

Her Majesty the Queen (respondent) v. Kevin Pelletier (appellant)
(C51054; 2012 ONCA 566)

Indexed As: R. v. Pelletier (K.)

Ontario Court of Appeal
Armstrong and Watt, J.J.A. and Then, R.S.J. (ad hoc)
August 31, 2012.

Summary:

The Ontario Superior Court of Justice, sitting without a jury, found Pelletier guilty of several offences arising out of his role in a beating and a shooting, about a week apart, of two drug purchasers who got behind in their payments. Pelletier appealed from conviction and from sentence. He contended that his convictions were flawed because the judge didn't take sufficient care in assessing the reliability of evidence of disreputable characters and untrustworthy eyewitnesses. Pelletier also contended that the sentence imposed was unfit because the judge failed to take into account that he was Aboriginal.

The Ontario Court of Appeal dismissed the appeal from conviction, and granted leave to appeal but dismissed the appeal from sentence.

Criminal Law - Topic 4296

Procedure - Trial judge - Duties and functions of - Prior out-of-court statements by principal witnesses - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 4298

Procedure - Trial judge - Duties and functions of - To exclude inadmissible evidence - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 4300

Procedure - Trial judge - Duties and functions of - Respecting credibility of witnesses (incl. accused) - A judge found the accused guilty of offences arising out of his role in a beating and a shooting of two drug purchasers who got behind in their payments - A ground of appeal was that the trial judge erred in failing to subject the evidence of two witnesses of unsavoury character (Danis and Arbour) to greater scrutiny - The Ontario Court of Appeal rejected that ground of appeal - "First, ... absent any misapprehension of evidence or palpable or overriding error, appellate courts are to accord substantial deference to findings of fact made by trial judges. It is all the more so where, as here, the complaint reduces to an assertion that the trial judge miscalculated the weight or overvalued the reliability of evidence adduced at trial, even though it is not said that the finding of guilt is unreasonable. Second, this is not a case in which it is or could be said that the trial judge was unmindful of the need for caution in assessing the credibility of Danis and Arbour and the reliability of their evidence. ... Third, as the trier of fact, the trial judge was entitled to rely on Danis' B(KG) statement, even in the absence of confirmatory evidence, as a basis upon which to record a finding of guilt. ... Fourth, to be confirmatory of a tainted witness' testimony, evidence need not implicate an accused in the commission of the offence.

Evidence is confirmatory if it provides comfort to the trier of fact that the unsavoury witness is telling the truth ... Finally, the trial judge was required to consider the evidence as a whole in determining whether the Crown had proven the appellant's guilt of any offence charged beyond a reasonable doubt. This judge, aware of the frailties associated with the evidence of Danis and Arbour, did so. That was his call." - See paragraphs 49, 70 to 75.

Criminal Law - Topic 4304.2

Procedure - Trial judge - Duties and functions of - Duty to consider totality of evidence - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 4355

Procedure - Charge or directions - Jury or judge alone - Directions regarding included offences - The Ontario Court of Appeal discussed the principles governing when one offence might be included in another - See paragraphs 105 to 113.

Criminal Law - Topic 4355

Procedure - Charge or directions - Jury or judge alone - Directions regarding included offences - An issue arose in connection with the appellant's conviction of aggravated assault on the count alleging he attempted to murder the victim "while using a firearm" - The Ontario Court of Appeal stated that "[t]he addition of the phrase 'while using a firearm' does not amount to a particularization of the means by which the offence was committed, thus cannot serve to expand the offences included in the description of the enactment creating the principal offence." - The court exercised its authority under s. 683(1)(g) of the Criminal Code and amended the count charging attempted murder by adding a description of the means by which the offence was committed and of its consequences to the victim ("by shooting him with a gun, thereby wounding him"), and affirmed the conviction for aggravated assault - The court's reasons for reaching that conclusion progressed through several steps - See paragraphs 102 to 126.

Criminal Law - Topic 4361

Procedure - Charge or directions - Jury or judge alone - Directions regarding identification - A judge found the accused guilty of offences arising out of his role in a beating and a shooting of two drug purchasers who got behind in their payments - Arbour and Guy were eyewitnesses to the home invasions in which each was injured - A ground of appeal was that the trial judge erred in failing to adequately scrutinize the reliability of the eyewitness testimony - The Ontario Court of Appeal did not accede to that ground of appeal for four reasons - "First, the trial judge was well aware that the identity of the assailant was the central issue in connection with each home invasion and that its proof depended, in part, on the weight to be assigned to the eyewitness testimony of the victims of each attack. He approached that evidence with justifiable caution ... Second, the trial judge reviewed at length the substance of the evidence of both eyewitnesses ... Third, he considered first whether the evidence about Guy's line-up identification should be excluded because of the few photographs displayed and the review procedure followed. ... The appellant made no effort to impeach the judge's admissibility conclusion on appeal. ... In connection with the evidence of Arbour, the trial judge took into account Arbour's lies to investigators and his

