

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Sykes*, 2014 NSCA 57

Date: 20140604

Docket: CAC 417943

Registry: Halifax

Between:

Kenneth Curry Sykes

Appellant

v.

Her Majesty the Queen

Respondent

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

Appeal Heard: March 18, 2014 and May 23, 2014, in Halifax, Nova Scotia

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

Counsel: Appellant in person
William D. Delaney, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] On June 27, 2013, Chief Justice Joseph P. Kennedy convicted the appellant on charges of robbery while wearing a mask and breach of conditions while on a Recognizance or Undertaking. He was sentenced to seven years imprisonment.

[2] Mr. Sykes had counsel at his trial but is now self-represented and appeals from his conviction. Although his grounds of appeal are not particularized I take from his submissions, which I will set out in more detail later in these reasons, that he is arguing that the verdicts were unreasonable or not supported by the evidence.

[3] The appeal was heard over two days: oral argument was heard March 18, 2014; the Court reconvened the appeal on May 23, 2014, to review videotape evidence.

[4] For the reasons that follow I would dismiss the appeal.

Background

[5] The trial judge convicted Mr. Sykes on four of five counts that were heard by him over the course of a trial held between June 17 and 19, 2013. The five counts had been severed from a 26-count Indictment. Mr. Sykes was convicted on:

- Count #16 – Robbery
- Count #17 – Wearing a mask to cover or hide his facial features contrary to s. 351(2) of the **Criminal Code**
- Count #18 - While committing the robbery breached his Recognizance entered into on July 19, 2010, contrary to s. 145(3) of the **Criminal Code**
- Count #19 – breached the house arrest provisions of his Recognizance after leaving his residence contrary to s. 145(3) of the **Criminal Code**

[6] Count #20 referred to another Recognizance dated November 28, 2011, which was breached by the same robbery. Applying **R. v. Kienapple**, [1975] 1 S.C.R. 729, the trial judge stayed that count.

[7] In light of the appellant's allegation that the verdict is unreasonable or not supported by the evidence I will review the evidence in some detail to illustrate that the convictions were reasonable and amply supported by the evidence.

[8] The Running Room, a sportswear store in the Sunnyside Mall in Bedford, was robbed on January 26, 2012, at approximately 1:15 p.m. There was only one employee present in the store at the time of the robbery. She described the robber as a white male, wearing a black hat, a black pea coat with his features hidden by dark sunglasses and a face shield covering the bottom half of his face.

[9] He was not wearing gloves. She could only see his hands and the back of his neck and the part of his face that was not obstructed or hidden by either the face shield or the sunglasses or the hat.

[10] She testified when she first encountered the robber, he told her that it was a robbery and "give me all the money in the till".

[11] She asked him if he was joking, however, it immediately became apparent to her that it was not a joke. The robber then lifted his jacket to display a gun in his waistband which the employee described as having silver on the handle with a brown grip.

[12] The robber told her to hurry up and give him the money. When there was a delay in her getting the key for the cash register the robber came around the counter, grabbed the employee by the throat and smashed her head on the counter.

[13] The employee opened the cash register and gave the robber the money in the till. She was then directed to the back of the store and the robber left.

[14] The employee was not able to identify Mr. Sykes as the robber or her attacker.

[15] At trial, the Crown produced additional evidence in the form of security camera videos and a fingerprint.

[16] The videotapes show the robber entering the Sunnyside Mall at approximately 1:08 p.m. After walking around the mall he sits on a bench outside the Running Room entrance for approximately four minutes.

[17] Between 1:11 p.m. and 1:15 p.m., before the robber enters the store, his actions are recorded on the security camera in the mall. Significantly, as noted by

the trial judge, during the period that he is sitting on the bench he drapes his right arm over the top of the back support of the bench with his right hand resting on the top edge of the back support.

[18] At 1:15 p.m. he gets up off the bench and enters the Running Room, pulling a scarf up over his face as he does so. At that point the security cameras inside the store start to record what is happening.

[19] It is evident from the videos, and it was found by the trial judge, that the male entering the store was without question the male who had been sitting on the bench.

[20] The security video from inside the store shows the robbery as described by the employee.

[21] After the robbery, the robber exits the store where the mall security cameras pick him up again. The cameras show him running in the mall, exiting the mall at approximately 1:18 p.m.

[22] Detective Constable David Emberlin gave evidence at trial. He arrived at the Running Room at approximately 2:30 p.m. and dusted for fingerprints inside the store. He found no useful prints.

[23] Then he watched the mall security camera videos and noticed that the robber was sitting on the bench outside the store touching the rail at the top of the bench with his right hand.

[24] The detective secured the bench and dusted it for prints. In the middle of the rail on the back of the bench he lifted a quality thumb print. The Crown introduced a photograph of the location of where the print was found. It was in the location where the robber had his right hand resting on the rail as shown in the video.

[25] At that time the print was unknown. The detective placed the unknown thumb print into a computer file identification program which identifies prints by matching the prints against hundreds of thousands of prints taken from offenders across North America.

[26] The program identified 20 possible matches. One of those possibilities was Mr. Sykes.

