COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Umeadi, 2023 ONCA 7
DATE: 20230105
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Tulloch, Lauwers and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Chibuzo Umeadi

Appellant

Maija Martin and Stephanie Brown, for the appellant

Marie Comiskey and Christina Malezis, for the respondent

Heard: June 23, 2022

On appeal from the convictions entered by Justice Gregory M. Mulligan of the Superior Court of Justice, sitting with a jury, dated August 13, 2018, and from the sentence imposed on October 25, 2018.

REASONS FOR DECISION

OVERVIEW

[1] The appellant appeals his convictions for importing heroin, possessing heroin for the purpose of trafficking, and possessing proceeds of crime over $5,000. On December 22, 2015, the Canada Border Services Agency intercepted a package that had been shipped from Cameroon. The package was addressed

to an “M. Shelia” and was to be delivered to “box 152” at a Pak Mail location in Barrie. The package contained 518.83 grams of heroin. As a result of the seizure, the Barrie Police Services organized a controlled delivery of the package to investigate and apprehend the parties involved with the shipment.

[2] On December 30, 2015, the package was ready to be picked up from the Pak Mail location. Using a camera, the police placed the store under observation. An undercover officer posing as a trainee employee worked at the front counter with Sue Szymanski, the manager of the store. The appellant briefly attended the store that afternoon but did not retrieve the package. Instead, he went to the house where he had been staying, at 7 Versailles Crescent. A few hours later, he returned to the store and retrieved the package. Shortly after leaving Pak Mail, the police attempted to arrest the appellant, but he dropped the package and fled. The police eventually caught up to the appellant and arrested him. The police also retrieved the package, which had been opened.

[3] The police then executed a search warrant at 7 Versailles Crescent. They found the following items in the appellant’s bedroom: $39,650 in a white paper bag, coloured ribbons and cloth-like material of the same type found inside the intercepted package, a working digital scale, a non-smartphone type cellphone, three driver’s licences bearing the appellant’s name and date of birth, and tax and bank documents bearing the appellant’s name.

[4] On January 5, 2016, a second package containing about a kilogram of heroin also arrived for box 152. It was addressed to a Yulia Petesh. The appellant was in custody at the time. This package was also seized by police.

[5] As a result of the two seizures, the appellant was charged with four offences. The charge relating to possession of the second package of heroin was subsequently withdrawn by the Crown.

ISSUES

[6] The appellant was tried by a judge sitting with a jury and was convicted of all three counts – importing heroin, possession for the purpose of trafficking, and possession of proceeds of crime. The trial judge sentenced the appellant to a global sentence of 12 years.

[7] On appeal, the appellant raises the following issues:

- The trial judge erred in refusing to order a mistrial because of the non-disclosure of potential alternate suspects.
- The trial judge failed to instruct the jury on the frailties of Ms. Szymanski's eyewitness identification evidence.
- The trial judge erred in allowing police officers to give opinion evidence about the appellant's behaviour and the guilt of the appellant.
- The trial judge failed to instruct the jury regarding how to approach evidence of post-offence conduct.

[8] The appellant also seeks leave to appeal his global sentence of 12 years imprisonment, which he says is unfit because of the trial judge's error in imposing consecutive sentences for the offences. He seeks a reduction of the sentence to 8 years.

[9] After oral argument we dismissed the appeals for reasons to follow. These are those reasons.[1]

ANALYSIS

I. CONVICTION APPEAL

Issue 1: Did the trial judge err by failing to declare a mistrial because of the non-disclosure of alternate suspects?

[10] As noted above, in January of 2016, a second package addressed to a Yulia Petesh arrived for box 152. It contained heroin. Ms. Szymanski testified that she had received a few phone calls and visits to Pak Mail by three Black men with accents who were looking for the second package addressed to box 152. She told the men that the package had been seized by the police and provided them with contact information for Officer Cowan. The men did not attend the Pak Mail location for the package after this interaction.

[11] During trial, at the end of her examination-in-chief by the Crown, the parties discovered that Officer Cowan's notes of Ms. Szymanski's communication to him

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[1] We did not call on the respondent to respond to any of the grounds of appeal.

about these men inquiring about the second package were not provided to the Crown and defence counsel.

