

**SUPERIOR COURT OF JUSTICE**

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DATE: 20110819

SUPERIOR COURT OF JUSTICE

HEARD: July 4 and 20, 2011

[5] There were serious discrepancies as between the testimony of Ms. Ajao and the evidence given by the complainants concerning the discussions with Ms. Ajao before and during the termination meeting, and the nature of the documents that were ripped up by Ms. Ajao.

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[6] In particular, Ms. Ajao testified that the documents that she ripped up were handwritten and of a personal nature. The complainants testified that they saw Ms. Ajao tear up documents but that, with the exception of a nursing schedule, they could not identify the nature of the documents torn up by Ms. Ajao. They admitted that they did not verify if Ms. Ajao threw the nursing schedule in the garbage can or on the floor of her office.

[7] Ms. Donnelly and Ms. Bell testified that, after Ms. Ajao left her office and Fairview Nursing Home, they immediately locked Ms. Ajao's office. After about an hour and a half, during which time the complainants admitted that the office remained under Ms. Donnelly's and Ms. Bell's control, the police came and took photographs of Ms. Ajao's office and the torn documents that were on her desk, in the garbage can and on the floor.

[8] Following the police's departure, Ms. Donnelly and Ms. Bell gathered all of the torn papers from Ms. Ajao's office, put them in a garbage bag, and placed the garbage bag unattended in another room in the nursing home. They admitted that at no time did they examine the documents in the garbage can, on the floor or collected in the garbage bag. They subsequently discovered that the garbage bag had been inadvertently thrown away.

[9] The photographs of the documents taken by the police were identified and entered as exhibits at trial.

[10] In summary, the trial judge convicted Ms. Ajao on the mischief charge on the basis of the photographic evidence of the documents that the trial judge examined and her adverse assessment of Ms. Ajao's credibility as a witness.

Analysis:

[11] There are several grounds for this appeal set out in the appellant's Notice of Appeal. In essence they all relate to the trial judge's findings of fact and credibility and her assessment of the evidence submitted at trial.

[12] A trial judge's findings of fact and inferences from facts can only be overturned where the judge committed a palpable and overriding error. There is a need for great caution and deference on the part of appellate courts when they review assessment of facts by a trial court. It is not the role of the appellate court to retry the case or substitute its decision for that of the trial court. Absent a determination that no reasonable trier of fact, properly instructed and acting judicially, could have made the same findings, the trial decision should not be disturbed on appeal.¹

[13] In addition, the appellant takes issue with the assessment of and conclusions concerning a photograph of various documents, marked as Exhibit 11, which the trial judge set out in her

¹ *R. v. Coates* (2003), 176 C.C.C. (3d) 215, [2003] O.J. No. 2295 (Ont.C.A.), at paras. 20-21.

Reasons for Judgment, which she made without having given the parties an opportunity at trial to respond by means of evidence or closing argument. With this ground of appeal, the appellant does not focus so much on the correctness of the trial judge's observations but rather on the contention that there was a denial of natural justice in that the appellant was not given an opportunity to respond at trial to the trial judge's findings.

[14] It is beyond dispute that a fair judicial process includes a right to a hearing which entails the right to know the case put against one, and the right to answer that case. The denial to an accused person of the opportunity to make full answer and defence is a denial of natural justice which amounts to a reversible error in principle.²

[15] The trial judge had looked closely at Exhibit 1I, a photograph of documents in Ms. Ajao's office, with "a stronger pair of reading glasses, almost a magnifying glass", and formed certain conclusions about otherwise indecipherable portions of a document in that photograph without sharing her observations with the parties during the trial and allowing them to respond to her observations, which had not arisen at the trial. The portion of the photograph identified by the trial judge became a critical part of the evidence supporting the trial judge's finding of guilt against the appellant.

[16] The trial judge stated that she relied on the testimony of Ms. Bell and Ms. Donnelly that Ms. Ajao was tearing up documents in her office during their meeting, as well as the photographs that were marked as exhibits at the trial. The trial judge found that Exhibit 1F showed that the documents in the garbage can were not handwritten but typed documents (although some fragments are handwritten), which contributed to her rejection of Ms. Ajao's evidence, and that one of those documents was a table. The trial judge found that Exhibit 1I showed a number of torn documents lying on the floor of Ms. Ajao's office, one of which had the name of "Fairview" and the words, "Nursing Home" on another adjacent document.

[17] With respect to one of the other documents pictured in Exhibit 1I, which she looked at closely with "a stronger pair of reading glasses, almost a magnifying glass", the trial judge said that she could see "quite clearly" the words, "Accreditation Canada" and "clearly" another word referring to the nursing home itself. Her observations, coupled with Ms. Donnelly's testimony that she was trying to deal with accreditation problems, led the trial judge to conclude that the document shown in Exhibit 1I was referring to the accreditation issue.

