R. v. Dhatt

Collection: Decisions of the Court of Appeal
Date: 2023-10-24
Neutral citation: 2023 ONCA 699
Docket numbers: C68391
Judges: Fairburn, J. Michal; MacPherson, James C.; Zarnett, Benjamin
Subject: Criminal

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dhatt, 2023 ONCA 699
DATE: 20231024
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Fairburn A.C.J.O., MacPherson and Zarnett JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Manpreet Singh Dhatt

Appellant

Manpreet Singh Dhatt, acting in person

Carter Martell, appearing as duty counsel

Aaron Shachter, for the respondent

Heard: October 3, 2023

On appeal from the convictions entered by Justice Pamela L. Hebner of the Superior Court of Justice on October 31, 2019, and from the sentence imposed on February 25, 2020, with reasons reported at 2019 ONSC 6250 and 2020 ONSC 1211.

Zarnett J.A.:

(1) Introduction

[1] The appellant was convicted, after a trial by judge alone, of (i) importing cocaine into Canada and (ii) possession of cocaine for the purpose of trafficking, contrary to ss. 6(1) and 5(2), respectively, of the *Controlled Drugs and Substances Act*, (S.C. 1996, c. 19). The trial judge imposed a sentence of 10 years incarceration on the importing offence, less a credit for presentence custody, and a concurrent sentence of seven years on the trafficking offence. She also made certain ancillary orders.

[2] For the reasons that follow, I would dismiss the appellant's conviction and sentence appeal.

(2) Factual Context

[3] Early in the morning of December 27, 2016, the appellant, a long-haul truck driver, drove a refrigerator transport trailer truck into Canada, crossing from the United States at the Ambassador Bridge in Windsor, Ontario.

[4] The appellant first interacted with Border Services Officer ("BSO") Cunningham at the primary commercial inspection booth. The appellant provided commercial paperwork, including his identification and an E-manifest that showed the appellant was hauling oranges. The appellant did not say he had anything other than oranges in his truck. He did say he had information about a person, Gagnan Grewal, who had been pressing him to smuggle goods into Canada. The appellant said that he was prepared to say "yes next time. Then you can arrest everyone involved at once, so they don't think I was part of it." BSO Cunningham

arranged for an investigator to meet with the appellant, and in the meantime the truck went to secondary inspection.

[5] At the secondary inspection area, another officer, BSO Boughner, specifically asked the appellant if he had any drugs in the load or in the truck. The appellant said “no”. BSO Cunningham arrived at the secondary inspection area and escorted the appellant to an off-site inspection area. Prior to searching the truck and trailer, BSO Cunningham asked the appellant: “Are we going to find anything? Is there anything in the trailer this trip?” The appellant responded: “No. Nothing. No problems” and proceeded to back up the trailer for inspection.

[6] When the trailer was searched, 30 bricks of cocaine were discovered in a space between the skids of orange boxes. The cocaine had a value ranging between $1.95 million to $4.8 million, depending on how it might be cut and sold.

(3) The Trial Judgment

[7] The trial judge convicted the appellant of importing cocaine and possession of cocaine for the purpose of trafficking. She noted that the appellant admitted that he “knowingly crossed from the United States into Canada on December 27, 2016, with approximately 30 kg of cocaine in his trailer. He knew the cocaine was to be trafficked.” She found that although the appellant testified he was transporting the cocaine because he had been threatened by Grewal, the Crown had proven beyond a reasonable doubt that elements of the defence of duress were not present, and therefore that defence was not available to the appellant. She rejected arguments that, at the time he crossed the border, the appellant had abandoned any relevant intention to import or traffic and was in innocent possession of the cocaine. And she rejected the argument that the appellant could not be convicted of the offence of importing as the cocaine had never cleared customs.

[8] In explaining the sentence she imposed of 10 years for importing and 7 years concurrent for possession for the purpose of trafficking, the trial judge noted the parties’ agreement that the range for this type of offence was 10 to 12 years. She considered, as mitigating factors,

that the appellant was a first-time offender who faced likely deportation upon his release from custody, as well as his offer to help the border services officers. She considered, as aggravating factors, the use of a commercial vehicle, the fact that the appellant drove across the United States under the influence of cocaine, as well as the significant quantity of cocaine he was transporting and its effect on society. She noted that the pre-sentence report indicated the appellant took minimal responsibility for his actions and had limited insight into his offending behaviour, and that the report also raised concerns about his continuing negative peer association and problems maintaining sobriety.

