NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Mauger*, 2018 NSCA 41

Date: 20180517
Docket: CAC 468587
Registry: Halifax

Between:

James Russell Mauger

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Farrar, and Van den Eynden, JJ.A.
Appeal Heard:	March 14, 2018, in Halifax, Nova Scotia
Held:	Appeal on conviction allowed in part; leave granted on appeal from sentence and appeal allowed in part, per reasons for judgment of Beveridge, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Alan Stanwick, for the appellant Kenneth Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Mr. Mauger was a bright young man from Cape Breton. Unfortunately, when he moved out west, he fell in with the wrong crowd. Drug use led to federal time for drug-related offences in 2007.

[2] Mr. Mauger eventually moved back to Cape Breton. He met his partner. They had three children. He had full-time employment and, by all accounts, was a great father to his children. Although not entirely clear from the record, he apparently had some minor trouble with drug offences (possession) in 2014 for which he received probation.

[3] The real trouble came on November 13, 2016 when Mr. Mauger went to 110 Bruce Street in Glace Bay. According to him, it was a known drug house. He said he went to buy marijuana for a friend. After gaining entry, and more will be said about this later, he learned that Bobby Morrison was the tenant.

[4] Mr. Mauger had a beef with Mr. Morrison. Apparently Morrison had been referring to Mauger as a "rat". Mr. Mauger went upstairs and confronted him. A fight took place. There was considerable divergence about how it started. But all agreed, it ended with Mauger's flight down the stairs and outside.

[5] Mr. Morrison pursued. He picked up a butcher knife on his way. Once outside, he saw Mr. Mauger in the safety of his van. Morrison brandished the knife and challenged Mauger to fight. He declined.

[6] Mr. Morrison jettisoned the knife and repeated the challenge. Mr. Mauger declined again. Thereafter, the evidence about what happened is drastically different.

[7] Mr. Mauger said when he started to back up his van to leave, Mr. Morrison struck the windshield with a chair damaging the windshield to such an extent that he had to raise his arms to shield himself from the broken glass. The rear of Mauger's van then struck the house.

[8] Mr. Mauger claimed that because he needed to get some distance from the house, he turned the wheels toward the house and went forward. When he did so, he pinned Mr. Morrison against the house with the van's front quarter panel.

Mauger said this was an accident; he could not see where Morrison was. When he became aware of Mr. Morrison, he backed up and drove home.

[9] Mr. Morrison's evidence was vastly different. He admitted that he struck Mauger's windshield with a chair, but did so when the van was stationary. After the blow, he saw Mauger cut the wheels toward him. He tried to get out of the way, but the van accelerated and the front quarter panel of the van pinned him against the house.

[10] He beat on the van to alert Mr. Mauger. He said Mauger's response was to give the van more gas. Mr. Morrison said he could feel his pelvis crack under the pressure. When Mr. Mauger finally backed up, Morrison fell to the ground, seriously injured.

[11] The police investigated. They charged the appellant with: forcible entry into the real property of Robert Morrison; common assault on Robert Morrison; assault on Robert Morrison with a weapon (the van); and dangerous driving. There was also an ancillary charge of breach of probation, because if the offences were made out, the appellant had failed to keep the peace and be of good behavior.

[12] The appellant pled not guilty. He was represented at trial by Alan Stanwick, who is also his counsel on appeal. The trial judge was the Honourable Judge Alain Bégin of the Provincial Court. Shortly after counsels' summations, the trial judge delivered oral reasons.

[13] By way of an overview, the trial judge rejected the evidence of the appellant and accepted the evidence of Mr. Morrison and his girlfriend. The judge said, as a consequence, he found the appellant guilty. The Crown took the position that the rule against two convictions for the same wrong (usually referred to as the *Kineapple* principle) applied. Hence, the judge entered a judicial stay on the dangerous driving count.

[14] Sentencing was adjourned until September 11, 2017 to allow for the preparation of a Pre-Sentence Report. The parties filed briefs, followed by oral submissions. The Crown sought a total custodial sentence of between three and five years; the appellant, a sentence of one year.

[15] The trial judge imposed a sentence of: four-and-a-half-years' incarceration on the assault with a weapon offence (s. 267); one year concurrent on the forcible

entry charge (s. 72); four months' concurrent for the common assault (s. 266); and three months' concurrent on the breach of probation (s. 733.1).

[16] Initially, the appellant's Notice of Appeal advanced nine grounds of appeal against conviction and five against sentence. I will deal with the application for leave to appeal against sentence later.

