Date: 1998 06 17
Docket: CA 00690

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

YELLOWKNIFE CRIMINAL SITTINGS

HEARD JUNE 16, 1998

	COUNSEL	TRIAL JUDGE	COURT
TAI LAM	S. Tarrabain	Hewak J.	Irving, J.A. Richard, J.A. Sulatycky. J.A.
Appellant			
- and -			
HER MAJESTY THE QUEEN	W. Smart		
Respondent			

APPEAL #CA 00690

MEMORANDUM OF JUDGMENT

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[1] The appellant appeals his conviction for narcotics offences following a jury trial in Yellowknife in March 1997. The appellant alleges error by the presiding trial judge in his conduct of the trial.

[2] Firstly, we deal with what we consider to be the primary ground of appeal; i.e., that the trial judge's exhortation to the jury to reach a verdict was improper. The jury commenced their deliberations at 5:45 p.m. Late in the evening the jury sent the following written question to the presiding judge:

> We all agree to 11 key facts. We all agree these facts point to a guilty verdict. One of us feels uncomfortable at a gut intuitive level. Please advise how we weigh intuition versus facts - evidence.

[3] Upon the jury being brought into the Courtroom, the presiding judge answered the jury's question as follows:

> As I told you a number of times during the course of my instructions to you, you are obliged to bring in a verdict according to the evidence. Remember the oath that you took when you were sworn as members of the jury, that you will well and truly try and true deliverance make between Our Sovereign Lady the Queen and the prisoner at bar whom you shall have in charge and a true verdict give according to the evidence. That's the oath that you took. So it has to be according to the evidence; it can't be according to any other rule of thumb or any other standard that you want to apply. You have to apply the rule of evidence; you have to consider the evidence; you have to decide on the evidence and not on anything else. I believe that answers the question for you.
>
> It's now ten after 11:00. When we last met a moment ago, I said to you that at 11:00 o'clock we will use that as a yardstick. We're prepared to go to 11:30 now because of what you say in your question and how close you are in coming to a verdict. At 11:30, you will be brought in. If you have come to a verdict by that time, we will hear it. If you haven't, then we will deal with it in the appropriate fashion at that time. You may leave.

[4] The jury returned a guilty verdict shortly after 11:30 p.m.

[5] The appellant argues that in his answer to the jury's question the trial judge was exerting undue pressure upon the "twelfth juror". We respectfully disagree.

[6] Exhortation *per se* is not improper. However in any exhortation given to a jury the judge ought not encourage a juror to change his or her mind simply for the sake of conformity. Also, a deadline for reaching a verdict should not be imposed and a jury should never be rushed into returning a verdict. *R v. R.M.G.* [1996] 3 S.C.R. 362.

[7] We cannot draw the inferences which the appellant urges upon us. From the trial judge's words quoted above we cannot infer either a) that the judge was encouraging the "twelfth juror" to agree for the sake of conformity, or b) that the trial judge was rushing the jury into reaching a verdict. It may very well be that, with the judge's explanation about deciding the case on the evidence and not on intuition, the jury needed little time to conclude their deliberations.

[8] Accordingly this ground of appeal must fail.

[9] As to the remaining grounds of appeal, we comment as follows:

[10] Infringement of appellant's s.10(b) Charter right to counsel, resulting in the appellant being conscripted to give evidence: This Charter issue was not raised at trial although the appellant had the opportunity and ability to do so. There is strong case authority which precludes the appellant from raising the Charter issue for the first time on this appeal, in these circumstances.

[11] Error by trial judge's *voir dire* ruling on the presence of reasonable and probable grounds for the arrest of the appellant: Our review of the trial judge's reasoning on this point discloses no error in law or principle.

[12] Error by trial judge in directly questioning the appellant and another witness, following the conclusion of counsel's examination and cross-examination: We see no error or miscarriage of justice here. A review of the transcript indicates there is no basis for the appellant's suggestions that a) the trial judge was rehabilitating the Crown witness, or b) that the trial judge was assisting the Crown in the questions he posed to the appellant. The questions were evenhanded and not unfair.

