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

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 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.

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 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

 1 THE COURT: Good morning.

 2 MR. CLEMENTS: Good morning.

 3 THE COURT: This is an application by

 4 Richard Roberts for a mistrial, or to vacate

 5 the convictions and reopen the trial to permit

 6 the defence to call additional evidence. The

 7 application is based upon evidence, that the

 8 defence claims is recently discovered, and

 9 that impacts upon the credibility of the

 10 complainant **[name redacted]**. There are two

 11 aspects to this evidence: A witness

 12 **[name redacted]** who provided a statement to the

 13 defence after the trial; and, statements made

 14 by **[name redacted]** in the pre-sentence report

 15 prepared for the sentencing of the applicant.

 16 The applicant was charged with three

 17 counts: break and enter and commit sexual

 18 assault, uttering threats to cause bodily

 19 harm, and uttering threats to destroy

 20 property.

 21 The trial was held before me in the

 22 Supreme Court of the Northwest Territories

 23 here in Yellowknife from May 9th to 12th,

 24 2016. Five witnesses testified for the Crown:

 25 The complainant **[name redacted]**, **[name redacted]**,

26 **[name redacted]** and **[name redacted]** and **[name redacted]**.

 27 Mr. Roberts testified on his own behalf.

 1

 1 On June 20th, 2016, Mr. Roberts was found

 2 guilty of sexual assault and two counts of

 3 uttering threats. A pre-sentence report was

 4 ordered and the matter was adjourned to

 5 September 2nd, 2016 for sentencing. Prior to

 6 September 2nd, 2016, Dane Bullerwell, who was

 7 counsel for Mr. Roberts during the trial, sent

 8 a letter to the Court advising that new

 9 evidence had been discovered and that the

 10 defence would be seeking to have a mistrial

 11 declared or the trial reopened. At the

 12 appearance on September 2nd, 2016, Mr.

 13 Bullerwell applied to be removed from the

 14 record and requested the sentencing be

 15 adjourned to allow new counsel to make the

 16 mistrial application. Mr. Bullerwell was

 17 removed from the record and the matter was

 18 adjourned.

 19 A Notice of Application was filed on

 20 October 19th, 2016, seeking a mistrial or an

 21 order vacating the applicant's conviction and

 22 reopening the case to call fresh evidence.

 23 The application for a mistrial was heard on

 24 November 10th, 2016.

 25 The evidence that forms the basis for the

 26 mistrial application is, first, that following

 27 the trial Mr. Bullerwell received information

 2

 1 from a third party witness, **[name redacted]**,

 2 regarding the frequency with which the

 3 complainant and the applicant had interacted

 4 prior to the offence. This information

 5 contradicted the evidence of the complainant

 6 at trial.

 7 Second, that the complainant had made

 8 statements in the pre-sentence report about

 9 her relationship with the applicant and his

 10 spouse which also contradicted her evidence at

 11 trial.

 12 In the trial, my decision turned on

 13 assessment of the credibility of the

 14 complainant and the applicant. I rejected the

 15 evidence of the applicant, that the sexual

 16 intercourse between he and the complainant was

 17 consensual, and accepted the evidence of the

 18 complainant that she awoke in her bedroom to

 19 the applicant on top of her having sexual

 20 intercourse with her without her consent.

 21 It has been accepted that a judge is not

 22 functus officio following a finding of guilt

 23 until a sentence is imposed or the case

 24 otherwise finally disposed of. A court can

 25 vacate a finding of guilt at any time prior to

 26 imposing sentence although this power should

 27 only be exercised in exceptional circumstances

 3

 1 where it is clearly called for. This was

 2 established in R. v. Lessard, 1976 O.J. 74

 3 (SC-CA), at paragraph 10 and 12 by the Ontario

 4 Court of Appeal. That the Court has the

 5 authority to do this has been reaffirmed by

 6 the Ontario Court of Appeal in subsequent

 7 cases and endorsed in other jurisdictions.

