COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Eriksen***,
2006 YKCA 13

Date: 20060914
Docket: CA02-YU489

Between:

Regina

Respondent

And

John Abraham Eriksen

Appellant

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

E.R. Hill — Counsel for the Appellant

M. Cozens — Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon
May 29, 2006

Place and Date of Judgment: Vancouver, British Columbia
September 14, 2006

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Saunders:

Introduction

[1] Mr. Eriksen appeals from his conviction by a judge alone, on August 13, 2002, of one count of committing perjury. The reasons for conviction are indexed at 2002 YKTC 91.

[2] The learned trial judge found that Mr. Eriksen committed perjury by giving false testimony at a preliminary inquiry in relation to charges against his brother, David, arising from a large quantity of stolen bicycles which ended up in Mr. Eriksen's garage.

[3] Mr. Eriksen raises two issues on appeal. The first issue concerns the degree of, and nature of, corroboration required to prove perjury. The second issue concerns the use made by the trial judge of a warned statement made by Mr. Eriksen which he found during the trial to be inadmissible on the basis that it was not voluntary. For the reasons that follow I am not persuaded that the appeal should be allowed on either issue.

Background

[4] The circumstances were described succinctly by the trial judge thus:

> [3] When Mr. Eriksen was initially called as a witness for the Crown, he initially disclaimed recollection of even where he had lived at the relevant dates. After some intervention by the trial judge, the accused then conceded that he lived at the residence with the garage at the relevant time. When he was asked by Crown counsel about the bicycles in the garage and how he came into possession of them, he said the following, "I bought them off somebody." Crown counsel then

asked, "Who did you buy them off?" The accused answered, "I don't remember."

[4] Later, at page 9, after Mr. Eriksen had been directed to some other statements that he made in connection with the issue, Crown counsel asked the following questions:

> Q So Mr. Eriksen, I'll come back to my earlier question to you before we played the video. Can you indicate to the Court how you came into possession of the bicycles for which you pleaded guilty to possession of stolen property?
>
> A I bought them off somebody.
>
> Q Who did you buy them off?
>
> A I don't remember.
>
> Q So you don't have any recollection of receiving the bicycles in question?
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> A I was drunk when I bought them.

[5] As the proceedings progressed, Judge Lilles, who was presiding, gave the witness an opportunity to consider his position with respect to the possibility of being committed for contempt, amongst other matters. The case was adjourned, I gather, over the lunch hour to give Mr. Eriksen a chance to consult with counsel. In the afternoon, when Mr. Eriksen returned to the witness stand and was again asked about the bicycles and how he came into possession of them, Mr. Eriksen then admitted that he had been approached by his brothers, including the accused in the trial, David Stanley Eriksen, and had given his brothers permission to store the items in his garage. This testimony, which clearly implicated the accused Mr. Eriksen's brothers, was obviously contradictory to what he said in the morning about the same matters.

[5] At trial the Crown tendered into evidence two items which the trial judge used in his determination of guilt. The first was a document bearing the signature of Mr. Eriksen, referred to as the “Signed Statement” described by the trial judge this way:

> [6] … This document was signed by the accused and was witnessed by his then counsel, Mr. Clarke, and was provided to Crown counsel. The exact circumstances of the making of this document are somewhat obscure in a couple of respects. Firstly, although the Crown urged that the document in question was a sworn document, it is far from clear that the document was in fact sworn, or at least properly sworn, because although it says at the outset that "I, John Abraham Eriksen, swear the following to true..."; nevertheless, at the bottom of the document, there is no indication that the document is a statutory declaration or that an oath was administered to Mr. Eriksen. In fact, Mr. Clarke signs the document describing himself as a witness.
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> [7] In my view, the Crown has not proved that this was a sworn document. Nevertheless, it is a document authored by the accused, containing admissions against his interests and is, therefore, admissible. …

