

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Ogden*, 2011 NSCA 89

Date: 20110926

Docket: CAC 335103

Registry: Halifax

Between:

Victoria Mae Ogden

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Saunders, Oland and Farrar, JJ.A.

Appeal Heard: September 26, 2011, in Halifax, Nova Scotia

Written Judgment: September 27, 2011

Held: Appeal dismissed per oral reasons for judgment of Saunders, J.A.; Oland and Farrar, JJ.A. concurring.

Counsel: Luke A. Craggs, for the appellant
Jennifer A. MacLellan, for the respondent

Reasons for judgment: (Orally)

[1] After a short trial before Nova Scotia Supreme Court Justice Peter M.S. Bryson (as he then was), the appellant was convicted of robbery and sentenced to four years' imprisonment. She now appeals her conviction on the single ground that the trial judge erred in law by treating the conflicting Crown and defence evidence as a credibility contest.

[2] After carefully considering the record and counsels' submissions we are unanimously of the opinion that the appeal ought to be dismissed.

[3] The crime took place in a room with only three persons present. Late in the morning of June 2, 2008, the appellant and her friend Tara Deviller visited Maurice LeBlanc in his apartment at 218 Main Street in Yarmouth. Space was tight, and described by its owner as "like a big motel room". Apart from the police officer whose testimony and photographs documented the scene and the injuries suffered by the victim, the only other witnesses were the appellant, Ms. Deviller and Mr. LeBlanc.

[4] The judge found that Ms. Deviller sat on the couch across from the kitchen table where Mr. LeBlanc was seated and that at some point shortly after their arrival, the appellant got up and proceeded through a doorway behind Mr. LeBlanc, purportedly to use the washroom. A few moments later Mr. LeBlanc felt something wrapped around his throat. He was choked until he passed out.

[5] When he regained consciousness, Mr. LeBlanc was lying on the floor and the appellant was crouching over him. He felt his wallet under his back. The appellant said nothing and left. Afterwards Mr. LeBlanc discovered that \$110 was missing from his wallet. He called the police who quickly apprehended the appellant after discovering her hiding under a bed at Ms. Deviller's residence. She was on parole at the time. Ms. Deviller was located shortly afterwards. She told the officers she had been out buying cigarettes.

[6] The police were unable to recover any of the money that Mr. LeBlanc had lost. Ms. Ogden was charged with robbery, and assault with a weapon. Ms. Deviller was not charged with any offences relating to this incident. She gave a

statement to the police and testified as a witness for the Crown against the appellant.

[7] On cross-examination, Mr. LeBlanc did not waiver in his evidence that Ms. Deviller never left his sight and was still seated on the couch directly in front of him when he suddenly felt something being tightened around his throat. He tried to loosen it with his fingers but couldn't, and ultimately passed out. He was insistent that as he felt the cord or belt going around his neck, Ms. Deviller was where she had always been, seated on the couch in front of him.

[8] Ms. Deviller's testimony supported the victim's evidence. She said that she and Ms. Ogden had gone to Mr. LeBlanc's apartment that morning to bum a cigarette. She was sitting on his sofa smoking when the appellant went to use the bathroom. She observed Ms. Ogden wrap a belt from a bath robe around Mr. LeBlanc's neck and choke the man until he passed out. Ms. Deviller said that as soon as she saw Mr. LeBlanc start to lose consciousness, she ran off because she already "had charges against her" and didn't want to get involved in this incident. After she ran from the apartment she assumed the appellant removed Mr. LeBlanc's money from his wallet, and fled.

[9] The appellant took the stand in her own defence. She admitted that at the time of this offence she was on parole. She knew that if she were convicted, her parole would be revoked. Ms. Ogden said she was using crack cocaine at the time and bouncing around from friend to friend for a place to sleep. While in Mr. LeBlanc's apartment she admitted that she went to use the bathroom, but only to smoke the rest of her drugs in private without having to share it with others. She said that while inside the bathroom she could hear a commotion. When she came out she saw Mr. LeBlanc lying on the floor with Tara Deviller saying "she had the money" as she ran out the door. The appellant said she didn't really know what to do at that point because Mr. LeBlanc was "out cold" on the floor. She crouched over him and lifted his head to see that he was okay. When he came to he said he was going to call the police. She ran. She denied ever seeing his wallet, robbing or strangling Mr. LeBlanc, or being part of a plan to rob him.

[10] Justice Bryson's oral decision was rendered shortly after hearing the evidence and detailed submissions from counsel. In his reasons he carefully reviewed the testimony offered by the witnesses who had just appeared before him.

While Justice Bryson did not specifically refer to the principles set out in **R. v. W.(D.)**, [1991] 1 S.C.R. 742, we are satisfied that he recognized their importance and that he did not fall into the trap of simply comparing the Crown and defence positions without then going on to assess the whole of the evidence to establish proof of guilt beyond a reasonable doubt. **R. v. Mah**, 2002 NSCA 99.

[11] In the end, Justice Bryson accepted Mr. LeBlanc's evidence as to what had occurred, accepted Ms. Deviller's evidence as to who strangled the victim, and rejected the appellant's testimony and denials of responsibility. Read as a whole, we are satisfied that the judge properly assessed all of the evidence, recognizing throughout that the ultimate issue was not credibility but reasonable doubt. We see no error in his conclusion that the appellant's culpability for the robbery and the assault had been established beyond a reasonable doubt.

[12] For all of these reasons we would dismiss the appeal.

Saunders, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.