SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Moore*, 2018 NSSC 148

Date: 20180629
Docket: Hfx No. 473137
Registry: Halifax

Between:

Roy Douglas Moore

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Jamie Campbell

Heard: May 9, 2018, in Halifax, Nova Scotia

Last Written Submission: May 10, 2018

Counsel: Tony Amoud, for the Appellant
Erica Koresawa, for the Respondent

By the Court:

[1] Roy Moore was convicted in Provincial Court on November 16, 2017. He was sentenced on January 8, 2018. The charges were assault causing bodily harm and breaches of probation. They arose from an incident that happened on February 25, 2017 in Dartmouth, at a bar called The Best Kept Secret. Mr. Moore has appealed both the conviction and the sentence imposed. Roy Moore's counsel argues that the trial judge erred in his application of the "air of reality" test to Mr. Moore's argument that he acted in defence of another person. He also says that the judge erred in law with respect to his sentencing. He says that the judge stated that his lack of acceptance of responsibility was an aggravating factor and that the judge failed to address whether provocation was a factor in determining a fit and proper sentence.

Summary

[2] The appeal is denied both with respect to the conviction and the sentencing. This was a judge alone trial. There was no issue of whether a defence should be put before a jury. The trial judge said that there was no "air of reality" to the defence of self defence or defence of another. He then considered the defence and concluded that the evidence to support that defence did not raise a reasonable doubt. The reference to the absence of an air of reality did not result in the judge applying the wrong standard to the assessment of that evidence.

[3] In the sentencing the trial judge referred to Mr. Moore's failure to take responsibility for his actions. That was a legal error. But it was not an error that contributed to the length of the sentence. The trial judge did not address provocation as a mitigating factor. From the transcript it is apparent that the trial judge did not accept that there had been provocation.

Evidence at the Trial

[4] There were six witnesses at the trial. Four of them offered direct evidence about the interaction between the individuals involved in the altercation. The complainant was Ellen Jordan. She and her friend April Baker were called by the Crown. They both knew Roy Moore, who had previously been in a relationship with Ellen Jordan. Roy Moore testified and so did his girlfriend, Jennifer Down. The court heard basically two versions of how things happened that night at The

Best Kept Secret. Ellen Jordan and April Baker gave one version and Roy Moore and Jennifer Down gave another, different version.

[5] Ellen Jordan and Jennifer Down, Mr. Moore's former and then current girlfriends, had some exchanges through the evening. There was an argument which culminated in Roy Moore pulling Jennifer Down out of the bar. Ellen Jordan followed Roy Moore and Jennifer Down out of the bar. Ellen Jordan was upset and angry.

[6] Once they were outside the bar the versions diverge. Ellen Jordan said that Roy Moore said something to her and she responded. He shoved her and she shoved him back. Another person, Scott Moir restrained her in what she called a bear hug. She said something further to Roy Moore and it was at that point, while she was restrained, that Roy Moore punched her in the face. That version was confirmed by April Baker, who also said that Ellen Jordan was restrained when Roy Moore punched her.

[7] The other version comes from Roy Moore and Jennifer Down. Roy Moore said that when he left the bar Ellen Jordan approached him and started pushing him. He walked away. When he looked back, he noticed that Jennifer Down was on the ground surrounded by several people, one of whom was Ellen Jordan. He said that he pushed and shoved his way through the crowd to get Jennifer Down out of the situation. He said that he did not remember if Ellen Jordan was one of the people he pushed but he did recall that he had his hands on several people. Jennifer Down said that Ellen Jordan had pushed her down and spilled the contents of her purse all over her. After that happened some people gathered around her. Roy Moore pushed through the crowd and helped her to get the contents of her purse and leave.

[8] At the trial, Roy Moore's counsel argued that Mr. Moore had been defending Ms. Down and that any injuries that were sustained by Ellen Jordan were caused when Roy Moore pushed his way through the crowd to help Jennifer Down.