CONVICTION APPEAL

[17] Mr. Stanwick argued in his factum that the trial judge failed to conduct a proper inquiry into the credibility and reliability of the complainant and of the appellant, and misapprehended evidence.

[18] No misapprehension of any of the evidence was identified. The sole complaint by the appellant was that the trial judge erred because he did not deal with a material inconsistency in the complainant's evidence. Absent that putative error, the complainant's credit would be marred with a corresponding enhancement of the appellant's version of events.

[19] There is no merit in Mr. Stanwick's complaint. The claimed inconsistency was between Mr. Morrison's trial evidence about smashing the appellant's windshield and what he had told the police in a recorded statement.

[20] However, the trial transcript shows that no inconsistency was established by Mr. Stanwick when he cross-examined Mr. Morrison. Morrison had described in his direct-examination that the appellant's van was stationary when he wielded a chair to smash the windshield.

[21] Mr. Stanwick used a transcript of Mr. Morrison's police statement to challenge aspects of Morrison's evidence on that issue. But Mr. Morrison denied the accuracy of the transcript. Defence counsel made no attempt to play the recorded statement or otherwise call evidence to establish the transcript's accuracy.

[22] After confirming that it was indeed Mr. Morrison's evidence that the van was stationary when he struck the windshield with a chair, the attempt to establish an inconsistency was as follows:

> Q. The, the van wasn't moving? Okay. Do you recall giving a statement to the police on November 16th, 2016, ah, Mr. Mauger…Mr. Morrison?
>
> A. Yes.

THE COURT: What date?

MR. STANWICK: November 16th, 2016. And, and that would've been about three days after the incident?

A. Ah, yeah.

Q. Okay. And I just want to, ah, read you a question and answer from that statement, okay, and it's, it's on the bot, bottom of page 8, it says, okay and then answer:

> And then I walked, I was walking towards him it was like you were gonna stab me then I was like I'm up now I'm gonna come out let's go and he was shaking his head no and then he started to back out so I picked up the chair and fuckin whiffed it at his windshield.

Do you recall saying that to the police?

A. No. I didn't throw the chair. The chair was in my hand and I smashed it through his windshield and…

Q. Okay.

[23] After Mr. Morrison explained that he was doped out of his head on painkillers when he was interviewed by the police, the cross-examination continued:

MR. STANWICK: So, you, you would agree, at least in this statement, you, you were saying it was when he was backing out of the…backing out that you picked up the chair and you used the word, fucking whiffed at his veh…windshield. You were…that's what the statement says, you, you recall saying that in the statement, do…

A. No, sir.

Q. Okay. But you, ah, you gave that answer didn't you, and that was three days after the, ah, the…

A. I don't think I've ever used the word whiffed in my life

Q. Okay. Okay. So are you, are you saying the police didn't transcribe your statement properly?

A. I'm saying that yes.

Q. You're saying that. Okay.

…

Q. You're saying in your evidence today that Mr. Mauger's van was just parked there and you smashed the windshield...

A. Yes.

Q. ...but then you said in your statement, ah, to the police three days after the incident the van was backing up when you, when you struck the, ah, the, ah, the windshield with the chair?

A. Yeah well there's a mistake there somewhere.

Q. There's a mistake there somewhere, okay.

A. Yes, sir. Because as I recall the only time he reversed was when he was reversing off of me...

[Emphasis added]

[24] Mr. Stanwick persisted with a further extract from Mr. Morrison's November 16, 2016 statement:

Q. Okay. And then I'd ask...then on page 10 of your statement, ah, there was this, ah, exchange between you and the police, um, it says:

> Okay so you were on, on grass were you on dirt.
>
> Answer: I was in between well there's a little piece of grass.
>
> Question: Uh hum.
>
> Answer: I was on the driveway, I was on the driveway itself, there's a little piece...patch of grass maybe about a foot wide between the fuckin driveway and the house itself.
>
> Okay, so how close do you think you were to the house.
>
> Maybe a foot away.
>
> Question: Okay.
>
> So...cause I was trying to get to his driver's side door.
>
> Question: Okay was his driver's side door open or closed.
>
> Answer: Closed.
>
> Okay, was his window upon [*sic*] or closed.
>
> Answer: It was closed.
>
> Okay, and what do you believe at that point he was trying to do.
>
> Answer: Trying to get away.
>
> Question: Okay.
>
> Answer: Uh hum.
>
> Question: Okay, so at that point he was backing the van out of the driveway?
>
> Answer: Yeah.

