COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Huff, 2012 ONCA 86
DATE: 20120207
DOCKET: C52545

Feldman and Watt JJ.A. and Dambrot J. (*Ad Hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

John Huff

Appellant

John Kaldas, for the appellant

Alexander Alvaro, for the respondent

Heard and released orally: January 27, 2012

On appeal from the conviction entered on April 26, 2010 and the sentence imposed on June 11, 2010, by Justice James A. Ramsay of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] John Huff appeals his conviction of attempted murder and the sentence of imprisonment for life imposed by the trial judge for that conviction.

[2] On the appeal from conviction, the appellant submits that the trial judge erred in four respects:

i. that he failed to adequately instruct the jury on the position of the defence and to marshal the evidence in support of the defence position;

ii. that he failed to achieve a proper balance in his instructions as between the positions of the Crown and defence and the evidence supportive of each;

iii. that he left the appellant's liability to be determined on an alternative basis, aiding or abetting, for which there was no evidentiary support and was contrary to the way in which the case had been prosecuted and defended, namely, that the appellant was the principal; and

iv. that he discharged a juror during the course of the trial without conducting a proper inquiry.

[3] We would not give effect to any of these grounds.

[4] To take first the complaints about the adequacy of the trial judge's instructions on the position of the defence and his references to the supportive evidence.

[5] This was not a factually intricate or legally complex case.

[6] The Crown contended that the appellant, who had been in a relationship with the victim, bore her ill-will because she had ended their relationship and had become involved with another. The appellant, with this underlying motive, had

uttered threats to kill the victim and had threatened to use a baseball bat on her shortly before actually doing so. In addition, he solicited a false alibi to place himself elsewhere than where the attack occurred.

[7] The defence position was that the appellant was elsewhere when the attack on the victim occurred, thus he did not participate in it. The appellant also challenged the reliability of the evidence of several witnesses whose testimony tended to identify him as the assailant.

[8] The trial judge discussed with counsel his proposed instructions before he delivered them. Trial counsel took no objection to the instructions on any basis now advanced as error.

[9] Adopting a functional approach in our review of the instructions, and considering them as a whole, we are satisfied that the trial judge adequately put the defence position to the jury. He described the essential characteristics of an alibi and included in his instructions on alibi a reference to the three familiar steps of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. Thereafter, he briefly summarized the positions of the parties including that of the appellant. In our view, this summary was accurate and adequate.

[10] The trial judge also recounted the salient features of the evidence adduced at trial. As in almost any case, he could have said more, but we do not test the adequacy of jury instructions on this basis, else most would fail. The

references here were adequate and balanced. The jurors were not left in any state of uncertainty about the value and effect of the evidence or its relationship to the defence position.

[11] Second, we are not persuaded that the trial judge's decision to leave party liability to the jury on the basis of aiding or abetting reflects error.

[12] To begin, we are satisfied that there was an evidentiary foundation, an air of reality supportive of the appellant's participation as an aider or abettor of his brother, Ron.

[13] It is fair to say that the case had been prosecuted and defended on the basis of the appellant as principal, but defence counsel acknowledged that there was evidence supportive of the alternative basis of liability, aiding or abetting, left by the trial judge here. Unlike some cases, where submission of an alternative basis of liability compromises trial fairness, this alternative did not prejudice the appellant's principal defences at his trial.

[14] The appellant did not press the final ground of appeal against conviction, that the trial judge erred in discharging a juror without conducting a formal inquiry. We see no error in the manner in which the trial judge dealt with this issue.

[15] The trial judge received a note from a juror complaining about some language Crown counsel (not Mr. Alvaro) had used at trial. The trial judge told

counsel what the note said and asked for their submissions about whether the juror should be discharged or permitted to remain. There was no suggestion that the views expressed by the juror in the note had been communicated to other jurors. The nature and extent of the inquiry necessary on juror issues such as this is very fact-specific. We are not persuaded that the nature of the inquiry here was inadequate or the decision to discharge erroneous.

[16] We would also not interfere with the sentence of life imprisonment imposed by the trial judge.

[17] This was a brutal and savage attack that occurred in the setting of a fractured domestic relationship the appellant appears unwilling to put behind him. It consisted of several skull-shattering blows inflicted by a baseball bat wielding assailant on an unarmed victim. It was calculated and it was callous. It constituted a significant breach of trust. The effect on the victim was at once significant and enduring.

[18] The predominant sentencing principles applied by the trial judge were denunciation and deterrence. In this, he was right.

[19] The appellant has a lengthy criminal record including several offences against the person, both actual and threatened, together with over a dozen convictions involving noncompliance with court orders. He is 43 years old and has no significant gap in his record that began more than a quarter century ago.

[20] In our view, the sentence imposed reflects no error in principle, improper emphasis on aggravating or diminished consideration of mitigating factors. In a word, this sentence is fit.

[21] In the result, the appeal from conviction is dismissed. Leave to appeal sentence is granted, but the appeal from sentence is dismissed.

"K. Feldman J.A."

"David Watt J.A."

"M. Dambrot J.A. (*ad hoc*)"