COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Heath, 2024 ONCA 309
DATE: 20240426
DOCKET: C68722

Fairburn A.C.J.O., Rouleau and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jason Heath

Appellant

Nathan J.S. Gorham, for the appellant

Howard Piafsky, for the respondent

Heard: October 30, 2023

On appeal from the conviction entered by Justice Steve A. Coroza of the Superior Court of Justice, sitting with a jury, on August 7, 2019.

Fairburn A.C.J.O.:

Overview

[1] There is no dispute that the appellant brought approximately 15 kilograms of cocaine in his carry-on luggage from Trinidad to Canada, the location of entry being Toronto Pearson International Airport. The central issue at his trial was

whether the appellant was acting under duress. The jury rejected duress beyond a reasonable doubt and found the appellant guilty of importing.

[2] This is an appeal from conviction. The appellant maintains that the trial judge erred in several respects in instructing the jury. Specifically, he argues that the trial judge erred in the instructions he delivered on demeanour evidence and the right to silence. As well, he says the trial judge should have corrected speculative theories advanced by the trial Crown in her closing to the jury.

[3] All of these claims are advanced for the first time on appeal.

[4] For the reasons that follow, I would dismiss the appeal.

Background Facts

[5] The appellant arrived at Pearson Airport with almost 15 kilograms of cocaine in his carry-on luggage. The value of that cocaine well exceeded half a million dollars. As I will explain, the appellant waited until he was in the secondary inspection area, to state that he did not know what was in it because some men in the Trinidad airport had threatened him in a washroom and placed something in the bag.

A. The Crown's Case

[6] After a ten-day stay in Trinidad, the appellant flew to Toronto on December 16, 2013. The appellant's plane arrived at a different gate from what had been originally scheduled. Accordingly, washrooms that would have been available to

the appellant upon his arrival, had the scheduled gate remained the same, were not available to him. I will come back to why this is important shortly.

[7] At the primary inspection area, the appellant provided his documents to the Border Services Officer (“BSO”). They engaged in a short communication and the BSO waived him through. The appellant said nothing to that BSO that would raise any concerns.

[8] From there, the appellant went down into the baggage hall. Close to the carousel where the baggage from the appellant’s flight was coming off, there was a BSO with a drug sniffing dog. A second BSO was acting as a “spotter”, meaning that he was watching for anything out of the norm, including people who leave the area in a possible attempt to avoid the drug dog. That is what the appellant did.

[9] The spotter saw the appellant look toward the BSO and his dog and then walk away from the carousel toward a money exchange booth. Once at the booth, the appellant turned around and looked in the direction of the BSO and dog. He exchanged $20 USD into Canadian currency and then returned to the carousel.

[10] Having caught his attention, the spotter alerted the BSO with the dog who then went close to the appellant. The dog indicated on the appellant’s carry-on bag. The appellant was then asked if he had been around any drugs, to which he responded that he had been around a friend who “smokes weed”. He was asked if he had drugs on him and he said no.

[11] The appellant was then sent to secondary inspection, where he met with another BSO. That secondary inspection BSO asked the appellant if he was carrying his own bags and whether he had packed them himself. He initially answered yes to both questions. When asked if he knew what was inside of them, the appellant claimed for the first time that an “Indian man” had approached him at the Trinidad airport, showed him a picture of his wife, threatened him, and tampered with his carry-on bag.

[12] The secondary inspection BSO opened the carry-on bag, and discovered a knapsack inside. She believed that there were narcotics in the bag and placed the appellant under arrest. She then tested the contents of the knapsack and it came back positive for cocaine.

[13] Importantly, that was not all of the evidence obtained. A pat-down search of the appellant also revealed a set of keys in his front pocket. The keys opened compartments in washrooms at the airport that would have been accessible to the appellant had his plane landed at the originally scheduled gate. While there was also a key that could have afforded access to a hiding spot in a washroom in the area where the appellant was ultimately forced to disembark from the plane, that washroom was out of service and inaccessible that day.

