NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. R.S.*, 2014 NSCA 105

Date: 20141125
Docket: CAC 426547
Registry: Halifax

Between:

R.S.

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on Publication: pursuant to ss. 110(1) and 111(1) of the Youth Criminal Justice Act

Judges:	MacDonald, C.J.N.S.; Beveridge and Scanlan, JJ.A.
Appeal Heard:	October 8, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Scanlan, J.A.; MacDonald C.J.N.S. and Beveridge, JJ.A. concurring
Counsel:	Roger A. Burrill, for the appellant Jennifer A.MacLellan, for the respondent

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of offender not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) – Identity of victim or witness not to be published – Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

[1] R.S. is a young person who was convicted of offences that were found to have occurred on August 27th, 2013, in Halifax, Nova Scotia. The primary offences were: robbery and possession of a weapon (a knife) for a purpose dangerous to the public peace, Sections 344 and 88(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Secondary offences were breaches of probation, Section 137 of the **Youth Criminal Justice Act**, R.S.C. 1985, c. Y-1. For the reasons set out below I would dismiss the appeal from conviction.

Appellant's position

[2] The appellant submits on appeal that the trial judge made mistakes in a number of findings of fact. He argued that the evidence does not support the facts as determined by the trial judge. R.S. argues that these misapprehended facts influenced the trial judge's findings of guilt.

Respondent's position

The respondent argues that there is no misapprehension by the trial judge of the evidence. There is, it argues, evidence to support the trial judge's finding on all material issues.

Analysis

Standard of review:

[3] As noted above, the appellant suggests the trial judge misapprehended the evidence and that these findings influenced the trial judge's finding of guilt. In **R. v. Morrissey**, [1995] O.J. No. 639 (C.A.) , Doherty J.A. said:

> 88 In my opinion, on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict (s.686(1)(a)(i)). If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of the evidence occasioned a miscarriage of justice (s.686(1)(a)(iii). If the appellant is able to show that the

> error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases , a new trial ordered. Finally, if the appellant cannot show that the verdict was unreasonable or that he error produced a miscarriage of justice, the court must consider the vexing question of whether the misapprehension of the evidence amounted to an error in law (s.686(1) (a) (ii)). If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s.686(1)(b)(iii)).
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> …
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> 93 When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

[4] I adopt the analytical approach as set out in **Morrissey**. This approach was recently affirmed in **R. v. J.P.**, 2014 NSCA 29 wherein Beveridge, J.A. noted:

> [98] … To quash a conviction based on a miscarriage of justice due to misapprehension of evidence, the misapprehension must have played an essential part in the reasoning process that led to conviction. …

[5] I am satisfied that the trial judge did not misapprehend the evidence and the conviction is reasonable in that the evidence was sufficient to support the facts as found by the trial judge. Those facts were sufficient to establish a circumstantial case upon which the trial judge could reasonably be satisfied beyond a reasonable doubt that the appellant was guilty of the charges upon which the trial judge convicted. I am not satisfied that the trial judge misapprehended the evidence in any material way. There was no miscarriage of justice or resulting error of law. I review below the evidence which supports the trial judge's findings and conclusions.

The Evidence:

[6] On August 27th, 2013 Pria Jafarpur had finished his work shift at 11:30 P.M. and he proceeded to a bus stop. While waiting at the bus stop he was approached by two individuals. One of them said "Give me all you have" as he held a knife. The second person was immediately behind Mr. Jafarpur. As Mr. Jafarpur moved he fell to the ground and his wallet fell from his back pocket. It was picked up by one of the two individuals. Both then left the area.

[7] Mr. Jafarpur immediately went to a local restaurant and called the police. Although the officer who met Mr. Jafarpur described him as "really shaken up", Mr. Jafarpur was able to relay details of the incident, including a description of the two persons he said had robbed him. That information was broadcast to police and a search of the area commenced. Constable Egist Mandru received the broadcast description. He said that as a result of the broadcast he was looking for 2 young males, age 16 to 17, dressed in dark hoodies. One was wearing shorts. There was also a description of some kind of white lettering on one of the hoodies. The Constable testified that the two males he apprehended matched the description that was given that: "…I seen on my screen". He estimated the persons apprehended were located approximately two kilometers from the robbery.

