NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Phillips, 2006 NSCA 135

Date: 20061214
Docket: CAC 266449
Registry: Halifax

Between:

John James Arthur Phillips

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, CJNS, Roscoe, and Fichaud, JJ.A.
Appeal Heard:	December 6, 2006, in Halifax, Nova Scotia
Held:	The appeal against convictions is dismissed and leave to appeal with respect to sentence is denied, per reasons for judgment of Fichaud, J.A.; MacDonald, CJNS and Roscoe, J.A. concurring.
Counsel:	David Grant, for the appellant Dana Giovannetti, Q.C., for the respondent

Reasons for judgment:

[1] A 911 dispatch informed two police officers that Mr. Phillips was reported missing by a hospital, that he was suicidal and should be returned to the hospital. The officers attempted to apprehend Mr. Phillips at his home without warrant under s. 38(1) of the *Hospitals Act*. Mr. Phillips resisted and assaulted the officers. A judge convicted him of assaulting the officers in the execution of their duties contrary to s. 270(1)(a) of the *Criminal Code*. Mr. Phillips appeals. He says that the officers had no authority to apprehend him, and he was entitled to resist. He seeks to add a new issue, not argued at trial, that the authority to apprehend in s. 38(1) of the *Hospitals Act* violates the *Charter of Rights*. He challenges the trial judge's application of reasonable doubt under the *W.(D)* principles.

Background

[2] On March 1, 2005, in the words of the trial judge, Mr. Phillips "was feeling pretty depressed". He saw his physician, who sent him to the Dartmouth General Hospital for blood work and assessment. At the hospital, Mr. Phillips had his blood work done and sat in a room awaiting further assessment. The trial judge described the events in the waiting room:

> In the room, he was visited by a person he called a student psychiatrist and another doctor. He explained to them both how he felt, of his suicidal and homicidal tendencies, and went on to say that it was not like he was going to kill a bunch of people. He then sat around for a couple of hours and, when no one else came, he left and went home.

[3] Dr. Parkash, who had interviewed Mr. Phillips, testified:

> 34. Q. Dr. Parkash, could you tell us what you either observed or what conversation you had with Mr. Phillips that led you to the conclusion that he should be referred for an assessment at the Nova Scotia Hospital?
>
> A. By initially reading the triage notes and the nursing notes, once I came in to talk to him I looked at the - I reviewed the emergency room note and just noted that we'd talked about he had a history of depression and was having a tough time lately. It had been even a little longer, the note said, about even - over a year kind of feeling more depressed and - but worse that day or that couple of days and had been, been having thoughts of self-harm.

35. Q. Anything else that you recall speaking with Mr. Phillips about that day? Any other thoughts he expressed to you that he was having that...

A. I don't - in my note, I didn't write anything about, about homicidal thought, so he didn't express that part to me, which had been brought up before. But my note didn't say anything about that. The big thing was just the kind of acute crisis he was having for the last couple days.

36. Q. And it was your understanding from speaking with him and reviewing the history that he had a long standing history of depression and I guess, in your words, this was a bi[t] of a crisis he was having this particular day?

A. That's the way it appeared, yeah.

37. Q. And he expressed to you thoughts of suicide and self-harm?

A. Yes.

Dr. Parkash did not perform a full psychiatric examination. He testified that Mr. Phillips was being "medically cleared to be set up to be seen at the NS". The full psychiatric examination would have occurred at the "NS" - the Nova Scotia Hospital psychiatric facility. But, after waiting two hours, Mr. Phillips left the Dartmouth General Hospital before he could be transferred to the Nova Scotia Hospital.

[4] The Dartmouth General Hospital staff reported to 911 that Mr. Phillips had left the hospital during his assessment and that he might be suicidal. The head nurse, Ms. Jackman, testified:

A. And immediately, we- I notified dispatch. We have a direct line to the police dispatch that this gentleman was missing and needed to be brought back.

Q. Alright. Do you recall what information, specifically, you had advised police dispatch?

A. I advised them that this gentleman had been missing and had expressed homicidal and suicidal ideations in the Emergency Department.

> Q. And where did you receive that information from about the suicidal and homicidal ideations?
>
> A. From his chart, from Dr. Parkash and from the other staff.
>
> Q. What - can you tell us what, if anything occurred once the police were contacted, what - any further involvement you had with Mr. Phillips?
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> A. At that point I gave them his address and a description that we were given at the time and asked them to return him to the Emergency Department.

