Court of Queen's Bench of Alberta

Citation: R v Dad-Mohammad, 2021 ABQB 425

Date: 20210607
Docket: 190114678Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Shad Dad-Mohammad

Accused

Reasons for Judgment
of the
Honourable Madam Justice B.B. Johnston

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[1] Mr. Dad-Mohammad is charged that on September 24, 2018, he did unlawfully commit robbery contrary to section 344(1)(b) of the *Criminal Code of Canada*.

Introduction

[2] It is not disputed that a bank robbery occurred on September 24, 2018 at a TD Canada Trust ("TD") branch in northeast Calgary. A hand-written note was passed to the bank teller indicating that the robber had a gun and was demanding money. The robber was given money and left the bank. He then tried to re-enter the bank but the doors had been locked.

[3] The Accused was arrested on December 13, 2018.

[4] The sole issue in this case is identity. Both the Crown and defence agree that all other elements of the offense have been proven beyond a reasonable doubt.

Relevant Facts

[5] An agreed statement of facts was entered by the parties. Some of the facts agreed are set out below.

[6] Following the robbery, the note was placed in a plastic bag using a plastic sheet by Mr. Alam, a TD bank employee. No one, including him, touched the note with their bare hands after the initial use of the note seen on CCTV.

[7] The note stated "I have a gun I want $2000. If you make any wrong moves I will shoot so just give me money".

[8] Constable Bodwell, a member of the Forensic Crime Scenes Unit of the Calgary Police Services, attended at the TD branch on September 24, 2018 to collect the note.

[9] Constable Bodwell was provided with the note in a sealed plastic bag.

[10] The Accused provided his fingerprints to a fingerprint technician. The fingerprints were placed on an automated fingerprint identification system card and they were accurate.

[11] Constable Bodwell subsequently analyzed the note for fingerprints. Four prints were identified on the note. These four prints were identified as R1, R2, R3 and R4. Only fingerprints R1, R2 and R3 had sufficient levels of clarity and detail for comparison.

[12] The three prints on the note that were analyzed were made by the Accused's left thumb.

[13] The TD branch had various video cameras operating on September 24, 2018 which captured an accurate description of what happened on that date.

[14] Three bank employees participated in photographic lineups on various dates following the incident that occurred on September 24, 2018. The lineups were standard police lineups and contained photographs of ten individuals. One of the individuals was the Accused. The employees did not select any person from the photographic lineup.

[15] The Crown called five witnesses: three bank employees, Constable Bodwell and Detective Reisinger. Detective Reisinger was the lead investigator on the case. Mr. Dad-Mohammad testified in his own defence.

Issue

[16] Has the Crown proven beyond a reasonable doubt that the Accused was the person who entered the TD bank on September 24, 2018 and committed the robbery?

Analysis

i. Reasonable Doubt

[17] The Crown must prove the guilt of the Accused beyond a reasonable doubt.

[18] Reasonable doubt is inextricably intertwined with the presumption of innocence. Reasonable doubt means a doubt based on reason and common sense that is logically connected to the evidence, or the absence of evidence. Reasonable doubt must not be imaginary or frivolous or based on sympathy or prejudice***: R v Lifchus***, [1997] 3 SCR 320 at paras 30, 31 and 36.

ii. Credibility

[19] The Accused testified in this case. In cases where credibility is at issue, a trier of fact must acquit if they believe the evidence of the accused. If the trier of fact does not believe the testimony of the accused but is left in reasonable doubt, they must also acquit.

[20] Even if a trier of fact is not left in doubt by the evidence of the accused, they must ask themselves, whether, on the basis of the evidence which they do accept, they are convinced beyond a reasonable doubt by that evidence of the guilt of the accused: ***R v W(D)***, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 at paras 10-11.

