R. v. Roberts, 2017 NWTSC 34

S-1-CR-2015000026

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

vs.

RICHARD ROBERTS

Transcript of the Ruling (on the Defence application for a mistrial) by the Honourable Justice S. H. Smallwood, at Yellowknife in the Northwest Territories, on January 4th, A.D. 2017.

APPEARANCES:

Mr. R. Clements:	Counsel for the Crown
Ms. A. Seaman:	Counsel for the Accused

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s. 486.4 of the Criminal Code of Canada

THE COURT: Good morning.

MR. CLEMENTS: Good morning.

THE COURT: This is an application by Richard Roberts for a mistrial, or to vacate the convictions and reopen the trial to permit the defence to call additional evidence. The application is based upon evidence, that the defence claims is recently discovered, and that impacts upon the credibility of the complainant **[name redacted]**. There are two aspects to this evidence: A witness **[name redacted]** who provided a statement to the defence after the trial; and, statements made by **[name redacted]** in the pre-sentence report prepared for the sentencing of the applicant.

The applicant was charged with three counts: break and enter and commit sexual assault, uttering threats to cause bodily harm, and uttering threats to destroy property.

The trial was held before me in the Supreme Court of the Northwest Territories here in Yellowknife from May 9th to 12th, 2016. Five witnesses testified for the Crown: The complainant **[name redacted]**, **[name redacted]**, **[name redacted]** and **[name redacted]** and **[name redacted]**.

Mr. Roberts testified on his own behalf.

On June 20th, 2016, Mr. Roberts was found guilty of sexual assault and two counts of uttering threats. A pre-sentence report was ordered and the matter was adjourned to September 2nd, 2016 for sentencing. Prior to September 2nd, 2016, Dane Bullerwell, who was counsel for Mr. Roberts during the trial, sent a letter to the Court advising that new evidence had been discovered and that the defence would be seeking to have a mistrial declared or the trial reopened. At the appearance on September 2nd, 2016, Mr. Bullerwell applied to be removed from the record and requested the sentencing be adjourned to allow new counsel to make the mistrial application. Mr. Bullerwell was removed from the record and the matter was adjourned.

A Notice of Application was filed on October 19th, 2016, seeking a mistrial or an order vacating the applicant's conviction and reopening the case to call fresh evidence. The application for a mistrial was heard on November 10th, 2016.

The evidence that forms the basis for the mistrial application is, first, that following

27 the trial Mr. Bullerwell received information

from a third party witness, **[name redacted]**, regarding the frequency with which the complainant and the applicant had interacted prior to the offence. This information contradicted the evidence of the complainant at trial.

Second, that the complainant had made statements in the pre-sentence report about her relationship with the applicant and his spouse which also contradicted her evidence at trial.

In the trial, my decision turned on assessment of the credibility of the complainant and the applicant. I rejected the evidence of the applicant, that the sexual intercourse between he and the complainant was consensual, and accepted the evidence of the complainant that she awoke in her bedroom to the applicant on top of her having sexual intercourse with her without her consent.

It has been accepted that a judge is not functus officio following a finding of guilt until a sentence is imposed or the case otherwise finally disposed of. A court can vacate a finding of guilt at any time prior to imposing sentence although this power should

only be exercised in exceptional circumstances

where it is clearly called for. This was established in R. v. Lessard, 1976 O.J. 74 (SC-CA), at paragraph 10 and 12 by the Ontario Court of Appeal. That the Court has the authority to do this has been reaffirmed by the Ontario Court of Appeal in subsequent cases and endorsed in other jurisdictions.

Both the Crown and the applicant are in agreement regarding the authority of the Court to declare a mistrial or to reopen the case following a conviction by the Judge, and both parties are in agreement regarding the test that must be applied.

The test to be applied has been stated in R. v. Kowall, [1996] O.J. No. 2715 (C.A), the Ontario Court of Appeal, at paragraphs 31 and 32:

> The test for reopening the defence case when the application is made prior to conviction has been laid down by this Court in R. v. Hayward (1993), 86 C.C.C. (3d), 193. However, once the trial judge has convicted the accused a more rigorous test is required to protect the integrity of the process, including the enhanced interest in finality. It seems to have been common ground in this case that the most appropriate test for determining whether or not to permit the fresh evidence to be admitted is the test for the admissibility of fresh evidence on appeal laid down in Palmer and

27 Palmer v. The Queen (1979) 50 C.C.C. (2d) 193, at page 205

(S.C.C.) The test is as follows:

> (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...;
>
> (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 affect the result.

