Supreme Court of Newfoundland - Court of Appeal

R. v. Kenny

Date: 19960710

Docket: 1992no.79

1996 CanLII 6633 (NL CA)

The judgment of the court was delivered by

GUSHUE C.J.N.: - The appellant, a former member of the Christian Brothers of Ireland and, at one time, Superior and Superintendent at Mount Cashel Boy's Home and Training School (normally referred to as Mount Cashel Orphanage) was convicted in the Trial Division of the Supreme Court, by a judge sitting alone, of seven counts of indecent assault, contrary to s. 156 of the *Criminal Code* of Canada, 1975. The date of conviction was March 31, 1992 [94 Nfld. & P.E.I.R. 181], and the date of sentence (five years' imprisonment) was April 14, 1992 [95 Nfld. & P.E.I.R. 131]. On May 13, 1992, the convictions and sentences were appealed to this Court. At counsels' request, the appeal against sentence was heard on September 20, 1994, prior to the hearing of the conviction appeal. The sentence was increased to seven years [126 Nfld. & P.E.I.R. 199]. The appeal against conviction was heard on April 18, 1995. Rendering of this judgment has been deliberately postponed pending the filing by the Supreme Court of Canada of its decision in the appeal taken to that Court by Joseph Burke. Joseph Burke was likewise a Christian Brother who taught and resided at Mount Cashel Orphanage and was convicted of various counts of indecent assault and assault. Many of the issues in Mr. Burke's appeal which were before the Supreme Court were deemed to be relevant to this appeal. The Burke decision in the Supreme Court (as yet unreported) was filed on March 21, 1996 [now reported 105 C.C.C. (3d) 205 (S.C.C.)].

The appellant became a member of the Christian Brothers in 1960. In 1971 he was appointed Superior and Superintendent at Mount Cashel and he remained in this capacity until 1976. At that time he was reassigned to a similar institution in Vancouver. He left the Christian Brothers in 1983.

The following is from the Statement of Facts which appears in the appellant's factum, which facts (except as noted) have been agreed to by counsel for the Crown:

> In 1975, a police investigation was commenced when allegations were made by residents of Mount Cashel Orphanage against two other Christian Brothers.

> *Unbeknownst to the Appellant,* allegations of child abuse were also made against him during the course of the 1975 investigation. That investigation was discontinued by the Crown in 1976, and the Appellant was reassigned outside of Newfoundland by the Christian Brothers after a six month spiritual renewal program in Rome.
>
> A commission of Inquiry was appointed in 1989 to examine the 1976 decision to discontinue the police investigation into Mount Cashel and to enquire into past and present police and governmental policies regarding the handling of allegations of child abuse and to make recommendations regarding same. It was entitled "the Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints" and was headed by The Honourable S.H.S. Hughes. The "Hughes Inquiry" was a public inquiry and received extensive media coverage. Seven of the ten complainants in the present case gave evidence in public at the Hughes Inquiry. The Appellant was first charged two weeks after the Inquiry began.
>
> A pre-trial Application was made in February, 1991 alleging abuse of process by the Crown for violation of Douglas Kenny's Common Law and Charter rights with a stay of proceedings as the appropriate remedy... . a stay was denied, although a Charter breach was found. This decision contains relevant background information concerning pre-trial publicity, pre-charge delay, Commission impact upon proceedings, prosecutorial discretion and the Crown's failure to protect the rights of the Appellant.

(The statement, underlined by me in the above quote, that the allegations of abuse were "unbeknownst to the Appellant" is disputed by the Crown in its factum where reference is also made to a statement by the trial judge who, it would appear, did not accept that the appellant was unaware of the charges. Nothing turns on this point.)

The most significant aspect of the appeal is directed to the refusal by the trial judge to grant a stay of proceedings because of allegations of abuse of process and violations of the *Canadian Charter of Rights and Freedoms.*

The Pre-trial Judgment

The effect of the lengthy delay in the laying of charges, the extensive amount of graphic pre-trial publicity, the holding of the judicial inquiry while charges were pending, as well as allegedly prejudicial statements by governmental officials were all claimed to have amounted to an abuse of executive power, warranting a stay of proceedings. In a lengthy judgment which comprehensively analyzed the law and its application to the facts of the case, the trial judge determined, firstly, that, despite the extensive pre-trial publicity, "the risk of a biased jury can be neutralized by proper jury selection procedures and by proper judicial instructions" and, also, that he was not satisfied that the appellant could not obtain an impartial jury and have a fair trial.

