NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hines*, 2007 NSCA 56

Date: 20070511
Docket: CAC 265817
Registry: Halifax

Between:

Ronald Douglas Hines

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.
Appeal Heard:	May 9, 2007 in Halifax, Nova Scotia
Held:	Leave to appeal sentence allowed. Appeal with respect to count 10 of the indictment allowed; that conviction overturned and an acquittal entered. With the exception of the foregoing, appeal against conviction and sentence dismissed per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	David Perlmutter for the appellant Dana W. Giovannetti for the respondent

Reasons for judgment:

[1] At the conclusion of the hearing of this appeal, we allowed leave to appeal sentence; with respect to count 10 of the indictment only, allowed the appeal, overturned the conviction, and entered an acquittal; and, with that exception, dismissed the appeals from conviction and sentence. The parties were advised that reasons would follow. These are those reasons.

[2] Justice Allan Boudreau, sitting alone, convicted the appellant of armed robbery (s. 344 of the *Criminal Code*) and seven other offences, namely forcible entry (s. 72(1)), confinement (s. 279(2)), being masked with intent (s. 351(2)), using imitation firearm (s. 85(2)(a)), two breaches of probation (s. 733.1(1)), and breach of undertaking (s. 145(3)). He found that the appellant, with two others, broke into a home around 1:00 in the morning, tied the homeowner's hands with duct tape, disabled his phones, and took cash and personal property. They then used an axe to break into an outbuilding where the victim operated a bootlegging business, and stole liquor and other items. The total sentence, without credit for remand time, was eight years imprisonment.

[3] The appellant argues that the trial judge erred in law in his application of the test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 (S.C.C.) by relying on misapprehended physical corroborating evidence, and that he imposed a sentence which was excessive in the circumstances. At the hearing of the appeal, the appellant informed the court that his appeal against conviction is brought pursuant to s. 686(1)(a)(I) of the *Code* which reads:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> . . .

[4] The test for reviewing a trial judge's verdict pursuant to s. 686 (1)(a)(i) for unreasonableness was set out by Fish, J. in *R. v. Beaudry*, 2007 SCC 5. In that

decision, Fish, J. revisited the appropriate test and, at ¶ 98, stated:

> I hasten to add that appellate courts, in determining whether a trial judge's verdict is unreasonable, cannot substitute their own view of the facts for that of the judge or intervene on the ground that the judge's reasons ought to have been more fully or more clearly expressed. That is beyond the purview of an appellate court: *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Burke; Biniaris; H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Kerr* (2004), 48 M.V.R. (4th) 201, 2004 MBCA 30. But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(a)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.

Having reviewed the record and heard the submissions of counsel, we are not persuaded that the trial judge's verdict was unreasonable or cannot be supported by the evidence, such as to justify appellate intervention. Nor are we persuaded that the trial judge erred in principle, failed to consider a relevant factor, overemphasized appropriate factors, or imposed a sentence that is demonstrably unfit sentence*: R. v. Harris*, [2000] N.S.J. No. 9 (N.S.C.A.) at ¶ 46-47.

[5] The Crown pointed out that count 10 of the indictment alleged a breach of a probation order by the consumption and possession of alcoholic beverages, but the probation order in evidence at trial did not include such a prohibition. With respect to count 10 only, we would allow the conviction appeal, overturn the conviction, and order acquittal. However, where the sentence for count 10 was concurrent, the total sentence remains unchanged.

[6] We would grant the appellant leave to appeal his sentence but, with the exception noted above in regard to count 10, would dismiss the appeals against conviction and sentence.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.