NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cain*, 2020 NSCA 84

Date: 20201216
Docket: CAC 492589
CAC 499119
Registry: Halifax

Between:

Percy Cain

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	December 1, 2020, in Halifax, Nova Scotia
Legislation:	*Canadian Charter of Rights and Freedoms*, ss. 8 and 9; Civil Procedure Rule 90.47
Cases Cited:	*R. v. S.T.P.*, 2009 NSCA 86; *R. v. Toope*, 2016 NSCA 32; *R. v. Grant*, 2009 SCC 32; *Palmer v. The Queen*, [1980] 1 S.C.R. 759
Subject:	Appeal; Appeal—conviction; Appeal—motion to introduce fresh evidence; *Charter*; *Charter*—ss. 8 and 9; Civil Procedure Rule 90.47; Criminal; Motion; Motion—fresh evidence; Evidence; Evidence—motion to adduce fresh evidence
Summary:	Following a trial in the Supreme Court of Nova Scotia, the Appellant was convicted of break and enter and possession of stolen property. He now appeals the conviction and moves to introduce fresh evidence.

Issues:	(1) Whether the judge erred in convicting the Appellant? (2) Whether fresh evidence should be admitted?
Result:	The Appellant did not establish the first and fourth elements of the test in *Palmer v. The Queen*. The motion to adduce fresh evidence is dismissed. The judge did not err in his application of the law regarding arrest and search incidental to arrest, nor in his analysis of s. 24 of the *Charter*. The appeal is dismissed.

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Judges:	Bryson, Scanlan, and Beaton JJ.A.
Appeal Heard:	December 1, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton J.A.; Bryson and Scanlan JJ.A. concurring
Counsel:	Raymond Kuszelewski, for the Appellant James A. Gumpert Q.C., for the Respondent

Reasons for judgment:

[1] Mr. Cain was convicted in the Supreme Court of Nova Scotia of the offences of break and enter, contrary to s. 348(1)(b) of the *Criminal Code* and possession of stolen property, contrary to s. 355(a) of the *Code*. He now appeals from conviction and moves to introduce fresh evidence, pursuant to Civil Procedure Rule 90.47.[1]

[2] The offences occurred on January 10, 2019. A homeowner in Cole Harbour, Nova Scotia was alerted to the activation of their home security system at a time when no one was in the residence. When police arrived they found the patio door of the residence broken, with glass littering the inside of the home. The homeowner later found a number of items of jewelry were missing, along with a pillow sham from a bed.

[3] Within minutes an investigation began, with various members of several police agencies participating in a series of radio communications concerning the newly reported break and enter. During those exchanges Mr. Cain was identified as a possible suspect. Several of the participating officers were aware Mr. Cain was then subject to a court Recognizance that included a requirement he reside under "house arrest" in his residence.

[4] Officers attended at Mr. Cain's residence but were unable to locate him. They subsequently set up surveillance at the back of his residence and a short time later Mr. Cain appeared, clutching a pillow sham that matched the description of the one missing from the homeowner's bed. It contained jewelry later confirmed to belong to the homeowner.

[5] The trial judge, the Honourable Justice Timothy Gabriel, rejected Mr. Cain's arguments that he had been unlawfully detained and unlawfully searched pursuant to ss. 8 and 9 of the *Charter*. The judge found Mr. Cain was detained following the investigators' formulation of reasonable and probable grounds to believe he was in breach of his Recognizance. The judge was satisfied the search of Mr. Cain, consisting of a pat-down and the seizure of the pillow sham that Mr. Cain refused to release from his grip, was a search conducted incidental to arrest, as part of standard procedure for officer safety. The trial judge concluded the warrantless search was reasonable under the circumstances.

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[1] In his Notice of Appeal and filings, Mr. Cain also sought leave to appeal and appeal of his sentence. At the commencement of the hearing his counsel advised Mr. Cain would not be pursuing those matters.

[6] On appeal, the issue is whether the judge correctly applied the law. We cannot re-hear the trial or re-weigh the evidence put before the judge. Both parties agreed the applicable standard of review is correctness, based upon any errors of law. (*R. v. S.T.P.*, 2009 NSCA 86 at para. 12; *R. v. Toope*, 2016 NSCA 32 at para. 20).

[7] In his written materials Mr. Cain submits the judge erred in concluding his arrest and detention were lawful. In oral submissions before us, the argument became somewhat more refined. Mr. Cain made a motion to introduce fresh evidence and asserts the foundation of his argument rests on this evidence. The fresh evidence consists of a transcript of the radio transmissions exchanged among the various officers involved in the events leading to Mr. Cain's arrest.

