NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Melvin*, 2016 NSCA 52

Date: 20160609
Docket: CAC 439892
Registry: Halifax

Between:

Cory Patrick Melvin

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Farrar and Van den Eynden, JJ.A.
Appeal Heard:	March 22, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, convictions set aside and a new trial ordered per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Van den Eynden, JJ.A. concurring.
Counsel:	Stanley W. MacDonald, Q.C., for the appellant Mark Scott, Q.C., for the respondent

Reasons for judgment:

Overview

[1] Mr. Melvin was charged with a number of offences arising from an incident which occurred in the early morning hours of August 16, 2011. His first trial commenced on November 25, 2013 and resulted in a mistrial after nine days.

[2] The appellant's second trial commenced on February 2, 2015 before a jury with Justice James R. Chipman presiding. The trial continued for nine days and at the conclusion of the trial, the appellant was found guilty of aggravated assault and possession of a weapon for the purpose of committing an offence. He was found not guilty of two other assault charges.

[3] Mr. Melvin was sentenced to 18 months in jail for the aggravated assault charge, and six months for possession of a weapon, to be served concurrently, followed by 18 months of probation.

[4] On appeal, the appellant alleges the trial judge made a number of errors in his charge to the jury which require a new trial.

[5] For the reasons that follow, I would allow the appeal, set aside the convictions and order a new trial.

Background

[6] At approximately 3:30 a.m. on August 16, 2011, Mr. Melvin was in downtown Halifax with Samantha Gorman and Nick Power. Chris Millett and Callum MacDonald were also downtown. The two groups came into contact with each other on Grafton Street outside "The Liquor Dome". Words were exchanged. Mr. Melvin was punched in the face by Mr. MacDonald, causing him to fall to the ground. After being punched, Mr. Melvin was bleeding from his nose.

[7] After punching Mr. Melvin, Mr. MacDonald ran south bound on Grafton Street with Samantha Gorman pursuing him.

[8] Mr. Melvin, after he collected himself, walked in a southerly direction on Grafton Street.

[9] A number of other people were in and around Grafton Street at that time and became involved as matters unfolded.

[10] Jacob Henry, Matthew Warmerdam and Melvin Day were inside Freeman's Little New York eating breakfast.

[11] Mr. Henry did not testify at this trial, but his testimony at the preliminary inquiry and at the mistrial was played for the jury. He saw "a couple of people" across the street arguing. He thought there may be a fight so he exited the restaurant. When he got outside he saw one of the individuals get punched. Mr. Henry testified that he ran into the Avis parking lot, chasing the person that he believed to be the "puncher".

[12] Mr. Warmerdam testified that he saw Mr. Henry run after a person towards the Avis parking lot. Mr. Henry hollered to Mr. Warmerdam to catch the guy who was running away. Mr. Warmerdam grabbed this person's collar and kicked his feet out from under him. He put him on the ground and held him there. As they were holding him, they saw another altercation, south on Grafton Street near a fence where the Midtown Tavern and Chronicle Herald were once located. At that point, the person that they were holding was attacked by a woman, wearing a black and white striped dress and high heels.

[13] Mr. Warmerdam testified that the person that he was holding was a "little guy" who was wearing a polo or rugby-style shirt with a collar.

[14] Mr. Warmerdam and Mr. Henry left the intersection of Grafton Street and Prince Street where they had been holding the person they believed to be the puncher and proceeded south on Grafton Street to the Midtown/Chronicle Herald altercation. When they got there, Mr. Warmerdam said he saw two people physically attacking a man on the ground. He could not identify the person on the ground. By description, he identified the appellant as one of the physical aggressors.

[15] Mr. Henry gave similar evidence, in the sense that he and Mr. Warmerdam left the person who they were holding on the ground (the puncher) and proceeded south on Grafton Street to the other altercation. During cross-examination at the preliminary inquiry, Mr. Henry gave evidence to the effect that the person who was being assaulted by the appellant and one other person was the "friend of the puncher".

[16] Mr. Henry also gave evidence at the first trial. During that testimony, Mr. Henry was less certain about whether he and Mr. Warmerdam were holding the puncher and of the identity of the person on the ground south on Grafton Street near the fence. He did adopt a portion of the statement that he made to the police at the time of the incident in which he said that he and Mr. Warmerdam grabbed "the puncher".

[17] Mr. Warmerdam and Mr. Henry were joined by Melvin Day at the Midtown/ Chronicle Herald altercation. Mr. Day testified that as he came out of Freeman's Little New York, he saw a man laying on the ground. He looked south and saw the Midtown/Chronicle Herald altercation and described the appellant as the aggressor. He testified that the appellant was alone over top of the person on the ground and that Mr. Henry grabbed the appellant.

