IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. White*, 2021 NLCA 39
Date: June 25, 2021
Docket Number: 201901H0005

BETWEEN:

TRENT WHITE — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Corner Brook

Appeal Heard: March 10, 2021
Judgment Rendered: June 25, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: White J.A.
Dissenting Reasons by: Hoegg J.A.

Counsel for the Appellant: Bob Buckingham
Counsel for the Respondent: Dana Sullivan

Authorities Cited:

CASES CITED:

Welsh J.A.:
R. v. Greenham, 2020 NLCA 14; *R. v. Freake*, 2012 NLCA 10, 318 Nfld. & P.E.I.R. 305; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Stark*, 2017 ONCA 148; *R. v. D.G.M.*, 2018 MBCA 88; *R. v. V.J.*, 2017 ONCA 924; *R. v. Gardner* (1995), 54 B.C.A.C. 205 (B.C. C.A.), leave to appeal to S.C.C. refused, (1995), 193 N.R. 317 (note).

Hoegg J.A. (dissenting):
R. v. G.D.B., 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. G.M.*, 2013 SCC 24, [2013] 2 S.C.R. 202; *R. v. G.M.*, 2012 NLCA 47; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Wolkins*, 2005 NSCA 2; *R. v. Smith*, 2021 SCC 16; *R. v. Esseghaier*, 2021 SCC 9; *R. v. Stark*, 2017 ONCA 148; *R. v. Snow*, 2019 NSCA 76; *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.).

STATUTES CONSIDERED:

Welsh J.A.:
Criminal Code, sections 266, 268, 430(4), 536.

Hoegg J.A. (dissenting):
Criminal Code, sections 535, 536, 606(1.1), 686(1)(b)(iv); *Canadian Charter of Rights and Freedoms*, sections 7, 11(b), 11(d), 11(f).

Welsh J.A.:

[1] Trent White was convicted of assault, aggravated assault and damage to property, contrary to sections 266, 268 and 430(4), of the *Criminal Code*. He appeals his convictions on the basis that representation provided by his counsel at trial was ineffective, resulting in a miscarriage of justice.

BACKGROUND

[2] The trial judge accepted evidence that Mr. White had attempted to throw his partner, Ms. Decker, over the side of his fishing vessel, into the ocean. Ms. Decker managed to hold onto the side of the vessel until she was helped back on board. None of the three crew on board the vessel saw the incident.

[3] At the trial, the Crown did not call Ms. Decker as a witness, but relied on the evidence of the three crew members. Despite Mr. White's request, his counsel, Mr. Matthews, did not call Ms. Decker as a defence witness. Subsequently, with the assistance of new counsel, Mr. White was successful in having his case re-opened before sentence had been passed. What occurred at the re-opening of the case is not relevant to this appeal which is based on Mr. White's allegation that his counsel at the initial trial, Mr. Matthews, did not provide him with competent representation.

ISSUES

[4] The sole issue on appeal is whether Mr. Matthews failed to provide competent representation for his client, and, in particular, whether he failed to obtain Mr. White's informed instructions regarding his election as to mode of trial. It is not necessary to address Mr. White's additional submissions regarding the adequacy of Mr. Matthews' assistance during the trial.

ANALYSIS

General Principles

Procedural Issues

[5] When an allegation of ineffective assistance of trial counsel is made on appeal, the correct procedure is for the appellant to make an application for fresh evidence (more accurately referred to as additional evidence). Because the issue is evidentiary in nature and integral to a ground of appeal, the application for fresh evidence will be heard by the same panel as hears the appeal. For this reason, in the absence of special circumstances, the application will be heard at the same time as the appeal. In order to permit trial counsel to respond to the allegation, the appellant must waive solicitor-client privilege for purposes of the appeal (*R. v. Greenham*, 2020 NLCA 14, at paragraph 9).

[6] Although an application for fresh evidence is necessary, an affidavit from the appellant and from trial counsel will properly be admitted without

consideration of the factors that ordinarily apply to the admission of fresh evidence (*R. v. Greenham*, at paragraph 8; *R. v. Freake*, 2012 NLCA 10, 318 Nfld. & P.E.I.R. 305, at paragraphs 10 to 14).

[7] To facilitate responding to the allegation of ineffective assistance, trial counsel will be granted intervenor status, if requested. Parties may cross-examine on the affidavits (*R. v. Greenham*, at paragraph 9).