[12] The Crown obtained additional disclosure of the police notes, which revealed that Ms. Szymanski had emailed Officer Cowan on January 26, 2016, regarding an individual who had requested access to box 152.

[13] As a result of this late disclosure, defence counsel brought a mistrial application and argued that his right to full answer and defence had been prejudiced. Specifically, he argued that the appellant was prejudiced because he could not investigate the other individuals, and that the disclosure of these notes may have affected the appellant's election of his mode of trial and the concessions made in the agreed statement of facts.

[14] The trial judge dismissed the mistrial application. The trial judge noted that defence counsel was aware that Ms. Szymanski had previously given evidence that she had received anonymous phone calls regarding the second package. Indeed, defence counsel had cross-examined Ms. Szymanski on this issue during the preliminary inquiry. The trial judge concluded that any prejudice could be remedied by providing defence counsel with additional preparation time to cross-examine Ms. Szymanski about these other men. To that end, the trial judge adjourned the cross-examination of Ms. Szymanski from August 1, 2018, to August 7, 2018. In addition, the trial judge permitted the Crown to withdraw

Count 3 from the indictment which specifically dealt with the second package, permitted the parties to amend the agreed statement of facts regarding the second package, and agreed to provide a limiting instruction. Importantly, the trial judge noted that defence counsel conceded that this additional disclosure "may well assist the defence in making full answer and defence".

[15] On appeal, the appellant renews his argument that the trial judge erred in refusing to order a mistrial because of the non-disclosure of potential alternate suspects. The appellant argues that the evidence of other people coming to the same post box was relevant to the appellant's knowledge of the package containing heroin and the remedy selected by the trial judge – an adjournment – provided no opportunity to investigate these other people.

[16] We do not accept this argument. A mistrial is a remedy of last resort. The trial judge is in the best position to determine whether a mistrial is a remedy that is warranted in all of the circumstances. As with any discretionary decision, the trial judge's determination that a mistrial is not warranted is entitled to deference unless it is clearly wrong or based on some erroneous principle: *R. v. G.(A.)*, 2015 ONCA 159, 124 O.R. (3d) 758, at paras. 50-52. In our view, given the alternative remedies provided by the trial judge, it was reasonable to conclude that the drastic remedy of mistrial was not necessary.

[17] From a practical perspective, it is not clear that any further investigation into these men was possible. Again, once Ms. Szymanski gave Officer Cowan's contact information to the men, they effectively vanished. As we see it, the best that defence counsel could have done under the circumstances was to point to these other men making inquiries about the second package in order to advance the appellant's position that he had no knowledge of the heroin in the package that he picked up – and that is what defence counsel did. Indeed, following the trial judge's ruling refusing a mistrial, defence counsel argued that he was entitled to explore the issue of this other package during the cross-examination of Ms. Szymanski, notwithstanding that the specific charge in relation to that package was withdrawn. The trial judge permitted defence counsel to explore these issues, and he did so in his cross-examination of Ms. Szymanski. In his closing, defence counsel also specifically argued that the men who visited Pak Mail for the second package in January generally matched the description of the appellant, and that this should give rise to a reasonable doubt. This only fortifies our conclusion that there is no basis to interfere with the decision of the trial judge that this late disclosure did not prejudice the appellant.

Issue 2: Did the trial judge err in failing to instruct the jury on the frailties of eyewitness identification evidence?

[18] As noted above, Ms. Szymanski was the manager of the Pak Mail location in Barrie. She was told about the plan for a controlled delivery of the first package,

including that an undercover officer would pose as an employee trainee during the delivery. On the morning of the scheduled delivery, Ms. Szymanski received a call from an unknown male with an “African” accent who asked whether a package had arrived for box 152. He said he would pick it up later that day.

[19] At trial, Ms. Szymanski testified that she recognized the appellant as the person who attended the Pak Mail location to pick up the package. She also testified that the appellant had previously opened box 152 and had picked up packages on three or four earlier occasions from the same box. He had also changed the box number from 107 to 152 about six months after opening box 107. Although Ms. Szymanski agreed on cross-examination that the photo identification that the appellant presented under the name M. Shelia to open the box did not look like him, she said that she recognized her regular customers and gave them packages even if they were addressed to the wrong box.

