admission of new evidence. He was seeking, among other things, the production and admission of a long list of records from Metro Transit, the re-examination of the complainants and all police officers involved after the incident, a copy of the 911 call transcript, medical records of Ms. Poirier, the opportunity to question Judge Digby, and an original audio recording of the trial. The application was dismissed with brief oral reasons. The application did not satisfy the conditions for admission of new evidence from **R v. Palmer**, [1980] 1 SCR 759 and discussed in **R v. Assoun**, 2006 NSCA 47 at ¶ 295-302. In particular, nothing was tendered in admissible form, the suggested evidence either was available at the first trial or does not exist (the Metro Transit tapes), and none of the suggested items could be expected to affect the result or be potentially decisive. As Mr. Godron acknowledged, he essentially seeks a new trial. For that, he must show an appealable error by the trial judge.

[8] The thrust of Mr. Godron's argument on appeal was to the effect that he was denied the right to make a full answer and defence because the Metro Transit security videotape was not available for his trial. He also suggested that his counsel did not investigate the matter thoroughly and therefore he was denied a fair trial due to the ineffective assistance of counsel. As well, his submissions and his notice of appeal could be taken as an argument that the verdict was unreasonable.

[9] It is clear from the trial transcript that Mr. Burrill attempted to obtain the videotape, but as he explained to Judge Digby, the transit authority only retains the tapes for a period of 7 to 16 days before destroying them. It is also clear that the videotapes were never in the possession of the Crown and there is no suggestion that the Crown failed to discharge its disclosure duty.

[10] The right to make a full answer and defence is protected by s. 7 of the **Charter**. In **R. v. Lu (Vu)**, [1997] 2 S.C.R. 680, at ¶25, Justice Sopinka stated that "... where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence." In this case there is no evidentiary basis to support the allegation that the appellant has suffered any prejudice as a result of the unavailability of the videotape and this ground of appeal should be dismissed.

[11] In **R. v. MacKenzie,** 2007 NSCA 10, Justice Bateman explained how this court must deal with an allegation of ineffective assistance of counsel:

> 7 Commonly we would require the allegations of ineffective assistance to be placed before us as evidence, usually by affidavit, with notice to trial counsel (**R. v. G.R.S.** (1996), 148 N.S.R. (2d) 175; [1996] N.S.J. No. 69 (Q.L.)(C.A.)). In view of the fact that Mr. MacKenzie is self-represented and the material allows us to fairly assess the substance of his complaints we will do so.
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> 8 An appellant who contends that his counsel has not conducted his defence with a reasonable degree of skill must establish: (a) counsel at the trial lacked competence; and (b) it is reasonably probable that but for such lack of competence, the result of the proceedings would have been different. (**R. v. G.R.S.**, *supra* at para. 15).
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> 9 The standard for assessing counsel's competence was addressed by the Supreme Court of Canada in **R. v. G.D.B.**, [2000] 1 S.C.R. 520 where Major, J., for the Court, wrote:
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> > 27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

> 28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
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> 29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (**Strickland**, 466 U.S. 668, *supra*, at p. 697).

[12] Mr. Godron did not file an affidavit specifying how his counsel was ineffective or notify him of this argument so he could respond, which is the required procedure when arguing ineffective assistance of counsel. As in **MacKenzie**, taking into account the fact that Mr. Godron is self-represented and because the record allows us to fairly assess his argument, we did not require that he file an affidavit.

[13] There is nothing on the record before this court which supports the appellant’s contention that there was incompetent, ineffective or inadequate assistance of his counsel at the trial. The appellant has not particularized any error or omission of his counsel other than the failure to obtain the videotape which was not in existence. That there may have been something useful to the appellant on the videotape, if it had been available, is entirely speculative. The appellant has not shown that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different, and this ground of appeal ought to be dismissed.

[14] The appellant submitted that the verdict was unreasonable because, in his view, the evidence of the complainants was full of “indiscrepancies” and that the judge erred in accepting their evidence.

[15] In **R. v. Matthews**, 2008 NSCA 34, this court described the applicable test when there is an allegation of an unreasonable verdict:

> [13] On an appeal where it is alleged that the verdict is unreasonable, our role is to determine 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 and whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. See: the analysis of **R. v. Beaudry**, [2007] 1 S.C.R. 190 in **R. v. Abourached**, 2007 NSCA 109, 24 - 29.

[16] While there were minor differences in the evidence of the two complainants, they were pointed out to the judge by Mr. Godron in his submissions, and on essential elements their evidence was consistent. The trial judge found that there was no "great contradiction" in their evidence which indicates that he recognized there were some minor inconsistencies. A trial judge is entitled to find that witnesses are credible despite inconsistencies in their evidence: **R. v. Clarke**, 2006 NSCA 68. My review of the record leads me to conclude that the verdict is one that a properly instructed jury acting judicially could reasonably have rendered and the decision is not incompatible with uncontradicted evidence.

[17] I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.