In the Court of Appeal of the Northwest Territories

Citation: Bruha v. Northwest Territories, 2006 NWTCA 01

Date: 20060222
Docket: A-1-AP-2003000018
Registry: Yellowknife, N.W.T.

Between:

Pavel Paul Bruha

Appellant

- and -

Her Majesty the Queen

Respondent

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Ted Richard
The Honourable Mr. Justice Clifton O'Brien

Memorandum of Judgment
Delivered from the Bench

Appeal from the Conviction by
The Honourable Mr. Justice J. Z. Vertes
Dated June 27, 2003
and Appeal of the Sentence
Dated July 3, 2003

Memorandum of Judgment
Delivered from the Bench

Fraser, C.J.N.W.T. (for the Court):

[1] Pavel Bruha appeals his manslaughter conviction by a jury. While Bruha advances several grounds of appeal, we find it necessary to deal with one only. That relates to the Crown's cross-examination of Bruha on his criminal record.

[2] Bruha was tried for manslaughter in the death of Yves Lebel. A second man, Craig Stromberg, pled guilty to manslaughter in connection with Lebel's death. The medical examiner determined that Lebel had died of a subdural haematoma.

[3] It was alleged by the Crown that Bruha and Stromberg acted together in the attack on Lebel. The Crown theory is that Stromberg and Bruha went to Lebel's apartment to lay a beating on Lebel because they believed that Lebel was having an affair with Bruha's wife. In support of its theory, the Crown led evidence from Stromberg who testified that Bruha was present in the apartment when Stromberg attacked Lebel and that Bruha also hit and kicked Lebel. Other Crown witnesses testified that on the day following the assault, Bruha admitted that he had kicked and hit Lebel. The evidence called by the Crown indicated that Bruha and Stromberg had been drinking prior to their assault on Lebel.

[4] Bruha testified in his own defence. He denied participating in the attack. He also denied being inside Lebel's apartment when the attack took place. During cross-examination, Crown counsel questioned Bruha on his criminal record. That record included one 1995 conviction for assault and a conviction for driving while intoxicated, as well as other convictions for theft and misuse of a firearm.

[5] After the jury's verdict was rendered, but before the sentencing hearing, Crown counsel learned that in 2002, prior to Bruha's trial for manslaughter, Bruha had received an administrative pardon under the *Criminal Records Act*, R.S.C. 1985, c. C-47, in respect of five of his convictions. That information was known to the lead investigating officer prior to Bruha's trial but had not been disclosed to Crown counsel.

[6] At the sentencing hearing, which took place about a week following the jury verdict, the defence moved for a mistrial on the basis that it had not been open to the Crown to question Bruha on the pardoned convictions and that the effect of that line of questioning had prejudiced Bruha's right to a fair trial. The trial judge denied the mistrial application.

[7] In our view, the trial judge was *functus officio* at the time of the mistrial application. At that point, the jury verdict had been rendered and the jury discharged. Thus, the trial judge did not then have the jurisdiction to declare a mistrial. This being so, this Court must itself consider the effect of the Crown's cross-examining Bruha on his pardoned convictions.

[8] When this appeal first came on for hearing, the panel directed that additional inquiries be made and submissions filed on a number of related issues, including the relevant facts relating to the granting of the administrative pardon, Bruha's eligibility to receive that pardon, whether the Crown's challenge to Bruha's pardon amounted to a collateral attack on the pardon and, against this background, whether any error was therefore made in how Bruha's criminal record was dealt with at trial and the consequential effect of that error, if any.

[9] The facts as we understand them are these:

1. Bruha had been convicted of a number of offences before 1995. All but one were summary conviction offences. The one exception was a 1984 conviction for an indictable offence, theft, in respect of which Bruha received a fine only.

2. Bruha applied to the National Parole Board for a pardon in August 2000. The sentences for each of his prior offences had expired at least five years before his application was made.

3. On November 1st, 2001, while his pardon application was outstanding, Bruha was convicted of theft under $5000.00 and sentenced to nine months probation. Then, in January, 2002, Bruha was charged with second degree murder.

4. In March of 2002, the Parole Board granted Bruha an administrative pardon for his pre-1995 offences. Prior to granting the administrative pardon, it appears that the Parole Board was not advised of either Bruha's 2001 theft conviction or Bruha's outstanding homicide charge.

[10] This Court heard considerable argument as to whether Bruha was eligible to receive the subject administrative pardon when granted by the Parole Board in light of Bruha's 2001 theft conviction and his outstanding homicide charge.

[11] Bruha submits that the Crown's argument on appeal amounts to a collateral attack on the Parole Board's decision to issue the pardon and that this Court should not permit such an attack.

[12] The Crown attempts to step past the collateral attack argument this way. The Crown concedes that had this issue come up before the trial judge, the Crown could not have contended that Bruha was ineligible to receive the pardon, nor that it had been wrongly issued as this would amount to an impermissible collateral attack on the Parole Board's decision. But it contends that this Court is in a different position. It argues that in considering whether there has been a miscarriage of justice warranting a new trial, this Court ought to go behind the pardon and determine whether Bruha was eligible to receive it. The Crown asserts he was not. Thus, the Crown argues that this Court ought to take that ineligibility into account in deciding whether a miscarriage of justice has occurred.

