

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Tossounian, 2017 ONCA 618

DATE: 20170725

DOCKET: C57314

Juriansz, Pepall and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jeannette Tossounian

Appellant

Kristin L. Bailey, for the appellant

Jessica Smith Joy, for the respondent

Heard: May 30, 2017

On appeal from the conviction entered on July 5, 2012, and the sentence imposed on August 27, 2012, by Justice Barry Herriot Matheson of the Superior Court of Justice.

Juriansz J.A:

A. OVERVIEW

[1] This appeal raises issues about the Crown's disclosure obligations to an unrepresented accused in custody, and a trial judge's duty to assist an unrepresented accused, particularly in ensuring that the accused's right to full disclosure has been fulfilled.

[2] On February 15, 2012, a fire took place on premises which the appellant rented and where she operated an unsuccessful art gallery. Three people in a passing car, all of whom were unknown to the appellant, noticed the blaze, and saw a female walking away from the site of the fire carrying a gas can. They called the police and followed the woman. The police arrived and arrested the appellant. The police found an empty gas can along the route the appellant had taken. On her arrest, she was in possession of two lighters and smelled of gasoline.

[3] The appellant was in custody for some 191 days at the Vanier Institute before and during the trial. She was unrepresented throughout the proceedings.

[4] After a two-day trial by judge alone, she was convicted of arson and possession of incendiary material for the purpose of committing arson. The Crown called 16 witnesses. The appellant did not call a defence. The only issue at trial was identity. In her closing argument, the appellant submitted the evidence of the three civilian witnesses who identified her was not reliable.

[5] On appeal, the appellant advances two main issues: (i) that her right to a fair trial and the right to make full answer and defence was compromised by the Crown's failure to provide disclosure; and (ii) that the trial judge failed to provide adequate assistance to her, particularly by failing to ensure she understood her right to full disclosure.

[6] For the reasons that follow, I would allow the appeal, set aside the finding of guilt, and order a new trial.

B. FACTS OF DISCLOSURE MADE

[7] The Crown made disclosure in three stages.

[8] On March 27, 2012, an in-court judicial pre-trial was held. Although urged by the pre-trial judge to talk to a lawyer, the appellant indicated she would be representing herself as she had "never received good advice from a lawyer once in my life". She also stated that she would definitely not be applying for Legal Aid because she did not "want to waste the taxpayer's money", and that she would be pleading not guilty. She acknowledged that she had received and already read a 144-page disclosure package, but understood that there was more evidence coming. The Crown provided a synopsis of its anticipated evidence and indicated that summaries of the witness statements were included in the 144-page disclosure package. The Crown advised that the police had put a rush on the transcripts of the witness statements that were being prepared and they were

expected to be done in a few weeks. The pre-trial judge confirmed that as soon as they were ready, the transcripts would be made available to the appellant. The Crown also indicated that samples from the site had been sent to the Centre for Forensic Sciences (“CFS”) to test for accelerant, and that a CFS report would be forthcoming. In two to three months. As well, the Crown anticipated a Fire Marshal’s report within the next couple of weeks. The pre-trial judge inquired whether, subject to receiving the further disclosure, the appellant was ready for trial and she indicated that she was. The pre-trial judge reiterated that the appellant should speak to a lawyer. He remanded the case to an April 17 Assignment Court but indicated that he was unsure whether the Crown would be ready to proceed because it was still awaiting forensic evidence which might take months to receive. The pre-trial judge made the following endorsement:

Accused is in custody but claims to be ready for trial, however, the Crown is awaiting forensic evidence, which it does not anticipate receiving for several months. The accused intends to plead not guilty to the charges and intends to testify on her own behalf. The Crown expects its evidence to take two to three days, the accused does not plan to call any evidence other than her own evidence.

[9] On April 17, a trial date of July 3 was set by another judge, who made no inquiries nor comments on the state of the Crown’s disclosure. On June 13, 2012, the Crown personally served the appellant with the expert report of the CFS chemist.

[10] The Crown couriered a disclosure package of over 500 pages¹ to the appellant which was received by the Vanier Institute, scanned through its security, and lodged into the appellant's property by June 25, 2012. This package included the Fire Investigation Report containing some 165 photographs taken by the author of the report, and the transcripts of the witness statements; both of which had not been previously disclosed.

