In the Court of Appeal of the Northwest Territories

Citation: R. v. Tourangeau, 2008 NWTCA 02

Date: 2008 03 20
Docket: A-1-AP2007000008
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Tanya Tourangeau

Appellant

The Court:

The Honourable Madam Justice Elizabeth McFadyen
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Chief Judge B.A. Bruser
Entered on the 13th day of October, 2006

Memorandum of Judgment

The Court:

Introduction

[1] The appellant challenges her conviction for one count of theft of cheques, the property of 4990 NT Ltd., of a value exceeding $5,000.00: ***R v. Tourangeau,*** [2006] N.W.T.J. No. 66, 2006 NWTTC 10 (QL). The count alleges that the theft occurred on or between April 23 and July 23, 2003 "at or near the Town of Fort Smith in the Northwest Territories". She was tried along with Victor Marie ("Marie") who was, during the material time, chief of the Salt River First Nation ("SRFN"). Marie was also convicted but no appeal by him was before the Court. The essence of the appellant's challenge is that the Crown failed to prove that any conduct on *her* part constituted the *actus reus* or *mens rea* of theft *within the territorial jurisdiction* thus specified in the count.

[2] Evidence of the appellant's dealings in Edmonton, Alberta on July 21 and 22, 2003, was said by the Crown to show that she was a party to theft of the cheques. The appellant asserts that nothing she did in Edmonton constituted the fact - or evidence - of her participation in theft of the cheques in the Northwest Territories as alleged by the count. In his reasons, the trial judge stated that he was not deciding if the appellant and Marie were guilty of theft in Alberta, but rather was treating the evidence of what transpired in Alberta as simply part of the proof that the theft of the cheques had been committed by both of them in the Northwest Territories.

Context

[3] A numbered company, 4990 NT Ltd. was incorporated in January, 2002 by the then Chief of SRFN, James Schaefer ("Schaefer"), and four others. There was a dispute as to whether 4990 NT Ltd. was privately owned or band owned. The appellant testified that she believed that it was band owned and essentially under Marie's direction. Schaefer's view was that SRFN control had not been effective for band businesses and that it was better to have people with business acumen running the companies. Under a contract dated May 8, 2002, with the Government of Canada for $74,048.28, 4990 NT Ltd. was to conduct surveys related to land settlements for SRFN. The company contact at that time was Schaefer.

[4] On August 31, 2002, Marie was elected chief, but a dispute arose and a non-confidence motion was brought in November 2002 against him by some councillors. At that meeting, the August, 2002 councillors were putatively removed and replaced, but Marie remained as chief. The appellant Tourangeau was formally hired as the band's financial manager at that time. Litigation followed in the Federal Court to determine which council - as between the August, 2002 Council and the November, 2002, Council - was duly elected to run SRFN.

[5] The trial judge found that the appellant was "well educated, bright and articulate", that she was "very knowledgeable about the business of the SRFN band", that she was involved with the incorporation of 4990 NT Ltd., and that she participated in the negotiations leading to the contract with Canada: [Judgment at paras. 82 to 85]. He found that she was aware of the need to pay band bills, and that it was important to create records for audit and other purposes [Judgment, para. 89].

[6] Under the contract with Canada, two cheques for $10,773.31 and $12,258.38. were issued in April, 2003 by Canada to 4990 NT Ltd., for a total amount of $23,031.69. The trial judge found as a fact that Marie's "physical possession of the cheques ... along with knowledge of their significance and control over them, occurred in the band offices in Fort Smith": [Judgment para. 51]. Indeed, the appellant testified that she transferred the cheques to Marie immediately since, in her view, he was authorized to deal with them as a band owned company: [Judgment, para. 80].

