Date: 20150414
Docket: 14/58
Citation: *R. v. Boland*, 2015 NLCA 20

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

BRANDON BOLAND APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Rowe, White and Harrington JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Grand Bank 2014 0813A00260

Appeal Heard: January 22, 2015
Judgment Rendered: April 13, 2015

Reasons for Judgment by Harrington J.A.
Concurred in by Rowe and White JJ.A.

Counsel for the Appellant: Donald A. MacBeath Q.C.
Counsel for the Respondent: Robin Fowler

Harrington J.A.:

[1] The appellant Brandon Boland appeals his conviction and sentence for trafficking in cannabis marijuana in contravention of s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 2. The appellant received a sentence of 9 months' incarceration coupled with a firearms ban and other related restrictions. The appellant submits that his conviction was

due to acceptance by the trial judge of the evidence of two men, the Crown's primary witnesses , who accepted a plea bargain and testified that they were street sellers of marijuana supplied by the appellant. For the reasons which follow, I conclude that the trial judge made palpable and overriding errors in his assessment of the credibility and reliability of the two principal Crown witnesses such that the verdict is unreasonable and an acquittal ought to be entered.

BACKGROUND

[2] The police conducted surveillance of the residences of Albert Mayo and Gary Farrell, nextdoor neighbours in Marystown, on November 14, November 20, and November 21, 2013 on suspicion that they were trafficking in marijuana. They observed many people and vehicles coming and going to and from Mayo's residence. The police stopped several vehicles shortly after they had left Mayo's residence and found the occupants of the vehicles in possession of small quantities of marijuana. The appellant's truck was seen by the police in the vicinity of Bridgett Place on November 14, but the driver of the vehicle was not identified on that occasion. On November 20, the police observed the appellant parking his truck, entering Mayo's residence at 5:45 p.m. and leaving one minute later. On that date, the appellant was living in the Town of Fortune and employed as a tradesman. The appellant had been a neighbor of Mayo and Farrell prior to November, 2013.

[3] On November 21, the police executed a warrant to search Mayo's residence. They found Mayo and Farrell in possession of drugs, cash and trafficking paraphernalia including grinders, scales and tin foil. Both were found to be in an intoxicated condition by the effects of alcohol and drugs. They were arrested, interviewed and released after having been charged with trafficking. During questioning, they told the police that the appellant supplied them with the drugs. They later pleaded guilty to a lesser offence of selling marijuana and received a conditional sentence.

[4] On November 22, the police arrested the appellant at his residence and interviewed him. The appellant made statements to the police admitting that he bought drugs from Mayo on November 20, a day falling within the dates set out in the indictment (November 7 to 21). He also admitted that he had visited Mayo's house to purchase three joints on his way to work on November 20, which was the day the police observed him entering and leaving Mayo's residence one minute later. The appellant volunteered to the

police that he had sold marijuana 3-4 months prior to the month of November but not thereafter.

[5] The trial judge acknowledged the limited value of any of the corroborating circumstantial evidence against the appellant as follows:

> [2] … The circumstantial evidence is of limited utility: it corroborates the evidence of Mayo when it puts the accused in brief contact with his residence the day before Mayo was searched and arrested. This is confirmed, to a limited extent, by the admission from the accused [to the police] that he had gone to Mayo's place to buy [versus sell] marijuana.

[6] However, the trial judge further found that "the direct evidence, which I will review in brief compass, overwhelmingly leads to a conviction of the accused for trafficking in marijuana." Mayo and Farrell testified that the appellant had supplied them with the drugs which they sold from their adjacent residences. The trial judge wrote:

> [16] By far and away, the most compelling evidence in this matter comes from the testimony of Albert Mayo and Gary Farrell. As noted earlier in these reasons, both were arrested at Mayo's residence when the police went into the place to execute a search warrant. Both men were interviewed, both confessed, and both independently implicated the accused as their supplier of marijuana. Both men were charged, appeared in Court, pleaded guilty and were sentenced for trafficking in marijuana.