[18] Ms. Donnelly had admitted that she did not know whether the documents that Ms. Ajao was tearing up were personal or belonged to the nursing home, except for a nursing schedule. The nursing schedule referenced by Ms. Donnelly was not visible in the photographs: the table observed by the trial judge in Exhibit 1F was not identified by any witness as a nursing schedule and did not contain any wording to identify it as such. Ms. Bell admitted that she did not know

² *R. v. Turpin*, [2011] O.J. No. 1044 (C.A.), at paras. 44 and 45

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the nature of the documents that Ms. Ajao took from her desk, tore up and put in the garbage can of her office, except she said that she saw Ms. Ajao take down a nursing schedule from her office bulletin board, rip it up and put it in the garbage can. The trial judge did not accept Ms. Bell's evidence that Ms. Ajao had torn a nursing schedule from a bulletin board in her office because of Ms. Bell's lack of familiarity with the nursing home's documents and because Ms. Donnelly never testified that there was any document taken from the board in the office. Ms. Ajao testified that she tore up "into two"³ only handwritten personal documents; the trial judge erroneously stated in her Reasons for Judgment that Ms. Ajao had indicated that she did not rip them up before putting them in the garbage can.

[19] There was no direct evidence that Ms. Ajao was seen tearing up corporate documents during the meeting. It therefore appears that the trial judge made an inference based on the photographic evidence that, during the meeting with Ms. Donnelly and Ms. Bell, Ms. Ajao tore up the corporate documents that were in the garbage can and on the floor of Ms. Ajao's office as the trial judge found were shown in the photographs.

[20] As already noted, Ms. Donnelly and Ms. Bell did not at the relevant time examine the documents on the floor or in the garbage can of the office. When asked at trial to identify the documents photographed in Exhibit 1F, Ms. Donnelly could not identify any of them, as she said it was "very difficult to recognize anything". She did not know how the documents photographed in Exhibit 1G ended up on the ground. When Exhibit 1I was put to her, Ms. Donnelly said that she could not specifically recognize any of the documents in the photograph, because it was "hard" for her to recognize them, except she could see the words, "Nursing Home" and "Fairview", on a document that appeared to be torn into two parts, but she could not identify what type of document it was, other than that it had the letterhead of and therefore, she concluded, was the property of the nursing home.

[21] Given the lack of direct evidence of the nature of the documents that Ms. Ajao was actually tearing up during the meeting, other than Ms. Ajao's testimony that the trial judge rejected, the trial judge's inference appears to have been heavily weighted on her observations of the documents in the photographs and, in particular, Exhibit 1I. The most significant evidence of torn corporate documentation was that of the ripped accreditation documentation that the trial judge said she observed after having used "almost a magnifying glass".

[22] While I agree with the Crown's position that it would not ordinarily have been necessary for the trial judge to call for further submissions on a physical aspect of an exhibit that was plainly available to be seen by all and that had been put to the witnesses, the portion of the Exhibit 1I scrutinized by the trial judge with stronger reading glasses was not plainly visible and had not been put to the witnesses at trial. On the contrary, that portion of the photograph was miniscule, illegible and required the trial judge to use "almost a magnifying glass" to read it.

³ June 3, 2010 Trial Transcript, at p. 105

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[23] With such a small area, there is potentially a large margin for error with respect to what can be accurately observed, especially as the trial judge was not viewing the document itself but a small photograph of the document that was not the actual size of the document. In looking at Exhibit 11, I was unable to see what the trial judge observed concerning the accreditation documentation; it was therefore not possible for me to confirm that the trial judge's findings on that aspect of the evidence were correct.

[24] There is no dispute that the trial judge was entitled to view the photographs privately in chambers while considering her Judgment, just as juries examine exhibits in their jury room during their deliberations. The trial unfairness arose because the trial judge made new observations that appear to have been crucial to her Judgment, which did not come up in the course of the trial, and to which she did not give the parties an opportunity to respond.

[25] In proceeding in the manner that she did, the trial judge denied the appellant the opportunity to respond to and test her findings that documents in the garbage can were accreditation documents, that is, important corporate documents, which appear to have materially contributed to her rejection of the appellant's evidence and credibility, and ultimately led to the trial judge's rejection of the defence that the appellant tore up only personal documents and not documents belonging to the nursing home, and to her conclusion that the Crown had proven the mischief charge beyond a reasonable doubt.

[26] In the interest of fairness, the trial judge's conclusions reached by using "almost a magnifying glass" to view the documentation in Exhibit 11 should have been put to the appellant. This was not done. Accordingly, those conclusions should not have been used against the appellant. The appellant suffered prejudice in the conduct of her defence. There has been a denial of natural justice to the appellant which amounts to a reversible error in principle.⁴

[27] Having determined that the appellant's appeal should be allowed on the above ground of the denial of natural justice, it is not necessary for me to consider the other grounds of appeal set out in the appellant's Notice of Appeal.

Conclusion:

[28] For the reasons stated, I allow the appellant's appeal and order that there be a new trial on the mischief count.


L.B. ROBERTS, J.

Released: August 19, 2011

⁴ *R. v. Turpin, supra*, at para. 45

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ONTARIO
SUPERIOR COURT OF JUSTICE
HER MAJESTY THE QUEEN

- and -

HELEN AJAO

REASONS FOR JUDGMENT

L.B. Roberts J.

Released: August 19, 2011