unwillingness to cooperate with them, along with his testimonial reversal at the preliminary inquiry ... Finally, ... this ground of appeal has to do with the weight the trial judge assigned to items of evidence adduced at trial. ... The weight to be assigned to individual items of evidence and the persuasive force of the evidence as a whole are pre-eminently questions for the trial judge. This trial judge did not misapprehend the evidence, reach his conclusion illogically, or fail to appreciate the value and effect of the evidence adduced at trial. That was his job. It is not ours to reset the balance." - See paragraphs 96 to 101.

Criminal Law - Topic 4377

Procedure - Charge or directions - Jury or judge alone - Directions regarding credibility of witnesses - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 4377.1

Procedure - Charge or directions - Jury or judge alone - Directions regarding reliability of witnesses' testimony - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 4467

Procedure - Verdicts - Included offences - Inclusion in attempted murder - [See **Criminal Law - Topic 4355**].

Criminal Law - Topic 5241

Evidence and witnesses - Identification - Eyewitness identification - [See **Criminal Law - Topic 4361**].

Criminal Law - Topic 5252

Evidence and witnesses - Identification - From photographs - Use of photos by police - [See **Criminal Law - Topic 4361**].

Criminal Law - Topic 5364

Evidence and witnesses - Photographs, movies, videotapes, audio tapes, etc. - General principles - Weight - [See **Criminal Law - Topic 4361**].

Criminal Law - Topic 5404

Evidence and witnesses - Witnesses - Credibility - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 5420

Evidence and witnesses - Witnesses - Out of court statements (incl. videotaped statements) - [See **Criminal Law - Topic 4300**].

Criminal Law - Topic 5833

Sentencing - Considerations on imposing sentence - Deterrence - [See **Criminal Law - Topic 5846.1**].

Criminal Law - Topic 5835

Sentencing - Considerations on imposing sentence - Protection of public - [See **Criminal Law - Topic 5846.1**].

Criminal Law - Topic 5846.1

Sentencing - Considerations on imposing sentence - Aboriginal offenders - A judge found the accused guilty of offences arising out of his role in a beating and a shooting of two drug purchasers who got behind in their payments - The offences related to two home invasions - The trial judge considered that a global sentence of 12 years in the penitentiary was proportionate to the gravity of the offences and the degree of responsibility - He credited the accused with two years and eight months (16 months spent in pre-sentence custody) and imposed a global sentence of nine years four months - The trial judge made no mention of the accused's Aboriginal status - The accused contended that the sentence was unfit because the judge failed to take into account his Aboriginal status - The Ontario Court of Appeal dismissed the sentence appeal - "Accepting the failure of the trial judge to expressly identify section 718.2(e) as a relevant sentencing principle as an error in principle disentitling the sentencing decision to deference, I am satisfied that the sentence imposed remains fit. These offences, committed a week apart, involved pre-concerted activity. Each involved the use of a weapon against unarmed victims. One of the weapons was a semi-automatic handgun. Both victims suffered serious injuries. The motive underlying each invasion was to encourage or enforce payment of a drug debt. The appellant was recruited as an enforcer. No rational application of the objectives and principles of sentencing dictated a sentence that did not involve a substantial period of imprisonment. Denunciation, deterrence and the need to separate persons who engage in such behaviour from the rest of society were the most prominent sentencing principles." - See paragraphs 145 to 152.

Criminal Law - Topic 5848.7

Sentencing - Considerations on imposing sentence - Denunciation or repudiation of conduct - [See **Criminal Law - Topic 5846.1**].

Criminal Law - Topic 5849.4

Sentencing - Considerations on imposing sentence - Premeditation - [See **Criminal Law - Topic 5846.1**].

Criminal Law - Topic 5849.20

Sentencing - Considerations on imposing sentence - Use or possession of firearms - [See **Criminal Law - Topic 5846.1**].

Criminal Law - Topic 5849.23

Sentencing - Considerations on imposing sentence - Home invasion - [See **Criminal Law - Topic 5846.1**].