 8 Both the Crown and the applicant are in

 9 agreement regarding the authority of the Court

 10 to declare a mistrial or to reopen the case

 11 following a conviction by the Judge, and both

 12 parties are in agreement regarding the test

 13 that must be applied.

 14 The test to be applied has been stated in

 15 R. v. Kowall, [1996] O.J. No. 2715 (C.A), the

 16 Ontario Court of Appeal, at paragraphs 31 and

 17 32:

 18 The test for reopening the defence

 case when the application is made

 19 prior to conviction has been laid

 down by this Court in R. v.

 20 Hayward (1993), 86 C.C.C. (3d),

 193. However, once the trial

 21 judge has convicted the accused a

 more rigorous test is required to

 22 protect the integrity of the

 process, including the enhanced

 23 interest in finality. It seems to

 have been common ground in this

 24 case that the most appropriate

 test for determining whether or

 25 not to permit the fresh evidence

 to be admitted is the test for the

 26 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

 4

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

 2 (1) The evidence should

 generally not be admitted if,

 3 by due diligence, it could

 have been adduced at trial

 4 provided that this general

 principle will not be applied

 5 as strictly in a criminal

 case as in civil cases...;

 6

 (2) The evidence must be

 7 relevant in the sense that it

 bears upon a decisive or

 8 potentially decisive issue in

 the trial;

 9

 (3) The evidence must be

 10 credible in the sense that it

 is reasonably capable of

 11 belief; and,

 12 (4) It must be such that if

 believed it could reasonably,

 13 when taken with the other

 evidence adduced at trial, be

 14 expected to affect the

 result.

 15

 16 The Court continued:

 17 These criteria provide helpful

 guidance to a trial judge faced

 18 with an application to reopen

 after conviction. In addition to

 19 the Palmer criteria, a trial judge

 must consider whether the

 20 application to reopen is in

 reality an attempt to reverse a

 21 tactical decision made at trial.

 Counsel must make tactical

 22 decisions in every case. Assuming

 those decisions are within the

 23 boundaries of competence, an

 accused must ordinarily live with

 24 the consequences of those

 decisions. Should the trial judge

 25 find the test for reopening has

 been met, then the judge must

 26 consider whether to carry on with

 the trial or declare a mistrial.

 27

 There is no specific test to determine

 5

 1 whether a mistrial should be declared or the

 2 trial reopened and continued on with. One of

 3 the considerations, endorsed by the Ontario

 4 Court of Appeal in R. v. Griffith, 2013 ONCA

 5 510 at paragraph 40, is whether the

 6 credibility findings are impacted by the

 7 reopening of the case:

 8 The approach taken by Trotter J.

 in R. v. Drysdale 2011 ONSC 5451,

 9 provides a useful example of the

 approach that might have been

 10 taken in this case. In Drysdale,

 the trial judge, in convicting the

 11 accused, had made very strong

 adverse credibility findings after

 12 rejecting the accused's evidence

 on a key issue going to

 13 identification. New evidence

 touching on identification came to

 14 light at the sentencing hearing,

 and the trial judge permitted the

 15 trial to be reopened and the

 findings of guilt to be set aside.

 16 The trial judge then concluded

 that the only reasonable course of

 17 action would be to declare a

 mistrial because in light of the

 18 credibility findings, any attempt

 to judge the accused's credibility

 19 on a different basis would be

 disingenuous. In the trial

 20 judge's view, any result he

 reached would be open to question

 21 and the only way to avoid that

 possibility would be to begin

 22 again with a new trial.

 23 In this case, the Notice of Application

 24 states that the applicant is seeking a

 25 mistrial or to reopen the trial to permit the

 26 defence to call additional evidence. In oral

 27 submissions, counsel for the applicant advised

 6

 1 that the preferred remedy is for a mistrial to

 2 be granted. The Crown is opposed to the

 3 application but agreed that the appropriate

 4 remedy is a mistrial and not to reopen the

 5 trial.

