

Date: 20131126
Docket: 13/06
Citation: *R. v. Strickland*, 2013 NLCA 65

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

JOSEPH HENRY STRICKLAND APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Rowe, Mercer and White JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
Grand Bank.

Appeal Heard: October 10, 2013
Judgment Rendered: November 26, 2013

Reasons for Judgment by: Mercer J.A.
Concurred in by: Rowe and White, JJ.A.

Corrected Decision: The text of the original judgment was corrected on
January 30, 2014. A description of the correction is appended.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent, Federal Crown: Leonard MacKay
Counsel for the Respondent, Provincial Crown: Vikas Khaladkar

Mercer J.A.:

[1] This appeal is focused on whether the trial judge, in convicting the appellant of two drug trafficking offences, committed material evidentiary errors. The alleged errors concerned the effect of defence counsel's consent to the qualifications of an expert witness and the admissibility of an unanswered text message to the appellant's cell phone.

Charges and Evidence

[2] Following execution of a search warrant on his apartment in Marystown, the appellant was charged on March 3, 2012 with 8 offences under the *Controlled Drugs and Substances Act*, SC 1996, c. C-19, (*CDSA*) and the *Criminal Code of Canada* RSC, 1985, c. C-46 (*Criminal Code*). There were two counts of possession for the purpose of trafficking (marijuana and cocaine), one count of trafficking in a substance held out to be MDA (ecstasy), one count of resisting arrest, and four counts of breach of probation.

[3] During the search of the appellant and the appellant's apartment, the police seized:

- 16 grams of marijuana, a number of small Ziploc bags (dime bags) and a digital scale which tested positive for marijuana;
- a Ziploc bag containing 3 grams of cocaine, a Ziploc bag containing 0.9 grams of cocaine and a digital scale which tested positive for cocaine;
- 43 green tablets subsequently identified as containing BZP (a stimulant) and TFMPP (an hallucinogen). On March 3, 2012 BZP and TFMPP were not listed as controlled substances under the *CDSA*, though they were added on March 30, 2012;
- \$2,820.00 in cash, including 70 x \$20 bills and a debt list showing names and amounts owing (score sheet);
- the appellant's cell phone from which they re-captured text messages to and from the cell phone in the 48 hours preceding its seizure.

[4] At trial the Crown sought to qualify Constable David Emberley, an RCMP officer, as an expert witness in 8 fields including: paraphernalia used in the consumption and trafficking of drugs; the difference between possession of cocaine and possession of cocaine for the purpose of trafficking; the difference between the possession of ecstasy and possession of ecstasy for the purpose of trafficking; the issue of trafficking in substances held out to be ecstasy; and street slang used for drugs in the context of the CDSA.

[5] Noting that he had declared Constable Emberley to be an expert witness in drug matters previously, the trial judge asked whether defence counsel wished to have a *voir dire* about his qualifications. Defence counsel stated, “We’re going to waive a *voir dire* and we won’t object to his being qualified as an expert witness for the same reasons he’s been qualified as an expert witness in the past”. The judge then declared that Constable Emberley was qualified to give expert evidence in the areas specified by the Crown.

[6] Constable Emberley testified that the appellant possessed marijuana and cocaine for the purpose of trafficking and that he offered for sale, as ecstasy, the pills containing BZP and TFMPP. Extensive reference was made in his testimony to texts to and from the appellant’s cell phone and Constable Emberley opined as to the meanings of the street slang used in those texts including slang said to refer to cocaine and ecstasy. He referenced an unanswered text to the appellant’s cell phone seeking a “ball”, meaning eight ball which is street slang for 1/8 ounce of cocaine, as indicating that the 3 grams of cocaine found during the search were being sold as an eight ball.

[7] The appellant testified. He admitted to trafficking in marijuana and denied trafficking in cocaine stating that the cocaine seized was for his personal use. He testified that he knew the pills were not ecstasy, that they were for his personal use and that he consumed 4-6 pills a day. He testified that others had access to his cell phone and stated that a temporary tenant of his apartment, S.D., was selling cocaine and ecstasy from the apartment and that he would not encroach on S.D.’s business. The appellant disputed Constable Emberley’s definitions of certain street slang used in the text messages. Contrary to Constable Emberley’s assertion that users do not employ scales to weigh cocaine for personal use, the appellant testified that he had placed cocaine on the scale to determine the purity of “crack” he had produced.