[11] The trial began on July 3, 2012. At the outset, the Crown alerted the judge to the fact that the CFS report had not been served on the appellant within the requisite 30 days' notice. The Crown proposed three options: (i) adjourning the trial, (ii) calling all of the evidence but for the expert testimony and adjourning to allow the appellant adequate time to review the expert report, or (iii) proceeding with the trial with the appellant's consent. The trial judge explained each of these options to the appellant. The appellant confirmed that she had read the CFS report, that she had understood it, that she would not be calling contrary expert evidence, and that she consented to the admission of the CFS report on short notice.

[12] Early in the trial, the Crown indicated she would like to approach one of the three civilian witnesses to show her some photographs of the crime scene taken

¹ Within this package, some of the pages were duplicates. However, the majority were unique pages that differed in substance from the initial 144-page disclosure.

by the Ontario Fire Marshal. The judge asked the appellant if she had seen the pictures and she indicated that she had not. On a further inquiry by the judge, the appellant confirmed the photographs had not been “served on” her. The Crown protested that she had couriered all materials to the appellant properly and that she had confirmed with the Vanier Institute that they were all placed in the appellant’s property for her access and that she would have had access to all these documents. The judge asked if the Crown would be calling a witness from the Vanier Institute to confirm that, and the Crown indicated they would not be. The trial judge stated: “Well she denies receiving it.” The Crown proceeded by asking questions on the description of the building without showing the witness the photographs.

[13] At the opening of the second day of trial, the Crown advised that the police had followed up and had obtained confirmation from the Vanier Institute that it had received the Crown’s material and it had been lodged in the appellant’s property by June 25, 2012. The Crown also had obtained confirmation from the courier that the material had been delivered to the Vanier Institute. Although the Crown accepted that the appellant had not seen the photographs, she did wish to introduce six photographs as exhibits and suggested a brief recess to allow the appellant to look at them. The appellant agreed and, after the recess, the trial continued.

[14] The appellant brought a motion to file fresh evidence relating in part to the issue of disclosure. The Crown consented to the motion.

C. ANALYSIS

(1) Right to disclosure

[15] The appellant has the constitutional right to disclosure of all material that could reasonably be of use in making full answer and defence of the case against her as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. At this stage, in order to be entitled to a remedy under s. 24 (1) of the *Charter*, the appellant bears the onus of establishing two things. First, she must establish on a balance of probability that the Crown breached its obligation to make proper disclosure. Second, if she does so, she must go on to establish that the Crown's failure to disclose impaired her right to make full answer and defence: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para 31.

[16] I am satisfied that the appellant has established both stages and is entitled to a new trial as a remedy under s. 24 (1) of the *Charter*.

(a) Violation of the appellant's right to disclosure

[17] The Crown attempted to make full disclosure of all materials but, in my view, did not take adequate steps to ensure that the appellant received them. The Crown ensured the appellant received the initial 144-page package of disclosure by handing it to her in court in March 2012. The Crown also ensured

that the appellant received the expert report of the CFS chemist by personally serving it on her on June 13, 2012. However, the Crown delivered an additional package of over 500 pages of disclosure to the Vanier Institute and instructed the Institute to place the package in her property. This material was received by the Vanier Institute by June 25, 2012 and differed from the 144-page disclosure previously made by the Crown. It consisted of transcripts of the witness statements of three civilian witnesses, a transcript of the appellant's statement to the police, reports from the Centre of Forensic Sciences and notices to tender expert evidence. The fresh evidence establishes that the Vanier Institute did not advise the appellant of its receipt, and, although it was placed in her property, the appellant was not aware of it until after trial.

[18] The Crown submits that the appellant was told at the pre-trial that additional material would be forthcoming and that she should be found to have not exercised due diligence because she did not ask the Crown if it had been sent and did not ask the jail if it had been received.