 6 I agree with counsel that the preferred

 7 remedy would be for a mistrial to be declared

 8 if this application was successful. If I were

 9 to permit reopening the trial, it could

 10 possibly mean that **[name redacted]** would be

 11 recalled for further cross-examination

 12 regarding her interactions with the applicant

 13 and his spouse prior to the incident, and it

 14 would mean that **[name redacted]** would

 15 testify regarding her observations of the

 16 relationship between **[name redacted]** and her

 17 spouse **[name redacted]** and the applicant and his then

 18 spouse. The probative nature of the "new

 19 evidence", taken at its best, goes to the

 20 credibility of the complainant and the

 21 applicant.

 22 In order to reach a different verdict and

 23 acquit the applicant, I would have to come to

 24 different conclusions regarding the

 25 credibility of **[name redacted]** than those

 26 expressed in the reasons for judgment in June

 27 2016. If I were to conclude that the new

 7

 1 evidence was not sufficient to change my

 2 perception of **[name redacted]**'s evidence, there

 3 could be a perception, as contemplated by

 4 Justice Trotter in Drysdale, that I had

 5 already made up my mind or that nothing was

 6 going to change my mind.

 7 In my view, because this evidence goes to

 8 the credibility findings I made regarding the

 9 complainant and the applicant, the most

 10 appropriate remedy in that circumstance would

 11 be to grant a mistrial.

 12 Turning to the evidence that has been

 13 presented on this application, the evidence is

 14 the affidavit of Dane Bullerwell, who was

 15 trial counsel for the applicant, and the

 16 pre-sentence report prepared by Su-Ellen

 17 Kolback, a probation officer.

 18 Mr. Bullerwell's affidavit details his

 19 preparation for the trial and his contact with

 20 **[name redacted]** both before and following

 21 the trial. Following the trial, Mr.

 22 Bullerwell retained someone to take a

 23 statement from her which was taken and audio

 24 recorded August 10th, 2016.

 25 **[name redacted]** did not testify on the

 26 application and her statement was not

 27 presented in evidence. I understand from

 8

 1 counsel's submission that her audio recorded

 2 statement was fairly brief, only a few pages

 3 long and was not taken under oath. Counsel

 4 agree that **[name redacted]** stated something

 5 about "both couples mentioned partying

 6 together" and that the statement does not say

 7 much more about what **[name redacted]** could

 8 say about the relationship between

 9 **[name redacted]** and her spouse and the applicant

 10 and his spouse.

 11 Ms. Kolback, the author of the

 12 pre-sentence report, did not testify on the

 13 application but the pre-sentence report had

 14 been filed with the Court on August 26th,

 15 2016. In it, under the heading of "interview

 16 with victim", the author indicates that she

 17 had spoken with **[name redacted]** and that

 18 **[name redacted]** had provided further comments

 19 for the section. At page 6, the report

 20 states:

 21 **[name redacted]** confirmed she knew the

 accused to some extent, as he was

 22 friends with her spouse and she

 was friends with the accused's

 23 spouse. She noted that since the

 charges have come forth, she no

 24 longer talks to the accused's

 spouse and that the two are no

 25 longer friends. **[name redacted]** advised

 that they used to go for coffee

 26 and visits, but now those meetings

 have ceased.

 27 I understand that there may have been

 9

 1 difficulties in presenting this application

 2 but the evidence as presented on this

 3 application makes it extremely difficult to

 4 assess the proposed new evidence as required

 5 under the Palmer test. It is not clear what

 6 the evidence of **[name redacted]** would be

 7 should she testify. The known extent of her

 8 potential evidence at this point is that she

 9 would say that both couples mentioned partying

 10 together. It is not clear whether this

 11 evidence is admissible, whether it is hearsay,

 12 and there are very few details regarding what

 13 **[name redacted]** might be able to say about

 14 this relationship. There are many unanswered

 15 questions: What is the basis of

 16 **[name redacted]**'s knowledge? Is it from personal

 17 observation or hearsay? What exactly can she

 18 say about the relationship between

 19 **[name redacted]** and her spouse and the applicant

 20 and his spouse? When did she acquire her

 21 knowledge regarding the relationship? What

 22 time period does her knowledge of the

 23 relationship cover? Is **[name redacted]**

 24 available to testify? Is she willing to

 25 testify?