Trial Decision on Conviction, January 22, 2013 (Trial Decision)

[8] The trial judge observed that the appellant had admitted to selling marijuana and that, “This narrowed the focus to whether the accused had in fact been in simple possession of the cocaine found in his room, or whether he had been in possession of it for the purpose of trafficking in it. A similar question arose in relation to the green pills...” Trial Decision, paragraph 6.

[9] The judge noted the qualifications of Constable Emberley as an expert witness and then stated:

[13] The fact that the accused consented to the recognition by the Court of Constable Emberley as an expert witness adds significant weight to his testimony...

[10] There followed a lengthy summary of Constable Emberley’s evidence which the trial judge clearly accepted. That summary included the following:

[17] The accused was in possession of two sets of scales. One had traces of marijuana on it, the other had cocaine on it. Purchasers of illicit drugs do not weigh them. Possession of scales is consistent with trafficking, and inconsistent with simple possession.

...

[23] Moving on to the cocaine, a relative small amount of cocaine was seized. It was in two plastic baggies, one of 3 grams, and the other of 0.9 grams. According to Constable Emberley, a heavy user of cocaine can use up to 2 grams per day.

[24] Keeping in mind that it is common for drug dealers to deal in more than one kind of drug, and in the context of the other items seized from the accused, Constable Emberley formed the opinion that the accused was also trafficking in cocaine. He pointed to a solid example to support his opinion.

[25] In the texts found on the cell phone, there is a message sent to the accused where a person says to the accused, “I want a ball for \$325”. A ball is one eighth of an ounce, or 3 grams, of cocaine... In this context, a separate package of 3 grams of cocaine, separate from the 0.9 gram package, supports Constable Emberley’s opinion, i.e., that the accused was in possession of the cocaine, or at least the 3 gram package of it, for the purpose of trafficking it.

...

[29] In that context, the possession of 43 of the pills by the accused goes far beyond what a user of the drugs might have in his possession. Constable Emberley said that it would be unusual for a user of this sort of drug to have as many as ten pills in his possession. There is no shortage of “ecstasy” in Newfoundland, and they are neither hard to find nor hard to transport. It follows that there is no need for a user of this sort of drug to hoard or stockpile them.

[30] Keeping in mind the fact that the accused was also selling cocaine and marijuana, and noting that 43 pills is way beyond possession for personal consumption, Constable Emberley was of the opinion that the accused had also been selling the pills, and holding them out to be ecstasy.

...

[34] It was suggested to Constable Emberley that the accused might have weighed cocaine which he had purchased for his own use. Constable Emberley has never heard of a purchaser weighing his purchased cocaine. Besides, he said, if that were the case, it would be weighted while in a plastic bag, and would not have left a residue of cocaine on the set of scales. The residue is consistent with the drug having been cut while on the scales.

[11] The trial judge next summarized the evidence of the appellant, including his denial of trafficking in cocaine or in the pills alleged to have been held out as ecstasy. The trial judge did not accept the explanation of the accused concerning the use of the scales to weigh cocaine for personal use. With respect to the pills, the trial judge stated:

[40] The accused also differed with Constable Emberley on the use of some drug slang. For example, he said that “white ladies” was a reference to ecstasy, not to cocaine. He did agree that “bombs” could refer to ecstasy. This did not really help the accused, as I will explain.

[41] As noted above, when queried about whether there were any “white ladies” around, the response from the accused was “yes, come see me”. According to Constable Emberley, “white ladies” means cocaine, and the invitation to “come see me” was actually an invitation to come see the accused about buying some cocaine from him. Taking the accused at his word, all that he was saying was that he was not trafficking in cocaine, but was trafficking in a drug held out to be ecstasy.

[12] The trial judge concluded that:

[48] The self-contradictions identified earlier in these reasons will suffice to explain why I did not believe the evidence of the accused, and why his evidence did not raise a reasonable doubt with me.

[49] It is clear from the evidence that the accused was in possession of a large variety of drugs, some being prescription medications and some being prohibited substances under the CDSA. It is also clear from the multiple text conversations that the accused was offering to sell the marijuana, the cocaine, and the green pills with the upturned middle finger logo. He described these as “bombs” and as “green circles” in various text messages. I accept Constable Emberley’s evidence that when the accused was referring to the green pills as “bombs”, he was passing them off as “ecstasy”.

