

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Jobe*, 2016 NSSC 282

Date: 2016-10-19

Docket: CRH No. 446890

Registry: Halifax

Between:

Her Majesty the Queen

v.

M'Bai Babou Jobe, Jordan Matthew Joyce, and Tyler Damian Kipper

Judge: The Honourable Justice James L. Chipman

Heard: September 19, 20, 21, 22 and 23 and October 19, 2016, in
Halifax, Nova Scotia

Counsel: Sean McCarroll, for the Provincial Crown
Luke Craggs, for Mr. Jobe
Eugene Tan, for Mr. Joyce
Jonathan Hughes, for Mr. Kipper

Orally by the Court:

Introduction

[1] The three co-accused are charged as follows:

That they on or about the 13th day of September, 2015 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully rob Z.S., contrary to Section 344 of the Criminal Code.

AND FURTHER that they at the same time and place aforesaid, did without lawful excuse point an imitation firearm at Z.S., contrary to Section 87(1) of the Criminal Code.

AND FURTHER that they at the same time and place aforesaid, did unlawfully have in their possession a weapon or imitation of a weapon, to wit., “an imitation firearm”, for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.

[2] I previously released two decisions dealing with the inadmissibility of statements made by Mr. Jobe (*R. v. Jobe*, 2016 NSSC 254) and R.B. (*R. v. Jobe*, 2016 NSSC 275).

[3] At nearly 3:00 a.m. on September 13, 2015, Halifax Regional Police received a call that there had been an armed robbery at the Atlantica Hotel on 1980 Robie Street, Halifax, Nova Scotia. Cst. Sherri Sampson testified she was one of the attending officers who first encountered the “hysterical guests”, Z.S. and Macara Johnson. Ms. Johnson was not overly cooperative; however, Z.S. provided Cst. Sampson with a statement which she said included a “detailed description of those involved”.

[4] On cross-examination, Cst. Sampson was referred to her notebook and entries referable to individuals involved in the robbery. For example, one of her notes disclosed there was a “young looking white male at the door” and that, “a black male and another white male burst in”. As for the fourth suspect, a female, Cst. Sampson testified that Ms. Johnson pulled a photo of R.B. up on her phone. When police looked R.B. up in their system, it was disclosed that she could be living at [...]. Accordingly, as the below agreed statement of facts discloses, police shortly thereafter attended at the South Street address where they came upon Jordan Matthew Joyce, M’ Bai Babou Jobe and Tyler Damian Kipper.

Agreed Statement of Facts

[5] On September 22, 2016, the parties submitted, pursuant to s. 655 of the *Criminal Code*, the following agreed statement of facts:

1. On September 13, 2015, at approximately 3:48 a.m. Halifax Regional Police officers attended 5189 South Street, Halifax, Nova Scotia.
2. Three males, identified as Jordan Matthew Joyce, M'Bai Babou Jobe and Tyler Damian Kipper, were located standing outside the residence.
3. At the time of arrest Mr. Kipper was wearing grey sweat pants, black sneakers, and a white t-shirt under a black vest.
4. Incident to arrest a set of car keys was seized from Mr. Joyce. (exhibit #8)
5. Using the electric unlock button on the key FOB officers were able to locate a black Mercedes-Benz E320 with NS License plate FRH 030 in the parking lot of the Atlantic Superstore, 1075 Barrington St.
6. Jordan Joyce is the registered owner of said vehicle.
7. The vehicle was seized and a warrant to search was obtained.
8. During the search of the vehicle officers found a black backpack in the trunk. (exhibit #7)
9. Inside the backpack officers found an Iver Johnson, model American Bull Dog, 32 Smith & Wesson caliber revolver. The firearm was subsequently tested and found to be inoperable. (exhibit #9)
10. The gun was wrapped in a white cloth and a \$5 bill.
11. Three 32-calibre cartridges were also found inside the backpack. (exhibit #10)
12. A grey Nike hoodie sweater was recovered from the trunk of the vehicle. (exhibit #11)
13. A search warrant was also obtained for Apt 17, 5189 South Street. During the search of that residence a Nova Scotia Driver's License in the name of M'Bai Babou Jobe was located from a black wallet on a window ledge. (exhibit #12)
14. During an interview with police R.B. admitted to her involvement in the robbery and directed police to a small closet in the basement of 5189 South Street. There police retrieved a Macbook laptop belonging to Z.S., a pink Dr. Dre Beats speaker belonging to Z.S., and a black backpack containing a ziplock bag of what appeared to be cocaine.
15. Clothing seized from Mr. Joyce, which he was wearing at the time of arrest included: a pink T-shirt (exhibit #13), blue jeans (exhibit #14), and white Nike sneakers. (exhibit #15).