[6] The second was the transcript of allegations of fact read to the court in other proceedings concerning the bicycles in which Mr. Eriksen pleaded guilty and Mr. Eriksen agreed that the facts were true. The trial judge described this transcript in this way:

> [9] The next bit of evidence upon which the Crown relies, is a transcript of some proceeding, also on the 15th of May 2002, wherein the accused Mr. Eriksen entered a plea of guilty to a charge of stolen property, which had been laid against him, arising out of the possession of the self-same stolen bicycles. In that proceeding, as is commonly the case, the Crown made certain allegations of fact.
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> [10] Essentially those allegations included the facts that the accused had stored the bicycles, that he had been asked by his brothers to do so, and that he was to be paid a sum of money for his trouble. During the course of the proceedings, Mr. Eriksen was asked by the learned Justice of the Peace, who was presiding, whether he admitted those facts and the accused said, "I do."
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> [11] In my view, the admissions of fact made by the accused in the course of those proceedings are admissible against him, as indicated by the decision of the Ontario Court of Appeal in *R. v. W.B.C.*, 142 C.C.C. (3d) 490.

[7] The warned statement, a videotape of a statement provided by Mr. Eriksen to the police, was ruled inadmissible.

[8] The trial judge concluded that Mr. Eriksen's evidence on the morning of the preliminary inquiry, which he recanted in the afternoon, was false and intended to mislead the court:

> [13] The only rational conclusion that can be drawn on the whole of the evidence is that the accused's initial claim that he bought the bikes off someone was false and was intended to mislead the Court, his particular intention in this case being an effort to deflect the Crown's prosecution of his brother. I should indicate that, in my view, it is not necessary that the false statement actually mislead the Court so long as the accused intended to mislead. From the interventions and comments of Chief Judge Lilles during the course of the proceeding, it is quite obvious that he was not, in fact, misled by Mr. Eriksen's initial assertions as to how he came into possession of the bikes.
>
> [14] The question is not whether Judge Lilles was misled, but whether the accused intended to mislead; and I find that he did.

[9] The trial judge then turned to the issue of corroboration. He found that corroboration was required and that both Mr. Eriksen's sworn statement and his court admission in the other proceedings satisfied that requirement:

> [16] The crime of perjury requires that the accused makes a false statement on oath with intent to mislead, knowing that the evidence is false. I am satisfied that that is exactly what occurred in this case. The provisions in the *Criminal Code* with respect to perjury also require that there be corroboration before an accused may be convicted. In my view, a fair reading of the transcript of the proceedings before Judge Lilles would lead to the conclusion that of the two versions provided by the accused, the earlier version, that is "I bought the bikes" version, was false. Corroboration for the falsity of that assertion is, in my view, found in the May 15th statement made by the accused and by the accused's admissions upon his own sentencing, also on the 15th of May.

Issues

[10] Mr. Eriksen says that something more than evidence or statements from him alone is required for conviction. He points to s. 133 of the ***Criminal Code***, R.S., 1985, c. C-46:

> **133.** No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

[11] Mr. Eriksen says as well that the use made by the trial judge of the warned statement contradicted his own ruling that the statement was inadmissible.

Discussion

[12] To convict for perjury the Crown must prove: 1) that the accused made a false statement under oath or solemn declaration; 2) that the accused knew the statement was false when it was made; and 3) that he made the false statement intending to mislead the court: ***R. v. Calder***, [1960] S.C.R. 892, 129 C.C.C. 202. Where the first two elements are proven, that is, that the accused made a false statement under oath and knew it to be false when it was made, the court may infer the third element, an intention to mislead the court: ***R. v. Wolf***, [1975] 2 S.C.R. 107, 17 C.C.C. 425.