> A. **Okay, I would love the recorded testimony.**
>
> Q. **Oh you would love to hear the recorded**...
>
> A. **Yes, sir, I would. I would love to hear where I said he was tryin to get away when I was chasin after him because that was not the case**.
>
> Q. **Okay. So you're disagreeing with what was in the statement?**
>
> A. **I'm totally disagreeing with that yes**.
>
> Q. Okay. Do you have any reason why, why the police wouldn't have transcribed your words in the statement properly?
>
> A. I don't know. The only time that he was reversing to try to get away was when he had stopped kicking me and Katelyn came out and chased him and told him to fuck off out of the yard. Which is I suppose when he reversed and hit the house, which is why the siding got stuck behind his brake lights.
>
> [Emphasis added]

[25] While one might rightly be suspicious that the transcript was indeed an accurate reflection of what Mr. Morrison told the police, Morrison plainly denied that he had said those words and challenged defence counsel to play the recording. Unfortunately, counsel did not.

[26] If he had, it would have been plain that either Mr. Morrison had, in fact, related different details to the police or the transcript was not accurate. Like the trial judge, we simply do not know.

[27] The procedural rules with respect to cross-examination of witnesses on prior inconsistent statements in Federal proceedings is set out in ss. 10 and 11 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Defence counsel was well within his rights to cross-examine Mr. Morrison on what he had allegedly told the police in his November 16, 2016 statement. But, as demonstrated above, Morrison did not admit telling the police the details found in the transcript of that statement.

[28] Section 11 of the *CEA* directs the process:

> 11. Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

[29] As pointed out by Prof. Bryant (as he then was) in his seminal article, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984), 62 *Can Bar Rev* 43, s. 11 settles the question—defence counsel has the right to independently prove the prior inconsistent statement if the witness does not distinctly admit having made it (p. 61). Prof. Bryant then points out:

> However, unless the former statement is admitted or proven under the section [11], no contradiction exists.

[30] Before us, the Crown argues that the postulated inconsistency is not material because the trial judge accepted the evidence of Morrison's girlfriend, Kaitlynn Rosnok. Leaving aside whether the inconsistency was material, the record plainly demonstrates that no prior inconsistent statement was established before the trial judge.

[31] Therefore, I would not accede to the appellant's argument that the conviction on the offence of assault with a weapon was marred by legal error. However, the forcible entry conviction cannot be allowed to stand.

[32] There are two problems. The first stems from the failure of the trial judge to address the elements of the notably archaic and seldom charged offence of forcible entry. The second is the trial judge's reliance on what is known as the rule in *Browne v. Dunn* to convict the appellant of this offence. I will deal with each in turn. Some further details put these concerns into context.

[33] As noted above, the appellant claimed that he went to 110 Bruce Street to buy marijuana from one Stephen Costey, ostensibly for a friend. The appellant testified that he knocked on the door. At first, there was no response. Knowing it was a drug house and Mr. Costey a user, the appellant kicked the door "politely" to rouse him. He said Mr. Costey then let him in. There was no drug transaction because Mr. Costey had no marijuana left.

[34] Mr. Costey testified in direct-examination that he had been staying at Bobby Morrison's apartment at 110 Bruce Street for maybe two weeks. On November 13, 2016, he was there with his girlfriend, Haley Boutlier.

[35] Mr. Costey was high from using intravenous drugs that day. The others, as far as he knew, were not. Sometime during the night, he said he opened the door,

apparently for the appellant, and talked to him for a couple of minutes. However, he added he must have opened it, but he had no memory:

> Q. Okay, and, ah, during the night did, ah, did you wake up at all during the night?
>
> A. Yeah I'm, I'm...I don't know. I was that drugged up I honestly...
>
> Q. Okay, so were you, um, were you aware of anyone else in the apartment besides the four people that were there for the day, your friends?
>
> A. **Like I said I was that high I, I opened the door for him, I talked to him for a couple of minutes and then, you know what I mean, I...honestly I was that high, I had that much drugs in me I don't know what...**
>
> Q. You opened what door?
>
> A. The...that door right there, I'm pretty sure.
>
> Q. The one that was just opened?
>
> A. Yeah.
>
> Q. You opened the door...you say you opened it for somebody?
>
> A. Yeah, well I, I must, I must've, it's open, right. I was that high...
>
> Q. So why would you think...did you just say you can't remember anything?
>
> A. I'm tellin ya I can't remember that's...
>
> Q. That night?
>
> A. ...what I'm sayin.
>
> Q. Okay. So you don't know if you opened the door for someone, is that what you're saying?
>
> A. No but the door is opened so it...you know what I mean, that's what I'm guessing.
>
> [Emphasis added]

[36] In the guise of trying to refresh memory, the Crown was then permitted to, in essence, cross-examine Mr. Costey. The most Mr. Costey did was acknowledge the document being shown to him was his statement; he could not read it and had been high when he spoke with the police. Thereafter, he simply maintained that he could not recall anything that was put to him from that statement. The Crown declined the opportunity to prove his statement.

