NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Martin*, 2007 NSCA 121

Date: 20071211
Docket: CAC 280396
Registry: Halifax

Between:

Dean Victor Martin

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	November 29, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	Luke A. Craggs, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Justice John D. Murphy of the Supreme Court of Nova Scotia found the appellant guilty of armed robbery, kidnapping, and possession of a weapon for a dangerous purpose contrary to ss. 344, 279(1.1)(b) and 88 respectively of the *Criminal Code*. The testimony he heard included eyewitness identification evidence. He also watched a security video and an audio-visual recording of a police interview of the appellant, and certain items of clothing were exhibits at trial. Pursuant to s. 675(1)(a) of the *Code*, the appellant appeals from these convictions. For the reasons which follow, I would dismiss his appeal.

[2] The sole issue at trial was identification. On appeal, the sole issue concerned the reasonableness of the judge's finding that the appellant was the person who committed the offences. The appellant submits that the verdicts were unreasonable within the meaning of s. 686(1)(a)(i) of the *Code.*

[3] The standard of review on an unreasonable verdict appeal was considered in *R. v. D.C.S.,* [2000] N.S.J. No. 144 wherein Roscoe, J.A. reviewed jurisprudence including *Yebes v. R.* (1987), 36 C.C.C. (3d) 417 (S.C.C.), *R. v. Biniaris* (2000), 143 C.C.C., (3d) 1 (S.C.C.) and other authorities. She summarized at ¶ 24:

> In the context of this case then, this court should first engage in a thorough re-examination of the weight of evidence, and then with deference to the trial judge's finding of credibility, scrutinize the reasons provided for defects in analysis, errors of legal principle, or logical inconsistencies.

[4] In *Abourached v. R*, 2007 NSCA 109, this Court noted that in *R. v. Beaudry*, [2007] 1 S.C.R. 190 Justice Charron, in speaking for the majority in the result, reiterated the test for an unreasonable verdict from the *Yebes* and *Biniaris* decisions, namely whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. However, Justice Fish (dissenting in the result) spoke for the majority in his formulation of the process inquiry to determine whether the decision of a judge alone is unreasonable under s. 686(1)(a)(i) of the *Code*.

[5] At ¶ 98 of *Beaudry*, Justice Fish stated that:

> . . . But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(a)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.

In determining this appeal, I will consider this test as well as the traditional *Yebes/Biniaris* test.

[6] At approximately 10:30 p.m. on January 19, 2007, Paul Verge was robbed at a bus stop. The man who held him up at knife-point asked for his wallet which contained $240 and told him to follow him. The robber also took his cell phone. The victim spent the next several hours walking around the north end of Halifax with the robber, frightened of being stabbed and hoping to retrieve his cell phone which he needed to keep in touch with his baby's mother and for work. During that night a person shouted out "Dean" and the robber answered back.

[7] Around 4 a.m. the following morning, the pair went to the convenience store at the Robie Street Irving. On the way, the robber returned the cell phone. There, the robber asked Mr. Verge to get money out of the bank machine. He was unable to do so. The robber then went to the counter to buy cigarettes, but Mr. Verge's debit card was declined. When the robber walked out of the gas station, the doors automatically closed behind him. Mr. Verge asked that they be locked and disclosed his situation. The police were called. The appellant was arrested approximately six hours later. When arrested, he had on a black puffy coat, a yellow hooded sweatshirt, grey jogging pants, and black running shoes. The police seized his clothing. No knife or any money was recovered from him.

[8] At trial, Mr. Verge and two convenience store employees, Ian Hardie who had been working behind the counter, and Carl Lawrence, the baker who had arrived to start his shift, gave eyewitness testimony as to the physical characteristics of and the clothing worn by the robber. Each of them described a black man wearing a hooded jacket or sweatshirt, which Messrs. Verge and Hardie said was yellow. The robber had kept his head, but not his face, covered with the hood when with the victim and when at the gas station. Mr. Verge also testified that the robber was wearing a black jacket with a hood, grey jogging pants, and white sneakers. On the security video the robber is wearing a black puffy jacket, grey sweat pants and black sneakers. The victim also testified that the robber had gaps between his teeth, but acknowledged in court that the appellant had none.