[13] Error by judge in allowing jury's questions to be put to appellant during his testimony: At the conclusion of the appellant's examination-in-chief and during a brief adjournment, the jury sent to the trial judge a note containing questions related to the factual background of the appellant's testimony to that point. The trial judge, quite properly, disclosed the contents of the note to counsel, and left it to counsel to decide whether to ask the questions of the appellant. Appellant's trial counsel decided to do so, and was permitted to reopen his examination-in-chief to do so. Clearly, the decision to ask these particular questions (which questions, apparently, the appellant now finds troublesome and inappropriate) was that of appellant's counsel. In these circumstances, blame or error can hardly be placed with the trial judge.

[14] Crown's cross-examination of appellant resulting in disclosure of appellant's previous criminal activity, prior to any ruling on *Corbett* application: It was both counsel's intention to seek a ruling from the trial judge as to whether the appellant could be cross-examined on his criminal record, which included a narcotics offence. In his direct evidence the appellant testified, *inter alia*, that he had no knowledge of the narcotics activities of his acquaintances Jones and Hudson on the day in question. Crown counsel in his cross-examination assailed the appellant's credibility on this point. In giving answer

to Crown counsel's questions, the appellant himself disclosed his previous narcotics conviction, as indicated in the following excerpt from the cross-examination:

> Q I'm going to suggest to you that you knew Emerick had the cocaine on him because you arranged for him to take it, didn't you?
> A No, I didn't know anything about it.
> Q You didn't know anything about any trafficking in cocaine?
> A I didn't know anything about them, what they did.
> Q What they did? It was totally foreign to you what they were doing?
> A They didn't tell me anything about that.
> Q All right. It's something you wouldn't be involved with, is it?
> A I was always surprised why they took the same plane to Yellowknife.
> Q That wasn't -- that didn't answer my question.
> A Could you repeat the question again?
> Q That's something you wouldn't be involved with, is that what you're saying?
>
> MR. TRIGGS: I think my friend should specify as to this particular incident that he's referring to. Is that what his question is regarding?
>
> MR. COUPER: All right.
>
> Q Trafficking in drugs isn't something that you'd be involved with?
> A I don't want to get involved into that again.
> Q Again?
> A Because I learned my lesson. I was arrest for that few months -- few years before that. I was in prison and I was thinking about not worth anything so I decide not to do it.
>
> MR. COUPER: My Lord, I have a final area of questioning that I believe I should address in the absence of the jury before I embark on it.

[15] There then followed the *Corbett* application in the absence of the jury, and the trial judge ruled that the appellant could be cross-examined on his prior criminal convictions as contemplated by s.12 of the *Evidence Act*. The trial judge gave the jury the standard instruction as to the limited use the jury might make of the appellant's criminal record.

[16] The appellant submits that Crown counsel's conduct in "extracting" this information from the appellant prior to any *Corbett* ruling prejudiced the appellant's subsequent *Corbett* application and affected the fairness of the trial.

[17] In our view it is unfortunate that Crown counsel in phrasing his questions as he did veered into this area which he knew was to be the subject matter of a *voir dire*. This constituted, at most, improper conduct of Crown counsel; however, it was not fatal to the fairness of the trial in the circumstances, particularly given the trial judge's instructions to the jury as to use of that evidence. There was no miscarriage of justice flowing from the prosecutor's questions.

[18] We find no merit in these other grounds of appeal for the reasons given.

[19] The appeal is dismissed.

Dated at Yellowknife, Northwest Territories, this 17th day of June A.D. 1998.

_ Irving, J.A.

_ Richard, J.A.

_ Sulatycky, J.A.

Counsel for the Appellant: S. Tarrabain
Counsel for the Respondent: W. Smart

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