Principles of Law

[8] The general approach to issues related to ineffective assistance of trial counsel is discussed in *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paragraphs 23 to 35. Major J., for the Court, stated:

> [26] ... 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.
>
> ...
>
> [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.

[9] In conducting the analysis, Major J. indicated that there are some decisions that require the informed consent of the accused:

> [34] Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice. While it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions. The failure to do so may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice.

[10] In *R. v. Stark*, 2017 ONCA 148, Lauwers J.A., for the Court, addressed the question of miscarriage of justice when the alleged incompetence of trial counsel is based on failure to obtain the client's instructions regarding electing the mode of trial. Lauwers J.A. explained:

> [14] ... The miscarriage of justice can be established in one of two ways. The first is to show that incompetent representation undermines the reliability of the verdict.

> The second is to show that the incompetent representation undermined the appearance of the fairness of the trial proceeding.

[11] When the first of these routes applies, calling into question the reliability of the verdict, the appellant must establish prejudice by demonstrating "a reasonable possibility that, but for the incompetence, the verdict could have been different" (*Stark*, at paragraph 15). The majority of claims of ineffective assistance of counsel take this route. Examples include counsel's failure to object to inadmissible evidence, failure to prepare the accused to testify, and failure to properly review Crown disclosure (see *Stark*, at paragraph 15).

[12] By contrast, the second route, which addresses trial fairness, is engaged where "counsel has made certain decisions that should have been made by the accused person because they relate to the accused person's fundamental right to control his or her own defence: *R. v. Swain*, [1991] 1 S.C.R. 933, at para. 35" (*Stark*, at paragraph 16). Unlike when the reliability of the verdict is questioned, where trial fairness is at issue, the accused is not required to establish further prejudice.

[13] In *Stark*, Lauwers J.A. continues:

> [18] In my view, the right to elect the mode of trial under s. 536 of the *Criminal Code* is one of those fundamental rights that counsel cannot take from a client and on which the client is entitled to be adequately advised by counsel.
>
> [19] Parliament has chosen to give accused who are charged with the more serious crimes a choice as to the mode of trial. That right is partly constitutionalized in s. 11(f) of the *Charter*, which guarantees a right to trial by jury for offences punishable by a sentence of five years or more. The exercise of the right to choose the mode of trial is integral to the court's jurisdiction over an accused and is essential to the fairness of the proceeding.
>
> [20] If an accused receives no advice from counsel as to his options, or the advantages and disadvantages of the respective options, then the accused has effectively been denied his right to choose his mode of trial under s. 536 of the *Criminal Code*. The miscarriage of justice lies in proceeding against the accused without allowing him to make an informed election, and the accused need not establish further prejudice. What the accused might or might not have done had he been aware of his options is not relevant.

I would add the caution expressed by Lauwers J.A. in *Stark*, at paragraph 32, that there may be circumstances when "trial counsel's failure to advise the

accused person about the available modes of trial will not constitute a miscarriage of justice". In my view, that exception does not apply here.

[14] A similar position to that in *Stark* was adopted in *R. v. D.G.M.*, 2018 MBCA 88, in which both the question of election of mode of trial and the accused's decision whether to testify were at issue relative to the allegation of ineffective representation by trial counsel. Beard J.A., for the Court, concluded:

> [32] While the Court in *Stark* was dealing with the right to elect the mode of trial, these comments apply equally to the decision of whether to testify, which was identified in *Stark* as another fundamental right of an accused and about which he was entitled to receive advice from his trial counsel before making a decision as to how to proceed.
>
> [33] We are of the view, based on the evidence of both the accused and the trial lawyer, that the trial lawyer did not give the accused any advice about the advantages and disadvantages related to the crucial decisions of re-electing to a judge-alone trial and of testifying in his own defence. Thus, we are of the view that these facts are sufficient to fatally undermine the fairness of the trial and constitute a miscarriage of justice.

[15] In most cases, trial counsel will provide evidence, accepted by the court, that the relevant information regarding mode of trial was provided to the accused. (See, for example, *R. v. V.J.*, 2017 ONCA 924, at paragraph 10.)

