NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Newman*, 2020 NSCA 24

Date: 20200313
Docket: CAC 478408
CAC 484585
Registry: Halifax

Between:

Shawn Newman

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Van den Eynden

Appeal Heard: December 12, 2019, in Halifax, Nova Scotia

Subject: Unreasonable verdict—Misapprehension of Evidence—Demonstrably unfit sentence

Summary: Mr. Newman was convicted of robbery and assault with a weapon. The assault charge was stayed under the *Kienapple* principle. He was sentenced to 5 years and 6 months for the robbery charge. Mr. Newman appealed against conviction and sentence. He claimed the judge misapprehended the evidence which led to incorrect conclusions and an unreasonable verdict. Mr. Newman requested his conviction be overturned. Alternatively, he wanted his sentence reduced, claiming it was too harsh. Mr. Newman also wanted to introduce fresh evidence on appeal.

Issues:

(1) Is the verdict unreasonable or unsupported by the evidence?

(2) Is the verdict based on a misapprehension of evidence?

(3) If leave is granted, is the sentence demonstrably unfit?

(4) Should fresh evidence be admitted?

Result: The proposed fresh evidence would not have affected the outcome and did not meet the admissibility requirements. The judge made no error in determining that Mr. Newman was the robber. His findings of fact and inferences drawn are logical and reasonable. The verdict was one the judge could reasonably render. The judge applied the correct sentencing principles. The sentence imposed is fit and within the range of available sentences.
Conviction appeal dismissed. Leave granted, but sentence appeal dismissed. Fresh evidence not admitted.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 14 pages.

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Respondent

Judges:	Beveridge, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	December 12, 2019, in Halifax, Nova Scotia
Held:	Motion for fresh evidence dismissed; conviction and sentence appeals dismissed, per reasons for judgment of Van den Eynden, J.A.; Beveridge and Scanlan, JJ.A. concurring
Counsel:	Shawn Newman, appellant in person Erica Koresawa, for the respondent

Reasons for judgment:

Introduction

[1] Mr. Newman was convicted of robbery and assault with a weapon (ss. 344 and 267(a) of the *Criminal Code*). The assault charge was stayed under the *Kienapple* principle. He was sentenced to 5 years and 6 months for the robbery charge. Mr. Newman appeals against conviction and sentence. He claims the judge reached incorrect conclusions and his conviction should be overturned. Alternatively, he says his sentence is too harsh and should be reduced. On appeal, Mr. Newman also wanted to introduce fresh evidence.

[2] I would dismiss the conviction appeal. I would grant leave, but dismiss the sentence appeal. I would not admit the fresh evidence. My reasons follow.

Issues raised on appeal

[3] Mr. Newman is self-represented on appeal. He filed two Notices of Appeal. The first followed his conviction. The second was after being sentenced; however, it overlaps with his conviction complaints. I reproduce them as they appear. He articulated the grounds this way in his first Notice:

1. The Time of the robbery (and the Time I was somewhere else is only 4 minutes apart (impossible);
2. The store owner saying never in store before. Been in store several times before;
3. The witness said he didn't know my name. But said my name in is statement;
4. That I am not guilty;
5. That to many things were said that wasn't True;
6. The store owner said he didn't know me. But I have spoke to him in person several times;
7. The time of the 911 call and The Time that I was on camera at another store is 4 to 5 minutes the distance between stores is 4 to 5 kilometres which is impossible;
8. The Judge errored is finding me guilty.

And this way in his second Notice:

1. How can The STore clerk I.D. me when He said in The Voice Recording one hour after the Robbery, said The Robber was wear as a Mask;
2. Then he said my name was Shawn one hour after The Robbery on Voice Recording. And up on stand he said he Did his own Research and know my Name 48 hour after so how can That be;
3. I was on camera at other store 4 mins after the 911 call to cop about Robbery;
4. I would like to get my sentence Reduced I feel 5 year 6 months is A little much, when it's my first Robbery "allegedly" on my Record no other violence Besides 12 years ago over a Decade ago;
5. And would like To Have The conviction look at again were the Store clerk said The Robber was wearing A mask and then recanned his Voice STatement to the Robber wasn't wearing A mask and My name was Shawn???

