
CANADA / JUDGMENT

R. v. Mohebtash

2007 BCCA 307

COURT

British Columbia Court of Appeal

DECIDED

1 June 2007

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2007 BCCA 307 R. v. Mohebtash

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Mohebtash,

2007 BCCA 307

Date: 20070601

Docket: CA034078

Between:

Regina

Respondent

And

Mohammad Mohebtash

Appellant

Before:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Smith

G.D. McKinnon, Q.C.

Counsel for the Appellant

K.M. Ker

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

15 March 2007

Place and Date of Judgment:

Vancouver, British Columbia

1 June 2007

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] The appellant was charged with two offences:

Count 1

At or near West Vancouver, in the Province of British Columbia, between the 3rd day of March, 2004, and the 19th day of March, 2004, he did use a document, a Power of Attorney, as if it were genuine, knowing the said document to be forged, contrary to Section 368(1)(a) of the Criminal Code of Canada.

Count 2

At or near West Vancouver, in the Province of British Columbia, between the 3rd day of March, 2004, and the 19th day of March, 2004, he did attempt to defraud the Canadian Imperial Bank of Commerce of money, of a value in excess of five thousand dollars (\$5,000.00), contrary to Section 380(1) and 463 of the Criminal Code of Canada.

[2] A trial by judge alone was held before Goepel J. of the Supreme Court in December of 2005 and on February 3, 2006 Goepel J. found the appellant guilty on both counts. The Crown alleged that the appellant had used forged documents in attempting to obtain \$400,000 from a branch of the Canadian Imperial Bank of Commerce located at 225 - 17th Street in West Vancouver. The judge found that on March 4, 2004, the appellant attended at the bank branch and met with Mr. Molyneaux, a loans officer at the branch. The appellant told Mr. Molyneaux he had been referred by another customer. Mr. Molyneaux recognized the name of the other customer. The appellant advised Mr. Molyneaux that he wished to acquire a

\$400,000 mortgage to be charged against certain real property located in North Vancouver at 220 East 26th Street (the "property") on behalf of someone living in Iran. He produced a power of attorney purportedly signed by such person, together with a City of North Vancouver Property Tax and Utility Statement relating to the property. He said he was acting on behalf of the owners who were resident in Iran. The background of the relationship between the appellant and the owners of the property, Ms. Vafaeinejad and her husband, is narrated in the reasons for judgment of the trial judge:

- [15] Mahindokht Vafaeinejad and her husband, Mr. Fard, bought the Property in 1999. They have clear title. Her husband is 92 years-old and presently resides in Iran. He has done so since 2002. He owns a company known as Shafa Pharmaceutical, which carries on business in Iran.
- [16] Ms. Vafaeinejad testified that she originally met Mr. Mohebtash on December 20, 1998, the day she first came to Canada with her husband. Over the next month, she and her husband would see Mr. Mohebtash every day at the hotel where they were staying. He would give her husband rides to the bank and do other errands for him.
- [17] In 1999, Ms. Vafaeinejad and her husband travelled to the United States. Before leaving, they entrusted Mr. Mohebtash with some valuable personal documents. On their return from their trip, Mr. Mohebtash returned their documents. They subsequently purchased the Property.
- [18] Ms. Vafaeinejad says that after 1999, for reasons not explained in the evidence, she stopped having contact with Mr. Mohebtash. She says he would occasionally phone their home and leave messages for her husband. She says he came at least once to the Property after it became their home.
- [19] Ms. Vafaeinejad first became involved in this matter after Mr. Mohebtash had been arrested. Police showed her his driver's licence and she immediately recognized him as the man she met on her first day in Canada.
- [20] Ms. Vafaeinejad was shown the Power of Attorney. She testified it is not in her full name. She does not know a person named Eylah Hondoe. It is not her or her husband's signature on the Power of Attorney.
- [3] The power of attorney used by the appellant named Eylah Hondoe as the attorney. This name was very similar to a relative by marriage of the appellant. The appellant portrayed himself to Mr. Molyneaux as the named attorney. Mr. Molyneaux said that the initial meeting between himself and the appellant on March 4, 2004 lasted between 15 and 30 minutes. At this meeting he took some information from the appellant and obtained a photocopy of the power of attorney. Mr. Molyneaux felt that he might have had a second meeting with the appellant a few days later, but conceded in cross-examination that he may only have spoken to him on the telephone. The judge narrated the course of events in his reasons.