[7] On May 16 and May 29, 2003, two different Notices of Change of Directors of 4990 NT Ltd. were filed under the *Business Corporations Act*, the purpose being to install differentmembers of the competing Councils as directors for the company. The May 16, 2003, Notice removed Marie, Norman Starr, Connie Benwell, Michelle Bjornson, Harvey Lepine, Don Tourangeau, Nora Beaver and David Gowans - members of the November, 2002 Council - as Directors, substituting in their place Schaefer, Ronnie Schaefer, Allan Schaefer, Ken Laviolette and Melvin Wanderingspirit. Schaefer and Wanderingspirit were members of the August, 2002 Council. Different persons also were on the August, 2002 Council.

[8] On July 21, 2003, a document purporting to be Minutes of a Director's Meeting of 4990 NT Ltd. dated May 25, 2003 was presented by the appellant to the Peace Hills Trust in Edmonton. This set of Minutes, signed by Marie, purported to report a Directors' resolution that 4990 NT Ltd. establish "a presence in Alberta" and to authorize the opening of an account at the Peace Hills Trust in Edmonton. The "two authorized signing authorities" were to be Marie and the appellant. The alleged Directors indicated in the Minutes to have been present at this May 25, 2003 meeting were all those who were removed by the May 16, 2003, Notice except for David Gowans.

[9] The trial judge found that the putative Minutes and the resolution containedtherein was a lie. One reason for the conclusion was that the resolution referred to clients which did not exist. To that point, 4990 NT Ltd.'s sole client was Canada. Another was that it would create a banking arrangement not suitable for direct deposit arrangements - which was otherwiseavailable throughthe Bank of Montreal in Fort Smith: [Judgment, paras. 73 to75]. Up to that point, Canada had been paying 4990 NT Ltd. by cheque.

[10] The May 29, 2003 Notice of Change of Directors of 4990 NT Ltd. purported to remove the Schaefers, Laviolette and Wanderingspirit (who had been designated by the May 16, 2003 Notice) as directors, reinstating Marie and others of the November, 2002 Council. Coincidentally, on May 29,

2003, Rouleau J. of the Federal Court Trial Division ordered that the August, 2002 Council be reinstated and the November, 2002 Council be removed [Exhibit 9, A.B. III/ 961 - 979].

[11] By a letter dated June 5, 2003, the appellant advised Marie's counsel of her objections to members of the August, 2002 Council having signing authorityfor SRFN: [Exhibit 9, A.B. III/1104-1105, A.B. 403/43-406/26]. Her letter was exhibited to an affidavit of Marie filed in a then pending Federal Court appeal process from the decision of Rouleau J. The appellant's letter complained that the members of the August, 2002 Council were not democraticor fair in their "sporadicapproval and denial of legitimate payment requests" and she opposed their taking over signing authority on all "Band Accounts". In his affidavit, Marie asserted that the Federal Court proceedings involved an attempt by the August, 2002 Council to hijack the SRFN leadership. The trial judge noted the effort by the August, 2002, Council to remove Marie's signing authority. He found that the appellant and Marie were allied in opposition to this change well prior to the trip to Peace Hills Trust in Edmonton on July 21, 2003: [Judgment at para. 85; appellant's testimony A.B. 408/1 - 412/45].

[12] On June 18, 2003, a letter dismissing the appellant as band financial manager was prepared. The trial judge found that this letter was handed to the appellant on June 20, 2003, at 9:00 a.m. by Raymond Beaver. The trial judge instructed himself to ignore the ten allegations set out in the letter regarding the causes for the appellant's dismissal. The appellant, however, testified that she was not given the letter: [A.B. 403/18-24]. She claimed that she simply desisted from coming to the office as she "simply started working with Victor" and "we were always down South in Edmonton giving testimony": [A.B. 403/26-33]. The trial judge rejected the appellant's evidence and accepted Beaver's evidence on this issue in unambiguous terms :[Judgment, paras. 101 to 104].

