NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Francis*, 2018 NSCA 7

Date: 20180117
Docket: CAC 463816
Registry: Halifax

Between:

Michelle Marie Francis

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Oland and Bryson, JJ.A.
Appeal Heard:	November 29, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Oland, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Roger A. Burrill and Christa Thompson, for the appellant Timothy O'Leary, for the respondent

Reasons for judgment:

[1] Michelle Francis stabbed Douglas Barrett in the back and was charged with assault causing bodily harm. Judge Alain Bégin of the Provincial Court rejected her argument that she had acted in self-defence, and found her guilty as charged. He sentenced her to 300 days plus one day, which were offset by her 300 days on remand and one day served by her presence in court for sentencing. The judge also sentenced her to 24 months' probation, and added DNA and firearms weapons prohibition orders.

[2] Ms. Francis appeals from conviction. For the reasons which follow, I would grant her appeal.

[3] At trial, the appellant represented herself, and there was an interpreter to translate from Mi'kmaw to English if she needed. The judge heard the evidence of three witnesses: Mr. Barrett, Cape Breton Regional Police officer Shane Olford, and Ms. Francis. The officer had responded to the call for assistance following the stabbing.

[4] Ms. Francis was a sex trade worker. Both she and Mr. Barrett testified that he picked her up on the night of September 18, 2015 on Charlotte Street in Sydney, Nova Scotia. This was not their first encounter. He testified that they'd known each other "quite a while" and she testified that, over five years, she wouldn't be able to count how many times she had traded sexual activities with him for money. According to both, she had previously stayed in his house several times.

[5] Ms. Francis' evidence was that Mr. Barrett was well-known to sex workers. She confirmed that she knew that he had mistreated and abused some sex workers, and had locked them in the basement and wouldn't let them leave. He had never locked the appellant in the basement or abused her. She testified that she was afraid, but that night she got in his truck anyway.

[6] It was undisputed that Ms. Francis was addicted to drugs and Mr. Barrett knew this. According to the appellant, that night she was ill with "cotton fever," felt "deathly sick," and was going through major drug withdrawal. She believed he had the money to help alleviate her sickness. Her evidence was that, at her request, Mr. Barrett drove her to Forrest Street, where he provided $10 of the $15 needed for a hydromorphone pill. Mr. Barrett denied that he had given her any money for this.

[7] Afterwards, the two went to his place on Terrace Street. According to Mr. Barrett, he took her there because the appellant didn't have any place to stay; he did it "out of kindness." According to Ms. Francis, he told her that he had clean injection gear at his house and offered her $10 if she injected there.

[8] The two agreed that at Mr. Barrett's place, the appellant injected the pill using clean gear that he supplied. She fell asleep on the couch. Thereafter, their evidence was starkly different.

[9] According to Mr. Barrett, he went upstairs to his room. He was asleep when Ms. Francis came upstairs and used the bathroom. When she came out, he asked her for a back rub, which she gave him. After that, while he was face down on his bed, the appellant stabbed him in the back with a knife.

[10] According to the appellant, she stabbed Mr. Barrett to protect herself. Her evidence was that he called her upstairs to his bedroom between 1 and 3 in the morning. She took a knife from the kitchen with her, which she hid under a chair in his bedroom, out of arm's reach. After she got into his bed, the appellant cocooned her body in a blanket.

[11] Her evidence was that she told Mr. Barrett then that she wanted to leave early in the morning. When he suggested driving her later, she testified that she told him she needed to leave before that because she was very heavily into drugs and would get really, really sick without a fix.

[12] The appellant testified that she fell asleep and was awakened by Mr. Barrett touching her breasts:

> **MS. FRANCIS:** …he doesn't pay me to touch me while I'm awake. He pays to touch me while I'm sleeping. That's the way his kind of, um, of sexual activities or exchanges are. It's always when you're sleeping. He wants to pay you to sleep so he can touch you while you're sleepin. And I pretend like I don't know he's touchin me, but this night I said no. This night…and I, I, I didn't feel comfortable because I was scared. I was terrified. I was already scared when I got into the truck and by sleepin next to him I was even more scared to the point that he had already given me money and I had already did the pill. It was already in my veins. So now that I'm gonna say no it's, it's not gonna end well. I, I, I didn't know how it was gonna end, or what was gonna happen, or how it was gonna start. So that's how it started. I said no. I said, ah…I pretended to wake up so he stopped touching me.
>
> [Emphasis added]

[13] According to the appellant, Mr. Barrett went to the bathroom around 8:30 in the morning. She reminded him that she needed to leave and wanted the money that he had promised her. He replied that they would wait until later. At that point, she brought the knife closer. She didn't leave because she needed his money for drugs.

