C.A.C. No. 127897

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Gogan, 1996 NSCA 260

Hallett, Jones and Roscoe, JJ.A.

BETWEEN:

ROBERT ALLISON GEORGE GOGAN Appellant	Appellant in person
- and -	
HER MAJESTY THE QUEEN Respondent	William D. Delaney for the Respondent
	Appeal Heard: December 12, 1996
	Judgment Delivered: December 19, 1996

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Jones and Roscoe, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from the appellant's conviction for the offence of theft over $5,000. He had been charged with robbery. There are two grounds of appeal:

(i) That the verdict is unreasonable and unsupported by the evidence; and

(ii) That on the facts of this case, violence was a necessary element of the theft offence and that there could not be an included offence of theft in this case.

Facts

On December 31st, 1995, about 3:30 p.m., an employee of the Nova Scotia Liquor Commission, while crossing a parking lot at a shopping centre in Springhill, Nova Scotia, for the purpose of making a deposit of over $5,000 to the Canadian Imperial Bank of Commerce was confronted by a person he could not identify. The employee saw that the person had a tubular object up his sleeve. The confrontation was such that the employee, fearing for his safety, threw the deposit bag containing the money at the person and ran. The employee saw the person pick up the bag and leave. The empty bag was found several hours later on a woods road at Sunnyside, not far from the Town of Springhill.

A forensic expert gave evidence that a thumb print found inside the bag was that of the appellant. The expert witness was subject to vigorous cross-examination; no expert evidence was called by the defence.

Following his arrest, about one month after the crime, the appellant gave a statement to the police denying any involvement. In that statement he said he had been at his sister's house in Oxford on December 31st and had left in the afternoon to visit his ex-girlfriend, returning later that afternoon to Oxford. His ex-girlfriend

testified that he did not visit her that afternoon.

When confronted by the police the day he was arrested, to explain how his thumb print could have been found inside the deposit bag he stated:

> "I'll tell you how my fingerprint got inside the money bag ... a person whom I do not know called me, offered me a sum of money to move a red vehicle ... I moved that vehicle to where I don't want to say, when I got in the vehicle the money bag was laying on the back seat. I picked it up and put it back on the seat." A police officer asked the Appellant, "who was the person and where did you take the vehicle" The Appellant replied, "I got nothing more to say.""

The appellant's sister testified that a call from her house which was shown on the telephone bill to have been made at 3:32 p.m. on December 31st to the appellant's girlfriend Donna Spence in Truro must have been made by the appellant as he would be the only one who would be calling Ms. Spence.

Donna Spence, who subsequently married the appellant but had separated from him prior to the trial date, testified that she received a 3:32 p.m. call from the appellant.

First Ground of Appeal - That the verdict cannot be supported by the evidence

In **R. v. Burns** (1994), 89 C.C.C. (3d) 193 (S.C.C.), McLachlin, J., writing for the Court on the scope of appellate review pursuant to s. 686(1)(a)(i) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, stated at p. 198-199:

> "In proceeding under s. 686(1)(a)(i), the Court of Appeal is entitled to review the evidence, re-examining it and reweighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes** (1987), 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424, [1987] 2

> S.C.R. 168; **R. v. W.(R.)** (1992), 74 C.C.C. (3d) 134, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257. Provided this threshold test is met, the Court of Appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial."

In **R. v. W.(R.)** (1992), 74 C.C.C. (3d) 134 (S.C.C.) the Supreme Court of Canada cautioned appellate courts with respect to showing deference to findings of credibility made at trial. She stated at p. 142:

> "This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses."

I am satisfied from a review of the evidence that the jury could reasonably have reached the conclusion that the appellant was guilty of theft. The most damning evidence against the appellant was the presence of his thumb print inside the empty deposit bag. The jury apparently rejected his explanation of how the print got there. The jury apparently rejected his evidence of having visited his ex-girlfriend in Amherst on the afternoon of December 31st and accepted his ex-girlfriend's evidence that he did not visit her that afternoon. The jury apparently rejected the evidence of the appellant's sister that he made a call from her Oxford home at 3:32 on the afternoon of December 31st.

The appellant did not testify at trial.

In **Corbett v. The Queen** (1973), 14 C.C.C. (2d) 385 (S.C.C.) it was held that the failure of an accused to testify at trial may be a factor to be considered on the issue of the reasonableness of the trial verdict.

In the absence of any compelling reason for this Court to interfere with the findings of credibility implied in the jury verdict, we should not substitute our opinion

on the evidence for that of the jury.

Second Ground of Appeal

In my opinion the offence of theft on the facts of this case was an included offence. The jury were apparently not satisfied beyond a reasonable doubt that the person who confronted the Liquor Commission employee had threatened violence. The evidence would support such a conclusion. The evidence also clearly supports a finding that the person who took the money, which was the property of the Liquor Commission, did not have a right to take it and had the intent to deprive the Liquor Commission of the money. Proof of violence was not an essential element of the offence of the theft.

In summary, having reviewed, re-examined and re-weighed the evidence, I am satisfied the appellant's conviction for theft was reasonable and supported by the evidence. Secondly, the offence of theft was an included offence on the facts of this case.

I would dismiss the appeal.

Hallett, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.

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Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.