COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Harris, 2014 ONCA 746
DATE: 20141027
DOCKET: C55199

Cronk, LaForme and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Hollie Marie Harris

Appellant

Julianna A. Greenspan, for the appellant

Milica Potrebic, for the respondent

Heard: October 22, 2014

On appeal from the conviction entered on January 16, 2012 and the sentence imposed on March 22, 2012 by Justice S. Casey Hill of the Superior Court of Justice, sitting without a jury, with reasons for conviction reported at 2012 ONSC 27.

ENDORSEMENT

[1] This is an appeal from a conviction for importing cocaine and a sentence of four years' imprisonment. The only issue at trial was whether the appellant "knowingly" imported the drug. The appellant testified at trial. Her credibility was central to the disposition of the case. Of particular concern was the plausibility of

her description of events. On appeal, the appellant argues that the trial judge misapprehended the evidence and rendered an unreasonable verdict. She also submits that the sentence imposed was harsh and excessive in the circumstances. Finally, the appellant seeks to admit fresh evidence.

[2] For the reasons that follow, we would deny the fresh evidence application. Further, we do not agree that the trial judge misapprehended the evidence or that his verdict is unreasonable. Nor do we agree that the sentence was harsh and excessive in the circumstances. Accordingly, we would dismiss the conviction appeal, grant leave to appeal sentence and dismiss the sentence appeal.

BACKGROUND

[3] By way of brief background, the charge of importing relates to the appellant's arrest when she returned to Canada from a week in Panama. About two pounds of cocaine were discovered in her suitcase. The appellant maintained that she had no knowledge that the cocaine was in her possession.

[4] The appellant travelled to Panama with a Mr. Curran who paid her $2,000 to accompany and entertain him for the week. He also paid for her airfare and accommodations. According to the appellant, while in Panama, she and Curran met up with a woman named Nancy, who spent time with them during their stay there.

[5] Prior to the appellant's return to Canada, Nancy asked the appellant to carry some clothes and souvenirs for her back to Canada. The appellant agreed. The appellant testified that as she and Curran were packing their suitcases, he asked her to transport bottles of what appeared to be health care products. Again, the appellant agreed. Upon arrival in Canada, the appellant was searched at customs. The cocaine was discovered in the health care bottles and the appellant was arrested.

THE FRESH EVIDENCE APPLICATION

[6] The trial judge, at para. 51 of his reasons, referenced the Crown's position as to why the appellant's testimony should not be believed. According to the Crown, the appellant's testimony included: "a confusing account of how items were to be returned to Nancy, a person assuming she exists who, like Curran, was not called to confirm the accused's story". At para. 75 of his reasons, the trial judge observed "that the evidence is far from solid that a Nancy actually existed."

[7] The appellant seeks to admit fresh evidence, which consists of photographs of a woman said to be "Nancy" taken from a camera found in the appellant's possession at the time of her arrest. She asserts that it is relevant because the trial judge disbelieved her testimony about Nancy – including the fact of Nancy's existence – and this was a significant reason why he rejected her

evidence as a whole. The appellant says that the photographs confirm that Nancy existed and that proof of this fact would directly have affected the trial judge's assessment of her credibility and the plausibility of her testimony. We disagree.

[8] Rather than disbelieving the appellant on the basis that Nancy did not exist, the trial judge considered the appellant's entire account of her relationship with Nancy. In considering this relationship, the trial judge found that elements of the appellant's evidence rendered her testimony unbelievable. These elements included, "inconsistencies in her testimony, and between testimony and out-of-court utterances, the implausibility of aspects of her story, established deception on some matters" (para. 71 of the trial judge's reasons). At para. 74(1) of his reasons, the trial judge outlined his concerns about the implausibility of the appellant's testimony relating to Nancy:

> [A]s to "Nancy", the accused made no inquiry and had no knowledge of her prior connection to Curran, she was unaware of Nancy's surname, she gave no thought to the effect of taking shoes and other items from Nancy on the maximum weight allowance for her luggage, and the vagaries of any plan to return items to Nancy – variously described as at the P.I.A. or by phoning her in Toronto.

[9] We agree with the Crown that the nature of the fresh evidence – photographs of a woman only the appellant can identify as Nancy – relates to a non-essential aspect of the appellant's testimony at trial. Nancy was merely a

part of the appellant's story that the trial judge found did not make sense. A photograph of a woman purporting to be Nancy would not have rectified the implausibility of the appellant's testimony.

[10] And finally, the images on the camera were reproduced and provided to the appellant's trial counsel after the camera was seized by the authorities. Trial counsel, in cross-examination on her affidavit, said that she made a decision not to tender the photographs into evidence at trial as it was her view that they were unnecessary and of no value. Trial counsel was correct.