[4] As I will explain later, several of Mr. Newman's grounds are based on his misunderstanding or incorrect recollection of the trial record.

[5] In responding to the issues raised by Mr. Newman, the Crown helpfully reframed the issues in its factum which I adopt as follows:

1. Is the verdict unreasonable or unsupported by the evidence?
2. Is the verdict based on a misapprehension of evidence?
3. If leave is granted, is the sentence demonstrably unfit?

[6] Mr. Newman also referenced fresh evidence in his factum which he asked the panel to consider on appeal. I will address the fresh evidence later.

[7] I would grant Mr. Newman leave to appeal his sentence.

Background

[8] Before setting out the standard of review and my analysis, a brief summary of the offence is helpful.

[9] A violent robbery took place at the victim's family-owned business. The victim (store owner) was attacked with a weapon and robbed. Mr. Newman was charged with robbery and assault with a weapon. The sole issue at trial was the robber's identity. Mr. Newman said it was not him.

[10] The case against Mr. Newman involved recognition evidence supported by circumstantial evidence. I will mention specific timelines as they were part of Mr. Newman's defence.

[11] The robber came into the store around noon and talked to the store owner. The robber told the store owner that his steps were icy, so the owner went outside briefly to salt the steps. When he came back into the store, the robber had moved to the counter area where the cash was kept. The store owner went behind the counter and set the salt bag down. When he turned around, he was attacked and beaten with a weapon (wrench). He suffered several forceful blows to his face and head. The victim was able to push the robber causing the robber to fall. This allowed the victim to escape. The robber got away with the cash box.

[12] The victim ran to a business close by for help. He was bleeding badly from his head wound. A staff person there (Ms. F.) called 911 and provided basic first aid to the victim. They both noticed a man running by, and the victim identified him as the robber. The call to 911 was received at 12:14 p.m. The victim would have arrived at the business seeking help a few minutes before.

[13] At the time of the offence the victim did not know Mr. Newman's name, but Mr. Newman was familiar to him. Mr. Newman and his partner lived in the area. They had frequented the victim's shop, and the victim would see them walking past his shop regularly.

[14] The victim was able to provide a detailed description of the robber. He said the robber was wearing a white toque, sunglasses, black zip-up sweater without a hood, black track pants and black gloves. He described the robber's height, weight, and complexion. The other witness, Ms. F., described the man she saw running by as having an average build and wearing a dark puffy-style jacket or vest that she did not think had a hood. She said the man wore dark athletic trousers with a white stripe down the side and was wearing a white hat which she thought was a ball cap. Unlike the victim, she only saw him for a few seconds and not at close range. She could not remember whether he was wearing gloves.

[15] Police arrived and engaged the K-9 unit. A scent was picked up in the area where the robber was seen running. The dog handler followed the track (a single set of footprints in the snow) to an area behind a nearby house. The house was about 100 metres from the victim's shop. There, police found the discarded stolen cash box, emptied of money. In proximity, lay a pair of black gloves and a white toque.

[16] The Crown presented video surveillance from a convenience store that is near Mr. Newman's home. The time of the video is 12:27 p.m.—not long after the robbery. It shows Mr. Newman buying cigarettes. He is seen wearing dark track

pants with a white stripe. He is wearing a blue shirt; however, when leaving the store, he puts on a heavy black pullover style sweater with a zipper at the neck. He has black sunglasses perched on his head. No toque or black gloves are evident. The victim said the stolen cash box contained some small bills but mostly one- and two-dollar coins. The video shows Mr. Newman paying for his cigarettes using a quantity of change; however, the exact denominations are not clear from the surveillance video.

[17] There was evidence before the judge respecting the distance from where the robbery occurred to where Mr. Newman was seen on video in the convenience store buying cigarettes. The evidence confirmed that there was enough time for a person to easily travel between these two points. In fact, Mr. Newman's own testimony confirmed this.

