COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Sabir, 2018 ONCA 912
DATE: 20181114
DOCKET: C63563

Strathy C.J.O., Nordheimer J.A. and McKinnon J. (*ad hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

Belal Sabir

Appellant

Boris Bytensky, for the appellant

Caitlin Sharawy, for the respondent

Heard: October 16, 2018

On appeal from the conviction entered on September 22, 2016 and the sentence imposed on March 27, 2017 by Justice Johanne Morissette of the Superior Court of Justice, sitting without a jury.

Strathy C.J.O.:

Introduction

[1] The appellant appeals his convictions for criminal harassment (count 1), mischief under $5,000 (count 2), possession of a weapon for a purpose dangerous to the public peace (count 3), and the use of an imitation firearm in the commission of an offence (count 4). He also seeks leave to appeal his sentence of 18 months' custody and two years' probation.

[2] For the reasons that follow, I would allow the appeal from the convictions on the weapons offences and would order a new trial on those counts. In the circumstances of this case, the trial judge did not discharge the heavy burden of providing meaningful assistance to the unrepresented accused.

[3] I would grant leave to appeal sentence and would allow the sentence appeal in part.

Facts

[4] The appellant and the complainant were co-workers. They did not get along. The complainant had spoken to her manager about a series of incidents in the workplace involving the appellant's threatening words and conduct that had made her very uncomfortable.

[5] In the early morning of August 21, 2014, the complainant left her boyfriend's house and got into her car to drive home. She noted the appellant watching her from his own car, a black Volkswagen Golf. The complainant's boyfriend testified

to seeing a black Volkswagen on the street as the complainant was leaving his home. He did not observe who was inside the vehicle.

[6] As the complainant began to drive away, she saw the appellant get something out of his trunk and then follow her in his car. He continued to follow her car, accelerating and decelerating at the same pace as she did. On two occasions, he came alongside her car, as if to force her off the road.

[7] At some point, the complainant's driver-side window shattered. The appellant made a U-turn in front of her and drove away. She called the police.

[8] Two officers, P.C. Lucas and Sgt. Gilmore, responded to her call. The complainant was visibly distraught. They examined the vehicle and noted a small round "divot" near the top of her shattered window, which was held in place by the tinting film. They suspected that the damage was caused by a projectile, possibly a bullet. The complainant identified the accused as the individual who had been following her in his vehicle.

[9] Another officer, P.C. Bollman, went to the appellant's residence. Although it was the middle of the night, he found the appellant inside his garage, with the door open. He arrested the appellant for "property damage and criminal harassment" and read the appellant his rights. The arrest took place without incident.

[10] Sgt. Gilmore arrived at the appellant's residence as P.C. Bollman was effecting the arrest. He observed a Nissan vehicle parked outside the appellant's

residence. The rear windshield was shattered and had a small hole in it, similar to the damage to the complainant's vehicle.

[11] Sgt. Gilmore questioned the appellant about what had happened to the Nissan. The appellant said that it was being sent for salvage and that he had shot out the back window with his BB gun. Sgt. Gilmore asked him where the gun was. The appellant replied that it was in the trunk of his Volkswagen.

[12] Sgt. Gilmore informed the appellant that they would tow his car and get a warrant to search it. The appellant allegedly agreed to let them search the vehicle and signed a "Consent to Search" form, permitting them to do so. The form stated that the purpose of the search was "to assist in an investigation of criminal harassment". The vehicle was searched and a loaded BB gun was seized from the trunk. The appellant was then charged with the firearms offences.

[13] About three months prior to trial, the appellant was provided with a memorandum that is prepared for unrepresented accused persons to assist them with criminal trial procedure. The actual document was not part of the record before us.

[14] For the trial, counsel was appointed to cross-examine the complainant pursuant to s. 486.3 of the *Criminal Code*. The appellant otherwise conducted his own defence. He was articulate and had a reasonable appreciation of the trial issues, as well as of trial procedure and evidence.

Trial Judge's Reasons

[15] The trial judge accepted the complainant's evidence identifying the appellant as the person who had followed her in his car. This evidence was corroborated by the observations of the complainant's boyfriend. The trial judge found that the appellant's conduct while following the complainant in his vehicle amounted to criminal harassment.

[16] She also found that the BB gun seized from the appellant's vehicle was used for a purpose dangerous to the public peace, to threaten and intimidate the complainant in furtherance of the criminal harassment, and was used to cause damage to the complainant's vehicle in an amount less than $5,000.

[17] The trial judge accepted a joint submission and imposed a custodial sentence of 18 months.

