



THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 71

Date: 20070620

Between: Docket: 1092
Stanley Armstrong Smith Appellant
- and -
Her Majesty the Queen Respondent

AND

Between: Docket: 1093
Her Majesty the Queen Appellant
- and -
Stanley Armstrong Smith Respondent

Coram:
Gerwing, Jackson and Smith JJ.A.

Counsel:
Bob P. Hrycan for Stanley Armstrong Smith
Douglas G. Curliss for the Crown
Alan G. McIntyre for R. Drew Belobaba

Appeal:
From: Q.B. C.R. 842A, Judicial Centre of Estevan
Heard: December 14, 2006
Disposition: Appeal allowed
Written Reasons: June 20, 2007
By: The Honourable Madam Justice Jackson
In Concurrence: The Honourable Madam Justice Gerwing
In Concurrence: The Honourable Madam Justice Smith

Jackson J.A.

I. Introduction

[1] On September 16, 2005, the appellant Stanley A. Smith was convicted of possessing a controlled substance for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*¹ and unlawfully producing a substance to wit: cannabis marihuana contrary to s. 7 of the same *Act*. He was sentenced to two years less a day and prohibited from possessing firearms for a period of 10 years. He appealed his conviction and sentence and the Crown appealed the sentence.

[2] Before his appeal was perfected for hearing, Mr. Smith's counsel (who was not counsel at trial), applied for leave to adduce "fresh evidence" to demonstrate ineffective assistance of counsel at trial. This application raised the threshold issue whether the Court should admit the "fresh evidence" in light of the controlling principles set out in *R. v. Palmer*,² *R. v. G.D.B.*³ and also *R. v. Lévesque*.⁴

[3] A hearing was held to consider the application to adduce fresh evidence at which *viva voce* testimony was heard from Mr. Smith and his trial counsel, in accordance with the practice that has been developed in this Court: see *R. v. Crawford*⁵ and *R. v. Moore*.⁶ (By this point, Mr. Smith had been released

¹ S.C. 1996, c. 19.

² [1980] 1 S.C.R. 759.

³ 2000 SCC 22, [2000] 1 S.C.R. 520.

⁴ 2000 SCC 47, [2000] 2 S.C.R. 487.

⁵ Unreported decision of Sask. C.A., 21 January 1999, Docket 7031.

⁶ 2002 SKCA 30, [2002] 7 W.W.R. 424.

on bail and counsel was appointed by the Court to represent him.) Mr. Smith filed an affidavit and submitted himself to full cross-examination by the Crown. Trial counsel was called at the direction of the Court with both the Crown and appeal counsel being afforded an opportunity to examine him and to present argument.

II. Issues

[4] The issues in this case are:

1. should the fresh evidence be admitted to demonstrate a miscarriage of justice; and,
2. if it is admitted, what is the appropriate remedy.

The first issue raises the question of the extent to which the trial judge's statement, that he would have convicted with or without the accused's evidence, overcomes concerns regarding the reliability of the verdict.

III. Approach to Review

[5] In *G.D.B.*⁷ Major J., speaking for the Court, outlined the approach to be taken in determining whether evidence as to the ineffectiveness of counsel should be admitted. He wrote:

26 The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), *per* O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

27 Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result

⁷ *G.D.B.*, *supra* note 3.

of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

28 Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

29 In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. **If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow** (*Strickland, supra*, at p. 697).

[Emphasis added.]

[6] In *R. v. Archer*,⁸ Doherty J.A. referred to the observation of Major J. in *G.D.B.* that when an allegation of lawyer incompetence is made the court should first consider whether the alleged incompetence resulted in a miscarriage of justice. He said: “[a] verdict is rendered unreliable where the appellant demonstrates that had counsel performed in a competent fashion, there is a reasonable possibility that the verdict could have been different.”⁹ And later: “[t]his approach recognizes that it is the appellate court’s function to determine whether a miscarriage of justice has occurred and not to grade counsel’s performance.”¹⁰

[7] The thrust of these comments is that a reviewing court is not to engage in written reasons in a detailed analysis of the trial record for the purposes of assessing counsel’s performance only to conclude that the verdict would have been the same in any event. In this case, I have concluded that there is a reasonable possibility that the outcome would have been different but for

⁸ (2005), 202 C.C.C. (3d) 60 (Ont. C.A.).

⁹ *Ibid.* at para. 120.

¹⁰ *Ibid.* at para. 121.

counsel's inexperience. I also conclude that a new trial must be ordered. Given this conclusion, the evidence will be discussed as briefly as possible.

