COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Badiru, 2012 ONCA 124
DATE: 20120223
DOCKET: C50244 and C50557

O'Connor A.C.J.O., MacPherson J.A. and O'Connor J. (*Ad Hoc*)

BETWEEN

Her Majesty the Queen

Respondent
(Appellant on sentence appeal)

and

Peyton Badiru

Appellant
(Respondent on sentence appeal)

Howard L. Krongold and Matthew Webber, for the appellant/respondent on sentence appeal

Susan Ficek, for the respondent/appellant on sentence appeal

Heard: January 23, 2012

On appeal from the conviction entered by Justice Harriet E. Sachs of the Superior Court of Justice, sitting with a jury, on October 17, 2008, and the sentence imposed on February 26, 2009.

By the Court:

A. INTRODUCTION

[1] The appellant Peyton Badiru appeals from his conviction for second degree murder.

[2] The appellant Crown appeals from the 13-year period of parole ineligibility imposed as part of Badiru's sentence.

B. FACTS

[3] Gabriel Jaramillo was shot to death in a basement after-hours club in Toronto at about 6:00 a.m. on Saturday, June 3, 2006.

[4] The core of the Crown's case against Badiru was the eyewitness testimony of Francisco Gellibert, the owner of the club, and Reza Talebi, the club's bouncer. Gellibert and Talebi testified that they saw Badiru shoot Jaramillo inside the club immediately after a fist fight between Jaramillo and Luis Rosales, the brother of Badiru's girlfriend or wife. They said that just as Talebi separated Jaramillo and Rosales, Badiru walked into the room with a handgun and shot Jaramillo. Gellibert testified that there were four shots; Talebi testified that there were three. An autopy revealed that one bullet struck Jaramillo in the neck, killing him almost instantly. Talebi testified that Badiru showed up at his house after the shooting, and told him "you know that in there, it was just me and you and no one else." This appears to have been an effort to discourage Talebi from going to the police.

[5] The defence case emphasized Gellibert and Talebi's lack of credibility. Both witnesses were subject to *Vetrovec*[1] warnings and there were substantial inconsistencies between their statements. Notably, in his initial statement to police, Gellibert did not mention Talebi's presence or role at the murder scene.

[6] Badiru testified that he was at the club, but was not involved in the shooting. A defence witness, Jorge Riberio, testified that he was with Badiru in a different room of the club when the shots were fired.

[7] After an 18-day trial, the jury convicted Badiru of second degree murder. The trial judge, Sachs J., imposed a sentence of life imprisonment with a parole ineligibility period of 13 years.

[8] Badiru appeals his conviction. The Crown appeals the sentence, seeking to increase the parole ineligibility period to 15 years.

C. DISCUSSION

(1) Badiru's conviction appeal

(a) Instruction on collusion between Crown witnesses

Badiru contends that the trial judge erred by failing to instruct the jury that they could rely on "mutual confirmation" between Crown witnesses Gellibert and Talebi only if they were satisfied that the witnesses had not colluded about their

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[1] *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811.

testimony.

[9] Badiru does not challenge the contents of the trial judge's *Vetrovec* warnings about Gellibert and Talebi. Nor does he contend that the trial judge erred in instructing the jury that it was open to them to rely on similarities between Gellibert and Talebi's accounts of the shooting as confirmatory evidence. Rather, Badiru submits that once the "mutual confirmation" door is opened the jury must be cautioned about the potential for collusion between the witnesses. This is so because, if there has been collusion, the evidence of each *Vetrovec* witness is not independent of the other and cannot, therefore, be confirmatory.

[10] We do not accept this submission. Defence counsel at trial did not request that the possibility of collusion be included in the jury charge, a copy of which had been provided to counsel before the pre-charge meeting. In the pre-charge discussions no objection was taken to the absence of a collusion charge. Nor did counsel object to its absence after the charge was delivered. Importantly, defence counsel never put to either *Vetrovec* witness in cross-examination that they had colluded with each other.

[11] All of this silence on the defence side about possible collusion between the two main Crown witnesses was not, in our view, accidental. The thrust of the defence case was, in fact, the opposite of collusion between Crown witnesses: it

was that the number and quality of inconsistencies between the two *Vetrovec* witnesses were so striking that it made their testimony not reliable or credible.