Analysis

A. CONVICTION APPEAL

[18] It is well-settled that there is a heavy onus on a trial judge to assist a self-represented accused to ensure the fairness of the trial: *R. v. Tran* (2001), 55 O.R. (3d) 161 (C.A.), at paras. 22-27; *R. v. Dimmock* (1996), 47 C.R. (4th) 120 (B.C.C.A.), at para. 20. The degree of assistance required depends on the circumstances of the case and those of the particular accused: *R. v. Breton*, 2018 ONCA 753, at para. 13. The appellant submits that, in the instant case, this heavy

onus was not met because: (1) the trial judge failed to conduct a voluntariness *voir dire* in relation to the statements made by the appellant to Sgt. Gilmore following his arrest; (2) the judge failed to inquire into potential *Charter* breaches; and (3) the judge misinformed the appellant concerning his right to testify.

(1) The Statements

[19] The Crown did not adduce evidence of the appellant's statements to the police through the evidence of P.C. Bollman, who had arrested him for mischief and criminal harassment. In the Crown's examination of P.C. Bollman, the Crown told the officer that she was not going to ask him anything about what the appellant may have said to him.

[20] However, in the course of the appellant's cross-examination of P.C. Bollman, the following exchange took place with respect to the officer's observations of the Nissan:

> Q. [by the appellant]: And did you ask the accused what happened to the vehicle?
>
> A. I did.
>
> Q. What did he say?
>
> A. Again, I cannot provide …
>
> The Crown: Well, he …
>
> The Court: No. That is fair. That is the accused.
>
> The Witness [P.C. Bollman]: I can answer that?

> The Crown: Yes. You can because he [the appellant] is asking.
>
> A. Yeah. I recall you saying that you shot it out with a BB gun.

[21] In examination-in-chief by the Crown, the next witness, Sgt. Gilmore, was asked about statements made by the appellant in response to questioning about the Nissan. He responded:

> … I asked him what had happened to that vehicle [the Nissan], and he told me it was going to the junk yard so he shot out the back window with his BB gun. I then asked him where his BB gun was at the time and he indicated to me that it was parked in the trunk of his Volkswagen and he further stated [the location of the vehicle].

[22] The appellant submits that the statements made to Sgt. Gilmore regarding the Nissan and the BB gun were important pieces of the Crown's case against him. He submits that where the Crown seeks to introduce evidence of a statement made by an accused to a person in authority, voluntariness of the statement must be established beyond a reasonable doubt. The trial judge did not turn her mind to the issue of the voluntariness of these statements. There was nothing in the record to suggest that the appellant gave an informed waiver of his right to a voluntariness *voir dire*.

[23] The Crown submits that the absence of a voluntariness *voir dire* did not render the trial unfair for two reasons. First, it was the appellant who initially elicited the statements from P.C. Bollman in cross-examination. Second, there was nothing in the record to suggest that the statements were not voluntary.

[24] As the Supreme Court explained in *R. v. Park*, [1981] 2 S.C.R. 64, at p. 73, there is no particular wording or formula required to communicate an informed waiver. However, the waiver must be express. “The question is: Does the accused indeed waive the requirement of a *voir dire* and admit that the statement is voluntary and admissible in evidence?”: *R. v. Park*, at p. 74. In the context of a waiver made by defence counsel, the court stated that the trial judge must be “satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*”: at p. 73. The onus on a trial judge with respect to voluntariness is high, even where an accused is represented by counsel. As the Supreme Court noted in *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 41: “The trial judge has a duty ‘to conduct the trial judicially quite apart from lapses of counsel’: see *R. v. Sweezey* (1974), 20 C.C.C. (2d) 400 (Ont. C.A.), at p. 417. This includes the duty to hold a *voir dire* whenever the prosecution seeks to adduce a statement of the accused made to a person in authority”.

[25] The decision of the British Columbia Court of Appeal in *R. v. Dimmock* is instructive on the issue of an informed waiver in the case of an unrepresented accused. In *Dimmock*, a new trial was ordered because the trial judge did not intervene to hold a *voir dire* on the admissibility of certain statements made by the accused to police, or obtain the accused’s informed waiver. The court concluded that despite the trial judge explicitly asking the accused whether the statements were voluntary and free of any inducement or threat, it could not be established

based on these exchanges that the accused understood the issues and provided informed consent: at para. 22.

