NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Bourassa***, 2004NSCA127

Date: 20041020
Docket: CAC 208198
Registry: Halifax

Between:

Peter Todd Bourassa

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Bateman, Saunders & Fichaud, JJ.A.

Appeal Heard: October 12, 2004, in Halifax, Nova Scotia

Held: Appeal dismissed as per reasons for judgment of Saunders, J.A., Bateman & Fichaud, JJ.A. concurring

Revised Decision: The text of the original judgement has been corrected incorporating the text of the erratum (released October 21, 2004).

Counsel: David Bright, Q.C., for the appellant
Peter P. Rosinski, for the respondent

Reasons for judgment:

[1] The appellant, Peter Todd Bourassa, was tried on a three count Indictment before Nova Scotia Supreme Court Justice Felix A. Cacchione in September, 2003. Each of the counts charged robbery contrary to s. 344 of the **Criminal Code**, the first said to have involved an employee of Scotiabank in Halifax, on January 13, 2003; the second said to have involved a different employee at Scotiabank on January 24, 2003 and the last said to have involved an employee of the Credit Union Atlantic on January 31, 2003.

[2] The first count was dismissed for want of prosecution after the Crown offered no evidence. Mr. Bourassa was acquitted on the second count and found guilty as charged on count number three. On October 2, 2003 Mr. Bourassa was sentenced to seven years imprisonment, reduced to 68 months after taking into account (on a 2 for 1 basis) the months Mr. Bourassa had spent on remand.

[3] Initially representing his own interests, Mr. Bourassa appealed his conviction, advancing what amounted to three principal arguments. First, that the trial judge erred in determining that an offence of robbery had been committed. Second, by "mixing" evidence from two separate offences in one trial. Third, in arriving at a verdict that was unreasonable, a matter which in this case turns primarily on the issue of identification. Subsequently, after engaging Mr. Bright to represent him on this appeal, counsel narrowed the grounds to a single issue framed as a question:

> Did the Honourable Justice Cacchione err in law in determining that the actions of the person who stole money from a teller at the Credit Union Atlantic on January 31, 2003 constituted the offence of robbery contrary to section 343(a) of the *Criminal Code*?

[4] Having carefully reviewed the entire record and after considering the submissions of counsel, I am of the view that there is no merit to the appeal from conviction and that it ought to be dismissed.

[5] Mr. Bourassa was charged as follows:

> . . . AND FURTHER THAT HE AT THE SAME PLACE on or about the 31st day of January, A.D. 2003 did unlawfully rob Irene Miller, an employee of Credit Union Atlantic, contrary to Section 344 of the Criminal Code.

[6] Robbery may be committed in more than one way. Section 343 of the **Criminal Code** provides:

> 343. Every one commits robbery who
>
> (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
>
> (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
>
> (c) assaults any person with intent to steal from him; or
>
> (d) steals from any person while armed with an offensive weapon or imitation thereof. R.S., c. C-34, s. 302.

[7] "Steal" is defined in s. 2 of the **Criminal Code** as: "means to commit theft." "Theft" is defined generally in s. 322. Also relevant in this case is s. 588 which concerns the ownership of property, here the financial institution's money. From these definitions and the jurisprudence which has considered them, one sees that in simplistic terms the difference between "robbery" and "theft" is that robbery is committed by confronting and intimidating the person whose property is taken, whereas theft is committed without violence or threats of violence, and often occurs secretly, such that the victim is left unaware of being relieved of their property.

[8] Mr. Bourassa's defence lawyer at trial clearly made this an issue when he asked Justice Cacchione to consider that if he were satisfied Mr. Bourassa had been sufficiently identified by the witnesses who testified, that he go on to decide "whether this is robbery or theft here," as they would be seeking an acquittal on the robbery charge. In his decision the trial judge stated:

> . . . and I am satisfied beyond a reasonable doubt, that the Credit Union on Wyse Road in Dartmouth was robbed on January 31st, 2003.
>
> . . .
>
> The sole issue before me . . . is the identity of the perpetrator.

[9] Ms. Miller was the bank teller on January 31, 2003. She said everything happened very quickly "within 30 seconds, if that." As the robber

approached her wicket, wearing a blue jacket with the hood up, he put his sunglasses on, pulled out a note and told her, not so much in words but in motion, and in a grunting fashion, that he wanted her large bills. She said he kept his right hand in his pocket at all times. Although she couldn't see it, she assumed he was holding a weapon of some sort. She froze and could not hand over the money. The robber then came across her wicket, reached into the till and grabbed packages of bills one of which included a concealed dye pack. Ms. Miller watched him leave the bank and turn left toward Faulkner Street.