[18] Mr. Warmerdam and Mr. Day both testified that the person identified as the appellant in the Midtown/Chronicle Herald altercation had a knife.

[19] Mr. Henry testified at the preliminary inquiry that he saw a "flash" in the appellant's hand during the Midtown/Chronicle Herald altercation. At the first trial, he testified he did not see the appellant in possession of a knife.

[20] Mr. Warmerdam and Mr. Day said that the knife the appellant was holding disappeared quickly.

[21] Mr. MacDonald's evidence in his police statement and at the preliminary inquiry was that after he struck the appellant, he ran south on Grafton Street and into the Avis parking lot, which was located just north of the intersection with Prince Street. While there, he engaged in a confrontation with another group of people, including a bi-racial male wearing an Oakland A's baseball cap. Mr. MacDonald said that the bi-racial male cut him, following which he ran to the Subway shop located at the intersection of Argyle Street and Blowers Street and called 9-1-1.

[22] The physical incidents/confrontations all occurred between 3:30 a.m. and 3:40 a.m. The police arrived on the scene and, using a sniffer dog and metal detectors, a search was conducted in the area of where Mr. Warmerdam and Mr. Day testified they saw Mr. Melvin with a knife. No knife was found.

[23] Sergeant Perry Astephen was the first officer to arrive at the incidents. When he arrived he observed the appellant, Nick Power and Samantha Gorman in

one group in a verbal confrontation with Mr. Henry, Mr. Warmerdam and Mr. Day.

[24] At approximately 11:30 a.m. on August 16, 2011 Marie Robinson, who ran Freeman's Little New York on Grafton Street, saw a knife in an alcove in front of that restaurant, and called the police.

[25] The appellant's blood was found on the handle of the knife. The police swabbed the blade of the knife and sent it for DNA analysis. Both the appellant's and Callum MacDonald's DNA were found on the knife blade.

[26] This is a brief summary of the evidence. I will review the evidence in more detail when addressing the individual grounds of appeal.

Issues

[27] Mr. Melvin raises four issues on appeal:

1. The trial judge erred in his instructions to the jury by failing to properly review the evidence and relate the evidence to the issues raised by the defence;
2. The trial judge erred in his instructions to the jury on the issue of circumstantial evidence;
3. The trial judge erred in his instructions to the jury by failing to instruct the jury that they may not use the evidence on one count to infer guilt on any other count;
4. The Crown failed to prove a particularized element of the offence of aggravated assault and, as a result, the verdict on that charge was unreasonable and cannot be supported by the evidence.

Standard of Review

[28] The standard of review for the first three issues with respect to the adequacy of instructions to the jury requires a functional approach based on the evidence at trial, the live issues raised and the submissions of counsel (*R. v. Howe*, 2015 NSCA 84, ¶67).

[29] The fourth ground of appeal relates to the Crown's particularization of the aggravated assault count in the Indictment. That issue focuses on whether the Crown was required, as a matter of law, to prove that Mr. Melvin did wound and

endanger the life of Callum MacDonald as set out in the Indictment. This involves a question of law that is reviewable on a standard of correctness.

[30] However, as I will explain, I am satisfied that we should give effect to the first ground of appeal and order a new trial. As a result, it will not be necessary to address the other three grounds.

Issue #1 The trial judge erred in his instructions to the jury by failing to properly review the evidence and relate the evidence to the issues raised by the defence

[31] The basic principles which inform a court's decision about the adequacy of a trial judge's instructions to a jury were discussed in *R. v. P.J.B.*, 2012 ONCA 730 and may be summarized as follows:

- Anyone charged with a criminal offence and tried before a jury is entitled to a properly, but not perfectly, instructed jury (¶41);
- A trial judge's final instructions must leave the jury with a clear understanding of the factual issues to be resolved, the legal principles governing the factual issues, the evidence adduced at trial, the position of the parties and the evidence relevant to the positions of the parties on those issues (¶42);
- The responsibility of the trial judge has two components: the first is a review of the evidence and the second is to relate the evidence to the position of the defence (¶43);
- Except in the rarest of cases, where it would be unnecessary to do so, a trial judge must review the substantial parts of the evidence and give the jury the position of the defence so that the jury can appreciate the value and effect of the evidence (¶44);
- A trial judge is under no obligation to review all of the evidence at trial nor is a trial judge required to review the same evidence more than once when the evidence relates to more than one issue, provided the trial judge makes it known to the jury that the evidence is relevant for more than one purpose ¶45);
- The obligation to review the substantial parts of the evidence and to relate it to the issues raised by the parties is for the trial judge and not counsel, whether prosecuting or defending. The closing arguments of

> the parties do not relieve the trial judge of the obligation to ensure that the jury understands the significance of the evidence to the issues in the case. However, a trial judge may take into consideration the arguments of counsel in deciding how to discharge his or her obligations (¶47).