What is involved in s. 72?

[37] The English version of s. 72 appears to define the offence in a straight-forward manner. It provides:

> 72 (1) A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.
>
> (1.1) For the purposes of subsection (1), it is immaterial whether or not a person is entitled to enter the real property or whether or not that person has any intention of taking possession of the real property.

[38] In *R. v. J.D.* (2002), 167 O.A.C. 89 the Ontario Court of Appeal quashed the conviction for forcible entry and entered an acquittal. Justice Doherty examined the French and English versions of s. 72. He noted that:

> [11] There are two distinctions between the French and English versions which take on some importance in the interpretative exercise. Section 72(1) in the English version uses the word "enters" to describe the prohibited conduct, while the French version uses the phrase "prend possession". The word "enters" can refer to a purely physical act. However, the phrase "prend possession" suggests the taking of some form of control over the property.

[39] Justice Doherty turned to the common law and statutory history of the offence to find the purpose of the offence—the prevention of potentially violent confrontations over entitlement to land. Justice Doherty's analysis led him to conclude that to constitute the offence, the prohibited entry must interfere with the peaceable possession of the person in actual possession at the time of the entry:

> [18] Although the language of s. 89(1) did not track that used by Sir James Stephens in his Digest, the *Criminal Code* offence, like the common law crime, was clearly designed to preserve public peace by prohibiting potentially violent confrontations over entitlement to land between those claiming possession and those in actual possession. That purpose is apparent from the placement of s. 89 in Part II of the *Criminal Code* (Offences Against Public Order, Internal and External), the express indication that entitlement to entry was irrelevant to liability, and the requirement that the manner of entry precipitate a breach of the peace or a reasonable apprehension of a breach of the peace.
>
> [19] No doubt because the *Criminal Code* provision shares the same purpose as the common law offence, several appellate authorities have interpreted the *Criminal Code* provision as a codification of Stephen's definition of forcible entry despite the differences in the language used in Stephen's Digest and the *Criminal*

> *Code*: *R. v. Pike* (1898), 2 C.C.C. 314 at 316, 319 (Man. Q.B.); *R. v. Gordon* (1947), 88 C.C.C. 413 at 415 (B.C. C.A.); *R. v. Scribner*, [1968] 4 C.C.C. 126 at 128 (N.B. S.C. App. Div.). For example, in *R. v. Pike*, *supra*, Killam J. said at p. 316:
>
> > Our *Code*, defines forcible entry, as where a person "enters" on land in the actual and peaceable possession of another, etc. I think, in view of what I take, in the absence of authority to the contrary, to have been the previous law, that "entering" in the Code is not merely going upon land or trespassing upon it, but there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor the land, and that such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not an "entering" within the *Code* [emphasis added by Doherty J.].
>
> [20] The phrase "prend possession" in the French version of the current *Criminal Code* captures the definition of "enters" favoured in *R. v. Pike, supra,* and the other authorities. It is also consistent with the common law concept of forcible entry. In addition, the requirement in s. 72(1) that the real property be in the actual and peaceable possession of another at the time of the entry indicates that the prohibited entry must interfere with the peaceable possession of the person in actual possession at the time of the entry. The common meaning of the French and English versions of s. 72(1) speaks of more than a mere physical entry upon the property. **Read together, I think, the two versions require a taking of possession in the sense of some interference with the peaceable possession of the person in actual possession of the real property at the time of the entry**…
>
> [Emphasis added]

[40] Justice Doherty made one further important point—s. 72(1) does not address breaches of the peace that may be causally connected to the taking or interference with peaceable possession, but which is not linked to the forcible entry. In other words, some other action taken after the entry does not make out the offence. The breach or apprehended breach of the peace must flow from the manner of which possession of the real property is taken. He reasoned:

> [22] In addition to the requirement of a taking of possession as I have described it, s. 72(1) also requires that the taking of possession be done "in a manner" likely to cause a breach of the peace or a reasonable apprehension of a breach of the peace. The section does not address breaches of the peace which may have some causal connection to the taking of possession of the property, but are not associated with the manner in which possession was taken. The breach or the apprehended breach must flow from the manner in which possession of the real property is taken and not from subsequent events. As was said in *R. v. Campey*, *supra*, at 495:

> By these terms and from the context, I conceive a breach of the peace or apprehension thereof as a present incident existing or occurring at the time of entry, not something to result or to be apprehended in the future.
>
> [23] The direct link between the manner in which possession is taken and the breach or apprehended breach of the peace found in the language of s. 72(1) is consistent with the purpose underlying the offence, that being to prevent breaches of the peace which can arise from confrontations between those seeking to take possession of real property and those in actual and peaceable possession of that real property.