[16] The decision in *R. v. Gardner* (1995), 54 B.C.A.C. 205 (B.C.C.A.), leave to appeal refused, (1995) 193 N.R. 317 (note), is an example of a situation when trial counsel conceded that he had not advised the accused with respect to his right to elect the mode of trial, but the Court concluded that this did not warrant a determination that there was a miscarriage of justice. There are two ways in which the decision in *Gardner* is distinguishable from the case before this Court. First, the Court did not believe Mr. Gardner's evidence regarding his lack of understanding with respect to his mode of trial and what his counsel was agreeing to.

[17] More importantly, in *Gardner*, which preceded both *G.D.B.* and *Stark*, the Court did not address the difference between incompetent representation that undermines the reliability of the verdict and incompetent representation that undermines trial fairness. As discussed above, that difference, essential to the decision in *Stark*, was adopted by the Supreme Court of Canada in *G.D.B.*

Application of the Law

[18] In this case, Mr. White filed an affidavit to support his submissions regarding ineffective representation by his counsel, Mr. Matthews. However, Mr. Matthews, who was represented by counsel for purposes of addressing the allegation of ineffective representation of his client, did not file an affidavit in response. Further, he did not request intervenor status, but instead advised this Court that he would not be participating in the matter.

[19] Following cross-examination by counsel for the Crown, I accept Mr. White's affidavit, to which Mr. Matthews did not respond, as truthful as to the facts.

[20] Pursuant to section 536 of the *Criminal Code*, Mr. White had the right to choose to be tried on the charge of aggravated assault by a provincial court judge, a Supreme Court judge, or a judge and jury. In his affidavit, Mr. White swore:

> 7. THAT at some point in the course of the matter a decision was made to have my trial take place in Provincial Court. Mr. Matthews did not discuss with me or seek my instructions on whether the case should be heard in Provincial Court or Supreme Court. I understand I had a choice whether the charges would proceed in Provincial Court or Supreme Court. I did not make that decision. Mr. Matthews made that decision without my instruction.

[21] In the absence of an affidavit from Mr. Matthews, and considering that the veracity of Mr. White's affidavit was not shaken in cross-examination by Crown counsel, I conclude that Mr. White did not give informed instructions regarding the election as to mode of trial.

[22] Further, if Mr. Matthews had a reason for not discussing the mode of trial with Mr. White or felt it was unnecessary in the circumstances, he did not provide any explanation by means of an affidavit in response to the appeal in this Court.

[23] Aggravated assault is a serious charge. Mr. White had the right to advice from his counsel about the advantages and disadvantages related to the mode of trial. Since he did not have the opportunity to make an informed election and to instruct his counsel, a conclusion not contested by Mr. Matthews, I am satisfied that, in the circumstances, Mr. Matthews' failure undermined the fairness of the trial proceedings, and resulted in a miscarriage of justice.

SUMMARY AND DISPOSITION

[24] In summary, I am satisfied that Mr. Matthews failed to provide competent representation for Mr. White at trial by failing to obtain informed instructions from Mr. White regarding the mode of trial. In the circumstances, that failure undermined the fairness of the proceedings and resulted in a miscarriage of justice.

[25] I would allow the appeal and order a new trial on all the charges.

_____

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

Dissenting Reasons Hoegg J.A.:

[26] I am unable to agree with my colleague that Mr. White's appeal be allowed and a new trial ordered.

[27] The incident leading to Mr. White's convictions took place on Mr. White's 65-foot commercial fishing vessel during the summer of 2018. The vessel was returning to Rocky Harbour on the island of Newfoundland from fishing turbot in the waters of Red Bay, Labrador. Five crew were on board: Mr. White, his partner Jessica Decker, and Eustace Hewlin, Barry Reid and Sean Dobbin.

[28] Mr. White was found guilty of assaulting Ms. Decker, aggravated assault by endangering her life (by partly pushing her overboard into very rough water), and damaging her property by throwing her telephone into the sea. In brief summary, Mr. Hewlin and Mr. Reid testified that they were in the wheelhouse

when they heard yelling and screaming from Ms. Decker, so they ran to the back of the vessel where they saw her body, except for one of her legs, over the side of the vessel and one of her hands holding onto a fish tray. They said she was screaming for help. They said that Mr. White appeared angry, that he let go of Ms. Decker as they arrived on the deck, and that he then stood next to her "doing nothing". Mr. Hewlin and Mr. Reid pulled Ms. Decker onboard to safety.