[13] We do not agree. In our view, the Crown's invitation that this Court consider whether Bruha was in fact and in law eligible to receive the administrative pardon constitutes an impermissible collateral attack on the legitimacy of that pardon: *R. v. Consolidated Maybrun Mines Ltd.* [1998] 1 S.C.R. 706; *R. v. Al Klippert Ltd.* [1998] 1 S.C.R. 737. The rationale of the collateral attack rule is to ensure the integrity of administrative processes. In determining whether to permit a collateral attack on the pardon, this Court must consider Parliament's intention as to the appropriate forum to challenge the validity of that pardon. Having done so, we have concluded that this Court is not that forum.

[14] Parliament has expressly conferred on other bodies the jurisdiction to revoke a pardon, beginning with the Parole Board itself. Under s.7.2(b) of the *Criminal Records Act*, the Parole Board has the jurisdiction to revoke an administrative pardon where it is convinced by new information that the person was not eligible for a pardon at the time it was granted. But neither the Parole Board nor the Crown has sought to revisit Bruha's pardon on this basis. In addition, it is open to the Crown to challenge the Parole Board's decision to grant a pardon by applying to the Federal Court of Canada for judicial review. It is the Federal Court, not this Court, that has been assigned the exclusive original jurisdiction to hear and determine a judicial review application brought against a federal board, and that includes the Parole Board: s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. However, the Crown has never sought to review the Parole Board's decision in respect of Bruha's pardon.

[15] Further, the Crown's attack on the issuance of Bruha's pardon is based on the interpretation of the eligibility requirements in the *Criminal Records Act*. That interpretation is not free from doubt: *Tanner v. Canada (Attorney General)* 2003 FCT 268; *Conille v. Canada (Attorney General)* 2003 FCT 613. Neither the Parole Board nor the Federal Court has had the opportunity to consider and pronounce on the interpretation of the statutory prerequisites that the Crown now raises. This is an area in which it can be expected that both the Parole Board and the Federal Court enjoy considerable expertise. To allow the Crown's argument on parole ineligibility in these proceedings would deprive Bruha of the benefit of the pardon despite the fact that those bodies have not had an opportunity to properly consider the matter. This approach would undermine the integrity of the parole system created by Parliament.

[16] Thus, this Court is in no different position than the trial judge; it should not permit the Crown to collaterally attack the Parole Board's decision in these proceedings. Accordingly, we have concluded that this appeal must be dealt with on the basis that the pardon issued by the Parole Board was in effect – and valid – at the time of Bruha's trial.

[17] We now turn to the effect of the Crown's failure to bring the existence of this pardon to the attention of the trial judge at the relevant time. What consequences flow from this?

[18] Had the existence of the pardon been disclosed by the police to the Crown on a timely basis, then Crown counsel could have – and would have – brought this to the attention of both the trial judge and defence. It must be emphasized that neither Bruha nor his defence counsel had received notice of the issuance of the pardon prior to Bruha's trial. Under s.5(a)(ii) of the *Criminal Records*

Act, the effect of the conviction in respect of which a pardon has been granted is that it should no longer reflect adversely on the character of the recipient of the pardon. This being so, it is clear that had this matter been brought to the attention of the trial judge, the trial judge would have made a ruling on what cross-examination, if any, would be permitted on the pardoned offences.

[19] The trial judge could have refused cross-examination on the pardoned offences on the basis that to permit such cross-examination in a criminal trial would defeat the purpose of the *Criminal Records Act*: *R. v. Paterson* (1998), 22 C.C.C. (3d) 254 (B.C.C.A.); *contra*, in another context, see *Therrien (Re)* [2001] 2 S.C.R. 3. Alternatively, assuming without deciding that cross-examination could be permitted on the pardoned offences, the trial judge could have permitted cross-examination on one or more of the offences. Had the trial judge permitted cross-examination, he would have been required to consider what terms should apply to that cross-examination. At a minimum, he would have been obliged to disclose to the jury the existence of the administrative pardon and to instruct them on what use, if any, could be made of the pardoned convictions. Because of the non-disclosure by the police to the Crown, the defence lost the opportunity to request the trial judge to restrict cross-examination on Bruha's pardoned offences, either in total or on terms.

[20] Therefore, we must now ask, in deciding whether there was a miscarriage of justice, whether there is any reasonable possibility that the verdict would have been different had there been timely disclosure of the existence of the pardon. It is evident that the purpose of the Crown's cross-examination on Bruha's record was to impugn Bruha's credibility. In fact, the trial judge expressly instructed the jury that it could take Bruha's record into account in considering credibility. Since this trial turned on an assessment of the credibility of all witnesses, including Bruha, who denied being present in Lebel's apartment with Stromberg, the absence of any restriction on Bruha's cross-examination on the pardoned offences amounts to serious prejudice to Bruha's fair trial right. In the circumstances of this case, therefore, we cannot say that there is no reasonable possibility that the verdict would have been different had the existence of the pardon been disclosed on a timely basis.

[21] Accordingly, breach of Bruha's fair trial right warrants a new trial. We allow the appeal and order a new trial.

Appeal heard on October 18, 2005 and January 17, 2006.

Memorandum filed at Yellowknife, N.W.T.
this 27th day of February, 2006

Fraser, C.J.N.W.T.

Appearances:

H. R. Latimer
for the Appellant

L. Charbonneau
for the Respondent