16. Clothing seized from Mr. Kipper, which he was wearing at the time of arrest included: grey sweatpants (exhibit #16), a black vest (exhibit #17), and black Nike high top sneakers. (exhibit #18).
17. Clothing seized from Mr. Jobe, which he was wearing at the time of arrest included: green sweat jacket (exhibit #19), blue jeans (exhibit #20) and black and red high top sneakers. (exhibit #21)

Background

[6] The case against Mr. Jobe, Mr. Joyce and Mr. Kipper rests on the direct eye witness identification evidence and exhibits, inclusive of exhibit 3, video evidence taken from the lobby of the Atlantica Hotel on the morning in question.

[7] In addition to Cst. Sampson, the Crown called Sgt. Darrell Longley, Cst. Grant Fiander, D/Cst. Kurt Walsh, Cst. Gilles Boudreau and Cst. Brock Brooks. The Crown's lay witnesses were Raymond Snow, Z.S. and R.B.. Twenty-two exhibits were entered as part of the Crown's case. The Defence did not call any evidence.

[8] The burden of proving guilt beyond a reasonable doubt rests with the Crown and never shifts to the accused. An accused, in any criminal proceeding, is presumed innocent and bears no burden to explain away or rebut the Crown's evidence. The burden of proving guilt beyond a reasonable doubt is not discharged if guilt is suspected or if guilt is a probability.

[9] The Crown must prove each essential element of the offences charged beyond a reasonable doubt. In this case, the accused young men are charged with armed robbery in respect of victim, Z.S.. In order for the Crown to succeed, it must prove the essential elements of the offences in respect of the accused. The parties agree, and I find, this to be a case involving circumstantial evidence. Further, a key aspect boils down to whether the Crown has proven beyond a reasonable doubt the identity or identities of any one, two or three of Mr. Jobe, Mr. Joyce and/or Mr. Kipper.

Governing Law

[10] In *R. v. Leeds*, 2013 NSSC 364, Justice Cacchione dealt with eye witness identification evidence at length. I find his decision to be extremely helpful and of tremendous guidance in this area. Accordingly, I wish to quote extensively from Justice Cacchione's decision, from paras. 7-15:

[7] The decision in this case essentially rests on whether Ms. Gautreau correctly identified the accused as the person she allegedly saw assault the deceased. It is for this reason that her evidence must be scrutinized with the greatest care. Observation and memory are often unreliable when it comes to the identification of people. It is an area where people often make honest mistakes.

[8] In cases where eyewitness identification is the foundation of the prosecution's case, special caution must be paid when relying on such evidence. This is because although an eye witness can be a convincing witness, because the witness honestly believes that the accused is the person that he or she saw committing the offence, the witness may be mistaken. The Court must also be aware that although identification evidence by one witness can support that of another, even a number of honest witnesses can be mistaken. It is incumbent upon the Court to examine closely the circumstances in which the identification by a witness or a number of witnesses came to be made and to take into account any weaknesses which appear in the identification evidence: *Sophonow* (No.2), (1986), 25 C.C.C. (3d) at 438-40 (Man.CA.)