[19] Although the courts have recognized that diligence on the part of defence counsel is relevant in determining whether there has been a breach of the right to disclosure (see, *Dixon*, at para. 37 and *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.), at para. 29), neither party provided the court with any authority discussing the standard of due diligence imposed on an unrepresented accused in custody. Because pre-trial custody may involve institutional rules that are

inhospitable to accessing disclosure, as well as unpredictable events, such as lockdowns, an accused person has little scope for exercising initiative in relation to disclosure. Consequently, the standard of diligence expected in the circumstances must necessarily be minimal. This case serves as a good example of some of these restrictions. In cross-examination on the appellant's December 17, 2015 affidavit in the fresh evidence admitted on consent, the appellant testified that the Vanier Institute did not even permit her to take the 144-page disclosure package with her to trial. That said, the Crown again gave her a copy of that package to use at trial and she acknowledged that she had reviewed it again in preparation for trial.

[20] The fresh evidence establishes the appellant's disclosure materials were kept in the manager's office and were only available to her on request. She did request the disclosure materials when she prepared for trial, but that was before the second disclosure package arrived. She explains that when she was personally served with the report of the CFS expert on June 13, 2012, she believed she had received the material she had been told at the pre-trial would be forthcoming. This was a reasonable assumption on the appellant's part.

[21] In all of the circumstances, the appellant acted diligently in relation to the incremental disclosure made by the Crown.

[22] I would conclude the Crown failed to make full disclosure. I appreciate the complications in making disclosure to an unrepresented accused person who is in custody. The Crown must resolve these complications in order to fulfil its responsibility to ensure the relevant materials make it into the hands of an in-custody accused. This may involve personal service of materials. It may involve further court appearances including videoconferences, to ensure that disclosure is complete and the case is ready for trial. It will depend on the circumstances of each case. In this case, the problem might have been diminished had the set-date judge made further inquiries on the state of Crown disclosure and expected delivery dates. Similarly, a readiness hearing held reasonably in advance of the trial could have served to alleviate or eliminate the inadequate disclosure.

(b) Impaired ability to make full answer and defence affected the overall fairness of the trial

[23] Appellant's counsel frankly concedes it would be a difficult task to persuade the court that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction. However, she relies on the second branch of the test Corey J. set out in para. 36 of *Dixon*:

Even if the undisclosed information does not *itself* affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses

or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but to the *realistic* opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence. [Emphasis in original.]

[24] To meet the onus of showing there is a reasonable possibility that undisclosed information impaired the right to make full answer and defence, appellant's counsel puts forward two categories of materials in the second disclosure package of which the appellant was not aware at trial.

[25] Appellant's counsel acknowledges that the appellant was given a fair opportunity to review the six photographs that the Crown put into evidence. However, pointing out that those six photographs were drawn from among the 165 photographs taken by the Fire Marshal's office, she submits the appellant might have made use of some of the other photographs for the defence. Appellant's counsel did not draw the court's attention to any particular photograph to show how there was a reasonable possibility it might have been of use in the appellant's defence. I would not give effect to this argument.

[26] The other category of materials on which the appellant relies are the transcripts of the witness statements. The appellant had disclosure only of the brief summaries of the statements that were included in the initial 144-page package of disclosure. Appellant's counsel points out discrepancies between the

statements of certain witnesses and their testimony at trial. There are a number of discrepancies about which effective cross-examination might have been possible.

[27] The interview summary of the witness who was the front passenger of the passing car indicated that the woman seen walking away from the fire “came across the street toward their vehicle, she didn’t say anything or make a motion to them but appeared calm and began to walk east”. The transcript of the interview of the witness indicates she said, “... she crossed the street in front of us and when she noticed that we had pulled into the plaza she looked somewhat shocked and distraught she looked at us and then turned around and walked in a circle and looked at us and turned around and walked in a circle”. At trial, the witness testified that the woman “started casually walking down the street. She turned to look back at us a few times. At one point she shrugged at us and continued casually walking down the street” (emphasis added).

[28] Appellant’s counsel combines the testimony of this witness with that of the witness who was the driver of the passing car. The interview summary that the appellant had reviewed indicated that the driver “saw the female and described her as white, with brown, long hair, wearing a dark jacket. He could not see her face. He described her demeanour as calm, not in a hurry.” The transcript of the driver’s statement indicates that he said, “well like I said I caught, I saw her face for maybe 10 seconds not enough to really grasp anything but she wasn’t erratic

she wasn't running she was walking there was nothing that really jumped out at me that said you know this was a really agitated or upset individual." At trial, the driver testified: "Initially, I noticed that the reaction seemed very calm. When the person looked at us in the vehicle, it appeared to me that they made a kind of shrugging motion, and then proceeded to turn around and walk away very calmly" (emphasis added).