[14] The officer in charge of the investigation later learned that the police in Trinidad had uncovered evidence of an internal conspiracy at the Port of Spain airport in Trinidad, where the appellant flew out of. He received three videos of the appellant from that airport before he got on his plane. They were introduced into evidence.

B. The Appellant's Testimony

[15] The appellant testified that he arrived in Trinidad on December 6, 2013. He said that he was pursuing a business opportunity there, although he declared to local customs that he was there for a vacation. He did not book a place to stay before arriving.

[16] The appellant went to the club district on his first night in Trinidad. There, he met someone whom he knew: "Bads." It turns out that the appellant had been involved in a prior business venture with Bads in Jamaica. That venture had ended poorly, and Bads thought that the appellant owed him a large sum of money. Bads reminded the appellant of this debt.

[17] A day or two later, Bads called the appellant and asked for a meeting. Bads brought a man with a gun to the appellant's hotel and the three of them went to the appellant's room. There Bads told the appellant that there would be a way for him to pay Bads back. Bads and the man then left the hotel room.

[18] The night before his scheduled departure, the appellant received a call from Bads, who said that he was at the appellant's hotel. Bads came up to the appellant's room and told the appellant to take something for him on the plane when he left. When the appellant resisted, Bads told him that they would "fuck up [his] family" and it would be "lights out" if he did not assist.

[19] After the appellant cleared security at the airport the following day, someone approached him and said: "Bads boy, come into the fucking bathroom, now." Once in the washroom, the appellant says that his bag was emptied onto the floor. He was threatened with a gun. The man with the gun then showed the appellant a text he received of a picture of the appellant's wife holding their youngest daughter. The man told the appellant that if he did not cooperate, then they would kill his family.

[20] The appellant testified that at some point, he was given two keys. He was told that a girl would approach him once he was in Toronto.

[21] The men told him to go to the duty-free shop to buy something so he would look like a normal traveller. He followed that instruction and bought two bottles of Hennessy Pure White Cognac.

[22] The appellant testified that he felt that he had no option. He could not go to the authorities in Trinidad because he thought that Bads had too many connections. He also thought that he was being watched on the plane and after the plane had landed in Toronto. It was his fear of Bads and the threats to his family that kept him from approaching anyone and asking for help, including the BSO officers he encountered before reaching the secondary inspection area.

Analysis

[23] The appellant raises three alleged errors in the trial judge's charge to the jury, two of which involve what the jury was told, and one of which involves what the jury was not told.[1] In my view, none of the grounds can succeed.

A. Instructions on Demeanour Evidence

[24] The appellant argues that the trial judge erred by failing to instruct the jury that the observations that others made of the appellant before the drug dog indicated on his bag, and the opinions they expressed about why he was behaving in a certain way, were of no probative value. The appellant maintains that the appellant's behaviour before the drug dog indicated on his bag was ambiguous at best and could not support the inference that the Crown was asking to be drawn,

[1] In his factum, the appellant also challenged the instructions to the jury on the use of testimony he gave at a previous trial on the same charges, that ended in a mistrial. Appellant's counsel abandoned this ground of appeal at the start of the hearing in this matter.

that the appellant knew he had cocaine in his bag and was voluntarily importing it into Canada.

[25] The trial judge reviewed the evidence surrounding the appellant's behaviour while in the area waiting for his bag at the carousel. Specifically, he reminded the jury that around the time when the appellant saw the drug dog, he went to the currency exchange counter, but exchanged only $20 USD for Canadian currency. He did this while turning around and looking in the direction of the drug dog.

[26] The trial judge also reviewed the appellant's position on this point: that he was not avoiding the drug dog and had good reasons to exchange a small amount of funds, including to make a call and to have a little cash while visiting his mother. He only looked back to the carousel to see if his bag had arrived.

[27] The trial judge instructed the jury that they could consider how the appellant behaved both before and after the cocaine was discovered, along with all of the other evidence, in deciding if the Crown had proven the appellant's guilt.

