NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Travers*, 2019 NSCA 83

Date: 20191107
Docket: CAC 473448
Registry: Halifax

Between:

Robert Henry Travers

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	October 1, 2019, in Halifax, Nova Scotia
Subject:	Criminal; Criminal-verdict; Evidence-fresh; Motion-to adduce fresh evidence; Sentencing; Sentencing-victim fine surcharge; Standard of review
Legislation:	*Criminal Code*, R.S.C. 1985, c. C-46, s. 726; 737.
Cases Considered:	*Housen v. Nikolaisen*, 2002 SCC 33; *R. v. Braich*, 2002 SCC 27; *R. v. Clark*, 2005 SCC 2; *R. v. S.T.P.*, 2009 NSCA 86; *R. v. Miller*, 2009 NSCA 129; *R. v. Mauger*, 2018 NSCA 41; *R. v. Lacasse*, 2015 SCC 64; *R. v. Senek* (1998), 130 C.C.C. (3d) 473 (Man. C.A.); *R. v. Murphy*, 2019 SKCA 8; *R. v. Boudreault*, 2018 SCC 58; *R. v. Finck*, 2019 NSCA 60; *R. v. Snow*, 2019 NSCA 76; *Palmer v. The Queen*, [1980] 1 S.C.R. 759
Summary:	The appellant sought to have his conviction overturned on the basis the verdict was unreasonable due to errors in findings of fact and the legal analysis conducted by the trial judge.

The appellant also challenged the fitness of his sentence, including the imposition of a victim fine surcharge on an impecunious offender.

Finally, the appellant brought a motion to adduce fresh evidence, asserting the ineffective assistance of counsel and the availability of previously unheard evidence.

Issues: (1) Was the trial verdict unsupportable due to an error in fact or law?

(2) Was the sentence imposed demonstrably unfit?

(3) Should fresh evidence be admitted?

Result: The trial judge's decision did not reveal any errors in fact or in law. The conviction appeal is dismissed.

Leave to appeal sentence is granted. The sentence is varied to quash the victim fine surcharge imposed, in light of the reasons in *R. v. Boudreault*, 2018 SCC 58, decided after sentencing of the appellant.

The motion to adduce fresh evidence is dismissed.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Travers*, 2019 NSCA 83

Date: 20191107
Docket: CAC 473448
Registry: Halifax

Between:

Robert Henry Travers

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Wood, C.J.N.S.; Beveridge and Beaton, JJ.A.
Appeal Heard:	October 1, 2019, in Halifax, Nova Scotia
Held:	Conviction appeal and motion to adduce fresh evidence dismissed. Leave to appeal sentence granted and the appeal allowed in part to quash the victim fine surcharge per reasons for judgment of Beaton, J.A.; Wood, C.J.N.S. and Beveridge, J.A. concurring
Counsel:	Robert Travers, appellant in person Glenn Hubbard, for the respondent

Reasons for judgment:

[1] The appellant was convicted of aggravated assault contrary to s. 268 of the *Criminal Code* at trial in the Supreme Court of Nova Scotia before Justice Timothy Gabriel. He was subsequently sentenced to 6.5 years in custody and a victim fine surcharge of $200.00 was imposed. Mr. Travers appeals from conviction and seeks leave to appeal sentence, and has made a motion to introduce fresh evidence. For the reasons set out below, I would dismiss the conviction appeal and the motion to adduce fresh evidence, but would grant leave to appeal sentence and vary the sentence.

[2] By way of background, the circumstances surrounding the aggravated assault charge unfolded when the appellant, in a state of inebriation, encountered his frail elderly neighbour, the victim, on the sidewalk outside their respective homes. The victim held a set of keys in his hand and motioned to the appellant to go home. As the victim turned to leave, the appellant punched him in the side of the head and the victim fell to the ground, following which the appellant struck him two more times on the side of the face. The victim suffered permanent vision loss as a result of the assault. At trial, the court rejected the appellant's claim that he had acted in self-defence.

