COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Johnston, 2014 ONCA 704
DATE: 20141016
DOCKET: C57362

Cronk, Gillese and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Mark Andrew Johnston

Appellant

Mark Johnston, appearing in person

Breese Davies, appearing as duty counsel

Greg Skerkowski, for the respondent

Heard: September 10, 2014

On appeal from the convictions entered on June 14, 2013 and the sentences imposed on September 6, 2013 by Justice Katherine B. Corrick of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] Following a judge-alone trial, the appellant was convicted of fraud over $5,000, uttering a forged document and three counts of breach of recognizance. He was sentenced to four years in prison, consecutive to the sentence he received on other fraud charges.

[2] He appeals against both conviction and sentence.

BACKGROUND IN BRIEF

[3] The charges in the present case arose from the appellant's 56-day stay at the Yonge Suites, a luxury hotel catering to business executives who require long-term accommodation. During his stay, the appellant amassed a hotel bill in excess of $20,000, which included charges of approximately $2,000 for wine that he had delivered to his room.

[4] The hotel made numerous unsuccessful attempts to have its invoices paid. Finally, the appellant gave the hotel a forged cheque for an amount slightly in excess of $20,000. When the bank did not honour the cheque, the appellant was told that the hotel had to receive a minimum payment of $5,000 or the appellant would be required to vacate immediately. The appellant then gave the hotel $500 in cash.

[5] At this point, management at the hotel believed that the hotel was being defrauded and the manager called the police. She told the police that the appellant had an armed bodyguard, who was a former RCMP officer. Police attended at the hotel and knocked on the appellant's hotel room door on the 11th floor. No one responded. The police were told there was an alternative exit to the room on the 12th floor. They took the elevator to the 12th floor and saw the appellant leaving the room. They placed him in handcuffs, saying it was due to a concern about the presence of a firearm. The officers entered the hotel room to

check for an armed person. They did not have a search warrant. They found no one in the room. They seized a computer, a blackberry, memory sticks, a printer, files containing blank cheques, and various documents.

[6] At trial, the appellant claimed that the search violated his s. 8 *Charter* rights and sought to have the seized evidence excluded.

[7] The trial judge accepted that the officer's warrantless search of the hotel room violated the appellant's s. 8 rights but concluded, after consideration of the factors set out in *R. v. Grant*, 2009 SCC 32, that admission of the evidence would not bring the administration of justice into disrepute.

[8] The appellant submits that the trial judge erred in so ruling. Specifically, he argues that the trial judge erred in her assessment of the first two *Grant* factors.

THE CONVICTION APPEAL

The first *Grant* factor – the seriousness of the *Charter*-infringing state conduct

[9] The trial judge found that the officers had acted in good faith in response to a call about evicting a guest who had an armed bodyguard. She noted that the police had entered the room to determine if an armed person were present and conducted a cursory search. The items seized were in plain view and, although taken into police custody, the items were only searched after the police obtained a search warrant. The police were courteous and facilitated the appellant's right to counsel. They were conscientious about protecting that right, including

protecting his right to a private conversation with his counsel. She found that this factor favoured admission of the evidence.

[10] We see no error in the trial judge's reasoning on this factor. She adverted to the correct legal principles and the findings of fact on which she relied were open to her.

The second *Grant* factor – the impact of the state conduct on the appellant's *Charter*-protected interests

[11] The trial judge reviewed the relevant jurisprudence on the privacy rights of an individual in a hotel room and concluded that while the appellant had such a privacy right, it was reduced because he must have known that he was facing imminent eviction. She set out a number of findings to support this conclusion, including that the appellant knew of the various unpaid hotel invoices, the return of his (forged) cheque, the hotel's continued and increasing demands for payment, and hotel management having told him on the day in question that he would be evicted unless he paid $5,000 that day but he only paid $500.

[12] The trial judge concluded that the second *Grant* factor favoured "somewhat" the exclusion of the evidence.

[13] Again, we see no error in the trial judge's reasoning on this factor.

[14] No complaint is taken with the trial judge's handling of the third *Grant* factor so nothing more need be said about it except to note that the trial judge found that it favoured admission of the evidence because of the reliability of the

evidence, the fact that it was integral to the Crown's case and society's interest in an adjudication on the merits of a case of this sort. We agree.

[15] Accordingly, we decline to give effect to this ground of appeal.

THE SENTENCE APPEAL

[16] The appellant submits that the sentencing judge erred in two ways.

[17] First, he submits that the sentencing judge should have considered the offences at issue in this appeal to be part of a "spree" that began with his having defrauded his lawyer. In separate proceedings, he had been convicted for having deposited a series of fraudulent cheques in order to dupe a lawyer into representing him in a large criminal matter. The appellant argues that the sentencing judge should have recognized that it was a crime spree and imposed concurrent sentences in the present case, rather than making his sentences consecutive.

[18] We do not accept this submission. The sentencing judge was fully alive to this argument. Her decision to impose consecutive sentences was fully available to her and we see no basis for appellate interference. While the two sets of offences were committed close in time, they are not interrelated. There is no factual nexus between the two, the methods by which the appellant perpetrated the frauds were different, and so too were the victims.

[19] Second, the appellant argues that the sentence was either outside the range or offended the totality principle.

[20] Again, we do not accept this submission. The appellant has a lengthy criminal record for charges similar to those in the present case. At the time of sentencing, his criminal record included 36 convictions for fraud, a number of convictions based on personation and uttering forged documents, and 319 convictions under the *Excise Act* for fraudulent acts. The magnitude, complexity, duration, and degree of planning in the fraud were significant. The sentencing judge was entitled to find that protection of the public, denunciation and deterrence were of paramount importance, particularly as the appellant's prospects for rehabilitation are dim. Other than support from his family, there were no mitigating factors. In contrast, there were many aggravating factors, including the fact that these offences were committed while the appellant was on release for other crimes of dishonesty and bound by a recognizance that, among other things, precluded him from operating a computer.

DISPOSITION

[21] Accordingly, the conviction appeal is dismissed. We grant leave to appeal sentence but dismiss the sentence appeal.

"E.A. Cronk J.A."
"E.E. Gillese J.A."
"M. Tulloch J.A."