[21] The Court of Appeal in ***R v Ryon***, 2019 ABCA 36 at para 51, elaborated on ***W(D)*** and noted that the ***WD*** instruction applies to exculpatory evidence whether presented by the Crown or the accused. I have considered the Accused's testimony keeping in mind the following principles from ***Ryon***:

> i. The burden of proof is on the Crown to establish the accused's guilt beyond any reasonable doubt, and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown;
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> ii. In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect) or if they are not confident they can accept the Crown's version of events, they must acquit;
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> iii. While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit; and
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> iv. Even if the jury completely rejects the accused's evidence, they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

[22] I note that the second prong was slightly modified in ***R v Achuil***, 2019 ABCA 299.

iii. Circumstantial Evidence

[23] Where the Crown tenders evidence of a circumstantial nature:

> the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: ***R v Villaroman,*** 2016 SCC 33 at para 55.

[24] When assessing circumstantial evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The Crown may need to negative the reasonable possibilities, but does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused". Other plausible theories or other reasonable possibilities " must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation": ***Villaroman*** at para 37.

[25] Circumstantial evidence does not have to totally exclude other conceivable inferences. A verdict is not unreasonable simply because "the alternatives do not raise a doubt". Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt": ***R v Dipnarine***, 2014 ABCA 328 as cited in ***Villaroman*** at para 56.

Identity

i. Witness Identification and In-Docket Identification

[26] The Crown called three bank employees: Ms. Singh, Ms. Kessaodjee and Mr. Khan.

[27] All three employees were working at the TD branch at the time of the robbery.

[28] The three witnesses testified to their recollection of the robbery and the identity of the robber. All three witnesses confirmed the man in the CCTV video was the robber.

[29] Ms. Singh was the teller who was confronted by the robber. The robber passed the note to Ms. Singh. After receiving the note, Ms. Singh mixed $200 with a decoy pack and a dye pack and placed them in a clear plastic bag which she then gave to the robber.

[30] When asked to make an in-docket identification Ms. Singh noted that she did not see the robber's hair or properly see his face, but testified that the Accused in the docket "looks like him." Ms. Singh confirmed in her cross-examination that she had described the robber as being 18-25 years old and as looking "very young" and as pale and white.

[31] Ms. Kessaodjee testified that she did not witness the initial robbery but when the robber returned and tried to re-enter the branch she was at the last till closest to the door. When the robber tried to re-enter the bank, people were all screaming "its him". She made eye contact with the robber and she saw a "full picture of his face".

[32] Ms. Kessaodjee identified the robber in her police statement as Caucasian. She testified he could have been East European with a very pale complexion and he may have been Russian. He had tight lips and an angry face and small eyes.

[33] When asked in cross-examination whether she could make an in-docket identification of the Accused, she noted it "could be 50 percent" and "it looks much like what I saw but I cannot say 100 percent." She testified that the Accused had facial hair and the robber did not, which made identification more difficult.

[34] Ms. Singh and Ms. Kessaodjee testified that they participated in police photographic line-ups. Mr. Alam did not testify, but the agreed statement of facts confirmed he participated in a police photographic lineup. The lineups were standard police lineups that contained photographs of 10 individuals including the Accused. None of the witnesses selected any person from the photographic lineup.

[35] Eyewitness identification and in-docket identification are fraught with difficulties and a trier of fact must take these frailties into account: ***R v Atfield***, 1983 ABCA 44. This is particularly the case where the sole issue is identity, as in this case.

[36] I have put little to no weight on the identification of the Accused by the bank employees. The identifications were made in difficult circumstances in the midst of a bank robbery. The robber had a hood covering his head and the top of his forehead. This would also make photographic identification difficult.

[37] The three bank employees testified that there were many cultures and different races that attend at the TD Branch. All three witnesses who testified identified the robber as Caucasian, including Mr. Khan who stated in cross-examination that the Accused in the docket did not look Caucasian. Mr. Khan; however, noted there had been times "and it has happened" when he was wrong in identifying someone as Caucasian or Middle Eastern.

[38] In addition to the normal frailties associated with identification, such identification was made more difficult by the fact the Accused had facial hair when the in-docket identification was made and the robber did not.

ii. CCTV Video and Photographs

[39] The Crown further relies on the CCTV video to establish identity. In ***R v Nikolovski***, [1996] 3 SCR 1197, the Supreme Court of Canada stated that such images must be of "sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt."