[13] The appellant was accordingly convicted of possession of cocaine for the purpose of trafficking, of trafficking in a substance held out to be ecstasy and on all other charges except for the charge of breach of probation relating to the possession of BZP and TFMPP.

Trial Decision on Sentence, February 5, 2013

[14] The trial judge sentenced the appellant to a total of 22 months imprisonment - 18 months for possession of cocaine for the purpose of trafficking, concurrent terms of 6 months for the other two counts under the CDSA, 3 months for each of the 4 breaches of probation concurrent with each other and consecutive to the preceding sentences, and 30 days consecutive for resisting arrest. As the appellant’s judicial interim release had been revoked the trial judge granted credit for time on remand. That was calculated on a 1 for 1 basis at 211 days. In the calculation of that 211 days, the trial judge deducted 45 days from the remand time. During the sentencing hearing, the appellant had argued that as he completed another sentence on remand due to earned remission after 30 days, only 30 days rather than 45 days should have been deducted from his remand time.

Issues

[15] The appellant appeals the convictions respecting possession of cocaine for the purpose of trafficking, trafficking in a substance held out to be ecstasy, and the related breach of probation. The issues raised on appeal were:

- 1) Did the trial judge err in law per s. 686(1)(a)(ii) of the *Criminal Code* in finding that the defence counsel’s consent to the qualifications for the expert witness added significant weight to his testimony?

- 2) Did the trial judge err in law per s. 686(1)(a)(ii) of the *Criminal Code* in considering the unanswered text to the appellant's cell phone for the truth of its contents?
- 3) If there is an affirmative answer to either or both of the foregoing issues should the Court invoke the curative provision in s. 686(1)(b)(iii) of the *Criminal Code*?
- 4) Did the trial judge err in sentencing by deducting 45 days rather than 30 days from the time the appellant was held on remand?

Criminal Code

[16] The applicable provisions of the *Criminal Code* are as follows:

Section 686

- (1) On the hearing of an appeal against a conviction ... the court of appeal
 - (a) may allow the appeal where it is of the opinion that
 - ...
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - ...
 - (b) may dismiss the appeal where
 - ...
 - (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[17] Section 686(1)(a)(ii) encompasses any error of law that was not minor and that cannot be said to have caused no prejudice to the accused, *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. An appeal court will not reverse a conviction solely on the basis of a trivial error that could not have caused prejudice. Where the error is not minor and may have caused prejudice, s. 686(1)(b)(iii) may be applied to uphold the conviction where the case

against the appellant is so overwhelming that a conviction was inevitable. The Crown bears the burden of showing that this provision is applicable. The standard of inevitable conviction is a higher one than the requirement that the Crown prove its case beyond a reasonable doubt. Any possible measure of doubt concerning the strength of the Crown's case will be afforded to the benefit of the appellant. *R. v. Van*, 2009 SCC 22, 1 S.C.R. 716; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Pavlov*, 2009 NLCA 44, 289 Nfld. & P.E.I.R. 19; *R. v. Ellis*, 2012 NLCA 75, 330 Nfld. & P.E.I.R. 260.

Analysis

[18] The issue regarding expert evidence as argued on the appeal did not extend to all aspects of the test for admissibility of expert evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 [1994] S.C.J. No. 36 (“*R. v. Mohan*”). *R. v. Mohan* requires the trial judge to consider four criteria: (i) relevance, (ii) necessity in assisting the trier of fact, (iii) the absence of an exclusionary rule, and (iv) a properly qualified expert. It was criterion (iv), whether Constable Emberley was a properly qualified expert, on which the trial judge questioned whether he should enter into a *voir dire*. Defence counsel waived the *voir dire* stating “we won’t object to him being qualified as an expert witness for the same reason he’s been qualified as an expert witness in the past.”

