NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Dowe***, 2007 NSCA 128

Date: 20071219
Docket: CAC 279500
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Michael Gordon Dowe

Respondent

Judges:	Bateman, Cromwell and Fichaud, JJ.A.
Appeal Heard:	December 5, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed, acquittal set aside and a new trial ordered per reasons for judgment of Bateman, J.A.; Fichaud, J.A. concurring; Cromwell, J.A. dissenting
Counsel:	Peter Rosinski, for the appellant Stephanie Hillson, for the respondent

Reasons for judgment:

[1] After trial in the Nova Scotia Supreme Court Michael Gordon Dowe was acquitted on a charge of break and entry. The Crown appeals, seeking a new trial.

The Evidence at Trial

[2] Mr. Dowe's father, John Gibson Dowe was a caretaker and responsible for collection of coins from laundromat machines at the apartment building located at 21 Dickey Street in Amherst. As was his usual practice, he placed the coins he had collected up to about noon April 17, 2006 in a cardboard box in the desk in a locked basement office at that address.

[3] "After lunch" he saw his son and William Lank standing around the front part of the building talking. Shortly thereafter he went to check on the locked basement office and found the door had been "pried open with a crowbar or something" and the cardboard box and money in the desk had been stolen. Neither Mr. Lank nor Michael Gordon Dowe lived at that address.

[4] The younger Mr. Dowe's sister, Crystal Agnew, saw her brother and Mr. Lank walking away from the building "a little after lunch" that day with Mr. Lank carrying a backpack. She testified that Mr. Dowe was not visiting her on that day. She said, as well, that Mr. Dowe's girlfriend, Trina, lived on the second floor of the building.

[5] Mr. Lank was arrested a day or two after the robbery, providing a videotaped confession and statement. He initially plead not guilty but eventually entered a guilty plea to the offence. At the time of Mr. Dowe's trial Mr. Lank was awaiting sentencing.

[6] At trial Mr. Lank testified that he and Mr. Dowe had broken into the office and taken the money. It was Mr. Dowe who told him where the money could be found. They used a pry-bar to open the locked basement office door. He had a backpack with him that day but carried the money away in the cardboard box. The theft occurred around lunch time. They were only there for fifteen minutes or so. They took the coins (quarters and loonies), used them in VLTs, got money back as change and then bought drugs together, having split the proceeds 50/50. Mr. Lank

testified there was only approximately $450.00 in the box, not the $800.00 John Gibson Dowe had estimated.

[7] Mr. Dowe, who was not represented by counsel at trial, did not testify or present other evidence.

[8] He was acquitted by Justice D.L. MacLellan, sitting without a jury (decision reported as **R. v. Dowe**, 2007 NSSC 92, unreported).

ISSUES

[9] The Crown says the judge erred in law:

(i) in ruling that the Crown could have adduced evidence of Mr. Lank's prior consistent statement to the police to corroborate his evidence of Mr. Dowe's involvement in the robbery;
(ii) in concluding that corroborative evidence, in the *Vetrovec* context, must directly implicate the accused; and
(iii) in concluding that there was no evidence presented at trial capable of corroborating the evidence of William Lank.

ANALYSIS

Standard of Review

[10] Under s.676(1)(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, the Crown may appeal an acquittal, without leave, on a question of law. To obtain a new trial, however, the onus on the Crown is a heavy one. In **R. v. Graveline**, [2006] 1 S.C.R. 609, 2006 SCC 16, Fish J., for the majority of the Court, wrote:

> 14 It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

. . .

> 16 Speaking more recently for a unanimous court in *R. v. Sutton*, [2000] 2 S.C.R. 595, 2000 SCC 50, the Chief Justice stated:
>
> > The parties agree that acquittals are not lightly overturned. The test as set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. In *R. v. Morin*, [1988] 2 S.C.R. 345, this Court emphasized that "the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty" (p. 374). [para. 2]

Vetrovec Corroboration

[11] It has long been recognized that the evidence of certain kinds of witnesses in a criminal trial is inherently suspect. One such category of witness is the alleged accomplice of the accused. When charging a jury the judge must warn that it is dangerous to base a conviction upon the evidence of the "accomplice" unless that evidence is corroborated. A judge sitting without a jury must obviously treat the "accomplice's" evidence with equal caution.

[12] Prior to the Supreme Court of Canada's judgment in **R. v. Vetrovec**, [1982] 1 S.C.R. 811 it was the law that the evidence capable of corroborating that of the "accomplice" must be independent testimony which implicates the accused in the crime (**R. v. Baskerville**, [1916] 2 K.B. 658).