[29] Mr. White testified that he did not assault Ms. Decker and that he had not tried to throw her overboard, but if he had wanted to, "she would have been overboard". He answered many of the questions posed to him at trial by saying "I do not recall." His evidence was described by the judge as "purposely disingenuous"… "unreliable, incredible, and fanciful." Mr. Dobbin testified for the defence, but the judge found that his evidence could not be relied on because it related to a different incident between Mr. White and Ms. Decker.

[30] Ms. Decker did not testify. Although she had been subpoenaed by the Crown to give evidence, the Crown elected not to call her, and advised defence counsel that she was available to be called as a defence witness should the defence choose. Mr. White's counsel decided not to call her.

[31] The trial judge accepted the evidence of Mr. Hewlin and Mr. Reid and convicted Mr. White of the charges.

[32] Mr. White was upset that his counsel did not call Ms. Decker to testify. He sought new counsel, and applied to the judge to reopen the trial to hear evidence from Ms. Decker. Mr. White's initial counsel filed affidavit evidence which was tendered on the reopening application. In his affidavit, counsel stated that it was he who made the decision not to call Ms. Decker to testify, and he explained why. He said that he met with Ms. Decker twice on the day of trial, and that she told him two different versions of the events leading to the charges. He also said that he believed her credibility would be substantially challenged during cross-examination by the Crown on the basis of her statement to police about the incident.

[33] The judge allowed Mr. White's application. Although the judge characterized Mr. White's counsel's decision not to have Ms. Decker testify as "reasonable and tactical", and determined that the legal test for reopening a trial to permit fresh evidence had not been met, he allowed the application because of the "obvious potential importance" of Ms. Decker's evidence to Mr. White and the serious nature of the charges.

[34] Ms. Decker testified at the reopening. She said that she had lied when she told police that Mr. White had tried to throw her overboard. She said that she had fallen overboard and that she could not "remember a whole lot" about the incident. The judge concluded that Ms. Decker was neither a credible nor reliable witness, and that her evidence did not alter his determination that Mr. White was guilty of the charges.

[35] Mr. White subsequently retained a third lawyer, and filed an appeal to this Court alleging that his original counsel's assistance was ineffective and that he suffered a miscarriage of justice warranting a new trial. Mr. White also filed an application to tender fresh evidence respecting his original lawyer's ineffective assistance.

[36] Mr. White's application was granted by this Court and his fresh evidence, in affidavit form, was received.

[37] He attested that his original counsel did not engage with him prior to or during the trial, prepare him for the trial, review the Crown disclosure with him, meet with him to discuss which questions the Crown Attorney would ask him on cross-examination, meet with him after each of the Crown witnesses gave evidence to discuss any position with respect to the evidence, and did not take a break after the evidence to discuss closing submissions.

[38] He also attested:

> "that at some point in the course of the matter a decision was made to have my trial take place in Provincial Court but my counsel did not discuss that decision with me or take my instructions on whether the case should be heard in Provincial Court or Supreme Court. I understand I had a choice whether the charges would proceed in Provincial Court or Supreme Court. I did not make that decision. Mr. Matthews made that decision without my instruction".

[39] Mr. White was cross-examined on his fresh evidence by Crown counsel in this Court.

[40] Mr. White testified that he spoke with his lawyer twice by telephone before he appeared at Provincial Court for election and plea on June 5, 2018. He said that they discussed that he would be pleading not guilty to the charges and also that he wanted a trial date in the fall after fishing season was over.

[41] Mr. White also said that he had two in-person meetings with his counsel before his trial in addition to their meeting on the morning of the trial, and that

he "may have had 4 or 5 brief telephone calls with his counsel leading up to the trial." Mr. White said that he recalled some discussion about plea negotiations, and acknowledged that counsel may have discussed cross-examination with him on the day of trial but that he did not remember. Although Mr. White said that he knew what the charges were against him (his evidence was that most of the phone calls with his lawyer concerned him telling his lawyer "to get Jessica to testify to tell what happened instead of the other two peoples' version of events"), he said he was "blindsided" by the trial process.

