COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Smith, 2012 ONCA 892
DATE: 20121218
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Rosenberg, MacPherson and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Donald Smith

Appellant

Heather Pringle, John Bilton and Katherine Oja, for the appellant

Deborah Krick, for the respondent

Heard: December 4, 2012

On appeal from the conviction entered on May 29, 2008 and the sentence imposed on January 26, 2009 by Justice John F. McCartney of the Superior Court of Justice, sitting with a jury.

MacPherson J.A.:

A. INTRODUCTION

[1] In November 2002, the appellant was convicted by Pierce J., sitting with a jury, of two counts of making obscene material, one count of possessing obscene material for distribution, and two counts of distributing obscene material through

internet websites. The charges related to two types of material: audio-visual material and written stories.

[2] On appeal, this court upheld the sole conviction relating to the written stories but allowed the appeal and ordered a new trial on the four counts relating to the audio-visual material: see *R. v. Smith* (2005), 76 O.R. (3d) 435, leave to appeal refused [2005] S.C.C.A. 464 ("*Smith I*").

[3] The second trial on the various obscenity charges relating to the audio-visual material took place over a three-week period in 2008. The appellant was convicted by McCartney J., sitting with a jury, of two counts of making obscene material, one count of possessing obscene material for the purpose of distribution, and one count of distributing obscene material. He was sentenced to a fine of $28,000, two years of probation with conditions including 240 hours of community service, and repayment of the fine during the probationary period.

[4] The appellant appeals against conviction and sentence.

B. FACTS

[5] The appellant operated two websites, one free and one that could be joined for a fee. The count of distributing obscene material related to material distributed by the appellant through these websites. The counts of possessing and making obscene material related to audio-visual material seized from the appellant's home and retrieved from the appellant's computers.

[6] Generally, the material at issue in this appeal consists of audio-visual materials and still photographs of naked or almost naked women being shot or stabbed in the breasts and/or lower abdomen, directly above the pubic area.

[7] All of the video scenes and photographs are acted; no one is actually killed or injured through the violence that is depicted. The audio-visual materials are relatively short and have little plot or dialogue beyond the killing of the women. The perpetrators of the violence, usually male, speak and behave as though the women ‘deserve’ what happens to them.

[8] Frequently, the camera pans over the women’s naked bodies, particularly their breasts and genitals, and pauses as women appear to die. The still photographs include depictions of naked women with arrows or knives stuck in their abdomens, between the breasts or protruding from the rectum, or of blood flowing from injuries inflicted by bullets, as they lie appearing to die.

[9] In order to simulate the realistic appearance of the women’s skin being pierced by bullets, arrows and knives, a unique special effects technique was used that employed an air compressor and computer editing software.

[10] The Crown’s position at trial was that the material was obscene because the undue exploitation of sex was its predominant characteristic. According to the Crown, the material depicted explicit sex with violence. In addition, the material

created a risk of harm to the community by potentially inciting sexually deviant individuals to act on their fantasies.

[11] The appellant's position at trial was that none of the material depicted explicit sex. Even if it did depict explicit sex, the appellant submitted, it would be tolerated by the community and so would not constitute the undue exploitation of sex. The appellant submitted that the evidence called by the Crown about the risk of harm caused by exposure to the material should not be relied upon.

[12] The appellant was convicted on all four counts and received the sentence set out above.

C. ISSUES

[13] The appellant raises the following issues on the appeal:

(1) Did the trial judge err by admitting evidence in relation to meta-tags, banners, and links to other websites?

(2) Did the trial judge err by admitting as evidence written obscene stories contained on the appellant's website?

(3) Did the trial judge fail to adequately instruct the jury on the use to be made of the written obscene stories?

(4) Did the trial judge err by admitting evidence of the appellant's psychiatric condition through the testimony of Dr. Collins?

(5) Did the trial judge err by admitting opinion evidence from Dr. Malamuth about the nature of the impugned material?

(6) Did the trial judge properly charge the jury on the issue of "explicit sex"?

(7) Did the trial judge err by refusing to grant a stay for delay pursuant to s. 11(b) of the *Charter*?

(8) Did the trial judge impose a sentence that was unduly harsh?