[41] With this legal background, we can now examine the trial judge's reasons.

Trial judge's reasons

[42] The trial judge rejected the appellant's version of events that although he had kicked the door, Mr. Costey let him in. The judge repeatedly emphasized that this version of events was never put to Mr. Costey in cross-examination. He said:

> Mr. Mauger tried to downplay the force used on the door even though he did acknowledge that he kicked the door. Mr. Mauger testified he was actually let in the house by Mr. Costey, as he claims was testified to by Mr. Costey. In fact, Mr. Costey testified he had no recollection of any of this occurring. Mr. Costey had no recollection of anything. He never testified as to any interaction with Mr. Mauger. **Further, the scenarios...and critically the scenario was never put to Mr. Costey on cross examination for confirmation or denial.**
>
> [Emphasis added]

[43] Later in his reasons, he repeated his concerns over the lack of cross-examination of Mr. Costey on this issue:

> Mr. Steven Costey testified, and he included he had no intention of cooperating with anyone at the trial. He refused to acknowledge his prior statement to the police. **I reject any claims by Mr. Mauger that he was let in the house by Mr. Costey. This version of events was never presented to Mr. Costey for acceptance or rejection while he was on the stand.**
>
> [Emphasis added]

[44] It is obvious that the trial judge discounted the appellant's testimony because of what is referred to as the rule in *Browne v. Dunn*. The rule tries to ensure that if defence counsel intend to lead evidence to contradict a Crown witness's version of events, he or she should put to that witness the points on which he intends to challenge.

[45] I need not explore the sound policy reasons for the rule, its intricacies, and the array of remedies that are open to a trial judge if counsel run afoul of it. It is sufficient if I just explain the rule to understand why it had no application in this case.

[46] It is called the rule in *Browne v. Dunn* after the House of Lords decision in that case ((1893), 6 R. 67). It is well accepted in Canada as a rule of general application. It was described by Major and Fish JJ. in *R. v. Lyttle*, 2004 SCC 5 as follows:

> [64] The trial judge also made reference to the case of *Browne v. Dunn* (1893), 6 R. 67 (H.L.), as support for the proposition that an evidentiary foundation is required for questions put in cross-examination. He was mistaken. The rule in *Browne v. Dunn* requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 70-71:
>
> > **Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.** Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.
>
> [65] The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. See *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at pp. 781-82; J. Sopinka, S. N. Lederman and A. W.

> Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 954-57. In any event, the foregoing rule in *Browne v. Dunn* remains a sound principle of general application, though irrelevant to the issue before the trial judge in this case.
>
> [Emphasis added]

[47] If the Crown feels the rule has been violated, it has an obligation to make a timely objection (see: *R. v. Dexter*, 2013 ONCA 744; *R. v. Quansah*, 2015 ONCA 237 at para. 124). Once a violation is made out, the trial judge has considerable discretion about the selection and scope of remedy (see: *R. v. Miller*, 2009 NSCA 71 at para. 68). But no deference is owed to a trial judge on whether the rule is engaged; on that they must be correct (see: *R. v. Drydgen*, 2013 BCCA 253 at para. 22).

[48] At trial, the Crown never suggested to the trial judge that defence counsel had violated the rule in *Browne v. Dunn*. On appeal, Mr. Fiske, with his usual candour, admits that the rule in *Browne v. Dunn* was not engaged, and the trial judge was wrong to have relied on it.

[49] The concession is appropriate. Mr. Costey initially testified that he had, in fact, let the appellant into the apartment and spoke with him. He then seemed to resile from this evidence, professing to have little memory of the events due to drug consumption. Contrary to the trial judge's view, Mr. Costey freely acknowledged his statement—just that his memory was not refreshed by it.

[50] There would have been no point in putting to Mr. Costey the expected evidence from the appellant. First, Mr. Costey had testified that he let the appellant into the apartment and spoke with him for some minutes. Second, during the balance of Mr. Costey's direct-examination, he repeatedly asserted he had no memory of the events. Indeed, during the appellant's direct-examination, the trial judge acknowledged the sad state of Mr. Costey's memory.

