NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Cain, 2009 NSCA 121

Date: 20091201
Docket: CAC 302786
Registry: Halifax

Between:

Percy Lewis Cain

Appellant

v.

Her Majesty the Queen

Respondent

Judges: MacDonald, C.J.N.S.; Oland and Beveridge, JJ.A.

Appeal Heard: November 26, 2009, in Halifax, Nova Scotia

Held: Appeal is dismissed, per reasons for judgment of Beveridge, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring

Counsel: Eugene Y. S. Tan, for the appellant
Mark A. Scott, for the respondent

Reasons for judgment:

[1] At the conclusion of the hearing of this appeal, the court announced that the unanimous decision of the court was the appeal was dismissed with reasons to follow. These are our reasons.

[2] Mr. Cain was convicted following a trial of being unlawfully in a dwelling house contrary to s. 349(1) of the *Criminal Code* and sentenced to 18 months imprisonment. He filed his own appeal from conviction alleging 12 errors by the trial judge, Provincial Court Judge Barbara Beach. Counsel assumed carriage of the appeal. Many of the alleged errors were abandoned. The remaining grounds were consolidated and restated into three complaints: the presiding judge erred in law in granting a request for an adjournment as a result of the Crown failing to properly inform the judge of the unavailability of a key crown witness, the trial judge erred in law in admitting the statement of a witness, and even if it was admissible, accorded too much weight to that statement and insufficient weight to the evidence of the appellant.

[3] With respect, none of the alleged errors would permit this court to intervene. The concern over an earlier adjournment request to a different trial judge is more appropriately viewed as a complaint of an abuse of process or perhaps an infringement or denial of the appellant's rights under the *Canadian Charter of Rights and Freedoms*. To understand the issue raised and its lack of legal merit, a brief reference to the history of the proceedings and factual background is required.

[4] The date of the offence was January 9, 2007. Mr. Cain was observed by one Ernest MacDonald to knock on the front door belonging to his neighbours, Mr. and Mrs. Arsenault. The appellant then went to the side door, knocked, and shortly afterwards, opened the door and walked into the Arsenault home. MacDonald was suspicious and concerned. He made his way to the Arsenault home and also entered. He found the appellant and Mrs. Arsenault in the kitchen. He ordered the appellant to leave and called 911. The appellant was apprehended within a short period of time. He was charged and later arraigned the same day.

[5] After his initial appearance, the appellant was represented by counsel. The appellant was released on a recognizance, but found himself in custody due to

other matters. Eventually, on March 26, 2007, the appellant elected trial in provincial court. His trial was scheduled for April 19, 2007.

[6] Mrs. Arsenault was, at that time, 92 years of age. She had been served personally with a subpoena to attend court on April 19, 2007. The Crown received information from her family that she was ill and unable to attend. The Crown expected to be able to secure her evidence in the future, personally or through a KGB statement. The Crown sought an adjournment of the trial. The defence was opposed. The trial judge was Provincial Court Judge Castor H. Williams. He issued a warrant for Mrs. Arsenault, but ordered it held until May 3, 2007 to permit the Crown an opportunity to furnish medical evidence justifying her non-appearance.

[7] It appears that the Crown did present evidence to the trial judge that satisfied him, for medical reasons, Mrs. Arsenault was unable to attend court on April 19, 2007. The warrant was cancelled. To try to achieve the earliest trial date, the appellant appeared in Court No. 1 before Judge Beach. The trial was then set for December 19, 2007.

[8] In the meantime, the police obtained a KGB statement from Mrs. Arsenault. During the course of a *voir dire* on December 19, 2007 to determine the admissibility of that statement, the defence focused some of its cross-examination of a police officer on his efforts to subpoena Mr. MacDonald for the initial trial date of April 19, 2007. Counsel seemed to be aware that the officer had not been able to subpoena Mr. MacDonald to attend court on April 19, 2007. The officer testified he did not know if the Crown was aware that Mr. MacDonald was in Florida, and would not be returning to Nova Scotia until May 11, 2007.

[9] Trial proceedings continued over a course of different dates. On June 2, 2008 the trial judge ruled the KGB statement of Mrs. Arsenault admissible. After the Crown closed its case, the defence elected to call evidence, but was unable to do so that day. On June 4 a trial continuation date was set for June 17, 2008. However, on that date, the defence announced it had what it called a “preliminary matter”. Counsel advised he had a transcript of the April 19, 2007 proceedings and complained that the Crown had failed in its obligation to inform the defence and the court about the lack of due diligence in subpoenaing Mr. MacDonald for April 19, 2007. Had the Crown done so, it was suggested that the adjournment would

not have been granted and the appellant consequently acquitted when the Crown was unable to present the evidence it needed.

