

PROVINCIAL COURT OF NOVA SCOTIA

Citation : *R. v. Ajibade*, 2022 NSPC 1

Date: 20220110

Docket: 8461884

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Ayoola Ajibade

Judge:	The Honourable Judge Paul Scovil,
Heard:	August 30, 2021 and August 31, 2021, in Bridgewater, Nova Scotia
Decision	January 10, 2022
Charge:	380(1) <i>Criminal Code</i>
Counsel:	Alan G Ferrier, Q.C. for the Defendant Keavin-Mathieu Gallant Finnerty, for the Crown

By the Court:

[1] This case involves a fraud of almost half a million dollars that connects Nigeria, China, Brampton Ontario and the Town of Bridgewater, Nova Scotia. It also brings in the Bank of Nova Scotia and a very large group of companies under the banner of Dexter Construction.

FACTS

[2] Ayoola Ajibade, originally from Nigeria, but as of late hailing from Brampton Ontario, stands charged that:

On or about the 22nd day of October, 2019, at or near Bridgewater, did:
Fraudulently personate Joey Montgomery with intent to obtain property to wit Canadian Currency, contrary to Section 403 of the Criminal code,

And furthermore did

On or about the 25th day of October, A.D., 2019, at or near Bridgewater, Nova Scotia, did fraudulently personate Joey Montgomery and Dave Wood with intent to obtain certain property to wit Canadian Currency, contrary to Section 403 of the Criminal Code.

And furthermore did,

Between the dates of the 22nd day of October, A.D., 2019 and the 6th day of November, A.D., 2019, at or near Bridgewater, Nova Scotia, did by deceit, falsehood or other fraudulent means defraud the Town of Bridgewater of a sum of money, a total exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code.

[3] On October 22, 2019, the accounts payable clerk for the Town of Bridgewater received an email purporting to be from the Divisional Controller of Dexter Construction. The clerk recognized the individual's name and knew that the Town had numerous contracts with Dexter Construction. The email requested the forms necessary to allow Dexter Construction to conduct business through Electronic Fund Transfers (EFT) allowing direct deposit to a Scotiabank account.

[4] The clerk emailed the required forms back to the same email address. The forms were filled in and returned to the Bridgewater Town Office.

[5] Witnesses from Dexter Construction testified that they had not requested the EFT form, nor had they filled them out. Further, they did not bank with Scotiabank. Scotiabank was the financial institution listed on the EFT. The EFT

form directed that the funds owed to Dexter Construction were to be paid by the Town of Bridgewater to Scotiabank branch Number 63552 and to the account bearing Number 0007617. This brings us to Mr. Ajibade. Mr. Ajibade was the owner of account 0007617 at Branch 63552. Mr. Ajibade and the Scotiabank branch 63552 both resided in Brampton Ontario.

[6] Evidence adduced by the crown showed that neither Mr. Ajibade nor his occupation as an Uber driver, in Brampton, had anything to do with Dexter Construction or its group of companies in Nova Scotia.

[7] In any event, shortly after the Town of Bridgewater changed Dexter's payment method to the false EFT mechanism, they received an invoice from Dexter's for \$490,930.43. The Town wired that amount together with two other large payments to the Brampton Scotiabank branch. This occurred on November 4, 2019.

[8] Mr. Ajibade went to Scotiabank on November 5, 2019, to attempt a wire transfer of \$180,000 to China. The teller on duty at the time stopped the wire transfer from being sent and indicated at the trial that it was placed in the pending category. The teller then spoke to her manager given the large amount of the transfer.

[9] Daljit Singh was an assistant manager at the Brampton Scotiabank, when she was alerted to the amount of the transfer. She attempted to call Mr. Ajibade but was only able to leave voice mail. She, also met with the accused on November 6th when he attempted to wire the \$180,000 to China. She, or the teller advised Mr. Ajibade there was a hold on this transfer.

[10] Mr. Ajibade was advised he needed to provide the bank with an invoice for the sum. Mr. Ajibade returned later in the afternoon with an invoice. He advised the bank employee that it was from his investors. In cross examination, the bank manager testified that Mr. Ajibade expressed frustration in the afternoon regarding the situation.