[18] The trial judge, the Honourable Justice Jamie Campbell, in his conviction decision (2018 NSSC 113) described how the victim knew Mr. Newman:

> [3] [The victim] says that on February 23, 2017 at around noon he was in his store. A person came in. The person was known to him. He had not met the guy and didn't know his name. But [the victim] had seen him walk by the store with his girlfriend many times. He had seen him in places like Sobeys and Shoppers Drug Mart. He had seen the man standing outside his store when the man's girlfriend had come in to do business at the store. He "felt like" he knew the man. He didn't know him by name and had never spoken with him but nonetheless he "felt like" he knew him. His facial features were the same and his "body language" such as his gait, was the same. The person was wearing a white toque that [the victim] said he typically wore, had on dark track pants, a black sweater that zippered at the neck, and black sunglasses. There was nothing unusual about that. [The victim] recognized the man in the same way that people routinely recognize other people whom they have seen before. When [the victim] said that he "felt like" he knew the person he was expressing that sense a (*sic*) familiarity that one has with a person whom one sees regularly without knowing the person's name or anything about them, beyond their appearance.

[19] DNA analysis of the gloves and white toque was undertaken and presented as part of the Crown's case. The DNA report stated the chance that the DNA profile on the toque belonged to someone other than Mr. Newman is one in 100 million. The judge described it this way:

> [8] … There was no DNA found on the gloves. On the white toque, there was sufficient DNA to allow for analysis. The DNA on the toque could not be said to be the DNA of Shawn Newman with scientific certainty. But the chance of it being the DNA of anyone other than Shawn Newman is infinitesimally small. For any practical purpose, the

DNA was Shawn Newman's. In any event, Mr. Newman confirmed that the white toque had been his.

[20] Mr. Newman testified in his own defence. His partner was also called as a defence witness. The gist of their evidence was that Mr. Newman was not in the victim's shop the day of the robbery and had nothing to do with the robbery or assault. He was not out of the house long enough during that time to have committed the offence. Both acknowledged the white toque was Mr. Newman's—a gift to him from his partner. Thus, they were not surprised his DNA was found on it. However, they said the toque had been discarded prior to the robbery. The explanation provided to the judge was that Mr. Newman does not like white nor does he like toques, so they donated the toque (along with other winter clothing). It so happened that the donation bin was full, so they had to place their donation bag outside the bin.

[21] In cross-examination, Mr. Newman's partner acknowledged that he owned a pair of black pants with a white stripe but said on the day of the robbery he wore a red jacket and probably jeans. However, the video surveillance, captured shortly after the robbery, depicts Mr. Newman wearing similar clothes to those both the victim and another witness described the robber as wearing. The judge did not find Mr. Newman's partner to be a reliable witness. That finding was not challenged on appeal.

[22] During cross-examination Mr. Newman acknowledged: he walked by the victim's store several times a day; both he and his partner had been in the shop; and, his face would be familiar to the victim. He also acknowledged that he was the person captured in the video surveillance, and it depicted what he was wearing and that he was buying cigarettes, which he purchased with coins. However, he maintained he was not the robber and was mistakenly identified as such.

[23] The judge did not accept Mr. Newman's denial that he was the robber as reliable or credible. He found Mr. Newman's denial did not raise a reasonable doubt as to his guilt, nor did the evidence of Mr. Newman's partner. The judge found the evidence did not permit any reasonable inference other than Mr. Newman's guilt.

[24] Mr. Newman was sentenced to 5 years 6 months incarceration for robbery. The judge's sentencing decision was delivered orally and is unreported.

[25] In my analysis, I will refer to the judge's reasons in more detail and supplement any necessary additional background.

Fresh Evidence

[26] I return to the fresh evidence Mr. Newman seeks to admit on appeal. Mr. Newman did not file a motion or provide any advance notice that he intended to introduce fresh evidence on appeal. The Crown objected to the evidence. In my view, the fresh evidence can be summarily dispensed with.

