NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Rhyno***, 2013 NSCA 120

Date: 20131018
Docket: CAC 409762
Registry: Halifax

Between:

Michelle Florence Rhyno and
Michael Raymond Rhyno

Appellants

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Farrar and Scanlan, JJ.A.
Appeal Heard:	October 18, 2013, in Halifax, Nova Scotia
Written Release	October 18, 2013
Held:	Appeal of the Appellant Michael Rhyno allowed and new trial ordered per oral reasons for judgment of the Court.
Counsel:	Roger A. Burrill for the Appellant Mark Scott for the Respondent

Reasons for Judgment:

[1] After the hearing on October 18, 2013, the Court pronounced that Mr. Rhyno's appeal was allowed and a new trial was ordered, with reasons to follow. These are the reasons.

[2] Mr. Michael Rhyno and his mother, Ms. Michelle Rhyno, were jointly tried, before a jury, on charges of robbery. The evidence included an out of court statement by Ms. Rhyno, that implicated Mr. Rhyno. Ms. Rhyno's trial testimony did not adopt that statement. The trial judge did not appropriately instruct the jury on the effect, against Mr. Rhyno, of Ms. Rhyno's out of court statement. The jury convicted Mr. and Mrs. Rhyno. Mr. and Ms. Rhyno were each sentenced to three and one half years' incarceration.

[3] Mr. and Ms. Rhyno each appealed to this Court. But Ms. Rhyno abandoned her appeal.

[4] Mr. Rhyno has several grounds of appeal. It is only necessary to discuss one of them – that the trial judge erred in law by failing to instruct the jury on the legal effect of unadopted out of court utterances by one accused against the co-accused.

[5] In *R. v. C.(B.)* (1993), 80 C.C.C. (3d) 467 (O.C.A.), para 12, leave denied (1993), 83 C.C.C. (3d) vi (S.C.C.), Justice Finlayson said it is "black letter law" that an out of court statement by one accused is not evidence of the facts contained in it against a co-accused, and neither may that out of court statement be used merely to corroborate the victim's evidence. To similar effect: *R. v. Perciballi* (2001), 154 C.C.C. (3d) 481 (O.C.A.), paras 74-91, per Charron, J.A. for the majority, affirmed [2002] 2 S.C.R. 761 "substantially for the reasons of Charron J.A. in the Court of Appeal"; *R. v. Bailey*, [1987] N.S.J. 375 (C.A.), per Macdonald J.A. for the Court.

[6] If the accused who gave the statement adopts it in his testimony, then that testimony is not hearsay, and the testimony is evidence against the co-accused. But if the out of court statement is not adopted on the witness stand, then it remains hearsay against the other accused.

[7] This means that, in a joint trial, an effective limiting instruction is the minimal requirement. *R. v. Ward*, 2011 NSCA 78, paras 32-38.

[8] In this case, the trial judge gave no limiting instruction to the jury about the use of Ms. Rhyno's statement against Mr. Rhyno. To the contrary, he instructed the jury that they could consider the contents of Ms. Rhyno's statement against Mr. Rhyno. The judge and counsel for the Crown and defence – not the appeal counsel for either party – misapprehended the limitation on the use of a co-accused's out of court statement against the accused.

[9] On the appeal, the Crown acknowledges that the absence of a limiting instruction, in these circumstances, was an error of law by the trial judge. The Crown agrees that the curative proviso does not apply and that Mr. Rhyno should have a new trial.

[10] The Court allows Mr. Rhyno's appeal from his conviction and orders that there be a new trial.

Fichaud, J.A.

Farrar, J.A.

Scanlan, J.A.