

Case Name:
R. v. Wright

**RE: R., and
Omari Jabari Wright**

[2011] O.J. No. 76

2011 ONSC 194

Court File No. 328/09

Ontario Superior Court of Justice

F.N. Marrocco J.

Heard: November 30, December 1-3, 2010.

Judgment: January 10, 2011.

(37 paras.)

Counsel:

D. Wright, for the Crown.

S. Pieters, for the Accused.

ENDORSEMENT

1 F.N. MARROCCO J.:-- The accused, Omari Jabari Wright, was tried before this Court, sitting without a jury, on three counts, namely: the robbery of Kyle Lonergan while armed with a handgun; using a handgun while committing an indictable offence; and the storage of a firearm without reasonable precaution for the safety of other persons.

2 I have instructed myself on the presumption of innocence, the burden of proof and reasonable doubt. In a criminal case, the accused is presumed to be innocent unless and until the Crown has proved his guilt beyond a reasonable doubt. It is not the responsibility of any accused under our law to establish or to demonstrate or to prove his innocence. If the Crown should fail to prove guilt in respect of a particular crime beyond a reasonable doubt, then the accused is not guilty of the offence to which such crime relates. To put the matter somewhat differently, in order to find an accused

guilty of a particular offence, the Crown must prove each and every one of the essential elements of that offence beyond a reasonable doubt. If I should entertain a reasonable doubt about the proof of one or more of those essential elements, then I must find the accused not guilty.

3 A reasonable doubt is not a far-fetched or frivolous doubt. It is not some fanciful doubt. It is not a doubt based upon sympathy or prejudice. Rather, it is an honest and fair doubt based on reason and common sense. It is doubt that logically arises from the evidence or lack of evidence. It is not enough that I believe that Mr. Wright is probably or likely guilty. In those circumstances, I must find him not guilty because Crown counsel has failed to satisfy me of his guilt beyond reasonable doubt. Proof of probable guilt or likely guilt is not proof of guilt beyond a reasonable doubt. I should also remember, however, that it is virtually impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high. If, at the end of the case, based on all the evidence I am sure that Mr. Wright committed one or more of the offences with which he is charged, I should find him guilty of such offence or offences since I would have been satisfied of his guilt beyond a reasonable doubt. If, at the end of the case, based on all the evidence I am not sure that Mr. Wright committed one or more of the offences set out in the indictment, I should find him not guilty of such offence or offences. If, after a full consideration of all the evidence in this case there remains in my mind a reasonable doubt concerning Mr. Wright's guilt, the Crown has failed to meet the standard of proof which the law requires, the presumption of innocence prevails and it is my duty to acquit. On the other hand, if, after a careful consideration of all the evidence I am left with no reasonable doubt concerning the guilt of Mr. Wright, the presumption of innocence has been displaced, and it is my duty to convict.

4 Shanna Robinson testified that she was in her own apartment on the night of December 14 and early morning of December 15, 2007 celebrating with friends. After midnight on December 15, 2007, two men without her consent entered her ground-floor apartment through the unlocked front door. One of the men was wearing a ski mask and holding a handgun; the other was unmasked and dressed in a brown jacket. The man with the gun went to Kyle Lonergan, who was a guest at the party, and removed a large gold Jesus cross and an exceptionally long and thick gold chain which Mr. Lonergan was wearing around his neck as well as \$10 in cash. Ms. Robinson testified that the gunman then unsuccessfully attempted to take money from one of the other guests who turned out to have left his wallet in his car. At this point, according to Ms. Robinson, the masked gunman said to the accused, Omari Jabari Wright, whom Ms. Robinson identified as the other robber, "they do not have anything, let's just get out of here". According to Ms. Robinson, the masked gunman and Mr. Wright then left her apartment.

5 Ms. Robinson immediately called 911. A tape of her call was, on consent, entered as an exhibit. The call occurred at approximately 12:52 a.m.

