

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Chen, 2022 ONCA 803

DATE: 20221123

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Fairburn A.C.J.O., Huscroft and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Dan Ying Chen

Appellant

Mindy Caterina, for the appellant

Jason A. Morische, for the respondent

Heard: November 17, 2022

On appeal from the conviction entered by Justice Mary E. Misener of the Ontario Court of Justice on January 7, 2019.

REASONS FOR DECISION

[1] The appellant was convicted of trafficking methamphetamine and acquitted on a charge of possession of methamphetamine for the purpose of trafficking.

[2] She was observed handing a blue Tommy Hilfiger shopping bag to an unknown male, who stopped briefly at a residence she shared with her boyfriend and his mother. Her boyfriend's mother ran a clothing alterations business from

the home. The police observed the unknown male passing the bag to a second male, who later provided it to a third male. The third male was arrested and the bag was found to contain a clear plastic Tupperware container with 985 grams of methamphetamine, with a value between \$30,000 and \$78,800.

[3] The case against the appellant included five photographs depicting the handover of the bag to the unknown male at the front door of the residence. The appellant's boyfriend's mother testified that the appellant sometimes helped with her alterations business by providing bags of clothes to customers. The trial judge rejected the submission that the appellant passed the bag unwittingly, finding that the appellant spoke with the unknown male, looked down into the bag, and pointed at the bag while the unknown male looked inside it. Specifically, the trial judge found that the appellant could see what was in the bag she handed to the unknown male.

[4] The appellant submits that the trial judge misapprehended the photograph evidence. She failed to consider that the transfer occurred quickly, that the container of drugs was alongside tissue paper that would likely have obscured the contents of the bag, and that the pictures provided only a partial and obstructed view of the brief transaction between the appellant and the unknown male. It was not clear what the appellant was pointing to and no picture showed that the appellant could see what was in the bag.

[5] We do not agree.

[6] There was ample evidence to support the trial judge's finding that the appellant knew what was in the bag she passed to the unknown male. The trial judge considered and rejected the defence submission that there was a reasonable inference the appellant was handing clothing to him, finding there was no reasonable basis to doubt that the appellant knew what the contents of the bag were at the time she handed it over.

[7] The trial judge accepted the testimony of the surveillance officers regarding the exchange and the photographs were used to corroborate the police testimony. The trial judge found that the photographs depicted the appellant speaking with the unknown male; looking down into the bag she handed him; and pointing at the bag while the unknown male looked inside it. The trial judge found, specifically, that "[i]t is clear that she can see what is inside the bag which she hands over".

[8] This was the trial judge's call to make and there is no basis for this court to interfere with it. At the hearing, the appellant's argument focused on what she characterized as the trial judge's failure to specifically address the possibility that the brown tissue paper in the bag might have covered the Tupperware container, preventing the appellant from seeing it. That possibility was in fact raised by the trial judge in discussion with trial counsel during her submissions, so it is plain that the trial judge was aware of it.

[9] The trial judge followed the law governing circumstantial evidence as set out in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000. There is no objection taken to how the trial judge summarized those legal principles.

[10] Read contextually, it is clear that the trial judge rejected the tissue paper theory because she rejected the suggestion that the appellant unwittingly passed the bag to the unknown male. As the trial judge put it: “I am rejecting the submission that there is a reasonable inference that Ms. Chen passed the bag unwittingly.”

[11] It was open to the trial judge to reject this defence suggestion. She explained why she did so, including that the appellant could be seen in conversation with the unknown male, that they both looked down into the bag that was “open” at the top, and that the appellant could be seen pointing to something inside of the bag. Against that factual backdrop, and based upon logic and experience, it was open for the trial judge to conclude that the evidence gave rise to no reasonable possibilities inconsistent with guilt.

[12] The appeal is dismissed.

“Fairburn A.C.J.O.”
“Grant Huscroft J.A.”
“S. Coroza J.A.”