NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. R.H.L.***, 2008 NSCA 100

Date: 20081022
Docket: CAC 292284
Registry: Halifax

Between:

R.H.L.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: **Pursuant to s. 110(1) and 111(1) of the Youth Criminal Justice Act.**

Revised Decision: The original decision has been corrected according to the attached erratum dated November 28, 2008.

Judge(s): Cromwell, Saunders & Hamilton, JJ.A.

Appeal Heard: October 14, 2008, in Halifax, Nova Scotia

Held: Leave to appeal granted, but appeal dismissed per reasons for judgment of Saunders, J.A.; Cromwell and Hamilton, JJ.A. concurring

Counsel: Chandra Gosine, for the appellant
Peter P. Rosinski, for the respondent

Pursuant to s. 110(1) and 111(1) of the **Youth Criminal Justice Act**.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 110 (1) and s. 111(1) OF THE YOUTH CRIMINAL JUSTICE ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

[1] The appellant R.H.L. (a young person within the meaning of the **Youth Criminal Justice Act**) was charged, tried and convicted before Judge Pamela Williams in the Provincial Court of unlawfully assaulting a police officer engaged in the execution of his duty contrary to s. 270(1)(a) of the **Criminal Code**.

[2] His appeal to the Summary Conviction Appeal Court (SCAC) was dismissed, and his conviction and sentence were affirmed.

[3] Appeals from a decision of an SCAC may be taken to this court, with our leave, on any ground that involves a question of law alone, pursuant to s. 839(1) of the **Criminal Code of Canada**.

[4] For the reasons that follow I would grant leave, but dismiss the appeal.

Background

[5] At the appellant's trial witnesses were excluded. The Crown called three police officers and R.H.L. testified in his own defence.

[6] The events leading up to R.H.L.'s arrest on June 7, 2006 may be described summarily. At about 4:30 p.m. Constable Stanley of the Halifax Regional Police, while in uniform was driving a marked police vehicle on general patrol in Dartmouth. He responded to a call that a disturbance had taken place involving two males fighting in a parking lot at 271 Windmill Road. By the time the officer arrived the fight had ended and the crowd had dispersed. The person who had called the police pointed out R.H.L. to Constable Stanley as being one of the combatants. When approached by the officer, R.H.L. refused to identify himself or provide any information. Constable Stanley put R.H.L. in the back of the police vehicle. He described R.H.L. as "cursing, swearing . . . being very uncooperative."

[7] Two other police officers, Constables Moran and Rudderham, arrived at the scene in a police wagon. R.H.L. was transferred to that unit because in the words of Constable Stanley ". . . he was kicking my doors and I didn't want any damage . . . he was taken out of my vehicle and placed in the rear of the wagon."

[8] Constable Rudderham largely confirmed Constable Stanley's account. He said that when he arrived at the scene he saw R.H.L. "kicking at the back window and the back door, leaning across the back seat" and that "In order to save the police vehicle from receiving any damage, the gentleman . . . was placed in the rear of the vehicle . . . a patrol van."

[9] Constable Rudderham continued:

> In the back of the police van, he continued to kick, yell, thrash about. There was nothing there he could hurt . . . I advised him he was under arrest for creating a disturbance . . .

The officer informed the young person of his right to counsel.

[10] Constable Rudderham was asked:

> Q. Did he give a statement?
>
> A. All he wished to do was hurl obscenities at myself and every other person that was there.

[11] Constables Rudderham and Moran then transported R.H.L. to Halifax Regional Police Headquarters on Gottingen Street for booking. What happened next is picked up in the concise summary of the evidence provided by SCAC Justice Arthur J. LeBlanc whose decision is now reported as **HMQ v. R.H.L.**, 2007 NSSC 382.