[51] With respect to the intricacies of s. 72 explained in *R. v. J.D.*, *supra*, the trial judge's complete reasons were that the appellant had no legal right or authority to be in the house:

> With regards to the Germaine D [*sic*] case provided by defense counsel, and the issue of forcible entry, while Mr. Mauger may have been in the house prior, my understanding of his evidence was that this had occurred one year prior. Mr. Mauger had no authority to be in the house on the night in question.

[52] Legal right or authority to be in the house were irrelevant to the elements of s. 72.

[53] The Crown says any error by the trial judge could be cured by invocation of the *proviso* in s. 686(1)(b)(iii) of the *Criminal Code* on the basis that conviction was inevitable. With respect, I am unable to agree. Perhaps there was some evidence upon which a judge might convict, but, in the circumstances, the evidence was by no means overwhelming.

[54] The owner of the apartment, Mr. Morrison, never testified that the door had been damaged by the appellant. Mr. Costey's girlfriend, who was present throughout and not under the influence of drugs, was not called by the Crown on the issue of how the appellant entered the apartment. Mr. Costey initially said he opened the door for the appellant, and the trial judge improperly discounted the appellant's evidence on this issue. Further, even if the kicks caused the door to open, there was no direct evidence that the appellant interfered in the peaceable possession of anyone in actual possession of the property at the time of the forced entry. Whether an inference should be drawn is for a trial court.

[55] I would quash this conviction and order a new trial.

APPEAL FROM SENTENCE

[56] Imposing sentence is an inherently individualized exercise. The type and length of sentence hinge on the circumstances of the offence and offender. A trial judge is called on to consider those circumstances and to exercise his or her discretion against a backdrop of numerous, oft competing, principles of sentence.

[57] Absent an error in principle that impacted the type or length of sentence, an appeal court must defer to the trial judge's discretionary decision unless the sentence is demonstrably unfit (see *R. v. Lacasse*, 2015 SCC 64; *R. v. B.M.S.*, 2016 NSCA 35; *R. v. Landry*, 2016 NSCA 53; *R. v. Agin*, 2018 BCCA 133).

[58] I am not convinced by the appellant's submissions that the 4.5 year sentence is demonstrably unfit. However, I accept that the trial judge committed errors in principle that impacted the length of the sentence he imposed.

[59] With respect, the trial judge made a number of comments in the course of passing sentence that are troublesome and arguably reflect legal error. I will only

refer to two that demonstrate clear legal error: use of the appellant's criminal record and lack of remorse as aggravating factors.

[60] The appellant had some minor brushes with the law shortly after high school graduation. His real difficulties started after he moved to Alberta. Cocaine use led to a number of offences. Prior to the subject offences, his record was:

2007-03-22 Red Deer	(1)	Possession of a Schedule 1 Substance for the Purpose of Trafficking Sec 5(2) CDSA	(1)	2 Yrs & Mandatory Prohibition Order Sec 109
	(2)	Possession of Schedule 1 Substance Sec 4(1) CDSA	(2)	4 Mos Consec
	(3)	Obstruct Peace Officer Sec 129(a) CC	(3)	2 Mos Consec
	(4)	Obstruct Peace Officer Sec 129(a) CC	(4)	1 Mo
	(5)	Fail to Attend Court Sec 145(2)(a) CC	(5)	30 Days
	(6)	Dangerous Operation of Motor Vehicle Sec 249(1)	(6)	4 Mos Consec
	(7)	Personation with Intent Sec 403(a) CC	(7-8)	3 Mos on Each Chg Consec and Consec
	(8)	Poss of Property Obtained By Crime Over $5000 Sec 355(a) – 354(1)(a) CC		
	(9)	Flight While Pursued By Peace Officer Sec 249.1(1) CC	(9)	8 Mos Consec & Proh Dri 5 yrs
	(10)	Escape Lawful Custody Sec 145(1)(a) CC	(10-11)	1 Mo on Each Chg Consec
	(11)	Obstruct Peace Officer Section 129(a) CC		
	(12)	Poss of Property Obtained by Crime Over $5000 Sec 355(a) CC	(12)	2 Mos Consec

2013-02-20 Edmonton, AB	(1)	Obstruct Peace Officer Sec 129(a) CC	(1)	30 Days & Probation 3 Mos
	(2)	Fail to Comply with Recognizance Sec 145(3) CC	(2)	15 Days & Probation 3 Mos
2013-04-11 Edmonton, AB	(1)	Identity Fraud Sec 403(1)(a) CC	(1)	30 Days & Probation 9 Mos
	(2)	Identity Fraud Sec 403(1)(a) CC	(2)	30 Days Consec & Probation 9 Mos
	(3)	Identity Fraud Sec 403(1)(a) CC	(3)	30 Days Consec & Probation 9 Mos

[61] Counsel for the appellant properly pointed out to the trial judge that the subject offence was out of character for the appellant—and he had no prior offences for violence. The Crown did not suggest otherwise. The Pre-Sentence Report said the same thing. The appellant directly addressed the judge. He apologized for his actions and the damage caused to the victim. He had problems in the past, but nothing involving violence. This was unchallenged.

