NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Morton*** , 2011 NSCA 51

Date: 20110607
Docket: CAC 328179
Registry: Halifax

Between:

Tara Lynn Morton

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Beveridge and Farrar, JJ.A.
Appeal Heard:	May 31, 2011, in Halifax, Nova Scotia
Held:	Appeal from conviction dismissed; leave to appeal sentence is granted but the appeal is dismissed per reasons for judgment of Farrar, J.A.; Saunders and Beveridge, JJ.A. concurring.
Counsel:	appellant in person Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] The Subway restaurant location on the corner of Robie and Russell Streets in Halifax was robbed at knife point by two individuals on Sunday, December 20th, 2009. The appellant was charged and, after a six day trial before the Honourable Judge William B. Digby in February, 2010, she was convicted of two counts of robbery pursuant to s. 344 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and one count of failure to keep the peace and be of good behaviour pursuant to s. 145(3) of the **Criminal Code**.

[2] The appellant initially confessed to being involved in the robbery, however, at trial she recanted her confession on the basis that at the time she gave it, she was under the influence of drugs.

[3] The appellant was sentenced to three years in prison with remand credit of eight months.

[4] The appellant appeals from conviction and seeks leave to appeal from sentence.

[5] She is self-represented and her grounds of appeal are not easily discernible. However, a judicious interpretation of her various allegations and her oral argument disclosed that she is essentially arguing that her conviction is unreasonable.

[6] Since **R. v. Abourached**, 2007 NSCA 109, this Court, in unreasonable verdict cases, has consistently applied the traditional test that has been expressed by the Supreme Court of Canada in various forms. In **R. v. Hawco**, 2008 NSCA 81, at ¶ 13, Bateman J.A., speaking for the Court, described the proper test this way:

> The test to be applied in determining whether a verdict is unreasonable was recently summarized by Fichaud, J.A. for this Court in **R. v. Abourached** [citations]:
>
> > I will consider whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge. I

> will also consider the traditional *Yebes/Biniaris* test, preferred by Justice Charron in **Beaudry** whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[7] The appellant, in her oral submissions, argued that the verdict of the trial judge was unreasonable because of discrepancies in the evidence including, the inability of the clerks in the Subway restaurant to identify her, the inability to even tell from the video whether the person alleged to be her is a black male or female, the fact that she was wearing different shoes at the time she gave her statement than those shown in the video, and other evidence which she argued the trial judge "missed".

[8] Having examined the record and considered the oral and written submissions of the parties, I can see no merit to any of the alleged errors or issues raised by the appellant. There was ample circumstantial and direct evidence to justify the trial judge's finding, beyond a reasonable doubt, that the appellant was one of the two persons who robbed the Subway restaurant that Sunday afternoon. Simply to illustrate, when the appellant was arrested within 15 minutes of the robbery, she was wearing a coat similar, if not identical, to the coat worn by the female robber and she was carrying reusable shopping bags similar to the bags used in the robbery. The bags contained a grey hooded sweatshirt similar to the one worn by the male robber, bills and coins totalling approximately $101 (an amount similar to that taken from the store), a pair of sneakers, articles of apparel, two knives and articles of makeup. The appellant had sold makeup from similar grocery bags to one of the Subway store clerks early on the day before the robbery. Further, and not insignificantly, the appellant admitted to the police to participating in the robbery and named her male accomplice.

[9] I would dismiss the appellant's appeal from conviction.

[10] The appellant also applied for leave to appeal from sentence pursuant to s. 675(1)(b) of the **Criminal Code**. The sentence was imprisonment for three years with eight months credit for time spent on remand. In her notice of appeal, the appellant does not state any ground of appeal respecting sentence. Nor did she, in oral argument, address the appeal from sentence. However, I will take it that she wishes us to consider whether the trial judge erred at law by imposing a sentence which is unreasonable and demonstrably unfit for the range of similar sentences

considering the principles of totality and proportionality and the circumstances of the offence and of the offender.

[11] At trial, the appellant was represented and her counsel, in his sentencing submissions, agreed with the Crown's recommendation of imprisonment for three years and argued that a remand credit of eight months should be applied to the three years, resulting in a "net sentence" of imprisonment for 28 months. The trial judge's decision reflects the sentence as urged by the appellant's counsel.

[12] The primary consideration in cases of armed robbery is protection of the public. The usual starting point for the offence of robbery is imprisonment for three years although in exceptional cases, considerations of leniency may apply (**R. v. Johnson**, 2007 NSCA 102, ¶33, ¶ 35). Again, having examined the record, I see no error committed by the trial judge in imposing a sentence of three years with remand credit of eight months. While I would grant leave to appeal, I would dismiss the appeal from sentence.

Conclusion

[13] I would dismiss the appeals from conviction and sentence.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.