Court of Queen's Bench of Alberta

Citation: R v Lavallee, 2019 ABQB 370

Date: 20190517
Docket: 161304571Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown/Respondent

- and -

Lenny August Lavallee

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice E.J. Simpson

Introduction

[1] This Court convicted the Applicant, Lenny August Lavallee, of second degree murder (***R v Lavallee***, 2018 ABQB 458). While awaiting sentencing, he brings an application for a mistrial, alleging "As a result of the procedural prejudice, the only remedy is a mistrial".

Facts

[2] During the trial, the Crown called Ms. Butler, a former girlfriend of the Applicant. After she testified, counsel for the Applicant requested an adjournment until the next day to prepare for

cross-examination of her. The trial adjourned for the day with Ms. Butler expected back the next morning. She did not appear but from information provided, she was expected to appear later. Counsel agreed the trial should proceed with the testimony of other witnesses.

[3] Shanlai Cook testified before the cross-examination of Ms. Butler. Giving evidence, she said she stood at the edge of the yard watching two women giving assistance to the victim while waiting for an ambulance to arrive. She testified that a car stopped, a man left it, approached her, and he stated, "I shot the wrong one". This person then went back to the car which drove away.

[4] Ms. Cook then identified the Applicant as the person who spoke the words. Very quickly thereafter she acknowledged she did not know if the Applicant was the person who said the words. She only assumed it was the Applicant because she expected the police had arrested the right person.

[5] Neither the Crown nor the defence made an application with respect to the admissibility of the statement.

[6] When Ms. Butler returned to the stand for cross-examination, defence counsel advised she had no questions for her. The defence called no evidence. Arguing first, the Crown made no reference to the statement, "I shot the wrong one" whereas the defence argued I should rely on it for the truth of its contents. In response, the Crown objected, stating it was hearsay.

[7] Discussions followed, the defence did not make applications to re-open and to have the statement relied upon for the truth of its contents. Nor did the Crown apply to have it excluded.

[8] Rather, the defence maintained its position that it was evidence upon which the Court should rely for the truth of its contents. The Crown stood firm that it was hearsay and nothing more than evidence of someone speaking the words.

[9] The defence went a step further, advising that if the statement did not receive treatment in my judgment as evidence admitted for the truth of its contents, then an application for a mistrial would follow. In my decision, ***R v Lavallee, supra***, I ruled the evidence was hearsay on the record and gave it no weight for the truth of its contents.

[10] The Applicant filed this application for a mistrial.

Analysis

Position of the Applicant

[11] The Applicant summarizes his position in the final paragraph of the grounds in the application:

> As a result of the procedural prejudice, the only remedy available is a mistrial. Had the Court dealt with this issue at an earlier stage, other remedies may have been available. The best would have been for the Court to make the position to counsel clear and further submissions could have been made with respect to the admissibility of the statement. Had the Court even provided an earlier decision, as per the request of the defence, other options such as recalling witnesses would have been available. Unfortunately, now the decision has been made, findings with respect to credibility have been made, the accused having been found guilty, the only remedy is a mistrial.

[12] The Applicant also submits I am not *functus officio* at this stage of the proceedings and may still grant the application.

Position of the Crown

[13] The Crown submits at this stage I am *functus officio* and in any event, the application does not meet the legal test because:

(a) trial fairness was not compromised; and

(b) this is not the clearest of cases where no other way presents to save the trial.

Functus Officio

[14] With respect to the matter of whether at this stage of the proceedings I am *functus officio*, I prefer the position of the Applicant.

[15] The phrase means 'having performed his function'.

[16] The Ontario Court of Appeal in ***R v Griffith***, [2013] OJ No 3565 (QL) ruled the doctrine of *functus officio* applies to a trial judge upon imposing sentence. This aligns with the brief judgment from our Court of Appeal in ***R v JP***, 1997 ABCA 30.

[17] The Ontario Court of Appeal also dealt with the issue of *functus officio* even after sentence in ***R v Malicia***, 82 OR (3d) 772. In that decision, referring to ***R v JP, supra*** and ***R v Burke***, 2002 SCC 55, the Court of Appeal held that a judge in a judge alone trial is not *functus* until completion of sentencing.

[18] Then, after sentencing, a judge can still correct errors in sentencing, not requiring reconsideration of a judicial decision.

[19] ***R v Krouglov***, 2017 ONCA 197 (CanLII) affirmed ***R v Malicia, supra***, stating at para 35:

> The *functus officio* doctrine does not prevent the correction of errors where no reconsideration of a judicial decision is required and where the court's intention is manifest, such that the correction is consistent with that intention: *Malicia*, at paras. 26-31.

