

**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

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**Judge:** The Honourable Justice Duncan R. Beveridge

**Appeal Heard:** March 14, 2018, in Halifax, Nova Scotia

**Subject:** Criminal law: the elements of forcible entry; cross-examination on a prior inconsistent statement; the rule in *Browne v. Dunn*; reliance on an unrelated prior criminal record and absence of remorse as aggravating

**Summary:** The trial judge convicted the appellant of assault, assault with a weapon, forcible entry and breach of probation. The appellant cross-examined the main Crown witness on a transcript of a prior recorded statement. The witness insisted the transcript was wrong. Counsel did not take any steps to establish the putative inconsistency by playing the recording or otherwise establishing the accuracy of the transcript. The trial judge did not refer to the claimed inconsistency. The judge relied on the rule in *Browne v. Dunn* to make credibility findings adverse to the appellant with respect to the offence of forcible entry, and the judge's reasons did not reflect any appreciation of the elements of that offence. The trial judge sentenced the appellant to 4.5 years' incarceration for the offence of assault with a weapon despite the absence of a

prior record for offences of violence.

**Issues:**

(1) Did the trial judge err by not addressing the prior inconsistent statement?

(2) Was the conviction for forcible entry tainted by the trial judge's reliance on the rule in *Browne v. Dunn* and his failure to address the elements of the offence?

(3) Was the sentence for assault with a weapon manifestly excessive or otherwise tainted by legal error?

**Result:**

Counsel for the appellant failed to follow the procedure set out in the *Canada Evidence Act* to establish that the witness had said something inconsistent with his trial testimony. The trial judge's omission to discuss the inconsistency did not reflect error. However, the trial judge was wrong to rely on the rule in *Browne v. Dunn* to discount the appellant's evidence relevant to the forced entry offence. The judge also failed to address the nuanced elements of the offence of forcible entry. The appeal from conviction of the offence of assault with a weapon was dismissed, but the conviction for forcible entry was quashed.

The trial judge viewed appellant's lack of remorse and unrelated criminal record as aggravating. It was an error in principle to do so and it impacted the sentence imposed. Leave to appeal against sentence was granted, the appeal allowed and an sentence of three years' substituted.

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.***