1996 CanLII 6633 (NL CA)

With respect to pre-charge delay, the judge followed the decision of the Supreme Court of Canada in *R. v. L. (W K.)* (1991), 124 N.R. 146, 64 C.C.C. (3d) 321 (S.C.C.), which held that pre-charge delay, without more, cannot justify a stay of proceedings as an abuse of process. Further, he found that no additional factors had been demonstrated at that time which would justify a conclusion that pre-trial delay, whether pre-charge or post-charge, had resulted in prejudice and the inability to have a fair trial.

As to the holding of the Hughes Inquiry at the time when charges were pending, the judge did find that the publication, by various means, of the explicit testimony of witnesses, some of whom were to be complainants in the charges laid against the appellant, did infringe the appellant's Charter rights to a fair trial by an impartial jury by making it more difficult for an impartial jury to be selected. However, he concluded that while it might be more difficult, his view was that such could probably be selected and that a fair trial could be obtained. Further, in his view it was not to be assumed that a person subjected to pre-trial publicity will necessarily be biased. In this connection he relied on the Supreme Court of Canada decision in *R. v. Vermette,* [1988] 1 S.C.R. *985,* 41 *C.C.C.* (3d) *523 (S.C.C.).* (Further reference to the significance of the *Vermette* decision will be made below.) In other words, that aspect of the application was premature.

With respect to the allegation that prejudicial public statements were made by officials of the Department of the Attorney General, the judge analyzed various statements made by these officials with respect to the report of the Hughes Inquiry and other related issues and concluded that it was not established that these statements amounted to an abuse of process or an infringement of the appellant's rights to fundamental justice and the presumption of innocence. Again, it was the judge's opinion that such could only be adequately determined at the time of selection of a jury.

It was also submitted to the judge that the cumulative effect of all of the above prejudiced the accused's ability to obtain a fair trial. Once more, the judge stated that he was not satisfied that such was the case and he concluded as follows *[R. v. Kenny* (1991), 68 C.C.C. (3d) 36 (Nfld. S.C.) at p. 80]:

> There has been no abuse of process established to my satisfaction. I find that there has been an infringement of the accused's Charter right to a fair trial because of the publication of the explicit testimony before the Hughes Inquiry concerning the allegations which are the subject of criminal charges in this trial. This publicity has made it more

1996 CanLII 6633 (NL CA)

> difficult for the accused to obtain an impartial jury for the purpose of providing full answer and defence.
>
> I am satisfied, however, that a fair trial is possible, with proper attention paid to the selection of triers, with proper challenge for cause and peremptory challenge procedures during jury selection and with proper judicial instructions during the trial. In these circumstances, a stay is not the appropriate remedy. I reserve judgment on the appropriate remedy for the breach of the accused's Charter rights which occurred. The parties have leave to make further submissions in this respect. There may, for example, be a claim in damages or for costs because of any additional expense incurred in dealing with preliminary applications or extended jury selection.

It is clear that the judge was of the view that, for the most part, it was only at the trial itself that the matter of prejudice and inability of the appellant to obtain a fair trial could be properly and adequately assessed. This follows the principle stated by the Supreme Court in *Vermette.* In that case, an R.C.M.P Inspector had been charged with break, enter and theft of computer tapes containing a list of members of the Parti Quebecois. Certain questions were asked of the Premier in the Quebec National Assembly and the Premier answered at length disparaging a witness, the accused, defence counsel and members of the Federal Government. These remarks received widespread publicity and led the trial judge to declare a mistrial. Prior to a new trial, an application to stay was granted on the basis that the accused's rights under s. 7 and s. 11(d) of the Charter had been infringed. An appeal to the Quebec Court of Appeal was dismissed, but on further appeal to the Supreme Court of Canada, the appeal was allowed and a new trial ordered. To quote from the headnote, paraphrasing La Forest, J. for the majority:

> While s. 24(1) of the Canadian Charter of Rights and Freedoms applies not only in the case of an actual interference with guaranteed rights, but also where an apprehension of such interference at a future trial can be established by the accused, the granting of the stay of proceedings in this case was premature. *It was only at the stage where the jury is to be selected that it would be possible [sic] determine whether the accused could be tried by an impartial jury.* There is no evidence indicating that it would be impossible to select an impartial jury in a reasonable time. This was a matter of speculation only. [Emphasis added.]

