COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Singh, 2013 ONCA 750
DATE: 20131212
DOCKET: C55486

Doherty, Blair and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Neil Singh

Appellant

Anil Kapoor and Lindsay Daviau, for the appellant

Amy Alyea, for the respondent

Heard: October 18, 2013

On appeal from the conviction entered on December 9, 2011 and the sentence imposed on July 27, 2012 by Justice Julie A. Thorburn of the Superior Court of Justice, with reasons for sentence reported at 2012 ONSC 4429, sitting with a jury.

R.A. Blair J.A.:

Introduction

[1] Canadian society cannot tolerate – and the courts cannot permit – police officers to beat suspects in order to obtain confessions. Yet, sadly, that is precisely what happened in this case. One of the two police officers who

participated in the beatings apparently thought, as he said, that "it's part of [his] job" to do so.

[2] It is not.

[3] Respectfully, the trial judge erred in failing to grant a stay, and I would allow the appeal on that basis for the following reasons.

Background

[4] On February 9, 2009, two or more assailants robbed Crane Supply of approximately $350,000 worth of copper piping. During the heist a Crane employee was confronted by one of the robbers (not the appellant) in the warehouse office. He was bound up with zip ties and duct tape, and threatened with what he believed to be a handgun. A second robber (alleged to have been the appellant) loaded the copper piping into a vehicle, operating the forklift used for that purpose in a way that made the bound employee think the operator was familiar with the warehouse. The appellant was also a Crane employee and had left work only a short time before the robbery occurred.

[5] After the robbers left, the bound employee managed to free himself and called 911. The appellant and a co-accused, Randy Maharaj, were arrested some months later. Both were charged with robbery and unlawful confinement. Both alleged police brutality in relation to the statements obtained from them.

Maharaj suffered serious injuries, including a fractured rib. The appellant was less seriously injured.

[6] The Crown stayed the charges against Maharaj. The appellant's trial proceeded, however, and he was convicted on both counts. The statement he ultimately gave to police was exculpatory, but there was circumstantial evidence upon which it was open to the jury to convict.

[7] After conviction, and before sentencing, the appellant applied for a stay of the convictions pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, arguing that his rights under ss. 7 and 12 of the *Charter* had been violated. Section 7 protects life, liberty and security of the person. Section 12 protects against cruel and unusual punishment.

[8] The trial judge dismissed the application: *R. v. Singh,* 2012 ONSC 2028. Although she recognized that the conduct of the police was egregious – and the Crown conceded that the appellant's *Charter* rights had been violated – the trial judge concluded that the violation could be remedied by a reduction in the sentence imposed. At sentencing, she reduced what would otherwise have been a sentence of 6 ½ years' incarceration to one of 5 ½ years "in consideration of the police misconduct": *R. v. Singh*, at para. 78.

[9] The appellant seeks to set aside his conviction on a number of grounds. He also seeks to appeal the sentence imposed. In my view, the appeal can be

determined on the basis of the trial judge's failure to grant a stay. It is therefore unnecessary to address the other grounds, including the appeal from sentence.

The Beatings

[10] The appellant testified that he was beaten on three separate occasions over an extended period of time, prior to giving what turned out to be a generally exculpatory statement. Three police officers were involved: Detective Constable Jamie Clark, Detective Steve Watts, and Detective Donald Belanger. D.C. Clark was the principal administrator of the actual beatings, while Detective Watts appears to have been the police presence in the room; he did nothing to intervene and did his best otherwise to persuade the appellant to confess. Detective Belanger's role was that of "good cop" in relation to the interrogation of the appellant, although he appears to have been active as an aggressor in the case of Maharaj, who also testified on the stay hearing.

[11] The evidence of the appellant and Maharaj with respect to the assaults was not contested. None of the police officers testified and the Crown called no other evidence to counter that tendered on behalf of the appellant. Nor does the Crown contest that evidence on appeal. It therefore provides the factual framework for what actually happened.

The First Assault

[12] The appellant was arrested at his workplace on June 11, 2009, several months after the robbery occurred.

[13] After his arrest, D.C. Clark and Detective Watts brought the appellant to the police station and placed the appellant in an interrogation room. They strip searched him, and then left him alone. About 15 minutes later they returned and began questioning the appellant about the robbery. The appellant denied any involvement. He also denied knowing Maharaj (a statement that was not true).

[14] D.C Clark responded violently to these denials. He struck the appellant on the back of the head five or six times and kneed him in the ribs once or twice, all the while telling the appellant he was lying about not knowing Maharaj. The attack lasted for up to two minutes, during which the appellant was pinned against the wall of the interrogation room. D.C. Clark and Detective Watts then left the room.

