COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Imola, 2019 ONCA 556
DATE: 20190703
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Hoy A.C.J.O., Hourigan and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Christine Imola

Appellant

Wayne Cunningham for the appellant

Randy Schwartz for the respondent

Heard: June 4, 2019

On appeal from the conviction entered by Justice Richard A. Lococo of the Superior Court of Justice on May 15, 2017.

REASONS FOR DECISION

Introduction

[1] The appellant was charged with fraud over $5,000 and possessing proceeds of crime in an amount greater than $5,000. The complainant was the appellant's former employer, Ball Media Corporation ("Ball Media"). Between the years 2007 to 2012, the appellant was alleged to have issued unauthorized

company cheques to herself, placed her son on the company payroll when he was not an employee, and charged company credit cards with unauthorized personal expenses, for a total of $530,788 in misappropriated funds. The appellant's position at trial was that she had received the funds legitimately.

[2] The appellant brought an unsuccessful *Rowbotham* application before an application judge for appointment of state-funded counsel. She was found guilty on both charges by the trial judge, who declined to hear her pre-trial application under s. 11(b) of the *Charter.*

[3] The appellant appeals against conviction only and requests a new trial based on the following submissions. First, the application judge erred in failing to grant an order for appointment of state funded counsel pursuant to *R. v. Rowbotham* (1988), 25 O.A.C. 321 (C.A.). Second, her trial was rendered unfair as a result of trial Crown counsel's misconduct. Third, the trial judge erred in refusing to hear her *Charter* application on procedural grounds. We disagree with the first two submissions, but agree with the third.

Issues

(i) *Rowbotham*

[4] The appellant's pre-trial application *Rowbotham* was denied. On appeal, the appellant's position is that the application judge failed to take a holistic view of the complexities of the case in his assessment of whether she required the assistance of counsel. The application judge is alleged to have failed to consider

a number of factors that made this case complex, such as the length of the trial, the seriousness of the charges, the volume of disclosure, the requirement to cross-examine multiple Crown witnesses, the necessity to address the admissibility of evidence, and the need for forensic accountants.

[5] We are not persuaded by this argument. The application judge appropriately balanced the appellant's personal abilities against the complexity of the case and decided that state-funded counsel was not necessary for a fair trial. The appellant's evidence in this regard was inadequate and generic, and stood in contrast to compelling evidence of her abilities.

[6] The crux of the case was whether the appellant defrauded Ball Media or whether Ball Media paid her hundreds of thousands of dollars in bonuses, including at a time when the company was in dire financial circumstances. This was primarily a case that turned on the appellant's credibility and thus documentary evidence did not play a central role in the trial.

[7] In our view, the trial was not so complex that it required state-funded counsel to ensure that the appellant received a fair trial. We therefore dismiss this ground of appeal.

(ii) Crown Conduct

[8] The appellant advances a trial unfairness argument on the basis of alleged Crown misconduct and complains that the trial judge should have done more to protect her rights. The alleged Crown misconduct falls into two categories.

[9] First, the appellant argues that the trial Crown tendered evidence that lacked a foundation, was previously undisclosed, or was presumptively inadmissible. In particular, the trial Crown adduced evidence of the appellant's prior disreputable conduct, which is presumptively inadmissible, without holding a *voire dire*. Some of this evidence suggested that the appellant pressured a more junior employee at Ball Media to sign a fraudulent government grant document. Other evidence was led that the appellant diverted company staff time to creating promotional material for her private rental property in Florida. In addition, during her cross examination, the Crown produced previously undisclosed documents.

[10] The tendering of the disreputable conduct evidence is troubling. Regardless of any probative value this evidence may have had, the trial Crown improperly suggested during closing submissions that it showed the appellant's "habit of pressuring other employees to go along with her financial schemes and dishonest practices relating to Ball Media money". Implicitly, this was an invitation to the trial judge to find that the alleged disreputable conduct made the appellant more likely to have committed the crimes she was charged with. However, the trial judge did not rely on the impugned evidence in his reasons for conviction, and we are of the view that it had no impact on his reasoning. Similarly, the documents put to the appellant in cross-examination were of marginal relevance and were not mentioned in the trial judge's reasons for conviction. As a result,

the trial judge's failure to intervene at the time the evidence was introduced did not render the trial unfair or result in a miscarriage of justice.