[10] The Crown objected to the lack of proper notice. The trial judge expressed some reservation about the timing of the application and the lack of notice to the court. Nonetheless, the trial was adjourned for the purpose of permitting the defence an opportunity to provide proper notice of its application and to file materials. On July 30, 2008 the court offered August 28, 2008 as the date to hear the application, with a decision to follow in due course. This led to defence counsel taking instructions from the appellant. The trial judge was then advised by the defence that he would abandon the application, and simply continue with the trial on August 28, 2008.

[11] Having abandoned its application for some sort of *Charter* relief before the trial judge, it is simply not open to the appellant, in these circumstances, to now assert some sort of abuse of process or infringement or denial of an unspecified *Charter* right in this court.

[12] The appellant gave evidence at trial. He admitted entering Mrs. Arsenault's home, but suggested that he had a lawful excuse for doing so and had no intent to commit an indictable offence. His testimony was to the effect that he was engaged in a legitimate quest to track down an acquaintance of his from Toronto, named Becky. He only entered the home because Mrs. Arsenault beckoned him inside.

[13] On the issue of the admissibility of the KGB statement of Mrs. Arsenault, the appellant advances two arguments. First he submits the judge erred in finding the requirement of necessity had been satisfied. Trial counsel (who is not counsel on appeal) took the position at the *voir dire* that: "And with respect to necessity, we acknowledge essentially that the evidence has been made out in relation to that aspect. The doctor and the family member have provided the Court, I think, with enough information that it would be difficult for us to pursue that argument any further". This concession was appropriate. The argument that the trial judge erred in finding necessity has no merit.

[14] With respect to reliability, I do not accept the suggestion by the appellant that the trial judge did not fully consider and address the issues surrounding threshold reliability. The trial judge had before her the videotaped statement taken

from Mrs. Arsenault on April 22, 2007. It was under oath and she was cautioned about the importance of being truthful and accurate. Mrs. Arsenault had no apparent motive to lie, exaggerate or to do anything but answer honestly and as reliably as she could the questions asked of her. The trial judge was aware of the delay in taking the KGB statement and that the police officer read to her the content of her initial statement taken on February 1, 2007. The trial judge also heard evidence from Mrs. Arsenault's family and from her long time physician. The evidence not only dealt with her physical ailments, but also her mental acuity. It was relevant to both necessity and reliability.

[15] The essential evidence of Mrs. Arsenault was that the appellant entered the house without her permission and there was no query by the appellant about a person named "Becky". I am not satisfied that the trial judge made any error in finding the KGB statement of Mrs. Arsenault to be admissible.

[16] The last complaint is about the weight accorded to the statement of Mrs. Arsenault and the testimony of the appellant. The appellant argues that it was an error of law for the trial judge to have preferred the evidence of Mrs. Arsenault over that of the appellant, particularly without adequate explanation why the credibility of one should be preferred to another. With respect, that is not the relevant question in a criminal trial, nor did the trial judge engage in any such analysis. The essence of the trial judge's decision was that the appellant's evidence established no lawful excuse nor did the evidence raise a reasonable doubt as to his intent. The trial judge referred to the presumption set out in s. 349(2) of the *Criminal Code* and reasoned:

> There is no question, as I have said, Mr. Cain was in the residence; he acknowledges this. The question is, did he have a lawful excuse to be in that residence. Mr. Cain, alone, has provided an explanation for why he was in the home of Ms. Arsenault and there is simply no other evidence except that which I have heard from Mr. Cain to suggest that someone resided at the Cabot Street address that he knew. I have considered his evidence and I am not satisfied that it raises a reasonable doubt with respect to the matter of intent.
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> Unfortunately, Mr. Cain's credibility is seriously undermined by an extensive history of offences of dishonesty; and of course, that goes into the mix in coming to the conclusion that I have with respect to this matter.

> Mr. Cain's actions as observed by Mr. MacDonald, the evidence of Ms. Arsenault, coupled with the evidence of Mr. Cain which simply had no ring of truth to it whatsoever, leads me to no other conclusion but to find him guilty of the charge that is before the Court.

[17] The appellant fails to identify any error by the trial judge in finding that his evidence failed to raise a reasonable doubt with respect to his intent on entering or being in that dwelling house. I would therefore dismiss the appeal.

Beveridge, J.A.

Concurring:

MacDonald, C.J.N.S.

Oland, J.A.