In this matter, the trial judge was therefore quite right in refusing the stay of proceedings on the pre-trial application. Indeed, at trial the defence changed its position and elected trial by judge alone. Thus, the arguments raised on the pre-trial application for the most part dissipated in that obviously the effect of the Hughes Inquiry and the attendant publicity, as well as possible prejudicial statements made by officials of the Crown, were no longer of any significance. The only remaining issue with respect to abuse of process remaining for the trial

1996 CanLII 6633 (NL CA)

judge to consider at trial was the effect of delay on the defence's ability to call certain witnesses who were, because of the passage of time, unavailable. The trial judge found that it was mere speculation to assume that any of the few unavailable witnesses would be of any assistance in establishing alibis or otherwise for the appellant. Nor was the trial judge satisfied that any deficiency in the obtaining of proper evidence by the police and other investigatory bodies had been established or that there was any reason to suspect that the defence was prejudiced in any way in this regard. He therefore once again refused the application for a stay of proceedings based upon either abuse of process or breach of any Charter rights accruing to the appellant.

It will, I am sure, not come as a surprise that this Court is of the view that the trial judge was correct in refusing a stay of proceedings based on either abuse of process or violation of the appellant's Charter rights. The same issues which counsel for the appellant has raised before this Court were dealt with at the trial level in at least three other trials of former Christian Brothers who taught and resided at Mount Cashel at the same time as did the appellant, and who were likewise accused and convicted of sexual offences against boys residing at that institution. The most notable cases, from the aspect of this appeal, are *R. v. French* (1991), 93 Nfld. & P.E.I.R. 14 (Nfld. S.C.), *R. v. English* (1991), *89* Nfld. & P.E.I.R. 236 (Nfld. S.C.) and *R. v. Burke* (1991), *92* Nfld. & P.E.I.R. 275 (Nfld. S.C.). All three were tried in the Trial Division of the Supreme Court of Newfoundland. In all three cases, applications for stays of proceedings were refused. English appealed to this Court on two separate occasions on similar grounds to those raised in the present case and on both these occasions the appeals were dismissed. Leave to appeal from the second decision was refused by the Supreme Court of Canada.

The same issues were also raised by Burke on appeal to this Court and again the Court unanimously agreed with the trial judge that there had been no abuse of process or Charter violation which would warrant the entering of a stay of proceedings. Burke was also tried before judge alone. This Court unanimously agreed that neither delay nor pre-trial publicity could be said to have operated so as to deprive Burke of a fair trial. As stated above, Burke appealed to the Supreme Court of Canada and these issues were raised before that Court. The appeal was allowed in part, but with respect to the issues of delay and publicity similar to those which concern us here, the Supreme Court, per Sopinka, J. stated [at para. 2]:

1996 CanLII 6633 (NL CA)

> On the abuse of process issue, I respectfully agree with the decision of the Newfoundland Court of Appeal.

Clearly, the stay of proceedings aspect of the appeal was a non-issue. Further, with respect to the issue of pre-trial publicity arising out of a concurrently held judicial inquiry, the Supreme Court dealt with that issue in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. *97, 98* C.C.C. (3d) 20 (S.C.C.). That case was concerned with an application for a stay of the inquiry into the Westray mine disaster because of the effect which publicity arising therefrom might have on persons charged with criminal offences and their right to a fair trial. The court held, firstly, that assessment of the effect of publicity on the right to a fair trial must take place in the context of the existing procedures to safeguard the selection of jurors and, further, the nature and extent of the publicity must be considered. However, in that particular case the foundation on which the stay of the Westray Inquiry was based had disappeared because the accused persons had elected trial by judge alone and the trial had started. It was therefore unnecessary and undesirable to decide the case on a basis that had disappeared. If an accused elects trial before a judge alone, pre-trial publicity will not be a factor to be taken into consideration in assessing the fairness of the trial.

The various grounds of appeal dealing with abuse of process and Charter breach must therefore be dismissed.

<u>The Other Grounds</u>

Although he did not press them to any extent in his oral presentation to this Court, counsel for the appellant did raise in his factum three other areas where he claims the trial judge erred both in law and in its application to the facts of the case. These were the areas of similar fact evidence, corroboration and collaboration between witnesses. I shall deal with these in order.