[14] The appellant testified that when Mr. Barrett came out of the bathroom, he placed his body on top of hers:

> **MS. FRANCIS:** …He's like no, you know, just, you know, let's…give me a back rub, you know, massage me and he got on top of me, as he came back in from the bathroom, he got on top of me. And at that point I had pushed him with two of my hands and his, um, his right hand would have been able to peel the blanket from where I had concooned [*sic*] my body. He had peeled the blanket out from underneath me and I was kinda twisted inside the blankets a little bit, and I was, I was stuck. That's when I grabbed the knife and I had stabbed him, um, on the shoulder blade …
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> **THE COURT:** Just gonna back you up for one second. So you pushed him back, and what did you say happened next, you started…
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> **MS. FRANCIS:** Well we were…he was grabbing at the blanket. I said no. I said I, I wanted to leave. I told you I wanted to leave, just let me go. And he's like no we could just fool around for a bit. And that's when I had grabbed the knife and I had poked him in the back with it. He was on top of me. When he realized, very quickly, that what I had and what, what had happened, he started to, um, use his body weight on top of me and struggled to fight the knife from my finger grips, but I was so scared, I was terrified, I had no idea what was gonna happen. I didn't know if he was gonna…
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> **THE COURT:** Take your time.
>
> **MS. FRANCIS:** …take the knife and, and hurt me more or…I just wanted to use it to, to protect myself and, and, and shield my body, and then, ah…I was so scared…
>
> [Emphasis added]

She testified that Mr. Barrett calls any kind of sexual activity a "back rub" and that's what she understood when he used that term.

[15] The evidence of Ms. Francis and Mr. Barrett as to what happened after the stabbing was similar in the essentials. They fought for possession of the knife which he managed to get and to kick under the bed, after which he gave or threw her $25, which she took. They made it down to the main floor. He headed to the

basement, grabbed an axe, and came back up with it. Either she was looking around in the knife drawer when he went for the axe, or he confronted her with the axe before she reached for a knife. In any event, on her way out the front door, the appellant cut his telephone cord so she would have enough time to get away and get a pill and the fix she needed.

[16] An ambulance took Mr. Barrett to the hospital. There he remained for a week, and was treated for a collapsed lung. He also had cuts and marks on his face, ear, chest, and neck, which he thought were from the altercation with the appellant.

[17] After hearing the evidence, the trial judge gave an oral decision. He stated that the Crown has the onus of establishing beyond a reasonable doubt that Ms. Francis committed assault causing bodily harm. He also noted the essential elements of that offence, namely, the intentional application of force to the victim and bodily harm resulting from the force applied in the case before him.

[18] The judge then turned to the appellant's defence, namely, self-defence pursuant to s. 34 of the *Criminal Code*. He spoke of the requirements of that provision, and stated that the critical issue is often whether the acts of the accused were reasonable in the circumstances.

[19] The judge made no explicit findings as to credibility, nor did he resolve the inconsistencies between the testimony of Ms. Francis and Mr. Barrett. It appears that, based on her version of what had transpired, the judge found that the appellant's actions were not reasonable in the circumstances and, accordingly, entered a conviction. Later, I will examine his reasons more closely.

[20] Ms. Francis' appeal to this Court is pursuant to s. 675(1) of the *Criminal Code*, which allows an appeal against conviction on any ground that involves a question of law alone. She submits the judge erred in two ways: first, in his application of the law of self-defence to the facts as found and, second, in his application of the law of consent in the sexual assault context.