ISSUES

[7] The issues on this appeal are:

(i) Was the conviction "unreasonable" under s. 686(1)(a)(i) of the *Criminal Code* on the basis that no trier of fact, properly instructed, could have convicted the appellant thus justifying an acquittal; or

(ii) Did the judge make "palpable and overriding errors" in the assessment of Mayo and Farrell's evidence constituting a "wrong decision on a question of law" or a "ground based on a miscarriage of justice which errors made the verdict "unsound" rather than "unreasonable" thus justifying a new trial; and

(iii) if the conviction should stand, was the nine-month custodial sentence "unfit"?

[8] The appellant's counsel submits that the trial judge erred (i) in accepting the credibility and reliability of the evidence from Mayo and Farrell; (ii) in failing to justify his decision to ignore the motives of Mayo and Farrell to fabricate; (iii) in rejecting the credibility of the appellant's denial of trafficking; (iv) by reaching "inexplicably inconsistent verdicts on trafficking and conspiracy"; and (v) by imposing a lengthy sentence of incarceration given his antecedents.

[9] The Crown's factum acknowledges that the credibility of the Crown witnesses, Mayo and Farrell, was central to the conviction of the appellant and that there were a number of inconsistencies in their evidence which were described in its factum as follows:

> (i) Farrell originally testified that he could not remember when the Appellant supplied him with marijuana however later, during cross-examination, he testified that the Appellant used to live next door to him and it was during this time period that he would supply Farrell with marijuana. The Appellant moved out approximately one year prior to the alleged charges in the case at bar.
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> (ii) Mayo testified that he would set up times to meet the Appellant using text messages on Tammy Clarke's cell phone. Mayo could not explain why there were no text messages found on this phone.
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> (iii) Farrell originally testified that he did not sell marijuana however later testified that he did sell enough to make money for cigarettes.
>
> (iv) When the police entered Mayo's residence to arrest the two men Cst. William Walsh testified there was marijuana on the table. It was revealed during cross-examination of both witnesses that the marijuana belonged to Mayo and that he had slid the drugs into Farrell's jacket in an attempt to avoid responsibility.
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> (v) Mayo had originally testified that the marijuana did not belong to him and that it had belonged to Farrell. He later changed this position and testified that the drugs belonged to him.
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> (vi) Farrell was not originally clear in his testimony on the ownership of the marihuana but appeared to originally claim that the drugs were his to sell. This notion was quickly abandoned and he claimed that the drugs belonged to Mayo. Both witnesses eventually testified that the marijuana belonged to Mayo.

(vii) Both men adopted portions of their statements put to them in cross-examination in which they each advised that the Appellant was the only person who supplied them with marijuana.

APPLICABLE LAW

[10] Both counsel rely on the reasons of the Supreme Court of Canada in *R. v. R. P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, which outline the two kinds of unreasonable verdict:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessment of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that the verdict "cannot be supported by any reasonable view of the evidence". (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7.)

[11] In *R. v. Burke*, Sopinka J. wrote at paragraph 5:

> Despite the "special position" of the trial court in assessing credibility, however, the court of appeal retains the power, pursuant to s. 686(1)(a)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence. As McLachlin J. stated in *W. (R.)*, at pp. 131-32:
>
> > ... as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
>
> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.

See also *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180.

ANALYSIS

[12] The trial judge found that the evidence of Mayo and Farrell was sufficiently credible to find that during the period November 7 to 21, 2013, the appellant had been trafficking in cannabis marijuana by dealing to these two men, permitting them to make a small fee of approximately $20 on the sale of each gram of marijuana, which Mayo testified was sufficient to buy "a pack of cigarettes".

[13] The appellant submits that the only credible evidence in support of the appellant's guilt for trafficking in marijuana relates to the trial judge's finding regarding a one-minute visit by the appellant to Mayo's residence on November 20, 2013, the day prior to his arrest. However, this evidence was challenged by the appellant, who told the police that he went to Mayo's residence to buy marijuana not to sell it, as he had done on occasions when he was a neighbour of Mayo and Farrell prior to the dates cited in the indictment.