IV. Factual Context

[8] In brief compass, this is what transpired. On August 19, 2003, RCMP officers, acting on a tip that green plants were growing in a remote part of the province, took a specially equipped vehicle to the general area to try to locate the plants. They eventually located marihuana plants in a secluded glade in a farmer's field. Mr. Smith, who was living at the scene in his vehicle, was arrested and charged with the above-mentioned offences. The land was not owned by him, but was leased to one Trent Brittz, who as it was learned by defence counsel during the course of the trial only, had played a role in transporting and caring for the marihuana seedlings, and perhaps planting them. After the police officers arrived, there was a delay of some three and one-half hours before Mr. Smith was put in contact with a lawyer. It appears that during this delay, police officers questioned Mr. Smith and some searches were conducted.

[9] Prior to trial, trial counsel filed a notice of motion requesting orders:

1. Excluding evidence gathered during the search of R. M. North West 29-6-8 on August 19th of 2003 pursuant to Sections 8 and 24(2) and the *Charter of Rights and Freedoms*.
2. Excluding statements made by the Applicant, Stanley Armstrong Smith following his arrest on August 19th, 2003 pursuant to Sections 10 and 24(2) and the *Charter of Rights and Freedoms*.

The grounds for the application included these:

3. That the arresting officers conducted the search, even though it did not meet the criteria of Section 187.11 of the *Criminal Code* and was therefore contrary to Section 8 of the *Charter of Rights and Freedoms*.

4. That upon his arrest, the Applicant, Stanley Armstrong Smith, was repeatedly refused the opportunity to contact legal counsel. Even though he had not been given the opportunity to contact legal counsel, the Applicant, Stanley Armstrong Smith, was still questioned by the arresting police officers contrary to Section 10 of the *Charter of Rights and Freedoms*.

5. That in conducting the warrantless search without grounds, and in refusing the Applicant, Stanley Armstrong Smith opportunity to speak with legal counsel prior to questioning, the actions of the arresting police officers threaten to bring the administration of justice into disrepute.

[10] Trial counsel's inexperience manifested itself almost as soon as the trial opened. Trial counsel believed that he had to prove that his client had "standing" to make the *Charter* application. In examination, before this Court, trial counsel admitted to this limited belief:

Q You assumed the *voir dire* was only to deal with the issue of standing and would not extend to substantive issues; is that correct?

A Yes.¹¹

[11] All that was problematic at trial flowed from trial counsel's belief as to the limited purpose for the *voir dire*. Crown counsel asked the Court to indicate how matters were going to proceed on the *voir dire*. Trial counsel said there was no agreement but "[w]e would like to ask you what your preference is, My Lord."¹² This was said in connection with a *voir dire*, the purpose of which was to determine the *Charter* questions above indicated. Trial counsel did not advise the Court until after all of the evidence was called that this was his first *voir dire*.¹³

¹¹ Transcript of Proceedings held December 14, 2006, p. 84, lines 16-19.

¹² Transcript of *Charter* Application and Trial Proceedings, p. 4, lines 20-21.

¹³ *Ibid.* at p. 333, line 24.

[12] Crown counsel insisted that trial counsel's client be called first saying that he bore the onus. Trial counsel simply agreed. Trial counsel knew that Crown counsel was going to contest whether or not a search had taken place by virtue of the fact that his client was not an occupier of the land, and he believed all he needed to prove was that his client was a sub-tenant, and that Crown counsel's questioning would be similarly limited. Trial counsel then proceeded to ask 28 questions only, confined to what he thought was the only issue, which was how Mr. Smith came to be on the land with the permission of the tenant, Mr. Trent Britz. No questions were asked about Mr. Britz's involvement in the operation.

[13] Nor did trial counsel lead from Mr. Smith the balance of the information that would have been necessary to establish either a subjective or objective expectation of privacy as outlined in *R. v. Edwards*.¹⁴ He asked few questions about the extent of Mr. Smith's living operations, the fact that he had a garden, how long he had been living on the land or the extent to which the land was secluded. He also asked no questions related to the other *Charter* issues regarding the right to counsel or, indeed anything, about what transpired with the police on the day of the warrantless search.

[14] When it was Crown counsel's turn, trial counsel objected to her cross-examining his client on any issue other than "standing."¹⁵ His objection was overruled and Crown counsel proceeded to cross-examine Mr. Smith thoroughly, gaining information that could serve not only as admissions on all elements of the offence, but on Mr. Smith's knowledge as a horticulturalist

¹⁴ [1996] 1 S.C.R. 128.

