COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Deu, 2019 ONCA 182
DATE: 20190308
DOCKET: C58112

Pardu, Nordheimer and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Phuong Minh Deu

Appellant

Mark Halfyard, for the appellant

Andrew Cappell, for the respondent

Heard: February 28, 2019

On appeal from the convictions entered on April 29, 2013 by Justice Alexander Sosna of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant, Phuong Minh Deu, appeals from his convictions for robbery and break and enter after a judge alone trial.

[2] The convictions arise out of a series of residential break-ins involving a group of males of which the appellant was said to be one. These break-ins began with a robbery at the home of a person that the appellant knew. The appellant had lived in the home for several months prior to suddenly leaving.

[3] The central issue in the trial was the identity of the perpetrators of the robbery and the break-ins and whether the appellant, in particular, was a member of the group of persons committing them. The trial judge found that the appellant was involved in a number, but not all, of the break-ins with which he was charged.

[4] With respect to the robbery, the trial judge found that the appellant was the main instigating force behind the robbery, even though he did not participate in the actual robbery. The trial judge found that it was the appellant who knew about the money and jewellery that was in the home, that he passed this information along to the two individuals who committed the robbery, and that he received some of the proceeds of the robbery after it occurred.

[5] In terms of the other break-ins for which the appellant was convicted, the trial judge found that the appellant was part of the group that organized and carried out the break-ins. The appellant's main role appears to have been identifying homes to be broken into and also "standing watch" outside many of those homes while the break-ins occurred. When the appellant was eventually arrested, items consistent with his participation in some of these break-ins were found, not only in the car which he occupied when arrested, but also in his residence.

Analysis

(1) The robbery

[6] The appellant raises three main issues on his appeal. We consider each, in turn. First, the appellant contends that the trial judge's conclusion that he was a party to the home invasion robbery (count #1 of the indictment) is an unreasonable verdict given the trial judge's parallel conclusion that the appellant was not guilty of the unlawful confinement of the owner of the home during the robbery (count #2 of the indictment).

[7] It was open to the trial judge, on the evidence, to conclude that the appellant planned for a break and enter and theft to occur in circumstances where it was expected that no one would be home. While it turned out that the owner was home, and consequently was tied up by the actual participants, the trial judge said that he was not satisfied that the appellant knew or ought to have known that this would occur, and thus could not be found guilty of unlawful confinement as a party under s. 21(2) of the *Criminal Code*, R.S.C. 1985, c. C-46,. That factual conclusion was open to the trial judge on the evidence and there is no basis for us to interfere with it.

[8] That said, we do agree with the appellant that the basis upon which the trial judge concluded that the appellant was part of the scheme to break into and steal from this home did not allow for a conviction for the offence of robbery. The trial judge found that the plan was to break-in when no one was expected to be home.

Neither of the persons involved in the actual break-in possessed a weapon, nor was there any evidence that the appellant expected that any violence would be used. Consequently, the essential elements of a robbery under s. 343 of the *Criminal Code*, as they relate to the appellant's involvement, were not made out.

[9] Here the indictment particularized the robbery as stealing with violence. The trial judge made no finding that the appellant's mental state made him a party to the robbery charged under either s. 21(1) or s. 21(2). Given the way in which the robbery offence was particularized in the indictment and given the trial judge's factual findings only the included offence of theft is available. As a result, we would substitute a conviction for theft on count #1.

(2) The robbery – misapprehension of evidence

[10] Second, the appellant says that the trial judge misapprehended the evidence of Christopher Tran. Mr. Tran was one of the two people who committed the initial robbery. He pled guilty to his participation in it. He then gave evidence for the Crown in its prosecution of the appellant.

[11] Mr. Tran gave evidence at the trial regarding how the robbery occurred. At one point, he suggested the appellant was not part of the plan which led to the commission of that offence. However, in cross-examination by Crown counsel under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, he was confronted with his preliminary inquiry evidence where he said that it was the appellant that had informed him, and the other participant in the robbery, that there were large

quantities of money and jewellery in the house. He also admitted that, immediately after the robbery, either he or the other participant had called the appellant. Mr. Tran also admitted that his evidence at the preliminary inquiry was true.

[12] The appellant submits that Mr. Tran never resiled from his position that the appellant was not involved in the first robbery. He further submits that the trial judge misunderstood Mr. Tran's evidence in this regard.

[13] We do not agree. The trial judge simply rejected that contention. The trial judge accepted the evidence that Mr. Tran gave at the preliminary inquiry and rejected his trial evidence. The trial judge also found that it would make no sense that, if the appellant was not involved in planning the offence, the participants would have immediately called the appellant after the robbery was completed and as they were "fleeing the scene". That conclusion was open to the trial judge on the evidence.

