
CANADA / JUDGMENT

Pisani v. R.

[1971] SCR 738

COURT

Supreme Court of Canada

DECIDED

21 December 1970

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Pisani v. R.

Collection

Supreme Court Judgments

Date

1970-12-21

Report

[1971] SCR 738

Judges

Fauteux, Joseph Honoré Gérard; Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett;
Laskin, Bora

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Pisani v. R., [1971] S.C.R. 738

Date: 1970-12-21

Bruno Pisani (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1970: November 18; 1970: December 21.

Present: Fauteux C.J. and Martland, Judson, Spence and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Jury trial—Improper address by Crown counsel—Prejudice—Fair trial—Criminal Code, 1953-54 (Can.), c. 51, ss. 393(b), 592(1)(b) (iii).

Criminal law—Jurisdiction—Right of appeal to Supreme Court of Canada—Question of law.

The appellant was convicted on a charge of possession of counterfeit money. He had a criminal record not related to any offence involving such money. He gave evidence in denial of knowledge of the presence in his car of a package consisting of three tightly rolled counterfeit notes. These were found by the police wedged among the wires under the dashboard next to the steering column. The Crown's theory was that the accused was a distributor rather than a pusher of counterfeit bills. In his address to the jury, Crown counsel put, as facts to be considered for conviction, matters of which there was no evidence and which came from Crown counsel's personal experience or observations. The Court of Appeal affirmed the conviction. Leave to appeal to this Court was granted on two questions of law: (1) Did the Court of Appeal err in failing to hold that the trial judge should have declared a mistrial by reason of the nature of counsel's address; and (2) Did the Court of Appeal err in not holding that the address to the jury by counsel deprived the accused of a fair trial?

Held: The appeal should be allowed and a new trial directed.

There can be no unyielding general rule that an inflammatory or improper address to the jury by Crown counsel is per se conclusive of the fact that there has been an unfair trial and that a conviction thereat cannot stand. However, in the present case, what Crown counsel at the trial improperly said to the jury bore so directly on the central issue in the case, namely knowing possession, and was so prejudicial in respect of that issue and of the related question of credibility of the accused, of whose criminal record the jury were aware, as to deprive the accused of his right to a fair trial. No case was made out for the application of s. 592(1) (b) (iii) of the Criminal Code.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction on a charge of possession of counterfeit money. Appeal allowed.

Claude Thomson and John Morin, for the appellant.

R.M. McLeod, for the respondent.

The judgment of the Court was delivered by

LASKIN J.—This appeal, from the affirmation by the Court of Appeal of Ontario of the conviction of the accused on a charge of possession of counterfeit money, is here by leave on two questions of law that were formulated as follows:

1. Did the Court of Appeal err in failing to hold that the learned trial judge should have declared a mistrial on the motion of counsel for the accused by reason of the nature of Crown counsel's address to the jury?
2. Did the Court of Appeal err in not holding that the address to the jury by Crown counsel was of such a nature as to deprive the accused of a fair trial and hence resulted in a miscarriage of justice?

Counsel for the Crown contended that these questions did not disclose any issue of law, and hence that this Court was without jurisdiction to entertain the appeal. It is sufficient to get to the merits to found jurisdiction on question 2, and to rely in this respect on the views of this Court on such a question as expressed in *Boucher v. The Queen*[1]. The reasons for judgment given separately in *Boucher* by Kerwin C.J., Rand, Locke and Cartwright JJ. amply point up the obligation of Crown counsel to be accurate, fair and dispassionate in conducting the prosecution and in addressing the jury. Overenthusiasm for the strength of the case for the prosecution, manifested in addressing the jury, may be forgivable, especially when tempered by a proper caution by the trial judge in his charge, where it is in relation to matters properly adduced in evidence. A different situation exists where that enthusiasm is coupled with or consists of putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experience or observations. That is the present case.

