COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kampe, 2012 ONCA 858
DATE: 20121005
DOCKET: M41715 (C54979)

Juriansz J.A. (In Chambers)

BETWEEN

Her Majesty the Queen

Respondent

and

Brian Kampe

Applicant

Ernest J. Guiste, for the applicant

Lisa Csele, for the respondent

Heard: September 27, 2012

ENDORSEMENT

[1] The applicant applies for an order to compel the Federal Minister of Justice to provide him with funding to appeal his conviction. The applicant was convicted of possession of cocaine for the purposes of trafficking. He was sentenced to 15 months imprisonment.

[2] The Crown does not dispute that the accused lacks the financial means to retain counsel and the capacity to argue the appeal himself. Under s. 684 of the *Criminal Code*, the onus is on the applicant to satisfy the court that "it appears

desirable in the interests of justice that the accused should have legal assistance".

[3] In order for it to be in the interests of justice to provide funding, the appeal must be arguable. Other factors to consider are the complexity and nature of the appeal, the legal principles it engages, and how those principles apply to the facts of the case.

[4] Applicant's counsel submits that the applicant should have legal assistance because this appeal engages the legal principles to be applied in "racial profiling" cases. While the legal principles engaged are one consideration, the merits of the appeal must be considered first.

[5] A review of the evidence, the trial judge's reasoning, and the arguments the applicant proposes to advance on appeal is necessary. The transcript of proceedings was not available on the hearing of the application, but the trial judge summarized the evidence in detail.

[6] The trial judge summarized the Crown's case against the applicant as follows:

> Three police officers were involved in the events leading to the charges against Mr. Kampe - P.C. Fagu, P.C. Lee, and P.C. Ahmed. They testified at the trial as follows. On November 16, 2009 in the evening, they were in uniform on general patrol in an unmarked police van in the north end of Rexdale. The three officers were attached to the Community Response Unit of 23 Division, a unit that deals with community complaints.

Their duties as members of the Community Response Unit included patrolling "high crime" areas within 23 Division. These areas had a high incidence of drug trafficking, drug use, prostitution, noise, and drinking.

At about 10:35 p.m., the officers drove into the parking lot of 121 Kendleton Drive, an area known to the officers as a "high crime" area. They noticed a grey Chevy Malibu with its interior light on backed in to a parking spot in front of 121 Kendleton Drive. This drew the officers' attention. Officers Fagu and Ahmed noted a male black driver and female passenger in the car. Officer Lee noted a male black driver and female white passenger in the car. The officers drove their van past the front of the parked car, stopped, got out, and approached the parked car from the rear. Officer Fagu approached the driver's side with P.C. Ahmed behind him. P.C. Lee approached the passenger's side.

P.C. Fagu testified that while standing just behind the pillar between the driver's door and the rear passenger door, he saw the male (who was later identified as Mr. Kampe) looking down in his lap at a piece of what appeared to be crack cocaine. He was able to observe this for a few seconds before Mr. Kampe noticed him. Once Mr. Kampe saw him, he closed his right hand and put his left hand on top. P.C. Fagu ordered him to open his hand. Mr. Kampe then moved his hand to the right side of his body and put it in his right pocket, according to P.C. Fagu.

P.C. Lee testified that he heard P.C. Fagu order Mr. Kampe to open his hand and saw Mr. Kampe put his clenched right hand in his jacket pocket. P.C. Lee reached across the passenger and grabbed Mr. Kampe's wrist out of his jacket pocket. Mr. Kampe's hand was empty.

Officers Fagu and Ahmed testified that they each took control of one of Mr. Kampe's arms and removed him from the car. P.C. Lee came around to the driver's side of the car, and while the other officers had Mr. Kampe's

> arms, he reached in to Mr. Kampe's right jacket pocket and removed a piece of crack cocaine that was wrapped and tied in plastic wrap.
>
> The officers testified that Mr. Kampe was informed that he was under arrest for possession of crack cocaine. When they tried to handcuff him, Mr. Kampe began to struggle. The officers forced Mr. Kampe to the ground, handcuffed him, patted him down and took him back to 23 Division. During the pat down, Officer Ahmed testified that he found a cell phone and $404.40 on Mr. Kampe.
>
> Officer Fagu testified that he searched the car and found a silver digital scale in working order between the driver's seat and the centre console, and two pieces of plastic wrap on the floor on the drivers' side. The car had been rented from Avis.
>
> None of the officers knew Mr. Kampe or knew of him, nor had any of them dealt with Mr. Kampe previously.

