

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

CITATION: R. v. Panko, 2010 ONCA 660
DATE: 20101008
DOCKET: C47862

COURT OF APPEAL FOR ONTARIO

Goudge, Sharpe and MacFarland JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andrew Panko

Appellant

Richard Litkowski, for the appellant

Grace Choi, for the respondent

Heard: September 27, 2010

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2007, setting aside the acquittal entered by Justice P.H. Reinhardt of the Ontario Court of Justice on June 2, 2006 and ordering a new trial.

By The Court:

[1] The appellant was acquitted at a summary conviction trial of one count of possession of child pornography and one count of accessing child pornography. The Crown appealed the acquittal on the possession count and the summary conviction appeal court judge allowed the appeal and ordered a new trial. The appellant seeks leave to appeal to this court and, if leave is granted, asks that the acquittal be restored.

FACTS

[2] The appellant took his computer to a repair shop. The appellant did not reveal his password or authorize the repairer to examine any files on the computer as that was not required to do the repair. However, the repairer bypassed the password and saw a large number of picture icons on the desktop of the computer screen. The repairer opened some of the icons and found depictions of child pornography. The police were called, the appellant was arrested and, shortly after his arrest, he made an incriminating statement to the police effectively admitting knowledge of the pictures.

[3] The trial judge found that the statement had been made in violation of the appellants' *Charter* rights and that the Crown had failed to establish the voluntariness of the statement. The statement was accordingly excluded. The trial judge found that the appellant's physical control of the computer did not prove beyond a reasonable doubt that the appellant possessed the child pornography.

[4] The summary conviction appeal court judge ruled that the trial judge had erred by excluding the appellant's statement to the police and by failing to infer knowledge of the pictures.

ISSUES

[5] The appellant submits that the summary conviction appeal court judge erred in law both by reversing the trial judge's ruling on the admissibility of his statement and by, in

effect, retrying the case without according appropriate deference to the factual findings of the trial judge.

ANALYSIS

1. Leave to appeal

[6] *R. v. R.R.* (2008), 90 O.R. (3d) 641 (C.A.), holds that leave to appeal may be granted in two types of cases:

1. Where there is an arguable question of law that has significance to the administration of justice beyond the four corners of the case; and
2. Where there appears to be a “clear” error, even if it cannot be said that the error has significance to the administration of justice beyond the specific case.

[7] We agree with the respondent Crown that as the summary conviction appeal court judge based his conclusion upon what he considered to be errors of law rather than the verdict of acquittal being unreasonable, it is not necessary for this court to address the legal issue of whether the Crown is entitled to appeal an unreasonable verdict in the context of a summary conviction appeal: see *R. v. Biniaris*, [2000] 1 S.C.R. 381; *R. v. Kendall* (2005), 75 O.R. (3d) 565 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 387. Accordingly, we would not grant leave under the first branch of the *R.R.* test.

[8] However, we agree with the appellant that leave should be granted under the second branch of *R.R.* As we will explain in greater detail below, there appear to us to be

clear errors on the part of the summary conviction appeal court judge, and as those errors led that judge to set aside an acquittal on a serious charge involving not only moral opprobrium but also a significant risk of imprisonment, it is in the interests of justice for this court to entertain the appeal.

2. Admissibility of the appellant's statement

[9] The appellant's mother, a high school teacher of 33 years' experience, testified on the *voir dire* that the appellant had been identified as a special needs child in grade 1 and that he had disabilities in reading, writing and comprehension. His cognitive skills are below average and while he had managed to graduate from high school, he did not always "hear" or grasp everything that was said to him, particularly when under stress. The Crown did not object to this evidence at trial.

[10] The trial judge said the following with respect to her evidence:

Mrs. Elizabeth Panko testified as to her son's difficulties in comprehension. Her testimony is clearly that of a parent with an interest in practical terms in the outcome of this proceeding. *I did not qualify her as an expert, but I did permit [her] to testify as to her personal knowledge of her son during his life with her. I also find that she has the experience and training in the public school system to provide me with a with the history of his difficulties in school.*

I accept her testimony for those insights. [Emphasis added.]

[11] The trial judge concluded that on the basis of the police description of the appellant and their interaction with him, "coupled with the testimony of Mrs. Panko",

there was more than a reasonable likelihood that the appellant's admissions to the officer "were not informed by an understanding of his right to remain silent or of how his admissions could be used in a legal proceeding." The trial judge was also not satisfied beyond a reasonable doubt that the appellant's admissions to the police were voluntary. The trial judge explained that there were readily apparent "objective indicia" that the appellant might have difficulties in comprehension, including his unusual appearance and attire and the disorderly state of the interior of his car.

[12] The summary conviction appeal court judge found that the trial judge had relied heavily on the mother's evidence and that he erred in doing so because, as the summary conviction appeal court judge put it, "her evidence as to what her son would understand at the time of his arrest was speculative and opinion evidence that should not have been acted on." He concluded that once her evidence was taken off the table, the trial judge's conclusion as to voluntariness had to be set aside.

