COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Al-Enzi, 2020 ONCA 117
DATE: 20200213
DOCKET: C67122

Sharpe, MacPherson and Jamal JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Abdulaziz Al-Enzi

Appellant

Matthew Gourlay and Peter Grbac, for the appellant

Roger A. Pinnock, for the respondent

Heard: February 7, 2020

On appeal from the conviction entered on October 1, 2018 and the sentence imposed on January 15, 2019 by Justice Peter K. Doody of the Ontario Court of Justice, with reasons reported at 2018 ONCJ 679.

By the Court:

[1] At the conclusion of a trial before Doody J. of the Ontario Court of Justice, the appellant, Abdulaziz Al-Enzi, was convicted of assault with a weapon (particularized as a jailhouse shank), assault causing bodily harm, and aggravated assault. In accordance with *R. v. Kienapple*, [1975] 1 S.C.R. 729, the convictions for assault with a weapon and assault causing bodily harm were conditionally

stayed. The trial judge imposed a term of incarceration of 30 months, with 153 days deducted for pre-sentence custody. Mr. Al-Enzi appeals the conviction and sentence.

[2] On April 19, 2018, there was an altercation involving several inmates in the dayroom at the maximum security unit of the Ottawa-Carleton Detention Centre. The complainant was assaulted and suffered significant injuries.

[3] Two inmates, Houssine Ali and Eli Elenezi, testified that they had assaulted the complainant with short pencils grasped in their fists, which they had hidden under their clothes before the fight. No pencil or other weapon was recovered from the dayroom.

[4] The complainant, who suffered two cuts to his face, testified that he did not know who had cut him.

[5] Mr. Al-Enzi did not testify.

[6] Two security videos recorded the altercation. The footage shows Mr. Al-Enzi holding a white object in his right hand. He removed the white covering as he ran toward the complainant. He punched the complainant and drew his right hand across the complainant's left cheek from his mouth toward his ear. He then grabbed the complainant's head in an arm hold. His right hand then moved across the left side of the complainant's face.

[7] The fight stopped. Mr. Al-Enzi went to the nearby partially visible (on the security videos) washroom and bent down over the toilet and then straightened up.

[8] At the conclusion of the trial, the trial judge reserved his decision. Counsel agreed that he could review the video evidence as he prepared his judgment.

[9] When the trial judge looked again at the videos, he noticed that Mr. Ali had his fingers splayed just before punching the complainant. There did not appear to be a pencil in his hand.

[10] The trial judge also noticed that after Mr. Elenezi punched the complainant, he stood in front of the washroom door for about 50 seconds before the guards entered, despite testifying that if he had a pencil, he would have disposed of it as soon as possible after a fight.

[11] Counsel had not questioned these witnesses on these potential discrepancies.

[12] The trial judge wrote to counsel, requesting submissions on these points and inquiring whether the defence wanted to bring a motion to reopen the defence case.

[13] Court was reconvened and, ultimately, defence counsel brought a motion to reopen its case and recall Mr. Elenezi (Mr. Ali could not be found). The trial judge granted the motion.

[14] After being recalled, Mr. Elenezi testified that he did not have time to flush his pencil down the toilet. When pressed in cross-examination, he said that he did not flush it because he would have been seen on the videos. He had not said this in his original testimony or in his examination in chief when recalled.

[15] Mr. Elenezi testified that he took the pencil out of his prison jumpsuit and then put it back about nine seconds later, after he had punched the complainant. However, in cross-examination, the trial Crown suggested that the video evidence showed that he put his hand on the back of another inmate immediately after punching the complainant and his fingers were splayed. There was no pencil. In addition, the video showed that he punched the complainant but did not swing his hand across his chest in a horizontal motion, contrary to his testimony when recalled.

[16] The videos also showed that Mr. Elenezi and Mr. Al-Enzi punched the complainant almost 28 seconds after Mr. Ali punched him. Before Mr. Elenezi and Mr. Al-Enzi punched him, the complainant did not have blood on his face and chest. Nine seconds later, the complainant had blood on his face and chest.

[17] The trial judge found Mr. Al-Enzi guilty of the three charges set out above. He said that there was a “live issue as to whether Mr. Ali and Mr. Elenezi had pencils in their fists when they struck the complainant.”

[18] The trial judge said that Mr. Ali's evidence was not credible. The video evidence shows that his fingers were fully extended after he took his hand out of the waistband of his pants. He did not have a pencil. The trial judge accepted Mr. Elenezi's evidence that inmates dispose of weapons in the toilet as soon as possible after a fight so the guards cannot find them. The video evidence showed that Mr. Ali did not go into the washroom to dispose of the pencil despite having time to do so. Accordingly, Mr. Ali did not cause the injuries to the complainant's face.

[19] The trial judge said that he did not believe that Mr. Elenezi had a pencil. The video evidence showed that he did not have a pencil immediately after striking the complainant. He had ample time (about 50 seconds) to dispose of a pencil in the toilet before the guards arrived, but did not do so. The only reasonable conclusion is that Mr. Elenezi did not have a pencil.