Trial Decision

[9] Judge Alain Bégin noted in his decision that Mr. Moore claimed self defence for any possible assault on Ms. Jordan. Mr. Moore said that he had gone to rescue Ms. Down and may have possibly struck Ms. Jordan while pushing seven or eight

people out of the way to get to her. The judge addressed the issue of self defence or defence of another. He said in his decision:

> This makes no sense and certainly does not have a "air of reality" and Mr. Moore is a professional bouncer doorman and he would know how to break up a crowd, having to exert such force as to cause injury sustained by Ms. Jordan, especially if it gets done by accident, as claimed by Mr. Moore.[1]

[10] The judge notes that one does not go into a crowd to break up a fight by punching people in the face with such force as to break a person's nose. The other problem with that version of events as noted by the trial judge was that Ellen Jordan would have been involved in the melee with Ms. Down and not simply a member of the crowd. Mr. Moore would have to have used some force on Ellen Jordan to separate her from Jennifer Down but that was not the evidence of Roy Moore. The trial judge also said that he was troubled by the fact that Roy Moore, as a professional doorman bouncer chose to leave instead of staying behind to help the police to sort out what happened.

[11] The judge raised the air of reality test and said that the defence made "no sense". He elaborated on why it did not make sense and why he did not accept the evidence to support it. The trial judge did not accept that the version of events put forward by Mr. Moore raised a reasonable doubt as to his guilt.

Air of Reality

[12] The air of reality test is used to decide whether a defence should be put before a jury. That requires the Crown to prove beyond a reasonable doubt that the defence does not apply to the facts of the case. The finding of an air of reality means that the defence is "in play" because a jury acting reasonably could find that it applied to the case. It is a two-part process. There is a finding by the judge that there is an air of reality. Then there is a finding by the jury whether the Crown has proven that the defence does not apply to the facts of the case. A judge sitting without a jury may deal with the process differently. It is not necessary to separate the process into two distinct parts. There is no requirement for a judge to assess whether the defence could be applied, mark a pause, and then separately decide that the Crown has not proven that it does not apply. Here the judge used the phrase "air of reality" but then explained why he did not accept the evidence that was intended to support the defence.

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[1] Trial transcript p. 258

[13] The Court of Appeal of Alberta addressed that issue *R. v. Williams*[2]. In that case, the trial judge was dealing with the defence of mistaken belief in consent. The trial judge said that he found no air of reality to that assertion. The Court of Appeal noted that there was no jury, so whether the defence had an air of reality was not the test. When deciding which issues should go before the jury a judge must assess whether there is any evidence to support the defence. That is not so when a judge alone is deciding on guilt. Judges sitting alone do not begin by first deciding whether there is any evidence to support a defence then separately considering whether the Crown has established beyond a reasonable doubt that the defence does not apply. "A trial judge sitting alone can proceed directly to considering whether the facts alleged are sufficiently proved, and whom the judge does or does not believe and whether the judge has a reasonable doubt on any of that."[3]

[14] In this case, the trial judge did not discount or fail to consider the defence. He specifically found that the evidence did not raise a reasonable doubt having regard to that defence.

[15] As with the trial judge in *Williams* it would appear as though the judge was using the term "air of reality" not as a term of art, as it would be used in a jury trial. He was expressing his finding that the defence had been proven to not apply and there was no doubt on the point. As the Alberta Court of Appeal noted, if there is no "air of reality" to the defence it is even more clear that it did not raise a reasonable doubt.

[16] The trial judge said that there was no air of reality to the defence. That statement did not lead him to apply an incorrect test for the assessment of the defence.

[17] The appeal of the conviction is dismissed.

Sentencing

[18] Two issues arise with respect to the sentencing of Mr. Moore.