At the conclusion of Crown counsel's address in this case, counsel for the accused moved for a declaration of a mistrial. The trial judge did not act on the motion but proceeded to charge the jury. There was nothing in his charge that can be regarded as directed to the serious breaches of duty exhibited by Crown counsel. The charge was in the general pattern that is followed when there is no untoward situation that demands particular consideration and instruction to the jury. I do not consider that the familiar observation or reminder to the jury that they alone are judges of the facts and that they may disregard any comments, whether of the trial judge or of counsel, on the facts in evidence, can meet a situation where Crown counsel, who addresses the jury last, puts extraneous prejudicial matters to the jury as if such matters were part of the record of evidence.

Of course, there can be no unyielding general rule that an inflammatory or other improper address to the jury by Crown counsel is per se conclusive of the fact that there has been an unfair trial and that a conviction thereat cannot stand. The issues in a case and the evidence that is presented are highly relevant in this connection, as is the supervision exercised by the trial judge in relation to the addresses of counsel and in the course of his charge. In the present case, I am satisfied that what Crown counsel at the trial improperly said to the jury bore so directly on the central issue in the case, namely knowing possession, and was so prejudicial in respect of that issue and of the related question of credibility of the accused, of whose criminal record the jury were aware, as to deprive the accused of his right to a fair trial. I have already observed that the trial judge did nothing to erase the effect of Crown counsel's remarks, and I should add that nothing said by defence counsel in his preceding address can be regarded as justifying what

Crown counsel intruded into the trial.

I wish to refer to some of the facts of the case and to portions of Crown counsel's address as reproduced in the transcript. The accused was a man with a record not related to any offence involving counterfeit money, and he gave evidence in denial of knowledge of the presence in his car of a package consisting of three tightly rolled up counterfeit notes. They were found by the police wedged among the wires under the dashboard next to the steering column. He had \$700 in cash on his person in genuine notes. There was evidence that his wife and two relatives had access to his car. He denied police evidence that he said, when the counterfeit notes were found, "I don't know. It looks like funny money", but admitted that he said to the police, "I guess you've got me good. I want to see a lawyer".

The Crown's theory was that the accused was a "distributor" rather than a "pusher" of counterfeit bills; that is, that he was, so to speak, a wholesaler who showed samples to "pushers" who would buy from the samples and then "sell" to the public. In opening to the jury before any evidence was led Crown counsel spoke as follows:

So the essence of the charge as you heard from the indictment is that he had it in his custody or possession. It was his car. He had the car for some time; apparently nobody had access to it—that he had placed this money in this hiding place, and he had it for some purpose. I will explain the purpose to you when I address you later.

No evidence was adduced as to any purpose, nor was there any evidence as to how counterfeit bills are distributed or marketed. There was no evidence as to any association of the accused with so-called distributors or pushers.

The transcript of Crown counsel's address to the jury includes the following passages:

All right, so what happens. The officers found it, and he has all his notes. He is going underneath like that. Now, if a person knew, if somebody in fact had put it there—I suggest he did—you would know where it is. You would be able to put your hand underneath, probably while you are still sitting there and pull it out notwithstanding that it was wedged in; you would know where it is, so you would measure it up and if you needed it—and I will explain why he needed it—you are not going to carry three ten dollar counterfeit bills on your person because in fact you may be stopped by the police. They stop people and they interview people and check people, and he is not going to carry the bills on him; that is for sure. He is not going to put it in his car. You heard the evidence about the \$700 on his person at that time, and this comes to the reason why I had Corporal Dore explain what type and quality this money was, going from fair to good to fairly deceptive. He said they were at the top range, deceptive, the best at that time.

Now, I suggest to you that what in fact Pisani had these bills for, was for specimens, for samples, and he would go out, and he was a distributor. He would not carry any of this money on him. It was too dangerous. The police might stop him, so he hides it in this very unusual hiding place in the car; somewhere where he could get it out fast if he wanted to show somebody, but he wouldn't carry it on his person. He would try to find pushers. People with records don't push counterfeit