D. ANALYSIS

(1) Meta-tags, banners, and links to other websites

[14] The meta-tags, banners, and links to other websites were admitted at the first trial. In *Smith I*, this court affirmed the trial judge's ruling on this issue, saying at para. 62:

> The trial judge did not err in admitting this evidence. The meta-tags, banners and links on an Internet website are analogous to the dustcover and preface to a book: they inform the viewer about the content of the publication and provide context for the work.

[15] The same evidence was led at the second trial, and the defence made no objection at that time. Accordingly, the trial judge did not make a formal ruling on the admission of this evidence.

[16] On appeal, the appellant asserts that the ruling in *Smith I* has been overtaken by the subsequent decision of the Supreme Court of Canada in *Crookes v. Newton*, [2011] 3 S.C.R. 269 ("*Crookes*"). Based on that decision, he

argues, the banners, links and meta-tags were not relevant to the content of the appellant's website and should not have been admitted.

[17] I do not accept this submission. First, *Crookes* says nothing about meta-tags and banners. Second, with respect to hyperlinks, *Crookes* and this case are quite different. *Crookes* was a defamation case where the issue was whether creating a hyperlink to a third party's defamatory work is the type of act that can constitute 'publishing' that work. The court's focus was on the sufficiency of the act for the purposes of defamation; its comment, at para. 30, that "a hyperlink, by itself, is content-neutral" must be understood with that in mind. In this case, the hyperlinks were adduced only as context for the content that the appellant published on his own website.

[18] Third, the trial judge explicitly instructed the jury that the meta-tags, banners and links could be used only "to give context to the images in question", that is, to the audio-visual material displayed by the appellant on his own websites. For these reasons, this court's decision relating to the admissibility of meta-tags, banners and links in *Smith I* remains good law and the trial judge in the second trial was correct to follow it.

(2) The written obscene stories – admissibility

[19] At the first trial, the appellant was convicted of distributing obscene material, namely, three written stories displayed on his pay website. The conviction for this offence was upheld by this court: see *Smith I* at para. 50.

[20] At the second trial, the trial judge admitted the three written stories as evidence on the basis that they provided context for the contents of the appellant's websites.

[21] The appellant challenges this ruling. He contends that the trial judge did not weigh the prejudicial effect of the stories against their probative value. He also submits that, on a proper assessment of these factors, the stories should not have been admitted.

[22] I disagree. Although the trial judge did not use the words "probative value" and "prejudice" in his four-page ruling on this issue, it is clear that these are precisely the factors he considered. His discussion of whether the stories are "remote" from the audio-visual material is directed to the probative value of the stories. Moreover, he explicitly states that the jury will need to be cautioned about the limited use of the stories, namely, to provide context for the contents of the website on which the audio-visual material is shown. This is a clear recognition of the potential for prejudice and the need to guard against it. Furthermore, the

focus of both the oral and written submissions of the parties was on probative value and prejudicial effect.

[23] As for the trial judge's actual decision, admitting the stories as evidence of context easily comes within the consistent message in the leading obscenity cases that "the work as a whole" – in this case, the appellant's websites – must be considered: see *R. v. Butler*, [1992] 1 S.C.R. 452 at para. 55 ("*Butler*"), and *Smith I* at para. 61.

(3) <u>The written obscene stories – jury charge</u>

[24] The appellant submits that the trial judge did not instruct the jury on the use it could make, and not make, of the evidence relating to the three stories.

[25] The trial judge did instruct the jury on the proper use to be made of the stories. The trial judge's caution was expressed in this fashion:

> I would like to then mention ***the special treatment that must be given to the stories***, the meta-tags, banners and links, which we have been talking about, in this material. ***Now it is important to remember that the accused is not on trial for anything but the images on the videos made by him and the audio and visual images in his computers and on the websites. However, the stories***, meta-tags, the banners, the links ***may be used to give context to the images in question***. However, they must relate to the images in question. So for example, the meta-tags, the banners, the links that are seen on the free site can only relate to the material on the free site, because that is where the material appears. Likewise the stories which appear on the pay site, only relate to the pay site, because that is where they appear, and must be, so the use of this

> material must be confined to the specific areas that they appear in. [Emphasis added]

[26] In my view, this was an appropriate caution. The trial judge made it clear that the appellant was not "on trial" for the stories, instructed the jury on the only use that could be made of the evidence, and specified the material for which the stories could provide context. In its closing address to the jury, the Crown, too, stated that the appellant was not on trial for the stories, and told the jury not to convict on the basis of what was in the stories. The trial judge did not say that the stories were themselves obscene or that the appellant had been convicted of criminal offences in relation to them. Nor did defence counsel object to this aspect of the charge. I would, therefore, dismiss this ground of appeal.

