COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bushiri, 2019 ONCA 797
DATE: 20191007
DOCKET: C64156

Watt, Huscroft and Jamal JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Glodi Bushiri

Appellant

Howard L. Krongold, for the appellant

Elena C. Middelkamp, for the respondent

Heard: August 21, 2019

On appeal from the conviction entered on September 28, 2016 by Justice Peter D. Griffiths of the Ontario Court of Justice.

Jamal J.A.:

Overview

[1] At common law, an accused who advances an alibi defence at trial must disclose the substance of that defence to the prosecution in sufficient time and with sufficient particularity to allow the authorities to investigate it before trial. When the accused does not do so, the trier of fact may draw an adverse inference when

weighing the alibi evidence. The courts have recognized this qualification of an accused's constitutional right to silence in order "to guard against surprise alibis [being] fabricated in the witness box which the prosecution is almost powerless to challenge"*: R. v. Cleghorn*, [1995] 3 S.C.R. 175, at para. 4; see also *R. v. Noble*, [1997] 1 S.C.R. 874, at paras. 111-13; *R. v. Wright*, 2009 ONCA 623, 98 O.R. (3d) 665, at paras. 18-20; and *R. v. Hill* (1995), 25 O.R. (3d) 97 (C.A.), at pp. 477-78.

[2] At issue in this appeal is whether the trial judge erred by drawing an adverse inference when weighing the appellant's alibi evidence because it was not disclosed on a timely basis and in disbelieving the explanation as to why it was not disclosed earlier.

[3] The appellant was convicted of several offences, the most serious of which was shooting a handgun at Mr. Jean Isralon on a residential street in Ottawa just after midday on November 18, 2015. The shot narrowly missed Mr. Isralon.

[4] Mr. Isralon had known the appellant for several years and identified him as the shooter from a photo line-up later that day. That evening the police contacted the appellant's first lawyer, who was not trial or appeal counsel, to advise that they had grounds to arrest the appellant. The appellant immediately turned himself in to the police and remained in custody until trial, almost a year later. At no point in this interval did the appellant or his lawyer mention to the authorities that he might have an alibi.

[5] Then, on the first day of trial, the appellant advised the Crown that he might be relying on an alibi defence. On the second day of trial, the appellant provided the Crown with notice of his alibi, his brother, who later testified that the appellant had been with him all day and therefore could not have been the shooter. The brother explained that he had not disclosed this to the authorities sooner because the appellant's first lawyer had repeatedly told him not to do so.

[6] The trial judge admitted the alibi evidence but gave it no weight, partly because of its late disclosure and partly because he found the brother's explanation for the late disclosure to be "simply not believable." Based on Mr. Isralon's evidence, the trial judge convicted the appellant.

[7] The appellant now appeals his conviction on the basis that the trial judge erred on both grounds for giving the alibi evidence no weight.

[8] As I will explain, I see no error in the trial judge's ruling and would dismiss the appeal. First, the appellant's alibi defence placed him elsewhere than the scene of the crime, and there was nothing in the facts of this case that would have put the Crown on notice of this. The trial judge was therefore entitled to draw an adverse inference when weighing the alibi evidence because of its late disclosure. Second, the trial judge was entitled to rely on his common sense and experience to disbelieve the explanation proffered by the appellant's brother for not disclosing this alibi evidence earlier.

Background Facts

(a) The prosecution's case

[9] At trial, Mr. Isralon testified in detail about how the appellant shot at him.

[10] On November 18, 2015, Mr. Isralon arrived at 955 Debra Avenue, unit 61 in Ottawa at about 11:00 a.m. This was the home of his former girlfriend and the mother of his two children.

[11] When the appellant — whom Mr. Isralon had known for several years — arrived about 90 minutes later, the two of them argued because Mr. Isralon believed that his former girlfriend was working for the appellant as a prostitute. The argument escalated into pushing and punching. At one point, Mr. Isralon picked up a knife, but he put it down when his former girlfriend told him to do so. The appellant then pulled out a handgun holstered in a sock and threatened to shoot Mr. Isralon and Mr. Isralon's former girlfriend.