6 No issue was taken with Ms. Robinson's evidence that Kyle Lonergan was robbed at gunpoint in her apartment. On October 7, 2008, Davonie Senior, a young offender, pled guilty in the Youth Justice Court to robbing Mr. Lonergan. The transcript of his guilty plea was received as evidence of what occurred when the plea was entered and, on consent, was made an exhibit in this proceeding. When he pled guilty, Mr. Senior admitted being the armed masked robber who actually took Mr. Lonergan's gold cross and gold chain and \$10 from his wallet.

7 The accused, Omari Jabari Wright, is Mr. Senior's older cousin.

8 Issue is taken in this proceeding with the identification of Mr. Wright as the unmasked robber.

9 Shanna Robinson identified Mr. Wright as one of the two robbers. Specifically, Ms. Robinson said that, for a few days prior to the robbery, a woman, identified as Althea, whom she knew through a mutual friend, had been staying at her apartment. Althea had recently arrived in Toronto from Western Canada and their plan was that she would stay on as Ms. Robinson's roommate if "everything worked out" between them.

10 Ms. Robinson testified that the party she was having the night of the robbery was a rather spontaneous affair. She stated that Althea came to the apartment with the accused while the party was going on.

11 According to Ms. Robinson, Althea and Mr. Wright had been at the party for about fifteen minutes when Althea announced that she was going to spend the night with Mr. Wright at his place. During this fifteen-minute interval, according to Ms. Robinson, she was introduced to Mr. Wright and they engaged in some small talk.

12 Ms. Robinson testified that, approximately one half-hour after Mr. Wright and Althea left her apartment, Mr. Wright and a masked man armed with a handgun entered her apartment and robbed Mr. Lonergan. Ms. Robinson indicated that, while the masked man was robbing Mr. Lonergan, Mr. Wright told her he was sorry "but your boy had to get took". Ms. Robinson indicated that she believed the phrase "your boy" referred to Mr. Lonergan.

13 During her testimony, Ms. Robinson identified pictures of Mr. Wright, taken on the night of his arrest, as pictures of the unmasked robber.

14 I accept the evidence of Ms. Robinson with the exception of her identification of Mr. Wright. Ms. Robinson was careful in her testimony. She was forthright about what she could remember and what she could not remember. She indicated that she had been drinking prior to the robbery, but did not attempt to understate how much she had had to drink. I have decided not to accept Ms. Robinson's identification of Mr. Wright for two reasons. First, Ms. Robinson was shown a photo lineup which has been lost and I am unable to determine if the photo lineup affected her in-court identification of Mr. Wright. Second, the 911 call reveals that, quite naturally, she was very disturbed by the robbery.

15 Ms. Robinson made two observations about the unmasked robber on which I intend to comment. I make this observation because a serious inconsistency between Ms. Robinson's description of the robber and Mr. Wright's appearance would have been relevant even though I attached no weight to her in-court identification of Mr. Wright.

16 First, Ms. Robinson said the unmasked robber was a light-skinned black man. Ms. Robinson indicated that she had worked in the entertainment industry as a singer for the last ten years. She said she had some experience with light-skinned, brown-skinned and dark-skinned black people. Pictures of the accused were introduced in evidence in exhibits 9 and 14. No expert evidence was called concerning the accuracy of the description of Mr. Wright as a light-skinned black man. Accordingly, I attach no significance to this observation by Ms. Robinson. I do not believe that it is appropriate for this court to determine, in the absence of evidence, whether it is accurate to describe Mr. Wright as light-skinned.

17 Second, Ms. Robinson said that the unmasked robber had a "chinstrap beard". She said it came around his face thinner than a full beard. Mr. Wright's beard can be seen in exhibits 9 and 14. Ms. Robinson's description of the beard is not inconsistent with the beard shown in those photographic exhibits. Nevertheless, for the reasons which I set out earlier, I attach no weight to her in-court identification of Mr. Wright.