1. Corroboration

[13] The first ground of appeal advanced by Mr. Eriksen concerns corroboration. On his behalf Ms. Hill submits that corroboration emanating from something or someone other than Mr. Eriksen was required in order to convict Mr. Eriksen. She

says that the use made by the trial judge of the signed statement and Mr. Eriksen's in-court agreement as to facts recited in the charges against him failed to satisfy a requirement for corroboration because they emanated from Mr. Eriksen himself, that is, he was convicted on the evidence of only one witness – himself – contrary to s. 133.

[14] Based upon that view of the law, she says there was insufficient evidence as to which of the two statements made by Mr. Eriksen at the preliminary inquiry, the one made in the morning that he bought the bikes from someone or the one in the afternoon to the effect that they came from his brother, was false. Likewise, she submits, there was insufficient evidence both that Mr. Eriksen intended to mislead and that his explanation given in the morning that he did not have any recollection of receiving the bicycles in question because he was drunk was untrue.

[15] The nub of the issue is the extent of the requirement for corroboration, for if either corroboration was not required in the circumstances of the case, or the evidence relied upon by the trial judge was capable in law of being corroboration, his conclusion that the elements of the offence were proved is a conclusion of fact and, there being evidence before the court to support it, is not one with which we are at liberty to interfere.

[16] The first question that must be answered on this appeal, therefore, is whether corroboration was required, that is, whether s. 133 applied.

[17] In considering the applicability of s. 133, guidance may be taken from ***R. v. Brewer*** (1921), 34 C.C.C. 341 (Alta. S.C. (App. Div.)), ***R. v. Clarke***, [2004] R.J.Q.

780 (2004), 184 C.C.C. (3d) 18 (C.A.), and ***R. v. Thind*** (1991), 64 C.C.C. (3d) 301. In ***Brewer*** the accused falsely swore an affidavit. His testimony given at an examination in aid of execution contradicted his affidavit evidence and was relied upon by the Crown in the trial for perjury. Beck J., for the Court, reviewed the English authorities on the need for corroboration in determining which of two sworn statements is true. As to the English equivalent of s. 133 that corroboration is required, he said:

> In England in 1911 the Perjury Act 1-2 Geo. V (Imp.) ch. 6, was passed. Section 13 provides that a person shall not be liable to conviction for perjury "solely upon the evidence of one witness as to the falsity of any statement alleged to be false."
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> It is undoubtedly on the question of the falsity of the statement in respect of which perjury is charged that further evidence was required at common law and is required by our statute and by the English statute. See Archibald's Criminal Pleading Evidence & Practice, 25th ed., pp. 1130-1; 1134-5.
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> But it seems to me that neither our statute, nor the English statute, nor that of New Zealand, was intended to meet the case of two contradictory oaths by the accused; but only the case of one witness produced at the trial to contradict the statement sworn to by the accused in respect of which perjury is charged -- such a single witness must be corroborated by some additional evidence not necessarily another witness; and that the case of two contradictory sworn statements of the accused is to be dealt with on the principles indicated in the cases already referred to.
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> The examination of the defendant for discovery in aid of execution on the judgment recovered on the bond in respect of which he made the affidavit of justification in my opinion is not only sufficient to justify a jury on finding it to constitute a contradiction of the affidavit of justification, but also to justify the conclusion that of the two contradictory statements it was the affidavit which was false.
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> Inasmuch as I think the statutory provision for corroboration has no application, this virtual admission by the defendant, if so found by a jury, would be sufficient proof of the falsity of the affidavit without other evidence…

[18] In ***Clarke*** the Quebec Court of Appeal had before it charges of perjury on the basis of two allegedly false statements in an information to obtain a search warrant. In the course of its reasons the Court said as to the basis for corroboration in relation to perjury:

> [6] Section 133 Cr. C. is clear: in perjury, although corroboration is justified by the fear of false accusations, [translation] "it is not simply a question of confirming the credibility of testimony, but rather of corroborating it in a material particular by evidence that implicates the accused". [*Jacques Fortin, Preuve pénale, Montreal, Éditions Thémis, 1984, p. 239*.] The reason is that it is unacceptable, in light of the Crown's burden of proof to prove beyond a reasonable doubt of the guilt of an accused, to tolerate that a person "who has testified to the truth of something is exposed to a risk of conviction just because somebody else testifies that it is an untruth". [*Brian Mararin, "The Offence of Perjury: A Prosecutor's Perceptive" (Spring 1993), 17 Prov. Judges J. 18-25, p. 23.*]

[19] In ***Thind*** Hutcheon J.A., for the majority of the British Columbia Court of Appeal, said as to the purpose of s. 133:

> This leads me to say that, in my view, the purpose of s. 133 is not "to ensure that no accused will be convicted on the basis of testimonial evidence that is by its very nature unreliable".
>
> Writing for the Alberta Court of Appeal, Chief Justice McGillivray in *R. v. Doz* (1984), 12 C.C.C. (3d) 200 at p. 212, 52 A.R. 321, approved this description of the purpose of s. 123 (now s. 133) of the *Criminal Code* given by Mr. Justice Monnin in his dissenting judgment in *R. v. Bouchard* (1982), 66 C.C.C. (2d) 338 at p. 342, 26 C.R. (3d) 178, [1982] 2 W.W.R. 603 (Man. C.A.): What is the purpose of corroboration, and where does this requirement stem from, apart from its codification in s. 123 of the Code ? The material particular for which corroboration is required is not the fact that the accused has sworn to testimony at the first trial -- that is proven by the stenographer's transcript of the evidence and the Judge's certificate -- but that such testimony was false.
>
> In other words, the material particular in which corroboration is required is the falsity of the statement alleged as the perjury. The

> purpose of this rule is to protect an accused from the false testimony of a single witness swearing against him and saying that the accused lied. It has been said that the court should not be left with one oath (that of the witness) against another oath (that of the accused). It used to be said that "where there is only oath against oath, it stands in suspense on which side the truth lies". That is simply not sufficient proof in a serious charge of perjury.

[20] Likewise in ***R. v. Evans*** (1995), 102 Man.R. (2d) 186,101 C.C.C. (3d) 369 (C.A.), Lyon J.A., for the court, wrote:

> In this court, Monnin J.A. (as he then was) in ***R. v. Bouchard***, [(1982), 13 Man. R. (2d) 344, 66 C.C.C. (2d) 338] commented on s. 133 (formerly s. 123) as follows at p. 342:
>
> > The purpose of this rule is to protect an accused from the false testimony of a single witness swearing against him and saying that the accused lied. It has been said that the court should not be left with one oath (that of the witness) against another oath (that of the accused). It used to be said that "where there is only oath against oath, it stands in suspense on which side the truth lies". That is simply not sufficient proof in a serious charge of perjury.
>
> Consequently, s. 123 [now s. 133] calls for corroboration when the evidence adduced by the Crown is that of one witness alleging falsity on the part of the accused.

[21] In my view, these cases demonstrate the evil addressed by s. 133, which is the danger that the accused will be convicted on a contest, oath against oath, between himself or herself, and another witness. It does not apply, in my view, to the case of conflicting statements by the accused where the one which has attracted the charge of perjury is on oath, where the court is able to determine which of the two statements is untrue and that the accused made the statement intending to mislead the court.

[22] This view of s. 133 is implicit in ***Wolf***. In ***Wolf*** the accused was the victim of a beating at the hands of two men in what was a domestic dispute. He dictated a statement to a police officer describing the circumstances of the assault, read it, and signed each page. However, at the preliminary inquiry of the assault trial against the men, he said he could not remember the particulars of the assault. The assault charges were dismissed and he was charged with perjury. The court held that all of the necessary elements of the offence of perjury could be inferred from the two contradictory statements made by the accused. While ***Wolf*** is most often cited in support of the principle that the intent to mislead can be inferred from the facts of the case, it is an example of a case in which an accused was convicted of perjury based on his own contradictory statements, without reference to corroboration and s. 133.