- [8] Subsequent to the March 4th meeting, Mr. Molyneaux spoke to Eylah on the telephone. On March 9, 2004, Mr. Molyneaux received a fax reportedly from the National Tejarat Bank in Iran confirming that a company owned by Mr. Fard had been a client since 1970 and that Mr. Fard had a good credit history and had significant credit with the bank. On March 11, 2004, Mr. Molyneaux received two faxes on the letterhead of Shata Laboratory Co. confirming that Mr. Rhamanifard is an employee of Shata Lab Co. with a salary of \$12,500 per month and that Mrs. Nejat is an employee of Shata Lab Co. with a salary of \$6,500 per month.
- [9] After the initial meeting of March 4, 2004, Mr. Molyneaux spoke to his mortgage manager concerning the Power of Attorney. The Power of Attorney was subsequently sent to the Bank's risk management division, which in turn contacted Cpl. MacPherson of the North Vancouver R.C.M.P. His investigation led him to conclude that the Power of Attorney was a forgery. Among other matters, one postal code was invalid while the other was for an auto mall. One address was for the office of a courier company, while the second address did not exist. The police could find no documentation establishing the existence of Eylah Hondoe.
- [10] The police asked Mr. Molyneaux to arrange a further meeting with his customer so the police could arrest him. That meeting took place on March 18, 2004, at 3:00 p.m.
- [4] The meeting between Mr. Molyneaux and the appellant was arranged for 3:00 p.m. on March 18, 2004 and by pre-arrangement police officers were waiting in an adjacent office at the bank branch on that afternoon. When the appellant arrived, there was some discussion between him and Mr. Molyneaux. Mr. Molyneaux had the appellant sign a couple of documents and then he excused himself on the ruse that he had to photocopy some documents. He left the appellant seated in his office. Immediately after leaving his office, Mr. Molyneaux advised the police that the appellant was in his office and thereupon the officers went to the Mr. Molyneaux's office and arrested the appellant.
- [5] At trial the appellant testified. He claimed to have never met the owners of the property. He further claimed that he had not been in that branch of the bank on any earlier occasion to see Mr. Molyneaux. He testified that on March 18 he had just arrived at the bank and by chance happened to go into the vacant office of Mr. Molyneaux and a few minutes later found himself arrested by police officers. He called as witness a person who gave evidence that on the 4th of March, 2004 the appellant could not have been in the bank because he was in his company on a work project, but the judge disbelieved that alibi evidence. The judge found that the alibi had been disclosed quite late and so late that the value of the alibi was compromised. However, more importantly, he went on to note that the alibi evidence suffered from inherent contradictions. He ultimately did not find the person called in support of the alibi, Mr. Sirdehai, a credible witness and he said that he gave no weight to the alibi whatsoever. The judge disbelieved the testimony of the appellant that he had no previous dealings with Mr. Molyneaux.

- [6] The appellant alleges error concerning identification and the judge's treatment of the alibi evidence. As regards identification, this case is not really an identification case, but is more in the nature of a recognition case. Based on his contact with the appellant on the prior occasion in early March, Mr. Molyneaux testified that he recognized the appellant when he came to his office on the 18th of March, the date the police arrested the appellant. The evidence of identification in this case is not of the fleeting glance type. I consider the rather bizarre story of how the appellant came to be in the office of Mr. Molyneaux when he was arrested not at all believable. The evidence of identity is made stronger by the testimony of Ms. Vafaeinejad who had considerable earlier contact with the appellant. Her evidence provides a credible explanation as to how the appellant could have come into possession of documents related to the property. It seems to me that the conclusion of the judge that the appellant was the person who had earlier dealt with Mr. Molyneaux was soundly based on the evidence. I see no force in the argument that there could be any reasonable doubt that the appellant was the person who attempted to obtain funds from the bank.
- [7] The only issue of real substance raised is a matter concerning s. 650(1) of the Criminal Code which provides that an accused shall be present in court during the whole of his or her trial. Neither Crown counsel nor defence counsel at trial, (not counsel on the appeal), nor the judge appear to have been alive to the provisions of this section, although I should think it is quite fundamental law. On some four occasions during the defence case, the appellant was briefly excluded from the proceedings while issues of evidence were being argued. On December 15, 2005, during the course of the trial the judge became aware of this issue. What occurred thereafter is disclosed in the following excerpt from the trial transcript at p. 177 and following:

THE COURT: Before we start, counsel, we have a small problem. Yesterday I believe on four occasions during the accused's testimony Crown asked for him to be excused. Bearing no objection I acquiesced in that occurring and the accused left the courtroom. That was, I think, hindsight and I should have caught it at the time a breach of s. 650 of the Criminal Code. The accused is entitled to be present in the court during the whole of his or her trial.

So we have a problem in that that should not have happened and the question is how we now deal with it. I - the clerk has made arrangements and I believe she has noted on the tapes when these exclusions took place and we are in a position to replay the testimony - or not the testimony, but the discussion that took place in the absence of counsel.

It is possible and I am prepared to hear submissions on this that under s. 651.1 a post facto agreement by both the prosecutor and the accused might act as a potential waiver to what took place. Clearly what took place took place without objection, but certainly there was no form of waiver made. So what took place shouldn't have happened in the fashion it did.

Now, I don't know if counsel wants a few minutes to consider what they wish to do about this.

DEFENCE COUNSEL: I hadn't thought of the point, My Lord, but has Your Lordship looked at s. 650(2)(b)?

THE COURT: I've looked at s. 650(2)(b), and I've looked at the jurisprudence and what happened in this case would not fall under s. 650(2)(b). It seems there is case law that says in these specific circumstances the lead of excusing witnesses to discuss evidentiary matters at s. 650(2)(b) does not apply. Those cases, I should add, predated s. 651.1, which if it had been followed at the time might have - might have applied.

What I would suggest is we should stand down, let counsel -

DEFENCE COUNSEL: Yes.

THE COURT: -- consider what they wish to do, and [defence counsel], presumably you may have to take instructions from your client as to what he wants to do. As I say, the tape is available and can be replayed and that might in some sense cure the problem, but it is a problem and it's one that I take full responsibility for. But certainly it should not have occurred yesterday.

DEFENCE COUNSEL: All right, and 30 minutes?

THE COURT: Well, yes, let's - oh, in 30 minutes or if you - well, let's take 30 minutes. That'll give it -

THE CLERK: Order in court. Court is adjourned for a brief recess.

(PROCEEDINGS ADJOURNED FOR BRIEF RECESS)

(PROCEEDINGS RECONVENED)

THE CLERK: [Defence counsel.]

DEFENCE COUNSEL: Yes, My Lord. I don't have instructions from Mr. Mohebtash to waive his rights under s. 650, but with that statement I also acknowledge that we're still within the trial, whereas most of those cases in the book the error is discovered after the trial and can't be cured.

The second point I acknowledge is that if my memory is accurate, I don't always claim it is, on each of the times that Crown had asked for his exclusion to debate the question she might be able to ask I don't believe Your Lordship allowed her to pursue the question she wished which is different than a case, perhaps, where an accused is absent from the courtroom, a ruling goes against the accused and he's - questions are put to him that he did not hear the debate. So whether it could be suggested to be prejudice. So I - if the rulings were in the defence favour yesterday then I can't say there was any prejudice to Mr. Mohebtash from being absent, but perhaps - so that's as far as I can make my statement.

THE COURT: Any suggestion as to how we should proceed?

DEFENCE COUNSEL: I - as I said, I don't have instructions on waivers, but I also don't have instructions to request a mistrial.

THE COURT: Do you have any submissions?

CROWN COUNSEL: Well, my suggestion of how to proceed, perhaps, is the remedy that Your Lordship suggested earlier. Perhaps if Mr. Mohebtash could listen to all those portions of the tape for which he was excluded from the courtroom then he will have had the benefit of hearing the proceedings that is his right under s. 650 of the Criminal Code.

[8] What occurred in the absence of the appellant was transcribed and read out to him and after this counsel for the defence at trial observed as follows:

DEFENCE COUNSEL: Yes, My Lord, I've been advised that the transcript references that Your Lordship read out this morning have been translated to my client and I don't have any further applications for further evidence to be heard, and that would conclude the evidence for the defence.