[27] As a result, the detective pulled the police file on Mr. Sykes and matched the unknown thumb print taken from the bench with the right thumb print of Mr. Sykes taken from the fingerprint card contained in the police file.

[28] At trial, the defence admitted that the fingerprint found on the bench was Mr. Sykes' print.

[29] As a result of receiving a positive match for Mr. Sykes' fingerprint, the police obtained a warrant to search a motor vehicle owned by Mr. Sykes' common law wife. In that vehicle they found a bag containing a toy pistol package together with a receipt for the purchase of that pistol from a Dollar Store on the day of the robbery.

[30] They also searched Mr. Sykes' home on a warrant and found a toy pistol. The police believed the toy pistol matched the packaging and the receipt found in the bag in the car.

[31] The gun has a brown grip but there is no silver on the grip as described by the store employee.

[32] Mr. Sykes chose to testify in his defence. The trial judge described him as mixed race and that he appeared to be a very light skinned black man.

[33] Mr. Sykes testified that on January 26, 2012, he was subject to house arrest under a conditional sentence. He said he got into a dispute with his oldest daughter and he was concerned that she was going to call the police and say that he had pushed her. Mr. Sykes felt that this would be a breach of his house arrest conditions. He said he panicked and took off with his wife's car eventually ending up at the Sunnyside Mall in Bedford where he parked the vehicle and went to Tim Horton's and had a coffee.

[34] He then went into the Sunnyside Mall. He said he was just wandering around looking in stores and sitting down on different benches. He said he was in the mall for a period of approximately 20-25 minutes from approximately 11:40 a.m., although he was not exactly sure of the time.

[35] This is the bulk of the evidence heard by the trial judge. I will address other evidence he also heard when responding to individual issues raised by Mr. Sykes. On the evidence the trial judge made the following findings:

- The person shown on the mall and Running Room security videotapes, the robber, is the same size and body shape as Mr. Sykes;
- While the employee's description of Mr. Sykes as a white male is incorrect, he is a very light skinned black man and the trial judge was satisfied that Mr. Sykes, in these circumstances, could have been described as a white male.
- The testimony of Mr. Sykes was not credible in many respects. He had been convicted of a number of integrity offences which could be considered in relation to the assessment of credibility before the court.
- It would be a sequence of extraordinary coincidences to believe Mr. Sykes sat on the same bench as a robber within an hour of the robbery taking place and put his hand in exactly the same spot as the robber.

[36] The judge concluded he was satisfied beyond a reasonable doubt that it was Mr. Sykes who robbed the Running Room store in the Sunnyside Mall that day.

[37] He then convicted him on four of the five counts as set out in ¶15 above.

Issue

[38] Was the verdict unreasonable or unsupported by the evidence?

Standard of Review

[39] The reasonableness of a verdict, within the meaning of s. 686(1)(a)(i) of the **Criminal Code** involves a question of law. The standard of review is correctness (**R. v. Biniaris**, 2000 SCC 15). In assessing whether a verdict is unreasonable, an appellate court must:

- i. determine whether the verdict is one that a properly instructed jury or a judge could reasonably have made; or
- ii. find the trial judge has drawn an inference or made a finding of fact essential to the verdict 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.

(**R. v. Sinclair**, 2011 SCC 40; **R. v. Biniaris**, *supra*; **R. v. Beaudry**, 2007 SCC 5; and **R. v. Yebes**, [1987] 2 S.C.R. 168).

[40] As noted above whether the verdict is reasonable is a question of law. However, the credibility of a witness is a question of fact. In reviewing the trial judge's assessment of credibility in order to determine, for example, whether the verdict is reasonable an appellate court cannot interfere with the credibility assessment unless it is established that such findings cannot be supported on any reasonable view of the evidence (**R. v. Burke**, [1996] 1 S.C.R. 474 at ¶7).

Analysis

[41] Applying this test in this case, was the verdict unreasonable or unsupported by the evidence? I find it was not.

[42] Mr. Sykes made a number of arguments in support of his position that the verdict is unreasonable. I will set out each of his arguments and address them individually.

[43] Before doing so, it is important to recognize that a trial judge's assessment of the evidence in a circumstantial case, such as this, is based on the whole of the evidence. The reasons for this are three-fold:

- i. the Crown's burden of proof is in relation to the essential elements of the case rather than to individual pieces of evidence [**R. v. Morin**, [1988] 2 S.C.R. 345 at ¶61-73];
- ii. the strengths of the inference to be drawn from an individual piece of circumstantial evidence depends on the context provided by the rest of the evidence [**R. v. Leitch**, [2010] O.J. No. 6240 (C.J.), *aff'd* 2012 ONCA 85];
- iii. the whole of the evidence may have more compelling effect than the sum of its parts [**R. v. Nolet**, 2010 SCC 24 at ¶48; **R. v. Luc**, [2007] O.J. No. 4210 (C.J.) at ¶36-37].

[44] I will now turn to Mr. Sykes' arguments.

- i. **The only evidence linking him to the robbery was a fingerprint found on the bench outside the store in the mall. The police could**

not indicate when the fingerprint was placed there or how long it could have been there.