[13] In **Vetrovec**, **supra**, the Court reassessed the law of corroboration in the context of accomplice evidence. There are a number of reasons to approach an alleged accomplice's evidence with suspicion: he may be purchasing immunity from prosecution or favour in his own sentencing by implicating the accused; he may testify against the accused to minimize his own role in the crime; he may falsely implicate the accused to protect a friend who was, in fact, his accomplice in the crime; or he is not worthy of belief because he is a self-confessed criminal. The Court in **Vetrovec** opined that none of these arguments justified a fixed rule requiring, in all cases, corroboration of the evidence of accomplices.

[14] Additionally, the Court rejected the **Baskerville** requirement that only evidence directly implicating the accused could corroborate that of the alleged

accomplice. Corroboration, said Dickson J., as he then was, for the Court, is any evidence which is capable of satisfying the trier of fact that the accomplice is telling the truth (at p. 826):

> . . .The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. This is because, as Wigmore said, the matter of credibility is an entire thing, not a separable one:
>
> > ... whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not how our trust is restored, but whether it is restored at all [Vol. VII, para. 2059, at p. 424].

[15] More recently in **R. v. Kehler**, [2004] 1 S.C.R. 328, 2004 SCC 11, Fish J. addressed the *Vetrovec* Rule:

> 12 The appellant concedes, at para. 11 of his factum, that "confirmatory evidence", in the sense that concerns us here, "need not directly implicate the accused or confirm the Crown witness' evidence in every respect". In his submission, however, "the evidence should ... be capable of restoring the trier's faith in the relevant aspects of the witness' account" (emphasis added).
>
> 13 As a matter both of law and of logic, we agree with that submission.
>
> . . .
>
> 15 . . . And while confirmatory evidence should be capable of restoring the trier's faith in relevant aspects of the witness's account, it hardly follows that the confirmatory evidence must, as a matter of law, implicate the accused where the only disputed issue at trial is whether the accused was a participant in the crimes alleged.

> 16 As the appellant himself concedes, it is clear from *Vetrovec, supra*, that independent evidence, to be considered confirmatory, does not have to implicate the accused. There is no separate rule in this regard for cases where the only evidence of the accused's participation in the offence is that of a tainted witness.
>
> . . .
>
> 20 Where a particular risk attaches to one critical element of the evidence of "an accomplice, or a disreputable witness of demonstrated moral lack" (*Vetrovec, supra*, at p. 832), the trier of fact must be satisfied that the "potentially unreliable" evidence of the witness can be relied upon as truthful in that regard.
>
> 21 Such a risk may arise, for example, where there is any basis in the record for suggesting that the unsupported evidence of an accomplice, though evidently truthful as to his own participation in the offence charged, is for any reason subject to particular caution as regards his implication of the accused.
>
> 22 However, even then, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness — even on disputed facts that are not otherwise confirmed — if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful.

The Trial Decision

[16] I will quote from the reasons for judgment and the trial record at some length. After reciting the evidence the judge said:

> [7] The burden in this case, as in every case, is on the crown to prove each and every element of the offence beyond a reasonable doubt. I find that the crown have shown by the evidence that the accused was clearly observed by his father and his sister in the area outside the building in which the office is located, on the day of the offence, and around the same time as the alleged offence. It is noted, however, that there is a partial explanation as to why the accused might be there, in that apparently his girlfriend lives in that apartment building.
>
> [8] There is no evidence directly linking the accused to the actual commission of the offence, except the evidence of Mr. Lank. Mr. Lank is clearly a co-accused of the accused here, and he says that, despite the fact that shortly after he was arrested, or at the time he was arrested, shortly after the alleged offence he gave a statement to the police in which he admitted complete involvement in the offence, he pleaded not guilty to the offence. The matter went on for some time in court, but after getting legal advice he changed his plea to guilty, but in fact he has not

been sentenced on that offence, and is scheduled to be sentenced later this month. The issue therefore is how much weight should be put on the co-accused's evidence.