> [2] . . . In an interview room at the police station he was instructed to take a seat in a particular location in the room. Rather than going directly to that seat, R.H.L. planted his feet and put his shoulder in Constable Rudderham's chest. R.H.L. was combative and unruly. The reason he had been arrested and placed in the police vehicle initially was that he was creating a disturbance and was being very belligerent, cursing, yelling and swearing.
>
> [3] Constable Moran and Constable Rudderham arrived in the police wagon and R.H.L. was placed in the wagon. Constable Rudderham, who was driving the police van, described R.H.L.'s conduct while in the van as kicking, yelling, and thrashing about. As he was placed in the back of the police wagon, he was told

that he was being arrested for creating a disturbance and breach of peace. At that point he continued to hurl obscenities at Constable Rudderham.

[4] At the police station he was taken to a booking area and from there to the interview room. The room itself is 7 feet by 9 feet, has one door, one light, and a bench 20 inches wide and 30 inches long. It has two benches, one against the wall and another one that is bolted to the floor on the other side of a table. Constable Rudderham described the room as follows: "When you enter, there would be a bench on the left against the wall." R.H.L. was advised of his right to counsel. He was informed that the handcuffs would be removed and he would be searched. At that point, R.H.L. mouthed obscenities to Constable Rudderham. He was directed again to have a seat so that his handcuffs would be removed, allowing him to call legal counsel.

[5] The seat in question would have been to Constable Rudderham's left and to R.H.L.'s right. Constable Rudderham was standing in the doorway and Constable Moran was behind him to his right when R.H.L. decided that he would go through Constable Rudderham, for whatever reason. "He put his shoulder down and came into me," said Constable Rudderham, and if he had gone through him, Constable Rudderham said that he would have "gone out the door." However, given the fact that Rudderham was larger than R.H.L., R.H.L. basically bounced off of him. He was again directed to have a seat against the wall on the bench and he was put on the seat. Due to his demeanour, legal counsel was not contacted for him at that time.

[6] R.H.L. was then advised that he was under arrest for assaulting a police officer and again given his right to counsel. He was taken back to the booking area and handcuffs were then removed.

[7] Constable Rudderham agreed that during the alleged incident R.H.L. was still in handcuffs, but denied that R.H.L. had any difficulty manoeuvring himself. Constable Rudderham denied that he and R.H.L. were jostling each other for a seat on the bench. He maintains that he was at the door to the room and that R.H.L. was directed to the room, and that if he had done as instructed his handcuffs would have been removed. He agreed that there were two benches, one on either side of the table.

[8] Constable Moran corroborated essentially all of the evidence of Constable Rudderham in that when his handcuffs were still on, R.H.L. failed to follow instructions, and that R.H.L. learned forward with his right shoulder and pushed into Constable Rudderham on his way over to the other side of the room. She said that R.H.L. used enough force that if it had been her at the door she would have

> been at least pushed backwards. She described Constable Rudderham as being quite large and therefore difficult to move away from the doorway.

[12] R.H.L. took the stand in his own defence. He testified that he was not being rude or belligerent. He said there were two benches and a table in the interview room. R.H.L. said it was he who decided to change from one side of the table to the other because that was the side of the room he preferred. He said he just got up to go to the other side. He denied lowering his shoulder, or planting his feet, or trying to strike Constable Rudderham with his shoulder in the middle of the officer's chest. He denied trying to get out the door. He maintained that he simply brushed shoulders with the officer as he passed by.

Decision of the Trial Judge

[13] In a brief oral decision delivered shortly after hearing the evidence and counsel's submissions, Williams, Prov. Ct. J. concluded that R.H.L.'s contact with the police officer was not accidental and constituted an intentional application of force. Accordingly Judge Williams found him guilty as charged for assaulting a peace officer engaged in the lawful execution of his duty.