[28] The jury was specifically instructed to disregard both the fact that the dog had indicated on the appellant's bag and the BSO's opinion that the appellant was behaving suspiciously. That evidence was provided only as a way of explaining why the appellant was approached and not to eclipse the jury's need to arrive at their own opinion on these issues. Specifically, the trial judge told the jury to "ignore any opinion that [the spotter BSO] may have given you as to the fact that Mr. Heath

was evading the dog or acting suspicious.… His opinion is irrelevant. It is your opinion that counts."

[29] The trial judge also instructed the jury that "perceptions of guilt based on demeanour are likely to depend on highly subjective impressions that may be difficult to communicate." The jury was also told that the BSO's observations and perceptions might have been inaccurate, and the probative value of the observations could consequently be "low."

[30] As well, the trial judge added that different people react differently to stressful situations, "especially when the stressful situation is precipitated by a situation which is entirely unprecedented for them." Here, the trial judge was clearly referring to the fact that if the appellant was telling the truth about what had happened at the airport in Trinidad, he would have been in a highly stressful situation. The jury should therefore not place too much weight upon his behaviour.

[31] The trial judge then reinforced the limited value of the evidence of the appellant's behaviour at the baggage carousel and that it would be "dangerous" to place too much weight upon how the jurors thought people should react in the appellant's situation.

[32] The trial judge concluded with the following observation:

> Mr. Heath explained that he needed money for exchange for use in Canada. He also explained that he was terrified and very nervous because he was waiting for a female to approach him. He acknowledged he looked back but that

> was because the bags had not arrived from the plane and he was checking in on them.
>
> On the one hand, there was evidence that he did exchange money. On the other hand, why was he really trying to exchange so little? On the one hand, there was evidence that [the dog handler BSO] and the dog were visible and around the baggage carousel. On the other hand, there was no dispute that the currency exchange is in a different direction and Mr. Heath would have to look back to see if his luggage had arrived. It is up to you to determine what use you will make of this evidence.

[33] This was a balanced and fair charge.

[34] The trial judge correctly removed the BSO's opinion from the jury's consideration. I do not agree that he put it back into their consideration when he instructed them that the probative value of the officer's observations may be "low." His opinion on this point was of no probative value, but his observations were part of the circumstantial evidence informing the case.

[35] I do not agree that the demeanour evidence was too ambiguous to hold any probative value at all. It was up to the jury to decide what to take from the evidence. When making that determination, the trial judge properly equipped the jury with the tools to assess the evidence, including the caution that the BSO's perceptions may be of limited assistance and not be entirely accurate.

[36] In short, the jury was well-equipped to understand the frailties of this evidence.

[37] While the appellant characterizes the appellant's actions at the carousel as after-the-fact conduct, they were not. Importation is not complete in fact while waiting for bags at a carousel in an airport, or even at secondary inspection prior to seizure: *R. v. Foster*, 2018 ONCA 53, 360 C.C.C. (3d) 213, at paras. 106, 109, leave to appeal refused, [2018] S.C.C.A. No. 127; *R. v. Okojie*, 2021 ONCA 773, 158 O.R. (3d) 450, at para. 106, leave to appeal refused, [2022] S.C.C.A. No. 113; *R. v. Dhatt*, 2023 ONCA 699, 29 C.R. (7th) 361, at paras. 12-24.

[38] I conclude on this point by noting that this instruction was specifically discussed with counsel and the parties agreed to the version that is now objected to for the first time on appeal. This is a very good indication of the strength and legal correctness of the instruction: *R. v. Goforth*, 2022 SCC 25, 470 D.L.R. (4th) 617, at para. 39.

B. Instructions on the Right to Silence

[39] The appellant argues that the trial judge erroneously instructed the jury that the appellant had a right to silence that was only triggered upon arrest. He maintains that the jury was improperly directed that they could use anything the appellant said or did not say before his arrest for determining the case. He contends that this created two distinct legal problems. First, he maintains that the instruction was simply wrong at common law, as there is always a right to be silent in the face of police inquiries. Second, in the context of the appellant's duress

defence, and specifically the element of whether he had a safe avenue of escape, the instruction might have confused the jury about whether the appellant was legally obligated to disclose to the authorities what he was carrying.