[27] Mr. Newman attached a printout from Google Maps to his factum which set forth distances the robber would have had to travel. However, the map in no way refuted the trial evidence that the robber could easily have travelled from the robbery site to the convenience store in approximately 13 minutes. He also wanted to reference a police occurrence report to suggest the 911 call was made later than 12:14 p.m. That report does not assist him either. Neither document has any bearing on this appeal.

[28] The proposed evidence would not have affected the outcome at trial. It does not assist Mr. Newman in any way. He is misguided in thinking otherwise. I would dismiss his request to introduce fresh evidence. It does not meet the requirements for admission (see *R. v. Palmer* (1979), [1980] 1 S.C.R. 759).

Standard of review

Unreasonable verdict

[29] In evaluating whether a verdict is reasonable we must determine if the verdict is one that a properly instructed jury or a judge could reasonably have made. We assess whether it was based on an inference or finding of fact that, (a) is plainly contradicted by the evidence relied on by the trial judge in support of that inference; or (b) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge. Furthermore, we do not interfere with credibility assessments unless it is established that they cannot be supported on any reasonable view of the evidence (see *R. v. Thompson*, 2015 NSCA 51).

Misapprehension of Evidence

[30] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to

give proper effect to evidence. The misapprehension must have played an essential part in the reasoning process that led to conviction. And it is not to be confused with a different interpretation of the evidence than that adopted by the trial judge (see *R. v. Lohrer*, 2004 SCC 80).

Sentence appeal

[31] A deferential standard of review applies to sentence appeals. This Court would only intervene if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. To warrant our intervention, an error in principle must have had a bearing on the sentence (see *R. v. Lacasse*, 2015 SCC 64).

Analysis

Issue 1: Is the verdict unreasonable/unsupported by the evidence?

[32] The case against Mr. Newman involved recognition evidence supported by circumstantial evidence. In his decision, the judge set out the governing legal framework respecting the onus and burden of proof, eyewitness identification, recognition evidence, assessment of credibility and reasonable doubt where an accused testifies, as well as the use of circumstantial and direct evidence.

[33] On appeal, Mr. Newman does not take issue with the legal principles identified and applied by the trial judge. Nor do I see any error. There is no need to review the legal principles further. What Mr. Newman wants is for this Court to review the evidence, make different findings of fact and draw different inferences to arrive at a different outcome—an acquittal.

[34] Mr. Newman's defence was essentially that they got the wrong guy. Mr. Newman attempted to cast doubt on the timing between the robbery and when he was seen on video in a nearby convenience store buying cigarettes and wearing clothes that closely matched the description of what the robber was wearing. He said the Crown did not prove that it was possible for a person to travel between those two points (victim's shop and the convenience store) given the timing of the robbery. Although the robber had Mr. Newman's hat on, this was explained by it being donated to charity prior to the robbery. Mr. Newman said he put on the dark track pants just to run out and buy cigarettes.

[35] The judge rejected those propositions. As noted, he did not accept the evidence of Mr. Newman, nor did he find it had raised a reasonable doubt. The judge did not find the evidence of Mr. Newman's partner reliable. Her evidence that Mr. Newman was only out of their residence for five minutes during the critical time period was inconsistent with her statement to police, and she acknowledged her poor judgment of time.

[36] The judge found the victim's recognition of Mr. Newman reliable and that the circumstantial evidence supported his recognition evidence. The judge concluded that the same person discarded both the cash box and the white toque containing Mr. Newman's DNA. These items were found in an area the robber was last seen running toward. Given Mr. Newman's DNA was on the toque, it was open to the judge to find, as he did, that this circumstantial evidence supported the victim's recognition evidence.

[37] The judge found that Mr. Newman had enough time to commit the robbery. That finding was supported by the evidence and was reasonable. Although the relative distance between the various locations was important, the precise distance was not material. Various witnesses, including Mr. Newman himself, testified that a person could cover the distance in approximately 13 minutes. In other words, Mr. Newman had enough time after the robbery to find his way to the convenience store where he was detected on video surveillance.