¹⁵ Transcript of *Charter* Application and Trial Proceedings at p. 13, lines 23-24.

regarding growing marihuana for personal consumption. No objections were made to these questions. Before us, trial counsel agreed that at the time he did not understand that Crown counsel would have free reign with his client:

Q You never expected that these issues would become part of a voir dire on standing; is that correct?

A I believe you're correct.¹⁶

[15] When trial counsel cross-examined the Crown's witnesses, his belief as to the narrowness of the exercise continued to hamper him. With respect to Mr. Briltz, he asked few questions directed to his relationship to Mr. Smith or Mr. Briltz's involvement in the grow operation. With respect to Mr. Briltz's father and the extent to which he was permitted access to the premises, there was no effective cross-examination. A question would be asked and answered, but the answers were accepted. He asked few questions of the police officers regarding the reasonableness of the search.

[16] Then, at the close of the *voir dire*, trial counsel allowed the evidence of his client on the *voir dire* to be applied to the trial. By this time, he thought that he could do so because he had formed his own conclusion regarding his client's claim to privacy, which was that it would not succeed. Since his client had testified about the amount of marihuana present, he believed that this would be useful information for sentencing. No rebuttal evidence was offered.

V. Analysis

¹⁶ Transcript of Proceedings held December 14, 2006 at p. 85, lines 5-7.

1. Issue #1: Whether the fresh evidence should be admitted to demonstrate a miscarriage of justice?

[17] Notwithstanding trial counsel's minimal cross-examination of Mr. Britz, the trial judge found that it would be inconceivable that Mr. Smith would be on the land, in this remote location, without someone's permission. The trial judge accepted Mr. Smith's evidence over that of Mr. Britz and said:

Stanley Smith will be taken as having the consent of the tenant, Trent Britz, to occupy the land that he did, and use it for the marihuana grow operation as he did.

I therefore find and conclude that the accused was a lawful occupier of the land, by virtue of the permission and consent he had to use it as he did, and be there as he was.¹⁷

The trial judge found, however, that Mr. Smith did not have the level of expectation of privacy that would prevent police incursion.¹⁸ He reached this conclusion largely on the evidence of the Britzes that they had access to the land and that they did not restrict access to it to any members of the public.¹⁹ The actions of the police in conducting the search were found to be reasonable.²⁰

[18] The trial judge convicted Mr. Smith saying this:

With or without the evidence of the accused, I find that the Crown has proven beyond a reasonable doubt the guilt of the accused upon both offences charged by the Indictment.²¹

¹⁷ Transcript of *Charter* Application and Trial Proceedings at p. 371, lines 7-14.

¹⁸ *Ibid.* at p. 374.

¹⁹ *Ibid.* at p. 373-74.

²⁰ *Ibid.* at p. 375.

²¹ *Ibid.* at p. 377, lines 8-11.

[19] The trial judge's treatment of the accused's evidence is a relevant factor in determining whether there has there been a miscarriage of justice, but it does not end the matter.

[20] There can be no question that the ineffective representation at this trial undermined the appearance of its fairness, and the reliability of the verdict. This is so, notwithstanding the trial judge's efforts to ensure fairness. Trial counsel was simply too inexperienced to determine what preparation was necessary for himself, what he was entitled to demand by way of an approach in relation to testing the issues that he wished to have tested, *i.e.* whether his client had a reasonable expectation of privacy or whether the search was reasonably conducted or whether the statement was voluntary. He asked few questions of the police officers, and as appeal counsel demonstrated before us, there was evidence that could have been elicited. He was also too inexperienced to cross-examine the critical witness, Trent Britz, as to the degree of his involvement in the operation, or his father. The significance of this failure is made evident when one notes that a reason why the trial judge found that Mr. Smith could have no expectation of privacy was because the Britzes had access to it.

[21] As to why defence counsel asked so few questions of the police officers, this exchange is significant:

Q I'm sorry. Where in these questions do you ask Sergeant Koroluk what his authority was to enter upon the property?

A I think I was going to get to that one and the judge asked me to desist before I got that far.

Q Well when you look at –

A If you could allow me to finish looking through it first?

Q Go ahead.

A Okay. And I believe if you go on to page 123 or 124, I was asking if he felt it was necessary to get consent. And then if you go to 125 I asked him when can you perform a warrantless search, and then the Court says, 'That, counsel, is an unfair question. That's frankly the precise issue which I am called upon to determine in this voir dire,' whereupon I desisted from questioning him along that line. The bottom of page 125.

Q So your testimony is that the question, when can you perform a warrantless search, was your effort to challenge the officer's authority to enter upon the property?