[10] In cross-examination defence counsel asked:

> Q. The hand in his pocket, though, he didn't do anything with that. Is that right?
>
> A. He didn't have to.
>
> Q. No - -
>
> A. When you're being robbed and somebody has his hand in his pocket, you're not going to ask questions.
>
> Q. That's right. He didn't say anything, he didn't make any threats, he didn't do anything that would believe - - that you would believe that he had a weapon in his pocket other than his hand being in his pocket.
>
> A. No.

[11] Earlier in direct examination Ms. Miller had testified:

> Q. You said this man's hand was in his pocket. Were any gestures made?
>
> A. When I hesitated, I believe he moved his hand.
>
> Q. And what were your thoughts when you saw that?
>
> A. I didn't know if he had a gun or not. I wasn't going to take any chances. We're trained in the bank to do what they say. Give them the money and let them go.

Ms. Miller had been the victim of another robbery at a different bank less than a year before. She said:

> Q. And so what did you do after you saw the sunglasses go on?
>
> A. As soon as he put the sunglasses on, I just instinctively opened my till.
>
> Q. And why did you do that?
>
> A. I knew what he wanted. I've been robbed before and, second time around, I wasn't going to argue.
>
> Q. How - - or when were you robbed before?
>
> A. February 2002, less than a year before.

[12] Although the Crown at trial did not particularize in the Indictment which subsection (a), (b), (c), or (d) it was relying upon, the Crown made reference to case law which considered the interpretation of s. 343 (a), that being the "uses violence or threats of violence" characterization generally applied in cases of robbery that do not involve the use of a weapon or imitation thereof, or personal violence.

[13] Here, the question for Cacchione, J. to decide was whether, on all of the evidence, the Crown had established beyond a reasonable doubt that the conduct of the offender amounted to using threats of violence. In coming to that determination the trier of fact may well apply a partly subjective and partly objective test. See **R. v. McClarty**, [1984] N.S.J. No. 327 (N.S.C.A., per Macdonald, J.A.).

[14] Justice Cacchione was well aware of the importance of this inquiry in deciding whether the appellant was guilty of the crime for which he was charged. He said:

> In the present case, on the count involving the Credit Union robbery, I find that the evidence when viewed in its totality leads to only one inference, which is that Peter Bourassa was the man who stole from the Credit Union on January 31st 2003.
>
> Counsel for Mr. Bourassa has asked me to consider whether a robbery has been proven or whether it was, in fact, simply a theft. To address this issue I must consider the entirety of the evidence.

> Irene Miller who had been the victim of a previous robbery saw a man approach her wicket, he put on sunglasses, and produced a note. He kept one hand in his pocket. She assumed that because of this that he had a weapon. She froze and was unable to comply with his request.
>
> To constitute robbery under S. 343 (a) of the Criminal Code all that is necessary is some act of violence or some demonstration from which physical injury to the person robbed may be reasonably apprehended. To conclude that such reasonable apprehension exists, it is necessary to look at the totality of the conduct of the accused. To enter a bank, to don glasses, produce a note in one hand while keeping the other hand in a pocket, can only have the effect of causing a reasonable apprehension of physical harm unless complied with. Ms. Miller became fearful by what she saw.
>
> I have reviewed the cases provided to me by counsel and the case of R. v. Katrensky provided and supported the submission that this was a theft and not a robbery is distinguishable from the situation before me. In Katrensky the teller, upon returning to her wicket, saw a note on the counter which said, "Empty your till." She saw a person standing before her who said nothing, he did nothing, he did not make any gestures indicating that he had a weapon.
>
> In the present case, the accused, Mr. Bourassa, had one hand in his pocket while holding the note in the other. Ms. Miller believe (sic) he had a weapon and she was afraid.
>
> The Crown is required to prove not only that Ms. Miller felt threatened, but also that she had reasonable, probable grounds for her fear. In the present case, the implied threat of violence caused by the accused having his hand in his pocket would reasonably and probably cause a victim to feel threatened if she did not comply with the demand. Ms. Miller did feel threatened by his actions, there was an implied threat of violence sufficient to make this a robbery.
>
> Accordingly, I find Mr. Bourassa guilty of the robbery of the Atlantic Credit Union dated January 31st 2003.

