COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Marzouk, 2021 ONCA 855
DATE: 20211201
DOCKET: C68089

Rouleau, Huscroft and Thorburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Ahmed Marzouk

Appellant

Faisal Mirza and Kelly Gates, for the appellant

Jeffrey Wyngaarden, for the respondent

Heard: October 29, 2021, by video conference

On appeal from the conviction entered on January 9, 2020 with reasons reported at 2020 ONSC 168, and the sentence imposed on March 3, 2020 by Justice Dunphy of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant appeals his conviction for robbery and the resulting three-year sentence.

[2] The robbery occurred after the complainant contacted Mr. Jermaine Jackson to arrange for an advance of money to pay his rent. Mr. Jackson was leaving the country and unable to meet the complainant, so he made arrangements whereby a friend, the appellant, would advance the funds. The appellant's telephone number was provided to the complainant. Following an exchange of texts between the complainant and the appellant, the complainant drove to an agreed rendezvous spot. The complainant had never met the appellant. When he reached the agreed

meeting spot, the appellant entered his car, forced the complainant to exit at gun point, and then drove away with the complainant's car.

[3] The central issue at trial was identity.

[4] The appellant's primary ground of appeal is that the identity evidence relied on by the trial judge to convict the appellant was so weak that the verdict is unreasonable.

[5] We disagree. The evidence in this case strongly implicated the appellant. The trial judge set out 10 pieces of evidence that support his conclusion that the appellant committed the carjacking. The appellant does not dispute the existence of this evidence, but argues that two of the points relied on by the trial judge – the complainant's in-court identification of the appellant and the complainant's identification of the appellant in a photo shown to him by police – were of no value and ought to have been given no weight by the trial judge.

[6] The appellant explains that the factors to be considered when assessing the reliability of eyewitness identification raised concerns: see *R. v. Tat* (1997), 1997 CanLII 2234 (ON CA), 117 C.C.C. (3d) 481 (Ont. C.A.). Specifically, the appellant was not known to the complainant; he was seen only briefly in stressful circumstances; and his identification was tainted because the complainant was presented with a single photo by police and was simply asked to confirm that it depicted the perpetrator. In these circumstances, the appellant argues, the identification was worthless.

[7] While we agree that the factors noted by the appellant are of concern, they do not render the complainant's identification valueless. There was considerable additional evidence to support the complainant's identification, such as the phone number used to arrange the meeting. The trial judge was well aware of the difficulties with each piece of evidence and the limits to its use. We see no error in his analysis and reliance on the complainant's identification evidence.

[8] The appellant also argues that the trial judge overlooked a critical piece of evidence that ought to have raised doubt as to the appellant's connection with the phone number used by the perpetrator of the crime. That evidence consists of a comment by Mr. Jackson that, when he later received a text message from the phone number associated with the perpetrator, he thought the appellant may have been in custody.

[9] We agree with the Crown's submission that the evidence cited by the appellant was, at best, equivocal. The appellant presented no evidence regarding his whereabouts when Mr. Jackson received this text messages. The trial judge's failure to advert to this evidence does not constitute an error.

[10] In any event, the available evidence links the appellant to the perpetrator's phone number at the time of the offence. The complainant had never met the perpetrator. Their contact was entirely arranged through the telephone number the

complainant received from Mr. Jackson. Mr. Jackson testified that the number belonged to the appellant, and that the appellant was the only person to answer his request for help.

[11] The appellant's final concern with respect to identity is the trial judge's reliance on the list of 10 items of evidence confirmatory of identity. The appellant argues that each of these items suggests a very tenuous links between the appellant and the crime. Even taken together, they are insufficient to support the trial judge's conclusion.

[12] In our view, the trial judge's reasons demonstrate that he was clearly aware that, taken in isolation, there were limits and frailties in each individual piece of identification evidence. He concluded, however, that viewed cumulatively, they fully supported a finding that the appellant committed the robbery. The weighing of evidence is clearly within the trial judge's domain and we see no error in his conclusion in that regard.

[13] The appellant's second ground of appeal is that the trial judge erred in allowing the Crown to call rebuttal evidence. The Crown presented an uncropped version of the photo shown to the complainant by police to identify the appellant. The cropped version was provided to police by Mr. Jackson and was put into evidence by the Crown. In his testimony, Mr. Jackson identified the cropped photo depicting the appellant and explained that the uncropped photo was one of him with the appellant. Prior to providing the photo to police, he cropped it to remove himself from the picture so as to avoid confusion when it was shown to the complainant. Mr. Jackson testified that the photo was taken when he and the appellant were in a relationship. No issue was taken with this aspect of Mr. Jackson's testimony and he was not cross-examined on these assertions. When the appellant testified in his defence, he denied having had a relationship with Mr. Jackson and strenuously denied that a photo depicting him with Mr. Jackson in fact existed.