A It was part of a continuing effort that was made and then the judge asked me to stop.²²

But the trial judge was not cutting off all questions. He was directing his concern to the one question that had been asked that was a question of law: when can you perform a warrantless search. Counsel's inexperience did not permit him to see the difference between extensive cross-examination intended to elicit whether the police searches were justified and reasonable, and one that usurped the judge's role.

[22] Another consequence of trial counsel's inexperience is that his client, as well, was not prepared when Crown counsel began to question him. His answers were short and appear to have been defensive, perhaps in part because of a lack of preparation and perhaps in part because his lawyer was objecting to the questions being asked at all. Defence counsel admitted how his client was unprepared for what happened:

Q You explained to Mr. Smith that the proceeding at trial would be in two stages, with the *Charter* application coming first, followed by the trial?

A Yes.

²² Transcript of Proceedings held December 14, 2006 at p. 67, line 19, to p. 68, line 16.

- Q And you explained to him that he would be testifying at the initial voir dire proceeding not the trial proper; is that correct?
- A That's correct.
- Q You also explained to Mr. Smith that in order to establish standing he would have to admit full responsibility for the criminal offences with which he was charged; is that correct?
- A Yes.
- Q You told him his admissions at the voir dire stage couldn't be used as evidence to support guilt at the trial stage?
- A That's correct.²³

[23] Finally, there is the misunderstanding as to whether Mr. Smith's evidence on the *voir dire* would be applied to the trial. While trial counsel does not make himself clear at the outset, he began the trial believing that his client's evidence could not be applied to the trial proper without his agreement.²⁴ Even though there was some confusion on the point, trial counsel conducted himself in accordance with that belief.²⁵ At the end of the *voir dire*, the trial judge confirms trial counsel's belief that the accused's evidence could not be admitted without consent, and offers him an adjournment to consider his position.²⁶ Trial counsel inexplicably refuses the adjournment and agrees to have his client's evidence applied to the trial proper.²⁷ He does so, in part, because he had decided himself that his client was not going to succeed, and he wanted to use some of the evidence as a mitigating factor in sentencing.²⁸

²³ *Ibid.* at p. 71, line 15 to p. 72, line 5.

²⁴ Transcript of *Charter* Application and Trial Proceedings at p. 6, lines 16-17.

²⁵ *Ibid.* at p. 333, lines 15-22.

²⁶ *Ibid.* at p. 357, lines 8-18.

²⁷ *Ibid.* at p. 358, lines 13-17.

²⁸ *Ibid.* at p. 357, line 19 to p. 358, line 17.

[24] Against this backdrop, the trial judge's conclusion that he would have found Mr. Smith guilty with or without his testimony does not save the verdict. The problem at trial does not relate just to whether or not Mr. Smith testified, or even whether his evidence was applied to the trial proper. While this is part of the problem, the more fundamental errors relate to trial counsel's inexperience.

[25] Most of the cases involving allegations of ineffective representation pertain to decisions made by counsel that could be considered a matter of defence strategy, i.e., whether the accused should testify (see *R. v. Moore*²⁹) or whether a certain witness should have been called (see *R. v. Jim*³⁰) or whether certain evidence should have been placed before the trier of fact (see *R. v. Joannis*³¹). In such cases, great deference must be shown to avoid second-guessing trial counsel. This case, however, does not turn on an examination of one strategic decision made during the course of the trial. In that respect, this case resembles *R. v. Deneault*³² where ineffective representation rested on trial counsel's lack of knowledge and failure to cross-examine a key witness.

[26] I think it is important to stress that this is not a usual case of ineffective representation on the basis of incompetence. It is rather a case resting on inexperience of counsel. By way of background, trial counsel graduated from law school in 2002 and was called to the Bar of Saskatchewan in 2003. He

²⁹*Moore*, *supra* note 6.

³⁰ 2003 BCCA 411 (QL).

³¹ (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 347 (QL).

³² (1993), 33 B.C.A.C. 156 (C.A.) (QL).

handled some criminal matters in the course of his articling year and he conducted a major trial resulting in an acquittal in the Court of Queen's Bench in the spring of 2005.³³ Mr. Smith's trial took place in the fall of 2005. We accept that trial counsel's preparation far exceeded the Legal Aid tariff that permitted him, according to the testimony in this Court, to bill 10 hours only for preparation, but nonetheless his preparation was not sufficient to provide effective assistance.³⁴

[27] I agree with Crown counsel that some of the factors to be weighed in determining whether there has been a miscarriage of justice include the strength of the prosecution's case and the merits of any defence, but I also agree with Mr. Smith's appeal counsel that trial counsel's cursory direct examination of his client at trial and his tentative examination of Crown witnesses permitted the Crown to control and define the issues on the *voir dire* and largely the conduct of the trial.