[9] The case law, and it's admitted I think fairly by Mr. Baxter on behalf of the crown, that the case law is fairly stringent in regard to evidence from a co-accused. Normally this court, in dealing with evidence from a co-accused, and if I was instructing a jury, and I should instruct myself the same way, is that it's normally dangerous to base a conviction on the evidence of a co-accused unless there is clear corroboration of his evidence. That is if the central and most significant evidence is the evidence from the co-accused. The reasoning behind that is that there is a concern that a person who is involved with a co-accused, by implicating others in the offence, might divert some blame from himself, and that might in effect help him on the issue of sentence, to the effect that he wasn't really the mastermind of the crime, but was just sort of a party to it, and that that would make him look better at sentencing, as opposed to being the principal person involved in the crime itself. There is always significant concern when that evidence is being taken from a co-accused who has not been sentenced for the offence for which he is admitting involvement. If the sentencing process is already finished, then there would be no concern because there would be no reason for the co-accused to implicate somebody else, because he couldn't derive any benefit. However, in this case clearly the sentencing process is not finished against Mr. Lank.

[10] There is no evidence from the police about what Mr. Lank told the police in his statement, except a general characterization of it that he admitted involvement. There is no evidence that he told the police at that time that the accused was with him when he broke into the office. If that was the evidence, that would allay the concern the court has that Mr. Lank is making up a story now to involve the accused, because if he gave a previous consistent statement to his evidence in court, then he can't be accused of making it up to better his own needs.

[11] The burden on the crown to prove guilt is very high. It not only must show that the accused might have committed the, or likely committed the offence, but the court has to be completely sure that the accused actually committed the offence and is guilty. The court here is not satisfied that there is other evidence that implicates the accused in this break and enter, except the evidence from Mr. Lank. There was evidence that he was in the area where the offence was committed, but there appears to be a rational explanation for him to be there. There is no evidence that the accused knew about the coins in the office. He doesn't live with his father, he lives on his own. I guess the question would be asked is how would he know that there were specifically coins in that office at

that time. That's an issue. The crown prosecutor has suggested that he told that to Mr. Lank. Well, there's no evidence from any of the other witnesses to base that suggestion that he knew that.

[12] Based on all the evidence, and the serious concern the court has about the evidence of the co-accused, I'm not satisfied that the court should rely on that evidence to enter a conviction in this case, and therefore I find that the charge has not been proven, and the charge will be dismissed. Thank you.

(Emphasis added)

[17] During the Crown's summation the judge observed:

THE COURT: I guess my concern is that Mr. Lank appears to have told the police officer that he was involved, but there was no evidence that he told the police that the accused was involved.

. . .

THE COURT: Well, he didn't tell us what he told Mr. Lank [sic]. I think he said that he . . . I guess my concern is that, it seems to me, Mr. Baxter [the Crown attorney], the law is umpteen cases from every court of appeal in the country that you are to instruct the jury it is dangerous to convict on the evidence of a co-accused. Particularly I think justice, Chief Justice Glube, former Chief Justice Glube had decided a case a number of years ago that where she refused to accept the evidence of a co-accused who had not been sentenced.

MR. BAXTER: Well the ...

THE COURT: And I don't know if the rule is that rigid or not anymore.

MR. BAXTER: I don't think it is, is that rigid. But the, that is why, as I say, that is why I've referred to the evidence of the, of the I guess uninterested witnesses, indeed witnesses who might . . .

THE COURT: But that just puts him at the scene.

MR. BAXTER: Yes.

THE COURT: It doesn't put him committing the offence.

. . .

(Emphasis added)

[18] In answer to a question posed by Crown counsel at the conclusion of his reasons the judge confirmed his view that the Crown could have put into evidence any prior consistent statement by Mr. Lank to the police to corroborate his testimony at trial.

[19] The Crown says the judge's reasons reveal two errors. Quoting from the Crown factum:

> 47. It is submitted that [the trial judge] erred in law in concluding that the evidence of the two independent witnesses could not corroborate Mr. Lank's testimony because it did not "put him committing the office" [i.e. directly implicate Mr. Dowe].
>
> 48. [The trial judge] also erred in law in concluding that Mr. Lank's prior statement to police, if consistent, could constitute "corroboration". . . .

[20] With respect, the judge clearly erred at law in holding that the Crown could have tendered, as corroborative of Lank's evidence, his prior statement to the police implicating Mr. Dowe. As Cory J. wrote in **R. v. Evans**, [1993] 2 S.C.R. 629, at p. 643:

> Ordinarily, other persons may not be called to testify as to a witness's out of court statements. Nor may a witness repeat, in court, her own earlier statements. Generally, the narration by a witness of her previous declarations made to others outside of the court should be excluded because of its general lack of probative value and because such a repetition is, as a rule, self-serving. However, they may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance. See *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.), at p. 18, *per* Martin J.A., and *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 409.