(A) <u>Similar Fact</u>

It is significant to note that there were 10 complainants and 14 charges of indecent assault and gross indecency. Before embarking on his analysis of the evidence in respect of each count, the trial judge stated that it was necessary for him to ensure that the presumption of innocence of the accused was applied to each count separately and that the Crown was required to prove the guilt of the accused beyond a reasonable doubt for each of those counts. He stated [94 Nfld. & P.E.I.R. at p. 187]:

1996 CanLII 6633 (NL CA)

> I must review the testimony of each of the complainants and other witnesses, individually, and approach each count, individually, in order to assess the total evidence for that count in the context of the presumption of innocence and the requirement for proof beyond a reasonable doubt.

The judge then canvassed the relevant law, both English and Canadian and concluded that four basic principles existed in determining whether similar fact evidence should be admitted. In his view these were [at p. 191]:

> 1. The admission of similar fact evidence is only done in exceptional cases.
>
> 2. It is a sufficiently exceptional case if the similar fact evidence goes to more than disposition and has real probative value because the similarities of the acts alleged cannot reasonably be attributed to coincidence.
>
> 3. The similar fact evidence should only be admitted even then where the probative force clearly outweighs the prejudice, or the danger that the trier of fact may convict for nonlogical reasons, should such evidence be received.
>
> 4. All of this assumes the absence of collaboration between the parties alleging the similar facts.

With respect specifically to the evidence sought to be admitted by the Crown as similar fact evidence for proof of a criminal act, the trial judge stated [at p. 193]:

> Looking at the types of evidence put forward by the Crown as similar fact evidence, and assuming for the moment that both deliberate fabrication and innocent tainting of memory by post-event information has been adequately ruled out, I find that the similarities of the following acts cannot reasonably be attributed to coincidence:
>
>> (a) the biting of the complainants' tongues and the requesting that complainants bite the tongue of the accused, while the accused fondled them;
>>
>> (b) having small boys sit on the floor next to the accused in the Reading Room, where he had been exercising an injured leg, and fondling their genitals;
>>
>> (c) bringing small boys to a field, near a beach, lying on a blanket, holding their bodies close and rubbing their groins against his;
>>
>> (d) generally, the holding of the bodies of small boys against the body of the accused and the rubbing of their groin areas against his, as though they were inanimate sexual playthings.
>
> Absent collaboration, I believe it would be an affront to common sense to conclude that more than one individual would, if making up a story, include *by coincidence* any of the above. These four types of activity will therefore, generally be accepted by me as meeting the Non-Coincidence Test and the rule in *Hodge's Case,* for admission as similar fact evidence for the purpose of proving a criminal act, but keeping in mind the presumption of innocence, the requirement for proof beyond a reasonable doubt and the necessity of considering the totality of the evidence.

As stated, the appellant was charged with 14 counts. Convictions were entered in respect of eight and six were dismissed. The trial judge clearly deals with the evidence of each

1996 CanLII 6633 (NL CA)

complainant, assesses their credibility and properly applies the principle of reasonable doubt. The issue of credibility in respect of each complainant and each complaint is analyzed as a separate issue quite apart from the introduction of the similar fact evidence. It is the appellant's submission that the similar fact evidence was improperly admitted because it was evidence going only to the disposition of the appellant to commit the offences in question. That however is not the case. It is clear that the evidence which was accepted goes to far more than disposition and there is no basis for questioning the trial judge's decision that their probative value outweighed the prejudice to the accused. In my view, the appellant has demonstrated no error of law on the part of the trial judge in accepting the evidence as he did. I shall comment further when dealing with collaboration.

1996 CanLII 6633 (NL CA)

(B) Corroboration

This raises also the question of corroboration. I am somewhat unsure of the point which counsel for the appellant is attempting to make here, but if the similar fact evidence is admissible, and it was, and if as well the complainants are found to be otherwise credible, then obviously that evidence will serve, at least to some degree, to corroborate. While corroborating evidence is no longer required to convict, it cannot be said that it was not admissible or could not be used by the Crown in further support of its position.

(C) Collaboration

It had been the appellant's position at trial that the evidence of many contacts between complainants, meeting with a Toronto-based lawyer (Kopyto) and the forming of an organization called "Justice for Victims of Mount Cashel" meant that "the Crown was unable to adequately negative the potential for collaboration".

