COURT OF APPEAL OF NEW BRUNSWICK

122/02/CA

JERRY JACQUES COTE

APPELLANT
- and -

HER MAJESTY THE QUEEN

RESPONDENT

Cote v. R., 2003 NBCA 38

CORAM:

The Hon. Chief Justice Drapeau
The Honourable Justice Turnbull
The Honourable Justice Robertson

Appeal from a decision of:
Garnett, J.
Sitting with a jury
May 3, 2002

Appeal heard:
April 8, 2003

Judgment rendered:
May 15, 2003

Reasons for judgment by:
The Hon. Chief Justice Drapeau

Concurred in by:
The Honourable Justice Turnbull
The Honourable Justice Robertson

Counsel at hearing:

For the Appellant:
Randall G. Maillet

For the Respondent:
William M. Wister
and Kathryn Gregory El-Khoury

JERRY JACQUES COTE

APPELANT
- et -

SA MAJESTÉ LA REINE

INTIMÉE

Cote c. R., 2003 NBCA 38

CORAM:

L’honorable juge en chef Drapeau
L’honorable juge Turnbull
L’honorable juge Robertson

Jugement de première instance :
Garnett, j.c.b.r.
Siégeant avec jury
le 3 mai 2002

Appel entendu :
le 8 avril 2003

Jugement rendu :
le 15 mai 2003

Motifs de jugement :
L’honorable juge en chef Drapeau

Souscrivent aux motifs :
L’honorable juge Turnbull
L’honorable juge Robertson

Avocats à l’audience :

Pour l’appelant :
Randall G. Maillet

Pour l’intimée :
William M. Wister
et Kathryn Gregory El-Khoury

THE COURT

The appeal is dismissed.

LA COUR

L’appel est rejeté.

The judgment of the Court was delivered by

DRAPEAU, C.J.N.B.

[1] The appellant, Jerry Jacques Cote, was tried by a judge and jury on a multi-count indictment and found guilty on five counts of arson (s. 434 of the ***Criminal Code*** of Canada), one count of willfully killing cattle [s. 444(a)] and one count of breaking and entering into a private residence and committing arson therein [s. 348(1)(b)]. The indictment upon which Mr. Cote stood trial alleged that he committed the seven offences over a two-day span in early November 2001.

[2] Mr. Cote did not testify at his trial. Nor did he lead any evidence in answer to the charges. Rather, he exercised his undoubted right to challenge the Crown's case by attempting to impugn by cross-examination the credibility of the several witnesses who implicated him in the commission of the offences set out in the indictment. Evidently, that strategy failed; hence, the present appeal.

[3] Mr. Cote's sole ground of appeal is that the presiding judge, Justice Paulette Garnett of the Court of Queen's Bench, committed reversible error under s. 686(1)(a)(ii) of the ***Criminal Code*** by failing: (1) to direct the jury that it was not at liberty to reach a verdict adverse to Mr. Cote on a particular count by resorting to evidence relevant only to another count, and (2) to caution the jury against relying upon the evidence and, where applicable, its finding of guilt on a particular count as proof that Mr. Cote was the sort of person who would commit the offence set out in another count.

Analysis and Decision

[4] In her charge to the jury, Justice Garnett segregated the evidence applicable to each count but omitted to direct the jury to deal with each count separately. At the request of counsel for the defence, she recharged the jury and instructed it to "deal with each count separately and to come to a decision on each count separately". In his opening statement to the jury, Crown counsel had urged the jurors to "consider each count in the indictment separately" and to "[c]onsider the evidence with respect to each count separately and weigh the evidence with respect to each count in the indictment independent of each other".

[5] In ***R. v. Paquet (R.) et al.*** (1999), 219 N.B.R. (2d) 130 (C.A.), at para. 25, the Court observed that it was "settled law that, in a trial on a multi-count indictment against several accused, the trial judge must delineate for the jury what evidence it is legally entitled to consider for the purposes of determining whether the Crown has proven the guilt of a particular accused in respect of each count against him or her". Needless to say, that time-honored rule applies to a multi-count indictment against a single accused. When evidence relating to one count is not admissible as similar fact evidence on the other counts in the indictment, the trial judge must make plain to the jurors that they must refrain from using that evidence in determining the other counts. The trial judge must also instruct the jurors that they are required to consider each count separately. See ***R. v. M.(B.)*** (1998), 130 C.C.C. (3d) 353 (Ont.C.A.), at para. 41, and Professor G.A. Ferguson and Justice J.C. Bouck, *Canadian Criminal Jury*

Instructions, vol. 1, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 1994), at para. 4.61, sub-paragraph 10. That said, there is no magic formula to convey those critical messages.