[13] On June 20, 2003, the Federal Court ordered that three councillors of SRFN had to sign for SRFN, one of those being Marie. The trial judge found that Marie was aware of this limited signing authority: [Judgment, paras. 76 to 77]. Witnesses Betty Tourangeau and Barbara McArthur saw a number of cheques payable to 4990 NT Ltd. in a desk drawer of the SRFN finance office in June, 2003: [Judgment paras. 51 to 53]. This was shortly before the office was broken into on June 24, 2003. The cheques were no longer seen after the break-in. The trial judge was not satisfied,however, that it was proven that cheques stolen during that break in included the two cheques handled in Edmonton, on July 21, 2003, by the appellant and Marie: [Judgment, para. 67].

[14] On June 27, 2003, the August, 2002 Council resolved that the original directors of 4990 NT Ltd. should return and replace the present ones, including Marie. On July 7, 2003, a Notice of Change of Directors to that effect was filed under the *Business Corporations Act*. The Schaefers, Laviolette and Wanderingspirit were thus reinstated as directors of 4990 NT Ltd.. On July 10, 2003, 4990 NT Ltd. prepared a "Certificate and Agreement" wherebyit appointedthe Bank of Montrealthe corporation's bank.

[15] On July 21, 2003, the appellant and Marie attended on Judy Lynne Hoglund ("Hoglund") in Edmonton, Alberta. The appellant asked to open an account putatively in the name of 4990 NT Ltd. at Peace Hills Trust. The account was opened with the two Government of Canada cheques payable to 4990 NT Ltd. plus other funds in the total amount of $31,454.46. On presenting the cheques for deposit, the appellant provided Hoglund with the putative May 25, 2003, corporateresolution as well as a document dated July 21, 2003, by which the appellant purported to identifythe directorsof 4990 NT Ltd. as the same eight persons, including Marie, identified in the May 29, 2003, Notice of Directors, but who had been replaced under the May 16, 2003 and July 7, 2003, Notices.

[16] Hoglund testified that when the account was opened, the appellant did "most of the talking": [Judgment at para. 91]. Hoglund said that the appellant wanted to immediately withdraw the money but was told she could only get $5,000.00 in cash, and the rest in money orders to a maximum of $1,000.00 each: [Judgment, paras. 91 to 92]. The next day, July 22, 2003, the appellantwithdrew the bulk of the money from the account, taking $5,000.00 in cash, and $26,300.00 in money orders.

[17] The payees of the money orders included herself, Betty Marie (Marie's sister), Telus Mobility, City Centre Inn, CIBC-VISA, lawyer Bruce Barry, Auto Choice, Jeannie Marie Jewell and Costco, these being personal bills and the like. Referringto the appellant's evidenceon this point, the trial judge found "no foundation in law or fact" that these expenditures were for the band's benefit. These payments were not to creditors of 4990 NT Ltd., nor were they authorized - as regards the payments to Marie's lawyer - by the August, 2002 Council to be used to support Marie in Federal Court: [Judgment, paras. 93 - 94]. Moreover, the trial judge found that the appellant knew that she was not an officer, director or employee of either SRFN or 4990 NT Ltd. when she depleted these assets: [Judgment, paras. 95 to 104]. He disbelieved the appellant's evidence that she reported these Peace Hills transactions back to SRFN.

Reasons of the Trial Judge

[18] The trial judge's detailed reasons addressed the variety of grounds upon which both Marie and the appellant resisted conviction. For this appeal, however, the focus is simply the basis upon which the trial judge concluded that the appellant and Marie agreed - *in the Northwest Territories* - to take part in a scheme to take the cheques to Edmonton and there convert their value to their own purposes and benefit.

[19] The trial judge found that the cheques must have left the Northwest Territories in the possession of one or both of the appellant and Marie from the uncontested fact that the appellantand Marie had the cheques with them on July 21, 2003, when they presented them to Hoglund at Peace Hills Trust in Edmonton: [Judgment, paras. 64 to 66]. He inferred that the appellant either had the cheques in her own possession or that she knowingly had them in Marie's possession within the meaning of s. 4(3) of the *Criminal Code*. Moreover, he concludedthat the taking of the cheques from the Northwest Territories was a "shared, common, and fraudulent enterprise": [Judgment, para. 87].