(4) Analysis

(a) The Conviction Appeal

[9] The appellant submits that the trial judge failed to resolve the issue of whether he had abandoned any intent to import or traffic cocaine by the time he crossed the Canadian border. He argues that the trial judge focused on the indicators of the appellant's state of mind while in the United States − that he accepted the cocaine in his trailer; drove for four days knowing he had cocaine in the truck; exercised control over it by opening, examining, ingesting, and repackaging it; and, expected to receive a substantial amount for bringing it to Canada. But she also noted that "[w]hen [the appellant] approached the U.S./Canada border, the only explanation for his odd behavio[u]r is that he got cold feet. He knew there was a good chance that [BSOs] would locate the cocaine and so he decided to confess, blaming it on Mr. Grewal's threat". The appellant argues that these latter findings were consistent with the appellant having abandoned an intention to import.

[10] I do not accept this argument. The trial judge found that the appellant "accepted the cocaine in his trailer, knew it was there, and transferred it to the border in Michigan. He imported the cocaine for financial gain…". Although she referred to those facts as being

"entirely inconsistent with innocent possession" they are equally entirely inconsistent with the notion that the appellant ceased to have the intent to import or traffic upon crossing the border.

[11] The trial judge's remarks about the appellant having "cold feet" and having "decided to confess, blaming it on Mr. Grewal's threat" were made in the context of addressing what she considered to be the appellant's "odd behaviour" after crossing the border and interacting with BSOs. Taken in the context of the reasons as a whole, they do not indicate that the trial judge had a reasonable doubt about whether the appellant continued to have the intention to import and traffic because he had abandoned that intention and replaced it with an intention to disclose and turn over the cocaine as soon as he arrived at the border. The appellant's statements at the border were about saying "yes" to Grewal "next time". The fact that he did not disclose that he was transporting cocaine this time, and his outright lies when asked if there were drugs in the trailer, contraindicated any change in intention about this importation.

[12] The appellant also argues that the conviction for importing was unreasonable because the cocaine did not clear customs and was never released from the control of the authorities. He submits that the decision of a five-judge panel of this court in *R. v. Okojie*, 2021 ONCA 773, 158 O.R. (3d) 450, leave to appeal refused, [2022] S.C.C.A. No. 113 stands for the proposition that the offence of importing is not complete, and therefore has not been committed, until these events occur.

[13] I do not interpret *Okojie* as compelling the far-reaching conclusion that a person, like the appellant, who intends to import cocaine and physically brings it with them into Canada does not commit the offence of importing if the person is caught by customs authorities having cocaine at the point of entry into Canada, and is thereupon arrested, and the drugs are seized.

[14] First, such a conclusion is inconsistent with prior decisions in which this court has affirmed convictions for importing where drugs were detected by customs authorities at the accused's point of entry into Canada in a suitcase the accused was travelling with, or on their person, the drugs were seized and the accused was thereupon arrested: see for example *R. v.*

Valentini, [1999], 43 O.R. (3d) 178, at para. 18; *R. v. Foster*, 2018 ONCA 53, 360 C.C.C. (3d) 213, leave to appeal refused, [2018] S.C.C.A. No. 127, at paras. 27 to 29; *R. v. Giscombe*, 2023 ONCA 637, at paras. 1, 3. *Valentini* and *Foster* were referred to in *Okojie* without any suggestion that the results they reached were incorrect. *Giscombe* was decided after *Okojie.*

[15] Second, in my view the appellant's argument takes statements from *Okojie* outside of the context in which they were intended to apply. In *Okojie*, at paras. 98-99, this court noted that the decision of the Supreme Court of Canada in *R. v. Bell*, [1983] 2 S.C.R. 471 had held that importing means "bringing, or causing a controlled substance to be brought into the country", but had not decided for all situations when that necessarily occurs. It also noted, at para. 100, that the endpoint or outer limit of when something enters the country can be important in "cases in which [a] controversy exists about whether the evidence of an accused's involvement satisfies the physical element of the offence". Such a controversy may exist, for example, when the question is whether the accused's involvement with the goods took place only after the endpoint or outer limit of importing had occurred.

[16] *Okojie* was a case in which there was such a controversy. The controlled substance was contained in a FedEx package sent from Kenya and directed to an address in North York. U.S. Custom officials detected drugs in the package while it transited through the United States, prompting them to turn over the package to their Canadian counterparts. No person involved in the importation physically carried the drugs over the border or possessed them in Canada before they came into the possession of Canadian law enforcement officials who then arranged a controlled delivery to the North York address: at paras. 8-10. When the accused paid for the delivery of the package which he knew contained drugs, to obtain their release from customs, he committed the offence of importing, as the importation was complete at that point: at para. 103.

[17] But as *Okojie* says, at para. 101, there are a myriad of other ways in which goods may be brought into Canada, and what constitutes importing in the sense of bringing something

into the country must take that into account. One example given in *Okojie* was “personal carriage”.