[15] Ms. Miller said she was frightened and angry to find herself again the victim of a bank robbery. Such evidence was clearly subjective, but was certainly relevant to the determination of whether she felt threatened by the conduct and whether such fear was reasonable under the circumstances. To simply isolate one or two actions of the thief as the appellant suggests, presents a distorted view. The better approach is to examine the entire sequence of events through the eyes of a reasonable observer who happened upon the scene. When assessing, objectively, whether such fear was reasonable,

many features of the incident would be especially persuasive, for example: the individual had the hood of his jacket up over his head as he approached the wicket; then after putting his sunglasses on, and keeping his right hand in his pocket, passed the teller a note, and by some gesture and grunting sounds made it clear that he wanted the large bills. When the teller froze and was unable to react, he reached across the till, grabbed the money and fled.

[16] Having regard to the bank teller's testimony and other evidence in this case, I am satisfied the trial judge was correct in law to find that Ms. Miller had been the victim of a robbery as defined in s. 343 (a) of the **Criminal Code**.

[17] I think it appropriate to briefly address the other matters raised by the appellant in his personal, hand written submissions. Accordingly, I will now turn to a consideration of whether the guilty verdict was reasonable. This is a question which turns primarily on the issue of identification. This ground of appeal engages s. 686(1)(a)(i) of the **Criminal Code** where it is our role to review the evidence, re-examine it and reweigh it for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion, in other words whether the trial judge could reasonably have reached the conclusion he did on the evidence before him. See, for example, **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. Burns**, [1994] 1 S.C.R. 656; **R. v. Biniaris,** [2000] 1 S.C.R. 381; **R. v. Francis**, [2001] N.S.J. 38 (C.A.); and **R. v. Diggs**, 2004 N.S.C.A. 16.

[18] Here, there was ample direct and circumstantial evidence tying Mr. Bourassa to the robbery. While Cacchione, J. was not prepared to accept Ms. Miller's in dock identification of the accused, there was other important evidence sufficient to satisfy him beyond a reasonable doubt of Mr. Bourassa's identity as the robber. For example, Debbie Monminie testified. She was a former acquaintance of the appellant. The trial judge accepted as credible, parts of her evidence, including the fact that she had selected two photographs, both of Mr. Bourassa, from different police photo line-ups; that she drove him to the bank; that he was only gone a short time; and that he did not go into the liquor store, which was nearby, despite his previously stated intention to do so.

[19] The trial judge also accepted Ms. Monminie's evidence that she saw pink coloured smoke coming from Mr. Bourassa's jacket as he rounded the corner of the building and approached her car from the parking lot beside the bank. She said he threw something away as he got into her car, saying the smoke came from a "flare" that had gone off in his pocket. She noticed a pink coloured substance on his hands.

[20] The trial judge did not accept the suggestion that the object was thrown away as he got into Ms. Monminie's car. He concluded that was done after they left the bank and were driving westerly on Faulkner Street. This inference, so the trial judge found, was corroborated by the testimony of another citizen, Mr. Ward Fitzgerald, who said that when he was driving up Faulkner Street he met a car coming towards him driving in an erratic fashion. He said suddenly the passenger door of that car was flung open and a male person came partly out of the car, along with a big puff of red smoke. The man then resumed his seat in the car and slammed the door as the car drove by. Mr. Fitzgerald noted paper floating in the air. He pulled over and found a dye pack attached to a bundle of money, and loose money littering the ground. Mr. Fitzgerald found a pair of sunglasses in the same spot also covered with the same red dye. He called the police and stayed there until officers arrived to take his statement and retrieve the money.

[21] All of this evidence more than supports the reasonableness of Justice Cacchione's conclusion when he said:

> . . . I find that the evidence when viewed in its totality leads to only one inference, which is that Peter Bourassa was the man who stole from the Credit Union on January 31st, 2003.

[22] Mr. Bourassa was charged originally on three separate informations for each of the bank robbery offences which later formed the single Indictment in the Supreme Court. Mr. Bourassa had counsel at each of his appearances in Provincial Court and elected trial by Supreme Court judge alone on all of them. Mr. Bourassa was represented by the same defence counsel at his trial.

[23] Mr. Bourassa's counsel could have made an application under s. 591 of the **Criminal Code** to sever one or more of the three counts on the Indictment in order to have separate trials on the counts. Having not made such an application prior to trial, and there being no apparent complaint that the combining of the charges in one Indictment was unfair to the appellant, he cannot now, without more, say that he ought to receive a new trial on the single count for which he was found guilty.

[24] There is nothing in the record to support the appellant's claim that the trial judge erred in law by "allowing mixing of evidence from two separate offences in one trial." Although the offences were jointly tried, there is no indication that Cacchione, J. improperly used evidence from the Scotiabank robbery to convict Mr. Bourassa of the Credit Union Atlantic robbery.

[25] Accordingly and for all of these reasons I would dismiss Mr. Bourassa's appeal from conviction pursuant to s. 686 (1) of the **Criminal Code of Canada**.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.