[15] About five minutes later, Detective Belanger came into the room. The appellant described him as nice and seemingly genuinely concerned. Detective Belanger told the appellant that "[he should] make sure [he had] something to say or else they're coming back". The appellant denied knowing anything about the robbery. Detective Belanger left the room simply shaking his head.

The Second Assault

[16] Sometime later, D.C. Clark and Detective Watts re-appeared. They asked if the appellant was ready to talk. He told them that he ready to talk, but not about the robbery since he knew nothing about it.

[17] D.C. Clark again responded with force.

[18] He grabbed the appellant's neck, squeezing his throat and slamming his head against the wall. He said to the appellant: "This is what it feels like when you wave guns in people's faces." The squeezing was forceful enough that the appellant was unable to breathe and felt that he was about to black out, but D.C. Clark let go before he did. The punching continued, however. D.C. Clark hit the appellant forcefully on the back with his fist several times, and demanded that the appellant tell them what happened in the robbery. Finally the officers left. As they did they stated "I bet you would talk if Randy [Maharaj] was here", and said they would be back.

[19] Detective Belanger later returned. The appellant was crying. Detective Belanger advised him to "tell them something, tell them anything or else they're going to come back." Receiving no response, he left.

The Third Assault

[20] Ten or fifteen minutes later Detective Watts and D.C. Clark opened the door and said "Look." Maharaj was between them. The door then closed and

the appellant was left alone again. Maharaj corroborated this in his testimony, observing that the appellant looked as though he had been in a fight.

[21] Sometime later, Detective Watts and D.C. Clark returned to the interrogation room. D.C. Clark told the appellant he was lying, and claimed Maharaj had given a statement implicating the appellant in the robbery. The appellant denied he was lying. D.C. Clark then asked: "What does zip ties mean?"[1] The appellant said he didn't know. D.C. Clark then began to administer another prolonged beating, hitting the appellant forcefully on the back of the head and on his back many times – sometimes with an open fist, sometimes with a closed fist. He testified he was in such pain at the time that he felt he could not go on and began to beg the officers just to kill him.

[22] The officers then left the room.

The Apology

[23] An hour later, D.C. Clark returned alone. He apologized to the appellant, saying: "I am sorry for what I did to you. It's part of my job." At this point D.C. Clark gave the appellant a bottle of water, a chicken sandwich and a towel. He told the appellant he believed him but wanted the appellant to make a statement on video.

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[1] Recall that zip ties had been used to tie up the employee in Crane's office.

The Video Statement

[24] After being given the opportunity to go to the washroom and clean himself up – the trial judge remarked that it was not possible to determine from the video what injuries he had received – the appellant prepared to give a statement. Before doing so, he was told by D.C. Clark that if he said "Yes" when asked on the video if he wanted to speak to a lawyer, they would make sure that he was charged. During the video statement the appellant said he did not want a lawyer and denied having anything to do with the robbery. The video statement was exculpatory.

[25] In spite of the foregoing, the appellant did not seek medical attention until July 10, 2009, ten days after he was released from custody, when he visited his family doctor and complained of neck pain. As noted, however, the Crown does not dispute the foregoing narrative.

The Maharaj Assaults

[26] Randy Maharaj was also beaten. While the stay here is not sought in relation to the charges against him – as noted, the Crown voluntarily sought a stay of those proceedings – the Maharaj assaults are relevant for the light they shed upon the pattern of conduct of the police officers involved.

[27] D.C. Clark was once again the principal actor in the assaults, but Detective Belanger participated as well. This time it was Detective Watts who played the "good cop" role.

[28] After being given the opportunity to speak with duty counsel, Maharaj was taken from the interrogation room, where he saw the appellant, who, according to Maharaj, appeared as if he had been in a fight. He was then returned to the interrogation room, where he was initially reluctant to make a video statement based on his advice from duty counsel, but changed his mind and agreed to make a statement on videotape. However, after being moved to the video room, he changed his mind and advised D.C. Clark and Detective Belanger that he did not wish to make a video statement. In his words, "that didn't go over too well."

[29] D.C. Clark reacted violently again. He grabbed Maharaj, pulled him out of his chair, and dragged him into an adjoining room – undoubtedly one without a video camera – where he pushed Maharaj to the ground, fell on top of him, and began punching him in the ribs for an extended period of time. At the same time, Detective Belanger attempted to grab hold of Maharaj's leg and step on his testicles. D.C. Clark added an oral element to the intimidation and assault: he said, "[O]h, you don't want to make a statement? You don't want to make a statement? You're going to make a statement. We'll make sure you make a statement … I hope you're tougher than your buddy." As the trial judge noted,

Maharaj screamed loudly enough that someone opened the door, and the beating stopped.