[20] Here, the Applicant does not ask me to reconsider my ruling on giving no weight to the evidence but submits the procedure giving rise to the ruling was unfair and I should grant the application to order a mistrial.

[21] That being a question of trial fairness, I agree I have the jurisdiction to consider and rule on the application.

Procedural Unfairness

[22] A trial judge has the discretion to order a mistrial and "must assess whether there is a real danger the trial fairness has been compromised" (***R v Khan***, 2001 SCC 86, para 79).

[23] "The remedy of a mistrial is reserved for the clearest of cases where there is no other way to save the trial" (***R v Karim***, 2010 ABCA 401, para 27).

[24] "Further, it must not be directed simply in light of an argument that trial strategy has now proved to have been ineffective" (***R v Keil***, 2018 ABQB 579, para 20).

[25] Regarding procedural unfairness, there was none. The record of the submissions discloses that I advised counsel that I would not before rendering judgment rule on the issue of the statement as evidence for the truth of its contents or exclude it from consideration without an application from the defence with respect to the former and the Crown regarding the latter.

[26] In the written application, the Applicant states: "Had the Court dealt with an issue at an earlier stage, other remedies may have been available". The Applicant is correct but made a tactical decision with respect to the cross-examination of Ms. Butler based on an assumption that the Court would deal with the evidence as a statement for the truth of its contents. Early on in the trial, the Applicant brought no application at the time Ms. Cook provided the statement, which prevented me from dealing with it earlier.

[27] This tactical decision came when the defence, having heard the words from Shanlai Cook before the cross-examination, decided not to cross-examine Ms. Butler. The defence did so because "Given the evidence of Shanlai Cook, and in particular that it raised a reasonable doubt as to who the shooter was, defence made a tactical decision not to cross-examine Ms. Butler".

[28] The defence made this tactical decision because "the starting position of the defence was that the statement having been led by the Crown without objection, was in for the truth of its contents and that during argument was not the appropriate time for the Crown to be making that objection".

[29] Simply put, the defence states it did not cross-examine Ms. Butler because the defence assumed the statement went in for the truth of its contents and raised a reasonable doubt as to the identity of the Applicant as the person who fired at the victim.

[30] Although the Applicant does not refer to it as such, the defence made another tactical decision when the Applicant during argument asked me to "give a decision on whether the statement can go in for the truth of its contents before then?", i.e. before rendering judgment, "because I have indicated I will apply for a mistrial if it doesn't go in for the truth of its contents".

[31] After further discussion with myself and submissions from the Crown, the defence did not make an application to re-open and have me hear an application regarding whether I should deal with the statement as evidence for the truth of its contents. Rather, defence took the position I must deal with the statement in my judgment for the truth of its contents and if I did not, then a mistrial application would follow.

Mischaracterization

[32] In oral submissions, counsel for the Applicant submitted the discussions left her with the impression the Crown had to apply to exclude the statement otherwise it was in for the truth of its contents. The defence submits in the written materials that I mischaracterized the issue: "Never did the Court suggest that either party was expected to make an application to have the statement admitted for the truth of its contents".

[33] Respectfully, I disagree.

[34] On reading the transcript at page 11, and page 25, line 30 to page 28, line 16, attached as Appendix "A", it discloses that if the Applicant wanted me to deal with the statement for the truth of its contents or if the Crown wanted me to exclude it, I would need either party to make an application.

[35] Starting at page 11, not yet having heard from the Crown on the issue, I advised that I expected to hear the Crown would argue I should give it no weight. Thereafter, at page 25, line 30, the defence asks for a ruling before I give judgment "...on whether the statement can go in for the truth of its content before then?"

[36] Before I could answer, she reminded me that if not, she would make an application for a mistrial.

[37] In effect, the defence had asked for a ruling on an evidentiary issue during argument without applications to re-open the evidentiary portion of the trial and to have the statement relied upon for the truth of its contents.

[38] My answer, "Woah. Just a minute. Well, I do not have any application--it is in right now." The words "is in" I will deal with later; however, at this point the defence wanted a ruling on the issue of "in for the truth of its content" before judgment. If that was to happen, I made clear to the Applicant that I will need someone to make an application because "I do not have any application...".

[39] Thereafter, at page 26, line 17 to page 28, line 25, the discussion continues (see Appendix "A").

[40] Here, the defence states the Crown has pointed out that the statement ought not to go in for the truth of its contents. In response, I advised that the Crown has not made an application either to exclude it.

[41] The Crown then went on to reaffirm its position that without an application to have the hearsay admitted for the truth of its contents, it is presumptively inadmissible (page 27, lines 1-16).