[6] Appellate review of a jury charge is not a mechanical task. The correctness and adequacy of any instruction must be determined by taking into account the charge (and any recharge) as a whole and the context of the entire trial with a view to determining whether any deficiencies or shortcomings cause serious concern about the jury's verdict. See ***R. v. Rhee***, [2001] 3 S.C.R. 364.

[7] Given the position articulated by Crown counsel in his opening statement and Justice Garnett's compartmentalization of the evidence applicable to each count in her charge to the jury, I am satisfied that the recharge adequately conveyed the required message, namely that the jurors were not entitled to consider evidence relevant only to one count in determining the other counts. The present case and the cases relied upon by Mr. Cote differ materially. Of the several cases cited by him, only two need be discussed to illustrate the point: ***R. v. Rarru***, [1996] 2 S.C.R. 165 and ***R. v. M.(B.).***

[8] In ***Rarru***, the jury found the accused guilty on five (sexual assault, aggravated sexual assault, sexual assault with a weapon, confinement and uttering a threat) of the 12 counts in the indictment involving two of six complainants. A defence motion for separate trials in respect of each of those six complainants had been denied prior to trial on the

assumption that the evidence of every complainant would be relevant on all counts. In his testimony at trial, Mr. Rarru denied having sexual intercourse with two of the complainants and asserted that sex with the other four was consensual. At the conclusion of the evidence, the trial judge decided against charging the jurors that they could consider the evidence of the six complainants on all counts; as a consequence, it would not be open to the jury to use the evidence on any one count as evidence on another. Despite that decision, Crown counsel pressed forward in his closing address with the theory that Mr. Rarru's sexual conduct with the various complainants followed a pattern, the existence of which, he argued, diminished Mr. Rarru's credibility and enhanced the credibility of each complainant. Despite his ruling against the application of the similar fact evidence rule, the trial judge instructed the jury that Crown counsel's address was accurate.

[9] On appeal to the British Columbia Court of Appeal, the accused argued that the trial judge committed reversible error in refusing to order separate trials in respect of each of the complainants and in failing to adequately explain to the jury that evidence on one count was not to be used in determining other counts. A majority of the British Columbia Court of Appeal disagreed and dismissed Mr. Rarru's appeal against convictions. See ***R. v. Rarru*** (1995), 62 B.C.A.C. 81. In dissent, Rowles J.A. took the position that a mistrial should have been declared when the trial judge ruled that in determining a particular count the jury could not consider the evidence of the complainants relating to the other counts. In Justice Rowles' view, a mistrial was required because no jury instruction - no matter how cleverly crafted

and forcefully delivered - could exclude the possibility of a miscarriage of justice. Justice Rowles went on to hold that the undoubtedly correct instruction that each count had to be determined separately from the other counts was contradicted by the trial judge's statement to the jury that Crown counsel's address was accurate. Recall that Crown counsel had explicitly invited the jury to consider the "pattern" of Mr. Rarru's conduct in assessing his credibility and the credibility of the complainants.

[10] The Supreme Court of Canada allowed Mr. Rarru's appeal and ordered a new trial. Sopinka J., who delivered the judgment of the Court, agreed with Rowles J.A. that the charge to the jury was erroneous. In Justice Sopinka's view, the circumstances of the case were such that it was incumbent upon the trial judge to go beyond merely instructing the jury that evidence on one count was not to be used on other counts. A warning was also required "about the dangers of the potential influence of evidence of numerous alleged criminal acts which were not the subject of a particular count". Justice Sopinka added that "[t]hese omissions were exacerbated by the invitation to the jury to consider the address of counsel for the Crown".

[11] In ***M.(B.)***, the accused was charged on a 49-count indictment with offences as varied as failing to comply with a recognizance, indecent assault, invitation to sexual touching, gross indecency, buggery, incest, assault causing bodily harm and bestiality allegedly committed over a 39-year period. The offences related to four daughters of the accused, a former spouse, a stepson, a babysitter, a family friend, a cousin and

two dogs. The accused unsuccessfully applied to sever the bestiality counts. He testified at trial, denying all allegations, and theorized that the complainants had either conspired or were unintentionally influenced by each other. Following his conviction on 33 counts, the accused appealed.