[12] After briefly trying to hide behind his former girlfriend, Mr. Isralon ran outside, jumped into his car, and sped away. When he saw that the appellant was not chasing him, he turned around to drive home, even though this would take him past the house again. Mr. Isralon saw the appellant cross the road with another man. When the appellant saw Mr. Isralon, he shot at him, hitting his car, penetrating the windshield, and only narrowly missing him. Mr. Isralon stopped the

car at a restaurant and called the police just after 12:30 p.m. The police arrived and interviewed Mr. Isralon.

[13] Mr. Isralon's 911 call was played in court. The trial judge found that Mr. Isralon's demeanour on the call "supports his assertion that something serious had just happened." On the call, Mr. Isralon gave the police a detailed description of the appellant as the shooter, the appellant's address, his street name, "Shadow" (he did not know his real name), and the colour of his clothing, all of which turned out to be accurate.

[14] Later the same day, Mr. Isralon identified the appellant as the shooter from a photo line-up. The trial judge noted that "[t]his is not an instance of a mistaken identity. Isralon well knew the accused and had just been in an argument with him at the house. This was not so much an identification as a recognition."

[15] Mr. Isralon was subsequently threatened several times by others for reporting the appellant to the police. He complained to the police, but the threats continued.

[16] Fearing for his safety, by February 2016 Mr. Isralon provided sworn statements recanting his identification of the appellant as the shooter.

[17] In June 2016, Mr. Isralon attended the appellant's bail hearing, where the appellant's first lawyer gave the police Mr. Isralon's sworn statement that the appellant was not the shooter. The hearing was adjourned to allow the police to

investigate, and at that time Mr. Isralon explained to the police that he had recanted because of the threats.

[18] At trial, in September 2016, Mr. Isralon returned to his initial story that the appellant was the shooter and explained his reason for recanting. As a result, the appellant was also charged with obstructing justice by attempting to intimidate Mr. Isralon into recanting his accusation.

(b) The alibi evidence

[19] The appellant's brother, Mr. William Bushiri, testified for the defence. He, along with their mother, was one of the appellant's two sureties for unrelated charges. The appellant was subject to a house-arrest bail, the conditions of which required him to reside with his surety at William's address on Laurier Avenue West, Ottawa, and to remain in his residence, except for medical emergencies, to attend in court, meet with his lawyer, comply with a court order, or if otherwise with his surety.

[20] William's testimony was that, on November 18, 2015, their mother dropped off the appellant at William's apartment at about 9:00 a.m. and they largely remained there together until 8:00 p.m., when the appellant's lawyer picked him up for him to surrender to the police. Between 11:00 a.m. and 12:00 p.m. or 12:30 p.m., William and the appellant were watching the first half of a soccer game between the Democratic Republic of Congo (the "DRC"), where they were from,

and Rwanda at William's apartment. At 12:00 pm or 12:30 p.m. — around the time of the shooting, which was at about 12:30 p.m. — William and the appellant walked a few blocks to the apartment of another brother, Sylvain Bushiri, where they watched the second half of the game, before returning to William's apartment somewhere between 2:30 pm and 3:00 p.m.

[21] Thus, William's testimony was that, at the time of the shooting, the appellant was with him either walking to or at his brother Sylvain's apartment, and therefore he could not have been the shooter.

(c) The trial judge's ruling

[22] The trial judge addressed three points.

[23] First, the trial judge found that the alibi evidence did not raise a reasonable doubt that the appellant shot at Mr. Isralon, for the following reasons:

- The soccer match — a key memory trigger for William — was not between the DRC and Rwanda but rather between the DRC and Burundi. William's memory was therefore suspect.
- Since the day of the shooting, William had made no notes of what happened that day, even though he had taken a two-year police foundation course where he had learned the importance of keeping notes.
- While the alibi evidence was admissible, it was not entitled to any weight, partly because of its late disclosure and partly because William's explanation

for the late disclosure was not credible. The alibi defence was not disclosed properly until William testified in court, on September 8, 2016 — day three of a four-day trial. The written alibi notice, given to the Crown on the second day of trial, provided inadequate specifics for the police to investigate. The written alibi notice stated: “Please be advised that Glodi Bushiri has an alibi for the offence alleged to have been committed on November 18, 2015. Mr. Bushiri was with his surety William Bushiri on the date in question and did not attend at 955 Debra Ave.” The trial judge noted that, between the arrest on November 18 and the beginning of trial in September, there was no hint of an alibi, even though the accused was denied bail and in custody throughout that time.