Decision of the SCAC Judge

[14] On appeal to the SCAC the appellant advanced four principal arguments. First, he said the trial judge erred by failing to analyse or even consider the defence of accident. Second, R.H.L. complained that the trial judge failed to apply the principle of *de minimis non curat lex*. Third, counsel for the appellant made a vague reference suggesting the trial judge failed to provide sufficient reasons to explain her decision. Finally, the appellant alleged that the trial judge failed to apply **R. v. W.(D.)**, [1991] 1 S.C.R. 742.

[15] LeBlanc, J. rejected each of these submissions. He concluded that there was no air of reality to the appellant's assertion that a mere accident had occurred. For that reason the court was not obliged to consider the defence. The SCAC judge went on to find that the principle of *de minimis non curat lex* had no application to this case because the evidence did not support such a finding. Finally, Justice LeBlanc was evidently satisfied with the sufficiency of the trial judge's reasons

and that she had properly subjected the evidence to the required criminal standard of proof.

Analysis

Alleged Errors

[16] In his factum the appellant lists a myriad of complaints which appear to challenge the trial verdict for the following reasons:

(i) the verdict is unreasonable

(ii) the verdict cannot be supported by the evidence

(iii) the trial judge erred in her interpretation and application of **R. v. W.(D.)**

(iv) both the trial judge and the SCAC judge erred in law by placing a burden upon the appellant to establish the legal defence of accident

(v) the trial judge's reasons were inadequate

(vi) the trial judge erred in her interpretation and application of the law of accident

(vii) the trial judge erred in her interpretation and application of the principle of *de minimis non curat lex*

(viii) there was a miscarriage of justice, which the appellant particularizes as a failure by the trial judge to properly deal with the defence of accident and the defence of *de minimis non curat lex*, which was said to have "severely compromised the Appellant's ability to make full answer and defence."

Jurisdiction

[17] It important to emphasize how the present appeal comes to this court. Given the manner in which the appellant framed his grounds of appeal it would appear he mistakenly assumed the procedural route of appeal to this court was prescribed by s. 675 of the **Criminal Code of Canada**. Of course those provisions pertain to appeals to us from indictable offences.

[18] By contrast, R.H.L. was charged under an Information that he unlawfully assaulted Constable Rudderham, a peace officer engaged in the execution of his duty, contrary to s. 270(1)(a) of the **Criminal Code**. This is a hybrid offence by virtue of s. 270(2). Whether proceedings are taken after having elected summary conviction, or if unelected, pursuant to ss. 37(5) and 37(7) of the **Youth Criminal Justice Act**, it is Part XXVII of the **Criminal Code** (s. 822 appeals) that applies with respect to appeals taken from the Youth Court to the SCAC. Appeals from the SCAC to this court are similarly made pursuant to s. 839(1) and are limited to a "question of law alone."

Standard of Review

[19] As already explained the appellant applies for leave and, if granted, appeals the decision of the Summary Conviction Appeal Court under s. 839(1) of the **Criminal Code**. That section provides that such an appeal may be taken on any ground that involves a question of law alone.

[20] Not only are appeals under s. 839 restricted to questions of law "but the error of law required to ground jurisdiction in this court is that of the summary conviction appeal judge" per Oland, J.A. in **R. v. Travers (R.H.)** 2001 NSCA 71 at ¶ 21, also making reference to **R. v. Shrubsall**, [2000] N.S. J. No. 26 (NSCA) at ¶ 7. Accordingly, for this appeal to succeed an error in law must be identified in the decision of Justice LeBlanc, sitting as the SCAC.

[21] The standard of review that applied at the SCAC during its review of the trial judge's decision was explained by this court in **R. v. Nickerson**, [1999] N.S.J. No. 210 at ¶ 6:

> . . . Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R.