[20] The trial judge found that both of them had a reason to be in Edmonton for the Federal Court proceedings, but he inferred that they shared another purpose; namely, to open the Peace Hills Trust account and withdraw the money: [Judgment, paras. 68 to 69]. He found that they would have been aware that withdrawals would not be possible if the cheques were deposited in the 4990 NT Ltd. account in the Northwest Territories : [Judgment, para. 69].

[21] Moreover, the Trial Judge found that, while Marie knew about the cheques in April, 2003, he failed to deposit them to the 4990 NT Ltd. account in the Northwest Territories because he intended to hold them as a personal "rainy-day fund": [Judgment, para. 104].

[22] The trial judge inferred that Marie, then Chief, but not a director of 4990 NT Ltd., wanted to have unimpeded access to the account monies: [Judgment, para. 70]. He concludedthat the appellant shared with Marie a fraudulent intention, without colour of right, to control disbursement of the money following the deposit of the cheques in Edmonton in July, 2003: [Judgment, para. 70]. The trial judge found that, before the cheques were taken to Edmonton, Marie would have known that the August, 2002 Council was back in control and that at least three councillors were required by the Federal Court to sign for 4990 NT Ltd.. Marie would further have known that the putative May 25, 2003 resolution was not valid: [Judgment, paras. 77 to 78].

[23] The trial judge found that the appellant's position - that 4990 NT Ltd. was an SRFN company and therefore she, emanating from Marie's authority, had the right to deposit the cheques and make withdrawals - did not fare any better: [Judgment, paras. 79-80]. With her intimate awareness of SRFN and 4990 NT Ltd., and with her being "well versed" in the Federal Court activities (designed in part to remove Marie as mandatory signer of documents), the trial judge inferredthat the appellant and Marie both knew the cheques were being brought to Edmonton for deposit and immediate withdrawal: [Judgment, paras. 86 to 90].

[24] The trial judge noted that the appellant did most of the talking to Hoglund. He found that the appellant's desire to take the money out in cash would have made it possible to avoid a paper trail as to how the money was disbursed, a fact that the appellant would know in light of her business experience: [Judgment, paras. 91 to 92]. He found that the appellantwas aware that the August, 2002 Council would not have authorized the disbursement of the funds as occurred: [Judgment, para. 94]. He found no colour of right nor belief in it. He specifically rejected the appellant's claim that she reported the deposits and disbursements of July 21 to 22, 2003 back to SRFN: [Judgment, para. 97]. He found that the appellant, having been fired, knew that she had no authorityas employee, officeror director of SRFN or 4990 NT Ltd: [Judgment, paras.103-104].

[25] The trial judge inferred from the circumstances which existed between April and July, 2003, that the appellant and Marie considered the assets of 4990 NT Ltd. to be under Marie's control, and that they resisted sharing that control with anyone else. He inferred that the plan for the creation of

the Peace Hills account in Edmonton was hatched by both of them in the Northwest Territories. He found that the cheques were taken to Edmonton to effectuate that plan and inferred that both of them would have known the cheques were taken there for that purpose. This, he said, was "a fraudulent course of action and without colour of right that began prior to their trip to Alberta": [Judgment, para. 106]. He did not find the theft occurred in Alberta or even that it started in the Northwest Territories and continued into Alberta. He found that what happened in Alberta was "compelling evidence that I have considered in determining what the earlier intentions and actions were in the Northwest Territories": [Judgment, para. 107].

Positions on Appeal

[26] In sum, the appellant's position is that the trial judge had no reasonable basis to infer that any *actus reus* or *mens rea* attributable to the appellant took place in the Northwest Territories. Accordingly, the appellant says she could not be convicted of theft in the Northwest Territories as alleged by the count against her. Reasonably, the appellant says nothing about what the legal effect might be of what the trial judge found to be the appellant's conduct in Alberta. The Crown seeks to sustain the finding of the trial judge about the involvement of the appellant in theft in the Northwest Territories as being a matter of factual inference and fact finding, and thus as being subject to the standard of review only for palpable and overriding error: ***L. (H.) v. Canada***, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24 (QL), 2005 SCC 25 at paras. 52 to 56.

