COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Benhsaien, 2024 ONCA 487
DATE: 20240618
DOCKET: M55124 (M54952 & C65649)

van Rensburg, Harvison Young and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent
(Applicant)

and

Nabil Benhsaien

Appellant
(Respondent)

Erica Whitford, for the applicant

Nabil Benhsaien, acting in person

Heard: June 5, 2024

REASONS FOR DECISION

[1] This is an application by the Crown to quash a motion to re-open an appeal. For the reasons that follow the application is granted and the motion is quashed.

[2] In January 2016 Nabil Benhsaien was convicted after a trial by judge and jury of four counts of aggravated assault and five counts of assault with a weapon in relation to five separate and random attacks against women in Ottawa between

2010 and 2013. In each case, the assailant approached the woman from behind when she was walking alone, struck her with a single blow to the back of the head with a hard object, then immediately ran away.

[3] The main issue at Mr. Benhsaien's trial was the identity of the assailant in respect of each of the attacks. The evidence included the eyewitness identification evidence of the victims. There was DNA evidence connecting Mr. Benhsaien to the attacks: from the sweatshirt that was torn off the assailant after the fourth attack by a bystander who gave chase, and on a hammer discarded at the scene after the fifth attack. In respect of the last incident, which happened at an O-Train station, there were two surveillance videos. Mr. Benhsaien admitted that he was the person on one of the videos near where the attack occurred, close to the time of the attack. A second video showed the attack itself. Mr. Benhsaien denied that he was the assailant, although his former apprenticeship supervisor identified him as the person in the video. The Crown's similar fact evidence application was granted, such that evidence in respect of the five assaults was admissible in respect of all of the offences charged.

[4] On June 15, 2018, Mr. Benhsaien was designated a long-term offender and sentenced to 12 years' imprisonment less credit of six years and nine months for pre-sentence custody, to be followed by a ten-year long-term supervision order.

[5] Mr. Benhsaien filed a notice of appeal against conviction and sentence in July 2018. His s. 684 application for state-funded counsel was dismissed in January 2023 by Trotter J.A. In April 2023 Mr. Benhsaien abandoned his appeal against sentence. The conviction appeal was heard by this court on December 4, 2023 in the inmate appeal stream. The appeal was dismissed on December 11, 2023, with reasons reported at 2023 ONCA 817.

[6] In his conviction appeal Mr. Benhsaien argued that the trial judge erred in granting the Crown's similar fact evidence application; that the verdicts were unreasonable; and ineffective assistance of counsel. The court noted that Mr. Benhsaien had abandoned the other grounds of appeal that were raised in his notice of appeal.

[7] The court concluded that there was no error in the trial judge's articulation and application of the test respecting similar fact evidence. The trial judge considered the probative value of the similar fact evidence on the issue of identity, weighed the probative value of the evidence against its prejudicial effect and – after specifically addressing the degree of similarity, possibility of collusion, likelihood of coincidence and the risk of propensity reasoning – determined that the evidence should apply across all of the counts charged.

[8] With respect to the argument that the verdicts were unreasonable, applying the test in *R. v. Yebes*, [1987] 2 S.C.R. 168, at para. 23 and other authorities, the

court noted that the guilty verdicts were plainly available to the jury given the ample evidence, including extensive testimony, physical evidence, photographic and video evidence, DNA evidence and the similar fact evidence.

[9] Finally, the court rejected the claim of ineffective assistance of counsel, noting that Mr. Benhsaien did not have counsel, and that *amicus* who was appointed to assist the court, ably examined all of the Crown's witnesses and brought to the jury's attention the inconsistencies in their descriptions of the assailant.