18 There is, however, evidence which persuades me beyond a reasonable doubt that Mr. Wright was the unmasked robber.

19 Ms. Robinson lives at 1 Fountainhead Rd., which is in the vicinity of Finch Avenue and Sentinel Road. As I indicated earlier, immediately after the robbers left her apartment, Shanna Robinson called 911. The call took place shortly before 12:52 a.m. on December 15, 2007. At that same time, P.C. Mangijardi was on duty, working in plainclothes and driving an unmarked police vehicle. P.C. Mangijardi received almost simultaneously with the making of the 911 call, over what is still referred to as the "police radio", a Toronto Police Service communication disclosing Ms. Robinson's 911 call and details of the robbery at her apartment. At 12:58 a.m, some six minutes later, P.C. Mangijardi, while driving eastbound on Finch Avenue near Sentinel Road, saw two black men running westbound on the north sidewalk of Finch Avenue near the ravine that lies between Fountainhead Road and Tobermory Drive. The two men were running away from Fountainhead Road in the direction of Tobermory Drive and, as they were running, they were looking back in the direction from which they had come. P.C. Mangijardi turned his vehicle around so that he was now proceeding in the same direction as the two men, namely, westbound. P.C. Mangijardi called for assistance and, after driving past the two men, cut them off and ordered them to stop running. The two men were arrested moments later when assistance arrived. P.C. Mangijardi testified that, when he stopped the two men, they were sufficiently out of breath that they placed their hands on their knees and bent over. No inconsistencies in his evidence emerged on cross-examination. I accept P.C. Mangijardi's evidence.

20 The two men stopped by P.C. Mangijardi were Davonie Senior and the accused, Omar Jabari Wright. Davonie Senior was, as I indicated earlier, a young offender at the time of his arrest. When Mr. Senior was searched, he was found to be in possession of Mr. Lonergan's large gold Jesus cross and chain, a loaded Norinco 9-mm. handgun and one \$10 bill. The 9-mm. handgun was owned by Omari Jabari Wright, who was licensed to acquire and possess it.

21 I am satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from this evidence is that Omari Jabari Wright was the unmasked second robber who assisted Davonie Senior in robbing Kyle Lonergan on December 15, 2007.

22 There are other facts which must be found in order to complete this matter.

23 According to the affidavit evidence of Cpl. Denis Deveau, on December 15, 2007, Omari Jabari Wright was licensed under the authority of the *Firearms Act* to possess the Norinco 9-mm. handgun. According to the affidavit evidence of Terri Ann Duarte, Omari Jabari Wright, on December 15, 2007, held a valid possession and acquisition licence permitting the possession and acquisition of restricted firearms. The affidavits of Cpl. Deveau and Ms. Duarte were entered as exhibits in this trial. I accept the evidence of Cpl. Deveau and Terri Ann Duarte.

24 Detective Constable Darryl Linqvist testified in this trial. In addition, on consent, his certificate of analysis, dated November 16, 2009, was received as an exhibit. He was qualified as an expert examiner of weapons. Detective Constable Linqvist test-fired the handgun seized from Mr. Se-

nior. He found that it was capable of discharging a shot, bullet or other projectile and that it was designed to be aimed and fired by the action of one hand. He also found that the barrel length was 116 mm. and that it was capable of discharging centre-fire ammunition in a semi-automatic manner.

25 I accept the evidence of Detective Linquist. There was no real issue in this case concerning the handgun seized from Davonie Senior. When Mr. senior was arrested, the handgun was photographed. Some of those photographs were made exhibits in the trial. No issue concerning continuity of the seized handgun was raised. There was no real issue concerning the fact that the handgun was capable of discharging a shot, bullet or other projectile.

26 I am satisfied beyond a reasonable doubt that the weapon seized from Davonie Senior on December 15, 2007 was a firearm, a restricted firearm and a handgun as those terms are defined in the *Criminal Code*. I am satisfied beyond a reasonable doubt that this firearm was, on December 15, 2007, licensed to Omari Jabari Wright.