[19] That consent by defence counsel was stated by the trial judge to have added significant weight to Constable Emberley’s testimony. With respect the attribution of “significant weight” to that factor was an error of law. Defence counsel’s consent to the qualification of the proposed expert witness was addressed solely to admissibility of the expert evidence and could not reasonably be interpreted as an acknowledgement by defence counsel that such evidence should be accorded weight beyond what the trial judge should otherwise attribute. The weight to be attributed to expert evidence must be determined by the trial judge having regard to the reasons given for the expert opinion, the evidence bearing on the basis of the expert opinion and the extent of the expert’s expertise. Defence counsel’s consent does not add weight, much less significant weight, to the expert evidence. See –Alan Mewett and Peter Sankoff, *Witnesses*, loose-leaf, (Toronto: Carswell, 1999), Chapter 10 at page 47. The error by the trial judge was an error of law as he applied an improper factor in the assessment of evidence.

[20] I would further concur with the submissions of all counsel on this appeal that the proposition stated by the trial judge would, if accepted, needlessly promote contested hearings on the threshold issue of the admissibility of expert evidence.

[21] The effect of this error of law cannot properly be characterized as minor and without prejudice to the appellant. With respect to the charges pertaining to cocaine and ecstasy the most critical evidence considered by the trial judge was that of Constable Emberley and the appellant. It is clear that he accepted Constable Emberley's expert opinion rather than the testimony of the appellant on key points, including whether the cocaine and pills were for personal consumption and the interpretation of various text messages.

[22] On the cocaine charge the amount of cocaine seized at the time of arrest was acknowledged by Constable Emberley to be "not necessarily an amount of cocaine that would be consistent with trafficking". Constable Emberley's expert opinion respecting the digital scales and the practice of drug dealers to deal in more than one kind of drug, (as supported by, among other things, the unanswered text message) was cited by the trial judge and was clearly an important factor in his decision on that charge.

[23] On the charge pertaining to ecstasy Constable Emberley's expert opinion, as stated in paragraph 29 of the Trial Decision noted above, likewise was crucial to the conviction. Though the trial judge noted inconsistencies in the appellant's testimony, it is clear that his assessment of that testimony was affected by the weight he accorded Constable Emberley's expert opinion.

[24] Having regard to the high standard imposed by section 686(1)(b)(iii) and the evidence as summarized above, it cannot be said that the evidence was so overwhelming that any trial judge would inevitably have convicted; see *R. v. Pavlov* at paragraph 21. The convictions for possession of cocaine for the purpose of trafficking and for trafficking in a substance held out to be ecstasy must therefore be set aside as the Crown has not established that the curative provision of section 686(1)(b)(iii) should be applied.

[25] The foregoing conclusion makes it unnecessary to discuss at length whether the trial judge erred in considering the unanswered text message for the truth of its contents. I note that the trial decision pre-dated *R. v. Baldree* 2013 SCC 35, [2003] S.C.J. No. 35, which addressed the admissibility of

drug purchase calls. If such calls are adduced as proof of the truth of their contents their admissibility must be based on the principled framework for an exception to the hearsay rule as described in *R. v. Baldree*. Application of the principled analysis requires consideration, among other things, of the requirement of necessity, which was not explored at trial or on this appeal.

[26] Finally, with respect to sentence it was properly conceded by the Crown that there was an error in the calculation of credit for remand time, resulting in the appellant receiving less credit for remand time than he ought to have received, and that 30 days, rather than 45 days, ought to have been deducted in that regard. The appellant's prison time is to be reduced by 15 days.

Conclusion

[27] The appeal is allowed. The convictions for possession of cocaine for the purpose of trafficking, trafficking in a substance held out to be ecstasy, the associated breach of probation, and the resultant sentences are set aside and a new trial on those charges is ordered.

[28] On the sentence appeal with respect to the remaining convictions leave is granted and the total sentence is reduced by 15 days.

K. J. Mercer J.A.

In Concur: _____

M. H. Rowe J.A.

In Concur: _____

C. W. White J.A.

Correction Notice

This decision was modified on December 3, 2013 by a corrigendum, *R. v.*

Strickland, 2013 NLCA 65 err 1:

- [1] In paragraph [13] in the last line, add the words “except for the charge of breach of probation relating to the possession of BZP and TFMPP”.
- [2] In paragraph [15] in the third line, delete the word “breaches” and replace it with “breach”.
- [3] In paragraph [27] in the third line, delete the word “two” and delete the word “breaches” and replace it with “breach”.

On January 30, 2014, the text of the decision was modified to incorporate these changes, in keeping with the Court’s new policy on correcting decisions.