The Court continued:

> These criteria provide helpful guidance to a trial judge faced with an application to reopen after conviction. In addition to the Palmer criteria, a trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial. Counsel must make tactical decisions in every case. Assuming those decisions are within the boundaries of competence, an accused must ordinarily live with the consequences of those decisions. Should the trial judge find the test for reopening has been met, then the judge must consider whether to carry on with the trial or declare a mistrial.

There is no specific test to determine

whether a mistrial should be declared or the trial reopened and continued on with. One of the considerations, endorsed by the Ontario Court of Appeal in R. v. Griffith, 2013 ONCA 510 at paragraph 40, is whether the credibility findings are impacted by the reopening of the case:

> The approach taken by Trotter J. in R. v. Drysdale 2011 ONSC 5451, provides a useful example of the approach that might have been taken in this case. In Drysdale, the trial judge, in convicting the accused, had made very strong adverse credibility findings after rejecting the accused's evidence on a key issue going to identification. New evidence touching on identification came to light at the sentencing hearing, and the trial judge permitted the trial to be reopened and the findings of guilt to be set aside. The trial judge then concluded that the only reasonable course of action would be to declare a mistrial because in light of the credibility findings, any attempt to judge the accused's credibility on a different basis would be disingenuous. In the trial judge's view, any result he reached would be open to question and the only way to avoid that possibility would be to begin again with a new trial.

In this case, the Notice of Application states that the applicant is seeking a mistrial or to reopen the trial to permit the defence to call additional evidence. In oral

27 submissions, counsel for the applicant advised

that the preferred remedy is for a mistrial to be granted. The Crown is opposed to the application but agreed that the appropriate remedy is a mistrial and not to reopen the trial.

I agree with counsel that the preferred remedy would be for a mistrial to be declared if this application was successful. If I were to permit reopening the trial, it could possibly mean that **[name redacted]** would be recalled for further cross-examination regarding her interactions with the applicant and his spouse prior to the incident, and it would mean that **[name redacted]** would testify regarding her observations of the relationship between **[name redacted]** and her spouse **[name redacted]** and the applicant and his then spouse. The probative nature of the "new evidence", taken at its best, goes to the credibility of the complainant and the applicant.

In order to reach a different verdict and acquit the applicant, I would have to come to different conclusions regarding the credibility of **[name redacted]** than those expressed in the reasons for judgment in June

2016. If I were to conclude that the new

evidence was not sufficient to change my perception of **[name redacted]**'s evidence, there could be a perception, as contemplated by Justice Trotter in Drysdale, that I had already made up my mind or that nothing was going to change my mind.

In my view, because this evidence goes to the credibility findings I made regarding the complainant and the applicant, the most appropriate remedy in that circumstance would be to grant a mistrial.

Turning to the evidence that has been presented on this application, the evidence is the affidavit of Dane Bullerwell, who was trial counsel for the applicant, and the pre-sentence report prepared by Su-Ellen Kolback, a probation officer.

Mr. Bullerwell's affidavit details his preparation for the trial and his contact with **[name redacted]** both before and following the trial. Following the trial, Mr. Bullerwell retained someone to take a statement from her which was taken and audio recorded August 10th, 2016.

[name redacted] did not testify on the application and her statement was not

presented in evidence. I understand from

counsel's submission that her audio recorded statement was fairly brief, only a few pages long and was not taken under oath. Counsel agree that **[name redacted]** stated something about "both couples mentioned partying together" and that the statement does not say much more about what **[name redacted]** could say about the relationship between **[name redacted]** and her spouse and the applicant and his spouse.

Ms. Kolback, the author of the pre-sentence report, did not testify on the application but the pre-sentence report had been filed with the Court on August 26th, 2016. In it, under the heading of "interview with victim", the author indicates that she had spoken with **[name redacted]** and that **[name redacted]** had provided further comments for the section. At page 6, the report states:

> **[name redacted]** confirmed she knew the accused to some extent, as he was friends with her spouse and she was friends with the accused's spouse. She noted that since the charges have come forth, she no longer talks to the accused's spouse and that the two are no longer friends. **[name redacted]** advised that they used to go for coffee and visits, but now those meetings have ceased.

I understand that there may have been

difficulties in presenting this application but the evidence as presented on this application makes it extremely difficult to assess the proposed new evidence as required under the Palmer test. It is not clear what the evidence of **[name redacted]** would be should she testify. The known extent of her potential evidence at this point is that she would say that both couples mentioned partying together. It is not clear whether this evidence is admissible, whether it is hearsay, and there are very few details regarding what **[name redacted]** might be able to say about this relationship. There are many unanswered questions: What is the basis of **[name redacted]**'s knowledge? Is it from personal observation or hearsay? What exactly can she say about the relationship between **[name redacted]** and her spouse and the applicant and his spouse? When did she acquire her knowledge regarding the relationship? What time period does her knowledge of the relationship cover? Is **[name redacted]** available to testify? Is she willing to testify?

