

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Shafea, 2012 ONCA 863

DATE: 20121206

DOCKET: C53961

Juriansz, Watt and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Abdul Shafea

Appellant

Howard L. Krongold, for the appellant

Eric Siebenmorgen, for the respondent

Heard and released orally: November 22, 2012

On appeal from the sentence imposed on June 14, 2011 by Justice George T. Valin of the Superior Court of Justice.

ENDORSEMENT

[1] The appellant appeals his convictions of one count of aggravated assault, one count of assault and three counts of breach of recognizance. The charges arose out of an altercation outside of a bar, the result of which left one victim badly injured due to a stab wound to his chest.

[2] Three of the assailants left the scene in a taxi. The trial judge, in finding the appellant guilty of all charges, relied heavily on the testimony of the taxi driver, Mr. Zaher, to the effect that he heard the passenger directly behind him say that he stabbed someone with a pen. Photographs taken by a camera installed in the taxi satisfied the trial judge that the appellant occupied that position.

[3] On appeal, the appellant argues that the record reflects a miscarriage of justice, given as things turned out, that the defence counsel had failed to cross-examine the taxi driver on a portion of his testimony at the preliminary inquiry. It is argued that such a cross-examination would have further undermined the taxi driver's evidence upon which the Crown's case depended. The appellant applied to have the relevant portion of the transcript admitted as fresh evidence.

[4] Regardless of whether or not the proposed evidence is admitted, we are of the view that the appeal must fail. Considering the record as a whole, including the final argument, it is clear that the trial judge was well aware of the discrepancies in Mr. Zaher's evidence particularly how they affected the key findings relating to what exactly was said and where the passenger who said it was seated in the taxi.

[5] At the conclusion of a thorough review of the evidence, the trial judge found at paragraph 59:

I accept as credible, accurate and reliable, Mr. Zaher's testimony that the passenger sitting in the back seat directly behind him made an utterance that he had stabbed someone.

[6] For reasons carefully explained by the trial judge, he reached this conclusion on the basis of evidence available to him and we see no reason to interfere.

[7] The appeal is therefore dismissed.

"R. Juriansz J.A."

"David Watt J.A."

"Gloria Epstein J.A."