[18] Unlike *Okojie*, this was a case of personal carriage. The appellant knowingly drove the cocaine over the border. There is no sense in which he did not bring, or cause the cocaine to be brought, into Canada. This was not a case where there can be any controversy over whether the appellant was involved in the physical element of the offence.

[19] *Foster* was also a case of personal carriage. In *Foster*, cocaine was discovered in the bra worn by the accused when she was searched at secondary inspection at Pearson International Airport in Toronto following her arrival on a flight from Jamaica. The drugs were never given back to her by customs. Rather they were discovered and seized, and she was arrested. She was convicted of importing, and her conviction was upheld by this court.

[20] *In Foster*, at para. 108, this court recognized the importing offence was “complete in law” when the contraband was seized on the appellant’s arrest at secondary inspection, even though, as a factual matter, the importation offence was not complete as its goal of getting the drugs into the hands of a Canadian recipient was not achieved. Adopting a distinction between offences that are complete in law and complete in fact, the court noted that since the importation was not in fact complete, border services officers remained a safe avenue of escape for the accused that she had not taken, which was relevant to the consideration, and rejection, of her defence of duress: at para. 109.

[21] But, importantly for the purpose of this discussion, the drugs discovered at secondary inspection in *Foster* were never released to the accused by customs. Instead, upon discovery, they were seized at customs and the accused was arrested. She was convicted of importing and her conviction was upheld. Although in *Okojie,* the court rejected the “complete in law/complete in fact reasoning in *Foster* … [it did] not overrule or otherwise qualify the

[decision]": at para. 120. In other words, it did not suggest that the accused in *Foster* should not have been convicted of importing.

[22] This provides important context for the statement at para. 106 of *Okojie*:

> The decision in *Foster* applies and is consistent with the majority decision in *Bell.* Left unanswered by *Bell*, by the appellant's own admission, is the meaning to be assigned to the phrase "enters the country". This, *Foster* concludes, in a case of personal carriage of the contraband, of bringing it into Canada, occurs when the contraband (and its carrier) clear Customs. This concludes the physical element of the offence. This endpoint does not mean that importing is a continuing offence. Nor is it inconsistent with what the majority in *Bell* decided. It reflects the law in this province as expressed in post-*Bell* authorities, the integrity of which is not challenged here.

[23] It is evident, from the affirmation of the result and central holding in *Foster* that the phrase "clear Customs" in the above quote refers to the endpoint or outer limit of when importing occurs, but does not mean that the person carrying the drugs into Canada and intending to have them pass through customs does not commit the offence of importing because custom officials at secondary inspection detect the goods and seize them, instead of releasing them back to the person carrying them.

[24] I therefore reject the submission that the verdict was unreasonable.

[25] The appellant also submits that the trial judge erred in the way she dealt with the defence of duress. I disagree.

[26] In accordance with *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, the trial judge outlined the five elements of duress, which may be summarized as follows:

> (i) that the accused was threatened with death or bodily harm unless he or she committed the offence;
>
> (ii) that the accused reasonably believed the threat would be carried out;
>
> (iii) that the accused had no safe avenue of escape from the harm threatened, evaluated against the actions of a reasonable person in the same circumstances;
>
> (iv) that the threat caused the accused to commit the offence; and

(iv) that the harm caused by committing the offence was not disproportionate to the harm threatened, evaluated against the behaviour we expect of reasonable person in the same circumstances.

[27] The trial judge correctly noted that if the Crown proved beyond a reasonable doubt that any of the five elements were not present, the defence of duress was not available to the appellant. She found that the Crown had proven that four of the five elements were not present. In my view, these findings were open to her on the record and are subject to deference on appeal.

(b) The Sentence Appeal

[28] The trial judge found, and the parties agreed, that the applicable sentence range for the types of offences committed by the appellant was 10-12 years. The Crown sought a sentence of 11 years. The defence sought a sentence of 7 years, once "extenuating circumstances" were taken into account. After considering the circumstances of the offence and the offender, including mitigating and aggravating factors, the trial judge imposed a sentence of 10 years.

[29] The appellant asks us to reduce the sentence to 9 years because the trial judge ought not to have considered the appellant's use of the cocaine he was transporting to be an aggravating factor.

[30] I disagree. The trial judge considered the totality of the circumstances and came to a fit sentence.

[31] Indeed, the sentence imposed by the trial judge for importing cocaine – 10 years − was at the low end of the range for this type of offence. In my view, the trial judge did not make any

error in principle that affected the sentence, nor was it unfit. Appellate interference is not warranted: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 36-55.

(5) Conclusion

[32] I would dismiss the conviction appeal and the sentence appeal.

Released: October 24, 2023 “J.M.F.”

“B. Zarnett J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. J.C. MacPherson J.A.”