[5] The 911 dispatch contacted police constables Galloway and Pickett and reported these circumstances to the officers. The trial judge said:

> . . . The officers were informed through 911 police dispatch Mr. Phillips had attended at Dartmouth General Hospital earlier that day and left. They were told he had to be returned, as he was a danger to himself, and he was about to be committed and admitted to the Nova Scotia Hospital.

[6] At 3 p.m. on March 1st, the two officers arrived at Mr. Phillips' home. The trial judge described what happened next:

> Mr. Phillips answered the door, and when Constable Galloway explained that they were there to return him to the Dartmouth General Hospital, Mr. Phillips refused. After some discussion at the door, he was informed that he would have to come with the officers or be arrested under the *Hospital Act*. Mr. Phillips again refused.
>
> Constable Galloway then grabbed Mr. Phillips' arm to arrest him and told him he was under arrest under Section 38 of the *Hospital Act*. At this point, Mr. Phillips punched Constable Galloway in the right ear; a struggle ensued. Mr. Phillips was able to wriggle out of a jacket he was wearing, ran into the living room of his house, through the kitchen and towards the basement, where there was a rec room.
>
> Constable Galloway got out his pepper spray, tried to spray him as he ran towards the kitchen and then down the stairs to the rec room. When they arrived in the rec room, Mr. Phillips threw dishes, forks and other items at Constable Galloway, but he was arrested after a brief struggle. He had been in the process of throwing an electronic machine at Constable Galloway when he was sprayed by Constable Galloway in the face, and he subsequently fell to his knees.

> He was arrested and taken out of the house and, in the process of being placed into the police van, referred to by the police officers as the paddy wagon, he spit at Constable Pickett and struck him in the chest with his fist.

[7] Mr. Phillips was charged with (i) assaulting Constable Galloway, engaged in the execution of his duty, contrary to s. 270(1)(a) for the incident at the door, (ii) assaulting Constable Pickett, engaged in the execution of his duty, contrary to s. 270(1)(a) for the incident at the van, (iii) using or threatening to use a weapon while assaulting Constable Galloway, contrary to s. 267(a) for the incident in the rec. room, (iv) and willful resistance to an officer engaged in the execution of his duty contrary to s. 129(a) of the *Criminal Code*. He was tried before Justice Simon MacDonald of the Nova Scotia Supreme Court, without a jury.

[8] Mr. Phillips applied for a ruling that the events at his home violated his rights under ss. 7 and 9 of the *Charter*, and that any evidence of the officers following the arrest at the door was inadmissible under s. 24(2) of the *Charter*. After a *voir dire*, the trial judge dismissed the application, ruling that Mr. Phillips' rights under s. 7 and 9 of the *Charter* were not violated.

[9] After the trial, the trial judge convicted Mr. Phillips of the two offences under s. 270(1)(a). Mr. Phillips was acquitted under s. 267(a). The trial judge stayed the charge under s. 129(a) under the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729. The trial judge suspended sentence and placed Mr. Phillips on probation for 12 months.

[10] Mr. Phillips appeals.

Issues

[11] Mr. Phillips' Notice of Appeal appealed the convictions and applied for leave to appeal the sentence. At the hearing Mr. Phillips' counsel abandoned the sentence appeal.

[12] Against the convictions Mr. Phillips listed six grounds of appeal which, in argument, he consolidated into four submissions. These are:

1. The trial judge erred in law by ruling that Mr. Phillips' *Charter* rights under ss. 7 and 9 were not violated by an arbitrary arrest, and by not excluding the evidence of the altercations under s. 24(2).

2. The trial judge erred by failing to rule that Mr. Phillips was entitled to disengage from the unlawful arrest.

3. The trial judge erred in law in failing to determine whether section 38 of the *Hospitals Act* was invalid insofar as it authorized an arbitrary arrest contrary to the *Charter*.

4. By making inconsistent credibility rulings, the trial judge erred in his application of the principle of reasonable doubt stated in *R. v. W. (D)*, [1991] 1 S.C.R. 742.

First Issue - Arbitrary Arrest - Sections 7 and 9 of Charter

[13] Mr. Phillips says that his warrantless arrest was unauthorized by law, therefore arbitrary contrary to ss. 7 and 9 of the *Charter*, and that all the evidence related to his altercations with the officers should be excluded under s. 24(2).