[14] The only other Crown witnesses were police officers who conducted surveillance, took statements and arrested all three men. The trial judge accepted the evidence of Mayo and Farrell in convicting the appellant while giving the following reasons:

> [47] The connection with the accused and each of Mayo and Farrell was corroborated by the surveillance, in that the accused had been seen making a one minute visit to Mayo's place the night before the police searched it. Since both Mayo and Farrell were dependant on social services for support, neither of them had the financial wherewithal to fund the purchase of marijuana. Both explained how the accused was fronting them with marijuana, and how they were paying him for it.
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> [48] While neither Mayo nor Farrell are particularly sophisticated witnesses, both were consistent, during both examination in direct, and in cross examination, that Brandon Boland was supplying them with marijuana. Cross examination, which Professor Wigmore said is "beyond any doubt the greatest legal engine ever invented for the discovery of truth", failed to reveal any contradiction in the evidence of either of these witnesses. In short, the witnesses were credible.

[15] The appellant submits in his factum that following the surveillance of Mayo and Farrell at Mayo's residence on November 21:

> … the police obtained a warrant to search the residence of Albert Mayo, and caught Albert Mayo and Gary Farrell in Mayo's residence red handed in possession of drugs and trafficking paraphernalia. Both were arrested, interviewed, released after having been charged with trafficking, pleaded guilty and were convicted and sentenced to house arrest at a later date.
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> The police arrested the Appellant at his home in Fortune and interviewed him at the RCMP detachment in Grand Bank on November 22. He made exculpatory statements denying supplying drugs to Mayo or Farrell on the dates set out in the information, admitted that he had dropped in to Mayo's house to purchase three joints on his way to work one day, said he had sold drugs to someone 3-4 months previously and was released after having been charged.

[16] At trial Mayo initially denied that the police seized any illegal drugs belonging to him at his home but testified that they did seize marijuana from Farrell which was located in the latter's jacket. Mayo insisted that he did not have any marijuana in his possession although drug paraphernalia including a scale and foil was found in the bathroom of his residence. He was then confronted by the police with the allegation that the bag of marijuana was his and that he had "shoved it in Gary's (Farrell) jacket". He testified that he was trying to assign responsibility to Farrell while denying that he put the bag of marijuana in Farrell's jacket. Appellant's counsel submits that Mayo's responses to the police changed further during police questioning when they inquired whether or not their source for the marijuana was the appellant.

[17] Counsel challenged Mayo's credibility asserting that while being interviewed by the police, Mayo repeatedly changed his evidence of how the drugs ended up in Farrell's jacket, as illustrated by the following answers during cross-examination:

> A. Well I guess it was on the table I just swept it to wherever it went to I guess.
>
> Q. Swept it to wherever it went to. Where did it go to?
>
> A. I guess it went on Gary [Farrell], I guess.
>
> Q. You guess it went on Gary. So now today we've come from the point where you didn't know anything about the weed on the table, to there was weed on the table, to where it might've been yours, to now you swept it off the table and it might've gone into Gary's jacket, just today that's your story has changed, right?

A. Yes.

(Trial transcript page 149)

[18] I agree with the appellant's submission that Mayo gave conflicting versions regarding whether he had any connection to the marijuana in Farrell's jacket when the police arrived to search his residence and ultimately to arrest him. The evidence of Farrell was straightforward to the extent that he testified that Mayo "poked the weed underneath my jacket" as the police arrived, an indication that Mayo was prepared to shift suspicion away from himself.

[19] Mayo testified at trial that the appellant was the supplier for Farrell and himself. He testified that his primary method of contact with the appellant was by use of his girlfriend's cell phone to either send text messages or to call the appellant to order drugs. He described how the appellant would call or text him on his girlfriend's cell phone before coming to his residence to complete a sale. However, appellant's counsel raised on cross-examination that the inspection of the cell phone by the police after the arrests contained usage records of the preceding 12 months and recorded only 20 phone calls, all of which were made during the month of November, and none were made to or from the accused. Mayo could not explain this absence from the cell phone of metadata or call records. The only connection of the appellant to the cell phone was that he was one of 99 listed contacts. There was no stored data linking the appellant to any phone calls or text messages to or from Mayo for the entire year prior to the date of the arrests.