[40] The legal error is said to have been particularly harmful, given that when Crown counsel closed to the jury, she named all the authorities to whom the appellant could have spoken before his detention but did not:

> He could have fled on another flight to another place. He could have gone to an embassy or a high commission. He could have contacted his family or authorities in the United States. He could have asked a WestJet staffer for help, or written a note on his declaration card. He could have sought assistance from any of the many BSOs he encountered at the airport before his secondary examination. He could have answered [the spotter BSO] truthfully and explained his predicament at the baggage claim when [the spotter BSO] asked him if he had drugs in his bag. He simply chose not to. His actions are inconsistent with someone who feared for his life or the safety of his loved ones. [Emphasis added.]

[41] The appellant maintains that the trial judge's erroneous instruction, that the appellant had no right to silence before he was detained, caused prejudice given the trial Crown's invitation to the jury to consider his pre-detention silence as a reason for finding beyond a reasonable doubt that he was not acting under duress.

[42] This ground of appeal cannot succeed.

[43] It is helpful to commence with the impugned instruction. The trial judge told the jury that the appellant had a right to silence that was triggered upon arrest:

> [O]nce a person is detained that person has the right to make a free and meaningful choice about whether to speak or remain silent, and this right only becomes engaged after a person is detained.

[44] Standing on its own, I agree with the appellant that this would be an incorrect statement of law. There is clearly a right to silence before detention: *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 27. The right triggered upon detention is the right to counsel, and that right is essential so that detainees understand that their pre-existing right to silence continues post detention.

[45] Importantly, though, the trial judge's instruction did not end there. He went on to contrast the post-detention environment with the pre-detention environment, within a border setting. Specifically, the trial judge told the jury that after detention, a person "does not have to speak to the CBSA or police officers. That person does not have to answer any questions."

[46] Read in context, what the trial judge was doing here was informing the jury that in the special circumstances of border crossings, there is only a modified right to silence. Section 11(1) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), makes clear that an individual arriving in Canada "shall" present themselves to a border officer and "answer truthfully any questions asked by the officer in the performance of his or her duties".

[47] The trial judge went on to contrast what happened after arrest in this case with what came before. The jury was reminded that immediately upon arrest, the appellant was cautioned by the arresting officer and then later by the RCMP officers when they arrived. The trial judge contrasted the post-arrest environment with what had come before and told the jury that "[p]rior to the time he was detained" anything the appellant said or did not say was evidence that could be used in considering the defence of duress.

[48] In the circumstances of this case, there was nothing wrong with this legal instruction. The appellant was entering Canada from abroad. Section 11(1) of the *Customs Act* applied and so the appellant was under a statutory duty to answer questions truthfully. Once he was arrested, that duty ended. Although the trial judge did not specifically frame his instruction in this way, in my view, all he was doing was informing the jury of the difference, in the airport context, between pre- and post-detention rights.

[49] The appellant correctly acknowledges that his failure to seek BSO assistance prior to the secondary inspection area was a relevant consideration when assessing his duress defence. Importantly, nothing in the charge would have led the jury to erroneously believe that duress was unavailable because the appellant did not disclose his situation to law enforcement prior to his detention. Rather, the decision not to disclose his predicament to other BSOs prior to secondary inspection was just one factor for consideration when determining

whether the Crown had established beyond a reasonable doubt that the appellant was not acting under duress. This instruction accorded exactly with how the case was litigated.

[50] Again, the fact that there was no objection to the instruction is but one indication of its legal accuracy.