[10] On February 2, 2024, Mr. Benhsaien filed a motion to re-open his appeal on the basis that he did not have proper time to prepare for the appeal, and that the court failed to properly consider his grounds of appeal. This court has jurisdiction to consider a motion to re-open an appeal where a final order on the appeal has not yet been issued: *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75, at paras. 34-37.[1]

[11] In order to succeed on his motion, Mr. Benhsaien would have to establish that it is in the "interests of justice" to re-open the appeal. The following factors are relevant: (i) the principle of finality; (ii) the risk of a miscarriage of justice; (iii) the

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[1] In this case, on December 21, 2023, after Mr. Benhsaien expressed a desire to bring a motion to re-open his appeal, he was notified that the final order on the appeal would be issued and entered in the normal course if he did not file his motion within 30 days. Although he did not meet the deadline, his notice of motion was accepted for filing. Thereafter the final order was erroneously issued. As acknowledged by the Crown in oral submissions, it is therefore appropriate for this court to treat this matter as though the final order had not been issued.

cogency of the case for re-opening; (iv) the nature of the error or omission alleged to require re-opening; and (v) the significance of the error to the disposition of the appeal: *Smithen-Davis*, at para. 36.

[12] In order to succeed on the application to quash, the Crown must establish that Mr. Benhsaien's motion to re-open the appeal has no reasonable prospect of success: *Smithen-Davis*, at paras. 63, 68.

[13] The Crown contends that it has met its burden. The Crown submits that Mr. Benhsaien has not pointed to any error in this court's decision, let alone an error that could impact the disposition of the appeal. Rather, he is seeking to relitigate issues that were properly considered and dismissed by this court. He had ample time to prepare for his appeal, and there is no risk of a miscarriage of justice should his motion to re-open be quashed.

[14] Mr. Benhsaien asserts that he is not seeking to reargue his appeal. He provided detailed written and oral submissions in response to the Crown's application, asserting various errors on the part of the panel hearing the appeal, and unfairness in how the appeal was addressed.

[15] Essentially, Mr. Benhsaien's position is that, at the hearing of the appeal he was deprived of the opportunity to address concerns about the video of the fifth assault, which was not in the record on appeal. He contends that the video is blurry and may not support the testimony identifying him as the assailant. He asserts

that, as a result of the decision dismissing his application for the appointment of counsel on the appeal, where Trotter J.A. said “this appeal is ready to be argued on the existing record”, he was required to accept the record as it was, and therefore he could not make the argument he was intending to make, that the video of the assault does not support his identity as the assailant. He contends that, in the absence of this video evidence, the rest of the evidence relied on by the Crown was circumstantial evidence that was open to interpretations inconsistent with his guilt. For example, he suggests that someone could have placed his DNA on the hammer that was found at the scene of the fifth assault and on the sweater that was grabbed from the assailant at the fourth assault, and that the similarities in appearance between the video in which he was seen shortly before the fifth assault and the identification evidence could be explained by someone dressing in clothing similar to what he was wearing that day in order to commit the assault.

[16] We agree with the Crown that there is no prospect that any of these arguments would succeed on a motion to re-open Mr. Benhsaien’s appeal. Even if Mr. Benhsaien mistakenly believed that he could not make these arguments at the hearing of the appeal because the video of the assault was not itself in evidence, we agree with the Crown that the arguments are fanciful and that, in any event, the rest of the evidence was overwhelming such that Mr. Benhsaien’s guilt was the only reasonable conclusion.

[17] Finally, the record does not support Mr. Benhsaien's assertion that he did not have proper time to prepare for the appeal. Although the appeal had been marked peremptory to Mr. Benhsaien, and had been adjourned repeatedly, he sought and was refused an adjournment of the December date. Paciocco J.A.'s endorsement of November 28, 2023 confirmed that Mr. Benhsaien had a "long history of making adjournment requests based on challenges he [had] experienced in completing his written arguments", that "extensive assistance [had] been provided to accommodate his needs", that "[w]ritten arguments [were] not technically required, as [the] appeal [would] be argued orally", that Mr. Benhsaien was "well-versed in what his submissions [would] be", and that accordingly it was not in the interests of justice to delay the hearing of the appeal any longer.

[18] For these reasons, the Crown's application to quash Mr. Benhsaien's motion to re-open the appeal is granted, and the motion is hereby quashed.

"K. van Rensburg J.A."
"A. Harvison Young J.A."
"L. Sossin J.A."