[20] The appellant submits that the trial judge failed to instruct the jury on the frailties of Ms. Szymanski’s eyewitness identification evidence. The appellant argues that eyewitness identification evidence is inherently unreliable, regardless of a witness’ confidence in their identification. The appellant points out that there were no instructions on the case-specific deficiencies in Ms. Szymanski’s identification, such as the fact that she failed to notice that the photograph on the driver’s licence on file did not match the appellant.

[21] The appellant argues that the issue is not the identification of who got the package, but the identity of the person who opened the mailbox, changed the number, and received several packages before December 30, 2015. According to the appellant, if the jury believed that the appellant opened the mailbox, they would believe that he would have done so using a false name which would have been an important piece of circumstantial evidence that the appellant knew there were drugs in the package.

[22] We agree with the appellant's submission that the jury ought to have been warned about the frailties of Ms. Szymanski's identification evidence in relation to her evidence that she had contact with the appellant prior to December 30, 2015. Although the Crown argues that the jury charge made it clear that the appellant did not concede that he was the person who had opened the box and had attended on previous occasions, this was not a substitute for a caution to the jury.

[23] The jury should have been told that there were several factors that could affect the reliability of Ms. Szymanski's evidence, and it was important for the trial judge to give a direction relating to the dangers of eyewitness identification evidence so that the jury could make its decision with the benefit of judicial experience about the challenges that eyewitness identification evidence can present: *R. v. Edwards*, 2022 ONCA 78, at para. 24. It was an error by the trial judge not to provide such a caution in the circumstances of this case. We do note, in fairness to the trial judge, no such instruction was requested by the defence.

[24] That said, having found an error, we agree with the Crown's argument that the curative proviso should apply. Even if the jury ought to have been warned about the dangers of Ms. Szymanski's eyewitness identification evidence in relation to any previous alleged contact prior to December 30, 2015, no substantial wrong or miscarriage of justice occurred.

[25] It was conceded that the appellant picked up the controlled delivery package on December 30, 2015, and accordingly there was no danger that Ms. Szymanski had misidentified the appellant as the person who had picked up that package. Further, her identification of the appellant was corroborated by the police officers who were observing the pickup through a camera. Thus, on the most critical evidence that grounded the conviction, there was no danger that Ms. Szymanski had erroneously identified the appellant.

[26] Further, the core issue at trial was not the identity of the appellant, but his knowledge of the contents of the package. There was overwhelming evidence of the appellant's guilt on the charge of importing heroin, possessing heroin for the purpose of trafficking, and possessing proceeds of crime. As the Supreme Court of Canada recognized in *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, the curative proviso applies where despite the seriousness of the error, the evidence against the accused is so overwhelming that any other verdict would have been impossible: at para. 34.

[27] Here, the appellant's behaviour before picking up the package, the discovery of cloth-like ribbons like those found within the controlled delivery package in the appellant's home, and the post-offence conduct, collectively provided strong circumstantial evidence. In our view, the evidence pointing to the guilt of the accused is so overwhelming that any verdict other than a conviction would be impossible. There was a large body of evidence that pointed to his knowledge of the heroin in the package that he picked up.

Issue 3: Did the trial judge err by permitting the Crown to lead opinion evidence from police officers?

[28] As noted above, during the execution of a search warrant at 7 Versailles Crescent, the police found several items in a bedroom including a digital scale for weighing items, $39,650 in cash, documents identifying the appellant, and a non-smartphone type cellphone in addition to the cellphone found on the appellant's person at the time of arrest. During the examination of three officers the Crown led the following evidence:

- That scales could be used by drug users to weigh the drugs to confirm the amount that they paid for and by drug traffickers to measure out the sale amount or to split the drugs into packets for sale.
- Officer Trude also testified that scales are of large significance because they lead investigators to believe they're dealing with drug traffickers.

- Officer Ford testified that in “most of [his] investigations” into drug traffickers, they seized multiple phones.
- That the non-smartphone type device is called a throwaway or “burner” phone.
- That cash is one of the main things to look for because drug trafficking is a cash business.
- Officer Ford testified that a normal heroin user would purchase 0.1 or 0.2 grams in his experience.