C. Crown Closing

[51] The appellant maintains that the trial Crown invited the jury to speculate about the appellant's alleged motive to import the cocaine and offered speculative theories that were not rooted in the evidence. For instance, the trial Crown suggested to the jury that:

- The video from the Trinidad airport showed that the appellant and the man outside the washroom actually greeted one another as if they were prior acquaintances.
- The appellant went to the money exchange in the baggage area because he was trying to evade the police.
- The appellant had a financial motive to commit the crime even though he was not financially destitute.
- If he was actually under duress, the appellant would have immediately alerted the authorities to his predicament.
- If the appellant had actually been told to buy something at the duty-free shop, he would not have chosen two bottles of Cognac.

[52] The appellant says that all of these suggestions combined to undermine the appellant's right to a fair trial by encouraging the jury to engage in speculation. They called for a clear rebuke by the trial judge and an instruction that there is no one way for a person in the appellant's predicament to react.

[53] I start with the observation that the defence neither objected to the trial Crown's closing on these points, nor made a request that the trial judge engage in any kind of rebuke or qualification of what the trial Crown said. This is because there was nothing wrong with what the trial Crown said in her closing. A trier of fact is permitted to use common sense to assess evidence and to draw inferences from that evidence: *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385, at paras. 71, 75. That is all the trial Crown asked the jury to do in this case.

[54] The Crown's point about the video of the interaction between the appellant and the man who supposedly forced him into the washroom in Trinidad was that it belied the appellant's evidence about what took place during that interaction. This was because, in the trial Crown's view, it demonstrated a friendly and familiar relationship between the appellant and his supposed tormentor. This submission was couched in the Crown's invitation for the jury to watch the video themselves and determine what they saw in it and what inferences they drew from it.

[55] As for the appellant's conduct in the baggage area, the trial Crown was entitled to put her theory to the jury: that the appellant walked over to the money exchange and kept a lookout on the drug dog because he knew there was a lot of cocaine in his luggage and he was a willing participant in the importing scheme. The trial Crown was simply asking the jury to draw available inferences from the evidence. There was nothing speculative about those inferences.

[56] Regarding the trial Crown's suggestion that the appellant had a financial motive to commit the crime, that suggestion was in direct response to a defence argument. The appellant had repeatedly asserted in cross-examination that he was financially sound and did not need the money. Indeed, the appellant's trial counsel asked the jury in their closing address: "[w]hy would somebody that's not in financial need, that has so much to lose, because I think we can all agree here that if you're bringing drugs into this country there's a risk that you're going to get caught" do what the appellant was said to have done?

[57] Moreover, the appellant's trial counsel noted that it was open for the trial Crown to suggest that "financial gain" was a "common sense" reason why someone may import cocaine to Canada. That is the point. It is common sense, and there was nothing speculative about the trial Crown's closing on this point.

[58] As for the appellant's suggestion that the Crown invited the jury to improperly speculate about whether someone in the appellant's position would have alerted

the first BSO he saw, this too was just common sense. Recall too that the trial judge told the jury that different people react differently particularly in stressful situations. There was nothing wrong with the Crown putting her theory in this way. No rebuke was asked for and none was required.

[59] Nor was there anything wrong with the Crown's suggestion that the appellant's explanation for having purchased two bottles of cognac appeared contrived and lacking in plausibility. As the trial Crown said, it did not make sense that the appellant, who had just been threatened at gunpoint with serious threats against his family, would go buy two bottles of cognac at duty-free, just because he was told to buy something. As the trial Crown pointed out, he was not ordered to buy alcohol, let alone cognac, let alone two bottles of cognac.

[60] In these circumstances, there was nothing for the trial judge to correct because the trial Crown had not asked the jury to improperly speculate.

[61] In any event, even the trial Crown made clear to the jury that they should keep in mind that there is no one way that people react, especially under stress, and that the appellant had offered alternative explanations for his conduct. The trial judge reinforced this view in his closing instructions to the jury, when he told them that people respond "differently to stress, especially when the stressful situation is precipitated by a situation which is entirely unprecedented for them."

Conclusion

[62] For these reasons, I would dismiss the appeal.

Released: “April 26, 2024 JMF”

“Fairburn A.C.J.O.”
“I agree. Paul Rouleau J.A.”
“I agree. L. Favreau J.A.”