[40] I note that the imaging on the CCTV footage is clear. The CCTV footage from the bank shows the robbery from several angles but the robber is wearing a dark top with the hood up which covers his head and part of his forehead. However, parts of his face are visible. Portions of the CCTV footage capture a reasonably clear picture of the robber's face below his forehead.

[41] The Accused's face is also visible in the photos taken at the police station that were entered as an exhibit. I note that the robber's face and that of the Accused bear a strong resemblance. The individual on the CCTV from the bank also has a similar build and physical likeness to the Accused.

[42] The Accused has a star tattoo on his left hand below his thumb. In the CCTV from the bank, the bottom of the robber's left hand is covered including below his left thumb.

[43] However, the CCTV evidence alone is not enough to identify the Accused as the person in the tape beyond a reasonable doubt.

iii. Finger Print Evidence

[44] The CCTV video footage shows the robber handing a note to the teller with his bare hands. In the agreed statement of facts a photo is included that shows the robber touching the note with his left hand. This is also visible on the CCTV footage from the bank.

[45] The Crown and defence agree that there were four potential fingerprints on the note. They were identified as R1-R4. No other fingerprints were identified on the note. One of the fingerprints, R4, did not have sufficient clarity and detail for comparison so no further analysis was conducted of R4. R1-R3 were analyzed. The parties agreed that R1, R2 and R3 were made by the Accused's left thumb. There was no agreement regarding when the prints were made other than that R1-R3 existed on the note when it was seized.

[46] During cross-examination, Constable Bodwell was not able to confirm the time and date the fingerprints would have been deposited on the paper. He did note in cross-examination that the longer the gap in time, the less chance they will find prints.

[47] The issue is therefore whether the contact occurred at the relevant time and place: ***R v Eide***, 2019 ABQB 83; aff'd 2021 ABCA 70 at para 4.

[48] The Crown provided numerous cases involving fingerprint and DNA evidence. In ***R v Chudley***, 2015 BCCA 315, the British Columbia Court of Appeal upheld the convictions of the accused notwithstanding the lack of positive identification of the accused. The fingerprints of the accused were on duct tape recovered from the home where the invasion occurred. The fingerprints were found to be "connected to the crime scene". The Court opined that fingerprint evidence with very little else can support a conviction: ***Chudley*** at para 16.

[49] In ***R v Keller***, 1970 CarswellSask 129 (CA), the accused's fingerprint on a match cover at the location of the robbery was the sole evidence that the accused had committed the offence. The Saskatchewan Court of Appeal concluded the presence of the fingerprint was consistent with

the conclusion that the accused had committed the offence. The evidence was sufficient to prove the charge beyond a reasonable doubt: ***Keller*** at para 8.

[50] Fingerprint evidence can also be considered as part of the totality of the evidence. In ***R v Samuels***, 2009 ONCA 719, 2009 Carswell 6105, the presence of the accused's fingerprints on a car touched by a home invasion suspect fleeing the scene were used to prove he was a perpetrator of the home invasion. The Ontario Court of Appeal considered the reasonableness of a jury verdict that found the appellant guilty. In upholding the conviction, they considered the totality of the evidence and concluded that the palm and fingerprint were capable of permitting a reasonable inference that the palm print and fingerprint on the windshield were placed there when one of the invaders fled the scene.

[51] In ***R v Wong***, 2011 ONCA 815, the Ontario Court of Appeal concluded that the totality of the evidence including DNA evidence on a mask and DNA and fingerprints found on duct tape at the scene of the crime, along with a general description of the perpetrator were sufficient for a finding of guilt by the trial judge.

[52] The Supreme Court of Canada in ***R v Youssef***, 2018 SCC 49, found that it was "not unreasonable for the trial judge to conclude the evidence as a whole excluded all reasonable alternatives to guilt, especially given the presence of the [accused's] DNA on two different pieces of evidence, one of which was connected to the scene of the bank robbery, and the other to the getaway car": ***Youssef*** at para 55.

[53] The Court of Appeal of Alberta upheld the conviction of the accused based on the strong probative value of DNA evidence found on a glove at the victim's home in ***Eide***. The DNA, the intruder's knowledge of the victims and the accused's presence in Calgary close to the location of the victim's house, were sufficient to establish the accused was one of the intruders.

