COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Tomlin, 2014 ONCA 357
DATE: 20140506
DOCKET: C56800

Hoy A.C.J.O., MacPherson and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Ramone Tomlin

Appellant

Breana Vandebeek for the appellant

Brian G. Puddington for the Crown

Heard: April 29, 2014

On appeal from the conviction entered on October 2, 2012 by Justice L. Ricchetti of the Superior Court of Justice, sitting without a jury.

By the Court:

[1] The appellant was convicted of importing 1.18 kilograms of cocaine which arrived in Canada with him, in two suitcases, upon his return from a trip to Jamaica. The cocaine was concealed in two large frozen fish, themselves each placed among other smaller frozen fish in a green bag located in each suitcase.

[2] The green bags were delivered to the appellant by a total stranger just before his departure from Jamaica. The appellant made no inquiries of the

individual about what was in the bags – indeed, the entire exchange between the appellant and the stranger consisted of two exchanges: “Hi” and “Have a good trip.” Neither the appellant nor his mother looked into the bags to see what they contained.

[3] The sole issue at trial was knowledge. The appellant testified that he had no idea the cocaine was in his possession and that he had been duped by his girlfriend, who had asked him to bring back some fish to her when he returned and who called to remind him to do so during his visit and to say that her father would bring the fish to her for that purpose.

[4] The trial judge did not accept the appellant’s version of events. He concluded on all of the evidence that the appellant knew he was importing the cocaine, and convicted him.

[5] The appellant raised two issues on appeal:

i. that the trial judge placed improper reliance upon a false statement made by the appellant on the Canadian Customs Declaration filled out on arrival (a statement the appellant admits was made to avoid a search of his belongings); and

ii. that the trial judge misapprehended certain evidence in drawing inferences of knowledge on the part of the appellant.

[6] We would not give effect to either ground of appeal.

The False Customs Declaration

[7] The appellant argues that the trial judge heavily and improperly relied upon the appellant's false declaration in assessing his credibility, in discussing his girlfriend's evidence and in arriving at his ultimate conclusion regarding knowledge. He argues that the statement on the declaration that he was not bringing fish into the country is equally explicable by his desire not to have them confiscated as it is by his desire not to have the importation uncovered.

[8] In his written submissions, the appellant argued that the act of making the false declaration – and doing so in order to avoid a search – was similar to after-the-fact conduct. Therefore, following a line of authorities reflected in *R. v. White*, [2011] 1 S.C.R. 433 and *R. v. Arcangioli*, [1994] 1 S.C.R. 129, the evidence had to be discarded as having no probative value because it was susceptible to a different explanation. In oral argument – perhaps recognizing that the false declaration did not neatly fall into the after-the-fact conduct category – counsel argued as well that it was simply circumstantial evidence and had to be analysed for other possible explanations on that basis.

[9] We do not accept this submission.

[10] The appellant admitted that he lied on the Customs Declaration and that he did so deliberately with the intention of avoiding a search of his belongings. His explanation that he did so on the advice of an unknown elderly lady who was

standing beside him when they were disembarking – the second total stranger in the story – was rejected by the trial judge.

[11] It defies common sense to suggest that a trial judge may not take into account a deliberately false declaration made at the very same time as the act of importing is taking place, in assessing the credibility of the accused or as a piece of circumstantial evidence bearing on the events. In these circumstances, the false declaration did not amount to after-the-fact conduct, in our view, and need not have been subjected to the "other possible explanations" analysis called for in *White* and *Arcangioli*. Just as the evidence of a customs officer about the demeanour of a person entering the country is not evidence of after-the-fact conduct, but rather evidence of conduct during the very commission of the offence, so, too, is the making of an admittedly false declaration like the one here. See *R. v. Morales*, [2004] O.J. No. 4010 (C.A.).

[12] Nor is it the law that each piece of circumstantial evidence must be examined individually to determine if it can be explained in more than one way. The law is that a person may not be convicted on the basis of circumstantial evidence alone, unless that evidence is consistent with guilt and inconsistent with any other rational conclusion: *R. v. Handy,* [2002] 2 S.C.R. 908, at para. 96. That is not a concern here.

[13] In any event, the false declaration was just one of several factors the trial judge relied upon in assessing the appellant's credibility and ultimately rejecting his version of events.

Misapprehension of the Evidence

[14] In our view, the trial judge did not misapprehend the evidence. The appellant is confusing adverse findings of credibility with misapprehension of the evidence.

[15] The allegation was raised in connection with three pieces of evidence:

i. the purchase of a second suitcase by the appellant prior to his return;

ii. the evidence concerning the failure to inquire about, and lack of concern regarding, the contents of the two delivered packages; and,

iii. the appellant's reaction towards his girlfriend when she visited him in jail after his arrest.

[16] In oral submissions, appellant's counsel withdrew the argument set out in (ii) above. Neither of the other two grounds can succeed either, in our view.

[17] The trial judge referred to the appellant's purchase of a second suitcase in his analysis of credibility. He rejected the appellant's evidence that he had bought the second suitcase simply to carry back food. He inferred that, because the second suitcase was necessary to bring back the two large packages, the

appellant knew in advance of the need for an additional suitcase. This inference was open to the trial judge on all of the evidence.

[18] Nor did the trial judge misapprehend the evidence regarding the appellant's reaction when he was visited in jail by his girlfriend after his arrest. The appellant's defence was that he had been duped by his girlfriend into bringing a large quantity of cocaine into Canada without his knowledge. Even though the girlfriend testified that the appellant seemed "shocked" that he had been arrested, there was no evidence that the appellant questioned her about the situation or suggested that he was upset because he had been set up. In these circumstances, it was open to the trial judge to conclude that the appellant's reaction was "subdued" for someone in jeopardy as the appellant was, and that his reaction was "more consistent with [the appellant's] having known about the cocaine in the two packages and had no reason to blame [his girlfriend].

[19] The misapprehension of evidence ground of appeal fails.

Disposition

[20] For the foregoing reasons, the appeal is dismissed.

"Alexandra Hoy, A.C.J.O.
"J.C. MacPherson J.A."
"Robert Blair J.A."

Released: May 6, 2014 "AH"