[8] Constable Mandru also noted that one individual had a black hoodie with red stripes and a red crest and numbers written on it. The officer could smell alcohol from the breath of that individual who was R.S. The second male, Constable Mandru said had jeans, white sneakers and a black hoodie with white letters.

[9] In his evidence Mr. Jafarpur described the individual with the knife as having dark lettering on his hoodie. He said of that individual, that he " definitely didn't look sober". At trial Mr. Jafarpur indicated that the individuals who robbed him were both white males. One had a hoodie with white lettering on it, the other a hoodie with red stripes and long shorts. A question from defence counsel at trial suggested that both suspects as identified by Mr. Jafarpur were wearing shorts and dark hoodies. It was not clear as to whether the witness agreed with that suggestion as he answered "Right. And kind of the same description that I gave on the hoodies."

[10] Mr. Jafarpur said he had a better look at the face of the one with the knife; the one wearing the hoodie with the red stripes. He did not really see the face of the other individual who was behind him but he described them as two white males. The appellant suggests in his submissions that he is of aboriginal descent and therefore questions Mr. Jafarpur's identification of R.S. as a white male. The trial judge had an opportunity to observe R.S. during the trial. He said he could appreciate how it was that Mr. Jafarpur would have described R.S. as a white male. In his evidence on direct the witness referred to the appellant as "…definitely not dark colour hair because I could see their eyebrows and everything." In cross-examination he said of the appellant that he had "…light kind of hair". The trial judge noted that: "… to Mr. Jafarpur his (the appellant) hair might actually appear to be light as opposed to dark." This Court is not able to discern from the record what the appellant looked like on the night of the incident nor at the time of trial. The trial judge's comment does not suggest that he misapprehended the evidence on that issue.

[11] Mr. Jafarpur described the weapon used as a knife with a silver blade, about 8 inches long and a black handle. He said it was straight edged, like the ones you use for cutting fruit and stuff. A knife was located on the ground in the area near where the officers had first observed R.S. and the co-accused. The knife was as Mr. Jafarpur had described it, except for the fact that other witnesses referred to it as being serrated.

[12] That knife was entered as an exhibit. It is as described by Mr. Jafarpur except that it is clearly serrated on one side, but almost without serration when viewed from the other side. The reference to it being of the type that would be used as a kitchen knife or to cut fruit or even as a steak knife all appear to be apt.

[13] The original dispatch to the restaurant was at 19 minutes after midnight. Sometime prior to 1:00 A.M. the appellant and a second person were apprehended by police within a ten or fifteen minute walk from the bus stop area where the robbery occurred. The clothing they were wearing matched the description of the clothing the apprehending officer said had been broadcast to police in the area. Mr. Jafarpur was still with the police officer when she was diverted to the area where R.S. and a second individual had been apprehended. He said the two individuals that were apprehended were definitely the ones who had robbed him at the bus station. The trial judge appropriately discounted this identification as being of little value in the circumstances, given that Mr. Jafarpur was driven to the site of

the arrest and the accused persons were already in police custody. The trial judge compared this to "in dock identification".

[14] The trial judge suggested there was more significant information that was relevant to the issue of identification. He referenced the clothing, specifically the hoodie with the red stripes as worn by R.S. at the time of his arrest. The trial judge said the red stripes could have been on the hoodie or the shorts. The record reveals that Constable Garland Carmichael testified that R.S. also had knee-length grey shorts on at the time of his arrest and that he showed signs of impairment. The trial judge noted that the clothing of R.S. matched what Mr. Jafarpur had described.

[15] The trial judge did not question the credibility of Mr. Jafarpur. The proximity to the scene of the crime was taken into account as was the fact the knife was found near where R.S. was first observed. The trial judge referred to the knife blade noting that "the serration of the blade is apparent only on a closer inspection of it."