 26 Similarly, the pre-sentence report

 27 presents concerns. While this Court regularly

 10

 1 sees pre-sentence reports, the contents of the

 2 reports are rarely challenged. As such, it is

 3 not clear exactly how the reports are

 4 prepared. While Ms. Kolback spoke with

 5 **[name redacted]**, it is not apparent what exactly

 6 **[name redacted]** said. The pre-sentence report

 7 does not contain direct quotes and there is no

 8 indication that the comments by **[name redacted]**

 9 were audio recorded, under oath or were her

 10 exact words.

 11 Counsel filed a number of cases dealing

 12 with applications to reopen the case or to

 13 grant a mistrial on the basis of new evidence.

 14 In most of the cases where the application was

 15 successful, the Court had a much clearer

 16 understanding of what the proposed evidence

 17 consisted of. Often the evidence was filed in

 18 an Agreed Statement of Facts or the proposed

 19 witness testified on the application.

 20 The Ontario Court of Appeal addressed the

 21 requirement for relevant evidence in R. v.

 22 Arabia, 2008 ONCA 565. The appeal in Arabia

 23 centered around an application to permit the

 24 defence to reopen their case or to declare a

 25 mistrial on the basis of new evidence. The

 26 evidence that was presented to the trial judge

 27 consisted of two affidavits.

 11

 1 Justice Watt, writing for the Court of

 2 Appeal, noted (at paragraphs 69 and 71) that

 3 the threshold for relevance was a modest one

 4 but that relevance alone would not be enough

 5 to warrant reopening the defence case. What

 6 was required was credible evidence, reasonably

 7 capable of belief and admissible in accordance

 8 with the law of evidence. Justice Watt went on

 9 to state at paragraphs 80 to 82:

 10 The assessment mandated by the

 fourth requirement of the Palmer

 11 test adopted in Kowall envisages

 an assessment of the impact of the

 12 proposed evidence on the result at

 trial. That assessment, at least

 13 as it seems to me, need only be

 performed in connection with

 14 evidence that otherwise satisfies

 the requirements of Kowall adopted

 15 from Palmer. To hold otherwise

 would mean that evidence not

 16 reasonably capable of belief, or

 evidence excluded by an

 17 admissibility rule, would

 nonetheless qualify for assessment

 18 under the fourth requirement, an

 absurd result.

 19

 In my respectful view, neither the

 20 Czernik affidavit nor the

 affidavit of Bruzzese should have

 21 engaged the trial judge's

 discretion to permit reopening of

 22 the defence case or to declare a

 mistrial.

 23

 Trial counsel for the appellant

 24 did little beyond proffer of the

 affidavits to assist the trial

 25 judge in his task. Counsel did

 not adduce any evidence to explain

 26 how it was that Czernik came

 forward, months after the finding

 27 of guilt, to accept responsibility

 for an offence committed almost

 12

 1 three years earlier. Nothing was

 said of any connection between

 2 Czernik and the appellant, of

 Czernik's whereabouts, more

 3 importantly of his availability

 and willingness to testify. No

 4 effort was extended to elaborate

 upon the bare acceptance of

 5 responsibility in the affidavit to

 demonstrate unique knowledge of

 6 the circumstances of the offence

 committed.

 7

 8 The situation in this case is not the same

 9 as in Arabia - the affidavit in that case was

 10 from an individual who purported to be

 11 responsible for the offence that Arabia had

 12 been convicted of committing. But the

 13 concerns raised by the Court about the ability

 14 to evaluate the evidence, to determine whether

 15 it is relevant, whether it might reasonably

 16 have affected the result and whether the

 17 Palmer criteria can be evaluated in the

 18 absence of evidence that the Court can

 19 reasonably assess are all valid concerns.