[9] After speaking with the eyewitnesses at the convenience store, the police took Mr. Verge to police headquarters where an officer prepared photographic lineup. Mr. Verge was presented with a series of photographs, each on a separate piece of paper and without any identifying particulars. When he got to the sixth of twelve pictures, the victim indicated that he was positive that it was of the robber. He testified that he was and remained 100 percent sure. That photograph was of the appellant. Mr. Verge did not look at the remaining photographs, and he testified that at some point he had seen two composite sheets which contained all twelve photographs with the name of the individual shown below. Mr. Hardie was not shown a photographic lineup. However, when the police came back to the convenience store and were reviewing different pictures of possible suspects, he looked over their shoulders and immediately identified one as that of the robber. That photograph was of the appellant. All three eyewitnesses identified the appellant as the robber in court.

[10] In his decision, the trial judge was aware of dangers of eyewitness testimony and cautioned himself regarding its use. He stated:

> The outcome of the case depends on eyewitness identification. As the parties have pointed out in their submissions, the Court must be very cautious when considering eyewitness identification evidence. The potential for error is significant, and the Court must be cognizant of that. I must look at the evidence as a whole, but I must also be acutely aware of discrepancies and inconsistencies in the testimony of any particular witness. It is trite to say, but I repeat again that with respect to the identification evidence, the burden is the same; the Crown must establish beyond reasonable doubt the identity of the accused.

He also observed that the correctness of the identification evidence, rather than credibility, was what was in issue:

> All of the identification witnesses were subject to cross-examination. They were vigorously cross-examined. In my view, I do not find that those witnesses were anything less than truthful; so the issue does not go to the credibility of the three eyewitnesses, rather it goes to whether their recollection and their impression is accurate. So the question really is whether their identification is correct; not whether they were being truthful in giving their evidence.

[11] The judge carefully considered the evidence before him. In his decision, he identified aspects of the evidence regarding the physical characteristics and clothing worn by the robber and of the photographic line-up which gave him concern, and considered the circumstances under which each eyewitness saw the robber which formed the basis of the identification evidence. He addressed the discrepancies in the evidence which were raised on this appeal. Having considered all the evidence, the judge was satisfied that the Crown had established beyond a reasonable doubt that the appellant was the robber, the person who had confined Mr. Verge, and had been in possession of a knife.

[12] The appellant argues that the trial judge considered the presence of three eyewitnesses compelling. He says that the judge ultimately relied upon the sheer number of eyewitnesses to convict him and points out that in the course of his reasons, the judge stated:

> . . . I am aware of the difficulties associated with eyewitness identification, but I note in this case that we do have, not just one eyewitness here, but we have three eyewitnesses who are essentially consistent in their description and their evidence. No major inconsistencies between the three witnesses; and the testimony of the witnesses was generally confirmed by the police officers. I am not saying with respect to the truth of what they said, but the police confirmed, for example, the prompt identifications from the pictures by both Mr. Hardie and Mr. Verge and their description of their reactions to the pictures was confirmed by the evidence of the police. (Emphasis added)

[13] In *R. v. Zurowski*, [2003] A.J. No. 1342 (C.A.), the majority of the Alberta Court of Appeal upheld the finding of the trial judge that Mr. Zurowski was the driver of a car which had caused a serious injury. The driver had left the scene after an emergency medical services (EMS) vehicle had arrived but before the police had arrived. The issue at the trial, held 16 months later, was the identity of the driver of the offending vehicle. A witness to the accident and the captain of the EMS response team could not identify Mr. Zurowski as the driver. Four other witnesses, including two EMS attendants, made a positive identification.