[26] In the circumstances of this case, the record does not suggest that the appellant understood the purpose and consequences of a voluntariness *voir dire*, and made an informed decision to waive his right to a *voir dire*. Nor can it be said that, had the trial judge raised the issue of voluntariness with the appellant, the appellant would have proceeded in the same manner.

[27] On the second point raised by the Crown, the case law makes clear that the voluntariness requirement extends to all statements made by an accused to a person in authority, even if the statement appears to be "obviously voluntary" or "volunteered": per Dickson J. in *Erven v. The Queen*, [1979] 1 S.C.R. 926. Whether or not the statement is actually voluntary is a substantive issue to be determined in the *voir dire* itself, not on the threshold issue of whether a *voir dire* is required.

[28] When the appellant indicated his intention to adduce evidence of the content of his statements, the trial judge was required to hold a *voir dire* into the admissibility of the statements, in the absence of an informed waiver. In the circumstances of this case, she was required to inform the appellant of the purpose of a voluntariness *voir dire*, that he had a right to waive a *voir dire*, and the consequences of so doing. The appellant's response to this information may have required a more detailed explanation of the *voir dire* process, including evidence to be adduced by each party and the burden of proof.

[29] It is unnecessary to consider what else may have been required to assist the appellant in that regard. In the absence of an informed waiver, the failure to conduct a *voir dire* vitiates the conviction: *R. v. Park*, at pp. 69-70. The appellant's statements were central to the discovery of the firearm, as I describe below.

(2) The Potential *Charter* Breaches

[30] P.C. Bollman initially arrested the appellant for "criminal harassment and property damage". While P.C. Bollman likely suspected, as a result of information received over the police radio, that a firearm had been shot at the complainant's car window, this was not communicated to the appellant at the time of his arrest. The appellant was read his rights to counsel and he stated that he did not have a lawyer.

[31] Observation of the damage to the window of the Nissan led Sgt. Gilmore to conclude that the damage was consistent with the damage to the complainant's vehicle. Further questioning of the appellant following his arrest led to the disclosure that he had used a BB gun to shoot the window of the Nissan, and the location of the BB gun in the trunk of the Volkswagen.

[32] The extent of the appellant's jeopardy had changed after his reference to the BB gun and his connection to the shot-out Nissan. There was sufficient evidence of a potential breach of the appellant's s. 8 and s. 10 *Charter* rights to require the trial judge to raise the issues on her own motion, to invite submissions, and to enter

into an inquiry. In *R. v Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 113, this court stated:

> The onus extends, at least can extend, to an obligation on the trial judge to raise *Charter* issues on the judge's own motion where the accused is self-represented: *R. v. Travers*, 2001 NSCA 71, 154 C.C.C. (3d) 426 (N.S. C.A.), at para. 36. This is not to say, however, that this specific obligation becomes engaged on the mere scent or intimation of a possible *Charter* infringement: *Travers*, at para. 40. But where there is admissible uncontradicted evidence of a relevant *Charter* breach, the trial judge has an obligation to raise the issue, invite submissions and enter upon an inquiry into the infringement and its consequences: *Travers*, at paras. 36, 40; *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.), at p. 372.

[33] Section 10(a) of the *Charter* protects the right to be promptly informed of the reasons for arrest. As this court stated in *R. v. Roberts*, 2018 ONCA 411, 360 C.C.C. (3d) 444, at para. 78, this requires “information that is sufficiently clear and simple to enable [the accused] to understand the reason for their detention and the extent of their jeopardy.” See also *R. v. Nguyen*, 2008 ONCA 49, 231 C.C.C. (3d) 541, at para. 20. The testimony of the arresting officers in this case suggests that, despite their suspicion of a firearm being involved in the commission of the offence, and that suspicion being crystallized upon the appellant making statements about the BB gun and the Nissan, the appellant was not promptly informed about his potential jeopardy related to the firearms offences. This was sufficient evidence to trigger an inquiry into a potential s. 10 *Charter* breach.

[34] With respect to s. 8, a consent to search requires that the Crown demonstrate on a balance of probabilities that the consent was fully informed. This court in *R. v. Wills* (1992), 70 C.C.C. (3d) 529, outlined a number of factors required to establish valid consent to a search. Among these factors is a requirement that the individual giving consent be aware of the potential consequences of giving the consent: at p. 546. In other words, "[t]he person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation" including "the nature of the charge or potential charge which he or she may face": at p. 546. In *Wills*, the court found that the consent given by the accused to a breath test was not a valid waiver of his s. 8 rights because he was not made sufficiently aware of his potential jeopardy and the potential consequences of consenting to the search. See also *R. v. Borden*, [1994] 3 S.C.R. 145, at p. 162.