(4) Dr. Collins' testimony

[27] Dr. Peter Collins, a Crown witness, was qualified as an expert in psychiatry, particularly in the area of paraphilia, including the effects of exposure to sexually explicit material in the development and enforcement of paraphilia. Dr. Collins testified that paraphilia is the clinical term for sexual deviance.

[28] The appellant contends that Dr. Collins' testimony transgressed the proper boundaries of expert evidence by providing a diagnosis of the appellant as a paraphiliac; this, submits the appellant, in effect amounted to bad character evidence.

[29] I do not accept this submission. The core of Dr. Collins' testimony was directed to explaining paraphilia and the effect that exposure to material such as was displayed on the websites at issue in this case has on those who have a paraphilia. This evidence was necessary to establish an evidentiary foundation for the community standards test, which the jury would have to apply to render a verdict. When, occasionally, Dr. Collins used language that came close to sounding like a diagnosis of the appellant, it was in response to questions asked by the appellant's counsel in cross-examination. Finally, the trial judge's charge to the jury included a caution with respect to this aspect of Dr. Collins' testimony:

> Now there is one bit of evidence in the case that counsel brought to my attention which I would just like to clarify. You will recall that when Dr. Peter Collins was testifying he made it clear that he was not in any way making any diagnosis of Mr. Smith as having any paraphilic tendencies, however he may have left you with that suggestion. Now the difficulty with that is that the motive of Mr. Smith – you might take from that that the motive of Mr. Smith, if that suggestion lingers with you, might be to commit this offence. Now that is totally improper evidence – sometimes evidence just flows out as things go along and the reason for that is because in a case of this nature, as you may have heard, and I will mention to you again, the motive of a person is not [relevant]. And so, for many reasons, not the least of which is that this is irrelevant evidence in this case, you must disabuse your mind of that suggestion, if in fact it lingers with you.

In my view, this instruction was both clear and sufficient.

(5) Dr. Malamuth's testimony

[30] Dr. Neil Malamuth, a Crown witness, was qualified as an expert psychologist on the effects of exposure to sexually explicit material, and the effects of sexually explicit violent material in particular.

[31] The appellant contends that Dr. Malamuth's testimony went beyond the scope of his expertise in two respects: first, by providing a definition of what constitutes sexually explicit violent material; and second, by offering an opinion that the material in respect of which the appellant ultimately was convicted fit into this category. In doing so, the appellant submits, Dr. Malamuth usurped the roles of both the trial judge and also the jury.

[32] I disagree. A review of Dr. Malamuth's testimony establishes that he did not define "sexually explicit violent material" for the purposes of the legal definition of obscenity, but, rather, to assist in his explanation of findings arising from his research. The entire purpose of Dr. Malamuth's testimony was to provide an evidentiary foundation for the Crown to argue that exposure to the material on the appellant's website could cause negative effects and satisfy the risk of harm branch of the obscenity test. In order to argue the final proposition – that the appellant's material posed such a risk – the Crown had to introduce the results of research in this area and establish that those results were applicable to the material in respect of which the appellant was convicted. By necessity, this

involved comparing the material that was the subject of Dr. Malamuth's studies to the appellant's materials. Finally, I observe that the trial judge made it clear in his jury charge that they were to take the definition of the relevant legal principles from him.

(6) The jury charge with respect to "explicit sex"

[33] The appellant contends that the trial judge's charge to the jury on "explicit sex" was deficient in two respects: first, it did not follow the order for addressing the relevant questions set out in *Smith I*; and second, it failed to instruct the jury that "sexualized nudity", without more, does not constitute explicit sex.

[34] The trial judge's charge set out s. 163(8) of the *Criminal Code* and then explained it in terms that were very close to those used in *Butler* and *Smith I*. When a trial judge instructs a jury about the law to be applied, it cannot be an error to do so by reference to the leading authorities, especially the leading Supreme Court of Canada case on the point in issue. In any event, when the trial judge's charge on "explicit sex" is read as a whole, it is clear that the jury was directed to decide, first, whether the impugned material, considered in light of the contextual factors identified by this court in *Smith I,* depicts explicit sex and, second, whether that portrayal constitutes the undue exploitation of sex and violence.