> 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript. (Underlining in original)

[22] The standard of review we are to apply on an appeal from a SCAC was described in **R. v. C.S.M.**, [2004] N.S.J. No. 173 (C.A.):

> [26] Under s. 839 (1), the issue is whether the SCAC has erred in "law alone". The Court of Appeal is considering an appeal from the SCAC, not a de novo appeal from the trial court. This Court must determine whether the SCAC erred in law in the statement or application of the principles governing the review by the SCAC of the trial verdict. **R. v. Travers (R.H.)** (2001), 193 N.S.R. (2d) 263; 602 A.P.R. 263; 2001 NSCA 71, at para. 21; **R. v. Cunningham (P.R.)** (1995), 143 N.S.R. (2d) 149; 411 A.P.R. 149 (C.A.), at paras. 12, 21; **R. v. G.W.**, [1996] O.J. No. 3075, (C.A.) at para. 20; **R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A).

See as well **R. v. Hayes**, [2008] N.S.J. No. 100 (C.A.) per Hamilton, J.A. at ¶ 21-22.

[23] To conclude on this point, unless R.H.L. can show that the SCAC judge committed an error on a question of law, the appeal will fail. I am not persuaded that Justice LeBlanc committed any such error, and for the reasons that follow I would direct that the appeal be dismissed.

[24] Having set out the basis of our jurisdiction in hearing this appeal, and having explained the standard by which this case will be reviewed, I turn now to the issues which require our consideration.

Issues

[25] The assortment of errors alleged by the appellant should, more appropriately, be recast as follows:

(i) Did the Summary Conviction Appeal Court judge err in upholding the verdict because the conviction was unreasonable or one not supported by the evidence?

(ii) Did the Summary Conviction Appeal Court judge err in failing to set aside the conviction because of the way in which the trial judge dealt with the defence of accident, and the principle of *de minimis non curat lex*?

(iii) Did the Summary Conviction Appeal Court judge err by failing to set aside the conviction because the trial judge's reasons were inadequate?

(iv) Did the Summary Conviction Appeal Court judge err by failing to set aside the conviction because the trial judge erred in her application of **R. v. W.(D.)**?

(v) Did the Summary Conviction Appeal Court judge err in failing to set aside the conviction because a miscarriage of justice arose due to the appellant's inability to make full answer and defence?

[26] I will now address each of those restated issues in that order.

(i) Did the Summary Conviction Appeal Court judge err in upholding the verdict because the conviction was unreasonable or one not supported by the evidence?

[27] Faced with the challenge that the verdict was unreasonable or could not be supported by the evidence, Justice LeBlanc was obliged to consider whether the trial judge, properly instructed and acting judicially, could reasonably have concluded that R.H.L. was guilty. **R. v. Corbett** (1973), 14 C.C.C. (2d) 385 (S.C.C.) and **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.). He was not entitled to interfere with findings of fact made or inferences drawn by the trial judge unless they were clearly wrong, unsupported by the evidence, or otherwise unreasonable. Any imputed error must be plainly identified and must be shown to have affected the result. **R. v. Clark**, [2005] 1 S.C.R. 6. The test to be applied in determining whether a verdict is unreasonable was described by Fichaud, J.A. in **R. v. Abourached** [2007] N.S.J. No. 470:

> [29] I will consider whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge. I will also consider the traditional **Yebes/Biniaris** test, preferred by Justice Charron in **Beaudry**, whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

and most recently applied by Hamilton, J.A. in **R. v. Robbins**, 2008 NSCA 93.

[28] The SCAC judge did not err by concluding that the verdict was reasonable. He referred to the material evidence presented by both the Crown and the defence and considered the manner in which the trial judge had addressed the essential issues triggered by the charge and the evidence. Justice LeBlanc conducted the required but necessarily modest re-examination and re-weighing of the evidence to be sure that it reasonably supported the trial judge's conclusions. LeBlanc, J. was obviously not persuaded that the trial judge's essential findings were demonstrably incompatible with the evidence. He was satisfied that the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. As I explain in my analysis under (ii) infra., based on the evidence of the police officers and the young person himself, it was certainly open to the judge to conclude, as she did, that the contact was deliberate and that the offence as charged had been proved beyond a reasonable doubt. There is nothing in the record which suggests any error on the part of Justice LeBlanc in reaching his conclusion that the verdict at trial was both reasonable and supported by the evidence. I would dismiss this ground of appeal.