Cases Noticed:

R. v. Khela (G.S.), [2009] 1 S.C.R. 104; 383 N.R. 279; 265 B.C.A.C. 31; 446 W.A.C. 31; 2009 SCC 4, refd to. [para. 64].

R. v. Snyder (K.) (2011), 278 O.A.C. 233; 273 C.C.C.(3d) 211; 2011 ONCA 445, refd to. [para. 65].

R. v. Kehler (R.A.), [2004] 1 S.C.R. 328; 317 N.R. 30; 346 A.R. 19; 320 W.A.C. 19; 2004

SCC 11, refd to. [para. 67].
R. v. Roks (A.) (2011), 281 O.A.C. 235; 274 C.C.C.(3d) 1; 2011 ONCA 526, refd to. [para. 69].
R. v. Miaponoose (A.) (1996), 93 O.A.C. 115; 110 C.C.C.(3d) 445 (C.A.), refd to. [para. 90].
R. v. Izzard (1990), 38 O.A.C. 6; 54 C.C.C.(3d) 252 (C.A.), refd to. [para. 92].
R. v. Williams (1982), 66 C.C.C.(2d) 234 (Ont. C.A.), refd. to. [para. 93].
R. v. F.A. (2004), 184 O.A.C. 324; 183 C.C.C.(3d) 518 (C.A.), refd to. [para. 93].
R. v. Nguyen (S.H.) (2000), 132 O.A.C. 354 (C.A.), refd to. [para. 93].
R. v. Goulart-Nelson (E.M.), [2004] O.A.C. Uned. 476 (C.A.), refd to. [para. 94].
R. v. Grant (T.D.) (2005), 371 A.R. 31; 354 W.A.C. 31; 198 C.,C.C.(3d) 376; 2005 ABCA 222, refd to. [para. 94].
R. v. Doyle (M.T.) (2007), 248 B.C.A.C. 307; 412 W.A.C. 307; 2007 BCCA 587, refd to. [para. 94].
R. v. Simpson (No. 2) (1981), 58 C.C.C.(2d) 122 (Ont. C.A.), refd to. [para. 105].
R. v. Lockett, [1980] 1 S.C.R. 1140; 30 N.R. 344, refd to. [para. 105].
R. v. Fergusson, [1962] S.C.R. 229, refd to. [para. 106].
R. v. Manley (M.) (2011), 275 O.A.C. 81; 269 C.C.C.(3d) 40; 2011 ONCA 128 (C.A.), refd to. [para. 110].
R. v. A.D. (2003), 179 B.C.A.C. 43; 295 W.A.C. 43; 173 C.C.C.(3d) 177 (C.A.), refd to. [para. 110].
R. v. Colburne (1991), 66 C.C.C.(3d) 235 (Que. C.A.), refd to. [para. 111].
R. v. Irwin (R.) (1998), 107 O.A.C. 102; 123 C.C.C.(3d) 316 (C.A.), refd to. [para. 112].
R. v. St. Clair (G.) (1994), 69 O.A.C. 161; 88 C.C.C.(3d) 402 (C.A.), refd to. [para. 113].
R. v. Williams (H.L.), [2003] 2 S.C.R. 134; 308 N.R. 235; 231 Nfld. & P.E.I.R. 1; 686 A.P.R. 1, refd to. [para. 121].
R. v. Godin (J.A.), [1994] 2 S.C.R. 484; 168 N.R. 193; 147 N.B.R.(2d) 321; 375 A.P.R. 321, refd to. [para. 121].
R. v. Gladue (J.T.), [1999] 1 S.C.R. 688; 238 N.R. 1; 121 B.C.A.C. 161; 198 W.A.C. 161, refd to. [para. 133].
R. v. Wells (J.W.), [2000] 1 S.C.R. 207; 250 N.R. 364; 250 A.R. 273; 213 W.A.C. 273; 2000 SCC 10, refd to. [para. 140].
R. v. Korponoy, [1982] 1 S.C.R. 41; 44 N.R. 103, refd to. [para. 142].
R. v. Ipeelee (M.) (2012), 428 N.R. 1; 288 O.A.C. 1; 318 B.C.A.C. 1; 541 W.A.C. 1; 280 C.C.C.(3d) 265; 2012 SCC 13, refd to. [para. 143].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 683(1)(g) [para. 112]; sect. 718.2(e) [para. 136].

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This conviction and sentence appeal was heard on February 22, 2012, before Armstrong and Watt, J.J.A. and Then, R.S.J.(ad hoc), of the Ontario Court of Appeal. In reasons written by Watt, J.A., the Court of Appeal delivered the following judgment, released on August 31,

2012.

Conviction appeal dismissed;
leave to appeal sentence granted;
sentence appeal dismissed.

Editor: E. Joanne Oley