[30] Maharaj was then returned to the original interrogation room, and then escorted to the room where the beatings occurred. There, Maharaj was shown a portion of the appellant's videotaped statement. D.C. Clark and Detective Belanger assured Maharaj that "[his] buddy [had] talked. He told us everything. Now you're [screwed]." While being escorted back to the original holding room, Maharaj was intercepted by Detective Watts who requested to speak to Maharaj alone. He was advised by Detective Watts that he should make a statement because, if he did not, Detective Watts would not be able to protect him from Detective Belanger and D.C. Clark. Maharaj testified that, fearing another beating, he agreed to give a statement. He was told that if he did so, he should say that he did not wish to have counsel.

[31] Maharaj gave an inculpatory statement, admitting his involvement in the robbery (which he later said was not true). He required medical attention for various bumps, scratches and bruises and sore ribs. X-rays subsequently revealed that he had suffered an acute fracture to the seventh rib on his left side.

The Crown Evidence with respect to the Beatings

[32] It bears repeating that none of the foregoing evidence was contradicted or contested by the Crown. The primary argument appears to have been that the

appellant was not permanently injured (and may have been exaggerating his injuries) and therefore was not the victim of police misconduct sufficiently serious to warrant a stay of proceedings.

Decision below - The Trial Judge's Decision on the Application for Stay

[33] The trial judge recognized the egregious nature of the police misconduct. Indeed, she accurately characterized it as "thoroughly reprehensible behavior on the part of those acting on behalf of the state". She concluded, nonetheless, that the beatings did not warrant a stay of the convictions in the circumstances. Her reasons were essentially three-fold: first, the police brutality had not affected the fairness of the trial (the defence conceded this); secondly, the appellant's injuries "were not permanent or lasting nor did they result in serious harm"; and, thirdly, the appellant had been convicted of two very serious charges. She also concluded that there were very few cases in Canadian jurisprudence where a stay has been imposed solely as a remedy for police brutality.

Analysis

[34] On behalf of the appellant, Mr. Kapoor accepts that the trial judge's decision not to impose a stay of the conviction was discretionary and that the decision should be disturbed on appeal "only if the trial judge misdirects [herself] or if [her] decision is so clearly wrong as to amount to an injustice": *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117; *R. v. Bellusci*, 2012 SCC 44,

[2012] 2 S.C.R. 509, at paras. 17-19. He submits, however, that the state misconduct here was so egregious that the mere fact of going forward in light of it would be so offensive to society that a stay of the conviction is warranted in the circumstances.

[35] I agree.

[36] In substance, the trial judge concluded that because trial fairness issues were admittedly not in play, and because the appellant's injuries did not result in serious harm, a stay was not warranted. However, the analysis is incomplete at that point. In my view, the trial judge was required as well to direct her mind to the nature of the police misconduct in the context of its potential systemic ramifications and the need to consider its impact upon the integrity of the administration of justice. Respectfully, she failed to do so. In my opinion, this constituted an error in principle overriding the deference to which her decision would otherwise be entitled.

[37] To be sure, the granting of a stay of proceedings as a remedy under s. 24(1) of the *Charter* often turns on trial fairness issues. But the remedy is not limited to cases where those kinds of issues are implicated. In the seminal case of *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Supreme Court of Canada recognized that there is a residual category of cases that do not impinge on trial fairness – albeit relatively narrow in application – where a stay may be

appropriate. This was confirmed in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 89, where the Court said:

> Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a "residual category" of cases in which a stay may be warranted. L'Heureux-Dubé J. described it this way, in R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 73:
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> > This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[38] That is not to detract from the general principle – confirmed in *O'Connor*, at para. 75, and *Tobiass*, at para. 90, and accepted by the trial judge – that two criteria must be satisfied for a stay to be granted:

> (i) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
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> (ii) No other remedy is reasonably capable of removing that prejudice.

[39] *Tobiass* also clarified that the first of these criteria must be satisfied even in cases where – as here – the improper conduct falls into the residual category.

That is because a stay of proceedings is not designed to redress a wrong already committed; rather, it is a prospective remedy designed "to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future." As the Court explained in the same passage, at para. 91:

> For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is *likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice*.... There may be exceptional cases in which the past misconduct is *so egregious that the mere fact of going forward in the light of it will be offensive*. But such cases should be relatively very rare.

