COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Montoya, 2015 ONCA 786
DATE: 20151117
DOCKET: C56257

MacPherson, Tulloch and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Elvira Montoya

Appellant

Peter Thorning and Richard Diniz, for the appellant

Dayna Arron, for the respondent

Heard: November 16, 2015

On appeal from the conviction entered on July 10, 2012 and the sentence imposed on November 28, 2012 by Justice Feroza Bhabha of the Ontario Court of Justice.

ENDORSEMENT

[1] The appellant, Elvira Montoya, was convicted of fraud over $5000 and two counts of uttering forged documents for her role in assisting a "straw buyer" to obtain a mortgage. The mortgagee bank suffered a loss of $118,873 as a result of the fraud. The appellant was sentenced to a 12 month conditional sentence

and ordered to pay $25,000 in restitution. She appeals her conviction on one ground and her sentence on one ground.

[2] On the conviction appeal, the appellant submits that the circumstances surrounding the trial judge's *Charter* s. 11(b) ruling gave rise to a reasonable apprehension of bias.

[3] On November 22, 2010, the day the trial commenced, the appellant brought an application for a stay of proceedings on the basis of unreasonable delay. The trial judge reserved her decision on the application. Because there was still a half-day of court time and the first Crown witness was there, the trial judge suggested that they proceed with his evidence. The Crown agreed and defence counsel did not object. The witness testified for the rest of the day.

[4] The next day, the appellant discharged her trial counsel and requested an adjournment to retain new counsel. The trial judge granted the adjournment and dismissed the s. 11(b) application with reasons to follow.

[5] It took the appellant a long time to retain new counsel. The trial resumed more than a year later on December 7-8, 2011. The evidence was not completed and additional time was scheduled. On February 13, 2013, the trial judge delivered comprehensive reasons for dismissing the s. 11(b) application.

[6] The appellant contends that this chronology establishes a reasonable apprehension of bias in two respects.

[7] First, the appellant submits that the trial judge should not have heard evidence from the main Crown witness (the afternoon of the first trial day) before making her s. 11(b) ruling (the start of the second trial day). The appellant says that this chronology exposed the trial judge to critical pieces of the Crown case and this may have influenced her s. 11(b) ruling.

[8] Second, the fact that the trial judge delivered her reasons for the s. 11(b) ruling 15 months after the application, and after hearing two more days of evidence, suggests again that her s. 11(b) ruling may have been tainted by the evidence she heard.

[9] We do not accept these submissions. An allegation of reasonable apprehension of bias should not be made lightly. That is because, as McLachlin C.J. said in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, at para. 22:

> There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with *cogent evidence* showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.
>
> [Emphasis added.]

[10] In our view, the appellant's submissions on this issue do not come close to the "cogent evidence" required by *Cojocaru*.

[11] In most cases, a trial judge makes her s. 11(b) ruling before any evidence is called. However, in light of the exceptionally busy dockets in provincial courts, we cannot say this practice must be an invariable one.

[12] In this case, the trial judge indicated that she was inclined to hear from the first witness, after indicating that she would reserve her decision on the s. 11(b) application. This witness had travelled to Australia rather than attend on an earlier trial date, and was the subject of a material witness warrant. He was present when argument was completed on the s. 11(b) application. Crown counsel indicated that he was content to proceed with the evidence of the first witness that afternoon. Defence counsel was silent. The trial judge's decision to hear a few hours of evidence from this witness before she formally dismissed the s. 11(b) application the next morning does not give rise to a reasonable apprehension of bias. There is nothing in the ruling on that application to suggest that it was affected by the evidence heard before the application was dismissed.

[13] Nor does the fact that the s. 11(b) ruling was delivered 15 months later once the trial had resumed raise a bias concern. During a trial, rulings with reasons to follow is a common and necessary practice. The reasons on the s. 11(b) application in this case are very comprehensive and address carefully and in detail the submissions that the parties, especially the appellant, made at the application hearing. There is not even a hint that the ruling was coloured by the

evidence heard between the day she announced her ruling (the second trial day) and the day she delivered her reasons.

[14] On the sentence appeal, the appellant challenges only the restitution portion of the sentence; she says that the trial judge did not consider her ability to pay, contrary to decisions of this court, including *R. v. Biegus* (1999), 141 C.C.C. (3d) 245 and *R. v. Castro*, 2010 ONCA 718.

[15] We do not accept this submission. There is no doubt that the trial judge was alive to the issue of the appellant's ability to pay a restitution order. During the sentence hearing, the trial judge explored this issue through several questions directed at defence counsel. Moreover, in her reasons for sentence, the trial judge recorded:

> She reports that she currently has no source of income, other than casual remuneration for working for Mr. Gonsalves, the father of her son, and Mr. Disotti, her current common-law spouse. She reports that she has no savings.

[16] The conviction and sentence appeals are dismissed.

"J.C. MacPherson J.A."

"M. Tulloch J.A."

"G. Pardu J.A."