[14] At the close of the appellant's case, the trial judge allowed the Crown to lead the uncropped photo as rebuttal evidence. We see no error in the trial judge having done so. The uncropped photo was obtained by the Crown only after its existence became an issue in the course of the appellant's testimony. In presenting its case, the Crown clearly did not and could not have reasonably expected that the uncropped photo would be an issue. It therefore cannot be faulted for not having sought to obtain it from Mr. Jackson and introduced it as part of its case. In these circumstances, including the appellant's failure to challenge Mr. Jackson on his evidence relating to the photo and their past relationship, the trial judge did not err in allowing this rebuttal evidence.

[15] The final ground of appeal as to conviction is that the trial judge erred in rejecting the appellant's alibi evidence. The appellant argues that this rejection was based on a misapprehension of the evidence. In his evidence, the appellant

claimed that, at the time of the offence, he was attending a course at York University. He presented evidence consisting of the course schedule and confirmation of his registration. In rejecting this alibi evidence, the trial judge noted that "no attendance is taken in class". The Crown concedes that there was no evidence of this led at trial.

[16] We agree with the Crown that this misapprehension is of no moment as it did not play a material part in the judge's reasoning process. The appellant did not disclose his alibi before trial, and the materials he produced at trial did not prove that he had been in class at the time of the carjacking or even that he had completed the course he was supposed to be attending. The trial judge, finding that the appellant lacked credibility, rejected his evidence and drew an adverse inference against the appellant's alibi based on its late disclosure. We therefore reject this ground of appeal.

[17] We turn now to the sentence appeal.

[18] The appellant argues that the three-year sentence over-emphasized general deterrence and denunciation and failed to sufficiently consider the principles of restraint and parity as compared to other youthful first-time offenders with strong rehabilitative prospects.

[19] The appellant explains that, although the trial judge indicates that he considered the cases referenced by the parties, he does not cite any of those cases or explain how the sentence he imposed is consistent with those authorities. Had he properly considered the case law, he would have found that similarly situated youthful individuals with no record and excellent rehabilitative prospects received far lesser sentences. In the appellant's submission, a sentence of 12 months would be more in line with the case law. He notes that, in *R. v. Hatimy*, 2014 ONSC 1586, a comparable case involving more serious injuries, the sentence imposed was one year.

[20] The appellant also tenders fresh evidence showing that he has continued on his positive progress.

[21] The Crown concedes that the appellant has excellent rehabilitative prospects but submits that the trial judge was well aware of this. In the Crown's submission, the sentence he imposed is entitled to deference and, absent an error in principle or a finding that it is demonstratively unfit, it ought not to be interfered with. The Crown relies on the decision in *R. v. Noor*, 2007 CanLII 44822 (Ont. S.C.) as being similar. In that case, the sentence was three and a half years.

[22] In our view, the case of *Noor* is quite dissimilar. In that case, the offender did not show strong rehabilitative prospects like those of the appellant. In *Noor*, the trial judge explained that, following his release after being charged, the offender had "occupied himself almost exclusively, it would seem, with getting into further trouble with the law".

[23] Although the trial judge acknowledged the appellant's mitigating factors and his excellent rehabilitative prospects, when he turned to the applicable sentencing principles, he referenced only denunciation and deterrence. However, when sentencing a youthful first offender, even for very serious offences justifying incarceration, rehabilitation remains an important consideration: *R v. S.K.*, 2021 ONCA 619, at para. 12 citing *R v. Priest* (1996), 1996 CanLII 1381 (ON CA), 110 C.C.C. (3d) 289 (Ont. C.A.). In our view, the trial judge erred in principle by focusing almost exclusively on the objectives of denunciation and deterrence: *R v. Borde*, 2003 CanLII 4187 (ON CA), 63 O.R. (3d) 417 (C.A.), at para. 36. This error had an impact on the sentence imposed, such that we must intervene: *R v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 64.

[24] The trial judge properly noted that carjacking is a very serious offence. The appellant planned the robbery from his first contact with the complainant and used an imitation firearm. The ordeal continues to haunt the complainant. However, in the specific context of this case, including the appellant's exceptional rehabilitative prospects, a fit sentence is one that does not result in a penitentiary sentence for this first offence. We note in particular that, in the period following the laying of the charge, the appellant completed his university degree in kinesiology and health sciences. He also has a strong pro-social family network and established community ties.

[25] Therefore, considering the severity of the offence, along with the fact that the appellant is a youthful first-time offender with excellent rehabilitative prospects, we consider a sentence of two years less a day followed by one year of probation to be appropriate.

[26] Nonetheless, we would dismiss the motion to file fresh evidence. In our view, the evidence serves only to confirm the appellant's rehabilitative prospects, the evidence of which was already before the trial judge. As such, it does not meet the test set out in *R v.* Palmer, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759.

[27] In conclusion, the conviction appeal is dismissed, and the sentence is varied to one of two years less a day followed by one year of probation, subject to the submissions of the parties as to terms. The parties are to provide proposed terms for the probation within 10 days of this decision. The balance of the terms of sentence remains the same.

"Paul Rouleau J.A."
"Grant Huscroft J.A."
"J.A. Thorburn J.A."