[35] At trial, Sgt. Gilmore testified that he explained to the appellant the mechanics of providing a consent to search – i.e. that it was voluntary and revocable at any time. However, the balance of the evidence before the trial judge was that the officers had not informed the appellant of the potential firearms charges. As noted above, the statements regarding the BB gun and Nissan changed the extent of the appellant's jeopardy. The consent to search form referenced only an investigation into "criminal harassment". Taken together, this represented sufficient evidence that the consent provided by the appellant may not

have been fully informed such that an inquiry into the s. 8 *Charter* issue was necessary.

[36] On this record, there was an objective basis upon which to trigger the trial judge's obligation to conduct an inquiry into voluntariness and *Charter* issues. The trial judge erred in failing to do so.

[37] The statements made by the appellant in relation to the BB gun and the Nissan provided the critical foundation for the firearms convictions and for the conviction for mischief. I would accordingly allow the appeal in relation to counts 2, 3 and 4.

(3) The Right to Testify

[38] The appellant asserts that the trial judge, prompted by statements made by the Crown, left the appellant with the impression that if he testified in his own defence, he had to testify first, before any other witnesses he called. He further asserts that the trial judge failed to correct a subsequent Crown suggestion that if the appellant testified after other witnesses he called, the court would be entitled to draw an adverse inference from that fact.

[39] The court has no authority to direct an accused person to call witnesses in any particular order or to give evidence before any other witness: *R. v. Angelantoni* (1975), 28 C.C.C. (2d) 179 (Ont. C.A.), at p. 183. Nor, quite obviously, is it appropriate to suggest that an adverse inference will be drawn from the failure of

the accused to testify first: *R. v. Smuk* (1971), 3 C.C.C. (2d) 457 (B.C.C.A.), at p. 462.

[40] In the circumstances of this case, a review of the record indicates the appellant understood that he had a right to testify, understood that he was not required to testify first, and made it clear that he had no intention of giving evidence.

[41] I am satisfied, therefore, that any error made by the trial judge regarding the right to testify did not deprive the appellant of a fair trial.

[42] For these reasons, I would dismiss the appeal in relation to count 1.

B. SENTENCE APPEAL

[43] The appellant submits that, in view of his youth and the absence of previous offences, if the firearms and mischief convictions are set aside, the sentence for criminal harassment should be reduced to time served (34 days), plus probation, without further ancillary orders. The Crown submits that the offence of criminal harassment is serious, even absent the aggravating aspect of the firearm, and proposes a sentence of 8 to 12 months.

[44] I agree with the Crown that, even without the discovery of the firearm, there was sufficient evidence of the appellant's identity and of his manner of driving to support the conviction for criminal harassment.

[45] I also agree with the Crown that, although the appellant is a youthful first offender, the principles of denunciation and general and specific deterrence call for

a custodial sentence. As this court observed in *R. v. Bates* (2000), 134 O.A.C. 156 (C.A.), at paras 38, 42, criminal harassment is a serious offence and usually requires the court to send a message to the offender and the public that harassing conduct against innocent and vulnerable victims is not tolerated by society, and that such conduct must be deterred. The appellant's driving was both dangerous and threatening. The events had a serious impact on the complainant's well-being and sense of security.

[46] In *Bates*, at para. 37, the court made reference to the fact that the offence of criminal harassment was enacted to address concerns about escalating harassment against individuals: "[t]he purpose of the new section was to criminalize the threatening behaviour and to permit punishment of the offenders in an attempt to restrain their behaviour before it escalates to physical violence against the victims."

[47] As the Crown notes, the context of this case includes a history of intimidation, threats, and harassment in the workplace. The trial judge also noted in her sentencing reasons that the appellant did not appear to grasp the importance of acknowledging the harm to the complainant.

[48] In my view a custodial sentence of 6 months is appropriate.

Conclusions and Order

[49] For these reasons, I would allow the appeal, in part. I would set aside the convictions on counts 2, 3 and 4 and would order a new trial on those counts. I would grant leave to appeal sentence and allow the sentence appeal, in part. I would reduce the sentence of imprisonment imposed by the trial judge from 18 months to 6 months. I would set aside the order under s. 109 (lifetime weapons prohibition), but would keep in effect the other ancillary orders, including the term of probation.

Released: “GS” NOV 14 2018

“G.R. Strathy C.J.O.”
“I agree. I.V.B. Nordheimer J.A.”
“I agree. Colin McKinnon J. (*ad hoc*)”