[21] As stated by this Court in *R. v. Levy*, 2016 NSCA 45, s. 34 replaced earlier provisions in the *Criminal Code* on self-defence. Beveridge, J.A. explained:

> [107] These sections were replaced with a new section 34. On its face, the defence is far simpler. One section applies to all forms of self-defence. If there is an air of reality to self-defence, no offence is committed unless the Crown disproves at least one of the following: 1) that the accused believed on reasonable

> grounds that force or a threat of force was being used or made against them or another person; 2) the accused's acts were done for the purpose of defending or protecting themselves or another; 3) the act was reasonable in the circumstances.
> . . .

and added:

> [112] For the purposes of this appeal, it is not necessary to offer concrete conclusions on all of the subtleties of the new s. 34. The Crown agrees that the new provisions did not discard the many fundamental principles of the law of self-defence. Importantly, an accused need not wait until he or she is actually assaulted before acting, and an accused is not by law required to retreat before acting in self-defence. The imminence of the threat, the existence of alternative means to respond, and the actions taken by the accused are factors that belong in the things that a trier of fact is required to consider to determine if the act committed by the accused was reasonable in all of the circumstances; and an accused is not expected to weigh with nicety the force used in response to the perceived use or threat of force.

[22] In his decision, the trial judge reviewed the three components of s. 34 summarized in *Levy*. However, he failed to relate the evidence to the first two of them. The Crown had to disprove the subjective elements in those components. Nowhere in his reasons is there any indication that the judge had any reasonable doubt that the Crown had failed to do so. Since he proceeded to examine the third component, I conclude that he accepted that the appellant believed on reasonable grounds that force or a threat of force was being made against her, and that her acts were done for the purpose of defending or protecting herself.

[23] I then turn to an examination of the judge's analysis of the third component, namely, the reasonableness of the act committed. Section 34(2) describes factors to be considered in determining whether the act claimed to have been in self-defence was reasonable in the circumstances:

> 34(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
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> (a) the nature of the force or threat;
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> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;

> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
>
> [Emphasis added]

[24] In his decision, the judge referred to this listing. The crux of his reasons reads:

> A lot of the evidence, and this is critical, a lot of the evidence I heard today refers to after the confrontation. After the stabbing. Really the first violent act was the stabbing. That was the first violent act. I'm not saying that someone going on top of someone is not a violent act, the, the threat of sexual assault. That can be the threat of a violent act, but at that point in time I don't think consent was an issue. It was afterwards that consent became an issue. Ms. Francis could easily have left when Mr. Barrett went to the bathroom. She didn't. I'll state clearly on the record, and anyone can quote me on this, Mr. Barrett is not a likable individual. I suspect he's a predator on women in the sex, sex trade and I suspect the allegations that Ms. Francis made with regards to abusive behaviour towards other sex workers is probably true. Alright. But that again, predators are also afforded protection under the law. They can't be attacked any more so than the prostitutes can. I, I, I, I doubt completely that Mr. Barrett is helping women with their addictions. I think he's preying on them for him to have that kit in his house is just, just tools to get people there to do what he wants to do. I completely reject the comments of Mr. Gouthro as to why would you get in the van if you're so afraid of him. I understand that at that point in time you got in the van, your addictions were stronger than your fears. You needed your fix. I accept that. I understand that. The difficulty I have is bringing the knife from the kitchen to upstairs when there was no threats made to you at that point in time, and clearly the history between you and Mr. Barrett there had never been any threats or violence towards you. That was anticipatory by you, i.e., just in case, you brought the knife. And your evidence, up to the point of the stabbing, it really had not been a whole lot had been going on. He started to get on top of you for the "back rub" but there was other options prior to then and at that point in time apart from stabbing him in the back with the knife, with such force that you punctured his

> lung. That to me is where I have the difficulties in this case, in terms of finding a reasonable doubt.
>
> You brought the knife knowingly upstairs when you could've left. You'd had your fix, you were functioning fine. He had gone to bed. He was upstairs had gone to bed and you went upstairs, you chose to go upstairs and at that point in time you weren't suffering the demands of your addiction as you had been when you were on the street and needed your fix really bad because of cotton fever.
>
> So I do find you guilty of the offense of assault causing bodily harm.
>
> [Emphasis added]

[25] I begin with the judge's identification of the stabbing as "the first violent act" and his remarks regarding consent. He did not consider Mr. Barrett's behaviour – getting on top of Ms. Francis and peeling away the blanket to get at her despite her resistance and saying "no" – to have been the first violent act committed. Rather, he characterized Mr. Barrett's actions as a possible threat of sexual assault or of a violent act, and then discounted even the possibility because "at that point in time I don't think consent was an issue."

