

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kamal, 2020 ONCA 213

DATE: 20200316

DOCKET: C61628

Watt, Paciocco and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Kendall Kamal

Appellant

Kendall Kamal, appearing via videoconference

Jessica Smith Joy, for the respondent

Joseph Wilkinson, duty counsel

Heard and released orally: March 11, 2020

On appeal from the conviction entered on November 18, 2015 by Justice Ian V.B. Nordheimer of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant appeals his convictions on two counts of robbery entered after a trial before a judge of the Superior Court of Justice sitting with a jury.

The Background Facts

[2] The appellant was alleged to have been the driver of the getaway car in two robberies of commercial premises about ten days apart. The principal evidence against him consisted of a videotaped interview of him by members of the Hold-Up Squad of the Toronto Police Service. The admissibility of this interview was challenged at trial on both voluntariness and constitutional grounds. The trial judge rejected the arguments and admitted the interview as evidence at trial.

The Grounds of Appeal

[3] Assisted by duty counsel, the appellant contends that the trial judge erred in admitting the interview as evidence. To be more specific, the appellant says that the trial judge erred in failing to hold that the police were required to give the appellant a *Prosper* warning.

[4] In our view, as this court held in *R. v. Fountain*, 2017 ONCA 596, 136 O.R. (3d) 625 (C.A.), at para. 27 a *Prosper* warning is needed only if “a detainee has asserted the right [to counsel] and then apparently change[s] his mind” after reasonable efforts to contact counsel have been frustrated, citing *R. v. Smith* (1999), 44 O.R. (3d) 373 (C.A.), at p. 384.

[5] The trial judge came to a factual determination that the appellant had not asserted his right to counsel. That finding of fact was available to the trial judge on the record at trial. It is a finding of fact to which we owe and give deference.

[6] The appeal from conviction is dismissed.

“David Watt J.A.”
“David M. Paciocco J.A.”
“Fairburn J.A.”