[12] The Ontario Court of Appeal ordered a new trial. Writing for the court, Justice Rosenberg explained that the determinative issue on the appeal was the trial judge's failure to adequately instruct the jury on the use that could be made of the evidence relating to the different counts and to direct the jury to deal with each count separately. In Justice Rosenberg's view, the trial judge also erred in dismissing the defence application to sever the counts alleging bestiality; that was so because of the intolerably high risk that those counts influenced the jury into believing that the accused was more likely to have committed the other sexual offences alleged by the Crown. Significantly, it is in relation to the bestiality counts that Justice Rosenberg made the following observations, at page 10:

> ... It was essential that the jury be instructed that they could not use that evidence with respect to any of the other allegations against the appellant. In particular, the jury should have been told that they could not use the bestiality evidence as proof that the appellant was the sort of person who would commit the other offences charged.

[13] The outcome in ***M.(B.)*** is also traceable, in no small measure, to the trial judge's failure to isolate the evidence relevant to each count; the jury was provided evidence

in bulk to determine 49 counts charging offences allegedly committed over a 39-year span. Given that state of affairs, it is hardly surprising that Justice Rosenberg concluded that the jury had every reason to consider all of the evidence in making its findings of fact. Moreover, in ***M.(B.)***, the trial judge said nothing in his jury instructions to attenuate the prejudicial impact of Crown counsel's improper suggestion to the jurors that they could consider the totality of the evidence in determining each count.

[14] Clearly, ***Rarru*** and ***M.(B.)*** are distinguishable from the present case in several material respects. Suffice it to spotlight the following: (1) in his opening statement, Crown counsel exhorted the jury to "consider the evidence with respect to each count separately and weigh the evidence with respect to each count in the indictment independent of each other", (2) in her charge to the jury, Justice Garnett compartmentalized the evidence applicable to each count, and (3) in her recharge she repeated, practically word for word, the formula recommended by defence counsel and instructed the jury that it "must deal with each count separately and come to a decision on each count separately". Understandably, defence counsel saw no reason in the immediate aftermath of the recharge to impugn its substantive adequacy.

[15] Given the present case's particular features, some of which are adumbrated above, I am satisfied that the jury understood quite clearly that its verdict on a particular count had to be reached solely on the basis of the evidence that the trial judge identified as relevant to that count. Viewed contextually, Justice Garnett's instruction that the

jury was required to “deal with each count separately” conveyed, in unmistakable terms, the essence of that indispensable message.

[16] Finally, I am not persuaded that, in the circumstances of this case, the trial judge was required to give a specific caution to the jury against allowing the evidence and its finding of guilt on a particular count to influence its determination of any other count. The contrast between the counts in the indictment at hand and the bestiality counts in ***M.(B.)*** is striking; unlike the latter, the former do not contain allegations that by their nature invite the jury “to engage in the forbidden line of reasoning”. See ***M.(B.)***, at page 10. I note, as well, that defence counsel did not ask the trial judge to provide the caution in question.

[17] More importantly, Justice Garnett provided the jury with instructions on reasonable doubt and the presumption of innocence that faithfully comply with the model proposed by Cory J. in ***R. v. Lifchus***, [1997] 3 S.C.R. 320 and, as noted, she carefully isolated for the jury the evidence applicable to each count. Her instructions to “decide solely on what you heard in this courtroom” and “to deal with each count separately and to come to a decision on each count separately” protected Mr. Cote against a jury verdict shaped by the kind of improper considerations the sought-after caution is designed to avoid.

Conclusion and Disposition

[18] The appellant raises one ground of appeal. It is that the trial judge committed reversible error by omitting to caution the jury against: (1) finding the appellant guilty on a particular count on the basis of evidence relevant only to another count, and (2) relying upon the evidence and, where applicable, its finding of guilt on a particular count as proof that the appellant was the sort of person who would commit the offence set out in another count.

[19] A functional approach must be taken to the review of the impugned jury instructions. The question that must be answered ultimately is whether the charge and recharge, read together and assessed in the context of the entire trial, feature instructions that enabled the jurors to understand the case before them and to fulfill their adjudicative mandate. The present case is uncomplicated, both legally and factually. The jury's mandate was to determine the counts in the indictment solely on the basis of the evidence that the trial judge identified as relevant to each. I am satisfied that, in the context of the entire trial, Justice Garnett's charge and recharge contain instructions that enabled the jurors to understand the issues and to fulfill their adjudicative mandate. The appellant's ground of appeal must fail.

[20] I would, accordingly, dismiss the appeal.

CHIEF JUSTICE OF NEW BRUNSWICK

WE CONCUR

WALLACE S. TURNBULL, J.A.

JOSEPH T. ROBERTSON, J.A.