Issue No. 1—Did the judge err in convicting Mr. Cain?

[8] Setting aside for the moment the question of whether the fresh evidence meets the test for admission, Mr. Cain argues that during the radio discussions among the officers they merely assumed Mr. Cain was "arrestable" for breach of his Recognizance, but were not certain such was the case. In particular, Mr. Cain asserts because the radio transmissions do not clearly identify the timelines of the conversations held, it is unclear or uncertain when it was the officers received various items of information prior to arresting him. Mr. Cain maintains we cannot be certain what portion(s) of the radio transmissions would have been heard and considered by the officer who conducted the arrest. In other words asks Mr. Cain, was he arrested on some nebulous "common" knowledge, or on what the arresting officers knew?

[9] The essence of Mr. Cain's argument is that there is a lack of context; because of the absence of a concrete timeline in the radio communications it cannot be discerned which officers knew what, and when they knew it. With respect, had the transcript of the radio transmissions been available at trial, it would not have assisted in the conduct of the defence, or the judge's decision-making process. There is no basis upon which to conclude, as is argued by Mr. Cain, the radio transmissions would have provided the judge with a "better inquiry" into the lawfulness of Mr. Cain's arrest.

[10] The burden was on the Crown to establish the warrantless search was reasonable and justified in the circumstances. Mr. Cain was initially arrested for breaching his Recognizance, and the judge was satisfied the arrest and the search

of Mr. Cain incidental to arrest were lawful. The record reflects the judge's correct application of the law regarding both the arrest and the search incidental to arrest.

[11] Once the trial judge determined there had been no breach of Mr. Cain's ss. 8 or 9 *Charter* rights, he nonetheless went on to consider that even had he concluded a breach had occurred he would not have excluded the evidence of the seized jewelry pursuant to s. 24(2) of the *Charter*. In conducting the s. 24 analysis and coming to that conclusion, the judge correctly stated and applied the principles established by *R. v. Grant*, 2009 SCC 32.

Issue No. 2—Should fresh evidence be admitted?

[12] The motion for fresh evidence was accompanied by the affidavit of Mr. Cain's counsel, the pertinent portions of which are:

> 2 THAT police transmission evidence was not available at trial;
>
> 3 THAT police transmission evidence is now available; I attach the transcript as Exhibit A to this my affidavit;
>
> 4 that [*sic*] police transmissions are fresh evidence as credible relevant and material facts for the trial.

[13] The longstanding decision of *Palmer v. The Queen*, [1980] 1 S.C.R. 759 sets out the test we must apply on a motion for fresh evidence:

> 22 Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them — see for example *R. v. Stewart*, supra; *R. v. Foster* (1978), 8 A.R. 1 (Alta. C.A.); *R. v. McDonald*, [1970] 2 O.R. 114, 9 C.R.N.S. 202, [1970] 3 C.C.C. 426 (C.A.); and *R. v. Demeter* (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, affirmed [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, 16 N.R. 46. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. R.* (Citation removed)

> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[14] As to the first branch of the test, there was no evidence put before us to explain why the transcript of the radio transmissions could not have been adduced at trial. Other than counsel's statement the evidence was not available at trial, we have not been provided with any details in support of that statement. I am left to speculate whether it was unavailable for a specific reason or reasons, or instead not sought before the trial took place.

[15] Regarding the second branch of the test, information of the radio communications is undoubtedly relevant, being the same subject matter as relayed by the police officers called to give evidence at the trial.

[16] On the third branch of the test, I take no issue that the evidence, if admitted, would be reasonably capable of belief.

[17] With respect, the greatest difficulty in the application of the *Palmer* criteria to this motion comes with the requirements of the fourth branch of the test. I am not persuaded the radio transmission could reasonably be expected to have affected the trial result. As noted by counsel for the Crown, the proposed fresh evidence would not add anything, and could in all likelihood serve only to strengthen the Crown's case, not that of Mr. Cain. I am not reasonably assured the evidence would have affected the trial result. Had it then been available, I am not persuaded its introduction would have altered the judge's decision. I do not accept Mr. Cain's argument that "… the lack of relevant and material evidence before the court did not allow a fully probative trial to take place".

[18] For the foregoing reasons, the motion to admit fresh evidence is dismissed.

[19] In conclusion, I am satisfied there were no errors committed by the judge in reaching his conclusions and ultimately, his decision to convict. For the foregoing reasons I would dismiss the appeal.

Beaton J.A.

Concurred in:

Bryson J.A.

Scanlan J.A.