[14] It is unnecessary to consider exclusion of evidence under s. 24(2). The directly dispositive issue is whether the conduct that constitutes the alleged *Charter* breach negates an element of the offence. If an arbitrary arrest was without legal authority or violated the *Charter*, the officer would not be acting "in the execution of his duty" under s. 270(1)(a).

[15] The trial judge, after the *voir dire*, rejected Mr. Phillips' submission that there was an unconstitutional arrest and entry. After hearing the testimony of Mr. Phillips and the officers, the trial judge made the following findings:

> Here, the two officers were on duty patrol. In the course of their duty, they received a 911 dispatch call that Mr. Phillips had left the Dartmouth General Hospital and that he was in danger of - he was a danger to himself or others, as Constable Galloway testified.
>
> . . .

I find here the police were acting, as I said before, on a dispatch call to apprehend Mr. Phillips. They were trying to apprehend him to protect themselves and possibly others, from the information they had obtained.

The description as to what occurred at the door between Mr. Phillips and Constable Galloway differs greatly. I believe the evidence of Constable Galloway as to what happened.

. . .

The arrest took place the moment Constable Galloway placed his hands on Mr. Phillips' arm. Constable Galloway stated he was not able to conclude Mr. Phillips was a danger to himself or others, but he was advised from the Dartmouth General Hospital he was being committed, and acted on that. I find it reasonable for him to do - to take that advice backed up by dispatch from the hospital staff.

In my view, the police had the power to enter the residence to protect life and possibly to prevent serious injury on all the facts here. The officer was justified in arresting Mr. Phillips based on the information he had received plus the evidence Constable Galloway and Constable Pickett told of Mr. Phillips' aggressive stance, the way he looked at them, the angry look on his face and, as Constable Galloway said on cross-examination, Mr. Phillips was upset, not a happy person.

I find such an intrusion into Mr. Phillips' residence is authorized at common law because it falls within the scope of general police duty to protect life and safety. It also did not involve an unjustifiable use of the powers associated with this duty, as stated in *R. v. Cordor*.

For the foregoing reasons, I find Mr. Phillips' rights under Section[s] 7 and 9 of the *Charter* were not violated. I find that the information given to the police from 911 dispatch as to Mr. Phillips' mental state would give them authority under Section 38 of the *Hospital[s] Act* as well to apprehend him. It may be that the information conveyed to the police by the hospital, through 911 dispatch was in error, but nonetheless it was reasonable for the police officers to act on the information they had received in the manner in which they received it.

The altercation that started at the door and continued to the rec room and the basement I find happened after the arrest and was the result of Mr. Phillips assaulting Constable Galloway, and then the police were in pursuit to arrest him.

> In conclusion, I would therefore deny Mr. Phillips' *Charter* application, allow the testimony of the Crown to continue about what happened after they first met with Mr. Phillips at the doorway.

[16] Mr. Phillips' submission to this court focuses on the interpretation of ss. 36 and 38 of the *Hospitals Act*, R.S.N.S. 1989, c. 208. Section 36 provides for the admission of an individual into a psychiatric facility after a medical assessment and execution of medical certificates by two qualified medical practitioners. Section 36(9) says:

> Notwithstanding subsection (1), a person may be admitted to a facility by the execution of one medical certificate signed by one qualified medical practitioner where compelling circumstances exist for the admission of such a person to a facility and where a second qualified medical practitioner is not readily available to examine the person and execute the second certificate.

Section 38(1), under which the officers acted here, states:

> Where a peace officer has reasonable and probable grounds to believe that a person suffers from a psychiatric disorder and
>
> (a) is a danger to his own safety or the safety of others; or
>
> (b) is committing or about to commit an indictable offence,
>
> the peace officer may take the person to an appropriate place where he may be detained for medical examination.

[17] Mr. Phillips submits that, after Dr. Parkash interviewed him at the Dartmouth General Hospital, the only permissible detention procedure was admission by certificate under s. 36. His factum states:

> Since the concern arose after the medical examination had taken place steps should have been taken under section 36(9) of the *Hospitals Act*. The option under section 38(1) no longer existed once the examination had taken place. Some other route was then open to deal with the problem but not an arrest under section 38(1).