[42] Mr. White said he "had no idea what a provincial court election was" and that there had been no discussion about whether he had wanted a jury trial. Mr. White did not say that he had wanted a jury trial, or that he would have elected to be tried by a judge and jury or a Supreme Court judge had he known that he could, or that he will elect to be tried by a judge and jury or a Supreme Court judge if his appeal is successful. Mr. White does not challenge the reliability of the trial verdict, say that his trial was unfair, or say that a different result could have obtained had he been tried by a judge and jury or a Supreme Court judge sitting alone. He says that he was unable to make full answer and defence to the charges, but does not say how. In short, he does not allege that he suffered any prejudice as a result of his counsel's conduct. He simply contends that he suffered a miscarriage of justice because his lawyer did not review modes of trial with him, and requests a new trial on that basis.

[43] The law respecting appeals based on the ineffective assistance of counsel was set out by the Supreme Court of Canada in *G.D.B.* In *G.D.B.*, the Court ruled that in order for an appellant to succeed with an appeal based on ineffectiveness of counsel, the appellant must establish that counsel's acts or omissions constituted incompetence (the performance component) and that a miscarriage of justice resulted (the prejudice component). The Court stated that a miscarriage of justice can occur if counsel's performance caused procedural unfairness or caused the trial's result to be compromised (para. 28).

[44] The Court also said:

> [29] … 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 [authority omitted].

[45] The requirement for an appellant to establish prejudice when alleging a miscarriage of justice was reinforced by the Supreme Court of Canada in *R. v. G.M.*, 2013 SCC 24, [2013] 2 S.C.R. 202. In that decision, the Court adopted the dissent in *R. v. G.M.*, 2012 NLCA 47, which reasoned that an appellant asserting an ineffectiveness claim must establish that he has been prejudiced by counsel's ineffective performance in order to obtain a new trial.

[46] The requirement to prove prejudice in order to establish a miscarriage of justice justifying a new trial is not a new concept. Trial verdicts are not automatically overturned on the basis of error, procedural or substantive, on the part of a trial judge unless the error had a material bearing on the result (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, in the case of the Crown appealing an acquittal) or severe enough to render the trial unfair or to create the appearance of unfairness (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 69). In *Khan*, the Court stated that the whole of the circumstances have to be considered in determining whether a trial was, or appeared to be, unfair (*Khan*, at para. 72). In *R. v. Wolkins*, 2005 NSCA 2, Cromwell J.A. (as he then was) put it another way, saying "[a] miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice" (para. 84).

[47] Miscarriage of justice in the context of alleged misapprehension of evidence was recently addressed by the Supreme Court of Canada in *R. v. Smith*, 2021 SCC 16, wherein the Court stated:

> [2] Determining whether misapprehension of evidence caused a miscarriage of justice requires that the appellate court assess the nature and extent of the error and its significance to the verdict (*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 221). It is a stringent standard, met only where the misapprehension could have affected the outcome (*R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 7). …

[48] Another recent Supreme Court of Canada decision also pertains. In *R v. Esseghaier*, 2021 SCC 9, the Court addressed miscarriage of justice in the context of procedural error on the part of a trial judge. The trial judge erred in the process of selecting the jury, which resulted in an improperly constituted jury. The two accused sought a new trial arguing that the procedural error went to the trial court's jurisdiction to hear the case, and that they had suffered a miscarriage of justice. The Supreme Court ruled that the accused had not shown that the judge's procedural error affected the trial court's jurisdiction. The Court also ruled that the accused had not suffered any prejudice as a result of the

judge's procedural error, and that there had therefore been no miscarriage of justice. Accordingly, the Court applied the curative proviso in section 686(1)(b)(iv) of the *Code* to restore the convictions which had been set aside by the lower appellate court.

[49] As this case concerns whether ineffective assistance of counsel caused a miscarriage of justice, it is useful to consider the nature of the relationship between counsel and an accused charged with a criminal offence. The counsel/accused or lawyer/client relationship is a private one, based on agreements and expectations governed by contract and tort principles. While counsel's competence and ethical behavior are governed by counsel's professional body, as stated by the Supreme Court in *G.D.B.*, counsel's errors, oversights, and other negligence are matters that belong to the civil courts unless they interfere with the relationship between the Crown and the accused such that counsel's conduct in the course of a criminal proceeding is so serious that it shakes public confidence in the administration of justice, thereby resulting in a miscarriage of justice (*Wolkins*, at para. 84).