[12] This focus of the defence case is well illustrated by defence counsel's closing address to the jury:

> Now two witnesses have been presented to you and I'm going to suggest to you that they're totally unsatisfactory. They're criminal perjurers. You watched them commit some crimes right in this box. You watched them commit crimes on a big technicolour screen. They have deliberately and repeatedly lied under oath. They committed a daily double and triple of perjury. They have lied under oath about lying while they were lying about the next thing.
>
> *Importantly, the two Crown witnesses that are of any importance in this case contradict each other on every material point including what happened in room number three. On every point they contradict themselves from their prior statements to the next statement to what they say here in this trial over and over again*.
>
> [Emphasis added.]

[13] In short, the emphatic defence position was that Gellibert and Talebi were liars, as demonstrated by inconsistencies within and between their testimony, not that they were liars because they concocted an identical story about the events surrounding the shooting. The trial judge's jury charge fairly reflected the defence position.

(b) Instruction on fabrication of alibi evidence

[14] Badiru's second ground of appeal is that the trial judge failed to properly instruct the jury on how to deal with the Crown's allegation in its closing address to the jury of a "jointly concocted fabrication" by Badiru and Riberio.

[15] We agree with Badiru that the Crown's closing submission that Riberio and Badiru had "concocted and colluded together" to prepare their testimony overreached the evidence. The Crown did not lead evidence of joint concoction, nor did it ask the jury to draw an inference of guilt based on joint concoction. However, the trial judge did explicitly address defence counsel's two main objections to the Crown's closing address in this domain:

> During her closing address to you, Crown counsel suggested that Mr. Riberio gave his statement to the private investigator on July 25th, 2006 after he had had the opportunity to view Francisco Gellibert's videotaped statement to the police. Crown counsel then went on to argue that Mr. Riberio tailored his statement to the private investigator using information that he had learned from viewing Mr. Gellibert's videotaped statement.
>
> Members of the jury, there is *no evidence* before you that before Mr. Riberio gave his statement to the private investigator on July 25th, 2006, he had had the opportunity to view Mr. Gellibert's videotaped statement or even that that statement had been disclosed to the defence by that time. Therefore, I am instructing you to ignore this aspect of Crown counsel's closing remarks to you.
>
> I am also instructing you to ignore any suggestion by the Crown that defence somehow participated in

> finding Mr. Riberio to be Mr. Badiru's alibi witness because he was a person with no criminal record and a sad story to tell. There is no evidence of any kind of misconduct *on the part of Mr. Badiru's defence counsel*. According to Mr. Riberio, he tried to contact Mr. Badiru shortly after he saw the newscast with Mr. Badiru's picture and the mother of Mr. Badiru's child got back to him. [Emphasis added.]

[16] On appeal, Badiru renews trial counsel's assertion that "no evidence" was not strong enough; that the language should have been "it was impossible". This strikes us as a very minor distinction. Badiru also submits that the correction relating to defence counsel's conduct might have left the jury speculating about Badiru's own role in obtaining Riberio's testimony. However, a fair reading of trial counsel's objection to the Crown closing, both immediately after it was made and later in discussions about the trial judge's draft jury charge, establishes that the central focus of the objection related to defence counsel's conduct. The trial judge was simply responding to the main thrust of the submission before her.

[17] Badiru goes on to argue that the trial judge erred in the way she addressed the joint concoction issue in her charge. In summarizing the Crown's position, she said: "This demonstrated that their story [Badiru and Riberio's] was a jointly concocted fabrication".

[18] Badiru argues that the trial judge erred in including this statement in her charge. Moreover, having done so, she erred in failing to instruct the jury (1) that there was no evidence that Badiru and Riberio had colluded and (2) that if the

jury disbelieved Badiru and Riberio's evidence, they should not draw an inference that Badiru and Riberio jointly concocted their evidence and use that inference as evidence of guilt.

[19] We would not give effect to these submissions.

[20] We start by noting that, consistent with the position taken by both counsel, the trial judge did not instruct the jury that they were entitled to draw an inference adverse to Badiru if they believed that he and Riberio had concocted evidence.

[21] Defence counsel had an opportunity to vet the trial judge's charge beforehand and did not ask the trial judge to remove the impugned statement from her charge. Nor did he ask that the trial judge give the instruction relating to the possibility of an adverse inference now sought.

[22] We also note that the trial judge gave a carefully worded *W.D.*[2] charge. She instructed that if the defence evidence did not leave the jury with a reasonable doubt, they could find Badiru guilty only if the rest of the evidence that they did accept proved guilt beyond a reasonable doubt. The trial judge made it clear that the Crown's case depended almost entirely on the evidence of Gellibert and Talebi.