[28] Appeal counsel drew the Court's attention to the comments of Doherty J.A. in *Archer* where he states that "[a] miscarriage of justice occurs if the appellate court is satisfied that counsel's ineffective representation undermined the appearance of the fairness of the trial, or the reliability of the verdict."³⁵ In drawing our attention to this quote, appeal counsel argued that a miscarriage of justice need not rest on an unreliable verdict alone.

³³ Transcript of Proceedings held December 14, 2006, at p. 36.

³⁴ *Ibid.* at pp. 55-56.

³⁵ *Archer*, *supra* note 8 at para. 120.

[29] I need not decide whether the ineffective representation in this case undermined the appearance of the fairness of the trial to such an extent so as to permit intervention on this ground alone, as I am satisfied that the miscarriage of justice in this case relates to the reliability of the verdict. This is so because the Court is uncertain as to whether it has all the evidence that could have been led (a) on the question of privacy; and (b) as to what transpired in the intervening hours before Mr. Smith was provided with counsel. This latter question, of course, has an impact not only on the question of whether the search was reasonable, but also as to whether the evidence ought to be admitted pursuant to s. 24(2) of the *Charter*.

[30] In our decision in *Moore*,³⁶ Tallis J.A., writing for the Court, reviewed the test for the admission of fresh evidence in the context of an allegation of ineffective assistance of trial counsel. He noted, relying on *G.D.B.* that the criterion of due diligence in the test for admission of fresh evidence must yield, “particularly in criminal cases, where its rigid application might lead to a miscarriage of justice.”³⁷ He also noted, again in reliance upon *G.D.B.*, that the Supreme Court of Canada has emphasized the right to effective assistance of counsel as “now a principle of fundamental justice.”³⁸

[31] Thus, I conclude that the fresh evidence should be admitted to demonstrate that Mr. Smith was denied effective representation.

2. Issue #2: What is the appropriate remedy?

³⁶ *Moore*, *supra* note 6.

³⁷ *Ibid.* at para. 37.

³⁸ *Ibid.* at para. 38.

[32] In *G.D.B.* the Court indicated that the right to effective representation "is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* and ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*." ³⁹ Appeal counsel asks that this Court grant a remedy for the infringement of this *Charter* right pursuant to s. 24(1). He asked that the Court enter a judicial stay of proceedings.

[33] The powers of a court of appeal are set out in ss. 686(1)(a) and 686(2) of the *Criminal Code* which read as follows:

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

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice;

...

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

- (a) direct a judgment or verdict of acquittal to be entered; or
- (b) order a new trial.

While the Court also has jurisdiction to grant a stay, it is a rarely granted remedy and it does not appear to be appropriate in this case. The real issue is whether this Court should enter a verdict of acquittal or order a new trial.

³⁹ *G.D.B.*, *supra* note 3, para. 24.

[34] This Court has recently commented on the powers of a court of appeal contained in s. 686 in *R. v. Keepness*.⁴⁰ In that case, the Court referenced *R. v. S.(P.L.)*⁴¹ and quoted Sopinka J. as follows:

[9] ...

On the other hand, if the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based.⁴²

[35] This is the approach that has been taken in *Moore*⁴³ and *Jim*,⁴⁴ where new trials were ordered. I note, as well, that the Court ordered a new trial in *Deneault*,⁴⁵ a case that has some similarities to this one. There is no reason in this case to depart from the application of a test that is dependent on whether there is evidence upon which a reasonably instructed jury could convict.

[36] Depending on what happens in relation to a future *Charter* application, there is evidence in this case upon which a conviction could reasonably be based. Accordingly, the appropriate remedy is to set aside the convictions and order a new trial.

[37] Given this result, it is not necessary to consider either the balance of the grounds of appeal or the Crown's or appellant's sentence appeals.

⁴⁰ 2007 SKCA 42.

⁴¹ [1991] 1 S.C.R. 909.

⁴² *Ibid.* at 916.

⁴³ *Moore*, *supra* note 6.

⁴⁴ *Jim*, *supra* note 30.

⁴⁵ *Deneault*, *supra* note 32.

VI. Conclusion

[38] The appeal is allowed and a new trial is ordered.

DATED at the City of Regina, in the Province of Saskatchewan, this
20th day of June, A.D. 2007.

Jackson J.A.
Jackson J.A.

I concur _____
Gerwing J.A.
Gerwing J.A.

I concur _____
Smith J.A.
Smith J.A.