27 P.C. Eric Reimer was also called as a Crown witness. He is with the Emergency Task Force and, on December 15, 2007, he was called to the scene of the arrest of Mr. Wright and Davonie Senior to safely remove all ammunition from the handgun. P.C. Reimer removed the ammunition. P.C. Reimer testified, and I accept his evidence, that there was a magazine in the handgun, the handgun was set to fire and that he ejected a round of ammunition from the handgun itself. I accept P.C. Reimer's evidence to the effect that squeezing the trigger of the handgun would have fired a bullet.

28 I propose now to comment on the evidence of Davonie Senior. Davonie Senior testified in this trial. He testified that he committed the robbery with a man named Junior Manon, who is now dead. Mr. Senior testified that he stole the Norinco handgun from Mr. Wright. Davonie Senior could not remember how long he had the handgun prior to his arrest; he could not remember the manufacturer of the handgun or the approximate length of the barrel. He stated that Omari Jabari Wright played no part in the robbery. He testified that he met Mr. Wright on Finch Avenue and that they were on their way home when the police pulled up. He said he was walking not running with Mr. Wright when they were arrested.

29 I reject Davonie Senior's evidence entirely. I do so because it is completely at odds with the facts which he admitted when he pled guilty.

30 When Mr. Senior pled guilty, he was represented by counsel and both his parents were in court. During his guilty plea, his father addressed the court concerning his son's rehabilitation.

31 There was a proper plea inquiry. The Youth Justice Court judge asked Mr. Senior's counsel if Mr. Senior knew that by pleading guilty he was waving his constitutional right to a trial. The Youth Justice Court judge also asked Mr. Senior's counsel if Mr. Senior was freely and voluntarily admitting the facts which would establish his guilt. Finally, the Youth Justice Court judge asked counsel if Mr. Senior understood that the final decision with respect to sentence rested with the court, despite the fact that there was a joint submission in that regard. Counsel assured the court that Mr. Senior was aware of these matters. Counsel indicated that he had written instructions consistent with the plea inquiries made by the Youth Justice Court judge. Davonie Senior then personally confirmed his lawyer's advice to the court.

32 During the course of the guilty plea, one of the facts read out to the judge was that the other robber was the accused, Omari Jabari Wright. This fact was emphasized by the Youth Justice Court judge, who asked Mr. Senior specifically if he agreed that the other robber was his cousin, Omari

Jabari Wright. Mr. Senior personally responded that Mr. Wright was the other robber and that it was Mr. Wright who had given him the gun. This admission was sufficiently important to the Youth Justice Court judge that His Honour described it as mitigating Mr. Senior's sentence.

33 Mr. Senior's evidence in this Court is completely at odds with his admission to the Youth Justice Court judge concerning the identity of the second robber. The effect of the previous inconsistent statement made by Mr. Senior to the Youth Justice Court judge concerning the identity of the second robber causes me to completely reject Mr. Senior's evidence in this trial identifying the dead man, Junior Manon, as the other person who robbed Mr. Lonergan. I also reject his evidence that he was walking with Mr. Wright and not running immediately prior to his arrest. The inconsistency between Mr. Senior's statements to the Youth Justice Court judge and his evidence in this Court is so stark that I reject Mr. Senior's evidence in its entirety.

34 I should indicate that, because I view Mr. Senior as utterly unreliable, I have not relied upon his identification of Mr. Wright as the second robber when he pleaded guilty as proof of that fact.

35 As I indicated earlier, I do not accept any portion of Davonie Senior's evidence and, therefore, do not accept his statement that he stole the Norinco 9-mm. handgun from Mr. Wright. The only reasonable inference from the evidence which I have accepted is that Mr. Wright gave his handgun to Davonie Senior so that they could rob Mr. Lonergan and the other guests at Shanna Robinson's apartment on December 15, 2007.

36 I am therefore satisfied beyond a reasonable doubt that Mr. Wright stored his firearm without taking reasonable precautions for the safety of other persons, contrary to section 86(2) of the *Criminal Code*.

37 Accordingly, I am satisfied beyond a reasonable doubt that Omari Jabari Wright is guilty of Counts 1, 2 and 3 in the indictment.

F.N. MARROCCO J.

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