C.A.C. No. 124000

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Skinner, 1996 NSCA 203

Pugsley, Hart and Bateman, JJ.A.

BETWEEN:

LESLIE BLAIR SKINNER	)	Joshua M. Arnold
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Dana W. Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard:
	)	October 1, 1996
	)	
	)	Judgment Delivered:
	)	October 8, 1996

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal dismissed per reasons for judgment of Bateman, J.A.; Hart and Pugsley, JJ.A. concurring.

BATEMAN, J.A.:

The appellant appeals from his three convictions arising out of a single incident. Following a trial by Justice David Gruchy of the Supreme Court, sitting without a jury, the appellant was convicted of robbery (s. 344 **Criminal Code**), unlawful confinement (s. 279(2) **Criminal Code**) and theft under (s. 334(b) **Criminal Code**).

To briefly summarize the facts: Late in the evening of September 24, 1995, R.J. drove to Citadel Hill and invited two men, who were then strangers to him, to come back to his house to engage in sexual activity. Upon arriving at the house, after some social preliminaries, the group repaired to Mr. J.'s bedroom. After the guests had partially removed their clothing and, apparently on a signal from one guest to the other, the two men attacked Mr. J., tied him up, and stole his vehicle as well as property from his home. Mr. J. provided a description of his assailants to the police and positively identified the appellant from mug shots. The co-accused, a Christopher Pottie, plead guilty before trial. Mr. Pottie did not testify in the trial of the appellant.

While there are a number of grounds of appeal, the appellant's submission centres upon the reliability of Mr. J.'s identification of the appellant. The appellant submits that the identification evidence was flawed in a number of respects. Broadly summarizing his submissions, he says that the variance between the victim's initial description of his assailant and the actual appearance of the appellant; the prejudicial effect of showing the victim mug shots in lieu of a photo lineup; and the failure of the victim to notice certain distinguishing features of the appellant result in an unreasonable verdict.

In R. v. Burns, [1994] 1 S.C.R. 656, McLachlin, J. spoke of the duty of a judge on appeal when considering a submission that the verdict was unreasonable. She said at p. 663:

> In proceeding under **s. 686(1)(a)(i)**, the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. W. (R.)**, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

In his detailed decision delivered on the day following the two days of trial, Justice Gruchy carefully and properly instructed himself on the applicable law. The record reveals no error in this regard. His thoughtful remarks confirm that he clearly appreciated the frailties of eye witness identification and the need for a trial judge to exercise great care in this regard. He noted that an honest witness may be mistaken as to identification. He expressly identified and discounted, with reasons, the impact of the several discrepancies between Mr. J.'s original description of his assailant and his subsequent photo identification. It cannot be said that his conclusions in this regard are unreasonable. He found the procedure followed by the police in permitting Mr. J. an opportunity to identify the appellant from "mug books" to be a fair one. While he disbelieved the alibi evidence of the appellant he correctly instructed himself in the manner required by the Supreme Court of Canada in **R. v W.(D.)**, [1991] 1 S.C.R. 1742.

Nor did the finding of guilt rest solely upon the victim's positive identification of his assailant. In contrast to the cases cited by the appellant, the eyewitness identification, here, was supported by other, confirmatory, circumstantial evidence. The evidence, re-examined and re-weighed, is reasonably capable of supporting the trial judge's conclusion.

Accordingly, I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Hart, J.A.

Pugsley, J.A.