[29] The Crown also led evidence on the pattern of the appellant’s driving before he picked up the package at Pak Mail on December 30, 2015. The officers provided the following evidence:

- Officer Robb testified that the surveillance team observed that the Chevrolet Malibu driven by the appellant made several “unique turns” into parking lots near the Pak Mail location. On cross-examination, Officer Robb elaborated that the unique turns in this case involved the appellant’s car going in and out of a parking lot twice.
- In Officer Robb’s experience, these manoeuvres are called “heat checks” or counter-surveillance techniques, made by the driver to see if vehicles are following them.

- Officer Trude testified that in his experience, traffickers who suspect they are being followed will conduct different techniques to detect if they are being followed by the police. These include driving through parking lots or checking vehicles to see if police are in them. The appellant's actions were consistent with this behaviour.

[30] The appellant argues that the trial judge erred in allowing these officers to give non-expert opinion evidence about the behaviour of drug dealers as *indicia* of the appellant's guilt.

[31] We do not accept this submission. We begin with the observation that most of the testimony from the police officers about the evidence of scales, phones, and cash – or the manner of the appellant's driving was admissible factual evidence and not opinion evidence. The factual evidence was clearly relevant and probative to the central issue related at the trial whether the appellant knew what was inside the package he was picking up from Pak Mail.

[32] Even if some of the testimony entered the realm of opinion evidence, we are not persuaded, in the circumstances of this case, that it was an error for the trial judge to permit the officers to provide these opinions. Defence counsel at trial did not object to several questions from the Crown adducing the evidence outlined above. Instead, he used his cross-examination to advance the position that there were innocent explanations for the way the appellant was driving, for the phones,

scale, and the cash located in the appellant's bedroom. He also argued in his closing address to the jury that the Crown attempted to lead this evidence to detract from the real issue in the case – knowledge of the heroin in the package that the appellant picked up. In the end, he focused on asking the jury to accept other inferences from the cumulative effect of this evidence.

[33] Each of the officers' opinions were grounded in facts that were before the jury. These officers, given their experience in drug investigations, were testifying as to what they perceived when they made observations of the appellant's driving before he picked up the package. And they were able to explain what they seized, why, and the significance of the items.

[34] These very brief opinions did not feature prominently in the Crown's case against the appellant and the trial judge did not highlight any of this evidence in his charge. For example, at the request of defence counsel he only described the manner of the appellant's driving as "circuitous", instead of repeating the detailed evidence of the driving. More importantly, the trial judge reminded the jury that it was for the jury to make findings of fact. Therefore, in our view, there was no danger that these brief opinions would have misled the jury, took up undue consumption of time, or usurped the jury's fact-finding role: *R. v. Graat*, [1982] 2 S.C.R. 819, at p. 836.

[35] In light of our conclusion that there was no error in admitting this evidence, strictly speaking, it is unnecessary to consider the Crown's reliance on the proviso. However, even if these very brief opinions should have been excluded, there is only one rational conclusion that could be reached on the remaining evidence – that the appellant was aware that there was heroin in the package he retrieved from Pak Mail on December 30, 2015: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 54.

[36] Before leaving this issue, we remind Crown counsel that it is good practice, especially in a jury trial, to vet testimony from police officers regarding counter-surveillance techniques or opinions regarding the significance of items seized in advance with the trial judge. In these cases, a trial judge may have to determine whether the evidence is one of fact or opinion. The distinction between fact and opinion is not always clear. And if the trial judge determines that it is opinion, they may have to decide whether it is "lay opinion" evidence, or whether it is opinion evidence that can only be introduced through a properly qualified expert. Vetting these issues in advance of the testimony will give the trial judge time to rule on the admissibility of the evidence and craft any instructions that are warranted in the circumstances of the case: *Sekhon*, at para. 48 and *R. v. Jenkins*, 2018 ONSC 1165, at para. 11.

Issue 4: Did the trial judge err in failing to instruct the jury regarding their approach to evidence of post-offence conduct?