- William’s explanation for why the alibi evidence was not disclosed earlier was “simply not believable.” William said he repeatedly told the appellant’s first lawyer — including on the night of the arrest and leading up to the bail hearing — that he could provide an alibi for the appellant, but the lawyer told him not to tell the police because it was not necessary, it would not help his brother, and the police would not do anything about it. The trial judge found that a defence lawyer knows the importance of timely disclosure of alibi evidence and he could not imagine a lawyer giving that advice, especially since the appellant’s first lawyer was very experienced.

[24] Second, the trial judge found that Mr. Isralon's evidence proved beyond a reasonable doubt that the appellant was the shooter. Mr. Isralon was "both believable and compelling" and testified in "vivid detail". The trial judge therefore convicted the appellant of the shooting offences and breach of his bail conditions.

[25] Finally, the trial judge was not satisfied beyond a reasonable doubt that the appellant was personally behind the threats to dissuade Mr. Isralon from testifying, and therefore acquitted him of obstructing justice.

Issues

[26] The appellant claims that the trial judge erred by (1) drawing an adverse inference when weighing the appellant's alibi evidence because of its late disclosure; and (2) disbelieving his brother's explanation for why the alibi evidence was not disclosed earlier.

Analysis

(a) Did the trial judge err in drawing an adverse inference when weighing the appellant's alibi evidence because of its late disclosure?

[27] The appellant's first ground of appeal is that the trial judge erred in law by drawing an adverse inference when weighing the appellant's alibi evidence due to its late disclosure because, contrary to his trial counsel's position, no alibi notice was required on the facts of this case.

[28] The appellant says that the alibi notice rule must be applied purposively, and that where the rule's purpose is not engaged, no alibi notice is required. The purpose of an alibi notice is to guard against a surprise alibi being fabricated in the witness box, which the prosecution is then effectively left powerless to investigate or dispute; but where the Crown could not have been surprised by the alibi defence, and thus was already in a position to investigate it, no alibi notice is required, and hence no adverse inference is permissible when weighing the alibi evidence, even if the alibi is not disclosed promptly.

[29] Applying these principles to this case, the appellant says that the Crown could not have been surprised by the appellant's alibi defence: in addition to the weapons offences, the appellant pleaded not guilty to breaching his house-arrest bail conditions, and thus impliedly claimed to have been with his surety at the time of the shooting, which was what his alibi witness, William, later testified at trial. Thus, no alibi notice was required. And because it was always reasonably open to the Crown to investigate the alibi, the trial judge erred by drawing an adverse inference when weighing the alibi evidence.

[30] I do not accept the appellant's argument.

[31] The relevant legal principles are not in dispute.

[32] "Alibi" is Latin for "elsewhere". It is settled that "[w]here an accused advances an alibi defence, he claims that as he was elsewhere he could not have

committed the crime alleged. The alibi defence moves the factual focus from the facts alleged by the Crown to an entirely different factual scenario. But for the alibi defence, the factual scenario introduced by the alibi has no relevance to the Crown's allegation": *Wright*, at para. 19.

[33] Put another way, "[a]libi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance": *Cleghorn*, at para. 22, citing R.N. Gooderson, *Alibi* (London: Heinemann Educational Books, 1977), at p. 30; *Wright*, at para. 19.