[26] Mr. Barrett had denied ever placing the weight of his body on the appellant's, so his testimony never addressed consent. The only evidence regarding consent came from Ms. Francis, and her evidence was clear and unequivocal – she never consented to any of Mr. Barrett's sexual advances or the sexual activity he initiated when he got on top of her. Rather, she pushed him away, and she said "no." Nowhere in his decision did the judge reject her evidence in this or, indeed, in any other regard.

[27] The first violent act was not, as the trial judge isolated, the stabbing of Mr. Barrett, but rather his sexual assault of the appellant. She was entitled to defend herself against this assault, within the bounds of s. 34(1)(c) reasonableness.

[28] According to the Crown, the judge misspoke when he described the stabbing as "the first violent act." It concedes that Mr. Barrett's getting on top of the appellant was the first violent act. As to the judge's remarks regarding consent, the Crown describes these as "confusing," but stresses that this was an oral decision delivered by a busy Provincial Court judge.

[29] Appellate courts are not to intervene simply because a trial judge did a poor job of expressing himself and, among other things, are to consider the time constraints and press of business in the criminal courts: *R. v. Sheppard*, 2002 SCC 26 at ¶ 26 and 55. Trial judges are presumed to know the law. When a phrase in a

decision is open to two interpretations, the one consistent with the judge's presumed knowledge of the applicable law is to be preferred over one suggesting an erroneous application of the law: *R. v. Morrissey*, [1995] O.J. No. 639 (C.A.) at ¶ 27.

[30] The Crown acknowledges that consent is to be determined subjectively, and that it was clear the appellant did not consent to whatever sexual activity was entailed in the "back rub." However, it argues that the judge simply did a poor job of expressing himself, and there is an interpretation of his reasons which could be consistent with the law on consent: namely, if the judge was referring to Mr. Barrett's knowledge of the appellant's lack of consent only after he started to get on top of her.

[31] With respect, the Crown's arguments are strained and not persuasive. The judge's references to "the first violent act" and consent are more than just "confusing" or "poor expression." They demonstrate that the judge erred in his application of the law of consent in the sexual assault context. He stated that the appellant consented to everything up to the stabbing, "the first violent act," when the uncontradicted evidence before him established the contrary.

[32] The judge's errors played a meaningful role in his assessment of reasonableness pursuant to s. 34(2). He faulted the appellant for not leaving earlier and for bringing the knife to Mr. Barrett's bedroom. He did not take into account Mr. Barrett's intentional application of force to the appellant in circumstances of a sexual nature such as to violate her sexual integrity. This resulted in the judge not fully considering several of the relevant circumstances and factors in s. 34(2), including the nature of the force or threat, the extent to which the use of force was imminent and what other means were available to respond, and the nature and proportionality of the appellant's response.

[33] The standard of review for errors of law is correctness. The judge erred in law in his application of the law of self-defence and the law of consent. His errors had a critical effect on his assessment of reasonableness and, therefore, on the verdict. I would allow the appeal.

[34] Where an appeal is allowed pursuant to s. 686(1)(a) of the *Criminal Code*, s. 686(2) provides that a court of appeal shall quash the conviction and either enter an acquittal or order a new trial. If there is no evidence upon which a properly instructed trier of fact could have convicted, then generally an acquittal is entered.

If there is any such evidence, then it is usually more appropriate to order a new trial: *R. v. Roy*, 2012 SCC 26 at ¶ 53; *R. v. MacNeil*, 2009 NSCA 46 at ¶ 16 – 18.

[35] As indicated earlier, the evidence at trial was contradictory; what happened, and credibility were very much in issue. In these circumstances, I would order a new trial.

Disposition

[36] I would allow the appeal and order a new trial.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.