[3] The questions raised in this appeal, as distilled from the grounds listed in the Notice of Appeal, can be summarized as follows:

i. Was the trial verdict unsupportable due to an error (a) in fact or (b) in law?

ii. Was the sentence imposed demonstrably unfit?

iii. Should fresh evidence be admitted to support an allegation of ineffective assistance of trial counsel?

Issue No. 1 – The Verdict

[4] The appellant asserted throughout a voluminous factum that the verdict was incorrect and therefore unreasonable. The appellant did not point to any discrete errors of law or fact ostensibly made by the trial judge. Rather, the appellant's argument centered on the significance of certain evidence which, as is apparent from the record, was never presented to the trial judge. The trial judge was positioned to assess only the case put before him.

[5] The respondent contended that the trial judge's reasons clearly reflect that all of the evidence at trial was thoroughly weighed and assessed, including that of the appellant, who chose to testify. The respondent maintained the trial judge directed himself as to the proper legal tests in play and came to a verdict which is now entitled to this Court's deference.

(a) Errors of Fact

[6] The findings of fact made by the trial judge are entitled to deference on appeal. The standard of review for findings of fact and for inferences of fact is whether the trial judge committed a palpable and overriding error that can be plainly seen from a review of the record: *Housen v. Nikolaisen*, 2002 SCC 33. That test guides this Court's review of the case at trial.

[7] The most that can be discerned from the appellant's argument is that the trial court decision was flawed because certain individuals, and in particular one Mr. Hill, were not produced as witnesses. Those individuals, asserts the appellant, would have "light to shed" on the case; in particular, that Mr. Hill had contacted 911 after the appellant came into physical contact with the victim of the assault. Regardless of whether any person, including Mr. Hill, could have been or could now be produced as a witness, they were not at the time of trial. That any of them were not does not constitute an error.

[8] The reasons of the trial judge clearly indicate the evidence upon which the determination was made that the Crown had proven its case beyond a reasonable doubt. It is not the function of this Court to speculate about what someone not called as a witness might have said, much less how that might have been relevant to an analysis of the evidence and application of legal principles that the record shows was thoroughly and properly conducted by the trial judge.

[9] The appellant invited this Court to "investigate" the whereabouts of and "to subpoena" Mr. Hill for further inquiry. With respect, this Court has no jurisdiction to investigate any case, nor to re-try it.

[10] The appellant expressed concern about inconsistencies in the evidence of certain trial witnesses, both internally in their respective evidence and as among one another. Credibility of the witnesses was a central issue at trial, and was discussed by the trial judge in his reasons. The trial judge was in the best position to make assessments of credibility and those were explained in his decision. Non-existent or inadequate reasons regarding the matter of credibility may justify

intervention on appeal: *R. v. Braich*, 2002 SCC 27. Neither of those difficulties are present in this case. A review of the record simply does not support the assertions advanced by the appellant on the matter of credibility of witnesses, nor does it reveal the inconsistencies he suggested.

[11] The record does not reveal any error or misapprehension by the trial judge in relation to any of his findings of fact or inferences as drawn from the evidence put before him. As discussed in *R. v. Clark*, 2005 SCC 2:

> [9] … Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

[12] I am satisfied the trial judge's findings and conclusions were supported by the evidence, and there is no basis upon which to interfere with them.

(b) Errors of Law

[13] The standard of review for questions of law is correctness. The trial judge was required to be correct in applying legal principles in play to the facts as he found them: *R. v. S.T.P.*, 2009 NSCA 86.

[14] The record demonstrates the trial judge properly directed himself on the applicable legal tests and assessed the evidence in light of and according to those tests. The trial judge discussed and analyzed the evidence in detail. It is clear from the transcript of the trial and the reasons given that the trial judge was alive to and properly considered the relevant and applicable legal principles. The trial judge's reasons provide the path to his analysis and are compatible with the evidence. There is no basis to now interfere with the trial process followed or the decision reached.

Issue No. 2 – Fitness of Sentence

[15] It is well-settled law that an appellate court cannot interfere with the sentence imposed unless it can be shown to have been demonstrably unfit: *R. v. Miller*, 2009 NSCA 129; *R. v. Mauger*, 2018 NSCA 41; *R. v. Lacasse*, 2015 SCC 64. Here, the record reveals no concerns about the overall fitness of the sentence imposed by the trial judge.