[62] Yet, the trial judge said he did not believe that the offence was out of character and twice stressed the appellant's criminal record was an aggravating factor in determining sentence. He said this:

> Further aggravating factors are the fact that Mr. Mauger was on probation at the time of these offenses. **As well, Mr. Mauger has a criminal record, and in fact, has been previously sentenced to federal time for drug related charges**. Now knowing this like, likely explains why Mr. Mauger had no problems going to a known drug house in the middle of the night. Perhaps Mr. Mauger was going for his own benefit versus doing an alleged favour for a friend.
>
> **It is also aggravating that Mr. Mauger has a prior conviction for dangerous operation of a motor vehicle in 2007.**
>
> [Emphasis added]

[63] The fact the appellant had a criminal record for drug related charges that had netted him federal time was not an aggravating factor—nor, in these circumstances, was the conviction for dangerous driving. The Crown did not suggest that the appellant had ever before been involved in a violent offence. The only information available was that the dangerous driving charge was part of a

package of offences including flight in a motor vehicle while being pursued by the police (s. 249.1).

[64] That is not to say an offender's prior record is not relevant, nor that its existence and extent may lead a court to impose a harsher type or longer sentence than it might otherwise. A prior record can speak to the need for greater emphasis on specific deterrence or diminish the importance of rehabilitation, but, on its own, it is not an aggravating factor leading to a sentence that is untethered to the purposes and principles of sentence.

[65] Justice Charron, albeit in *obiter*, cautioned in *R. v. Angelillo*, 2006 SCC 55, against a sentence that punishes an offender for a previous offence:

> [24] There are many provisions of the *Criminal Code* under which evidence that is, by nature, capable of showing that the offender has committed another offence can be admitted at the sentencing hearing. First, evidence of any prior convictions may be adduced. The admissibility of such extrinsic evidence does not generally pose any problems. For example, s. 721(3)(b) provides that, unless otherwise specified by the court, any pre-sentence report must contain the history of prior convictions. **There is no doubt that the court may take prior convictions into account in determining the appropriate sentence. In taking them into account, however, the court must not punish the offender again. The fundamental principle of proportionality requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender; a prior conviction cannot, therefore, justify a disproportionate sentence.** This principle, which is set out in s. 718.1 *Cr. C.*, assures repeat offenders the right not to be "punished ... again", as guaranteed in s. 11(h) of the *Charter*. The sentence imposed on a repeat offender may well be more severe, but this is not contrary to the offender's right not to be punished again. From the standpoint of proportionality, the sentence imposed in such a case is merely a reflection of the individualized sentencing process.
>
> [Emphasis added]

[66] Chartier J.A., as he then was, in *R. v. Wright*, 2010 MBCA 80 set out a helpful guide in the ways that a criminal record can be relevant:

> [7] It is trite to say that first, any information that is relevant to the determination of a sentence is to be taken into account by the sentencing judge (see s. 726.1 of the *Code*) and second, that an accused's prior criminal record is always a relevant factor at a sentencing hearing (see *R. v. Dobis* (2002), 163 C.C.C. (3d) 259 at para. 28 (Ont. C.A.)). Without intending the following to be exhaustive, the prior criminal record will assist in the sentencing judge's consideration as to:

1) leniency: whether an accused is entitled or disentitled to any leniency (see *R. v. Young*, [1979] M.J. No. 150 at para. 2 (C.A.) (QL));

2) discharge: whether an accused is entitled or disentitled to some form of discharge (see *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 at 455 (B.C.C.A.), and *R. v. Elsharawy* (1997), 119 C.C.C. (3d) 565 at para. 3 (Nfld. C.A.));

3) specific deterrence: whether an accused deserves a sentence on the higher end of the range to deter him/her from repeated criminal conduct (see *R. v. E.S.M.* (1997), 123 Man.R. (2d) 142 at para. 3 (C.A.), and s. 718(b) of the *Code*);

4) separation of offenders/public safety: whether an accused, because of repeated criminal conduct, should be separated from society (see *E.S.M.*, at para. 3, and s. 718(c) of the *Code*);

5) gap principle/rehabilitation: whether to accept that someone made an honest effort to avoid conflict with the law, showing there may be hope for rehabilitation (see s. 718(d) of the *Code*); and

6) jump principle: whether the sentence will respect the jump principle that "sentences for a repeat offender should increase gradually, rather than be large leaps" (see *R. v. E.O.* (2003), 169 O.A.C. 110 at para. 15).