[9] The point is taken on appeal that this lapse in procedure should vitiate the trial and result in an order for a new trial. Counsel puts it this way in his factum filed on behalf of the appellant:

61. there were elements of unfairness in the trial procedure of having the Appellant wait outside while evidence was introduced and submissions and rulings were made. In *Hertrich, Skinner and Stewart*, supra, Martin J.A. said that when an accused is denied "first-hand knowledge" of the proceedings leading to the eventual result the accused may well be left with a justifiable sense of injustice. It should be noted that when the Appellant filed his own Notice of Appeal on May 12, 2006 and sought the appointment of counsel under s. 684(1) of the Code he listed as his first ground of appeal the following:

While I was on the stand, I was excused several times by judge from the court. The court went on without my presence in those occasions. Soon though, the judge acknowledged that as his mistake and something against the law. This violation of my right was attempted to be rectified by reading back the transcripts of those occasions by a translator: A.B. p. 93.

[10] In argument, counsel submitted that a fair-minded observer would consider that the exclusion of the appellant at intervals during the defence case had the capacity to work an injustice upon the appellant. I observe that the occasions on which the appellant was excluded from the courtroom all occurred during the testimony of the appellant. Three of the occasions related to issues concerning the proffered alibi evidence. The fourth occasion was when an issue arose concerning questions sought to be put by the Crown about certain documents found by the police in a van associated with the appellant. These documents had been ruled inadmissible by the judge as a result of his finding the documents had been obtained in violation of the Charter rights of the appellant.

[11] All of the exclusions of the appellant from the courtroom arose when there was a contest between the Crown and defence about the propriety of questions directed by Crown counsel to the appellant in cross-examination. The issues being debated in his absence were primarily legal, not factual. These were matters to be dealt with by counsel and did not

particularly involve the appellant. These factual circumstances could be contrasted to a situation that might arise if an accused person was excluded from trial at a time when evidence of events was being adduced from a Crown witness or witnesses. In such circumstances, an accused could argue that he or she was deprived of an opportunity to know the case being advanced against himself or herself. That was not the situation extant in the case at bar.

[12] I consider it to be significant that trial counsel for the appellant indicated to the trial judge when the judge raised the issue of the absence of the appellant that "I can't say there was any prejudice to Mr. Mohebtash from being absent". After being given an opportunity to consult with counsel and having the transcripts read to him, no application was advanced on behalf of the appellant seeking a mistrial. The judge had specifically invited counsel to recall the appellant to the stand or to make any application he thought warranted by the circumstances, but nothing ensued from these invitations. I consider nothing ensued because manifestly there was no prejudice to the appellant from the irregularities that occurred. Counsel perceived that and acted appropriately.

[13] The Crown respondent invokes s. 686(1)(b)(iii) and (iv) of the Criminal Code. Those sections are as follows.

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(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, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[14] In my opinion, the short absences of the appellant from the courtroom while legal argument occurred in his absence were of no particular moment in these trial proceedings. I cannot think that a fair-minded and knowledgeable observer would have any belief that what occurred here had any capacity to work an injustice upon this appellant. I entirely agree with the comment of trial counsel for the appellant that there was no prejudice caused by the events to the appellant. What occurred here was within the terms of s. 686(1)(b)(iv), a procedural irregularity at trial that occasioned no prejudice to the appellant. In those circumstances, I would invoke the provisions of that section.

[15] The present case was a very strong one against the appellant and the defence offered was without substance. The judge was wholly justified in rejecting the fanciful evidence advanced by the appellant. If it could be considered that exclusion of the appellant could be

characterized as "a wrong decision or a question of law", so as to make applicable a consideration of s. 686(1)(b)(iii) in this case, I would have been inclined to invoke that curative provision and dismiss the appeal on the basis that no substantial wrong or miscarriage of justice was demonstrated. However, I prefer in this case to base a decision to dismiss the appeal on the foundation of the provisions of s. 686(1)(b)(iv) and I need not invoke the provisions of s. 686(1)(b)(iii).

[16] Since I do not consider that any of the grounds of appeal advanced on behalf of the appellant ought to succeed, I would dismiss this appeal from conviction.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Mr. Justice Donald"

I Agree:

"The Honourable Mr. Justice Smith"

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