[32] With these principles in mind, I turn to the trial judge's final instructions to the jury.

[33] The trial judge, before reviewing the evidence of the witnesses, attempted to identify for the jury what he considered to be the "real issue" in the case:

> The real issue in this case is whether the events alleged to form the basis of the crimes charged ever took place. It is for Crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred and that Mr. Melvin was the person involved in them. It is not for Mr. Melvin to prove that these events never happened. If you have a reasonable doubt whether the events alleged ever took place, you must find Mr. Melvin not guilty.
>
> [Emphasis added]

[34] With respect, the real issue from the defence's point of view, was not whether the events alleged ever took place. The witnesses described events that could have formed the basis of the crimes charged. The real issue with respect to the charges of aggravated assault and possession of a weapon for the purpose of committing an offence, was whether the Crown had proven beyond a reasonable doubt that Mr. Melvin was the person who cut Mr. MacDonald with a knife.

[35] The trial judge provided the jury with a copy of the verdict sheet and then stated:

> And so before I go through the specific elements of each count against Mr. Melvin, I will review with you my notes of the evidence.

[36] The trial judge then advised the jury that he had divided his notes of the evidence into two sections:

> The first section deals with the individuals who gave evidence mainly concerning counts one and six...And so what I'm going to do now is start to review with you the evidence that relates to two of the six counts.
>
> [Emphasis added]

[37] Those two counts were aggravated assault and possession of a weapon for the purpose of committing an offence. The trial judge then read from his notes, reciting his recollection of the evidence of D/Cst. Sayer, Cst. Stevens, Cst. Power, Cst. Bates, Nicole McCullough, Cst. Johnston, Marie Robinson, D/Cst. Emberlin, Jennifer Zwicker, Mr. MacDonald's 911 call, Mr. MacDonald's initial statement to the police and his preliminary inquiry evidence. At no point during his review of the evidence in relation to the charges of aggravated assault and possession of a weapon for the purpose of committing an offence did the trial judge recite or review the evidence of Matthew Warmerdan, Melvin Day, Jacob Henry, or Sgt. Astephen.

[38] The reason for the failure to review the evidence of these witnesses may be ascribable to the manner in which the trial judge compartmentalized the evidence.

[39] In his main instructions to the jury on the charges of aggravated assault and possession of a weapon for the purpose of committing an offence, the trial judge directed the jury to focus their attention on the evidence of those witnesses he identified above. As noted, those witnesses did not include Mr. Warmerdam, Mr. Day, Mr. Henry, or Constable Astephen. Furthermore, the trial judge did not review any of the evidence contained in the exhibits, such as the videos and photographs.

[40] I agree with the appellant that the testimony of those four witnesses, as well as the videos and photographs were directly relevant to the physical incidents/confrontations that occurred on the morning of August 16, 2011. I have already reviewed some of that evidence in the factual background above and will discuss it further to illustrate its importance to the issues at trial.

[41] It was open to the jury to accept the evidence of Mr. Henry that he and Mr. Warmerdam chased, caught and held the "puncher". This would have been Mr. MacDonald.

[42] That Mr. MacDonald was the person involved in the incident, with Matthew Warmerdam and Jacob Henry, could be said to be corroborated by the fact that the video showed Ms. Gorman chasing Mr. MacDonald after he struck the appellant. Mr. Henry and Mr. Warmerdam held the "puncher", and that puncher was then attacked by Ms. Gorman. It would be open to conclude that the person Ms. Gorman attacked was Mr. MacDonald.

[43] Furthermore, Mr. Warmerdam described the person who was flushed out of the Avis parking lot by Mr. Henry as the "little guy" and "the smallest guy of the bunch" that he saw that night. In the video, Mr. MacDonald was the smallest guy in the group of people involved in the altercations that night.

[44] In addition, Mr. Warmerdam testified that the guy that he grabbed by the collar, and put on the ground, was wearing a rugby or polo-style shirt. In the video, Mr. MacDonald is wearing a shirt with horizontal stripes.

[45] If it was Mr. MacDonald on the ground at the location of the incident with Ms. Gorman, then he was not the person observed on the ground at the Chronicle Herald/Midtown altercation where the appellant was identified.

[46] Mr. Henry's evidence to the effect that Mr. MacDonald ran in to the Avis parking lot after punching the appellant was corroborative of Mr. MacDonald's evidence that he was cut while he was in that parking lot. Mr. Henry put him in that lot.