[35] On the second issue, the trial judge instructed the jury that they had to decide whether the material depicted explicit sex with violence "taking into account the part of the body depicted, the nature of the depiction, the context, the accompanying dialogue, words, gestures, and all other surrounding circumstances." He also instructed that explicit sex "captures portrayals at the far end of the spectrum, in other words it has to be serious." This would have left no doubt that the jury had to consider the depictions in their entire context, not just "the part of the body depicted" and "the nature of the depiction". It was open to the jury to find that, having regard to all the circumstances, the material at issue depicted explicit sex. There is no reason to think that the jury was misled into concluding that the material was sexually explicit by virtue of the presence of nudity or sexualized nudity alone.

(7) *Charter* s. 11(b)

[36] During the second trial, the appellant twice applied to stay the proceedings on the basis of unreasonable delay, once at the commencement of pre-trial motions and then again just prior to sentencing. The appellant contends that the trial judge made several errors in these rulings, including a failure to assess the reasonableness of the overall time frame.

[37] I disagree. The delays in this case were not unreasonable in the context of the protracted and complex proceedings, including two trials, one appeal to this

court, an application for leave to appeal to the Supreme Court of Canada, numerous volumes of disclosure, and the severance of two other accused early on. As well, the proceedings required scheduling and travel arrangements for judge, counsel, witnesses and the accused. Although the trial judge did not explicitly characterize each delay, implicit in his reasons for ruling on both applications is that the constellation of the above factors suggested a large amount of inherent delay. I see no error in his analysis or in the results reached in the two delay applications.

(8) Sentence

[38] Following the appellant's conviction at his first trial, he was sentenced to a fine of $100,000 and three years of probation. On appeal, this court quashed four of the five convictions. The sentence on the remaining count was varied to a $2000 fine. On August 8, 2005, the court released an Addendum to sentence clarifying that the probation order was also set aside. By the time the Addendum was released, the appellant had served two years, eight months, and 11 days of the three-year probation order.

[39] Following conviction at his second trial, the appellant was sentenced to a fine of $28,000 (cumulative for the four offences for which he was convicted), two years of probation with conditions including 240 hours of community service, and

payment of the fine during the probationary period. The appellant contends that this sentence is unduly harsh.

[40] At the appeal hearing, it emerged that the appellant has served his entire period of community service and almost all of the probationary term. Hence, the only live ground of appeal on sentence is whether the $28,000 fine is too harsh.

[41] It should be recalled that the fine imposed on the appellant after the first trial was $100,000. After the second trial, the trial judge justified the imposition of the lower fine of $28,000 in this fashion:

> It is difficult to conceive how Donald Smith could repair the harm done by his actions on society, particularly, since it will never be known, considering the far reaches of the internet, how much damage his websites have done. However, there is one thing certain and that is that he must not be allowed to profit from his illegal conduct. Now, unfortunately the evidence is not entirely clear as to how much Donald Smith did profit from membership on his pay website. The evidence indicates that his records show a subscription list of some 2,000 members who would be paying $30.00 United States currency to become a member. This according to the Crown's calculations would have given him a profit of nearly $100,000.00 Canadian. This, of course, anticipates a very healthy exchange rate and fails to take expenses into account. Unfortunately, there is no hard evidence to support exactly what his profit would have been; however, I can't conceive of him netting less than half of the Crown's estimate in Canadian dollars which would be $30,000.00.

[42] In addition, the trial judge observed:

> It is clear to me that the offender, Donald Smith, has remained unrepentant throughout the many proceedings and, in fact, has shown a certain defiance, apparently having convinced himself that he is right and the law and his fellow citizens who have on two occasions found him guilty of producing and distributing obscene material are wrong.

[43] I accept this analysis. It renders impossible any conclusion that the $28,000 fine imposed on the appellant was unreasonable or unduly harsh, particularly since the appellant's convictions could have attracted a custodial sentence.

E. DISPOSITION

[44] I would dismiss the appeal.

Released: December 18, 2012 ("M.R.")

"J.C. MacPherson J.A."
"I agree. M. Rosenberg J.A."
"I agree. S.E. Pepall J.A."