And further, at para. 96:

> Admittedly, if the past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere fact of carrying forward in the light of it *would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings*. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. *It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptional manner, would be unfair*. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, continued pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system.
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> [Emphasis added.]

[40] In my opinion, this is one of those rare cases.

[41] The trial judge was partially influenced by a dearth of authorities in analogous situations. At paragraph 49 of her reasons on the stay application she said:

> There are few cases in Canadian jurisprudence where a stay has been imposed solely as a remedy for police brutality. The parties were unable to provide me with a case where in circumstances involving equally serious charges in the absence of trial fairness issues and very serious injuries, a stay of proceedings was ordered.

[42] The serious nature of the charges in question, the absence of trial fairness issues, and the nature of the injuries inflicted are all important factors in the balancing exercise that leads to the grant or refusal of a stay of proceedings. None is controlling, however, where – as here – the conduct involved goes to the heart of the integrity of the justice system. I do not think it is necessary, therefore, to canvass the jurisprudence in search of the perfectly analogous precedent in order to compare factual situations in other circumstances and the outcomes of those situations. Each case must be determined in the context of its own factual matrix. This case calls for the imposition of a stay.

[43] What occurred here was not a momentary overreaction by a police officer caught up in the moment of a difficult interrogation. What occurred here was the administration of a calculated, prolonged and skillfully choreographed investigative technique developed by these officers to secure evidence. This

technique involved the deliberate and repeated use of intimidation, threats and violence, coupled with what can only be described as a systematic breach of the constitutional rights of detained persons – including the denial of their rights to counsel.[2] It would be naïve to suppose that this type of egregious conduct, on the part of these officers, would be confined to an isolated incident.

[44] The courts must not condone such an approach to interrogation. Real life in the police services is not a television drama. What took place here sullies the reputations of the many good officers in our country, whose work is integral to the safety and security of our society.

[45] Nor does it appear that these officers have been called to account in any meaningful way, although the trial judge made it plain that, in her view, they should be. We were told that an internal investigation was undertaken by the police but that it ceased when the victims, not surprisingly, were unwilling to cooperate. Crown counsel was not able to advise of any charges, disciplinary measures, or other consequences flowing from the investigation.

[46] Yet the police had provided no response to the testimony of the appellant and Maharaj on the stay hearing. Indeed, they have not done so to this day. The absence of any meaningful disciplinary measures is telling, in my view, because the inability or refusal of the police to muster a pointed response in the face of

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[2] Indeed, the conduct in this case might well be characterized as “torture” as that term is defined in s. 269.1(2) of the *Criminal Code*.

such unchallenged allegations of serious criminal conduct by state actors during a criminal investigation makes the case for a stay under the residual category all the more compelling. Just as the fabrication of evidence by the police violates the integrity of the administration of justice, so too does the police misconduct in question here. Notwithstanding the absence of prejudice to trial fairness, this is, in my view, the very type of conduct "that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings."

[47] This view is reinforced by the more recent decision of the Supreme Court of Canada in *R. v. Bellusci*. There, a prison guard assaulted and injured the accused when the accused was, at the time, chained, handcuffed, defenceless and shackled in a secure cell in a prison van while being transported with other prisoners to a penitentiary. The prison guard had disclosed to the other prisoners that the accused was charged with rape. In return, the accused threatened to rape the prison guard's wife and children. In spite of the provocation, the Court held that the prison guard's "egregious breach" of the accused's constitutional rights warranted a stay of a conviction of a charge of intimidating the prison guard.

[48] I come to the same conclusion in these circumstances. Balancing all of the competing interests at play in contemplating a stay of proceedings – the seriousness of the offence and society's interest in upholding a conviction, the

integrity of the justice system, and the nature and gravity of the violation of the appellant's rights – I am satisfied that a stay is warranted and should have been imposed. The state misconduct was a flagrant breach of the appellant's *Charter*-protected rights. The prolonged and grave nature of the beatings, and the careful choreography underlying them, suggest a pattern of misconduct on the part of D.C. Clark and Detectives Watts and Belanger that has systemic implications. That similar assaults were committed against the appellant's co-accused reinforces this concern.

[49] To adopt the language of *Tobiass*, cited above, a stay of the convictions is necessary "to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future."

Disposition

[50] For the foregoing reasons, I would allow the appeal and grant a stay of the convictions entered against Mr. Singh.

"R.A. Blair J.A."
"I agree D. Doherty J.A."
"I agree David Watt J.A."

Released: December 12, 2013