(ii) Did the Summary Conviction Appeal Court judge err in failing to set aside the conviction because of the way in which the trial judge dealt with the defence of accident, and the principle of de minimis non curat lex?

[29] There is no merit to this submission. I turn first to the issue of "accident," that is, whether R.H.L. intentionally applied force to the officer.

[30] I would not interpret the trial judge's reasons as placing a burden of persuasion on the young person with respect to whether the application of force was accidental rather than intentional. Respectfully, my view is that when the trial

judge's reasons are read in the context of the record, she did not err in law in her approach to the burden of proof.

[31] The young person's evidence was that while under arrest and in handcuffs, he was directed by the officer to sit on a bench on one side of the interview room. Instead of doing what he had been directed to do by the officer, R.H.L. (according to his testimony) decided he wanted to sit on the bench on the other side of the room and that in the course of moving to do that, as opposed to doing what he had been directed to do, he "brushed shoulders" with the officer. He admitted to having contact with the officer and that he had "moved into" the officer. At no point did the young person say, or even suggest, that what he described as "brushing shoulders" with the officer was unintended or accidental.

[32] It was briefly suggested in argument at trial that the "brushing" could have been accidental. The trial judge considered this submission. As I read her reasons, she evaluated whether R.H.L.'s evidence could be understood as even suggesting this; clearly the police evidence could not. She pointed out, accurately, that the young person did not say in so many words that the contact was accidental and, in that context, said that she "was not persuaded" that it was accidental and that R.H.L. himself did not claim to have thought that it was. While the trial judge's choice of the word "persuaded" is regrettable, my view is that when read in the context of the record and her reasons for judgment as a whole, she did not by this expression indicate that there had been reversal of the burden of proof on the issue of intention but simply that the evidence was not consistent with accident and that R.H.L.'s own evidence made no plausible claim that the "brushing" was not intended.

[33] In short, the judge was of the view that R.H.L.'s own testimony could not plausibly be understood as having suggested that the admitted application of force was accidental. The use of the word "persuaded" in this context was simply a poor choice of words, not an error of law.

[34] I would conclude that the SCAC was correct in its fundamental conclusion on this point that the trial judge made no reversible error in her consideration of the burden of proof of the element of intention.

[35] As for the second aspect of the appellant's submission I see no error on the part of LeBlanc, J. in deciding that in light of the trial judge's conclusions and the evidence which supported her findings, the principle of *de minimis non curat lex* had no application in this case. While it is true that the principle was raised by counsel in their submissions to the trial judge (and therefore LeBlanc, J. was mistaken if he intended to suggest that the *de minimis* argument was only raised on appeal) this possible minor slip by the SCAC judge had no impact on the overall result. Given the trial judge's findings that R.H.L. had let his emotions get the better of him, that he was ". . . likely . . . combative and argumentative and surly" and ". . . quite upset . . ." at the police station, and that ". . . there is no issue . . . there was contact . . . the issue is the degree of contact" one can reasonably infer Judge Williams concluded that R.H.L.'s deliberate contact with the police officer came about as R.H.L. ignored the instructions of the arresting officer, and attempted to take a seat on the bench that R.H.L. preferred. In the context of these findings Judge Williams obviously felt that the principle of *de minimis* had no application. The SCAC judge instructed himself as to the law (assuming without deciding that the principle might still pertain to the current criminal law relating to assault in Canada) and made no error in concluding as he did that:

> [16] The trial judge's findings were that it was an intentional application of force. Although it may not have been, as she said, "push of the century" the application of force was sufficient to constitute the offence.
>
> [17] I also find that the principle of *de minimis non curat lex* is of no application here because the evidence does not support such a finding. . . .