[42] Once again, I stated I did not have an application and the Crown affirmed that it had no application to exclude the evidence.

[43] The defence re-stated her position and the exchange continues from page 27, line 27 to page 28, line 6.

[44] After stating the defence's position, I reminded defence counsel I have not decided the matter and re-stated I had no application to decide anything now.

[45] The discussion concluded with my advice that if either party intended to make an application, it would first require an application to re-open and make an application.

[46] From the whole of this discussion the point was made that if the evidence of the statement was to be considered for the truth of its contents or excluded, then someone needed to make an application. The Crown advised it would not apply to exclude it.

[47] The defence, having asked for a decision on "whether the statement can go in for the truth of its contents" and having received my reply, "Well, I do not have any application", chose not to make an application.

[48] The net result left the statement on the record to be dealt with in the judgment. The section "The Unknown Declarant" in the judgment dealt with the evidence as provided by Shanlai Cook.

[49] Accordingly, reading the whole of Appendix "A", I did suggest that either party was expected to make an application to have the statement admitted for the truth of its contents or excluded.

Changed Ruling

[50] The Applicant submits that in the judgment I changed a ruling I made during argument. This arises from my comments during the discussions regarding the admissibility of the statement that it was "in". From a reading of the whole of the transcript, from page 25, line 30 to page 28, line 6, "is in" can only mean is on the record. Various times I reminded the parties that the issue is what I do with the statement. Starting at page 11, I expected the Crown would argue that I not give it any weight. The Applicant's submission that I ruled the statement in for the truth of its contents does not reflect the discussions. I made it clear it was "in", i.e. on the record, but what weight if any I would give it was quite another matter.

[51] Reading pages 25 to 28, nothing points to a ruling that the evidence was in for the truth of its contents.

Failure to Address Defence Arguments

[52] The Applicant also raised various matters with respect to exceptions to the hearsay rule which I did not consider in my judgment.

[53] This does not support an application for a mistrial on grounds of procedural unfairness. The matter should be addressed by way of appeal.

Conclusion

[54] At two stages of the trial, the Court could have dealt with this issue if the defence had made an application to have a ruling to have the statement relied upon for the truth of its contents.

[55] First, at the conclusion of the evidence of Shanlai Cook, the defence could have made the application. This does not shift the burden to the Applicant but places the onus where it properly ought to lie, on the party intending to rely on a hearsay statement for the truth of its contents.

[56] The defence then, with a ruling on admissibility, would know the status of the statement as evidence in the trial. The assumption by the defence that it could be relied upon for the truth of its contents was only that, an assumption.

[57] In any event, once the defence made a request for a decision during submission on whether the statement was in for the truth of its contents, the defence had my answer. I had no application on which to make a decision, and it lay with either counsel to make an application to re-open and make an application for a ruling on the statement. At that time, the defence decided not to apply to re-open and make those applications. Rather, it would wait on the judgment and make an application for mistrial if it did not deal with the statement as evidence for the truth of its contents.

[58] Had the defence applied during argument, it had the benefit of the same arguments it made as to why the defence considered it evidence for the truth of its contents and accordingly should not be deprived of the opportunity to have me to at least re-open to deal with an application to have the statement relied upon for the truth of its contents.

[59] If unsuccessful with the application to have the statement relied upon for the truth of its contents, there remained the possibility of an order returning Ms. Butler to the stand for cross-examination. The defence chose not to make an application at either time in the trial. Rather, the defence brought this application based on procedural unfairness.

[60] However, for the reasons given with respect to procedural unfairness, the Court did advise the Applicant that if the defence expected a ruling on an evidentiary issue, I would require an application. With respect to mischaracterizing the evidence in for the truth of its contents, the record discloses that the evidence was on the record but what I would do with it, what weight if any I would give it, remained an issue. Finally, the ground of failing to address defence argument is a matter for appeal, not for a mistrial application.

[61] Finally, in the trial judgment in "The Unknown Declarant" section, I found that even if the hearsay statement could be relied upon for the truth of its contents it did not exclude the Applicant. He still had time to go to the residence where the police found him.

[62] Therefore, this is not a "clearest of cases" with no other way to save the trial.

[63] Accordingly, for the reasons given, the application for a mistrial fails.

Heard on the 13th day of May, 2019.
Dated at the City of Edmonton, Alberta this 17th day of May, 2019.

E.J. Simpson
J.C.Q.B.A.