Similarly, the pre-sentence report

27 presents concerns. While this Court regularly

sees pre-sentence reports, the contents of the reports are rarely challenged. As such, it is not clear exactly how the reports are prepared. While Ms. Kolback spoke with **[name redacted]**, it is not apparent what exactly **[name redacted]** said. The pre-sentence report does not contain direct quotes and there is no indication that the comments by **[name redacted]** were audio recorded, under oath or were her exact words.

Counsel filed a number of cases dealing with applications to reopen the case or to grant a mistrial on the basis of new evidence. In most of the cases where the application was successful, the Court had a much clearer understanding of what the proposed evidence consisted of. Often the evidence was filed in an Agreed Statement of Facts or the proposed witness testified on the application.

The Ontario Court of Appeal addressed the requirement for relevant evidence in R. v. Arabia, 2008 ONCA 565. The appeal in Arabia centered around an application to permit the defence to reopen their case or to declare a mistrial on the basis of new evidence. The evidence that was presented to the trial judge

consisted of two affidavits.

Justice Watt, writing for the Court of Appeal, noted (at paragraphs 69 and 71) that the threshold for relevance was a modest one but that relevance alone would not be enough to warrant reopening the defence case. What was required was credible evidence, reasonably capable of belief and admissible in accordance with the law of evidence. Justice Watt went on to state at paragraphs 80 to 82:

> The assessment mandated by the fourth requirement of the Palmer test adopted in Kowall envisages an assessment of the impact of the proposed evidence on the result at trial. That assessment, at least as it seems to me, need only be performed in connection with evidence that otherwise satisfies the requirements of Kowall adopted from Palmer. To hold otherwise would mean that evidence not reasonably capable of belief, or evidence excluded by an admissibility rule, would nonetheless qualify for assessment under the fourth requirement, an absurd result.
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> In my respectful view, neither the Czernik affidavit nor the affidavit of Bruzzese should have engaged the trial judge's discretion to permit reopening of the defence case or to declare a mistrial.
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> Trial counsel for the appellant did little beyond proffer of the affidavits to assist the trial judge in his task. Counsel did not adduce any evidence to explain how it was that Czernik came forward, months after the finding

of guilt, to accept responsibility for an offence committed almost

> three years earlier. Nothing was said of any connection between Czernik and the appellant, of Czernik's whereabouts, more importantly of his availability and willingness to testify. No effort was extended to elaborate upon the bare acceptance of responsibility in the affidavit to demonstrate unique knowledge of the circumstances of the offence committed.

The situation in this case is not the same as in Arabia - the affidavit in that case was from an individual who purported to be responsible for the offence that Arabia had been convicted of committing. But the concerns raised by the Court about the ability to evaluate the evidence, to determine whether it is relevant, whether it might reasonably have affected the result and whether the Palmer criteria can be evaluated in the absence of evidence that the Court can reasonably assess are all valid concerns.

In my view, the evidence that has been presented does not permit the Court to undertake an assessment of the Palmer criteria and the applicant's application must fail on this basis.

Having said that, I do want to say a few things about the proposed evidence. It is

difficult to assess this evidence, as I have

stated, but I have considered whether this evidence, based on what is before me, could have reasonably affected the result.

The issue of the relationship between **[name redacted]** and her spouse **[name redacted]** and that of the applicant and his spouse was just one aspect of the evidence in this trial. In rejecting the evidence of the accused, I had a number of concerns regarding his evidence, one of which was his characterization of the relationship between the people involved. In raising that concern, it was not just the evidence of the complainant and the applicant that I considered but also the evidence of **[name redacted]**.

The evidence of **[name redacted]** differed somewhat from the complainant and the applicant. **[name redacted]** acknowledged partying with the accused on occasion. In my view, what **[name redacted]** might say about this, based on the limited information that I have that has been provided, is no different than what **[name redacted]** testified to - the two couples had partied on occasion.

And my reasons did not focus on the

relationship between the complainant and the applicant's spouse or having coffee with her.

The complainant acknowledged that she knew the applicant's spouse and having had coffee with her on an occasion. Now, there were inconsistencies in the complainant's evidence and I acknowledged that in my reasons. But in reviewing my reasons, in accepting the complainant's evidence about what occurred in her bedroom that night, they did not revolve around conclusions about the nature of the relationship between the parties.