[50] Many miscarriages of justice occur by reason of error or missteps by judges. Some also occur at the hand of the Crown, and may not have been corrected, or able to have been corrected, by the judge involved. Miscarriages of justice usually rest on procedural or substantive error, but can also rest on jurisdictional or other error. Given that trial prejudice or prejudice so serious that it shakes public confidence in the administration of justice is required to be shown in order for these errors to warrant a new trial, I see no reason why an accused would not also have to demonstrate trial prejudice or serious prejudice as a result of counsel's conduct in order to obtain a new trial. Accordingly, the issue becomes whether the nature of the error counsel is alleged to have made in this case resulted in trial prejudice or is otherwise so serious that it shakes public confidence in the administration of justice thereby causing a miscarriage of justice justifying a new trial.

[51] My colleague writes that Mr. White suffered a miscarriage of justice on the basis of his counsel's failure to take instructions from Mr. White and advise him about the advantages and disadvantages of the trial modes available to him, and that this failure undermined the fairness of Mr. White's trial proceedings causing a miscarriage of justice. She quotes from *Stark* in support of her decision.

[52] The *Stark* Court reasoned that an accused's exercise of the right to choose the mode of trial is integral to a court's jurisdiction over the accused and

essential to the fairness of the subsequent proceeding. Although not precisely stated, the Court found prejudice in the fact that Mr. Stark's trial proceeded without him having made an informed election respecting which mode of trial to choose. The Court ruled that it was established that Mr. Stark did not receive cogent advice about his options concerning mode of trial, and consequently the fairness of his trial was fatally undermined and miscarriage of justice obtained without need for showing further prejudice (*Stark*, at paras. 30-32). In so ruling, the appellate Court relied on the published remarks of Arthur Martin Q.C., as he then was, delivered to an Advocates' Society event in Toronto in 1969.

[53] In his remarks, Mr. Martin referred to a tentative draft report of the American Bar Association which recommended adoption of the position that an accused facing a criminal charge was entitled to decide what plea to enter, whether to be tried by a jury when that was possible, and whether to testify, in the course of being defended by counsel. Mr. Martin stated defence counsel could not prevent an accused from making his own choices respecting these decisions, whereas other decisions in the conduct of a criminal trial were for counsel to make in the exercise of counsel's professional skill and judgment:

> Although counsel is free to advise an accused in strong terms as to the plea that he should enter, the ultimate choice is that of the accused and it must be a free choice. Counsel, however, is not bound to follow instructions which are *unreasonable* and in proper cases is entitled to refuse to act for a client who rejects his advice.
>
> …
>
> Are there other decisions which only the client can make? The *Tentative Draft Standards* reserve two other decisions for the client, namely:
>
> > (i) Whether to waive a trial by jury where that is permissible, and
> >
> > (ii) Whether to testify on his own behalf.

Mr. Martin continued:

> Obviously, neither counsel nor anyone else can deprive an accused of his fundamental rights. If the accused insists on giving evidence or insists on a jury trial, contrary to counsel's advise, counsel cannot, as a matter of law, prevent him from exercising those rights.

[54] The proposed recommendation of which Mr. Martin spoke has long been the law in Canada and holds true today. An accused cannot be prevented from

entering a plea of choice, choosing the mode of trial when choices are available, or choosing whether to testify.

[55] The *Stark* Court ruled that the exercise of the right to choose the mode of trial is integral to the Court's jurisdiction over the accused. I see no jurisdictional issue arising in Mr. White's case. The Provincial Court had jurisdiction over Mr. White and the offences with which he was charged, just as the Supreme Court would have had if Mr. White's trial had taken place there. The jurisdiction of any of these particular courts is not dependant on Mr. White's attornment. If no election is made, the default is trial by judge and jury. I do not see that the Provincial Court's jurisdiction over Mr. White's trial was affected by whether Mr. White or his counsel made the election for him to be tried in Provincial Court.

[56] As noted above, in *Esseghaier*, the Supreme Court rejected the accused's argument that the judge's procedural error affected the trial court's jurisdiction over them and that they had suffered no prejudice by certain jurors being chosen over others. Absent bias, which could raise the issue of prejudice, it is difficult to see how prejudice could result from certain jurors being chosen over others. All jurors are presumed to perform their duties in accordance with law, and it cannot be said that jurors in an incorrectly constituted jury are more fair, more capable, or otherwise more able to visit prejudice on a trial than jurors from a correctly constituted jury.