[23] Badiru relies on *R. v. O'Connor* (2002), 62 O.R. (3d) 263, at para. 36, for the proposition that an instruction is required to prevent the jury from improperly

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[2] *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

using disbelief of an exculpatory statement to infer guilt despite an absence of independent evidence of fabrication. *O'Connor*, like *R. v. Hall*, 2010 ONCA 724, 263 C.C.C. (3d) 5, involved allegedly false out of court statements introduced by the Crown to raise an inference of guilty fabrication. In this case, however, Badiru's and Riberio's testimony was offered by the defence for exculpatory purposes. We do not think that an instruction on the difference between disbelief and a finding of fabrication was mandatory here, given that the allegedly false statement was part of the defence evidence, the trial judge gave an adequate *W.D.* instruction, the Crown did not ask the jury to infer guilt from disbelief, and the defence did not request the instruction now sought.

(c) Instruction on Crown witnesses' lack of motive to lie

[24] Third, Badiru submits that the trial judge erred by failing to instruct the jury on how to assess the Crown's claim that Gellibert and Talebi had no motive to lie about what had happened at the club, thereby improperly shifting the burden of proof to the defence.

[25] We do not accept this submission. The closing submission of Crown counsel on this point was not inappropriate; nor did it require a corrective instruction from the trial judge in relation to the burden of proof. The comments of trial counsel did not improperly place the burden of proof on the defence. There is a difference between submitting that the witnesses had no motive to lie

in a case where the defence submits that Crown witnesses are lying, and a submission that the defence should have called evidence of motive to lie and failed to do so. The Crown did not cross-examine Badiru to suggest that there was a burden on him to establish that the Crown witnesses had a motive to lie. Defence counsel went to the jury almost entirely on the basis that the two main Crown witnesses were lying. The Crown was entitled to counter that defence within limits and submit that these witnesses had no motive to lie: see *R. v. LeBrocq* (2011), 2011 ONCA 405, 278 O.A.C. 142, at para. 19.

(d) Instruction on Badiru's exclusive motive to kill

[26] Badiru's final submission is that the trial judge erred in failing to give a corrective instruction concerning the Crown's improper submission that Badiru was the only person in the club with a motive to kill Jaramillo. Since there were many people in the club, most of whose relationship with the deceased is unknown, the trial judge should have instructed the jury to disregard the suggestion that only Badiru had a motive to kill the deceased.

[27] We do not accept this submission. The only evidence about anyone having a motive to kill Jaramillo that emerged from the trial was the fact that Rosales, the brother of Badiru's girlfriend or wife, was in a fight with the deceased moments before the shooting. The suggestion that any one among the many unknown people at the club could have had a motive to kill is mere speculation. The jury was instructed to avoid speculation when assessing

evidence. Accordingly, based on the evidence, the Crown's submission on this point did not require correction.

[28] For these reasons, we would dismiss the conviction appeal.

(2) The Crown's sentence appeal

[29] The Crown submits that in imposing a 13-year period of parole ineligibility, the trial judge gave insufficient consideration to the aggravating circumstances of the offence. This court has said that "the use of handguns in public places cries out for lengthy increased periods of parole eligibility": *R. v. Danvers* (2005), 199 C.C.C. (3d) 490, at para. 77. Badiru's callous execution-style shooting of an unarmed man in a club in the presence of bystanders showed a wanton disregard for the lives of others and warrants an exemplary sentence. The Crown submits that Badiru's parole ineligibility should be increased to 15 years.

[30] We do not accept this submission. In our view, the trial judge engaged in a comprehensive and fair assessment of the relevant factors. It needs to be recalled that the sentence in this case is one of life imprisonment with the possibility – not the certainty – of parole after 13 years. This is a lengthy sentence.

[31] Moreover, we note that in *R. v. Dooley*, 2009 ONCA 910, 249 C.C.C. (3d) 449 at para. 179, Doherty J.A. observed: "It is hard, absent some error in principle or misapprehension of material evidence, to justify appellate

intervention to adjust a mandatory period of parole ineligibility downward by two or three years." By parity of reasoning, this observation should apply with equal force to a Crown request to increase a period of parole ineligibility by two or three years, which is the Crown position in this case.

[32] For these reasons, we would dismiss the sentence appeal.

D. DISPOSITION

[33] The conviction and sentence appeals are dismissed.

Released: February 23, 2012 ("D.O'C.")

"Dennis O'Connor A.C.J.O."
"J.C. MacPherson J.A."
"O'Connor J. (*ad hoc*)"