[38] In his decision the judge sets out detailed reasons for his findings and credibility assessments. I will only refer to these paragraphs which summarize his conclusions:

> [37] There are two versions of events. The case is not a contest to determine which of those narratives is more likely to be true or which inference from the evidence is the more reasonable. The legal onus is on the Crown to prove the case beyond a reasonable doubt. Mr. Newman should be found not guilty if his evidence raises a reasonable doubt. That is so even if it is less worthy of belief than [the victim's] version of events. It is so even if only some of Mr. Newman's evidence is believed. He should be found not guilty even if his own evidence is not believed at all and does not raise a reasonable doubt but reasonable doubt can be found in any of the other evidence or in the insufficiency or absence of evidence.
>
> …
>
> [40] Strange things do happen. But the number of strange things required to have happened here to justify an inference other than guilt makes that inference unreasonable.

> [The victim] would have to have been wrong in his identification and there is nothing to suggest that he was. The robber would have to have obtained Shawn Newman's toque in the few days between it being discarded and the robbery. The robber would have to have looked like Shawn Newman. The robber would have to have been wearing dark track pants and a dark zipper necked sweater and had black sunglasses just like Mr. Newman had minutes later when he showed up at a convenience store. That person, looking like Shawn Newman and dressed like Shawn Newman was dressed at that time on that day, would have to have decided to rob a shop that Shawn Newman walked by daily, at a time when Shawn Newman himself was within easy walking distance.
>
> [41] The evidence does not permit any reasonable inference other than Mr. Newman's guilt.

[39] The judge made no error in determining that Mr. Newman was the robber. His findings of fact and inferences drawn are neither plainly contradicted by the evidence nor incompatible with the evidence that was not otherwise rejected. They are logical and reasonable. Deference is owed. As noted, this Court does not interfere with credibility assessments unless they cannot be supported on any reasonable view of the evidence. Such is not the case here. The trial judge's assessment of the witnesses' credibility was reasonable.

[40] In this case, the verdict was one a judge could reasonably render. I would dismiss this ground of appeal

Issue 2: Was there a misapprehension of evidence?

[41] Mr. Newman claimed there were several discrepancies between the evidence at trial and the trial judge's reasons, hence the verdict was based on a misapprehension of the evidence. However, the alleged discrepancies are based on Mr. Newman's misunderstanding or incorrect recollection of the record. This was illustrated effectively by the Crown in its factum.

[42] The Crown said:

> [56] The trial judge did not misapprehend the evidence on any material issue. Appellant points to several areas of apparent discrepancies between the evidence at trial and the trial judge's reasons to argue that the verdict was based on a misapprehension of the evidence. However, many of the alleged discrepancies are based on the Appellant's own misapprehension of the evidence:
>
> 1. Timing of the Robbery and Video

- The Appellant argues that the time between the robbery and the time he is observed at the convenience store is only four to five minutes and the distance between the two locations is four to five kilometres, making it impossible for him to have committed the robbery. The Appellant further argues that the time of the 911 call was 12:20 or 12:21 p.m.

- The trial record discloses that the first police officer was dispatched at 12:14 p.m. and the Appellant is at the convenience store at 12:27 p.m. This is a 13-minute time frame, not four to five minutes. Further, the distance between the scene of the robbery and the Appellant's residence (near the convenience store) was a 15 second drive and, according to the Appellant's own evidence at trial, a five to ten minute walk. This is a short distance, not four to five kilometres.

2. How the Victim Felt
   - The Appellant argues that the trial judge found that [the victim] was not "startled or concerned" but that [the victim's] evidence was that he was "on edge".

   - The trial record discloses that the trial judge's comment was about [the victim's] reaction to the robber's appearance. [The victim's] comment that he was "on edge" was how he felt after the robber had moved to the desk area inside the store, not because of the robber's appearance.

3. Inadmissible Evidence
   - The Appellant argues that the DNA reports were inadmissible.

   - The trial record discloses that the DNA reports were admitted by consent of the defence.