In his main judgment, the trial judge discussed the law in England and in Canada with respect to the burden on the Crown in negativing collaboration. He quoted the statement of Lord Wilberforce in *Boardman v. Director of Public Prosecutions,* [1974] 3 All E.R. 887 (H.L.) at pp. 897-8, in referring to the admission of similar fact evidence, that [at pp. 198-9]:

> "... the possibility (must be considered) that the witnesses may have invented a story in concert (and) also that a similar story may have arisen by a process of infection from media of publicity or simply from fashion. In a sexual field, and in others, this may be a real possibility; something more than mere similarity and absence of proved conspiracy is needed if the evidence is to be allowed. This is well illustrated by [D.P.P. v. Kilbourne

[1973] 1 All E.R. 440 (H.L.)l where the judge excluded `intra group' evidence because of the possibility *as it appeared to him,* of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out."

The trial judge referred also to the judgment of the Supreme Court in *R. v. B. (C.R.),* [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 1 (S.C.C.). In that case, Sopinka, J. stated that where the Crown tenders similar fact evidence, the burden is on it to negative conspiracy or collaboration "in accordance with the criminal standard", i.e., proof beyond a reasonable doubt. The trial judge accepted that this is "a requirement that applies whenever a preliminary finding of fact is a precondition to the admissibility of evidence tendered by the Crown" [at p. 198].

1996 CanLII 6633 (NL CA)

The further issue has arisen in certain cases as to whether it indeed is the function of the trial judge to look at the possibility of collusion or collaboration as a factor in determining the admissibility of similar fact evidence. In his judgment in *Burke* (supra), Sopinka, J. refers to two English cases *(Director of Public Prosecutions v. P.,* [1991] 2 A.C. 447 (H.L.) and R. v. *if.,* [1995] 2 A.C. 596 (H.L.)) where the House of Lords has taken the view that it is not the trial judge's function to do so. Sopinka, J. refers also to his judgment in *R. v. B. (C.R.)* where, as he put it, he stated that "the risk of collusion must be negatived by a finding by the trial judge" [105 C.C.C. (3d) 205 at p. 221].

Although the last above was contained in a dissenting judgment, I think it is fair to say that if there exists some evidence of collusion or collaboration, in Canada before the evidence of similar facts may be admitted there must be a finding of an absence of such collusion or collaboration. Further, as stated by the trial judge in this matter, the extent of proof required is proof beyond a reasonable doubt.

That the trial judge did so here is beyond question. He analyzed in detail the testimony of all complainants for, "... inconsistencies or discrepancies which would indicate a deliberate fabrication of testimony or unconscious tainting" [at p. 199]. Having quickly concluded that there were no complainants who had deliberately fabricated testimony, his full analysis of the evidence allowed him to reach a conclusion that the various stories were credible and thus admissible in accordance with the required legal test.

That treatment by the trial judge cannot be gainsayed. The evidence was admissible and it cannot be said that there was any improper exercise of the trial judge's discretion in utilizing it as he did. As stated by McLachlin, J. in her judgment in *R. v. B. (C.R.)* [at p. 733],

> ... the admissibility of similar fact evidence since *Boardman is* a matter which effectively involves a certain amount of discretion.... the weight to be given to evidence is a question for the trier of fact. Generally, where the law accords a large degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction.

These grounds of appeal must likewise be dismissed.

One issue remains. As noted above, while the trial judge felt that a stay of proceedings was not warranted in respect of any of the charges, he did conclude that there had been "an infringement of the accused's *Charter* right to a fair trial because of the publication of explicit testimony before the Hughes Inquiry concerning the allegations which are the subject of criminal charges in this trial". He granted the parties leave to file further submissions with respect to an appropriate remedy. It is my understanding that nothing in this regard has been done.

While no cross-appeal was filed by the Crown, it has nevertheless requested this Court to set aside that finding by the trial judge. It does appear on its face, because the basis for the trial judge's reaching this conclusion was that the "... publicity has made it more difficult for the accused to obtain an impartial jury for the purpose of providing full answer and defence", and that did not occur because there was no jury, there now exists no basis for any remedy. It is our feeling, however, that we should not deal with the matter "in vacuo". No remedy has been sought and may well not be sought in light of the circumstances, and this Court declines to involve itself unless and until that happens. If it does occur and a remedy is in fact awarded, then it would be open to the parties to question not only any award, but additionally the legitimacy of the original order itself.

In the result, the appeal is denied.

Appeal dismissed.

[ScanLII Collection]

1996 CanLII 6633 (NL CA)