 20 In my view, the evidence that has been

 21 presented does not permit the Court to

 22 undertake an assessment of the Palmer criteria

 23 and the applicant's application must fail on

 24 this basis.

 25 Having said that, I do want to say a few

 26 things about the proposed evidence. It is

 27 difficult to assess this evidence, as I have

 13

 1 stated, but I have considered whether this

 2 evidence, based on what is before me, could

 3 have reasonably affected the result.

 4 The issue of the relationship between

5 **[name redacted]** and her spouse **[name redacted]** and that

 6 of the applicant and his spouse was just one

 7 aspect of the evidence in this trial. In

 8 rejecting the evidence of the accused, I had a

 9 number of concerns regarding his evidence, one

 10 of which was his characterization of the

 11 relationship between the people involved. In

 12 raising that concern, it was not just the

 13 evidence of the complainant and the applicant

 14 that I considered but also the evidence of

 15 **[name redacted]**.

 16 The evidence of **[name redacted]** differed somewhat

 17 from the complainant and the applicant.

18 **[name redacted]** acknowledged partying with the accused on

 19 occasion. In my view, what **[name redacted]**

 20 might say about this, based on the limited

 21 information that I have that has been

 22 provided, is no different than what **[name redacted]**

 23 testified to - the two couples had partied on

 24 occasion.

 25 And my reasons did not focus on the

 26 relationship between the complainant and the

 27 applicant's spouse or having coffee with her.

 14

 1 The complainant acknowledged that she knew the

 2 applicant's spouse and having had coffee with

 3 her on an occasion. Now, there were

 4 inconsistencies in the complainant's evidence

 5 and I acknowledged that in my reasons. But in

 6 reviewing my reasons, in accepting the

 7 complainant's evidence about what occurred in

 8 her bedroom that night, they did not revolve

 9 around conclusions about the nature of the

 10 relationship between the parties.

 11 In my view, this evidence, based on the

 12 limited information that is before me, could

 13 not have reasonably affected the result.

 14 I am also of the view that the evidence of

 15 **[name redacted]** does not meet the due

 16 diligence requirement, the first step in

 17 Palmer.

 18 Mr. Bullerwell's affidavit contains the

 19 details of the defence's knowledge of

 20 **[name redacted]** and the contact with her, both

 21 before and after trial. It is apparent that

 22 **[name redacted]**'s name arose and was aware to

 23 defence prior to trial. Her name was referred

 24 to in the initial Crown disclosure and

 25 included the information that she had refused

 26 to provide a statement to the police. Mr.

 27 Bullerwell deposed in his affidavit:

 15

 1 My view was that, as an apparent

 friend of the complainant's, she

 2 was unlikely to cooperate with the

 defence. My view was also that

 3 any evidence she might be able to

 give appeared simply to be

 4 inadmissible hearsay evidence

 essentially repeating the

 5 allegations as reported to her by

 the complainant.

 6

 7 Shortly before the trial, the applicant

 8 advised Mr. Bullerwell that he had spoken with

 9 **[name redacted]** and that she was willing to

 10 speak with him. Mr. Bullerwell attempted to

 11 contact her the weekend before the trial. He

 12 phoned a number provided to him by the

 13 applicant and he spoke to someone he believed

 14 to be **[name redacted]**, although she did not identify

 15 herself. This person advised that she was not

 16 interested in talking to him.

 17 Following this conversation, Mr.

 18 Bullerwell was of the view that

 19 **[name redacted]** did not have helpful evidence to

 20 give in the trial and he was not confident she

 21 would be a beneficial witness. He viewed it

 22 as extremely risky to consider serving her

 23 with a last-minute subpoena or otherwise call

 24 her as a defence witness.

 25 After the trial, Mr. Bullerwell received

 26 information that **[name redacted]** might have

 27 relevant information and he then retained

 16

 1 someone to take a statement from her.