In my view, this evidence, based on the limited information that is before me, could not have reasonably affected the result.

I am also of the view that the evidence of **[name redacted]** does not meet the due diligence requirement, the first step in Palmer.

Mr. Bullerwell's affidavit contains the details of the defence's knowledge of **[name redacted]** and the contact with her, both before and after trial. It is apparent that **[name redacted]**'s name arose and was aware to defence prior to trial. Her name was referred to in the initial Crown disclosure and included the information that she had refused to provide a statement to the police. Mr.

27 Bullerwell deposed in his affidavit:

> My view was that, as an apparent friend of the complainant's, she was unlikely to cooperate with the defence. My view was also that any evidence she might be able to give appeared simply to be inadmissible hearsay evidence essentially repeating the allegations as reported to her by the complainant.

Shortly before the trial, the applicant advised Mr. Bullerwell that he had spoken with **[name redacted]** and that she was willing to speak with him. Mr. Bullerwell attempted to contact her the weekend before the trial. He phoned a number provided to him by the applicant and he spoke to someone he believed to be **[name redacted]**, although she did not identify herself. This person advised that she was not interested in talking to him.

Following this conversation, Mr. Bullerwell was of the view that **[name redacted]** did not have helpful evidence to give in the trial and he was not confident she would be a beneficial witness. He viewed it as extremely risky to consider serving her with a last-minute subpoena or otherwise call her as a defence witness.

After the trial, Mr. Bullerwell received information that **[name redacted]** might have

relevant information and he then retained

someone to take a statement from her.

It is apparent that the defence was aware of the existence of **[name redacted]** well before the trial, her name was referred to in the Crown disclosure. The applicant also had knowledge of **[name redacted]**. He had spoken to her shortly before his trial and advised his counsel of this. The issue is whether **[name redacted]**'s evidence could have been obtained through due diligence or whether this was a tactical decision made by counsel.

In my view, this appears to have been a tactical decision by counsel. Mr. Bullerwell was aware of **[name redacted]** early on. He had concerns about her willingness to cooperate which, given her refusal to provide a statement to the police and her friendship with the complainant, may have been a valid concern. However, he did not pursue whether she might have evidence helpful to the defence until it was raised by the applicant shortly before trial. He made the decision, as he stated, not to pursue **[name redacted]** as a possible defence witness.

Once the applicant brought **[name redacted]** to his attention shortly before

the trial, he made an effort to see if she had

evidence that might assist the defence. He attempted to contact her and the person he spoke to was not interested in speaking with him. At that point, he made the decision not to call **[name redacted]** as a witness. He was concerned that he did not know what she might say as she had not provided a statement and he was concerned about the risk of her saying something to him and then testifying differently.

At this point, Mr. Bullerwell was aware that the relationship between the parties was going to be in issue. This is apparent from his affidavit. He had considered calling the applicant's ex-spouse to testify regarding the relationship but ultimately decided not to as he was uncertain about her cooperation given the status of the relationship between the applicant and his ex-spouse. He decided that the defence evidence about the nature of the relationship could best come from the applicant himself.

While subpoenaing a witness of whose evidence you are uncertain is a risky proposition, it was also an avenue open to the defence. Mr. Bullerwell could have subpoenaed

27 **[name redacted]** and determined prior to

calling her as a witness whether she had any evidence to offer that might be helpful to the defence. The risk, as Mr. Bullerwell was aware, was that she might testify differently than what she had told him. This had the potential to place him in the position where he might be a witness. However, this could have been alleviated by having another person present during the interview. At that point, calling **[name redacted]** carried some risk, however Mr. Bullerwell proceeded with the trial and did not further pursue her as a witness.

It was a decision that counsel had to make and counsel often have to make the decision whether to call a witness who they do not know exactly what they will say (a witness who has not provided a statement). It is a risk known to all criminal lawyers but it is a decision that has to be made. On occasion, it turns out to be a decision that counsel regret making but in my view, it is ultimately a tactical decision.

It was a tactical decision that was also made within the boundaries of competence. Ms. Bullerwell's reasons for not calling

27 **[name redacted]** reflect a consideration of the

potential benefits and risks of calling her. Overall, from my perspective, I thought Mr. Bullerwell's representation of the applicant at trial was capably done, he was well prepared, knowledgeable, and did an effective job of representing the applicant. So in my view it was a decision that was made within the boundaries of competence.

For these reasons, I am dismissing the application.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt,
Court Reporter

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