[9] Eye witness identification cases involving the identification of a stranger heighten the alarm as to the well recognized dangers inherent in such evidence and the risk of a miscarriage of justice through wrongful conviction: *R. v. Goran*, [2008] O.J. No. 1069 (C.A.) at para. 19. The Court in *Goran* went so far as to say that "...such evidence is inherently unreliable...": *R. v. Cuming* (2001), 158 C.C.C. (3d) 433 (Ont. C.A.) at para. 20; *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.) at 38. As the trier of fact dealing with eye witness identification evidence regarding a complete stranger I must be mindful that such identification evidence can be notoriously unreliable: *The Queen v. Nikolovski* (1997), 111 C.C.C. (3d) 403 (S.C.C.) at 411-412; *Bardales v. The Queen*, [1996] 2 S.C.R. 461 at 461; *Burke v. The Queen* (1996), 105 C.C.C. (3d) 205 (S.C.C.) at 224.

[10] It is of the utmost importance that the Court be cognizant of the danger of an honest but inaccurate identification especially in cases where the alleged perpetrator is previously unknown to the eye witness. The eye witness may be convincing and convinced of the identity of the perpetrator. That witness, as I have said previously, may also be mistaken. It is important that the Court recognize that it is the reliability and not the credibility of the eye witness which must be established: *R. v. Alphonso*, [2008] O.J. No. 1248 (C.A.) at para. 5: "...certainty cannot be equated with reliability..."; In *R. v. Goran* (supra) at paras 26-27 the Court referred to the fallacy of mistaking certainty for accuracy. In the present case Ms. Gautreau has convinced herself that the accused was the perpetrator as evidenced by her testimony at trial that, "in my mind Ryan Leeds killed my boyfriend".

[11] A reason why special caution is necessary when examining eye witness identification evidence was aptly expressed by Doherty J.A. in *R. v. Quercia*

(supra) at p. 383 where he stated: "...The spectre of erroneous convictions based on honest and convincing, but mistaken, eyewitness identification haunts the criminal law..." This Court is required to assess the quality of the eye witness identification evidence. The poorer the quality of such evidence, the greater the danger of a wrongful conviction: *Mezzo v. The Queen* (1986), 27 C.C.C. (3d) 97 (S.C.C.) at 108.

[12] If a witness has no previous knowledge of the accused person so as to make her or him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. The witness' recognition must proceed without suggestion, assistance or bias: *Rex v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.) at 177.

[13] In cases where the eye witness identification evidence is suspect, a Court must look for cogent confirmatory evidence in order to overcome the real risk of a miscarriage of justice taking place: *R. v. Boucher et al.* (2000), 146 C.C.C. (3d) 52 (Ont. C.A.) at 58.

[14] Eye witness identification evidence must be based on the independent recollection of the witness and not recollection arising as the result of discussions with and amongst various people. Such evidence may be compromised where an eye witness has discussed with others his or her recollection of the person's appearance before making an identification: *R. v. Holden* (2001), 56 O.R. (3d) 119 (C.A.) at p.136-137. In some cases, the failure to mention distinctive characteristics of a suspect in an initial description to the police may be quite material to the reliability of the identification.

[15] The Supreme Court of Canada has described an in-dock or in-court identification as having an "...almost total absence of value as reliable positive identification...": *R. v. Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.) at p.146-147.

Facts Based on the Evidence Presented

Lay Witnesses

Raymond Snow

[11] Mr. Snow attended a party at [...] earlier on the evening of September 12, 2015. From his vantage point looking down from the upper deck of the residence, he noticed, "two guys and a girl leaving in a Mercedes". Mr. Snow said that he would have made this observation at sundown, perhaps between 7:30 and 8:30 p.m. He then elaborated that he saw two white guys, perhaps between the ages of 22 and 25 get in the front seat. He added that a black guy (between 20 and 22

years of age) and a female (perhaps 18) got in the backseat. He recalled that the individuals opened the trunk, put something (perhaps a garbage bag) in it, closed the trunk and drove off.

[12] Mr. Snow said that he could not describe the people “perfectly” in part because he was looking down when he observed them.

Z.S.

[13] Z.S. (DOB [...], 1999) was 16 on September 13, 2015. She currently attends classes at the [...] school. Asked to recall the circumstances leading up to the September 13, 2015 robbery, Z.S. started out by saying she was, “having a little party”.

