Court of Appeal Criticizes Trial Judge's Conduct

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In *R. v. Ibrahim*, 2019 ONCA 631, the Ontario Court of Appeal (Rouleau, Trotter and Zarnett JJ.A.) criticized the deportment of the trial judge in a criminal jury trial. While the issues about the trial judge's demeanour in this case arose in the context of a criminal trial, the comments of the Court of Appeal have broader application, and are relevant to almost all areas of litigation, including commercial litigation.

The appellant in *R. v. Ibrahim* appealed his conviction of manslaughter and sentence of four years' imprisonment. The Court of Appeal allowed the appeal based on the trial judge's instructions to the jury.

The appellant had also argued that the trial judge demonstrated bias against him by the manner in which he conducted the trial. The Court of Appeal rejected this argument, but went on to comment on the manner in which the trial was conducted.

The appellant applied for a mistrial toward the end of the trial. He alleged, among other grounds, that the trial judge continually shook his head with disapproval in front of the jury while defense counsel questioned witnesses, yelled at defense counsel on numerous occasions and glared at defense counsel, both in front of and in the absence of the jury.

When the motion was first brought, after briefly listening to oral submissions, the judge said that he would give counsel an opportunity to make full submissions at a later juncture. As to the complaints raised by defense counsel, the judge said "I disagree with virtually all of them, I think", and went on to make more disparaging remarks about defense counsel. He denied making facial expressions or physical gestures, but he said: "If I have, I am a human being." He said that it did not matter in any event as in his experience, jurors generally do not look at him, but look at witnesses and counsel. He disagreed that he yelled at anybody, or demonstrated any particular bias. He said all this before full submissions were heard.

In advance of these full submissions, two affidavits were submitted on behalf of defense co-counsel and an employee of defense counsel who attended one day of the trial. Co-counsel enlarged on the allegations earlier made and swore that the trial judge had undermined the appellant's relationship with his counsel, undermined his confidence in the fairness of the trial, and influenced the appellant's decision as to whether or not to testify on his own behalf. The employee described the judge's conduct during defense counsel's cross-examination of a Crown witness, that he appeared visibly upset, was shaking his head vigorously and was staring at defense counsel in what looked like an angry manner as defense counsel was asking questions.

The judge ultimately dismissed the application for mistrial, saying it was without merits. His reasons for decision were described by the Court of Appeal as "remarkable for their length (64 single-spaced pages, with 49 footnotes) as they are for their tone." The Court of Appeal stated that the trial judge's displeasure with defense counsel was palpable throughout, and that the reasons were "peppered with critical, and sometimes insulting, remarks."

While the Court of Appeal did not disturb the trial judge's decision dismissing the application for a mistrial, not being persuaded that there was a reasonable apprehension of bias, the Court did express concern with some aspects of how the trial was conducted, especially the manner in which the judge dealt with the mistrial application.

Of note, the judge effectively accused co-counsel of breaching Rule 5.2-1 of the Law Society of Ontario's *Rules of Professional Conduct* which prohibits a lawyer from being an advocate and witness in the same cause. The Court of Appeal dismissed this concern, noting that although co-counsel did not withdraw from the case after he filed the affidavit, he did not participate in the examination of any witness, nor did he make any submissions, consistent with the direction in the commentary accompanying this rule, which states that "[t]he lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer."

The trial judge criticized defense counsel for the manner in which the mistrial application was brought, without proper notice and without formally serving materials on Crown counsel ahead of time, nor filing them with the court in advance of oral argument. The Court of Appeal noted that Crown counsel took no objection to the timing of the application, the service of the materials nor the admissibility of the affidavits. Secondly, and more importantly, the trial judge raised none of these concerns with counsel at trial, so counsel had no opportunity to respond to the serious concerns raised by the judge for the first time in his written reasons, including allegations of professional misconduct. The Court of Appeal concluded that the trial judge conducted the mistrial application in an "injudicious manner", but as this portion of the proceedings took place in the absence of the jury, was not persuaded that this aspect of the trial judge's conduct had any impact on the overall fairness of the proceedings.

As to the trial judge's deportment, specifically his facial expressions, body language, and vocal communications – and about the manner in which he responded to these complaints in his written reasons, the Court expressed its concern, but given his denials in his reasons, stated that it was constrained in its ability to evaluate these claims.

The Court of Appeal, citing precedent, stated that "the trial judge at all times should control proceedings with judicious demeanour." This is the case even in the absence of the jury as other participants in the process – counsel, witnesses, court staff, and the public at large – should not expect to encounter a different type of courtroom environment. More broadly, the complaints raised in this case reflect the importance of the duty of the trial judge to maintain composure during the course of a trial, both in the presence and absence of the jury. The Court of Appeal stated:

We appreciate that a lengthy murder trial can be stressful for all involved – the jury, witnesses, counsel, court staff, the judge, spectators and, most especially, the accused person and his or her family, as well as the deceased's family, friends and supporters. There is so much at stake. Emotions may run high. […] Nevertheless, and notwithstanding where fault lies, it is the trial judge's responsibility to reduce the stress of conflict, not to exacerbate the situation through harsh words, a raised voice, or distracting and hostile non-verbal communications."

The Court of Appeal also quoted from Lord Denning in *The Family Story* (London: Butterworths & Co. (Publishers) Ltd., 1981), at p. 162: "When a judge sits to try a case with a jury, he is himself on trial – before his fellow countrymen. It is on his behavior that they will form their opinion of our system of justice." The Court of Appeal stated that notwithstanding the outdated gendered language, this passage resonates with the same force today.

Commercial litigation trials are typically non-jury. However, a judge who expresses hostility to one side or the other introduces a tension which can affect the outcome in unexpected ways. There is the potential for the client to lose confidence in counsel who is the target of harsh comments from the bench, as happened in this case, with a corresponding boost in confidence of the opposing party. It is also possible that such conduct will impair or eliminate the possibility of a mid-trial settlement, which is often driven by uncertainty as to the outcome. All of this is aside from the unpleasant workplace that the courtroom becomes for all who spend their days there. Hopefully, the unusual comments of this bench will serve as both a warning and guide posts as to acceptable conduct for those relatively few judges who conduct themselves in this manner, to the benefit of all those whose workplace is the courtroom,

such as court staff and counsel, as well as the parties, witnesses and the public.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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