(iii) Did the Summary Conviction Appeal Court judge err by failing to set aside the conviction because the trial judge's reasons were inadequate?

[36] I would reject this submission. A complaint that a decision-maker's reasons are inadequate does not give rise to a free-standing right of appeal. An inquiry into the sufficiency of a decision-maker's reasons should be directed at whether the reasons respond to the case's live issues. One embarks upon a functional inquiry by asking: is it possible to undertake an informed, principled and valid review for error? See, for example, **Lake v. Canada (Minister of Justice)**, [2008] S.C.J. No. 23, and **R. v. Dinardo**, [2008] S.C.J. No. 24. Here, the trial judge's brief oral decision rendered shortly after hearing the evidence and

counsels' submissions was sufficient to permit meaningful appellate review by Justice LeBlanc sitting as a SCAC judge. The verdict was "intelligible" because the trial judge's reasons provided a logical connection between the verdict and the basis for that verdict, having regard to the evidence, the submissions of counsel, and the history of the trial. **R. v. R.E.M.**, [2008] S.C.J. No. 52 at ¶ 35, per McLachlin, C.J. The trial judge's reasons were sufficient to respond to the substance of what was in issue in the case. **R. v. Walker**, [2008] S.C.J. No. 34, at ¶ 20, per Binnie, J.

[37] To conclude on this point, appellate review was in no way hampered by the way in which the trial judge expressed herself and explained the basis for convicting R.H.L. I would dismiss this ground of appeal.

(iv) Did the Summary Conviction Appeal Court judge err by failing to set aside the conviction because the trial judge erred in her application of R. v. W.(D.)?

[38] There is no merit to this submission. While the trial judge did not formally refer to **R. v. W.(D.)**, [1991] 1 S.C.R. 742, the case and its application had been mentioned by both counsel moments before. LeBlanc, J. averted to the correct legal principles before assuring himself that the trial judge had conducted the proper reasonable doubt analysis and assessed the evidence against the required criminal standard. I would therefore dismiss this ground of appeal.

(v) Did the Summary Conviction Appeal Court judge err in failing to set aside the conviction because a miscarriage of justice arose due to the appellant's inability to make full answer and defence?

[39] Here the appellant has essentially repeated his argument that the trial judge's "lack of direction" on the defence of accident and defence of *de minimis non curat lex* "severely compromised the appellant's ability to make full answer and defence," thus contributing to a miscarriage of justice.

[40] I need not repeat what I said earlier with respect to both the trial judge's and the SCAC judge's treatment of these two "defences." The appellant's complaint that he was somehow denied the opportunity to make full answer and defence, or that he is a victim of a miscarriage of justice, has no basis in reality.

[41] For all of these reasons I would grant leave to appeal, but dismiss the appeal.

Saunders, J. A.

Concurred in:

Cromwell, J. A.

Hamilton, J. A.

NOVA SCOTIA COURT OF APPEAL
Citation: ***R.v. R.H.L.***, 2008 NSCA 100

Date: 20081022
Docket: CAC 292284
Registry: Halifax

Between:

R.H.L.

Appellant

v.

Her Majesty the Queen

Respondent

Revised judgment: The original judgment has been corrected according to this erratum dated **November 28, 2008**

Restriction on publication: **Pursuant to s. 110(1) and 111(1) of the Youth Criminal Justice Act.**

Judge(s): Cromwell, Saunders & Hamilton, JJ.A.

Appeal Heard: October 14, 2008, in Halifax, Nova Scotia

Held: Leave to appeal granted, but appeal dismissed per reasons for judgment of Saunders, J.A.; Cromwell and Hamilton, JJ.A. concurring

Counsel: Chandra Gosine, for the appellant
Peter P. Rosinski, for the respondent

Erratum:

[1] In ¶ 11, the second sentence should read "**HMQ v. R.H.L.**, 2007 NSSC 382" and not "**HMQ v. R.H.L.**, 2008 NSSC 382."