[7] The trial judge summarized the applicant’s evidence as follows:

> Mr. Kampe testified, and related an entirely different version of events than the officers. He testified that he had just gotten into the car with a woman he had met earlier that day when an unmarked police car sped in front of his car and cut him off. Three officers approached the car from the front and came to the driver's door. They dragged him out of the car, assaulted him, arrested him and read him his rights. The officers searched him. P.C. Lee did not find crack cocaine in his jacket pocket. None of the officers said anything about finding crack cocaine or a scale at the scene, nor did they show him any crack cocaine or scale at the scene. He did not have any crack cocaine. He had never seen the scale before being paraded before the Staff Sergeant at 23 Division that evening. The police have fabricated the story that the crack cocaine was found in his jacket pocket and the scale

> was found in the car. The money and cell phone that were seized from him belonged to him.

[8] At trial, defence counsel made an issue of the fact that the Crown neither called the female passenger as a witness nor disclosed her identity to the defence. The police had not made a note of the woman's identity. The only officer who interacted with the woman testified:

> …that when he approached the passenger's side of the car, the female saw him immediately and opened the door. He asked her who she was and why she was there. She identified herself with an Ontario health card. She appeared intoxicated. [He] called for a scout car and a female police officer. Other officers arrived in a scout car and the female went with those officers. [He] believes the other officers took her to a bus stop. [He] testified that he did not make a note of her name in his notebook. He did not believe he had grounds to arrest her. He did not search her. He agreed with [defence counsel] that she would have heard the events that unfolded that evening.

[9] At the time of trial, the defence did not know the woman's identity. The trial judge stated the following:

> [The applicant] testified that he had just met the woman earlier that day. He was very vague about how he met her. He testified that he met her on the street near Danforth and Brimley. She had a dog with her. They made eye contact and exchanged phone numbers. She called him later that day. He called her back and later that evening picked her up at Danforth and Brimley. She came out of a building at Danforth and Brimley where [the applicant] assumed she lived. They drove back to [the applicant]'s apartment, where they stayed for 15 or 20 minutes. [the applicant] was going to take the woman home when police arrived at the car. [the applicant]

> testified that he does not remember the woman's name. He has never seen her since that evening.

[10] Defence counsel asked the trial judge to draw an adverse inference from the fact that the Crown did not call the woman as a witness. He asks the trial judge to infer that the woman, had she been called, would have confirmed the applicant's evidence about what happened that evening.

[11] The trial judge remarked that the police's "failure to make a note of the woman's name that evening or investigate her further is unusual", but went on to observe that "[o]n the other hand, on the evening in question, Mr. Kampe knew the woman's name, her telephone number and her address". However, it made sense to her that the police's attention focused on Mr. Kampe once crack cocaine was found in his hand. Consequently, she concluded that "the absence of [the woman's] evidence does not logically give rise to a reasonable doubt in this case."

[12] The trial judge rejected the applicant's testimony and accepted the testimony of the police officers. She found that the applicant's testimony did not leave her with a reasonable doubt that he was in possession of the crack cocaine and the digital scale. Taken together with the fact he had two cell phones and over $400 in cash, and there being no indication the crack was being consumed, she found he possessed the crack for the purpose of trafficking.

A. ANALYSIS

[13] I begin by identifying the arguments that the applicant seeks legal assistance to advance on appeal. Applicant's counsel proposes to argue that the trial judge failed to properly deal with the applicant's defence of "racial profiling". He submits that when racial profiling and the planting of evidence are raised as a defence, and the accused takes the stand, it is not enough to simply accept the evidence of the police and reject the evidence of the accused. Instead, he says the trial judge should heed this court's observation in *R. v. Brown* (2003), 64 O.R. (3d) 161, at para. 44:

> A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.

[14] He argues that, had the trial judge properly considered all the circumstantial evidence, she would have inferred that the applicant had been racially profiled and would have accepted his testimony.

[15] Counsel for the applicant also proposes to renew on appeal his argument that the trial judge should have drawn an adverse inference from the Crown's failure to call the passenger as a witness. He submits that an important aspect of the circumstantial evidence is that, as the police witnesses acknowledged under

cross examination, the passenger had material evidence to give. The trial judge should have inferred that she would have corroborated the applicant's testimony.

[16] There is no doubt that the type of racial profiling claim considered in *Brown* and the type of allegations of deliberate racist misconduct made in this case must be proven by inferences from circumstantial evidence. However, I see no merit in the argument that the trial judge failed to consider all the circumstantial evidence before rejecting the applicant's evidence.

[17] The trial judge was alive to the applicant's allegations of racism on the part of the police. She noted trial counsel's final submission "that these charges were yet another example of racial profiling and tunnel vision on behalf of the Toronto Police Services." She expressly instructed herself that she "[should] not give the police officers' testimony any more weight than the testimony of Mr. Kampe simply because they are police officers." She carefully considered the plausibility of each witness's evidence, the internal inconsistencies of each witness's evidence, and how each witness's evidence fit with all the evidence called at trial.