[45] Although the police cannot say when the fingerprint (of Mr. Sykes' right thumb) was placed on the bench, the evidence on the mall and Running Room security videotapes supports the trial judge's conclusion that it was Mr. Sykes who left the print on the bench just prior to the robbery taking place.

[46] The trial judge found as a fact that the male person seen on the video camera sitting on the bench in the mall was the same male person who subsequently robbed the Running Room and assaulted the employee. He also found that the male seen on the video sitting on the bench was holding the railing along the back of the bench in the same area from which the thumb print of Mr. Sykes was obtained.

[47] He also found the person on the bench to be the same size and shape as Mr. Sykes.

[48] Finally, he did not accept Mr. Sykes explanation for how his print came to be on the bench.

[49] In light of these findings, the trial judge's conclusion that it was Mr. Sykes who placed the print on the bench and then entered the store and committed the robbery was amply supported by the evidence.

ii. The video taken by the store security camera shows the robber touching the counter as well as a pair of white sunglasses. Both of these items were tested for fingerprints. Neither had Mr. Sykes fingerprints on them.

[50] Mr. Sykes' argument appears to be that if he was the robber, his prints would have been left on both the sunglasses and the countertop.

[51] Detective Constable Emberlin addressed the lack of fingerprints on the glasses and on the counter in his cross-examination by defence counsel at trial. With respect to the glasses, no fingerprints were found on those glasses. It was not as if there was a fingerprint that was not identified on the glasses. There were simply no fingerprints found.

[52] With respect to the countertop, Detective Constable Emberlin explained that the countertop was arborite which has the same surface as a very fine sandpaper.

As a result, it was “not the greatest” for lifting fingerprints. Again, no useable prints were found on the countertop.

[53] The trial judge’s failure to find reasonable doubt based on the lack of fingerprints on the glasses and the countertop does not make his verdict unreasonable. It is up to the trier of fact to determine what weight he is going to give to any piece of evidence. It is apparent from the trial judge’s reasons that the lack of fingerprints on these two items carried very little weight in light of the other evidence he heard.

iii. The videotape shows the employee being grabbed by the throat by the robber. The employee was screened for DNA evidence and no DNA evidence other than the employee’s was found.

[54] Again, this was explained by Detective Constable Emberlin in his cross-examination. He described the DNA sample that he took as a “contact DNA swab”. Contact DNA is where someone has touched something and the police are hoping that they can get their DNA from what they have touched.

[55] In this case, the only DNA found on the swab was the employee’s. Mr. Sykes’ DNA was not found on the swab nor was anyone else’s.

[56] Like the fingerprints, the lack of DNA is of little or no weight in the trial judge’s decision. To follow Mr. Sykes’ argument to its logical conclusion, if he was not the robber then someone else’s DNA ought to have been on the swab taken from the employee. However, there was no other DNA detected. It was entirely appropriate for the trial judge to put little or no weight on the lack of DNA.

iv. The police executed warrants on his house and his car and found none of the clothing, money or other items identified in the robbery. The toy gun that was found did not match the description given by the store employee.

[57] The trial judge was cognizant of the fact that the toy gun apparently purchased on the day of the robbery did not match the description given by the employee. He was clear in his reasons that the handgun did not constitute evidence that he was willing to weigh in consideration of his guilt or innocence.

[58] With respect to the items that were identified in the robbery that were not found, once again it was up to the trial judge to weigh that evidence and determine what weight should be given to it.

v. The employee identified him as a white male

[59] Mr. Sykes says he is of mixed race and that anyone describing him would not say he was white. He argues the trial judge dismissed the employee's description of him as irrelevant.

[60] Mr. Sykes' argument on this issue also fails. With respect, the trial judge did not dismiss that evidence. He carefully considered the evidence and was well aware of the discrepancy between the description of the robber as being a white male and the fact the appellant was of mixed race. The trial judge found that considering the stressful circumstances the employee was under while being robbed and choked, Mr. Sykes could have been described as a white male. In so doing, the judge did not misapprehend or ignore relevant evidence.

vi. The robber on the security cameras in the mall and the Running Room is not him

[61] Mr. Sykes says that the person on the videos does not match his description and the trial judge's finding that the robber had the same size and body shape as him is simply wrong. He further says that the trial judge did not have an opportunity to observe him in the courtroom for the length of time necessary to make the comparison.

[62] The trial judge emphasized that he had looked at the videotapes very carefully and he specifically found that Mr. Sykes has the same size and body shape as the robber shown on the videotape. It is also obvious from his reasons that the trial judge felt he had ample opportunity to view Mr. Sykes in the courtroom in order to ground his findings. His conclusion is consistent with the evidence.

[63] This concludes my review of the arguments made by Mr. Sykes.

[64] The trial judge carefully considered and explained the evidence he relied upon for the purposes of finding Mr. Sykes guilty. His reasons for convicting Mr. Sykes are substantial and sound and fully supported by the evidence at trial. In my

opinion, Mr. Sykes' argument that the verdict is unreasonable and not supported by the evidence fails.

[65] The appeal is dismissed.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.