[21] The judge was obviously concerned that Mr. Lank was manufacturing the evidence of Mr. Dowe's involvement to gain some favour for himself when sentenced. However, the defence did not allege recent fabrication. The trial judge raised this on his own motion during the Crown's final submissions. Even had the allegation of recent fabrication arisen, Mr. Lank's prior consistent statement to the police could only serve to rebut that allegation. It could not corroborate the truth

of his statement about Mr. Dowe's involvement in the offence (**R. v. D.R.C.**, 2007 SCC 28, (2007), 220 C.C.C. (3d) 289 (S.C.C.) *per* Charron J. at paras. 83 and 84).

[22] Distracted by his mistaken view that the Crown could have, but did not, call evidence of Mr. Lank's statement to the police, the judge then failed to properly assess whether there was other evidence corroborative of Mr. Lank's testimony. In effect he discounted Mr. Lank's evidence without appropriate analysis.

[23] This flawed approach was compounded by the judge's apparent view that, absent other evidence which implicated Mr. Dowe in the offence, he could not accept Mr. Lank's testimony.

[24] As is clear from **Vetrovec, supra** and **Kehler**, **supra**, evidence capable of restoring the trier of fact's faith in relevant aspects of the witness's account, while not directly implicating the accused in the offence, can be corroboration. Indeed, the trier of fact is entitled to convict without corroboration, if satisfied the witness is truthful.

[25] Here, in my respectful view, the judge failed to assess the credibility of Mr. Lank because he misunderstood the nature of the evidence that can serve as corroboration and, wrongly believed he could not accept Mr. Lank's evidence without such corroboration.

[26] The judge made no assessment of the evidence potentially corroborative of Lank's version of events - that Dowe was in the area of 21 Dickey Street at the time of the robbery; that he was seen walking away from the building with Mr. Lank at that time; that the box of coins seemed to have been the target of the break-in, being the only property stolen; and that it was Mr. Dowe's father who kept the coins in the office. Although these pieces of evidence viewed in isolation might not constitute corroboration, collectively they may do so (**R. v. Gagnon** (2000), 147 C.C.C. (3d) 193, [2000] O.J. No. 3410 (Q.L.)(Ont.C.A.) *per* Weiler J.A. at para. 48).

[27] While the judge did mention the independent evidence that Mr. Dowe was seen in the vicinity of the robbery at the same time of day, he did not reference it in the context of its potential to corroborate the truthfulness of Mr. Lank's account. He raised it but speculated on another possible explanation for Mr. Dowe's

presence in the area. In the face of his clear misunderstanding of the law of corroboration, the judge's failure to mention and discount the evidence capable of providing corroboration leads me to conclude that he erred at law in the assessment of Mr. Lank's evidence. Nowhere in his reasons does the judge say that he disbelieves the testimony of Mr. Lank about Mr. Dowe's involvement in the offence. Nor does he refer to Mr. Lank's evidence that he had been neither offered nor promised any favour for his testimony implicating Mr. Dowe.

[28] I acknowledge that a trial judge is presumed to know the law and is not required to demonstrate in his/her reasons that s/he has appreciated each aspect of all relevant evidence (**R. v. Burns**, [1994] 1 S.C.R. 656 at paras. 18 and 19). Where a phrase in a judgment is open to more than one interpretation, that which is consistent with the presumption that the judge knows the law is to be preferred. Reasons for judgment are not dissected in a search for error but read as a whole (**R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 (Ont.C.A.) *per* Doherty J.A. at p. 203).

[29] However, neither should a judgment receive a strained interpretation in an effort to diminish obvious defects. As LeBel J. wrote, dissenting, in **R. v. Graveline**, **supra**:

> 27 However, notwithstanding the traditional respect for acquittals in the Canadian criminal justice system, the *Criminal Code*, by the clearly expressed intention of Parliament, gives the Crown limited rights of appeal. Thus, rights of appeal do exist and acquittals are not necessarily sacrosanct. An appellate court must therefore try to make a reasonable assessment of the impact of the errors on which the prosecution bases its appeal.