[11] Second, the appellant submits that the Crown crossed the line in cross-examining her by being aggressive, sarcastic, and unfair. In addition, the appellant says that the Crown bombarded her with mostly unfounded allegations of non-compliance with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). Cumulatively, the appellant submits, these issues made the cross-examination abusive and violated her right to a fair trial.

[12] We accept that some of the trial Crown's *Browne v. Dunn* objections were not well-founded. However, the appellant had been warned by the trial judge about observing the rule in *Browne v. Dunn*, but then repeatedly testified to issues never put to Crown witnesses. The trial Crown's cross-examination, while aggressive at certain points, did not prejudice the appellant's defence or bring the administration of justice into disrepute. Moreover, the fact that this was a judge-alone trial diminished any prejudicial impact.

[13] In summary, although we are concerned by the manner in which the trial Crown prosecuted the case, we are not satisfied that the appellant's right to a fair trial has been breached. Accordingly, we dismiss this ground of appeal.

(iii) *Charter* Application

[14] The appellant sought a stay of proceedings, essentially for an alleged breach of her right under s. 11(b) of the *Charter* to be tried within a reasonable

time. The trial judge found that the application did not comply with several requirements of the *Criminal Proceeding Rules for the Superior Court of Justice (Ontario)*, SI/2012 (the "*Criminal Rules*"). For example, no affidavit or factum was filed, and the application was filed late. The Crown sought dismissal of the application for failure to comply with the *Criminal Rules*. The appellant asked that the application be decided immediately, or, in the alternative, that an adjournment be granted to remedy the deficiencies in her application record.

[15] The trial judge noted that leave is required to proceed with an application if it does not comply with the *Criminal Rules*. He declined to grant leave because the deficiencies in the application were so serious as to make it impossible for the Crown to meaningfully respond. He also declined to grant an adjournment on the basis that it would result in further delay. In addition, the trial judge observed that there was no reasonable prospect that the application would succeed, noting that, according to the Crown, the 56-month delay in the case exceeded the limits in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, but was subject to significant defence waivers. As a result, the trial judge dismissed the application.

[16] The appellant argues that procedural rules are not to be applied rigidly and that the trial judge had a duty to help an unrepresented accused with the requirements of filing an application. Further, she submits that the trial judge erred in refusing to consider the merits of the application and providing virtually no reasons for declaring it to be without merit.

[17] We are of the view that the trial judge erred in declining to hear the application. Trial judges have considerable discretion to manage the cases before them and an appellate court will not lightly interfere with that discretion. However, deference is not owed to unreasonable exercises of discretion: see *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at para 49; *R. v. Victoria*, 2018 ONCA 69, 359 C.C.C. (3d) 179, at para. 81. With all due respect to the trial judge, the decision not to hear the application was unreasonable, as there were a number of factors that the trial judge either failed to consider or did not accord adequate weight.

[18] The first factor is the timing of the application. The appellant only became self-represented partway through pretrial proceedings. Her counsel considered bringing a s. 11(b) application but decided not to do so. Sometime after the appellant became unrepresented, the Supreme Court of Canada released the decision in *Jordan*. In light of that development in the law, the appellant decided to bring her application. This explains the timing of the application; it was not a last minute gambit designed to delay the prosecution of the case.

[19] The next factor is the sufficiency of the appellant's materials. There is no question that the materials did not comply with the *Criminal Rules*. It is also not challenged that at a judicial pre-trial conference conducted three weeks before the trial, the appellant was instructed regarding the materials she needed to file in support of her application. However, there is no reason to believe that, had the

appellant been given the opportunity, she could not have remedied the deficiencies in her materials. Transcripts, an outline of the appellant's argument, and other documents accompanied the notice of application and could have been supplemented by the necessary documents. Moreover, the deficiencies in the application record were not so significant as to foreclose the possibility of a meaningful Crown response, which came in the form of a factum.

[20] The trial judge's conclusion that the application was without merit was not explained. In our view, the application was at least arguable on the merits and had a reasonable prospect of success. Depending on the calculation of defence delay, this could be a case that exceeded the presumptive 30-month ceiling, thus placing the onus on the Crown to justify the delay.

[21] It would appear from his reasons that the trial judge was concerned about the history of delay in the case. We note that the trial judge failed to consider who was responsible for that delay. In any event, even if the appellant had delayed the case previously, that is not a sufficient reason to prevent her from bringing a potentially meritorious *Charter* application.

[22] We conclude that the decision of the trial judge not to hear the appellant's application was unreasonable and cannot stand. In the next section of our reasons we consider the appropriate remedy that flows from our conclusion.