[34] Where there is not timely disclosure of an alibi defence, the adverse inference when weighing alibi evidence that is permitted, but not required, is said to be a rule of expediency, given "the risk of fabrication and the Crown's inability to effectively challenge alibi defences revealed long after the relevant events occurred": *Wright*, at paras. 19-20. But the adverse inference "can be justified only where the rationale for that qualification [of the right to silence] actually operates. Thus, if the alibi defence is disclosed in time to permit meaningful investigation of the defence, there are can be no justification for the [adverse inference]": *Wright,* at para. 20, citing *R. v. Hogan* (1982), 2 C.C.C. (3d) 557 (Ont. C.A.), at p. 566, leave to appeal to S.C.C. refused, 51 N.R. 154 (note), and *Cleghorn*, at paras. 3-5.

[35] In this case, it is not disputed that the appellant did not make timely disclosure of his alibi defence: he disclosed it only on the second day of trial, almost a year after the shooting. At that time, the appellant's trial counsel advised the court that he had been retained only a month before trial and conceded that "under normal circumstances of course such [an alibi] notice would be filed well in advance".

[36] The operative question is thus: did the Crown require disclosure of the appellant's alibi defence sooner, in order to effectively investigate and respond to the defence actually advanced? In my view, it did.

[37] The focus of the facts alleged by the Crown was that the appellant shot at Mr. Israelon outside 955 Debra Avenue in Ottawa. The Crown relied on the appellant's presence at the scene of the shooting to support both the various weapons charges and the charge of breach of the bail conditions.

[38] By contrast, the appellant's alibi defence was that he was elsewhere — either walking to or at his brother Sylvain's apartment — and therefore could not have been the shooter. This defence moved the factual focus from the facts alleged by the Crown (presence outside 955 Debra Avenue) to an entirely different factual scenario (en route to or at Sylvain's apartment). But for the alibi defence, the factual scenario introduced by the appellant's brother had no relevance to the Crown's allegation that the appellant was the shooter. In sum, the appellant's

defence was “entirely divorced from the main factual issues surrounding the *corpus delicti*”: *Cleghorn*, at para. 22; *Wright*, at para. 22.

[39] Here, nothing in the facts or circumstances of the offences alleged, or in the police investigation, would have suggested that the appellant might have been with one brother in transit to or at another brother’s apartment at the time of the shooting. The common-law alibi notice rule therefore required the appellant to provide timely disclosure of his alibi defence to permit the authorities to investigate it. Because the appellant did not do so, the trial judge was entitled to give his alibi evidence less weight.

[40] The appellant nevertheless asserts in his factum that the “the *corpus delicti* of this prosecution included not only the Appellant’s *presence* at the scene of the shooting, but also his *absence* from his brother’s apartment” (emphasis in original). As such, the appellant asserts that the Crown could not have been surprised by a defence that sought to rebut one of the elements that the Crown set out to prove as part of its case.

[41] I disagree. The Crown was not required to prove a negative — the appellant’s absence from his brother’s apartment. It was required to prove beyond a reasonable doubt that the appellant was the shooter, proof of which would inevitably establish the breach of several of the bail conditions beyond a reasonable doubt. This is exactly what the Crown set out to do.

[42] Moreover, the appellant's not-guilty plea to breach of his bail conditions did not sufficiently put the Crown on notice of his alibi defence, that he was with his brother William either walking to or at his brother Sylvain's apartment. The appellant's bail conditions permitted him to be in any number of places, with or without William: at William's apartment with or without William, to be with his other surety (his mother), or to be at any number of other locations for medical emergencies, to attend in court, meet with his lawyer, or comply with a court order. On the facts of this case, it cannot be said that the appellant's not-guilty plea put the Crown sufficiently on notice of his undisclosed alibi defence.

[43] Lastly, the cases cited by the appellant, which are examples where no alibi notice was required on the facts of those cases, are distinguishable.

[44] In *R. v. Mahoney* (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), at paras. 18-21, the court found that the police were aware of a witness who was crucial for the accused's alibi defence and had called that witness as part of its case at trial. In those circumstances, the court held that where the Crown's witness was available to it at such an early moment, the Crown had notice of the accused's alibi defence in sufficient time to allow the police to test it. As such, no alibi notice was required. In this case, by contrast, the prosecution had no reason to believe that the appellant's brother's evidence was relevant to the factual scenario advanced by the Crown.