[23] On behalf of Mr. Eriksen it is said, citing para. 41 of ***Bouchard***, *supra,* that proof beyond the statements of the accused is required for conviction:

> [41] I have a suspicion that Mr. Bouchard may have been manipulative, but suspicion is not enough for a conviction. I am not satisfied that the evidence in its totality can support the verdict of guilt and that it would be safe to allow the conviction to stand. Accordingly, I would allow the appeal and set aside the conviction.

[24] With respect, I think that statement says no more that the trier of fact must be satisfied beyond a reasonable doubt that the statement alleged to be false is, in fact, false. With that proposition I am in full agreement. But the statement does not address the issue before us on this appeal.

[25] I conclude, therefore, that s. 133 was not applicable and that the trial judge was not required to look for corroboration before determining either that the

statement was false or that Mr. Eriksen intended to mislead the court. This was a case in which the trial judge, having determined that the statements were contradictory, was entitled to consider whether the statement upon which the charge was based was made by Mr. Eriksen knowing it was false and with intention to mislead. In that assessment he was required to consider all of the evidence properly before the Court.

[26] It follows that I consider that the trial judge erred in holding that corroboration was required. However, that error redounded to the benefit of Mr. Eriksen and is not a basis upon which the guilty verdict may be set aside.

[27] I have disposed of the corroboration issue without examining the quality of the evidence referred to by the trial judge as corroborative. Mr. Eriksen contends that the evidence was incapable of constituting corroboration. He says that the trial judge's conclusion that the statement made by Mr. Eriksen in his morning testimony that the bicycles were purchased has not been established to be untrue, that the falsity of that statement is not the only reasonable conclusion to be drawn from the evidence, and that the other conclusion that Mr. Eriksen lied consistently in his statements was also a reasonable inference.

[28] While I do not consider that corroboration was required, the evidence referred to by the trial judge as corroborative are portions of the evidence before him that supported his verdict. Whether or not corroboration was required, the trial judge was properly cautious in looking to see whether there was other evidence that supported his conclusion, and in setting out the basis for his conviction. In my view

both the signed statement and the admission of Mr. Eriksen in court supported the trial judge's conclusion that the statement said to be perjured, was in fact perjured.

[29] I see no basis in the trial judge's treatment of the signed statement or the admission in court which would permit this court to set aside the verdict.

2. Reference to the Warned Statement

[30] The second ground of appeal focuses upon the use by the trial judge of the warned statement given by Mr. Eriksen to the police.

[31] The trial judge ruled that that the statement was inadmissible. Mr. Eriksen says that in spite of that ruling, the trial judge made use of it in convicting him, and refers to para. 12 of the reasons for judgment in which the trial judge said:

> [12] When one looks at the evidence as a whole, including the prior statements by the accused that I referred to, and the whole of his testimony at the preliminary inquiry before Chief Judge Lilles, it is quite clear to me that the accused did receive stolen property from his brothers but that he was understandably reluctant to implicate them. After he had provided false testimony in respect of those matters, he was given an opportunity to consider his position and later admitted that he had, in fact, received the property from his brothers.

[32] I do not read the reasons for judgment as referring to evidence that was declared inadmissible. The reference to the evidence as a whole is a reference to only that evidence that has been admitted. I would not accede, therefore, to this ground of appeal.

[33] For the reasons above, I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Smith"

I AGREE:

"The Honourable Mr. Justice Thackray"

Corrigendum to the reasons of
The Honourable Madam Justice Saunders – 04 October 2006

In reasons for judgment dated September 14, 2006, the following should be noted.

The name "Mr. Cozens" in line 2 of para. 13 should be replaced with the name "Ms. Hill".

Line 3 of para. 13 should read: "… in order to convict Mr. Eriksen. She …"

The first line in para. 14 should read: "… of the law, she says …"

The second sentence in para. 14 should read: "Likewise, she …"