[11] The bank contacted the Town and/or Dexter Construction. As a result of the conversation, the bank did not transfer the money. The total amount that had been wired to Mr. Ajibade was returned to the Town of Bridgewater, who then ensured Dexter was paid.

[12] Mr. Ajibade testified on his own behalf. He is a Nigerian refugee who has resided in Canada since 2004. At one point in time, he worked in Brampton with a car parts manufacturer.

[13] Mr. Ajibade testified that in October of 2019, he received a call from an individual named Andrew. Mr. Ajibade did not know Andrew, nor did he know Andrew's last name. Andrew resided in Nigeria.

[14] Andrew said he was a friend of Joshua's. Mr. Ajibade once worked with a Joshua at the car parts plant. He does not know Joshua's last name, address, or contact information.

[15] Andrew advised Mr. Ajibade that he needed his assistance to buy a business. Despite not knowing Andrew or how to contact Joshua, Mr. Ajibade said, "Okay, I'll do it for you."

[16] Two days after Andrew first contacted Mr. Ajibade, Andrew called again, saying he was ready to buy the equipment he needed. Mr. Ajibade gave Andrew his banking information. Andrew told him to check his account and transfer \$180,000 to China.

[17] After Mr. Ajibade had gone to the bank the first time, Andrew called him back. Mr. Ajibade testified that he told Andrew the bank required an invoice for the \$180,000, and that Andrew provided him with an invoice which Mr. Ajibade in turn provided to the bank.

[18] Mr. Ajibade stated in court that he inquired from Andrew where he got the money. Andrew said he would get back to him with that information. Andrew never called him again.

[19] Mr. Ajibade denied knowing that the matter was not on the up and up. He broke down and cried for a short while on the witness stand, saying he would never get involved in such a scheme knowingly.

LAW

[20] As in all cases before this court Mr. Ajibade is presumed innocent unless proven otherwise beyond a reasonable doubt.

[21] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right "to be presumed innocent until

proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. Mr. Ajibade is presumed innocent of the charge unless the Crown proves each element of the offence beyond a reasonable doubt.

[22] Justice Cory speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt as follows:

36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[23] Justice Iacobucci, of the **Supreme Court of Canada** for the majority, said in *R. v. Starr*, 2000 SCC 40 that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities”. Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person beyond a reasonable doubt – which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[24] In this matter, given that the accused has testified, I must also apply the principles of *R. v. W.D.*, [1991] 1 S.C.R. 742. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence called by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I

must ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt, if not then I must acquit.

[25] Credibility plays a crucial role in the matter before this court.

[26] While a trial judge must give reasons for how they resolved credibility issues, the **Supreme Court of Canada** has recognized that it is difficult, “to articulate with precision the complex intermingling of the impressions that emerge after watching and listening to witnesses”. It is not a “purely intellectual” exercise. See *R. v. R.E.M.*, [2008] 3 S.C.R. 3.

[27] Judges are entitled to accept all, some, or none of a witness’s evidence.

[28] Trial judges must scrutinize and examine all of the evidence when considering the credibility of any single witness. In *R. v. D.D.S.*, 2006 NSCA 34, [2006] NSJ No. 103 (NSCA), Justice Saunders of our **Court of Appeal** stated as follows:

77 Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[29] Credibility cannot be determined by following some prescribed set of rules. Having said that, trial judges can and have assessed credibility by using a number of guideposts. While not exhaustive, Justice Mossip in *R. v. Fillion*, [2003] O.J. No. 3419 (Ont. SCJ) set out a series of factors which are instructive. He stated:

27 In assessing the reliability and credibility of witnesses testimony, I have considered factors that judges invite juries to consider such as:

Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?

Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?

Does the witness seem to have a good memory? Does any inability or difficulty that the witness has and remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?

Does the witness's testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same event? Did the witness say or do something different on an earlier occasion?

Do any inconsistencies in the witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important, or minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?

The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

IMPERSONATION

[30] There was no direct evidence before the court that Mr. Ajibade signed the documents or impersonated anyone. Nor can it be said that there is any circumstantial evidence that would allow this court, in law, to convict Mr. Ajibade of the first two counts. These counts were dismissed by this court at the conclusion of the crown's case.

FRAUD

[31] S. 380 (1) of the **Criminal Code** set out the offence of fraud as follows:

380(1) Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars

[32] Fraud, not unlike almost all offences, consists of two main components, the prohibited act, or *actus reus* and the required state of mind, *mens rea*.