[29] There are inconsistencies in these testimonies that could have been explored at trial. For example, the passenger, after telling the police that the woman made no gestures, testified at trial that the woman shrugged. Appellant's counsel emphasizes that the first time that both the passenger and the driver testified the woman shrugged was at trial. The appellant could have made use of this to suggest inadvertent collusion between the witnesses was possible, that it showed they had discussed their evidence and that discussion influenced their testimony. This was a line of inquiry that the failure of disclosure foreclosed to the appellant.

[30] Appellant's counsel points out that the Supreme Court of Canada in *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 103, found that the "mere reasonable possibility" that the discrepancies could be used to impeach the credibility of witnesses "is all that is needed for it to be possible to hold that there was a reasonable possibility that the failure to disclose impaired the overall fairness of the trial."

[31] I am satisfied there is a reasonable possibility that the failure of disclosure in this case foreclosed lines of inquiry that could have been available to the appellant had disclosure been made, thus impairing her right to make full answer and defence. The only issue at trial was her identification as the woman seen walking away from the fire. The failure of disclosure detrimentally affected her ability to cross-examine and to diminish the reliability of the witnesses who identified her. Hence I am satisfied the inadequate disclosure negatively affected the overall fairness of the appellant's trial. The remedy for the infringement of the appellant's right is a new trial.

(2) Inadequate assistance by the trial judge

[32] Further, I am persuaded that the trial judge failed to provide the requisite assistance to the unrepresented appellant during the trial, particularly on the issue of disclosure.

[33] Early in the trial it became apparent the appellant had not seen the photographs the Crown wished to show to the second witness. It was at that point obvious there had been a failure of disclosure. The trial continued, and later that day, the Crown noted the appellant did not have a copy of the warrant to search her premises and provided her with a second copy. The warrant had been included in the initial 144-page disclosure package, and the appellant acknowledged having received that package. At the beginning of the second day

of trial, the Crown advised the court that a subsequent package of disclosure that enclosed the photographs had been couriered to the Vanier Institute. The court afforded the appellant a recess to look at the six photographs tendered and then the trial continued.

[34] The Crown points out that the appellant did not raise any concerns about her receipt or review of disclosure. That seems to me to be beside the point.

[35] As soon as it seemed there was a problem with disclosure, it was the duty of the trial judge to make the necessary inquiries and to take the necessary steps to ensure that the unrepresented accused received full disclosure, and that she fully understood her rights to disclosure and the available remedies for infringement of those rights.

[36] This court described the duty of a trial judge when dealing with an unrepresented accused in *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), at p. 347, as follows:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect.

[37] The responsibilities of judges in respect of unrepresented accused persons are also described in the Statement of Principles on Self-represented Litigants and Accused Persons (the “Statement”) issued by the Canadian Judicial

Council in September 2006. The Supreme Court of Canada endorsed the Statement in *Pintea v. Johns*, 2017 SCC 23, at para. 4, as did this court in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, at paras. 42-45.

[38] The *Statement*, at p. 7, offers specific advice to judges about how to meet their duties to self-represented persons in the courtroom environment:

Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.

In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.

Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

[39] The trial judge in this case failed to carry out these duties to the unrepresented accused. On this ground too, a new trial is necessary.

(3) Other issues

[40] The appellant raises three additional issues in her factum: (i) the trial judge erred in using the demeanour evidence relating to the appellant's appearance in finding her guilty of the offence; (ii) the fairness of the trial was compromised by having the same trial judge preside who had previously found

the appellant guilty; and (iii) the trial judge materially misapprehended the evidence and used that evidence in grounding the findings of guilt. Having determined a new trial is required due to a violation of the appellant's right to disclosure and inadequate assistance by the trial judge, I find it unnecessary to address these issues.

D. CONCLUSION

[41] For these reasons, I would allow the appeal, set aside the finding of guilt, and order a new trial.

Released: "SP" July 25, 2017

"R.G. Juriansz J.A."
"I agree. S.E. Pepall J.A."
"I agree. Trotter J.A."