Section 38(1) leads to detention "for medical examination". Mr. Phillips deduces that, if the medical examination has already occurred, s. 38(1) cannot apply. Mr.

Phillips concludes that, as s. 38(1) did not authorize his apprehension and there was no certificate under s. 36, the officers had no authority to apprehend him.

[18] In my view, Mr. Phillips' premise is mistaken. Dr. Parkash's interview at the Dartmouth General Hospital did not bar the use of s. 38(1).

[19] Mr. Phillips' submission reads into s. 38(1) an opening proviso: "Unless the process leading to an examination has commenced". There is no such proviso in the statute. As Mr. Phillips' counsel observes, the point of s. 38(1) is a detention "for medical examination". But Mr. Phillips had not completed his medical examination. He was to be examined at the Nova Scotia Hospital psychiatric facility. He left the Dartmouth General Hospital while arrangements were being made to transfer him to the Nova Scotia Hospital. His apprehension was necessary to execute the full examination.

[20] Section 38(1) permits a peace officer to apprehend an individual for purposes of medical examination where the "peace officer has reasonable and probable grounds to believe that the individual suffers from a psychiatric disorder" and the individual either "is a danger to his own safety or the safety of others or is committing or about to commit an indictable offence." The evidence was that Mr. Phillips told hospital staff that he was suicidal, the hospital staff relayed this to the 911 operator, who then dispatched the information to the police officers. The trial judge concluded that the officers had reasonable and probable grounds to believe that Mr. Phillips suffered from a psychiatric disorder and that he was a danger to his own safety. If the police have these reasonable and probable grounds, they need not suspend their response to the 911 distress call while inquiring about the status of the process under s. 36 of the *Hospitals Act*.

[21] Mr. Phillips began by seeking medical attention. He was then overtaken, from his perspective, by a frustrating progression of events. But that did not entitle him to assault two police officers executing their duties. The trial judge made no error, under any standard of review, in his finding that the conditions existed for the apprehension under s. 38(1). It is unnecessary to consider the police power at common law to respond to distress calls: *R. v. Godoy*, [1999] 1 S.C.R. 311 at ¶ 16, 23; *R. v. Nicholls* (1999), 139 C.C.C. (3d) 253 (OCA) at ¶ 11-13. The officers had statutory authority under s. 38(1) to apprehend Mr. Phillips. Their attempt to do so

at the doorstep of his home was not arbitrary, did not violate ss. 7 or 9 of the *Charter*, and was in the execution of their duties.

[22] After Mr. Phillips punched Constable Galloway at the doorway, s. 495(1) of the *Code* authorized the officers to arrest Mr. Phillips without warrant for the offence of assaulting a peace officer acting in the execution of his duty, contrary to s. 270(1)(a) of the *Code*. The issue that may be relevant to the later assault on Constable Pickett is whether the officers had authority to enter Mr. Phillips' home to make the arrest.

[23] In *R. v. Feeney*, [1997] 2 S.C.R. 13, at ¶47, Justice Sopinka for the majority held that the common law power of a warrantless arrest after forced entry into a dwelling offended s. 8 of the *Charter*, subject to the exceptions of "hot pursuit" and perhaps (without deciding) other limited "exigent circumstances". In response to *Feeney*, Parliament enacted ss. 529.1 to 529.5 of the *Code* (S.C. 1997, c. 39, s. 2 - Bill C-16). Section 529.3 says:

> 529.3 (1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
>
> Exigent circumstances
>
> (2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer
>
> (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
>
> (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

[24] Under s. 529.3, to enter Mr. Phillips' home for an arrest without warrant, the officers required (a) reasonable grounds to believe that Mr. Phillips was present in the home and (b) the conditions for obtaining a warrant under s. 529.1. Further, (c) because of "exigent circumstances" as defined in s. 529.3(2), it must have been impractical to obtain a warrant. I will consider these three prerequisites.

(a) Mr. Phillips had identified himself and was in his home.

(b) Section 529.1 as amended states the conditions for obtaining a warrant:

> 529.1 A judge or justice may issue a warrant in Form 7.1 authorizing a peace officer to enter a dwelling-house described in the warrant for the purpose of arresting or apprehending a person identified or identifiable by the warrant if the judge or justice is satisfied by information on oath that there are reasonable grounds to believe that the person is or will be present in the dwelling-house and that
>
> (a) a warrant referred to in this or any other Act of Parliament to arrest or apprehend the person is in force anywhere in Canada;
>
> (b) grounds exist to arrest the person without warrant under paragraph 495(1)(a) or (b) or section 672.91; or
>
> (c) grounds exist to arrest or apprehend without warrant the person under an Act of Parliament, other than this Act.