[54] In ***R v Ibrahim,*** 2014 ONCA 157, two men wearing black balaclavas and gloves robbed a bank. They were brandishing a gun which was partially covered by a white cloth. Within 45 minutes of the robbery, a police officer discovered a toy gun with a white cloth over it and a black balaclava in a garbage bin in a transit station. Subsequent testing of the items revealed the accused's DNA. The Court of Appeal confirmed that the trial judge understood that an inference of the appellant's guilt could not be drawn solely from the DNA evidence. Rather, the probative value of the DNA evidence depended on whether there was other evidence capable of permitting a reasonable inference as to when the appellant's DNA was deposited on the objects retrieved from the garbage bin.

[55] As with the above cases, I conclude that the fingerprint evidence including that it was found on the note used in the bank robbery is strong probative evidence.

iv. Tattoo

[56] The Accused has a tattoo of a star at the base of his thumb on his left hand. The robber had a covering over the base of his left hand including the base of his left thumb.

Evidence of the Accused, Mr. Shad Dad-Mohammed

[57] To determine the issue of credibility, an examination of the evidence of the Accused is necessary.

[58] The Accused testified in his own defence. His criminal record was entered at trial. He testified that he was not the person in the videos of the bank robbery. He denied robbing the bank and testified that the writing on the robbery note was not his writing. He did not recall what he was doing on the date of the robbery.

[59] Mr. Dad-Mohammed testified that he works at Barez Recycling, which is a junk yard owned by his brothers. The junk yard buys cars from auction. The cars are for salvage and have been written off. His job includes taking apart the vehicles for salvage and removing and disposing of the things that have no salvage value.

[60] The Accused testified that there have been many break-ins and thefts at the junk yard. Parts have been stolen and in two instances cars were stolen. He stated the cars were stolen in the last few years but he did not know the exact dates.

[61] The Accused testified that the only thing that made sense for how his fingerprints ended up on the note used in the bank robbery "was through work and one of our vehicles".

[62] In cross-examination the Accused confirmed he had a tattoo of a shooting star at the base of his left thumb on the back of his hand.

WD **Analysis**

[63] When considering the issue of credibility, I must consider the defence's evidence in conjunction with all of the evidence.

[64] The first step of the ***WD*** analysis requires me to determine whether I believe the evidence of the Accused denying guilt (or other exculpatory evidence to that effect): ***Ryon*** at para 51.

[65] I do not believe the Accused. I find the Accused's testimony about how his fingerprints may have ended up on the robbery note both implausible and unreasonable. His assertion would require someone breaking into the junk yard, finding a piece of paper that the Accused had touched, three of the Accused's left thumbprints being transferred to and remaining on the paper, the person writing a note on that paper, that person committing the robbery by passing the note to the teller with their bare hands without transferring their own fingerprints to the note; and the same person happening to cover the exact spot on his left hand where the Accused had an identifiable tattoo and having a physical likeness to the Accused.

[66] Alternative inferences must be reasonable not just possible: ***Villaroman*** at para 42, citing ***Dipnarine*** at para 24.

[67] The defence argued that the Crown failed to challenge the testimony of the Accused that he was not the individual on the CCTV video from the bank and he did not write the robbery note. The Crown argues evidence is not required to be challenged where there is a bald denial: ***R v Bernard***, 2018 ABCA 396 at para 33. I agree that the Accused's testimony on these points was a bald denial. Although the evidence of the Accused was not impeached in cross-examination, the Accused's evidence of a bald denial must be examined in context.

[68] In assessing the Accused's denial, I am mindful that the Accused does not have the burden to disprove evidence. The onus of proof remains at all times on the Crown.

[69] Having rejected the Accused's evidence, I must consider whether his evidence in the context of the whole of the evidence, leaves me with a reasonable doubt.

[70] I must then turn to the second step of the ***WD*** analysis that states that if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

[71] In assessing all of the evidence I am not left with a reasonable doubt.

[72] Specifically, and as noted above, I place strong weight on the probative value of the finger print evidence. I find that there is a connection between the note and the crime scene. The note was found at the bank and was left by the robber. In considering the totality of the evidence in this case, including the fact that the note has three of the Accused's fingerprints on it, results in the reasonable inference that it was the Accused who was in contact with the note at the time of the offence and was therefore present at the robbery. Furthermore, the CCTV footage from the bank shows the robber touching the note.