[20] Having disbelieved Mr. Ali's and Mr. Elenezi's testimony, the trial judge determined, based on the video evidence relating to Mr. Al-Enzi set out above, that he was the person who attacked the complainant with a weapon and caused the facial injuries.

Conviction Appeal

[21] Mr. Al-Enzi contends that the trial judge made two errors with respect to permitting Mr. Elenezi to testify after the trial was over and while he was preparing his judgment.

[22] First, Mr. Al-Enzi submits that the trial judge erred by, on his own motion, inviting the defence to reopen the trial and then using the evidence tendered to convict him. In support of this position, Mr. Al-Enzi refers to the trial judge's letter to counsel and describes it as "tantamount to the trial judge recalling the witnesses himself."

[23] We do not accept this characterization of what the trial judge did. Once court reconvened after counsel had received the trial judge's letter, the trial judge made it clear ("I'm not proposing to call a witness"; "I do not, rather, intend to call a witness") that he was seeking both counsels' views on how to proceed, now that they knew that he had seen things in the video evidence that had not been addressed during the trial testimony and that were potentially significant in his assessment of the evidence and ultimate verdict. This led defence counsel to say:

> I understand that. I - I wouldn't be seeking to recall Mr. Elenezi but for the letter, I mean it wouldn't be something that I would have done otherwise. But I think that it is a defence application at this point and it's not – it's not something that is emanating from the Court. [Emphasis added.]

[24] Second, Mr. Al-Enzi asserts that, if the defence made a motion to reopen the trial, the trial judge erred by granting the motion. Mr. Al-Enzi says that the trial judge's decision to reopen the trial was not made in an *ex improviso* situation – i.e. circumstances arose that could not have been foreseen. In support of this submission, Mr. Al-Enzi points to what the trial judge said in his reasons for judgment:

> The videos were played many times during the trial, in both normal speed and in slow motion. All witnesses were given an opportunity to comment on and describe what they saw happening on the videos. The inmate witnesses were asked to explain what they were doing in the videos. Counsel played them during submissions and made submissions on what they showed.

[25] We are not persuaded by this submission. The leading case dealing with reopening a trial is *R. v. Hayward* (1993), 88 C.C.C. (3d) 193 (Ont. C.A.), wherein Doherty J.A. said, at para. 15:

> A trial judge sitting without a jury may permit the reopening of the evidence at any time before sentence is passed. The decision to permit either party to reopen its case and call further evidence is within the discretion of the trial judge, and where that discretion is exercised judicially an appellate court will not interfere. [Citations omitted.]

[26] In *Hayward*, the court enunciated several considerations that comprise the test for assessing whether a trial should be reopened. In the present case, the trial judge, explicitly and faithfully, applied the *Hayward* test and granted the defence

application to recall a witness. He exercised his discretion judicially and, in the interest of trial fairness, reopened the trial. He made an entirely reasonable decision.

[27] In oral submissions on appeal, counsel for Mr. Al-Enzi agreed that the trial judge wrote his letter to counsel in fairness to the defence. While we understand appellate counsel's submission that it would have been less of a problem if defence counsel had initiated the application to reopen the trial, we do not agree that this well-intentioned decision was prejudicial to Mr. Al-Enzi. The trial judge's letter did not suggest he had decided to reopen the trial and wanted counsel to prove him wrong. Quite the opposite. In his letter, the trial judge asked "to hear counsel whether I should grant [the defence] an opportunity to re-open the defence case to recall Mr. Ali and Mr. Elenezi to testify with respect to these points." It was open to defence counsel as a tactical decision not to bring an application to reopen the trial. Instead, he brought an application of his own accord. Asking for submissions is not the same as asking the defence to recall a witness.

Sentence Appeal

[28] Mr. Al-Enzi submits that the 30-month sentence imposed by the trial judge is unfit. He says that the trial judge erred by minimizing relevant contextual factors related to the incident, namely that this was an assault (i) committed in the context

of a multiparty jailhouse fight; (ii) in which the complainant participated; and (iii) the complainant's injuries were at the low end of the scale for aggravated assault.

[29] We disagree. The trial judge listed several serious aggravating factors – the assault occurred in a correctional facility where "inmates are entitled to serve their sentences or prepare for trial in an environment devoid of violence"; Mr. Al-Enzi had a criminal record, including prior offences of violence; Mr. Al-Enzi used a concealed weapon and attacked the complainant after he had already been assaulted by two other inmates ("piling-on"); and the assault left the complainant with two permanent facial scars. These factors, cumulatively, justified the sentence he imposed.

Disposition

[30] The appeal is dismissed.

Released: "RJS" FEB 13 2020

"Robert J. Sharpe J.A."
"J.C. MacPherson J.A."
"M. Jamal J.A."