

[5] Ms. Gugins testified that on 30 September 2016, she was at the front of her residential building and saw the respondent standing approximately 10-12 feet away. He stared at her and uttered words to the effect that “they’re coming to get - like kick off my door to come and arrest me for something.” When Ms. Gugins reminded the respondent that he was not permitted to speak to her, the respondent allegedly replied: “Well, fuck them. They’re not gonna find out.”

[6] That same day, the two met again. This time, the respondent was conversing with another person whilst looking at Ms. Gugins. Ms. Gugins testified that she could not hear the content of the conversation but knew that she was the subject of discussion. Once again, Ms. Gugins told the respondent that he was not supposed to talk to her. At trial, she testified that she could not recall if he responded.

[7] Ms. Gugins testified that the total interaction with the respondent that day amounted to 20 minutes.

The Trial Judge’s Dismissal of the Case

[8] At the conclusion of Ms. Gugins’ evidence, the trial judge confirmed with defence counsel (not Mr. Carlisle) that she intended to call the respondent as a witness and was told that the respondent was going to testify after the Crown filed its final exhibit.

[9] After the Crown had done so, the judge made the following comments:

Okay, just before we go any further, I just want to say a few things about the new approach in these courts. Obviously I think the parties know we are a pilot project for bail hearings in this province-College Park and Ottawa. And we are asked to do things a little differently and expedite the process and try to come to some decisions without full-blown hearings.

[10] The judge then referred to the casebook provided by the Crown which contained the Supreme Court of Canada decision of *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659. He continued:

There is a provision in there talking about preventing delay. And I just wanted to speak to that because I’m not going to ask the defence to call any evidence because in my view the crown is not anywhere near proving his case beyond a reasonable doubt for the reasons I will indicate in a few minutes.

But I think this is important. I think the Supreme Court of Canada is speaking to tragedy throughout the country and saying that we need some real change here. The way we are doing things is not working.

[11] The judge then cited para. 37 of the *Cody* decision, hereinafter reproduced:

We reiterate the important role trial judges play in curtailing unnecessary delay and "changing courtroom culture" (Jordan, at para. 114). As this Court observed in Jordan, the role of the courts in effecting real change involves

implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

In scheduling, for example, a court may deny an adjournment request on the basis that it would result in unacceptably long delay, even where it would be deductible as defence delay.

[12] It should be noted that the judge placed great emphasis on the words underlined.

[13] Recognising that any motion for a directed verdict would fail, because there was some evidence upon which a reasonable trier could convict, the trial judge indicated what the consequences were:

And then the defendant would be put in the position of deciding to give evidence or not. And in this case the defendant would have testified. I can tell you right now, having heard the evidence I have heard over the last 20 minutes, that it would not matter what the defendant said. [Emphasis added]

[14] Without hearing any submissions from the Crown or the defence, the trial judge proceeded to dismiss the Crown's case because of concerns over Ms. Gugins' reliability, and concluded that "I just do not know what happened that day that Mr. Sibbert is alleged to have contacted the complainant in this matter, and that was based on the Crown's evidence. So in no way could the Crown ever prove this case beyond a reasonable doubt at this stage."

[15] In entering an acquittal, the trial judge remarked that:

And again we could have gone through this charade and it would have been, in my view - the defendant would have testified, and [the Crown] would have cross-examined based on a number of issues that would come up, and we could have spent another hour dealing with this matter.

[16] The judge repeated his view that the Supreme Court of Canada had decided that trial judges could “manage the case and determine just based on the evidence that they have heard that there is no chance of conviction.”

[17] He ended his comments by stating that: “And we need to be spending our time doing things that really matter...”

Grounds of Appeal

[18] The Crown appeals on the ground that in acting in the manner that he did, the trial judge breached the rules of natural justice, acted prematurely, and rendered a decision based on speculation.

[19] The respondent concedes that the trial judge acted erroneously but asks that this court apply the curative proviso under s. 686(i) of the *Criminal Code*, as the decision reached by the trial judge would have been the same even if the correct procedure had been followed.

[20] For the reasons that follow, I agree with the Crown that the judge erred and the appeal must be allowed. Since my conclusion is based on an error that struck at the very heart of the validity of proceedings, the application of the proviso is not appropriate, and a new trial in front of a different jurist is ordered.