[73] I place some weight on the evidence that the Accused had a tattoo on his left hand and the fact the robber had a covering on the same location on the left hand where the Accused's tattoo is located.

[74] I place little to no weight on any identification of the Accused by the bank employees. Both their witness identifications and their in-dock identifications were weak and as noted above such identifications are fraught with difficulty. Furthermore, I note that none of the employee's who participated in a photographic line-up identified the Accused.

[75] Finally, I place some reliance on the fact that the robber's appearance and physical build and that of the Accused were consistent in both the photographs in evidence of the Accused and the CCTV evidence taken from the bank on the day of the robbery.

[76] The Accused argues that the absence of evidence must lead to a finding of reasonable doubt. Specifically, the Accused argues the vehicle driven by the robber and seen on video footage from the Boston Pizza adjacent to the TD Bank, was not registered to him and there was no cell phone activity on the Accused's cell phone within the two-hour window of the robbery. However, it would be unlikely that a perpetrator of a robbery would drive a vehicle registered in their own name. The lack of cell phone activity with the Accused's cell phone only shows that that particular phone was not used at the time, nothing more.

[77] The Accused also submits that there were no finger prints on the note from the Accused's right hand notwithstanding the robber can been seen touching the note with both hands. I note the absence of any right fingerprints on the note, not just an absence of the "accused's" right fingerprint. I take nothing from this other than no prints were left by the robber's right hand.

[78] The Accused further asserts that the robber was seen talking on a cell phone at the bank with his right hand but the Accused held his cell phone in his left hand at the police station. He suggests the robber has a different gait on the CCTV footage from the bank, than the gait of the Accused seen on the CCTV footage from the police station. I place no reliance on the gait of the Accused as any differences in gait are not clearly discernible on the video footage. Nor do I place reliance on which hand the Accused is holding the cell phone in as there could be many explanations for holding a cell phone in different hands.

[79] Finally, the Accused argues that notwithstanding an investigation was undertaken, no other evidence connecting the Accused to the bank robbery was found**.** For example, the investigation did not find any evidence of the dye pack deploying, no decoy bills were ever found and the clothes worn by the robber were never recovered. The Accused asserts this lack of evidence raises a reasonable doubt relating to the guilt of the Accused.

[80] As noted above, I am mindful that the Accused does not have the burden to disprove evidence. The onus of proof remains at all times on the Crown. However, I must consider if the absence of evidence raises a reasonable doubt.

[81] A reasonable doubt may arise from the evidence or an absence of evidence: ***Lifchus*** at para 39. It is true that a certain gap in the evidence may result in inferences other than guilt, "[b]ut those inferences must be reasonable given the evidence and the absence of evidence, assessed logically and in light of human experience and common sense": ***Villaroman*** at para 36.

[82] The absence of evidence in this case does not raise a reasonable doubt.

[83] A court, even though it has rejected the evidence of the accused, must ask, whether, on the basis of the evidence which they accept, they are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[84] I find that the evidence as a whole excludes all other reasonable inferences and alternatives to guilt. I am convinced beyond a reasonable doubt by the totality of the evidence of the guilt of the Accused. I come to this conclusion after taking into consideration the following factors. In my view, the strong probative value of the fingerprint evidence along with the fact that the robber can be seen touching the robbery note with his left thumb in the CCTV video from the bank, the location of the tattoo on the Accused's left hand below his thumb, the fact that the robber had the bottom of his left hand covered, along with the likeness of the Accused to the robber in the CCTV video, all lead me to conclude beyond a reasonable doubt that it was the Accused who committed the robbery.

[85] I find the Accused guilty of robbery contrary to section 344(1)(b) of the *Criminal Code of Canada*.

Heard on the 29th, 30th & 31st days of March, 2021.
Dated at the City of Calgary, Alberta this 7th day of June, 2021.

B.B. Johnston
J.C.Q.B.A.

Appearances:

Matthew Block
for the Crown

Benedict Leung
for the Accused