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When Three Rights Make a Wrong?

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Case Commented On: *R v Oakes*, 2016 ABCA 90

R v Oakes raised the specter always haunting the edges of criminal procedure: what happens when a procedurally fair trial turns out, after the fact, to have produced an unfair conviction? Connie Oakes was convicted of the second-degree murder of Casey Armstrong, primarily based on the testimony of her alleged co-conspirator Wendy Scott. Scott, who is cognitively delayed and has an IQ of 50, told police that she had seen Oakes kill Armstrong with a knife in the bathroom of his trailer. Scott herself pled guilty to second-degree murder for her own involvement in the crime, after confessing during the course of numerous uncounseled interrogations between June 2011 and January 2012 (at para 4). Prior to implicating Oakes, Scott had accused three other individuals of the act, testifying at trial that she had lied on those three occasions (at para 16). Scott's testimony was the centerpiece of the Crown's case against Oakes in the absence of physical evidence linking her to the crime scene and given that a neighbor's description of a suspect leaving the scene more closely resembled one of the other individuals Scott had originally implicated (at paras 15-18).

During the course of the trial, the Crown made much of Scott's own guilty plea as evidence of her credibility. During closing summations the prosecutor noted "She did not receive a deal from the Crown in exchange for testimony. As she put it, she manned up to her responsibilities. She said repeatedly, I am trying to deal with what I have to deal with." (at para 27). The problem is that, subsequent to Oakes' conviction, the court presiding over Scott's case overturned her conviction because the facts presented when she entered her plea did not support it (at para 2). The issues for the Court in Oakes' appeal, then, were whether, in light of Scott's recantation and reversal, a miscarriage of justice would result if Oakes' conviction were allowed to stand and, if the appeal were allowed, what the remedy should be.

The question of whether a miscarriage of justice has occurred is governed by Section 686(1) of the *Criminal Code*, R.S.C. 1985, c.C-46, which contains flexible language stating that a court of appeal "may" allow the appeal "on any ground" where the court is of the opinion that there was a miscarriage of justice. In *Oakes*, ABCA made it clear that the question would turn not only on the evidence presented at trial but on the subsequent evidence of Scott's recantation and the judicial rejection of her plea. In considering whether such a miscarriage had occurred, the Court cited four considerations—none of which, interestingly, revealed error by either the trial court or the Crown, but which collectively, in light of new information, nonetheless painted the picture of injustice.

The first factor was the weakness of Scott's trial testimony and the general case against the accused. Given the obvious concerns about Scott's reliability and inconsistencies, her testimony was governed by *R v Vetrovec*, [1982] 1 SCR 811. In that case the Supreme Court of Canada held that, instead of the traditional, formalistic rule governing all accomplice testimony, trial courts should warn juries of reliance on the testimony of "unsavoury" witnesses in the absence of

independent confirmatory evidence (at para 18). The Court noted that the trial court had mentioned the neighbor's testimony as to the two women outside the victim's trailer, as well as Scott's relatively accurate description of the bathroom that had been the crime scene (at para 19). Yet, as mentioned above, the testimony of the neighbor was both vague, and even more probative as to the identity of another suspect, and the crime scene description did nothing to confirm that Oakes, specifically, was the killer (at paras 19-21).

The Court also cited the police tactics involved in obtaining Scott's confession as relevant to the weakness of her testimony (at para 23). The police relied upon the legality of tactics for misleading suspects, such as bringing in a phony surveillance tape and implying DNA had been recovered on the scene (at para 23). The Court noted that the police should not be criticized for those tactics, but that such tactics were nonetheless relevant to the frailty of Scott's testimony (at para 24).

As a second factor, the Court considered the Crown's representations that Scott's reliability was supported by her own confession and guilty plea (at para 26). The Court concluded that, although the Crown had done nothing wrong in emphasizing Scott's plea, nonetheless the "jury may well not have been able to get to a guilty verdict without the 'finding of guilt' by another judge in relation to Ms. Scott"—a finding which, of course, no longer stands (at para 28). (It should be noted that in dissent Justice McDonald noted that it is not at all clear whether the jury found Scott's testimony more or *less* credible due to her conviction, pointing out that Oakes' trial counsel repeatedly referenced her status as a confessed criminal as cutting *against* her credibility (at para 66).

Third, the Court considered the potential curative effect of the trial court's *Vetrovec* warnings, which invited the jury to approach potentially self-interested accomplice liability with caution and to look for evidence from a source unconnected to Scott to confirm the truth of her testimony (at para 32). The Court in no way faulted the trial court's jury instructions, but made the somewhat chilling observation that "on occasion words simply do not exist with which a trial judge can adequately offset the risk the jury may misapprehend evidence" (at para 33). Furthermore, the Court considered that the trial court could not have known that, according to Scott's trial judge, she should perhaps never have been convicted as an accomplice in the first place (at para 33).