[11] The application to admit the fresh evidence is denied.

THE CONVICTION APPEAL

[12] The appellant argues that the trial judge's disbelief in the existence of Nancy was a critical finding that resulted in a "current of disbelief running through his reasons for conviction." The appellant emphasizes the significance of the fresh evidence and how it is vital to this court's appreciation of the consequences of the trial judge's further misapprehensions of evidence. As the appellant's counsel put it in oral argument:

> The fresh evidence that is being proposed, and the circumstances around the fresh evidence, does, I submit, have a direct bearing on the case as a whole, and it impacted on the entire fact finding process, and so I think the fresh evidence, as I hope to point out to the court, does create a tenor of the entire judgment by the trial judge that informs the misapprehension of evidence as well as the unreasonable verdict …

[13] Having rejected appellate counsel's view of the importance of the fresh evidence, the force of the remaining allegations of misapprehension of evidence by the trial judge is seriously diminished. Nevertheless, we will briefly comment on these remaining allegations.

(i) Misapprehension of evidence

[14] The appellant submits that the trial judge misapprehended the evidence in three ways. First, the trial judge's finding that the prospect of a luggage inspection was "obvious" was a misapprehension that he relied on to infer that the appellant intended to abandon her bag. Second, in concluding that the appellant's testimony was implausible, the trial judge made the erroneous finding that the appellant: "ripped up boarding passes, as well as Curran baggage claim tags concealed in the accused's bra as opposed to placement in her purse or checked bag or pocket or a garbage bin". And third, the trial judge incorrectly found that the appellant knew that strip clubs have a reputation as sites for drug offences.

[15] We reject the appellant's assertion that the trial judge misapprehended the evidence. The trial judge conducted a thorough, detailed and accurate review of the evidence. In the end, he simply did not believe the appellant, nor did he find that her evidence raised a reasonable doubt as to her knowledge of the cocaine. After reviewing the circumstantial evidence at length, the trial judge found that

the only rational inference that could be drawn was that, prior to entering Canada, the appellant knew her luggage contained a prohibited substance. He was entitled to so find.

[16] Fundamentally, this appeal amounts to an invitation to this court to improperly substitute its own credibility assessments for those made by the trial judge. The appellant asks this court to dissect and microscopically examine single passages from the trial judge's reasons in isolation and out of context. As the Supreme Court of Canada made clear in *R. v. Stirling,* 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 13, citing *R. v. Davis*, [1999] 3 S.C.R. 759, at para. 103, citing *R. v. Davis* (1998), 159 Nfld. & P.E.I.R. 273 (C.A.), at para. 138:

> It is not sufficient to "cherry pick" certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages. This is especially true in the case of a judge sitting alone where other comments made by him or her may make it perfectly clear that he or she did not misapprehend the import of the legal principles involved. As McLachlin, J. said in *B.(C.R.)* at 26: "[t]he fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence." [Citations omitted]

[17] In short, the trial judge directed himself to the relevant issues and he did not err in his appreciation of the evidence in a manner that could have affected the outcome of the trial: *R. v. Alboukhari*, 2013 ONCA 581, 310 O.A.C. 305, at

para. 30. There was no miscarriage of justice and this ground of appeal is dismissed.

(ii) Unreasonable verdict

[18] Given our conclusions on the issues discussed above, this submission loses all of its force. There is no basis for a finding that the trial judge's verdict was unreasonable.

THE SENTENCE APPEAL

[19] The appellant also seeks leave to appeal her sentence, arguing that the sentence of four years' imprisonment imposed by the trial judge was harsh and excessive in the circumstances. She submits that the trial judge unduly focused on Curran's guilty plea in determining that a longer sentence was warranted in the appellant's case. Also, she contends that the trial judge gave insufficient consideration to the fact that the appellant was not the principal in the cocaine distribution chain.

[20] We would grant leave to the appellant to appeal her sentence but we would dismiss the appeal. The four-year term of imprisonment is within the acceptable range for like offenders, and is proportional to Curran's sentence. There is no reason to interfere with the trial judge's exercise of discretion. While the trial judge does reference Curran's guilty plea in his reasons, this was not the sole basis for imposing a harsher sentence on the appellant.

DISPOSITION

[21] For the reasons given above, the fresh evidence application and the conviction appeal are dismissed. Leave to appeal sentence is granted and the sentence appeal is also dismissed.

"E.A. Cronk J.A."
"H.S. LaForme J.A."
"P. Lauwers J.A."