[45] Similarly, in *Wright*, the accused's defence came from an individual who, on the Crown's own evidence, was directly involved in the events leading up to the crime. On those facts, this court held that "[t]he prosecution did not need advance notice from the defence to appreciate that [the individual's] version of events was relevant to its case against the [accused]": at para. 23. In any event, the court held that the defence was not properly characterized as an alibi defence as it did not involve placing the accused elsewhere than the crime, but rather was "an admission of some involvement in the relevant events coupled with a denial of any involvement in the crimes": at para. 22. In this case, by contrast, the appellant did rely on a true alibi defence, and the Crown had no prior reason to believe the facts relied on for that defence were relevant to the facts advanced by the Crown.

[46] For these reasons, I conclude that it was open to the trial judge to draw an adverse inference when weighing the appellant's alibi evidence.

(b) Did the trial judge err in rejecting the explanation for why the alibi defence was not disclosed earlier?

[47] The appellant's second ground of appeal is that the trial judge erred in rejecting the explanation proffered by the appellant's brother, William, for not disclosing the alibi earlier.

[48] The appellant argues that William's uncontradicted evidence was that the appellant's first lawyer repeatedly told William not to disclose the alibi evidence to the police. The appellant says that the trial judge erred in finding that, in the

circumstances of this case, it was “simply unbelievable” that “very experienced counsel” such as the appellant’s first lawyer would advise William not to tell the police about the alibi and that he could not “imagine the lawyer giving that advice.” The appellant further argues that his first lawyer may have been wrong in his advice, as even competent counsel can err, and there may have been several legitimate strategic reasons why counsel discouraged William from disclosing the alibi evidence to the police.

[49] I do not accept the appellant’s argument.

[50] An appeal court must defer to the credibility findings of a trial judge, absent palpable and overriding error. Such deference recognizes the special position of the trier of fact on matters of credibility, including the advantage enjoyed by the trial judge of seeing and hearing the evidence of witnesses. An appeal court cannot intervene simply because it has a difference of opinion with the trial judge: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10; *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at p. 131; and *R. v. Canavan*, 2019 ONCA 567, at para. 36.

[51] Here, it was open to the appellant to try to explain why his alibi evidence was not disclosed earlier, but equally it was open to the trial judge to reject that explanation. The trial judge was entitled to disbelieve William’s assertion that the appellant’s first lawyer repeatedly told him not to disclose the alibi evidence to the police, and to thereby let his innocent brother languish in custody for 295 days.

[52] Nor, in the circumstances of this case, was it erroneous for the trial judge to find that it was "simply unbelievable" that "very experienced counsel" would advise William not to tell the police about his alibi and that he could not "imagine the lawyer giving that advice." While trial judges must be wary of stereotypical reasoning (*R. v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, at paras. 5-7) and of second-guessing tactical decisions made by trial counsel (*R. v. Borde*, 2011 ONCA 534, 283 O.A.C. 181, at para. 21), they are nevertheless entitled to rely on their common sense and experience in making credibility findings (*R. v. R.D.S.*, [1997] 3 S.C.R. 484, at para. 129).

[53] Here, the trial judge's finding did not involve a stereotype. Nor did it involve second-guessing counsel's tactical decisions, as nothing else in the record suggests that the appellant's first lawyer made a tactical decision to refrain from disclosing the alibi evidence. To the contrary, the record shows that trial counsel thought that an alibi notice was required and would have disclosed it to the Crown sooner had he been retained earlier. In short, the trial judge relied on his common sense and experience to reject what was, on the facts of this case, an inherently implausible explanation for the late disclosure of the alibi evidence.

[54] In these circumstances, the trial judge was entitled to disbelieve William's evidence. I see no basis for this court to intervene.

Disposition

[55] I would dismiss the appeal.

Released: “DW” OCT 07, 2019

“M. Jamal J.A.”
“I agree. David Watt J.A.”
“I agree. Grant Huscroft J.A.”