[18] One specific factual difference in the two versions of events was whether the police approached the applicant's car from the front or from the rear. The trial judge preferred the evidence of the officers that they approached from the rear because it was more in keeping with standard police practice. She accepted the officers' explanation that "[i]f the occupants of a car are engaged in illegal activity,

approaching from the rear is safer for the police and allows the police to gain the element of surprise." On the whole, she found the testimony of the officers to be credible and reliable.

[19] On the other hand, she noted that Mr. Kampe "was unable to recall the name of the woman who was in the passenger seat of the car with him, where she lived, when he rented the car, or the purpose for which he rented the car. He was vague about how he met the woman who was in the car with him." She concluded that he was not a credible witness.

[20] The trial judge considered the applicant's criminal record. It included convictions for possession of a credit card obtained by crime, possession of property obtained by crime, obstructing a peace officer, possession for the purpose of trafficking, failing to comply with a recognizance, criminal harassment, and possession of a prohibited or restricted weapon. Although the applicant admitted that he had been convicted of these offences, he testified that he did not commit most of them.

[21] On my reading of the trial judge's reasons, it is clear she did not fail to consider the circumstantial evidence before her and, in particular, the fact that the police did not investigate the female passenger. She remarked that this was "unusual" but found she was "unable to infer from the failure of the woman to

testify that she would have supported either [the applicant's] version of the events or the police officers' version."

[22] There is nothing in *Brown* that supports the contention that the trial judge erred in principle in failing to draw an adverse inference from the fact that the Crown did not call the passenger as a witness.

[23] In my view, the trial judge's analysis and her reasons for rejecting the applicant's testimony are unimpeachable. There is no merit in an appeal that seeks to revisit the trial judge's credibility findings, which led her to conclude that the applicant was in possession of cocaine. That the credibility findings were made in a case involving allegations of "racial profiling" does not infuse the appeal with merit. It is not in the interests of justice that the applicant should have legal assistance to appeal the conclusion of the trial judge that he was in possession of cocaine for the purpose of trafficking.

[24] Despite this conclusion, I have pondered at great length the aspect of this case that the trial judge described as "unusual". On the police officers' testimony, what first attracted the police's attention to the vehicle was the fact that it was parked in a high crime area with its interior light on and was occupied by a black male driver and a white female passenger. Upon approaching the vehicle from the rear, they noted that the occupants were looking at a piece of crack in the applicant's hand. The applicant, who is black, was searched and arrested. The

police did not search or otherwise investigate the white occupant of the vehicle. One of the arresting officers believed that uniformed police, who arrived later, took the female passenger to a bus stop.

[25] The rejection of the applicant's testimony in no way precludes the applicant from relying on the Crown's evidence to argue that the police engaged in racial discrimination that breached the *Charter of Rights and Freedoms*. Such an argument could be based on "racial profiling", similar to the conduct found in *Brown*, or on a wider formulation of racial discrimination based on the differential treatment of the applicant during the course of the police investigation. In either case, an essential component of such an argument is that the applicant apply under s. 24(2) of the *Charter* to exclude the evidence implicating the accused.

[26] When making an application under s. 24(2), an accused does not dispute the factual circumstances that make out the elements of the offence, but argues that the evidence tendered to prove the offence should be excluded because it was obtained in breach of the *Charter*.

[27] Counsel for the applicant claimed in oral argument that an application was made at trial to exclude evidence under s. 24(2). Counsel for the Crown did not agree. The trial judge, at the very outset of her analysis, stated unequivocally "[t]he constitutionality of the conduct of the police was not challenged. No applications were brought by Mr. Kampe alleging a breach of his rights under the

Charter, or related to the nondisclosure of the name of the passenger." The material filed on the application does not include a *Charter* application and the applicant's factum on the application makes no reference to one.

[28] On the material before me, I find that the applicant did not bring a *Charter* application to exclude evidence. At trial, the applicant did make allegations of racist misconduct by the police, but those allegations were wrapped up as part of his defence of factual innocence. The position he took did not require an order excluding the cocaine. His defence explained its presence in his pocket — the police planted it. The significance the applicant placed on the passenger was that, if called, she would corroborate the applicant's testimony that he was factually innocent. He did not advance an alternative argument that the differential treatment of the passenger supported an inference of a *Charter* breach, requiring a *Charter* remedy.

[29] The applicant may have had a good tactical reason not to advance such an alternative argument at trial. Advancing such an argument could have undermined the force of the applicant's testimony that he was not in possession of the cocaine.

[30] I have not been satisfied that it is in the interests of justice to order legal assistance to advance an appeal on the basis that the trial judge failed to exclude the evidence implicating the accused.

[31] The application is dismissed. The applicant may renew the application before me if he is able to file materials demonstrating that a *Charter* application to exclude evidence was made at trial, as claimed by the applicant's counsel.