[57] Like the prejudice argument in *Esseghaier*, Mr. White's prejudice argument is difficult to make. Our criminal justice system provides options respecting modes of trial for certain serious offences, and each mode of trial is not only presumed to be, but well established to be, a fair process able to produce a just result. To find that prejudice can result from the choice of one mode of trial over another, or that one mode of trial produces a more just result than the other two, would be an effective indictment of our criminal justice system. I do not dispute that an error was made if in fact Mr. White's mode of trial was chosen by his counsel and not by him. However, the effect of that error did not cause prejudice to Mr. White. If the effect can be said to be prejudice, it is a very precious kind of prejudice, and not prejudice which resulted in an unfair trial or that is so serious that it shakes public confidence in the administration of justice so as to warrant a new trial. To grant a new trial to Mr. White in the circumstances of this case would be, to my mind, disproportionate to the error made.

[58] In any event, I do not put the decisions respecting how to plead, which mode of trial to choose, and whether to testify on the same footing. Choosing whether to plead guilty or not guilty is absolutely the choice of an accused. The plea is integral to the relationship between the Crown and an accused, and sets the course of an accused's involvement with the criminal justice system. The importance of this choice to an accused is recognized in section 606(1.1) of the *Criminal Code*, which requires the judge taking an accused's plea to be satisfied that it is voluntary and given in a full understanding of its nature and consequences. By contrast, there is no similar provision in the *Code* respecting a judge's acceptance of an accused's election respecting mode of trial.

[59] Whether an accused person testifies is a serious choice, for an accused's personal testimony can be a determining factor in the resolution of a charge. It is difficult to imagine this decision being made without an accused's wishes being respected. However, an accused's choice of whether to testify is almost always a tactical or strategic choice, made in the context of defences put forward, perceived strengths and weaknesses of the case, ethical considerations and other matters. Likewise, choosing one's mode of trial is a tactical or strategic choice, made for reasons similar to those informing the choice of whether to testify, as well as on the basis of financial means and perceived societal prejudices. Such choices do not generally result in successful appeals based on allegations of ineffective assistance of counsel (see *R. v. Snow*, 2019 NSCA 76). Preventing an accused from testifying or choosing the mode of his trial against his wishes is quite different from having had no advice from legal counsel respecting how to choose mode of trial.

[60] There is no suggestion in this case that Mr. White was prevented by his counsel from having a jury or a judge alone trial. Yet Mr. White's argument seems to be that his counsel effectively prevented him from exercising his right to choose his mode of trial because his counsel did not advise him respecting his choices. This sort of contention seems to have been somewhat based on the notion that counsel effectively prevents an accused from exercising constitutional rights − to a jury trial in these circumstances, to making full answer and defence to the charges, and to a fair trial (sections 7, 11(f), and 11(d) of the *Charter*) when counsel does not advise an accused respecting mode of trial (*Stark*, at paras. 10 and 19).

[61] The *Charter* applies to the relationship between the state and its people. A defence lawyer is neither the state, nor an agent of the state like a police officer is. Visiting responsibility on defence lawyers for ensuring an accused is aware of his *Charter* rights is, in my view, uncomfortably close to deputizing

defence lawyers to carry out the role of the state. The judge who takes the accused's election pursuant to section 536 of the *Code* is not an agent of the state either. The judge is independent of the state and an impartial arbiter between the state and an accused, and cannot be required, or be seen, to advise an accused respecting choosing modes of trial.

[62] This point is brought into focus when the circumstances of accuseds who do not have counsel, of whom there are many in our criminal courts, are considered. How does a self-represented accused get advice respecting *Charter* rights? How is such a person to get advice about deciding which mode of trial to choose? Is an accused who chooses a mode of trial in answer to the judge's section 535 question able to appeal his conviction on the basis that he did not receive advice respecting, or otherwise appreciate, how to choose his mode of trial? Does counsel representing a criminal client become an insurer for an accused's exercise of *Charter* rights? Does being represented by counsel enhance an accused's chances of success on appeal by according more rights to that accused than to a self-represented accused?

