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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20 Lois Hewitt,

Court Reporter

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