[19] In his sentencing decision, the judge twice referred to Mr. Moore's failure to take responsibility for the offences. The first reference simply says what was reported in the Pre-Sentence Report. The second reference was the inclusion of that

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[2] 2013 ABCA 110
[3] *Williams* at para. 14

factor in the list of aggravating factors. The trial judge noted that Mr. Moore had been on probation for similar offences at the time that these offences took place. He had two prior convictions for assault causing bodily harm and other assault convictions. Mr. Moore was noted as having convictions for breaches of undertakings and recognizance or terms of probation. The trial judge then said; "Mr. Moore does not take responsibility for his actions".[4]

[20] Failure of an offender to accept responsibility is not an aggravating factor.[5] While a guilty plea or an expression of remorse may be mitigating factors in sentencing, a person who has been convicted of an offence does not face a harsher sentence because he continues to maintain his innocence.

[21] The judge in this case, said that Mr. Moore's failure to take responsibility was an aggravating factor. That is an error. He did not elaborate. Other than reporting what was contained in the Pre-Sentence Report that brief remark was the only mention of it. It was a relatively minor consideration on the sentencing when considered as a whole. The sentence was based on Mr. Moore's related criminal record, the seriousness of the offence, and the fact that he was on probation when the offences were committed. The judge erred in law by making reference to the failure to take responsibility as an aggravating factor but that was not an error that influenced the sentence.

[22] During submissions at sentencing Roy Moore's counsel raised the issue of provocation as a mitigating factor. Counsel argued that the situation would not have happened had the complainant, Ellen Jordan not followed Roy Moore outside to confront him. Provocation may be a mitigating factor.[6]

[23] In the sentencing decision, the trial judge did not say whether or not he found that provocation had been established as a mitigating factor. The only mitigating factor specifically identified was the guilty plea for other charges. The lack of reference to provocation in the sentencing decision suggests either that the issue was overlooked or the trial judge decided that it was not a mitigating factor in this case.

[24] In argument at the sentencing, there was some discussion about the issue of provocation. Counsel said that there was evidence of provocation. He noted that

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[4] Trial transcript p. 308
[5] *R. v. Mauger* 2018 NSCA 41
[6] *R. v. Grewal* 2010 ABQB 346

Ellen Jordan had gone out of the bar and essentially chased Mr. Moore. The judge asked if the last comment by Ellen Jordan was the provocation that was to be considered. The judge said:

> But he was across the street, and to this day I have no idea what she said to him and whatever she said…feel free to tell me if you want. He jumps back over the snowbank and comes and hits her. So it's…is that the provocation, when she says something to him, or is it the actions beforehand?[7]

[25] Counsel said that the entire course of events between Ellen Jordan and Roy Moore could be viewed as provoking the assault that eventually took place. The judge then referred to his trial decision.

> But I'll address that for a second. The provocation issue. I do recall in my decision I said had Mr. Moore stayed in the bar that he was working that day instead of going out and she had just been escorted to the day as duties as the bartender that night.
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> …
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> There's some blame all around, clearly, but…
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> …
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> …the supposedly the sober one that evening, or most sober one that evening, by all the testimony would have been Mr. Moore and he's…
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> …
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> …the one that ended up getting criminal charges.[8]

[26] It is apparent from the exchange with counsel that the trial judge did not accept that there had been provocation. There may, as he said, have been some blame all around but he did not accept that the behavior rose or descended to the point of being provocation. The failure to note whether provocation was a factor was not an error.

[27] The trial judge considered the serious nature of the offence. Mr. Moore had a related criminal record with convictions for assault causing bodily harm. He was on probation for a similar offence when the offence was committed. In 2009, he served a sentence of one year for assault causing bodily harm and in 2015 served a 21-day sentence. Mr. Moore had more than 20 convictions for breaches of undertaking and recognizance or terms of probation. The sentence of 365 days

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[7] Trial transcript p. 287
[8] Trial transcript pp. 288-289

imprisonment was not demonstrably unfit. It was not affected by the refence to lack of remorse. The judge did not accept that provocation was present as a factor in sentencing and his failure to specifically mention it in his decision was not an error.

[28] The sentence appeal is dismissed.

Campbell, J.