[14] Z.S. said that she was at the Atlantica Hotel with her friend, 20 year old Macara Johnson, who was working as an escort. Further, Z.S. allowed that she would also, “take calls for duos”.

[15] In the time leading up to the alleged robbery, Z.S. acknowledged drinking alcohol and doing drugs. With respect to the former, given Z.S.’s testimony, it is my finding that she consumed an excessive amount of Hennessey cognac. On cross-examination, it was developed that she also consumed wine in the hours before the incident. With respect to drugs, Z.S. admitted to taking cocaine and marihuana. Consistent with her evidence concerning alcohol, Z.S. could not say exactly how much cocaine and/or marihuana she ingested.

[16] Z.S. said that at some point between perhaps 9:00 p.m. and midnight, she received a call from R.B.. R.B. wanted to, “come hang and do calls”.

[17] Z.S. provided R.B. with her room number and perhaps 10 or 15 minutes after they had spoken on the phone, Z.S. said there was a knock at her door. Upon letting R.B. into the room, Z.S. said that Ms. Johnson left to go to the vending machines located on the second floor. Shortly thereafter, Z.S. described another knock at the door. Thinking it was a “john”, she opened it up, whereupon three men “busted in”.

[18] At this point in her direct testimony, Z.S. began to describe the three men. For reasons that will be apparent, I have decided not to recount all of Z.S.’s testimony in this area. In any event, I found that throughout her direct examination Z.S.’s description of the men varied. The difficulty with these varying descriptions

became compounded when Z.S. allowed that some of her recollections were based upon social media and other exchanges in the roughly one year since the robbery. In this regard, I accept Defence counsels' submissions that this aspect of Z.S.'s testimony, which they term crowd-sourced, is full of hearsay and must be disregarded.

[19] Z.S.'s evidence becomes all the more concerning when I consider her level of impairment. In this regard, the (then) 16 year old Z.S. is of relatively small stature. At the time of the robbery, she had spent perhaps two or three nights (she was not sure) at the hotel. Throughout, she had been partying (drinking alcohol and doing drugs), turning tricks and sleeping. In the evening/early morning in question, by her own admission, she was "getting turned up/fucked up".

[20] Given the evidence, it is my finding that Z.S. was sleep deprived and impaired by drugs and alcohol during the material time. As such, her powers of observation would have been compromised.

[21] In all of the circumstances, I have serious questions concerning both Z.S.'s reliability and credibility in respect of her evidence, especially her identification evidence of Mr. Jobe, Mr. Joyce and Mr. Kipper.

[22] The fact that Z.S.'s description of these individuals became more detailed over time is of concern. It speaks of the tainting which occurred as a result of her social media and other exchanges about the possible identities of the robbers. At the end of the day, when I consider all of Z.S.'s evidence, I am persuaded by the Defence characterization of this witness as someone who did not take the Court proceeding seriously. Her flippant approach on top of everything else I have said about Z.S. causes me to conclude she is a completely unreliable and untrustworthy witness.

R.B.

[23] R.B. (DOB November [...], 1997) was 17 on September 13, 2015. She acknowledged living at the apartment depicted at exhibit 1, photograph 1; i.e., [...]. On direct examination, she agreed that at the time in question she was working as an escort.

[24] In my decision, *R. v. Jobe*, 2016 NSSC 275, due to reliability concerns, I refused the Crown's request to introduce R.B.'s September 13, 2015 statement for the truth of its contents. Pursuant to s. 9(2) of the *Canada Evidence Act*, I allowed

cross-examination of R.B.. In any event, I find the vast majority of R.B.'s evidence to be both lacking in reliability and credibility. Throughout her testimony, R.B. was evasive, adverse and hostile. Having said this, it is worth noting that R.B. acknowledged doing cocaine on the evening and early morning in question, "... so I was kinda high so I don't know. It all really happened in a rush."

[25] At the end of the day, having considered all of R.B.'s evidence, I find her, like Z.S., to be a completely unreliable and not credible witness.

Police Witnesses

[26] I previously touched on Cst. Samson's evidence at paras. 3 and 4. I should say I found her, along with the other police officers, to be reliable and credible witnesses. Having said this, there is nothing contained in their evidence which places the three accused at the Atlantica Hotel at the time in question.