[20] The appellant acknowledged in his statement to the police that he had been selling marijuana during the period when he lived at Bridget Place as a neighbour of Mayo and Farrell. He told the police that he had not been selling drugs to anyone since his move to Fortune three to four months before but would occasionally purchase small amounts of cannabis marijuana from Mayo and Farrell. The only evidence linking the appellant to either Mayo or Farrell during the period of police surveillance was the one-minute visit to Mayo's home on the day before the arrests took place. He admitted to the police to having purchased a small quantity of marijuana on that occasion.

[21] The absence of cell phone records linking the appellant to communications with Mayo during the two week period in November was

found by the trial judge to be inconsequential. He concluded that "not much turns on this" and "the absence of evidence is not evidence of absence". With regard to the credibility of Mayo and Farrell he referred to their lack of sophistication and status as social assistance recipients to conclude that they could not afford to be involved in drug transactions in anything other than a street selling capacity.

[22] The trial judge bolstered his finding that Mayo lacked intelligence by referring to the fact that Mayo while testifying did not know the meaning of a recognizance nor did he understand what the term "tendering of evidence" meant during questioning by Crown counsel. With respect, these references were irrelevant given that many accused appearing before a criminal court would be unaware of the legal terminology. Their status of being on social assistance was not relevant since it could have been another dealer other than the appellant who was trafficking through Mayo and Farrell. He also concluded that the appellant was the supplier rather than a buyer on the day he was seen by police surveillance entering and leaving the Mayo residence for a one minute period.

[23] Mayo's testimony confirmed that the appellant had lived in his neighborhood for six to seven months but had moved out a month or more before November 21, 2013. This testimony effectively corroborated the appellant's testimony that he was not selling at the time of the police surveillance and arrest of Mayo and Farrell. When asked who was supplying him with marijuana, Mayo testified that "Brandon used to bring it to me". He then testified, also in the past tense, that the appellant had been supplying him with marijuana for approximately two years.

[24] However, the only instance when Mayo was able to testify that the appellant was at his residence during November was when the police witnessed the one-minute visit on November 21, 2013, the day before the arrests.

[25] In summary, Mayo testified that the appellant sold drugs to him in November 2013. However, he gave inconsistent testimony as to who owned the drugs at his apartment when the police arrived which, while a collateral issue, nevertheless, undermines his credibility, including with respect to the critical issue of whether Boland sold drugs to Mayo during the relevant time period on the indictment. Further, the trial judge's conclusion that Mayo was not able to purchase the drugs for resale because he was receiving social assistance, even if true, would not necessarily implicate the appellant as

Mayo could have had another supplier which the appellant suggested in his statement to the police and named a person who had been identified in the police surveillance of Mayo's residence.

[26] There was no corroboration by Farrell or anyone else that the appellant was there to supply marijuana and not to buy it. There was no supportable evidence from Farrell to corroborate Mayo's evidence that Boland sold marijuana to him and Mayo during the period November 7 to 21, 2013. Farrell testified initially that he did not know when the appellant last sold marijuana to him. Farrell testified that he had only purchased marijuana from the appellant when they were next-door neighbours. He admitted on cross-examination that the marijuana that he had turned over to the police on November 21 had been obtained from the appellant when both were neighbours, which would have been outside the November 7 to 21 time frame of the indictment as the appellant had moved to Fortune months before.

[27] Farrell's evidence did not corroborate the evidence of Mayo whose residence was the center of the distribution of marijuana in November during the period of police surveillance which led the police to enter his residence and arrest Farrell and himself. The trial judge erred in failing to recognize that Farrell's evidence did not confirm a delivery of drugs to Mayo by the appellant during the period of November 7 to 21, 2013.

[28] Further, the trial judge erred in concluding that "absence of evidence is not evidence of absence." That is incorrect. If the Crown's case implies that certain evidence exists, its absence is relevant. Further, Mayo's evidence implied that the cell phone of the appellant's girlfriend ought to have contained evidence of calls or texts from the appellant. It did not. That fact is not decisive; it might be explained in many ways, but it is relevant as the absence of cell phone data (said to be the sole means of communication) did raise considerable doubt about the reliability of Mayo's evidence that he bought marijuana from the appellant between November 7 and 21, 2013. They were protected by the fact that they had already entered into a plea bargain which lead to a conditional sentence.

