PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Arsenault*, 2020 NSPC 49

Date: 20201125
Docket: 8365889
Registry: Truro

Between:

Her Majesty The Queen

v.

Mitchell Arsenault

Judge:	The Honourable Judge Alain Bégin,
Heard:	November 25, 2020, in Truro, Nova Scotia
Charge:	335(1) *Criminal Code of Canada*
Counsel:	Thomas Kayter, for the Crown Attorney Billy Sparks, for the Defendant

By the Court:

[1] This is a criminal trial. The Crown has the onus of establishing beyond a reasonable doubt that Mitchell Arsenault took the motor vehicle of Zoey Francis without her consent contrary to section 335(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. The onus of proof never switches from the Crown to the accused. There was an indication in the endorsements that the Crown proceeded by indictment, but this is strictly a summary conviction offense.

[2] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr,*** [2000] 2 SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[3] The Supreme Court of Canada in ***R. v. Lifchus,*** [1997] 3 SCR 320, noted at paragraph 39:

> 39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[4] It is settled law that an accused person bears no burden to explain why their accuser made the allegations against them. Reasonable doubt is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[5] In ***R. v. W.(D.),*** **[1991] 1 S.C.R. 742,** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[6] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offence beyond a reasonable doubt. I may only convict the accused of offences proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[7] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[8] A criminal trial is **not** a credibility contest.

[9] On the issue of credibility I am guided by the case of ***Faryna v. Chorny,*** [1952] 2 DLR 34, where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities <u>which a practical and informed person would readily recognize as reasonable in that place and in those conditions.</u>**

[10] Or as stated by our Court of Appeal in ***R. v. D.D.S.,*** [2006] NSJ No 103, (NSCA**), "Experience tells us that one of the best tools to determine credibility and reliability is <u>the painstaking, careful and repeated testing of the evidence to see how it stacks up</u>. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?"**

[11] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness's demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[12] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[13] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[14] The Ontario Court of Appeal in ***R. v. G(M),*** [1994] 73 OAC 356, stated at paragraph 27:

> Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. **But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**"
>
> And at paragraph 28, "…it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…

[15] A trier of fact is entitled to believe all, some, or none of a witness's testimony. I am entitled to accept parts of a witness's evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[16] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness's evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness's testimony while rejecting the rest of it.

[17] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown,*** [1994] NSJ 269 (NSCA), confirmed at paragraph 17 that:

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[18] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.),* (1991), 68 C.C.C. (3d) 18,** which stated:

> I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a Complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe…

[19] In the case of ***R. v. Mah,*** 2002 NSCA 99, the Court stated:

> The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt**…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[20] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offences beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

The s. 335(1) – Taking without Consent charge

[21] The external circumstances of the "taking" offence involves the taking of a motor vehicle and the absence of consent from the owner. The taking must be intentional. The mental element also requires proof of any ulterior motive specified in s. 335(1). The crux of the mental element is the accused's knowledge that the motor vehicle was taken without the owner's consent. An honest belief that the owner consented to the taking would afford a defence.

My Analysis of the Evidence

[22] I have reviewed all of the evidence that was presented at the trial, along with all of the exhibits. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts.

Zoey Francis

[23] Zoey Francis, who is 22 years of age, testified as follows regarding the events of June 19, 2019:

- The accused, who she had known for 5 years, needed a drive as he was looking to purchase a car
- They were also accompanied by Brandon Ross
- Zoey needed to get her hair cut at the Truro Mall, so she drove her vehicle to the mall and she left the accused and Mr. Ross in her vehicle while she went to get her hair cut
- It was a warm day so she left her keys in the car so that the accused and Mr. Ross could use the air conditioning
- She also left the accused her phone so that he could use it to search for cars while she was getting her hair cut
- She had parked her car in the parking lot
- When she left the accused and Mr. Ross, they were both sober, normal, and had not consumed drugs or alcohol
- Zoey's expectation was that her car would be where she left it after she finished her hair cut
- It took about one hour for Zoey to get her hair cut, about the length of time that she had anticipated, and she then goes outside to go to her car to discover that her car was not where she had left it with the accused and Mr. Ross
- She initially thought that perhaps they had moved her car to another part of the parking lot
- Zoey goes back inside the Truro Mall to find a payphone and called her phone, which she had left with the accused, to find out where her car was
- There was no answer on her phone, so she takes a taxi to the accused's house in Valley to see if her car was there
- Her car is not at the accused's house, so she then takes the taxi to her house
- Zoey tracks the location of her phone, and presumably her car, on her father's tablet via Snapchat and she learns that her car was in Brookfield

