COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dinh, 2012 ONCA 812
DATE: 20121123
DOCKET: C51834

Doherty and LaForme JJ.A. and Glithero J. (*Ad Hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

Duc Xuan Dinh

Appellant

David Wilson, for the appellant

Mary Henschel, for the respondent

Heard and released orally: November 16, 2012

On appeal from the conviction entered on November 21, 2009 by Justice J. A. Ramsay of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] The appellant was charged as a party to the offences of robbery (theft while armed with an offence weapon), aggravated assault, and assault with a weapon. These charges arose out of an event in which four men set upon two others in an apartment stairwell while armed with baseball bats and possibly a machete.

[2] The four stole the money from the two victims who were known to be carrying a significant amount of cash as a result of an arrangement made between them and the appellant in which the appellant would sell them 10 cell phones.

[3] The Crown theory was that the appellant knew of the plan to take the money from the victims and led the victims into the apartment knowing what was waiting for them. The jury convicted the appellant of the two robbery charges, one in respect of each victim. Given that the trial judge did not charge on the objective component of s. 21(2) (“ought to have known”), the jury must have been satisfied beyond a reasonable doubt that the appellant knew of the planned theft and that the thieves would be armed.

[4] During the robbery the two victims received significant injuries resulting from the use of the weapons. The appellant was convicted of the two counts of aggravated assault as the jury was necessarily satisfied that he knew of the plan to cause the victims some degree of physical harm. The appellant was found not guilty of the two counts of assault with a weapon, one in respect of each victim.

[5] The ground of appeal at issue here is whether the verdicts of guilty of aggravated assault can stand together with the verdicts of not guilty on the charges of assault with a weapon. The appellant argues that they are inconsistent. We don’t agree. It is for the jury to determine the facts. As long as

it was reasonably possible for the jury to determine a set of facts based upon the evidence which supports the differing results here in terms of verdicts, then there is no reason to interfere.

[6] We are of the view that it was open to the jury to conclude that the appellant knew of the thefts while armed with offensive weapons; knew that some degree of injury would be a likely result in any effort to relieve the two victims of their cash and yet not be satisfied beyond a reasonable doubt that he knew that it was probable that the plan involved the actual use or threatened use of the weapons during the taking of the money. The charge to the jury left open this possibility as did the decision tree provided to the jury. There was no objection taken to either.

[7] For these reasons the appeal is dismissed.

"Doherty J.A."

"H.S. LaForme J.A."

"C. Stephen Glithero J. (*ad hoc*)"