[29] Appellant's counsel argues that the trial judge ought to have found that there was a motive to fabricate given that Mayo and Farrell were caught red-handed in Mayo's residence with a bag containing approximately three grams of marijuana. Mayo acknowledged that when the police suggested to them that the appellant had been their supplier, the two men implicated the

appellant. Appellant's counsel noted that the two men received conditional sentences notwithstanding that both men had criminal records arising from previous drug transactions. Crown counsel responded that such a submission is not relevant given the fact that the men had pleaded guilty and been sentenced by the time they gave evidence on behalf of the Crown at the appellant's trial. I reject the appellant's submission that a motive to fabricate arose from the criminal process as it had concluded before Mayo and Farrell gave evidence at the appellant's trial. This finding does not affect the finding that the conviction of the appellant was based on the credibility of Mayo which was not credible or reliable.

[30] The trial judge appears to have rationalized the obvious contradictions and inconsistencies in the evidence of Mayo and Farrell based on aspects of their socio-economic backgrounds to support his conclusion that the appellant was the party trafficking to them and not the reverse. He erred in reaching such a conclusion. Character evidence that an accused has a propensity to deal in drugs is not admissible: *R. v. Lepage*, [1995] 1 S.C.R. 654, at para. 35. Farrell's evidence was admissible, because portions of it might corroborate Mayo's story. However, it was an error not to distinguish between the permissible and impermissible uses of it. In any event, Farrell did not corroborate Mayo's testimony that the appellant sold drugs to him in November, 2013. The criminal records and the character of Mayo and Farrell would have been at issue to the extent of requiring a trial judge to instruct a jury with a *Vetrovec* warning. In Hamish Stewart, *Halsbury's Laws of Canada—Evidence*, (Markham, ON: LexisNexis 2014) at page 158, the authors state:

> The testimony of one unsavory witness can confirm the testimony of another unsavoury witness, though if there is collusion or collaboration between two unsavoury witnesses, independent evidence is required to support their testimony.

[31] The evidence does not support the trial judge's finding at paragraph 16 that "the most compelling evidence in this matter comes from the testimony of Albert Mayo and Gary Farrell". Both witnesses gave inculpatory evidence of themselves at trial which was also intended to confirm that the appellant was the dealer. With respect, neither of the two men gave credible and reliable testimony. Mayo lied to the police from the beginning of the investigation. Farrell, at trial, did not link the appellant to any selling transaction during November 2013.

[32] The appellant should not be convicted of being a drug dealer in the abstract. The Crown had to prove that he trafficked in marijuana during a two-week period in November 2013. The trial judge placed undue weight on the evidence indicating that Boland had admittedly been a drug dealer, "a few months earlier" (at paragraph 14). He placed significant weight on Mayo's evidence. These analytical errors mean that the appeal must be allowed.

[33] Sometimes the evidence at trial could support a conviction even though the trial judge's decision is flawed. But sometimes an analytical defect reveals a fundamental weakness in the Crown's case (see *Biniaris* at paragraph 37). In this case, given the weaknesses in Mayo's evidence from a credibility standpoint and the lack of corroborating evidence from Farrell, and the complete absence of any independent corroborating evidence, I find that no jury, properly instructed, could have convicted the appellant. Therefore an acquittal must be entered.

[34] There is no necessity to address the issue of the significance of the decision of the trial judge to enter verdicts of trafficking and not with respect to conspiracy. As I would enter an acquittal, it is not necessary to review the merits of the sentence imposed.

SUMMARY AND DISPOSITION

[35] I conclude that the verdict in this case cannot be supported by any reasonable view of the evidence. In the result, I order that the appeal be granted and an acquittal entered.

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M. F. Harrington J.A.

I concur: _____

M. H. Rowe J.A.

I concur: _____

C. W. White J.A.