[13] While certain passages from the mother's evidence could be read as expressing an opinion about what her son would have understood upon arrest, in our respectful view, the summary conviction appeal court judge misapprehended the use to which the trial judge had put the mother's evidence.

[14] It is clear from the paragraph quoted above from the trial judge's reasons that the trial judge recognized the limitations of the mother's evidence, and in particular, that he recognized that he could not use it as opinion evidence as to what the appellant

understood at the relevant time. The trial judge did not err in law by holding that he could use her evidence for the insights provided into the appellant's mental limitations and difficulties and by taking that into account when assessing the voluntariness of the statement.

[15] While the trial judge's findings with respect to the admissibility of the appellant's statement appear to us to be generous, we do not agree that his findings were tainted with the legal error identified by the summary conviction appeal court judge. The trial judge was aware of the limitations of the mother's evidence and aware that it did not amount to expert opinion evidence, and he was entitled to use her evidence as to the fact of the appellant's disability.

[16] As the issue of the admissibility of the statement can be disposed of on the voluntariness point, we need not deal with the *Charter* issues.

3. Reversal of the acquittal

[17] The appellant's statement was a significant part of the Crown's case and the summary conviction appeal court judge's conclusion that the trial judge had erred by excluding the statement formed an important element in his conclusion that the acquittal should be set aside. As we disagree with the summary conviction appeal court judge's assessment of the statement issue, the case for setting aside the conviction is significantly weakened.

[18] Moreover, in our respectful view, the summary conviction appeal court judge erred by failing to accord the appropriate level of deference to the trial judge's conclusion that the Crown had failed to prove the case beyond a reasonable doubt. The trial judge's conclusion that the appellant's knowledge of the child pornography could not be inferred in the circumstances, like his finding that the statement was not voluntary, appears to us be a generous finding in favour of the appellant. However, it is well-established that absent legal error, factual findings made by trial judges, even findings that would not be made by the judge called upon to decide an appeal, are entitled to significant deference on appeal. That principle, frequently applied in the context of conviction appeals, has added force where the Crown appeals an acquittal resting upon a trial judge's conclusion that the evidence is not sufficient to prove the case beyond a reasonable doubt. This follows from the very nature of the concept of reasonable doubt, which rests upon a nuanced judgment about the sufficiency of the evidence rather than on the foundation of factual findings that is required to support a conviction: see *R. v. Walker*, [2008] 2 S.C.R. 245 at para. 26.

[19] The trial judge explained why he felt that the Crown's evidence failed to prove criminal knowledge and control to the criminal standard of proof and we do not agree that his reasons reveal any error of law that could justify an appellate court in reversing the acquittal. In effect, the summary conviction appeal court judge retried the case. He identified certain evidence that he thought should have led the trial judge to infer guilty

knowledge. While it is certainly the case that the trial judge *could have* inferred guilty knowledge from that evidence, the trial judge was not *required* to do so.

[20] We do not agree with the summary conviction appeal court judge that the trial judge overlooked, disregarded or misapprehended relevant evidence. It is clear from the record that the trial judge actually viewed the computer, the desktop, and the 91 icons. His detailed reasons indicate that he was fully aware of the relevant evidence and that he took it into account when deciding the case. Like the summary conviction appeal court judge, we might well have come to a different conclusion on this evidence. However, it was the trial judge who heard the evidence and saw the witnesses and it was for him, not the summary conviction appeal court judge, to make the call.

[21] We do not agree that the trial judge erred in law by admitting or considering the evidence of a police officer that material can make its way on to a computer in various ways, not all of which are known to or in the control of the owner. While it is true that the officer was not qualified as an expert, he was called by the Crown and he gave extensive technical evidence about the storage of digital images on computers. He explained the software that was used to examine the appellant's computer, what was found, and where. The impugned evidence was given in answer to questions posed by the trial judge. The only reference to opinion evidence came when the officer stated that he could not offer any opinion on whether someone had accessed the appellant's computer from a remote location.

[22] In these circumstances, we do not agree that the trial judge erred in law by relying on his evidence in concluding that there was at least a possibility that the offensive images could have been put on the appellant's computer without his knowledge. The issue of the officer's expertise was not raised at trial, either by the Crown or by the appellant's counsel. If the officer was not qualified to give the technical evidence that assisted the appellant, then we fail to see how he was qualified to give the technical evidence that favoured the Crown.

CONCLUSION

[23] Accordingly, we grant leave to appeal, allow the appeal, set aside the order of the summary conviction appeal court judge, and restore the acquittal.

“S.T. Goudge J.A.”
“Robert J. Sharpe J.A.”
“J. MacFarland J.A.”

RELEASED: October 08, 2010