Finally, the Court considered the limited role that appellate review ought to play with respect to findings of credibility (at para 35). Our entire system of justice turns, of course, on the gatekeeping function of trial judges and juries in evaluating the evidence in their court rooms. The "common sense" human intuition required to make credibility determinations cannot be deployed easily by appellate courts, and for that reason those courts observe a significant deference to trial fact finders on issues turning on witness credibility. The court concluded, however, that the issue was not so much the jury's evaluation of Scott's credibility, but the new evidence of the setting-aside of Scott's conviction and the resulting impact it might have had on the jury's assessment (at para 38).

For these reasons, the Court held that Oakes' appeal must be allowed. It remained to be determined, however, whether the new evidence of Scott's recantation should be admitted on the appeal and whether, in fact, the result of allowing the appeal should be a new trial or a directed verdict of not guilty. As to the first question, the Court was governed by *R v Palmer*, [1980] 1 SCR 759, which held that the admission of fresh evidence on appeal required that: 1.) the evidence not have been adducible at trial through due diligence; 2.) relevant; 3.) credible, and 4.)

if believed could reasonably have affected the result at trial (at para 41). With those prongs easily met in this case (the first mostly due, of course, to the fact that Scott's conviction had not in fact been overturned at the time of trial), the court turned to the question of remedy.
Oakes' counsel urged that the upshot of the admission of the new evidence was that Oakes should receive a directed verdict of not guilty. The Court considered this argument under the general rule that a new trial should be the remedy "unless no properly instructed trier of fact could reasonably have convicted the accused" in light of *all* of the evidence, old and new (at para 50). The Court declined to conclude that the jury was acting unreasonably in convicting Oakes in light of the evidence actually led at her trial, and further found that, even if a jury were aware of the new information concerning Scott, it would not be unreasonable for it to do anything but acquit (at para 56). As the Court put it "Whether by the date of a future trial Ms. Scott has again been convicted of Mr. Armstrong's murder, acquitted of it, or her charges remain pending but unresolved, that fact can be presented to the jury, which can then address Ms. Scott's credibility…" (at para 56). In other words, the Court recognized the miscarriage of justice in the original trial, but deferred to the importance of the factfinder's role in assessing credibility at the trial level.

Subsequent to the Court's holding, the Crown stayed the charges against Oakes, who has been in prison for over two years. In an interview with the CBC, available here, Oakes, who is Cree, attributed her conviction to systemic racism in the Medicine Hat justice system, but reaffirmed her longstanding belief that she would eventually be set free. The darker view of Oakes' case is that, even when procedural protections work exactly the way they're supposed to, the asymmetry of power between the accused and the state will always open up the possibility of innocent people spending their lives in prison. Here Scott, an intellectually and economically disadvantaged woman with no advice of counsel beyond one phone call, confessed and implicated Oakes after four months of questioning. The stakes of the plea bargains that resolve so many of our criminal trials can create incentives for the factually innocent to confess to obtain lighter sentences. These risks are even higher in cases where good legal advice is unavailable, and where false accusations against other parties will increase the value of the deal offered. Cases like *Oakes* force us to examine the series of events that can lead to bad outcomes, many of which inevitably relate to a general lack of systemic resources for the defence of the accused. While the *status quo* is not good enough on the front end, however, *Oakes* at least offers the silver lining of a glimpse at appellate review functioning appropriately. In *R v Stolar*, [1988] 1 SCR 480, the Supreme Court gave clear guidance for when fresh evidence should be admitted on appeal: where it has sufficient weight or probative force that if accepted by the trier of fact it might have altered the result at trial (at para 492). While we do not yet have a Supreme Court case explicating the operation of *Stolar* on miscarriage of justice applications under s. 686(1)(a)(iii), with *Oakes* the ABCA has joined the British Columbia and Ontario Courts of Appeal in affirming that allowing appeals from conviction on the basis of fresh evidence ought be done under this section of the CCC.

While this may seem like a formalistic technicality or, at the very least, an obvious conclusion, it is a critically important procedural path for courts to agree upon. In the United States, commentators still debate whether the 1993 Supreme Court case of *Herrera v Collins*, 506 U.S. 390, stands for the proposition that actual innocence is an insufficient ground to mount a *habeas corpus* challenge to a conviction under the cruel and unusual punishment clause of the Eighth Amendment. While the majority opinion held that it did not state a ground for *habeas* relief, language in a concurring opinion joined by two members of the majority suggested that the evidence against the accused did not support his claim of actual innocence. Thus, it appears a majority of that Court would have found an appeal based on actual innocence constitutionally required, though the case has been cited by some for the proposition that only claims of procedural error provide grounds for appellate reversal.

In short, the appellate procedural clarity provided by the *Oakes* case and its counterparts in other provinces is a welcome boon for substantive justice. The problem, of course, is that most cases do not proceed to the level of appellate review, or benefit from the media attention Oakes' case generated. Clear procedures for evaluating potential innocence on the back end cannot make up for systemic injustice on the front. The *Oakes* holding may be most significant to the extent that it makes this point clear.