[67] A criminal record that is not dated and reveals a pattern of conduct for similar offences may well result in a stiffer sentence and hence is "aggravating" because it can impact the court's analysis of the purpose and principles of sentence to arrive at a fit sentence (*R. v. Wright*, *supra*; *R. v. Taylor* (2004), 189 O.A.C. 388).

[68] In this case, the trial judge focussed on an unrelated ten-year-old record as aggravating. Such an emphasis was unjustified and contrary to well-established norms (see: *R. v. Melanson* (1976), 18 N.S.R. (2d) 189 (C.A.); *R. v. Evans* (1975), 11 N.S.R. (2d) 91 (C.A.)).

[69] With respect to remorse, the trial judge raised the issue with defence counsel. The judge said the issue was very important to the Court and to society:

> THE COURT: Before you sit down, when I read the presentence report, I don't see a whole lot of remorse coming out of your client...
>
> MR. STANWICK: Well...
>
> THE COURT: ...there's par...accepting partial responsibility. You may want to address that cause [*sic*] obviously very important to the court and to society.

[70] Defence counsel explained the appellant had pled not guilty and had advanced a defence that the contact with the victim had been accidental. What more could an offender do in those circumstances? Admit full responsibility for the offence, in essence acknowledging that he had committed perjury at trial where he had testified that it was an accident?

[71] The appellant addressed the Court directly. He specifically apologized to the victim for his actions. Nevertheless, the trial judge, in his reasons, circled back to the issue of remorse:

> Contrary to the comments in the presentence report, I do not believe that these actions were out of character for Mr. Mauger. As noted, Mr. Mauger takes little responsibility for what he did to Mr. Morrison.

[72] Mr. Fiske, again with his usual candour and fairness, acknowledged that the trial judge did appear to view the absence of remorse as an aggravating factor, and this reflects an error in principle.

[73] I am not convinced by the Crown's sequential submission that it did not impact sentence. The trial judge said that the apparent lack of remorse was important to the Court. It is well accepted that a genuine expression of remorse can mitigate sentence, but, except in limited circumstances, its absence does not act to increase sentence (see: *R. v. Hawkins*, 2011 NSCA 7 at paras. 32-35).

[74] What then is an appropriate sentence? At trial, the Crown advocated that the appropriate range for this offence was three to five years' incarceration. The injuries to the victim were serious, and the appellant's moral blameworthiness is high. Despite the positive Pre-Sentence Report, a significant period of incarceration is mandated. I would impose a sentence of three years' incarceration.

SUMMARY AND CONCLUSION

[75] There is no merit to the appellant's complaint that conviction for assault with a weapon was flawed because the trial judge failed to deal with a material inconsistency. The Crown witness insisted that the transcript of his recorded statement was wrong. Counsel failed to follow the procedure set out in s. 11 of the *CEA* to establish the claimed inconsistency.

[76] However, the trial judge erred in law when he relied on the rule in *Browne v. Dunn* to make credibility findings, adverse to the appellant, relevant to the offence

of forcible entry, contrary to s. 72 of the *Criminal Code*. That rule was simply not engaged. Further, his reasons do not reflect any appreciation of the elements of that offence. In these circumstances, the conviction is tainted by legal error and should be quashed.

[77] Although there was some evidence that could arguably support a conviction, the evidence was not so strong as to make a conviction inevitable. Hence, I would decline to invoke the *proviso* found in s. 686(1)(b)(iii) of the *Criminal Code*.

[78] The trial judge's sentence comments are troublesome. At least two reflect clear error in principle: reliance on a dated and unrelated criminal record as aggravating, and the judge's view that the appellant had not exhibited remorse for his conduct. Both errors impacted the length of incarceration imposed.

[79] I would dismiss the appeal from the s. 267(a) conviction, but quash the s. 72 conviction and order a new trial, should the Crown wish to pursue one. I would grant leave to appeal from sentence, and allow the appeal by substituting a sentence of three years' incarceration for the offence of assault with a weapon (s. 267).

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.