[63] The long-standing law respecting the requirement for prejudice to be shown in order to ground miscarriage of justice, the nature of an accused's relationship with legal counsel, and the unresolved questions respecting the practicalities of the criminal process and the vindication of an accused's *Charter* rights when represented by counsel all lead me to conclude that an appellant alleging ineffective assistance of counsel on the basis of a procedural error must show prejudice that affects the fairness of the trial or undermines the integrity of the administration of justice in order to obtain a new trial. I am of the view that allowing such appeals on the basis of the kind of prejudice said to have occurred here would shake public confidence in the criminal justice system. I hasten to add that my view on this matter should not be taken as an endorsement of substandard defence practice. Rather, my view is that all mistakes do not have the same, or equal, effect, and what the law demands is not procedurally perfect justice, but fundamentally fair justice (per Moldaver J. and Brown J. in *Esseghairer*, at para. 10 and per McLachlin J. in *R. v. O'Connor*, [1996] 4 S.C.R. 411, at 193, at para. 193 (S.C.C.)).

[64] In my view, Mr. White has received fundamentally fair justice. He has not shown in reality or in appearance that he has been prejudiced by his lawyer's mistake so as to warrant a new trial. I add that he already had his trial reopened, effectively on the basis that he was prejudiced by his counsel's decision not to call Ms. Decker, and Ms. Decker's evidence was subsequently received and considered. In this Court, Mr. White argues for a new trial without showing that

his trial was unfair or explaining how the error he attributes to his counsel prejudiced him such that a new trial is warranted. I see no miscarriage of justice in the totality of the circumstances of Mr. White's case (*Khan*, at para. 72, and *Wolkins*, at para. 102). Accordingly, I would deny his appeal.

[65] While I would deny Mr. White's appeal on the above basis, I must also say that I am not convinced that Mr. White did not receive advice from his original lawyer respecting the modes of trial available to him.

[66] The record of proceedings shows that election respecting the one electable offence among the four charges Mr. White was facing was a live issue when he and his counsel appeared in Provincial Court on June 5, 2018 for his election and plea. At the outset, Mr. White's counsel noted that there was at least one electable offence among the four charges. The Crown elected to proceed summarily on three hybrid offences, and the parties agreed that at least one day was needed for trial. The Court reporter suggested June 29th for trial, but that date was not suitable for Mr. White, so after discussion, the Court set October 4, 2018 for trial and defence counsel provided a section 11(b) waiver for *Jordan* purposes on Mr. White's behalf. Crown counsel then returned to the matter of Mr. White's election respecting mode of trial, saying "just, I guess we have to confirm, then, the aggravated assault is a Provincial Court election?" Mr. Matthews replied "Yes, we're electing Provincial Court on that. I'm sorry, your Honour, I should have mentioned that".

[67] This Court has only Mr. White's evidence respecting whether his original counsel discussed modes of trial with him. Original counsel did not file affidavit evidence on the appeal; original counsel's affidavit respecting the reopening application is part of the record, but that affidavit does not address Mr. White's allegation respecting mode of trial because mode of trial was not raised as an issue by Mr. White on his application to reopen the trial. There is therefore no evidence from original counsel respecting whether or to what extent mode of trial was discussed with Mr. White.

[68] The fact that there is no evidence from original counsel respecting the mode of trial issue does not automatically result in a conclusion that counsel did not review modes of trial with him. In other words, Mr. White must still establish, on the balance of probabilities, that his counsel provided ineffective assistance to him respecting the modes of trial. Mr. White's burden in this regard is akin to the burden on the Crown to prove a charge on the basis of the evidence it tenders regardless of whether defence evidence is tendered. My

colleagues accept that Mr. White's evidence in this Court establishes that his counsel did not advise him respecting mode of trial. I am not convinced.

[69] Mr. White's own evidence was that he had two telephone conversations with his counsel before appearing in Court on June 5, 2018 for election and plea, and that he and his counsel discussed how he would plead and his preferred times for trial so that he could fish during the summer season. As well, the record shows that Mr. White's memory, by his own admission in this Court and at his original trial, is not the best. I have reviewed the court record. In my view, it shows that original counsel's handling of the trial was professional, competent and ethical and that Mr. White's convictions resulted from the evidence against him and not because of his original counsel's conduct. While these considerations do not prove that original counsel had advised Mr. White respecting mode of trial, they indicate to me that there had been considerable discussion between Mr. White and his counsel before June 5, 2018, such that I am not convinced that counsel did not discuss modes of trial with Mr. White. Not being so convinced, I would not order a new trial because I am not convinced that his counsel's conduct prevented him from controlling his own defence.

_____

L. R. Hoegg J.A.