(3) The break and enter offences – improper use of similar fact evidence

[14] Third, the appellant submits that the trial judge improperly used similar fact evidence in reaching his conclusions of guilt in relation to the break and enter offences. The trial judge noted that the Crown was not seeking to rely on similar fact evidence. The trial judge also expressly said that he was not doing so. Indeed, the trial judge said in his reasons that he was considering each of the counts separately.

[15] Unfortunately, it appears that similar fact evidence did in fact enter into the trial judge's conclusions on two of the counts on which he found the appellant guilty – namely, counts #4 and #10 on the indictment.

[16] The evidence in respect of count #4 by itself established that the Acura motor vehicle, to which all the participants in these break and enters were all linked, was seen in the vicinity of the house around the time when the break-in occurred. The Acura was also later seen in the same area. The police approached the vehicle some hours later and found the appellant and one of the other participants inside. Tools capable of being used for break and enter purposes were found in the trunk, along with bandanas and masks. The police also found a sheet of paper in the glove box of the Acura that had a list of residential addresses on it. That list included the address for the home where the break-in had occurred.

[17] There was no other evidence unique to count #4. The trial judge found the appellant guilty of this break and enter. With respect, the only way that the trial judge could have been satisfied, beyond a reasonable doubt, of the appellant's guilt on this count is if the trial judge considered the similarity between this count and those other counts where there was direct evidence of the appellant's involvement in the break and enters. While that would have been a permissible route that the trial judge could have taken to a conviction if there was a successful similar fact application by the Crown, no such application was made. Without that similar fact evidence, the evidence relating solely to count #4 could not sustain a

conviction. As a result, we would set aside the conviction on this count and enter an acquittal.

[18] A similar situation presents with respect to count #10. On that count, on the day of the break-in the Acura was again seen in the vicinity of the home where the break and enter occurred. The appellant and the other three participants in these series of break-ins were observed in the car. While in the vicinity, all four occupants exited the Acura. Two of the occupants went to the home where the break-in occurred. The appellant was observed at a McDonald's that is more than a kilometre from the home. He was seen talking on his cell phone while, at the same time, three of the participants were seen at the front door of the home where the break-in occurred. Two of them entered the home while the third returned to the Acura. A short time later, the two who entered the home returned to the Acura. The Acura then left. The whereabouts of the appellant, at this point, were unknown. The Acura was next seen some kilometres away. The appellant was seen getting into the Acura. The Acura returned to Toronto. It was at this point that the appellant, along with the other three participants, were arrested. Upon being arrested, a piece of paper was found in the appellant's possession that had a number of residential addresses on it. Included in those addresses was the address for the house that was broken into.

[19] Once again, a conviction on count #10 could only be sustained if the trial judge drew the conclusion that, because the appellant was clearly involved in other

break and enters with these three persons, he must have been involved in the break-in that forms the basis for count #10. That again would be a conclusion based, not solely on the evidence relating to count #10, but on a pattern of conduct. In other words, on similar fact evidence. Indeed, the trial judge seems to suggest that is the route that he is employing when he says in his reasons:

> The Crown has not led similar fact evidence and I do not rely on similar fact evidence in making the findings. I have taken great pains to review each count individually and I find there was a system, suggesting it was similar fact evidence. [Emphasis added]

[20] In our view, despite his stated intention to do the opposite, it is clear that the trial judge allowed similar fact evidence to inform his conclusion respecting count #10. The evidence relating solely to that count could not otherwise establish a conviction. Again, we would set aside the conviction on this count and enter an acquittal.

[21] That said, with the exception of the two counts that we have just reviewed, each of the conclusions reached by the trial judge in respect of the other counts was available to him on the evidence. He did not make any palpable and overriding error in reaching his other conclusions.

Conclusion

[22] The appeal is allowed in part. The conviction on count #1 is set aside and a conviction for theft contrary to s. 334(a) of the *Criminal Code* is substituted. The

sentence on the robbery offence is set aside. The convictions on counts #4 and #10 are also set aside and acquittals are entered on those two counts.

[23] We would impose a sentence of 18 months on the theft offence concurrent to the sentences on the remaining break and enter counts. This sentence is the same sentence that the trial judge imposed on each of the break and enter offences, which were made concurrent to the others. The reversal of the convictions on counts #4 and #10, consequently, does not affect the overall sentence. It becomes a total sentence of 18 months. We note that this sentence is consistent with the sentences imposed on two of the other participants in the break and enter offences.

"G. Pardu J.A."
"I.V.B. Nordheimer J.A."
"A. Harvison Young J.A."