[47] No one gave any description whatsoever of the person who was on the ground during the Chronicle Herald/Midtown altercation.

[48] These are simply examples of evidence that could have created, or contributed to, a reasonable doubt on the charges for which the appellant was convicted, had the jury been properly instructed on these aspects of the evidence. During the main charge to the jury, they were not alerted to most of this evidence.

[49] Furthermore, the trial judge did not relate the evidence of any witness or the exhibits to the issue of whether the appellant was the person who cut Mr. MacDonald.

[50] This case is similar to the recent decision of the Ontario Court of Appeal in *R. v. McDonald*, 2015 ONCA 791, where the appellant was convicted of aggravated assault. The conviction was set aside and a new trial ordered. In the course of delivering the judgment of the Court, Pardu, J.A. said:

> [12] The trial judge's instructions on the law and his review of the evidence were accurate. However, the jury needed more help relating the evidence to the law in a way that was less abstract. In this case, the instructions on the law and the review of the evidence were contained in such separate silos that significant misunderstanding was possible.

[51] The trial judge not only put the instructions on the law and his recitation of the evidence in separate silos, he also put the witnesses in separate silos, at least in his main charge to the jury. The following day, in response to the jury's question, those silos were removed, but without any further instruction from the trial judge.

The Jury's Question

[52] Given the manner in which the trial judge compartmentalized the evidence, it was no surprise that on the second day of deliberations the jury asked the following question: "Do we consider all of the evidence for all of the charges?"

[53] After discussing this question with counsel, the trial judge answered the question by simply stating, "Yes." With respect, that answer was inadequate.

[54] The Supreme Court of Canada has emphasized the significance that must be attached to questions from the jury during their deliberations. In *R. v. W.D.S.*, [1994] 3 S.C.R. 521, Cory, J. stated:

> 13. It is true that directions to a jury must always be read as a whole; however, it cannot ever be forgotten that questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered. This is true for any number of reasons that have been expressed by this Court on other occasions. A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful manner. …

[55] Justice Cory continued:

> 18. There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.

See also *R. v. Layton*, 2009 SCC 36.

[56] The jury's question showed that they were struggling with how to relate the evidence to the issues. It was the trial judge's duty to recognize that fact and to fulfil the responsibility of reviewing the evidence and relating it to the issues to be decided. Simply stating "yes" to the jury in response to their question was not a sufficient response. It would have had the effect of letting the jury wander through all of the evidence with no direction as to how to apply it to the issues to be decided. The answer did nothing to improve the jury's "understanding of the particular aspects of the evidence that bear on their decision on each essential issue in the case." (*R. v. P.J.B*, ¶ 44)

[57] Further, with respect, the simple answer of "yes" to the jury's question contradicted the trial judge's instructions to the jury on this very issue in his main charge, and would have created additional confusion. In his main charge to the jury, the trial judge stated:

> Now the indictment on which you are trying Cory Patrick Melvin alleges that he committed six offences. Each allegation is a separate charge. You must make a separate decision and give separate verdicts for each charge. The verdicts may but do not have to be the same on each charge. <u>You must make your decision on each charge only on the basis of the evidence that relates to that charge and the legal principles that I tell you apply to your decision on that charge. You must not use evidence that relates only to one charge in making your decision on any other charge</u>.
>
> Mr. Melvin is presumed innocent of each charge. You must consider each charge separately and return a separate verdict for each charge based only on the evidence and the legal principles that apply to it. …
>
> [Emphasis added]

[58] The contradiction is obvious. On February 18th, the jury was told that they "must not use evidence that relates only to one charge in making your decision on any other charge." On February 19th, the jury was told that they could "consider all of the evidence for all of the charges." Had the jury received any instructions regarding how to relate the evidence to the true issues, this confusion and contradiction may have been avoided.

[59] To use the words of Cory, J. in *R. v. W.D.S.*, *supra*, by posing their question, the jury members in the case at bar were saying "please help us" to relate the evidence to the issues. That help was not provided. The trial judge erred in failing to review and relate the evidence of important witnesses to the central issue of

whether Mr. Melvin was the person who cut Mr. MacDonald. Further, his response to the jury's question did not remedy the error in his original charge.

[60] This Court's decision in *R. v. Fraser*, [1990] N.S.J. No. 117, granted a new trial on similar shortcomings by the trial judge which led to convictions for aggravated assault and possession of a weapon for a purpose dangerous to the public peace, is instructive. In setting aside those convictions the Court held:

> It is not sufficient simply for the judge to leave the whole evidence for the jury - in bulk as it has been said. The judge must refer to those parts of the evidence relative to the theories of the crown and the defence and relate that evidence to the principles of law that have been explained to the jury. (p. 11)

[61] Similarly, in this case, the failure to relate the evidence to these live issues at trial was a serious non-direction amounting to a misdirection (see *R. v. Fraser*, p.11).