[14] In his dissent, Berger, J.A. at ¶ 46 observed:

> 46 "Close appellate scrutiny" is required where a conviction is based solely upon honest but potentially mistaken eyewitness evidence: *R. v. Dorsey* (2003), 173 C.C.C. (3d) 443 at 445 (Ont. C.A.). See also *R. v. Miaponoose* (1996), 110

> C.C.C. (3d) 445 (Ont. C.A.). This is because, of all types of evidence, eyewitness identification is most likely to result in a wrongful conviction, even in cases where multiple witnesses have identified the accused. As the Court remarked in *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 at 383 (Ont. C.A.) "The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law."

He reviewed the taints to the evidence of the witnesses who identified Mr. Zurowski as the driver, including the police failure to obtain, as soon as possible, the fullest description of the person observed, their failure to conduct any live or proper photographic line-up and their having shown a single photograph to one Crown witness; two Crown witnesses having viewed a photograph of the accused in a newspaper account of the incident; dock identifications only of the appellant in shackles and remand clothing 16 months after the incident; and generic descriptions by all these witnesses.

[15] In his reasons, the trial judge had noted these difficulties but found that the evidence of four witnesses satisfied him as to identity. Berger, J.A. was of the view (¶ 68) that the trial judge failed to appreciate “the tenuous nature” of the identification evidence and had erred in law “by equating the sheer number of the identification witnesses with quality, reliability and accuracy of their testimony.”

[16] In *R. v. Zurowski*, [2004] S.C.J. No. 68, the Supreme Court of Canada gave an oral decision allowing the appeal from the majority decision of the Alberta Court of Appeal. It stated:

> We are all of the view that given the frailties of the identification evidence in this case, the appeal must be allowed and acquittals are entered.

[17] In *R. v. Hill*, [2005] N.S.J. No. 301 (C.A.), the issue in the appeal was identification although it did not involve eyewitness identification. At ¶ 34, Hamilton, J.A. for the court reiterated that a conviction based on eyewitness identification required close appellate scrutiny.

[18] Having given the decision under appeal close appellate scrutiny required, I am not persuaded that in this case the trial judge erred in law by ultimately relying on the sheer number of eyewitnesses to convict the appellant. Unlike the situation in *Zurowski*, all of the eyewitnesses who testified before him identified the appellant as the offender and their descriptions were consistent to a great extent.

The police obtained descriptions and conducted a photographic line-up, presenting more than one photograph only, shortly after the incident. Both Mr. Verge at that line-up, and Mr. Hardie, in an impromptu situation also shortly after the incident, selected photographs of the appellant as the robber. The eyewitness identification evidence here was not limited to dock identification which in *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 at p. 147 (S.C.C.) was described as having an "almost total absence of value as reliable positive identification." Moreover, the evidence established that the clothing the appellant was wearing when arrested, with the exception of the colour of the sneakers, matched that worn by the robber as described by the victim. Finally, the judge did not sweep aside inconsistencies and imperfections in the evidence as did the judge in *Zurowski*, but considered and weighed them in assessing the evidence and determining whether he was satisfied beyond a reasonable doubt.

[19] The sole ground of appeal is that the verdicts were unreasonable within the meaning of s. 686(1)(a)(i) of the *Code*. In accordance with the *Yebes/Biniaris* approach on an unreasonable verdict appeal, and where credibility was not an issue, I have re-examined the weight of the evidence and have scrutinized the reasons provided in the decision of the trial judge for defects in analysis, errors of legal principle, or logical inconsistencies. The convictions are verdicts that a properly instructed jury, acting judicially, could reasonably have rendered. Nor, under Justice Fish's test in *Beaudry*, are they demonstrably incompatible with evidence that is "neither contradicted by other evidence nor rejected by the trial judge." I am not persuaded that the judge's finding that the appellant was the person who committed the offences was unreasonable, and would dismiss the appeal.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.