[37] The appellant argues that the Crown relied on the following items of evidence that should have attracted an instruction by the trial judge on how the jury was to approach evidence of post-offence conduct:

- The appellant did not return directly to his car after he picked up the package.
- The appellant was in the process of opening the package when he was approached by the police.
- The appellant fled from the police after he was told he was under arrest.
- The appellant attempted to discard the package.

[38] The Crown relied on the post-offence conduct to support an inference that the appellant knew that the package he was picking up contained heroin. Although the appellant acknowledges that post-offence conduct can provide circumstantial evidence to support an inference of guilt, he argues that juries must be instructed when this conduct is consistent with inferences other than guilt and must be told to consider alternative explanations.

[39] The appellant argues that the trial judge erred in not instructing the jury on how to approach this evidence, and accordingly, the jury was invited to accept this evidence without conducting a proper analysis of whether other inferences other than guilt arose from these facts.

[40] We reject this argument. Again, the instruction sought now on appeal was not requested by defence counsel during trial, and for good reason. If such an instruction was given, it would have only served to highlight the post-offence conduct. Anything the appellant did after retrieving the package – opening the package and running from police – was a type of circumstantial evidence to be treated logically, with common sense and experience. The trial judge's charge provided an instruction on how to approach circumstantial evidence and he correctly instructed the jury that their conclusions must be decided on the whole of the evidence.

[41] The trial judge's jury charge was functionally appropriate to the task, did not attract any objection from trial counsel, and caused no prejudice to the appellant.

SENTENCE APPEAL

II. THE REASONS FOR SENTENCE

[42] The jury returned guilty verdicts for importing heroin, possessing heroin for the purpose of trafficking, and possessing proceeds of crime over $5,000. The Crown submitted that a fit sentence would be in the 10-to-12-year range given the seriousness, quantity, and potential street value of the drugs involved. Defence counsel submitted that a sentence of 6 to 8 years would be appropriate. As well, defence counsel sought credit for time served prior to trial and sentencing, as well as the 40 months of house arrest.

[43] The trial judge considered the existence of mitigating factors: the appellant has no criminal record, has maintained employment since arriving in Canada, and is married. He also considered the aggravating factors, namely, that the appellant is not a young offender and that the crime seemed to have been motivated by greed since there was no evidence of the appellant having any addiction issues.

[44] Ultimately, the trial judge determined that a substantial penitentiary term is often warranted for offences involving heroin. He concluded that a global sentence of 12 years was appropriate, comprised of 8 years for importing heroin; 4 years for possessing heroin for the purpose of trafficking, to be served consecutively with the importing sentence; and 1 year for possessing proceeds of crime over $5,000, to be served concurrently with the importing sentence. After accounting for 440 days of credit, the remaining time to be served was 10 years, 9 months, and 15 days.

[45] The appellant submits that the offences were intertwined and linked in a manner that warranted concurrent sentences. Instead, the trial judge erred in imposing consecutive sentences for importing and possession for the purpose of trafficking heroin resulting in a global sentence that was unfit. We disagree.

[46] A trial judge is given considerable latitude to craft a sentence that is tailored to the offender and the offence. In a case involving multiple offences, the

determination of whether multiple offences should be consecutive or concurrent is entitled to deference: *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 46.

[47] The ultimate question on appeal is – when combined, is the sentence imposed by the trial judge unduly harsh or manifestly unfit? In our view, considering the circumstances of this case and the dangers of heroin, a global 12-year sentence for these offences was fit.

[48] The appellant played a significant role in importing half a kilogram of heroin from Cameroon to Canada. The heroin had a significant street value of $181,590.77 and the trial judge observed the devastating impact of the drug. While on the high end of a range of sentence identified by the jurisprudence, those who import and possess large amounts of heroin should expect to receive significant and exemplary sentences: *R. v. Sidhu*, 2009 ONCA 81, 94 O.R. (3d) 609, at paras. 14-15.

[49] Accordingly, while we would grant leave to appeal sentence, we would nonetheless dismiss the sentence appeal.

DISPOSITION

[50] As explained above, the appeals were dismissed at the conclusion of the oral hearing.

"M. Tulloch J.A."
"P. Lauwers J.A."
"S. Coroza J.A."