[16] As to the appellant's argument that the trial judge denied him an opportunity to speak prior to passing sentence, s. 726 of the *Criminal Code* provides:

> Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.

[17] The record does indeed support the appellant's claim that he himself was not directly invited to speak prior to the passing of sentence. Nonetheless, the record also confirms the appellant had the opportunity to be heard by the court on sentence, both through the written and oral submissions made on his behalf by his counsel, and through the information provided in the Pre-sentence Report put before the court, all of which the trial judge referenced in his sentencing reasons.

[18] Omitting the opportunity for a convicted party to personally address the court by speaking aloud at the time of sentencing is not, in and of itself, a fatal procedural flaw, particularly when done inadvertently: see *R. v. Senek* (1998), 130 C.C.C. (3d) 473 (Man. C.A.); *R. v. Murphy*, 2019 SKCA 8. The appellant was not able to explain what it was that was lost by the trial judge's oversight in not inviting the appellant to personally address the court. I am not persuaded the appellant was disadvantaged in any way by that omission.

[19] As to the victim fine surcharge imposed, this issue was raised by the appellant during oral argument. The appellant asserted that as a then-impecunious offender about to embark on a 6.5 year custodial sentence, he should not have been required to pay the $200 victim fine surcharge.

[20] Quite properly, the respondent did not oppose the appellant's argument concerning the victim fine surcharge in light of the Supreme Court of Canada decision in *R. v. Boudreault*, 2018 SCC 58. That decision, coming after the sentencing of the appellant, declared the imposition of a victim fine surcharge on an impecunious offender, pursuant to s. 737 of the *Criminal Code*, to be unconstitutional and of no force and effect.

[21] Accordingly, the appellant's argument on that aspect of the sentence imposed has merit, and the appeal is allowed on that point. The victim fine surcharge ordered as part of the disposition is quashed.

Issue No. 3 – Motion to Introduce Fresh Evidence/Ineffective Assistance of Counsel

[22] It appears from the written material filed by the appellant that he wants this Court to admit evidence to establish one or both of the following:

1. that he suffered a miscarriage of justice owing to the ineffective assistance of counsel; and

2. that there is evidence now available which had it been introduced at trial might have resulted in an acquittal.

[23] As to the first issue, trial counsel provided an affidavit recounting a conscientious and professional carriage of the appellant's trial, which affidavit was not subject to cross-examination by the appellant at the hearing of the motion before this Court. As discussed in the recent decisions of this Court in *R. v. Finck*, 2019 NSCA 60 and *R. v. Snow*, 2019 NSCA 76, incompetence is to be assessed by the application of a reasonableness standard, with the burden falling to the appellant to rebut the strong presumption that counsel's conduct fell within a wide range of reasonable assistance. I am not persuaded the appellant's filed materials or oral argument have done so. It cannot be concluded on any of the material put before this Court that the conduct of the appellant's trial counsel amounted to incompetence which then resulted in a miscarriage of justice. The appellant complained about various aspects of counsel's conduct, but it is entirely unclear how anything that might have been done but was not could have had any meaningful impact upon the trial outcome.

[24] As to the second issue, there is no merit to the appellant's argument that evidence is available which, had it been introduced at trial would have affected the outcome. In many respects, the appellant's argument on this point mirrors his assertions in relation to errors in fact-finding as canvassed earlier herein. The appellant has not demonstrated there is any new or previously unavailable evidence which could have impacted the trial outcome had it then been made available, nor has it been established that any such evidence would be relevant to a determinative issue in the trial: *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[25] I would therefore dismiss the motion for fresh evidence.

Conclusion

[26] I would dismiss the conviction appeal and the motion to adduce fresh evidence going either to the ineffective assistance of counsel or any trial issue. I would grant leave to appeal sentence in part and vary the sentence to quash the victim fine surcharge.

Beaton, J.A.

Concurred in:

Wood, C.J.N.S.

Beveridge, J.A.