[27] The Crown does not appear to have taken the position at trial, and the Crown declinedto take the position on appeal, that the appellant's contention was moot or involved no substantial wrong or miscarriage of justice under s. 686(1)(b)(iii) of the *Criminal Code*. Inasmuch as the victim of the theft, 4990 NT Ltd., was in the Northwest Territories, and suffered its loss in the Northwest Territories, it was arguable that the theft occurred both in the Northwest Territories and Alberta simultaneously and that the appellant was a party to it even if she joined it in Alberta.

Analysis

[28] As a pillar in her main argument having to do with the ability of the trial judge to infer participation of the appellant in theft, the appellant submits that the offence of theft cannot be a continuing offence, and, therefore, cannot occur over time and presumably(though this is not certain from the argument) cannot occur in more than one jurisdiction at the same time. The appellant rests this contention on an *obiter dictum* in ***R. v. Bell***, [1983] 2 S.C.R. 471, [1983] S.C.J. No. 83 (QL).

[29] The trial judge may well have been persuaded to reason along this line, as he elected to focus his decision on the question whether the evidence supported the inference that the appellant and Marie committed theft of the cheques in what they did in the Northwest Territories. Because it is unnecessary to the outcome, we will not tarry on case law subsequent to ***Bell*** nor discuss the interpretation of s. 322 of the *Criminal Code* and comparableprovisions of the *Criminal Code* which

suggest that theft is capable of being a continuing offence. In refraining from such discussion, we do not wish to be taken as having conceded the proposition for the appellant that theft is not capable of being a continuing offence. An exegesis and decision on this submission can await a case when it is necessary.

[30] Setting that topic aside, the appellant's submissions are that the Crown was obliged to "prove beyond a reasonable doubt Tourangeau's dishonest intent, and absence of colour of right, in the jurisdiction of the N.W.T., where the offencewas chargedand tried": [Appellant's Factum, para. 20]. Apart from contending that "theft is not a continuing offence", the appellant submits that there is no evidence of the appellant's state of mind at the time she turned over the cheques to Marie in the Northwest Territories:[Appellant's Factum, paras. 24 -28].

[31] As to state of mind, Iacobucci J. in: ***R. v. Dawson***, [1996] 3 S.C.R. 783, [1996] S.C.J. No. 113 (QL) made the following observation for three judges. [L'Heureux-Dubé J. for four judges did not expressly agree or disagree with this passage]:

> [95] My final comments relate to the role that intent plays in narrowing the scope of s. 283. I agree that intent can in many cases be inferred from conduct. However, if this is so it is because the inference makes sense. *To impugn or make light of the inference from conduct to intent is to challenge one of the most fundamental inferences known to criminal evidence. No trier of fact, however clairvoyant, is privy to the thoughts of the accused. The indicia of intent are generally external, but they are not for that reason unreliable. If, having heard all the evidence, a judge or a jury concludes that an accused acted with a certain intent, chances are good that the accused did act with that intent.* Although I appreciate the concern that a parent who inadvertently and only technically breaches the other parent'scustody rights may face imprisonment, I wish to emphasize that the *mens rea* of the offence is not simply the intention to take the child, but the intention to take the child from the possession of one who is entitled to that possession. If a parent acts with the latter kind of intent, then it is not an extraordinary thing that he or she should face the sanction of the criminal law. Surely the parent whose only offence is to return his child to the custodial parent five minutes late does not have the requisite intent, and so is unlikely to face prosecution. While such a parent may know that he has, in however small a measure, deprived the custodial parent of possession of her child, it does not follow that he intends that consequence. Prosecution of trifling offences under s. 283 is not to be expected, because the offence described in s. 283 is not trifling. [Emphasis added]