[16] The trial judge's analysis was set out as follows:

> The question is, is it a reasonable inference that can be made, any reasonable inference other than guilt? In other words, what are the chances here that this is all just a misunderstanding, that this is just some fluke?
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> R.S. and Mr. [D.] would have to have been in the general area on a quiet night with not a lot of foot traffic or other traffic around, wearing clothing that match the description given by Mr. Jafarpur of the robbers, and a knife matching the description of the one used that just happened to have been found near the place where they were apprehended by the police.
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> And one of the young men would have to have been drunk or under the influence. And the young man who was under the influence would have to have been the one wearing the shorts and the hoodie with the red stripes. And there would have to have been two of them, and they would both have to been young men.

[17] The trial judge reasoned that:

> So finding two young men is not unusual. Finding two young men, one with hoodie… both wearing hoodies, one with shorts, one with long pants, is not unusual. Finding two young men where one of them's drunk is not unusual. Finding a knife is not unusual. But altogether, they create a compelling circumstantial case.

[18] The trial judge noted:

> He (Mr. Jafarpur) was not asked whether the hoodie admitted in evidence was the one that his assailant was wearing. He described the hoodie with a black (sic) stripe. He identified R.S. at the scene based on to some extent the fact that he was wearing that hoodie.
>
> He described R.S. as white. Again, Mr. Jafarpur would have no way of knowing that he was aboriginal. And to Mr. Jafarpur his hair might actually appear to be light as opposed to dark. His description of the person is two inches off.
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> Once again, what are the reasonable inferences that can be made here, and what are the inferences that cannot be made reasonably? In my view, it is not reasonable to infer that R.S. was found intoxicated with another young man, both wearing clothes described be Mr. Jafarpur as the clothing worn by his assailants in the general vicinity of the robbery with a knife found nearby, and that knife matches generally the description of the one that was used in the robbery – all of that was not simply coincidence.
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> The amount and the weight of the circumstantial evidence here is sufficient in my view to prove guilt beyond a reasonable doubt, and that finding will be made…

[19] The appellant argues that the evidence of the complainant at trial does not refer to one of the individuals wearing long pants. The trial judge did however hear the evidence of the complainant who said of the two individuals arrested:

> So I could see their clothing and I could see, like, two individuals getting arrested, and they were the exact same kind of clothing I saw.

[20] As noted above, the trial judge referred to one of the persons apprehended as wearing long pants. The trial judge had heard the evidence of Constable Mandru. He testified that he was looking for two suspects, young males 16 to 17 years old, dressed in dark. "One had shorts." There was also a reference to white lettering on one of the hoodies. He said the persons arrested *"…matched the description that was given that I seen (sic) on my screen, on the computer screen, given by the victim."*

[21] Constable Jennifer Turner LeBlanc testified that she obtained a description of the offenders from Mr. Jafarpur shortly after she arrived at the area from which he had first reported the incident to authorities and she *"…dispatched that over the air"*.

[22] There was certainly evidence before the trial judge to conclude that the description the victim gave to the police included, at least once, a reference to one of the offenders as wearing shorts and one with long pants or blue jeans. The notes of the officers as reviewed in court suggest that one of the persons arrested had shorts, one had blue jeans. Mr. Jafarpur also said:

> Definitely their clothing. Like, it was like a hundred percent what I said as a description that I gave the cops. Also the heights and their age and everything kind of was exactly the same.

[23] The trial judge was entitled to rely on that evidence as part of his determination as to what the appellant and the co-accused were wearing at the time of the offences and their apprehension.

[24] I am not satisfied the trial judge misapprehended the evidence as to what the appellant was wearing, nor that the trial judge misapprehended the evidence as to the description or type of knife used and found near where the appellant was first observed by the police. There is no requirement that the trial judge address every inconsistency in the evidence or provide a detailed account of the conflicting evidence (**R. v. J.A.H.**, 2012 NSCA 121).

Disposition

[25] The amount and weight of the circumstantial evidence supports the trial judge's finding of guilty beyond a reasonable doubt. I would dismiss the appeal.

Scanlan, J.A.

Concurred in:

MacDonald, C.J.N.S.
Beveridge, J.A.