[62] This alone would be fatal to the convictions of aggravated assault and possession of a weapon for the purposes of committing an offence. However, I also have concerns about another aspect of the trial judge's instructions on the two charges under consideration.

[63] In the trial judge's main instructions to the jury, he read aloud the wording of the charge of aggravated assault, as follows:

> That he, on or about the 16th day of August, 2011, at or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did unlawfully wound and endanger the life of Callum Paul MacDonald, thereby committing an aggravated assault, contrary to s. 268(1) of the **Criminal Code**.

[64] After reading the charge aloud, the trial judge instructed the jury that the Crown had to prove two essential elements beyond a reasonable doubt, namely, that the appellant intentionally applied force to Callum MacDonald and that the force the appellant intentionally applied wounded Callum MacDonald.

[65] The trial judge then went on to address the first element by instructing the jury on the various ways by which force may be applied (i.e. by means of a hand or foot). He then explained the difference between intentional and accidental applications of force. His focus was clearly on the word "intentionally". This is also reflected in the decision tree that was provided to the jury, where the word "intentionally" was in italics to emphasize it.

[66] The trial judge then stated to the jury:

> If you are not satisfied beyond a reasonable doubt that Mr. Melvin intentionally applied force to Callum MacDonald, you must find Mr. Melvin not guilty.

[67] The emphasis on the word "intentionally" could have had the effect of diverting the jury's attention away from the issue of whether the Crown had proven beyond a reasonable doubt that the appellant was the person who cut Callum MacDonald, which was the true issue.

[68] This diversion continued when the trial judge instructed the jury on the definition of "wound". Further, he discussed the concept of an intentional wounding and foreseeability of bodily harm.

[69] The trial judge then concluded his instructions on the charge of aggravated assault:

> If you are not satisfied beyond a reasonable doubt that the force Mr. Melvin intentionally applied wounded Callum MacDonald, you must go on to the next question.

[70] The trial judge spoke in terms of "the force Mr. Melvin intentionally applied". This again misses the real issue, which was the appellant's position that he did not ever apply any force to Callum MacDonald. The instructions to the jury on the legal elements of aggravated assault suggest that the appellant was the person who stabbed Callum MacDonald. While I recognize that the wording of instructions to the jury should not be parsed, ignoring the context of the instructions as a whole, in this case the absence of the relation of the evidence to the issues makes the instruction problematic. At no point did the trial judge relate the evidence to the issue of whether the appellant actually applied any force to Callum MacDonald. When the trial judge instructed the jury in terms of whether the appellant's application of force was intentional and whether it resulted in a wounding of Callum MacDonald, it suggests that Mr. Melvin applied the force and the issues were whether it was intentional and resulted in a wounding. With respect, there was really no issue that Mr. MacDonald had force intentionally applied to him and that resulted in a wounding. The real issue, and the trial judge's focus, should have been on whether it was Mr. Melvin who applied the force.

[71] Before concluding, I address two arguments made by the Crown to suggest that if there were deficiencies in the trial judge's charge, they would not have misled the jury.

[72] First, they argue that "counsels closing arguments would have kept a jury on track".

[73] As noted earlier – when reviewing the principles on the adequacy of a trial judge's instructions – *R. v. P.J.B.* is clear; the closing arguments of the parties do not relieve the trial judge of the obligation to ensure the jury understands the significance of the evidence.

[74] The Crown's second argument was that defence counsel at trial (not Mr. Melvin's lawyer on appeal) did not object to the instructions nor to the response given to the jury's question. Although trial counsel's failure to object may be a factor in determining whether or not the instructions to the jury were adequate, it is not fatal in every case (see *R. v. Pinter*, [1996] O.J. 3451 (C.A.), ¶21).

[75] As in *R. v. Pinter*, I am satisfied that the significance of the evidence in relation to the issues raised by the defence and the prejudicial effect occasioned by the trial judge's lack of instruction requires that a new trial be ordered, despite defence counsel's failure to object.

[76] For these reasons, I would set aside the convictions, and order a new trial, should the Crown wish to prosecute Mr. Melvin for a third time.

[77] In light of my conclusions on the first ground of appeal, it is not necessary for me to address the other grounds of appeal raised by the appellant.

Conclusion

[78] The appeal is allowed, the convictions set aside and a new trial ordered.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Van den Eynden, J.A.