(iv) Remedy

[23] The Crown submitted that, in the event the court concluded that the trial judge erred in not hearing the s. 11(b) application, the court should determine the issue on the existing record. We decline to do so.

[24] Appellate courts should be reluctant to determine a s. 11(b) application where a trial court has not done so on its merits: *R. v. Rabba* (1991), 3 O.R. (3d) 238 (C.A.). In our view, this matter has not been fairly and fully argued. The materials filed by the appellant in support of her application were incomplete. For example, some important transcripts that would have assisted in understanding who was responsible for specific periods of delay were not filed. The Crown has supplemented its materials on appeal but the appellant has not updated her application. It would be unfair to hold the appellant to the application record filed before the trial judge.

[25] The issue that arises is whether a new trial should be ordered on all issues or only the issue of the appellant's s. 11(b) application. As will be described below, we are of the view that the appropriate course in these circumstances is that the new trial be restricted to a determination of the s. 11(b) application.

[26] We start with the powers of a court on appeal. Section 686(2) of the *Criminal Code*, RSC 1985, c C-46 provides that when the court allows an appeal from conviction, it shall quash the conviction and either order a new trial or direct a judgment or verdict of acquittal to be entered. Section 686(8) provides that

when the court exercises any of the powers conferred by s. 686(2), it may make any order, in addition, that justice requires.

[27] Section 686(8) has a broad remedial purpose. However, because this is a supplementary power, an order made under this subsection cannot be at variance with the primary order or limit the accused's rights: *R. v. Hinse*, [1995] 4 S.C.R. 597, at paras. 30-31, and *R. v. Thomas*, [1998] 3 S.C.R. 535, at paras. 17, 26.

[28] In *R. v. Pearson*, [1998] 3 S.C.R. 620, the Supreme Court upheld a decision of the Quebec Court of Appeal ordering a new trial limited to the issue of entrapment on the basis that the Crown had failed to disclose information which could have been relevant to that issue. The court noted that entrapment is "completely separate from the issue of guilt or innocence as is reflected by the fact that it is dealt with at a separate proceeding from the trial on the merits": at para. 7. It does not ask whether the accused is guilty or bring into play the presumption of innocence: at paras. 11-12. As a result, the court reasoned that a new trial on the issue of entrapment would not be at variance with the primary order and it was unnecessary and wasteful to reopen the issue of the appellant's guilt or innocence on the substantive charges in a new trial: at paras. 13-14.

[29] In *Pearson*, at para. 16, the Supreme Court explained how an appellate court could quash a conviction without quashing the underlying verdict of guilt:

> A court of appeal which orders a new trial limited to the issue of entrapment exercises its statutory jurisdiction under s. 686 of the *Criminal Code* in the following manner: where an accused successfully impugns the finding of no entrapment at his or her first entrapment hearing, the court of appeal "allows an appeal against conviction", in accordance with the wording of s. 686(1). Then, pursuant to s. 686(2), the court of appeal "quashes the conviction" and "orders a new trial". However, the quashing of the formal order of conviction does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.

[30] In our view, this case is analogous to the situation in *Pearson*. The appellant was convicted after a receiving a fair trial. The only meritorious argument advanced on appeal was about the failure of the trial judge to hear her s. 11(b) application. As in *Pearson*, the remedy that is sought on the application is a stay of proceedings, a consideration entirely unrelated to the issues at trial or the fairness of the trial result. Like in *Pearson*, it is unnecessary and wasteful to reopen the issue of the appellant's guilt or innocence on the substantive charges in a new trial.

Disposition

[31] The appeal is allowed in part. We make the following order:

(i) the convictions are quashed pursuant to s. 686(2), but, pursuant to s. 686(8) the findings of guilt are affirmed and are not set aside;

(ii) a conditional stay of the proceedings is ordered pursuant to s. 686(8);

(iii) a new trial is ordered, confined to the s. 11(b) issue; and

(iv) the terms of the conditional stay are that: (a) in the event the s. 11(b) application is successful, the conditional stay becomes a permanent stay, and (b) in the event the s. 11(b) application is not brought within 60 days, is abandoned, or unsuccessful, the conditional stay expires, and the findings of guilt and un-appealed sentence already imposed will operate.

"Alexandra Hoy A.C.J.O."
"C.W. Hourigan J.A."
"David M. Paciocco J.A."