ANALYSIS

The Breach of Natural Justice

[21] The obligation to ensure a fair trial is a basic tenet of the judicial system. A fair trial accrues not only to a person accused of an offence but also the Crown who is charged with prosecuting the offence: *R. v. R.D.S.*, [1997] 3 S.C.R. 484, at para. 96; *R. v. Curragh* (1997), 113 C.C.C. (3d) 481 (S.C.C.), at p. 486; *R. v. Coreas* (1996), 115 C.C.C. (3d) 353 (Ont. C.A.) at p. 354; *R. v. J.V.* (2002), 163 C.C.C. (3d) 507 (Ont. S.C.), at para. 95.

[22] As described in *R.D.S.*, at p. 364, the adversarial system forms the “bedrock” of Canadian jurisprudence. That system incorporates, at its core, the right to be heard, also known as the *audi alteram partem* rule: *J.V.*, at para. 97.

[23] The right to be heard has been described as “one of the most fundamental components of natural justice”: *R. v. Dodson* (2000), 142 C.C.C. (3d) 134 (Ont. C.A.), at p. 142. See also: *R. v. McDonald*, 2018 ONCA 369, at paras. 37-39; *Supremarchés Jean Larecque Inc v. Flamand*, [1987] 2 S.C.R. 219, at para 58.

[24] In *J.V.*, at para. 107, Hill J. made the following observation about the *audi alteram partem* rule:

While not every breach of the audi alteram partem rule during a proceeding will warrant intervention for excess of jurisdiction, a denial of the right to be heard on the ultimate issue in the hearing is a flagrant violation of natural justice. Of course, statement of a tentative position or tentative conclusion, with a clear opportunity afforded to make submissions prior to a final decision, does not breach a party's right to be heard: *Rex v. Kovacevic* (1951), 99 C.C.C. 258 (Ont. H.C.J.) at 261-2 per Ferguson J.; *Regina v. Mullin* (1990), 56 C.C.C. (3d) 476 (P.E.I.C.A.) at 485-6 per Carruthers C.J.P.E.I. [Emphasis added]

[25] In this case, I agree with the Crown that the actions of the trial judge constituted a denial of natural justice.

[26] In relying on *Cody* to terminate the case in the manner in which he did, the trial judge's comments reflect a serious misunderstanding of the principles enunciated therein. That case, and its predecessor, *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, were focused on the case management powers of the judge to streamline motions and applications before and during the course of a trial to avoid unconstitutional delay. The comments made by the Court did nothing more than remind jurists of the principles enunciated in cases such as *R. v. Kutenyc* (1992), 7 O.R. (3d) 277, *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193; and in rules containing pre-trial motion protocols such as Rule 34.02 of the *Criminal Proceedings Rules*.

[27] The paragraph relied upon by the trial judge and the sentence he emphasised hardly signalled a system by which a trial judge could “short circuit” a trial even though there was further evidence to be called, and submissions to be made, simply because he or she thought they had “heard enough.”

[28] Whatever the ramifications of *Cody* and its comments encouraging judges to “control and manage” a trial, the Supreme Court of Canada did not sanction the elimination of one of the fundamental tenets of a criminal trial: the right of a party to make submissions on the guilt or innocence of an accused person.

[29] What happened here was a serious violation of natural justice and the appeal must be allowed on this ground alone.

Reasonable Apprehension of Bias

[30] The denial of natural justice is not the only difficulty that stems from the trial judge's actions.

[31] When questioned by the judge at the commencement of the trial, defence counsel characterised the case as a “he said-she said,” thereby alerting the judge that it was likely that the respondent would testify to refute the allegations made by Ms. Gugins.

[32] As previously described, just before the Crown closed its case, the judge made enquiries of defence counsel indicating that he knew she was planning to call the respondent. However, the

trial judge did not permit this to happen, immediately launching into reasons for dismissal of the charge.

[33] In *J.V.*, at para. 108, Hill J. also warned of that one of the dangers of the denial of natural justice was the appearance of a reasonable apprehension of bias on the part of the trial judge.

[34] I find that to be the case in this appeal. There are two bases for this concern: (1) the danger that a reasonable observer might also perceive that by acting in this manner the trial judge had pre-judged the issue, and (2) the potential perception that the judge had prevented the respondent from exercising his right to testify to ensure that he did not say anything that would bolster the Crown's case.