[32] The intent issue to which Iacobucci J. was referring was the intent to deprive the other parent of parental rights respecting the child. In the case at bar, the appellant says that the references by the trial judge to the intentions and agreements of the appellant and Marie were conclusory and

uninformative and are insufficient – under ***R. v. Sheppard***, [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30 (QL), 2002 SCC 26 – to explain why he concluded that the appellant had formed such intentions and agreements while in the Northwest Territories prior to arrival at the Peace Hills Trust on July 21, 2003. The appellant notes that she was cross-examined about her knowledge of the Federal Court proceedings and the letter dated June 5, 2003, and contends "there is no other evidence of acts or conduct by her in the Northwest Territories which would form any foundation for a conclusion as to dishonest intent in relation to those cheques in that jurisdiction": [Appellant's factum at para. 26].

[33] More specifically, the appellant says there was no evidence that "she was aware, before arriving in Edmonton and opening the account July 21st that she would be doing so, nor any evidence that she knew Victor Marie would be doing so". We are not persuaded that the trial judge was unaware of this issue. His decision addressed the Crown's burden of proof and the presumption of innocence properly. In our view, his decision sufficiently illuminated his reasoning process under ***Sheppard*** such as to make appellate review possible.

[34] In relation to a question of mental state, the Crown was not obliged to exclude all other possible inferences about her mental state as if ***Hodge's Rule*** applied to the situation: ***R. v. Cooper***, [1978] 1 S.C.R. 860, [1977] S.C.J. No. 81 (QL). The trial judge's reasons reveal that he inferred, in light of the appellant's alliance with Marie concerning the control of the assets and revenue of 4990 NT Ltd. as property of SRFN, and in light of her alliance with Marie to resist the onset of control by the August 2002 Council, that the appellant was well aware that the cheques – which she as financial officer should be dealing with but which she had simply handed over to Marie – were not being processed in accordance with the intentions of the August 2002 Council.

[35] Moreover, it is apparent that the trial judge inferred that the appellant was well prepared to address the implications of the bogus May 25, 2003, Directors' Resolution with the representative of the Peace Hills Trust. Even if there is no direct evidence that she took part in creating that Directors' Resolution, it is apparent that Marie for reasons not explained by him regarded her as an essential component of the process. Hoglund explained that the appellant acted on the document, was the active participant in the discussions with her when that document was presented, and that the appellant was the person who pressed for arrangements allowing the money to be taken out immediately in less traceable cash. The appellant's thorough involvement in the scheme did not leave the trial judge in any doubt that there was a plan in advance involving both her and Marie in how to deal with Peace Hills Trust respecting the cheques. The trial judge's reasons do not fall short of the functional requirement of explaining why the appellant was found guilty.

[36] As to whether the verdict was reasonable, it is true that no one testified as to a conversation in the Northwest Territories between the appellant and her co-accused about how to proceed with respect to the cheques or the misleading May 25, 2003, Directors' Resolution. It is not unusual for a crime to be done in a clandestine fashion such that there will be no compellable eyewitnesses. It was not, in our view, unreasonable to infer that her statements and conduct during the relevant time in the

Northwest Territories and her statements and conduct at Peace Hills Trust were consistent with the inference that she knew what was going on, and knowingly took part in it. The trial judge did not have to apply the doctrine of recent possession to reach the conclusion that, as a matter of common sense, the appellant's behaviour before and after the events not witnessed by anyone specifically justified the inference that she was a party to theft in the Northwest Territories. In the end, his decision, read as a whole, meets the probing standard contemplated by ***R. v. Biniaris***, [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16 (QL), 2000 SCC 15 at paras. 36 - 42.

Conclusion

[37] The appeal should be dismissed.

Appeal heard on January 22, 2008

Memorandum filed at Yellowknife, N.W.T.
this day of , 2008

McFadyen J.A.

O'Brien J.A.

Watson J.A.

Appearances:

M. Duckett, Q.C.
for the Appellant

C. Gagnon
for the Respondent

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