4. The Time of the 911 Call
   - The Appellant argues that the trial judge found the call about the robbery was received at 12:14 p.m. "based on [Ms. F's] evidence" but that [Ms. F] never gave evidence as to what time she called 911.

   - The trial record discloses that the trial judge stated the call was received by police at 12:14 p.m. (Cst. O'Brien testified that he received the call at 12:14 p.m.). In the next sentence, the trial judge stated that, based on [Ms. F's] evidence, [the victim] would have arrived at her store at 12:11 or 12:12 p.m. [Ms. F] testified that [the victim] was in her store only a few minutes before she called 911).

5. The Dog Track
    - The Appellant argues that the trial judge found that the K-9 unit picked up a scent but that D/Cst Malcolm testified the dog tracked following the scent of whomever left the footprints.

    - The trial record discloses that conclusion of the trial judge is based on the evidence. There is no discrepancy between the evidence and the trial judge's finding that the dog picked up a scent.

6. The Appearance of the Robber
    - The Appellant argues that [the victim] stated to police that the robber wore a mask, making it impossible to identify the robber.

    - The trial record contains no such evidence.

7. The Victim's Knowledge of the Robber's Name
    - The Appellant argues that [the victim] testified that he did not know the name of the robber at the time of the incident, but referenced the name of the robber in his statement to police.

    - The trial record contains no such inconsistency.

[43] The Crown did note a few minor errors the judge made in reciting the evidence in his decision. These slips were not material to his finding of guilt and do not require further comment.

[44] I agree with the Crown. The trial judge's reasons disclose no misapprehension of the evidence. I see no material mistake as to the substance of evidence, or a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. Rather, the trial judge's conclusions are fully supported by the evidence. I would dismiss this ground of appeal.

[45] There is an additional argument Mr. Newman advanced on appeal that I will briefly address. Although not previously raised as a ground in his appeal notices, in his factum and oral submissions to this Court he suggested there was some sort of conspiracy to convict him. He speculated the police showed the video surveillance to the victim and fed/brainwashed him on what to say about the robber's identity. Mr. Newman said this would explain why the victim could identify him and what he was wearing. There are several fatal problems with this contention. First, there is no evidence whatsoever in the record to sustain such a wildly speculative allegation. Second, Mr. Newman was represented by experienced criminal defence counsel at trial. This allegation was never raised, nor were any witnesses

questioned about it. It must be rejected. Nothing more need be said about this assertion.

Issue 3: Is the sentence demonstrably unfit?

[46] Mr. Newman does not raise any specific error. His complaint is simply that he views his sentence as too long. He asks that if his conviction is not overturned that his sentence be reduced.

[47] Mr. Newman was represented by experienced counsel in the court below. The judge had the benefit of written briefs and oral submissions from defence and Crown counsel. He also had the benefit of Mr. Newman's Pre-Sentence Report. The Crown was seeking a sentence in the range of 6 to 8 years. Mr. Newman's counsel suggested a range of 2 to 6 years and advocated for a sentence of 4 to 4.5 years. As noted, the judge imposed a sentence of 5 years and 6 months incarceration.

[48] Robbery is a serious offence. Mr. Newman has a fairly lengthy criminal record which the judge referred to. And while there were no prior convictions for robbery, Mr. Newman had convictions for both violence and property-related offences. The judge considered relevant aggravating and mitigating factors and the circumstances of the offender and the offence.

[49] In my view, with respect, there is no merit to Mr. Newman's sentence appeal. Having reviewed the judge's sentencing decision and the supporting record I am satisfied he did not err.

[50] The judge was mindful of and applied the correct sentencing principles set out in the *Criminal Code*. He did not fail to consider a relevant factor, or over-emphasize the appropriate factors. I see the sentence imposed as being fit and within the range of available sentences. I would not interfere with the judge's discretion. He exercised it reasonably.

Disposition

[51] I would not admit the fresh evidence. I would dismiss the conviction appeal. I would grant leave but dismiss the sentence appeal.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.

Scanlan, J.A.