C.A.C. No. 134407

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Pugsley, JJ.A.
Cite as: R. v. Robart, 1997 NSCA 96

BETWEEN:	)	
	)	
NATHANIEL ANDREW ROBART	)	Kevin G. Coady
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Robert E. Lutes, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	April 4, 1997
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	)	
	)	
	)	Judgment Delivered:
	)	April 8, 1997

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Hallett and Pugsley, JJ.A., concurring.

ROSCOE, J.A.:

The appellant was convicted of assault after a trial in the Provincial Court. He and Aldon Johnson had been jointly charged with assault causing bodily harm, a charge to which Johnson pleaded guilty. Although the trial judge was not satisfied beyond a

reasonable doubt that the appellant caused bodily harm to the complainant, he found him guilty of the included offence of simple assault.

The incident arose from a dispute over an automobile registered in the name of the complainant's sister, Jody King, but apparently beneficially owned by Johnson. Johnson and King had an agreement that only the two of them would drive the car. One evening King and the complainant observed the car being driven by the appellant while Johnson sat in the passenger seat. At an intersection, King, upset that the appellant was driving the car, yelled to Johnson to take the car home. She and the complainant followed the car to an apartment building where the appellant parked it. After the men entered the building, the complainant, acting on King's instructions to take the car home, and using King's key, opened the vehicle and sat in the driver's seat. The appellant and Johnson then came out of the building, approached the car and attempted to get the key away from the complainant. She testified that she and the appellant "... physically struggled...", that "... he was kind of shoving and pushing and trying to get at the key...". Jody King testified that the appellant "... wedged himself between her and the steering wheel..." and "he tried to sit in the driver's seat too to keep her from being able to drive the car." She also indicated that Johnson pulled her sister from the car and fought with her for five or ten minutes. The complainant suffered cuts to her lip and nose, several bruises and a black eye.

The appellant did not testify, nor was any evidence called on his behalf.

Although at the trial the defence position was that the complainant consented to the assault, since it was a mutual struggle, on appeal, it is submitted that the evidence of the appellant's intent was insufficient to find that the appellant committed an assault, that the trial judge erred by not applying the maxim "*de minimis non curat lex*", and one further defence not argued at trial is advanced, that is, that the appellant was defending his possession of property and therefore entitled to rely upon s. 39(1) of the **Criminal Code**.

On the first issue, the appellant submits that his “conduct in touching the complainant was incidental to ...[his]... goal of grasping for the keys and controlling the steering wheel of the vehicle” and that therefore the element of intent to apply force was not present. A review of the record reveals nothing at all to indicate that the appellant rebutted the presumption that a person intends the natural consequences of their actions. Although his motive may have been to prevent the complainant from driving the car, the uncontradicted evidence was that the means employed to accomplish the motive was the intentional application of force to the complainant.

The appellant submits in the alternative that the trial judge erred by not dismissing the complaint because of the trifling nature of the touching of the complainant by the appellant. He relies on **R. v. Lepage** (1989), 74 C.R. (3d) 368 (Sask.Q.B.); **R. v. Matsuba** (1993), 137 A.R. 34 (Alta.P.C.); and **R. v. Elek** (1994), Y.J. No. 31 (Y.T.C.), all cases where the maxim *de minimis non curat lex* was discussed in the context of assault.

In **Lepage, supra**, the accused was alleged to have pushed a fire inspector in the chest as he was leaving a small office. The accused testified that he brushed the inspector as he reached for his coat. On appeal from summary conviction, McIntyre, J. held that there was no evidence to support a finding that there was an intentional application of force and alternatively, the conduct was so trifling that the maxim *de minimis non curat lex* should apply.

Likewise in **Matsuba, supra**, the trial judge was not “... satisfied beyond a reasonable doubt that the accused deliberately touched the complainant ...”. (See page 55).

In **Elek, supra**, the accused testified that although she did place her hands on the neck of the complainant she intended it as a joke. The trial judge held that the touching was brief and no pressure was applied to the neck. In applying the *de minimis*

maxim to acquit the accused the trial judge held that the conduct ". . . was not sufficiently egregious as to amount to criminal misconduct."

One of the difficulties presented with this argument is that it was not raised at the trial. We therefore do not have the benefit of the trial judge's assessment of the evidence of the nature of and the extent of the force exerted by the appellant on the complainant. At trial, the issues were whether the injuries suffered by the complainant were caused by Johnson or the appellant and whether the struggle was consensual. In this Court, the appellant emphasizes the evidence that the appellant wedged himself into the seat and that the two struggled for the key but disregards the evidence of the shoving and pushing. The trial judge was not convinced that the appellant caused bodily harm to the complainant, and apparently did not consider whether the appellant was a party to the assault causing bodily harm. It was conceded at the hearing of the appeal that the evidence would support a finding that the actions of the appellant obstructed the complainant with the result that Johnson was able to commit the more serious assault. The totality of the surrounding circumstances of this case clearly distinguish it from those exceptional cases of innocuous behaviour where the *de minimis* maxim was found to be applicable.

Lastly, the appellant submits that he is entitled to a defence provided in s. 39(1) of the **Criminal Code**:

> 39 (1) Everyone who is in peaceable possession of personal property under a claim of right, and everyone acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

The practice of raising new defences on appeal should be discouraged. Recently in **Marshall v. The Queen**, C.A.C. No. 129874, March 26, 1997, this Court adopted the following statements of Lambert, J.A. in **R. v. Vidulich** (1989), 37 B.C.L.R. 391 at page 398:

> An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence.

That statement of principle is equally applicable to this case even though the appellant here is not seeking a new trial, but an acquittal. In any event, the defence, on the evidence as it was presented at the trial, does not support the appellant's contention that he was in any kind of peaceable possession of the vehicle, actual, joint or constructive, at the time of the assault. The most that could be said is that he had possession sometime before the assault.

In summary, there is, in my view, no error on the part of the trial judge in law or in its application to the facts. After carefully reviewing the evidence, it cannot be said that the verdict was unreasonable or not supported by the evidence and accordingly, the appeal should be dismissed.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.