Appearances:

Mark van Manen and Aleisha Bartier
Crown Prosecutors' Office
for the Crown/Respondent

Anna M. Konye
Sprake Song & Konye
for the Accused/Appellant

Appendix "A"

Again, I just reiterate the time for making argument about admissibility of evidence is during the trial not during argument, so this isn't a time for us to get --

THE COURT: Okay. Well, I have not heard an application to exclude it yet --

MS. KONYE: Right. But they're --

THE COURT: -- is how I --

MS. KONYE: They're just saying that as a general point that it's hearsay --

THE COURT: Yes.

MS. KONYE: -- and is inadmissible.

THE COURT: Well, I think they would be saying, I do not give any weight to it.

MS. KONYE: Well, I --

THE COURT: I think that, but any ways --

MS. KONYE: -- thought that I heard them say it's inadmissible.

THE COURT: Well, let us wait and hear what they say.

MS. KONYE: Yes.

THE COURT: I have not heard -- there is no application to exclude it at this time.

MS. KONYE: Okay. Well -- and sorry. I thought that I understood them to say that it's inadmissible and cannot be relied on at all and, in fact, I think that's what Your Lordship pointed --

THE COURT: Well, let us hear what they say.

MS. KONYE: And I'm just wondering, My Lord, in terms of your decision, are you going to be in a position to give a decision on whether the statement can go in for the truth of its content before then?

THE COURT: Well --

MS. KONYE: Simply because I have indicated I will apply for a mistrial if it doesn't go in for the truth of its contents.

THE COURT: Woah. Just a minute. Well, I do not have any application -- it is in right now.

MS. KONYE: Okay. It's in.

THE COURT: It is what I do with it.

MS. KONYE: So --

THE COURT: Right. The Crown has not asked to have it out.

MS. KONYE: Okay.

THE COURT: It is what I do with it.

MS. KONYE: Yes.

THE COURT: Which changes it from a mistrial to a review.

MS. KONYE: Sure. But I suppose that I hear my friend's arguments -- in argument saying that it ought not to go in for the truth of its content.

THE COURT: Well, that is argument.

MS. KONYE: Yes. So --

THE COURT: There is not an application for me to strike it.

MS. KONYE: Okay.

THE COURT: It is --

MS. KONYE: Thank you, My Lord. So -- okay. So then going back to --

THE COURT: Sorry. Let us just make sure the Crown is on the same page. There has been no application before me. I cannot --

MS. KONYE: Yes.

THE COURT: -- rule on something that I do not have. I simply -- I will be ruling on the arguments of each, and I will look at the law on my own. And I will rule on the weight, if any, that I gave.

MS. BARTIER: Well, Sir, just to clarify, that -- whether the statement goes in for the truth of its contents, there needs to be an application by the party who intends to rely on it because hearsay is presumptively inadmissible. The fact that it was said, that has gone in, but what use you make of it, if it needs to be made -- if it wants to be relied on for the truth of its contents, that can't be done unless there's been an application made pointing to which exception of the hearsay rule it falls under.

THE COURT: Well, okay. Well, I do not have an application before me, so that is --

MS. BARTIER: Well, the Crown's not applying to have it excluded. It just --

THE COURT: No.

MS. BARTIER: -- doesn't go in for the truth of its contents as a --

THE COURT: I know what your argument is.

MR. VAN MANEN: Yes.

MS. BARTIER: Okay. Thank you.

THE COURT: Yes. That is where I am at, Ms. Konye.

MS. KONYE: Well, and just to be clear, My Lord, I have indicated in my argument that this is evidence that has gone in before you. That I relied on it for the truth of its content, and given the circumstances of no objection from the Crown, that it was fair for me to do so. I acted on that, so if the Court is saying that --

THE COURT: Well, I have not decided anything yet, Ms. Konye.

MS. KONYE: Right. Okay.

THE COURT: I am just deciding that there is -- the only thing I can tell you, there is no application before me. The only thing I can do is it is in. What do I do with it? That is where I am at right now, and you have each made your submissions.

MS. KONYE: Right. So -- all right. Well, I'm --

THE COURT: Right now, if somebody was going to make any application, somebody would have to apply to reopen, make an application, and we would deal with it that way. But right now, it is a statement that goes in or that is in, I should say, and, you know --

And, Counsel, since we are at this, maybe -- and I do not know what is in disclosure. I do not see disclosure. But, Counsel, as I say, you have a much better idea of what is coming. And whether this was a spontaneous utterance or you knew it was in his statement or whatever, perhaps someone should have addressed their mind to whether there should have been a *voir dire* to deal with this. That is all I will say.

I mean, I am here making notes, trying to keep out hearsay as it goes, and it starts out looking like an admission against interest. I am just saying counsel know a lot more than the Court of what is coming and --