[27] Whereas several of the officers identified the three accused in Court, I make two observations:

1. The Supreme Court of Canada has noted that in-court identification has an almost total absence of value as reliable positive identification (see para. 15 from *Leeds*, at para. 10 of this decision); and
2. Even if I accept the police witnesses' identification evidence, it does not place the three accused at the Atlantica Hotel on September 13, 2015.

[28] On this latter point, several of the police witnesses thoroughly described especially Mr. Jobe and Mr. Joyce; however, they described them based upon their interaction in places other than the Atlantica Hotel. For example, Sgt. Longley and Cst. Boudreau described the men from when they encountered them at 5189 South Street.

[29] While the Crown obviously has some circumstantial evidence linking these three men to the robbery, on scrutiny I find it to be very weak evidence. For example, whereas Z.S.'s iPhone was found on the grass in close proximity to where the police first encountered the three accused, there is no evidence placing the phone on the person of any of the young men. Furthermore, when I review the evidence of Sgt. Longley and Cst. Boudreau, I find that it is such that there is no basis for the Crown's argument that the doctrine of recent possession applies.

Both officers who identified the location of the phone put it some 10-15 feet or 3-5 metres away from where the group was standing.

[30] Furthermore, when I examine the Agreed Statement of Facts, there is nothing there which links any of the accused beyond a reasonable doubt to the crimes in question. For instance, the inoperable revolver found in the black backpack of Mr. Joyce's Mercedes is not depicted on the Atlantica surveillance video, nor does Z.S.'s description of the gun assist in identifying it as likely the same gun she says was pulled on her.

[31] With respect to the Atlantica surveillance video, three of the four clips were introduced and shown in Court through the evidence of Cst. Brooks, who seized the video from the hotel. On cross-examination, it emerged that the Atlantica Hotel staff were "not very helpful" in terms of identifying suspects from the video. Further, police did not have Z.S. confirm the people she had described were depicted on the video.

[32] My review of the four clips contained on exhibit 3 did not shed any further light on the situation. Indeed, from the first clip it is difficult to differentiate the first two white men (carrying pizza boxes) from the next two entering the Atlantica lobby. Indeed, about the only thing I can definitively take from clips 1-4 is that there were ultimately two white men and a black man shown entering and then leaving the lobby. The three then appear to re-enter but are not again shown leaving. At no point do they appear to be walking quickly and it is questionable as to whether any one of them is carrying anything.

[33] The video surveillance is not focused on the people entering and exiting the lobby doors. Indeed, the surveillance is more so aimed at the front desk, looking down on the backs of the two depicted staff. No doubt the rationale for the Atlantica surveillance is to keep an eye on front desk transactions. For example, whereas at one point a male's face can be fairly well made out (as he stands at the desk facing the staff and camera), the people shown entering and exiting the lobby doors and surrounding area are significantly further back from the camera, such that their facial features are a blur.

Conclusion

[34] This is a case where eyewitness identification is the foundation of the Crown's case. Accordingly, I have exercised special caution. Whereas Z.S. may have provided Cst. Sampson with a detailed description of those involved, she

certainly did not do so on the witness stand. Furthermore, I reiterate my finding that she is not reliable or credible. I have said the same about R.B.. As for Mr. Snow, his descriptions (understandably, given his vantage point) were imprecise. Furthermore, he obviously had no direct evidence in respect of what may have transpired at the Atlantica Hotel.

[35] None of the accused were apprehended in the vicinity of the Atlantica Hotel. When they were encountered some time later outside the [...] residence, they did not possess any inculpatory evidence.

[36] In addition to the *viva voce* evidence, the Court had the benefit of 22 exhibits and the Agreed Statement of Facts. When I consider the totality of the evidence, it is apparent to me that the Crown has failed to prove beyond a reasonable doubt the guilt of any of the accused. Accordingly, I find the three co-accused not guilty of all three counts on the Indictment. Mr. Jobe, Mr. Joyce and Mr. Kipper, you are free to go.

Chipman, J.