[30] Throughout his reasons the judge was focussed on a search for evidence corroborating that of Mr. Lank which, he wrongly thought, must directly implicate Mr. Dowe. This is evident in each of the paragraphs of his decision reproduced above. I repeat his comments from the penultimate paragraph:

> [11] . . . The court here is not satisfied that there is other evidence that implicates the accused in this break and enter, except the evidence from Mr. Lank. There was evidence that he was in the area where the offence was committed, but there appears to be a rational explanation for him to be there. There is no evidence that the accused knew about the coins in the office. He doesn't live with his father, he lives on his own. I guess the question would be asked is how would he know that there were specifically coins in that office at that time. That's an issue. The

> crown prosecutor has suggested that he told that to Mr. Lank. Well, there's no evidence from any of the other witnesses to base that suggestion that he knew that.

[31] In summary, the judge did not engage in an ultimate analysis of Mr. Lank's testimony, and then reject his credibility. Had he done so, different issues would arise on appeal. Rather, the judge required corroboration before he could consider Mr. Lank's testimony. As is apparent in the passages quoted above, the corroboration sought by the judge was restricted to evidence implicating Mr. Dowe in the crime. But, as a matter of law, evidence can corroborate Mr. Lank's testimony even though that evidence does not itself implicate Mr. Dowe. The judge did not appreciate this. Consequently the judge did not consider whether Mr. Lank's testimony was corroborated by the evidence that: (1) Mr. Lank and Mr. Dowe were seen together in the area during the time period in question, (2) the mode of break in - prying the door open - may have corresponded with Mr. Lank's version, (3) the access to the coins in the box in the basement office may have indicated some inside knowledge by Mr. Lank, which Mr. Lank testified he obtained from Mr. Dowe. The judge did not assess Mr. Lank's testimony in the context of this other evidence as potential corroboration but rather rejected it because there was no other evidence of Mr. Dowe’s direct involvement in the crime.

[32] The issues raised here by the Crown are not isolated mis-statements within a lengthy jury charge or set of reasons. In my view the errors apparent in the judge’s reasons are interconnected and reveal a fundamental misunderstanding of the law of corroboration as applied to the evidence of Mr. Lank. They are inconsistent with a presumption that the judge knows the law. The judge was entitled to disbelieve Mr. Lank about Mr. Dowe’s involvement in the offence. However, it was incumbent upon him to evaluate that evidence in accordance with proper principles. This, with respect, I would find he did not do. The reasons do not admit of any other reasonable interpretation.

[33] In order to set aside an acquittal the Crown must establish, to a reasonable degree of certainty, that but for the judge’s error(s), the verdict would not necessarily have been the same. I would find that the Crown has met the burden.

[34] I would allow the appeal, set aside the acquittal and order a new trial.

Bateman, J.A.

Concurred in:

Fichaud, J.A.

Cromwell, J.A. (Dissenting):

[35] The Crown invites us to read into the trial judge's reasons an error of law alone that is not expressly there, and having done so, to set aside an acquittal resulting from the judge's reasonable doubt. I decline that invitation. With great respect to my colleagues who are of different opinion, I would dismiss the appeal.

[36] I accept that the judge erred in law in one respect. He thought, incorrectly, that Mr. Lank's prior statement to the police would have been admissible and would have constituted corroboration. However, this error on its own, as Crown counsel properly conceded, could not have affected the result. I would hold that while the judge erred in law in this respect, the Crown has not discharged its heavy burden of showing that the error "... might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal": **R. v. Graveline**, 2006 SCC 16, [2006] 1 S.C.R. 609 at para. 14.

[37] The judge was looking for corroboration to bolster Lank's evidence. The evidence he wrongly thought could constitute corroboration was not before him and could not have assisted him in his search for corroboration if it had been. There would not have been any more corroboration, even without this error. The judge's mistake in thinking that non-existent evidence could, if present, constitute corroboration was not material to his decision to acquit on the basis that Lank's evidence was not sufficiently corroborated to be trustworthy.

[38] That leaves for consideration the Crown's principal submission: that it should be implied from the judge's reasons that he thought corroboration must implicate the accused in the commission of the offence and that he could not accept Lank's evidence without such corroboration. I agree that this would be an error of law. However, my view is the judge made no such error.

[39] No one suggests that the judge made this alleged error explicitly. He did not. The question is whether it is implicit in what he did say that he must have had this mistaken understanding of the law.