[33] Proof of fraud requires an act of deceit, a falsehood or some other fraudulent means and a deprivation caused by the prohibited act. That deprivation may consist in actual loss or placing of the victim's pecuniary interests at risk. (See *R. v. Riesberry*, [2015] 3 S.C.R. 1167, *R. v. Theroux*, [1993] 2 S.C.R. 5 and *R. v. Zlatic* [1993] 2 S.C.R. 29)

[34] In *Riesberry*, Justice Cromwell stated at p. 23-24:

23 . . . Fraudulent conduct for the purposes of a fraud prosecution is not limited to deception, such as deception by misrepresentations of fact. Rather, fraud requires proof of "deceit, falsehood or *other fraudulent means*": s. 380(1). The term "other fraudulent means" encompasses "all other means which can properly be stigmatized as dishonest": *R. v. Olan*, [1978] 2 S.C.R. 1175, at p. 1180. The House of Lords [page1176] made the same point in *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819, a case approved by the Court in *Olan* (p. 1181). Fraud, according to Viscount Dilhorne in *Scott*, may consist of depriving "a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled": p. 839. And as Lord Diplock said, the fraudulent means "need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit": *ibid.*, at p. 841.

24 It follows that where the alleged fraudulent act is not in the nature of deceit or falsehood, such as a misrepresentation of fact, the causal link between the dishonest conduct and the deprivation may not depend on showing that the victim relied on or was induced to act by the fraudulent act. This is such a case.

[35] The *actus reus* of the offence of fraud was examined in *R. v. Olan*, [1978] 2 S.C.R. 1175. The elements needed to prove the offence are dishonesty and deprivation. The wording in s. 380 of "other fraudulent means" include means which may not be in the nature of deceit or a falsehood and encompass all other means which can properly be stigmatized as dishonest. The element of deprivation can be satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim.

[36] In *Theroux*, Justice McLachlin stated:

24 Having ventured these general comments on mens rea, I return to the offence of fraud. The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which

may, as we have seen, consist in merely placing another's property at risk. The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the actus of the offence (see Williams, supra, c. 3), the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

25 This applies as much to the third head of fraud, "other fraudulent means", as to lies and acts of deceit. Although other fraudulent means have been broadly defined as means which are "dishonest", it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the actus reus of the offence can be made out on particular facts. That established, it need only be determined that an [page20] accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.

26 I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.

ANALYSIS

[37] The question here primarily concerns the function of credibility and *R v. W.D.* The court must ask itself does it believe Mr. Ajibade. This court does not find him credible in the least. The story which Mr. Ajibade asks this court to accept is that he had a call from an Andrew, last name unknown, location unknown, save and except Nigeria, who asks Mr. Ajibade to assist in buying materials from China in the amount of \$180,000 from funds coming from the

Town of Bridgewater is incredible. Factor into this bizarre tale the fact that the only connection of Andrew to Mr. Ajibade is a Joshua, again name unknown.

[38] It is clear that Mr. Ajibade, knew or ought to have known, that the transaction involving the Town of Bridgewater sending him close to half a million dollars was fraudulent.

[39] Even if I was wrong and the story spun by Mr. Ajibade had truth to it, I find he would still be guilty by way of wilful blindness.

[40] The leading case on this issue is now *R. v. Briscoe*, 2010 SCC 13, [2010] 1 SCR 411, (SCC) where Charon J. summarized the principles that compose the doctrine at paragraph 21:

21 Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"

[41] Mr. Ajibade would have had his eyes shut here and shut hard.

[42] Mr. Ajibade, in his arguments to this court, stated that if the issue was one of willful blindness, then this would deprive this court of jurisdiction and Mr. Ajibade would have only been willfully blind in Ontario.

[43] This court has jurisdiction by virtue of s. 476(b) of the **Criminal Code**. There is a real and substantial link with Nova Scotia allowing jurisdiction by this court over the matters (see *Libman v. The Queen* [1985] 2 S.C.R. 178.)

[44] As a result of all the above the court finds that Mr. Ajibade committed the offence of fraud beyond any reasonable doubt and convicts him accordingly.

Paul Scovil, JPC