 2 It is apparent that the defence was aware

 3 of the existence of **[name redacted]** well

 4 before the trial, her name was referred to in

 5 the Crown disclosure. The applicant also had

 6 knowledge of **[name redacted]**. He had spoken

 7 to her shortly before his trial and advised

 8 his counsel of this. The issue is whether

 9 **[name redacted]**'s evidence could have been

 10 obtained through due diligence or whether this

 11 was a tactical decision made by counsel.

 12 In my view, this appears to have been a

 13 tactical decision by counsel. Mr. Bullerwell

 14 was aware of **[name redacted]** early on. He

 15 had concerns about her willingness to

 16 cooperate which, given her refusal to provide

 17 a statement to the police and her friendship

 18 with the complainant, may have been a valid

 19 concern. However, he did not pursue whether

 20 she might have evidence helpful to the defence

 21 until it was raised by the applicant shortly

 22 before trial. He made the decision, as he

 23 stated, not to pursue **[name redacted]** as a

 24 possible defence witness.

 25 Once the applicant brought

 26 **[name redacted]** to his attention shortly before

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

 17

 1 evidence that might assist the defence. He

 2 attempted to contact her and the person he

 3 spoke to was not interested in speaking with

 4 him. At that point, he made the decision not

 5 to call **[name redacted]** as a witness. He was

 6 concerned that he did not know what she might

 7 say as she had not provided a statement and he

 8 was concerned about the risk of her saying

 9 something to him and then testifying

 10 differently.

 11 At this point, Mr. Bullerwell was aware

 12 that the relationship between the parties was

 13 going to be in issue. This is apparent from

 14 his affidavit. He had considered calling the

 15 applicant's ex-spouse to testify regarding the

 16 relationship but ultimately decided not to as

 17 he was uncertain about her cooperation given

 18 the status of the relationship between the

 19 applicant and his ex-spouse. He decided that

 20 the defence evidence about the nature of the

 21 relationship could best come from the

 22 applicant himself.

 23 While subpoenaing a witness of whose

 24 evidence you are uncertain is a risky

 25 proposition, it was also an avenue open to the

 26 defence. Mr. Bullerwell could have subpoenaed

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

 18

 1 calling her as a witness whether she had any

 2 evidence to offer that might be helpful to the

 3 defence. The risk, as Mr. Bullerwell was

 4 aware, was that she might testify differently

 5 than what she had told him. This had the

 6 potential to place him in the position where

 7 he might be a witness. However, this could

 8 have been alleviated by having another person

 9 present during the interview. At that point,

 10 calling **[name redacted]** carried some risk,

 11 however Mr. Bullerwell proceeded with the

 12 trial and did not further pursue her as a

 13 witness.

 14 It was a decision that counsel had to make

 15 and counsel often have to make the decision

 16 whether to call a witness who they do not know

 17 exactly what they will say (a witness who has

 18 not provided a statement). It is a risk known

 19 to all criminal lawyers but it is a decision

 20 that has to be made. On occasion, it turns

 21 out to be a decision that counsel regret

 22 making but in my view, it is ultimately a

 23 tactical decision.

 24 It was a tactical decision that was also

 25 made within the boundaries of competence.

 26 Ms. Bullerwell's reasons for not calling

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

 19

 1 potential benefits and risks of calling her.

 2 Overall, from my perspective, I thought Mr.

 3 Bullerwell's representation of the applicant

 4 at trial was capably done, he was well

 5 prepared, knowledgeable, and did an effective

 6 job of representing the applicant. So in my

 7 view it was a decision that was made within

 8 the boundaries of competence.

 9 For these reasons, I am dismissing the

 10 application.

 11 -------------------------------------------

 12

 13 Certified to be a true and

 accurate transcript pursuant

 14 to Rules 723 and 724 of the

 Supreme Court Rules,

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 19 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 20 Lois Hewitt,

 Court Reporter

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