

5 of 5 DOCUMENTS

Indexed as:

R. v. Nimchuk

**Between
Her Majesty the Queen, respondent, and
Michael Nimchuk, appellant**

[1976] O.J. No. 1258

33 C.C.C. (2d) 209

1 W.C.B. 122

Ontario Supreme Court - Court of Appeal
Toronto, Ontario

Brooke, Martin and Blair JJ.A.

Heard: December 17, 1976.

Oral judgment: December 17, 1976.

Released: January 13, 1977.

(5 pp.)

Counsel:

Martin Kerbel, for the appellant.
David Doherty, for the respondent.

The judgment of the Court was delivered by

1 MARTIN J.A. (orally):-- The appellant appeals against his conviction on April 22, 1975, on the following charge:

"... on or about the 14th day of January, 1975, at the Town of Dundas in the said Judicial District, did unlawfully by deceit, falsehood or other fraudulent means defraud M. Green Drugs Ltd., operating as Shoppers Drug Mrt, 34 Plaza Dr. University Plaza Dundas, contrary to the provisions of Section 338-1 of the Criminal Code."

2 The evidence led by the Crown was that the appellant was observed on the day in question in the Shoppers Drug

Mart by Mrs. Vanka, a security officer. Mrs. Vanka testified that she observed the appellant remove a price label from a box of L'Oreal shampoo priced at \$2.95 by scratching and picking the label off the bottle; thereafter, he crumpled it and threw it on the floor, and replaced that label with the label from a box of Sofsyn Cream priced at \$1.56. The label alleged to have been taken from the box of L'Oreal shampoo was not recovered. Mrs. Vanka said that the appellant then picked up a number of items, proceeded to the cashier's desk, where the items were rung up, and left the store.

3 Mrs. Vanka followed the appellant out of the store, and according to her evidence she approached the appellant, identified herself and asked him to return. She said he refused to do so; an altercation ensued, and I think is quite clear from the evidence that Mrs. Vanka seized the appellant by his tie, around the knot, and was twisting it. Mrs. Vanka called for help, and the attention of Mrs. James, who was nearby, was attracted by what was occurring and she went over to the appellant and Mrs. Vanka. Mrs. Vanka requested the assistance of Mrs. James to get the appellant into the store. Mrs. James suggested that, perhaps, if Mrs. Vanka loosened her grasp of the appellant, he might be more amenable to her request that he return to the store. The appellant requested Mrs. James to go back into the store with him as his witness to what occurred. There was a conflict between the evidence of Mrs. Vanka and Mrs. James with respect to some matters.

4 In support of the Crown's case a tape was produced showing that the appellant had indeed purchased an item priced at \$1.56 in the Shoppers Drug Mart.

5 The appellant is a man of good reputation with no prior criminal record; he was employed by a pharmaceutical company, and testified that he was making a service call at the Shopper's Drug Mart on the day in question. He testified that while there he decided to do his shopping, and that as he made purchases he crossed the items off the list. The appellant denied that he had switched the price tags as alleged. He also said that Mrs. Vanka had seized him, but had refused to identify herself.

6 The learned trial judge in convicting the appellant, in our view, fell into a serious error with respect to the burden of proof. He said:

"Not only would I have to disbelieve her entirely, but I would have to find that she was completely framing him. I'm going to have to find him guilty."

7 In our view, the trial judge in concluding that in order to acquit the appellant he would have to find that Mrs. Vanka was "framing him", in effect, placed the burden of proof upon the appellant. The trial judge appeared to think that he was confronted with a choice between two alternatives, either accepting the evidence of the accused, and finding that Mrs. Vanka framed him, or accepting the evidence of Mrs. Vanka, which required a conviction. There was, of course, a third alternative, namely, if a reasonable doubt existed, in view of the conflicting testimony, as to exactly where the truth of the matter lay, it would, of course, require an acquittal.

8 In *R. v. Nykiforuk*, 86 C.C.C. 151 Mackenzie, J.A., delivering the judgment of the Saskatchewan Court of Appeal said at p. 155:

"It is manifest as the learned Judge has said that the story of the witnesses for the Crown are absolutely opposed to that given by the accused. It is also obvious as he remarks that they could not both be true.

In order to arrive at a proper verdict however it was not obligatory upon the jury, as the learned Judge suggests, 'to solve' the question as to which side was telling the truth 'beyond a reasonable doubt'. On the contrary the burden of proof being on the Crown throughout, the question for determination by the jury was whether they were satisfied beyond a reasonable doubt that the accused had committed the offence charged."

I refer also to R. v. Carrier et al. (1973), 23 C.R.N.S. 243; R. v. Tuffnell and Jasper, [1947] O.W.N. 515.

9 There is one other matter with respect to which we desire make some observation. We were advised by counsel for the appellant that the exhibits in this case were returned to the principal Crown witness, Mrs. Vanka, some time in May of 1975, and, in any event, they were not before the court. We do not base our judgment on the absence of those exhibits, but it would have been helpful, and desirable for the court to have had the exhibits before it.

10 In all the circumstances, we are of the view that the conviction cannot stand. We therefore allow the appeal, set aside the conviction and order a new trial.

MARTIN J.A.

BROOKE J.A.

BLAIR J.A.

qp/s/mbm/lcw