[40] In considering that question, it is important to understand the different roles of the judge when instructing himself on the law and when acting as a trier of fact. To be capable in law of constituting corroboration, the evidence must simply be

independent evidence which is "... capable of restoring the trier's faith in the relevant aspects of the witness' account": **R. v. Kehler**, [2004] 1 S.C.R. 328, 2004 SCC 11 at para. 12. Whether the evidence actually has that effect is for the trier of fact. Evidence which, in law, is capable of constituting corroboration may not actually restore the trier of fact's faith in the witness's evidence. As was recognized in **Kehler**, "... triers of fact will not lightly accept unsupported assertions by a disreputable or unsavoury witness where nothing but the word of that witness implicates the accused in the commission of the crime charged": at para. 17. In short, with or without evidence which is capable in law of being corroboration, the trier of fact is entitled to have a reasonable doubt about the accused's guilt.

[41] The judge in this case was very concerned that the Crown's case rested on the evidence, not just of an accomplice, but of an accomplice who had not yet been sentenced for the crime. Lank was awaiting sentence for the offence at the time he testified against the accused. The judge noted that "[t]here is always significant concern when evidence is being taken from a co-accused who has not been sentenced for the offence for which he is admitting involvement." (Reasons, para. 9).

[42] This, if anything, was an understatement. In words at least twice approved by the Supreme Court of Canada, "...the practice of calling an accomplice against whom unresolved legal proceedings are outstanding is to be frowned upon and even condemned...": **R. v. Williams** (1974), 21 C.C.C. (2d) 1 (C.M.A.C.) at 11, leave to appeal refused December 2, 1974; **United States of America v. Shepherd**, [1977] 2 S.C.R. 1067 at 1086, **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at 641. As to Lank's own involvement in the offence, the judge had no apparent reason to doubt Lank's evidence. But with respect to the accused's participation, the judge had a wealth of judicial experience and common sense to support his scepticism about Lank's testimony.

[43] The judge refers to this point twice in his very brief oral reasons. He made no error in this regard. Nothing he said in the context of directing himself on this point states, or even suggests, that he thought corroboration as a matter of law must implicate the accused in the commission of the offence. For that matter, nothing he said suggests he thought corroboration was necessary in order to convict. He observed, correctly, that "... it's normally dangerous to base a conviction on the

evidence of a co-accused unless there is clear corroboration of his evidence." (Reasons, para. [9]). The judge, in my view, understood that he could convict even without corroboration.

[44] As I read the judge's reasons, he found that the evidence as a whole did not persuade him beyond a reasonable doubt that the accused had participated in the offence. I cannot accept the suggestion that he failed to assess Mr. Lank's credibility or that he discounted Mr. Lank's evidence without appropriate analysis.

[45] The judge stated that the issue was "... how much weight should be put on the co-accused's [Lank's] evidence.": reasons para. 8. This statement of the issue is, of course, inconsistent with the suggestion that the judge thought the issue was simply whether there was other evidence implicating the accused. The Crown in effect suggests that the issue the judge really decided is not the one he said he had to decide. I would not accede to that suggestion. The judge acknowledged that there was independent evidence placing the accused near the scene at about the time the offence was alleged to have been committed. He also observed that this did not materially strengthen the Crown's case as there were innocent explanations available on the evidence as to why the accused would have been there. His father managed the building and the accused's girlfriend lived in it. (Reasons, paras. 7 and 11) This analysis, of course, would have been unnecessary if the judge mistakenly thought that this evidence was not corroboration or that without evidence implicating the accused in the commission of the offence, he had to acquit. The judge concluded his reasons by saying "[b]ased on all of the evidence, and the serious concern the court has about the evidence of the co-accused, I'm not satisfied that the court should rely on that evidence to enter a conviction in this case...": reasons para. 12. This statement, too, is inconsistent with any view on the part of the judge that he had to acquit absent other evidence implicating the accused in the commission of the offence.

[46] Respectfully, I cannot by implication read into the judge's reasons any finding by him that corroboration in law had to implicate the accused let alone that he could in law only convict if there was independent evidence implicating the accused in the commission of the offence. In my view, the judge found, as he was entitled to find and as he stated expressly, that the charge had not been proved: reasons para. 12.

[47] While there was evidence capable in law of constituting corroboration, it was open to the judge, as the trier of fact, to find that there was nothing that materially assisted him in overcoming his doubt on the critical issue of the accused's involvement in the offence. There were good reasons for the judge to be concerned "... that the unsupported evidence of an accomplice [and, I would add, an accomplice awaiting sentence], though evidently truthful as to his own participation in the offence charged, [was] ... subject to particular caution as regards his implication of the accused." **R. v. Kehler**, **supra** at para. 21. The judge, as the trier of fact, was entitled to have a reasonable doubt and to acquit.

[48] I would dismiss the appeal.

Cromwell, J.A.