[35] The test for reasonable apprehension of bias can be found in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394 as:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

[36] This test was approved by Cory J. in *R.S.D.* at para. 111, he added:

...This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.

[...]

Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, supra, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34.

[37] See also *R. v. James*, 2000 BCCA 616, 149 C.C.C. (3d) 534, at paras. 15-17; *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148, at para. 29; *R. v. P.G.*, 2017 ONCA 351, 138 O.R. (3d) 343, at para. 25.

[38] In my view, what happened in this case meets the test for reasonable apprehension of bias. Here, the judge, in his reasons stipulated that there was no point in continuing with the trial because the respondent's testimony did not matter.

[39] With respect, it might well have mattered. The respondent might well have made admissions when testifying. Cross-examination by the Crown might have yielded the answers necessary to discharge its burden of proof and remove reasonable doubt. Submissions by the Crown may have brought matters to the judge's attention that he had not thought of, or turned his mind to.

[40] It cannot be known if any of these things would have happened because the judge, on his own motion, ended the trial before it was over.

[41] When giving his reasons, the judge commented that he had not "asked" the defence to call further evidence because the Crown was "not anywhere near proving this case beyond a reasonable doubt." With respect, an accused person's decision to testify is not a matter of request from a trial judge but a fundamental constitutional right. The exercise of this right, expressly indicated by his counsel, was frustrated by the judge.

[42] The question on review is: what would a reasonable observer conclude in the circumstances?

[43] In my view, the judge's additional unhelpful comments that the trial was some sort of "charade" adds to the impression of unfairness, as does his opinion that the court should be "spending our time on doing things that really matter."

[44] These unfortunate comments, can only give rise to a reasonable apprehension of bias.

[45] Impartiality is the staple of a trial judge's role. The comments made by the trial judge, would in my view, strongly suggest that he had pre-judged the matter. In my view, an informed person viewing the matter realistically and practically, and having thought the matter through would think that it was more likely than not that the trial judge in this matter, consciously or subconsciously, had not decided the matter fairly: see *R. v. Huang*, 2013 ONCA 240, 115 O.R. (3d) 596, at para. 17.

Is the Curative Proviso Applicable?

[46] Mr. Carlisle, for the respondent, with characteristic candour, concedes that he cannot defend the actions of the trial judge. However, he argues that the appeal should be dismissed on the basis of s. 686(1)(b)(iv) of the *Criminal Code* which states:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

[...]

(b) may dismiss the appeal where

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[47] Relying on *R. v. Vézeau*, [1977] 2 S.C.R. 277, Mr. Carlisle submits that the Crown has not shown that the result would not necessarily have been the same even if the judge had not ended the trial prior to the defence calling evidence and the parties making submissions.

[48] I reject Mr. Carlisle's submissions for two reasons.

[49] First, my finding that the judge's actions were a breach of natural justice forecloses the application of s. 686(1)(b)(iv) of the *Code*: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 70-71.

[50] The finding of a breach of natural justice must always render a decision invalid whether or not the reviewing court is of the opinion that the result would have been the same: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, at para. 23; *Supermarches Jean Labrecque Inc. v. Flamand*, at paras. 64-75; *J.V.*, at para. 93.

[51] Secondly, even if *Vézeau* were to apply, it would not be appropriate in this case. The principles in *Vézeau* operate when the case has been completed and the Crown is required to demonstrate within the parameters of the finished case that the outcome would not necessarily have been the same were it not for legal error: *R. v. Collins* (1993), 79 C.C.C. (3d) 204, at para. 44.

[52] Here, there was no complete trial: the defence was prevented from calling evidence; the Crown was not allowed to make submissions on the issue of guilt.

[53] Accordingly, there is no way of determining whether the result might have been different because all of the evidence had not yet been heard and none of the arguments had been made.

[54] I therefore find that the curative proviso cannot be used in this case.

CONCLUSION

[55] For the above reasons, the Crown's appeal is allowed and a new trial is ordered.

[56] In light of the unusual circumstances of this case, the Crown may wish to review the matter in exercising its discretion to proceed with a new trial.

S.A.Q. Akhtar J.

Released: 2 May 2018

CITATION: R. v. Sibbert, 2018 ONSC 2731
COURT FILE NO.: CR-17-00000121-00AP
DATE: 20180502

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

BRIAN SIBBERT

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.