- Zoey gets her friend Austin to take her to Brookfield, but by the time she gets to Brookfield, she now tracks her car to Middle Stewiacke
- When she gets to Stewiacke she finds her car, severely damaged, sitting on the back of a tow truck. There are police on scene
- Zoey's car was a 2012 Toyota Corolla with $8,000 in damage. She ends up selling her car for scrap/parts.
- Zoey did not consent to the accused taking her motor vehicle, and she also stated that there would have been no implied consent for the accused to take her car
- She also did not consent to her car being damaged by the accused

[24] In cross-examination, Zoey Francis testified that:

- She did not immediately report her car stolen as she initially tried to track where it was, and she took the time to find it
- She did not speak to the police on scene in Stewiacke, and she only reported her car stolen after she had spoken with her parents. She had not immediately reported it stolen at the mall as she wanted to find the accused and her car.
- She had left her phone in her car with the accused so that he could look for cars
- She was adamant that the accused had never driven her car before, and she stated that she would be surprised to hear that the accused would claim to have driven her car before
- She disagreed with the suggestion that the accused drove her car to the mall
- She expected the accused to be in the mall parking lot with her car when she was finished her hair cut
- She gave the accused the keys to operate the vehicle, but not to drive it away

[25] On re-direct examination Zoey testified that she would not have reported her car stolen if she would have found it undamaged.

Constable Nathan Forrest

[26] Constable Forrest testified regarding being at the scene of the accident. He was unable to state who was driving the vehicle when it went into the ditch. Constable Forrest spoke with both the accused and Mr. Ross at the scene of the accident, but neither would tell him who was driving, and both appeared to be intoxicated.

Brandon Ross

[27] Brandon Ross testified as follows:

- He has been a close friend of the accused for approximately 22 years
- Mitchell Arsenault drove Zoey's car to the mall on June 19, 2019 so that she could get her hair cut and the expectation was that she would be there for 2 or 3 hours
- They depart the mall in Zoey's car after she had gone in for her hair cut
- They first go to smoke some cannabis in Hilden with a friend, they then do some bridge-jumping, drink alcohol that they had purchased in Brookfield, and then go to Colby Graham's house in Stewiacke
- Brandon Ross claims that he was driving the car after an argument with the accused as to who was the most sober and able to drive, and that Brandon Ross put the car in a ditch, and not the accused
- Zoey Francis had left her phone with him and the accused so that she could contact them when she was finished her hair cut
- He indicated that the accused had driven Zoey's car numerous times before, and then contradicted himself by stating that the accused had driven Zoey's car "probably the one time before"

[28] On cross examination Mr. Ross testified that:

- The accused drove the car away from the mall, and it was the accused that drove the vehicle the rest of the afternoon, but not for the accident
- The accused was planning to look for a new vehicle, and Zoey knew this
- They just dropped Zoey off at the mall and drove away
- Zoey was supposed to call them when she had finished her haircut
- He and the accused never looked for a new vehicle as they went directly to Hilden, then to Brookfield, and then to Stewiacke
- Brandon Ross was supposed to help the accused look for a vehicle but then indicated "I'm not good with cars like that" when it came to him actually being able to advise the accused on purchasing a vehicle
- At one point he indicates that Zoey had given the accused consent to drive her car, but shortly thereafter he indicates that Zoey did not give the accused consent to drive her car
- He then testifies that they had parked Zoey's car halfway between the mall and the road in the parking lot. This makes no sense as he had previously indicated that the accused was driving and that they had dropped Zoey off

for her haircut. Why would they make Zoey walk halfway across the parking lot instead of dropping her off right beside the door if it was everyone's intention to drop her off and they leave with her car?

Mitchell Arsenault

[29] Mitchell Arsenault testified as follows:

- Zoey's haircut was supposed to take 2 or 3 hours
- He had told Zoey that he was going to look for cars and the plan was for Zoey to call him when she was finished
- He had Zoey's phone so that he could look for cars
- With regards to looking for cars on June 19th he stated he "had people he was messaging but the car ended up in the ditch"
- He also testified that he was heading back to the mall to get Zoey as her time at the hairdresser was up, so it is not believable that the accused had the time or intentions to go look for a car after the Stewiacke stop. Also, he had previously testified that he was supposed to wait to receive a call from Zoey when she was finished and needed a ride.
- There was an altercation between himself and Brandon Ross as to who should drive considering their levels of intoxication, and Brandon Ross ends up putting the car in the ditch
- Zoey Francis never put any limitations on his using her car except that he was supposed to go get her "when she calls me on her phone"

[30] On cross-examination Mitchell Arsenault testified that:

- On one hand he states that he was messaging people on Zoey's phone to look for cars, but on the other hand he acknowledges that he did nothing to look for a car
- He changes the time that he was in Hilden from 30 minutes to 15 minutes
- **When he was asked if he had told Zoey that he was going to Brookfield to get some alcohol he responded that "I probably did"**
- When questioned about his actions taken in Zoey's car, he stated **"She just gave me consent, what does it matter what I am going to do?"**
- He story as to the steps taken to look for a car that afternoon changed:
  "I had plans to look at a car, that was the plan originally."
  "Maybe I was on Kijiji"
  "I was on Kijiji"

- With regards to having Zoey's phone, he stated at one point "She gave me the phone to kill time" whereas he had previously stated that it was for Zoey to contact him when she was finished, or for him to look for cars. **The comment by the accused of her giving him the phone to "kill time" is a very clear indication that Zoey expected the accused to remain at the mall.**
- He also contradicts Brandon Ross when he states that with regards to Brandon Ross driving Zoey's car "I gave him permission and consent."

Zoey Francis Rebuttal

[31] On rebuttal Zoey Francis testified that:

- There was no discussion at the mall where she agreed that the accused could take her car to go look for cars stating, "I didn't tell him that or express that."
- There was no discussion of Zoey calling the accused when she was done "I told him that he could use my phone, not my car."
- She denied that she told the accused that her haircut would take 2 hours

Summary/Decision

[32] I noted at the start that I was guided by the case of ***R. v. W.D.*** I must consider whether I believe Mr. Arsenault's evidence, and if so, then he is entitled to be acquitted on the charges where I believe his denial. I do not believe the evidence of Mr. Arsenault so I must turn to the second stage of ***R. v. W.D.***

[33] Even where I do not believe Mr. Arsenault's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence. The evidence by Mr. Arsenault did not raise a reasonable doubt so I must turn to the third stage of ***R. v. W.D.***

[34] Even where I do not believe Mr. Arsenault, and Mr. Arsenault's evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offence beyond a reasonable

doubt. I may only convict Mr. Arsenault of the offences proven beyond a reasonable doubt.

[35] There is no evidence as to who drove the car into the ditch, so Mr. Arsenault is not guilty of that charge. The evidence is clear that up until the time of the accident that Mr. Arsenault was the only person driving the car, so in all likelihood it was Mr. Arsenault who drove it into the ditch as well, but there is no clear evidence on this offence.

[36] Mr. Arsenault is guilty of the s. 335(1) charge. His testimony, and that of Mr. Ross is neither believable, nor consistent. Some of the glaring issues are:

- Why would the accused and Mr. Ross have parked in the middle of the parking lot if they were dropping Zoey off for her haircut? Logically they would have dropped her off at the door.
- The story by Mr. Arsenault as to the steps taken by him to find a car greatly varied.
- Zoey Francis testified that she expected her car to be where she left it, and that is consistent with her actions that day where she left the mall to go to her car. Upon not finding her car she goes into the mall to call her phone. If Mr. Arsenault's version was true, Zoey Francis would have called Mr. Arsenault on her phone right after her haircut before ever leaving the mall.
- Mr. Arsenault's statement that Zoey Francis "gave me the phone to kill time" is a very clear indication that he was to wait in the parking lot. He would not be "killing time" on her phone if he was driving around in her car doing whatever he wanted with her car as she supposedly had not put any limits on his use of her car.
- As well, if Zoey Francis was supposed to call Mr. Arsenault after her haircut on her phone, why didn't Mr. Arsenault answer her phone as he claims was the plan? He did not answer her phone as that was never the plan.
- When Mr. Arsenault was asked if he had told Zoey Francis that he was going to Brookfield to buy alcohol he responded, "I probably did." The problem with this evidence is that it is clearly contradicted by Zoey Francis, and it also goes against Mr. Arsenault's claim that his plan was to go look for cars.

[37] As previously noted, the external circumstances of the "taking" offence involves the taking of a motor vehicle and the absence of consent from the owner.

The taking must be intentional. Mr. Arsenault intentionally took Zoey Francis' car. Zoey Francis did not consent to Mr. Arsenault taking her car.

[38] As well, the mental element requires proof of any ulterior motive specified in s. 335(1). The crux of the mental element is the accused's knowledge that the motor vehicle was taken without the owner's consent. The evidence is clear that Mr. Arsenault did not have the consent of Zoey Francis. Further, Mr. Arsenault did not have an honest belief that Zoey Francis consented to his taking her car that could afford him a defence.

[39] Mr. Arsenault is guilty of the s.335(1) charge of taking Zoey Francis' car without her consent.

Judge Alain Bégin, JPC