money. They are distributors. They sell it to pushers. They sell it to people without records and they push it. Pisani wouldn't be caught dead pushing ten dollar bills. It is not worth it to him. He has got a record, so he goes, he finds his pusher, he brings it to wherever the pusher is and then calls them as he reaches underneath the dashboard where it is. He tries to persuade the pusher. He says, "Look, it is good quality ten dollar bills." Here is the sales pitch. He takes the three ten dollar bills, he goes in and he says to the man, and he will take one or two perhaps; he will say: all right, take a look at this. The person looks at it, and if he has another ten dollar bill he would look at it, and he would say: It looks pretty good. Then he would say, all right take a look at this, and then lo and behold they have the same serial number; they have got to be counterfeit. He looks at it and says: This is pretty good; these are top-notch counterfeit, I probably could get rid of this. Maybe that person wouldn't do it, he pushes it through his girlfriend or an associate. He says: Take another look at this. This is another sample. This is another of the batch with a different serial number; have a look at it. That is pretty good top. So that is the sales pitch. He has one. He shows them to everyone. It has to be counterfeit, because it has the same serial number. So he has three samples, and they are top-notch quality and people want it. It is good quality. The type of people that would push them say: Yes, I could fool a person with them.

How many of you people know what a counterfeit looks like? My Dad owns a store. He doesn't know. I work in a store. I don't know what counterfeit is unless there is something drastically wrong with the bill. That is when he questions it.

I suggest to you that Pisani had secreted these three counterfeit ten dollar bills, and he wouldn't touch it. He probably figured the police aren't going to find it there. You will recall that it took the officer quite some time. He would put it there knowing that it was dangerous to have it on his person, on his physical person, and only at the last minute when he arrives where the pusher is, whether it be in a store or an apartment, and he would park, look around and make sure there are no police officers, no detectives that he recognizes, he would take it out and would show the samples to the person who is doing the pushing. Then when he comes back he would hide it in the same place.

Later on in the address, Crown counsel after referring to Pisani's seven previous convictions and to the legal limitation that these convictions could only be used to assess his credibility, said this:

He had \$700 in his possession at that time made up of hundreds, fifties, twenties and tens. Is it possible that he got that as down payment from one of his pushers? He wouldn't bring money to the pusher. The pusher would have to go to somebody else, another person or party that has no record to get money. Pisani wouldn't be caught dead with the money. He would arrange for the pusher to get the money. He wouldn't be caught dead with large quantities of counterfeit money.

Again, in a succeeding portion of the address he spoke as follows:

You heard the evidence that if you put the bills through the silver nitrate processing solution you would ruin the paper itself. It would turn to dark brown as we have heard, and they handle this money gingerly in Ottawa. You don't lift prints off counterfeit; that was known to Pisani. Pisani is, as I suggest to you he is not a pusher, but a distributor. He knows these technical things. He

knows you can't lift a print, so I suggest to you that there is a matter of credibility. The story at the scene contrast. There is no one that he mentions. No person that he mentioned that would plant this money, and I suggest to you if that was so there would be a good quantity of money put there instead of three ten dollar bills.

There was no evidence that Pisani knew that fingerprints cannot be lifted from counterfeit money, and Crown counsel was also again repeating as facts matters not in evidence.

Two more passages of the address should be quoted:

I would ask you then to disbelieve Pisani entirely when he says he didn't know who put it there. I suggest to you exactly that he put it there. He might have been on a selling jaunt at that time. He might have gotten a deposit to line up the place where the pusher would have got the money from a third party who had no record and he was coming back. He had a large quantity of money and unfortunately he was stopped and his car was searched.

There is no direct evidence in this case that anyone saw Pisani put it there. There is no statement, and you don't expect statement from a person like this, do you really? A person, I suggest to you, that a person without a record may give a statement, not a person like this. There is no statement: Yes, I put it there. There is nothing like that, so I ask you—I am going to have to ask you to draw your conclusion that he put it there on the basis of circumstantial evidence.

The foregoing passages bear out the assessment I made of the effect of the address.

In my view, no case was made out for the application of s. 592(1)(b)(iii) of the Criminal Code. In the result, I would allow the appeal, set aside the conviction and direct a new trial.

Appeal allowed and new trial directed.

Solicitor for the appellant: C.R. Thomson, Toronto.

Solicitor for the respondent: W.C. Bowman, Toronto.

[1] [1955] S.C.R. 16, 20 C.R.1, 110, C.C.C. 263.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/4177/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/pisani-v-r-1970>

Prepared on 27 October 2026 · Esheria