The officers had witnessed Mr. Phillips at the door commit an assault on Constable Galloway in the execution of his duty and then escape custody. There were grounds to arrest without warrant under s. 495(1)(a). This satisfied s. 529.1(b).

(c) Section 529.3(2) defines "exigent circumstances" to include reasonable grounds to suspect that entry is "necessary to prevent imminent bodily harm or death to any person." "Any person" includes Mr. Phillips. The officers had been told that Mr. Phillips was suicidal. They observed his erratic and violent behaviour at the door.

> These were "exigent circumstances" that rendered it impractical to obtain a warrant.

[25] Further, as Justice Sopinka noted in *Feeney* at ¶ 47, in a "hot pursuit" into a dwelling "the privacy interest must give way to the interest of society in ensuring adequate police protection." The trial judge found that the altercation after the arrest at the door "was the result of Mr. Phillips assaulting Constable Galloway, and then the police were in pursuit to arrest him." Apart from s. 529.3, the common law power of entry in hot pursuit, retained by *Feeney*, authorized the officers to enter Mr. Phillips' home.

[26] After the assault on Constable Galloway at the doorway, the police officers had legal authority, under s. 529.3 and at common law, to pursue Mr. Phillips into his home and arrest him, without warrant. There was no arbitrary apprehension or arrest. The trial judge made no error in his conclusion that Mr. Phillips' rights under ss. 7 and 9 of the *Charter* were not violated. The officers were acting in the execution of their duties. Section 24(2) does not apply. I would dismiss this ground of appeal.

Second Issue - Disengaging from Unlawful Arrest

[27] Mr. Phillips says that after the unlawful arrest he was entitled "to disengage from physical contact with the police officers", citing *R. v. Hickey*, [2004] O.J. No. 199 (O.C.A.).

[28] There is no merit to this argument. First, as discussed earlier, the arrest was lawful. Second, in *Hickey*, p. 2, the court said:

> 2. ... The appellant was attempting to disengage from physical contact with the police officers who were attempting to arrest him and exerting considerable physical force against him. The act of pulling his arm away from the police officers did not, in law, amount to an assault.

Mr. Phillips did not just pull away. Constable Galloway, whose evidence was accepted by the trial judge, testified that Mr. Phillips "hauled off and struck me in the side of the face, my right ear, with a fist."

[29] I would dismiss this ground of appeal.

Third Issue - Validity of s. 38 of Hospitals Act

[30] Mr. Phillips says that, insofar as s. 38(1) of the *Hospitals Act* authorized the officers to apprehend him, s. 38(1) permits an arbitrary arrest and is an unconstitutional violation of ss. 7 and 9 of the *Charter*.

[31] Mr. Phillips did not challenge the validity of s. 38(1) at the trial. This is a new argument on appeal. The Crown says that it would have introduced substantial evidence at the trial on the issue, and that this court should not consider the issue without that record and without the benefit of a trial judge's decision.

[32] In *Nova Scotia (Minister of Health) v. V.S.*, 2006 NSCA 122, this court discussed whether a challenge to the validity of legislation should be considered for the first time in the Court of Appeal. The court stated:

> [28] The Supreme Court of Canada and provincial courts of appeal often have said that a new issue on appeal, including a new constitutional issue, (1) should not be considered unless the record contains all the facts material to that issue, and further (2) should not be considered if the opposing party would be prejudiced in a manner not remediable by costs. The opposing party would be irremediably prejudiced if, in the lower court, that party would have adduced additional evidence, not already on the record, that is relevant to the new issue. See: *R. v. Warsing*, [1998] 3 S.C.R. 579, at ¶ 16, L'Heureux-Dubé, J. dissenting on another issue; *R. v. S.(K.)* (2000), 148 C.C.C. (3d) 247 (Ont. C.A.) at ¶ 33; *Perez v. Salvation Army of Canada* (1978), 171 D.L.R. (4th) 520 (Ont. C.A.), at ¶ 12; *R. v. Brown*, [1993] 2 S.C.R. 918, approving the dissenting reasons of Harradence, J.A. in the Alberta Court of Appeal (1992), 73 C.C.C. (3d) 481 (C.A.) at p. 488; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at ¶ 48-55; *Canadian Newspapers Co. v. Canada (A.G.)*, [1988] 2 S.C.R. 122 at p. 134; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, at p. 679; *Ross v. Ross*, 1999 NSCA 162 at ¶ 34; *S-Marque Inc. v. Homburg Industries Ltd.*, [1999] N.S.J. No. 94, at ¶ 26 - 29, *Jeffrey v. Naugler*, 2006 NSCA 117, at ¶ 13 - 15; *Scott Maritimes Pulp Ltd. v. B.F. Goodrich Canada Ltd.* (1977), 19 N.S.R. (2d) 181 (C.A.) at ¶ 40; Sopinka, *The Conduct of an Appeal* (2nd ed.), 2000, at p. 66.

[33] The conditions for considering a new issue on appeal do not exist here. The record does not contain all the facts material to the constitutional issue. The Crown, or the Attorney General representing the Province, would have adduced

evidence with respect to the challenge to s. 38(1) and justification under s. 1 of the *Charter*. Because the matter was not raised at trial, this evidence has not been adduced. To decide the issue would prejudice the Crown or Province. Mr. Phillips' factum discusses the topic in four paragraphs, and at the hearing Mr. Phillips' counsel barely touched the issue. Section 38(1) is a significant power of apprehension, and its equivalent exists in the statutes of most provinces. On this sparse record, this court is in no position to consider the constitutional validity of s. 38(1) as a new issue.

[34] I would deny Mr. Phillips' request to initiate the constitutional challenge to s. 38(1) in this court.

Fourth Issue - Credibility and Reasonable Doubt under W.(D.)

[35] The trial judge convicted Mr. Phillips of the two offences of assaulting an officer under s. 270(1)(a), accepting the testimony of the officers and rejecting the inconsistent testimony of Mr. Phillips. The trial judge said:

> I am also aware that the rule of proof beyond a reasonable doubt, as has been raised for me, is applicable to issues of credibility. I also have applied the test set for in R. v. W. D. (1991) 1 S.C.R. 742, which is as follows. First, if I believe the evidence of the Accused, I must acquit. Second, if I do not believe the testimony of the Accused but I am left in a reasonable doubt by it, I must acquit. Third, even if I am not left in a doubt by the evidence of the Accused, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by the evidence of the guilt of the Accused.
>
> ...
>
> I accept the evidence of both police officers over that of Mr. Phillips and Mr. Thebeau as to what took place just inside the front door.
>
> ...
>
> I find on the facts that Count No. 1, the assault occurred by Mr. Phillips striking Constable Galloway on the side of the head after he was apprehended by the Constable. ... I also find Mr. Phillips assaulted Constable Pickett when he spit at him, hitting him in the chest with his spit. There has been no contrary evidence on this point.

> ... there is no doubt in my mind that Mr. Phillips did commit the charge as laid ...

[36] For the charge of using or threatening to use a weapon under s. 267(a), the trial judge concluded that he had reasonable doubt as to Mr. Phillips' guilt. He accepted the evidence of another witness, a furnace serviceman, over the testimony of the officers as to what occurred inside the house.

[37] Mr. Phillips says that the trial judge erred by accepting the police officers' testimony of the events at the door and at the van for the charges under s. 270(1)(a), while not accepting the officers' testimony of the events in the rec room for the charge under s. 267(a). Mr. Phillips says that this inconsistency misapplied the principle of reasonable doubt in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at pp. 757-8.

[38] I disagree with the submission. The trial judge discussed the three *W.(D.)* principles. He said that he did not accept Mr. Phillips' version. The trial judge said that, after considering all of the evidence including Mr. Phillips' evidence, he had "no doubt" that Mr. Phillips committed the assaults charged under s. 270(1)(a).

[39] In *R. v. Lake*, 2005 NSCA 162 at ¶ 15 this court said:

> [15] *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction. *R. v. Boucher*, 2005 SCC 72 at ¶ 29 and 59; *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542 (O.C.A.), at ¶ 22; *R. v. Brown* (1994), 132 N.S.R. (2d) 224 (C.A.) at ¶ 17 and 19; *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (O.C.A.) at ¶ 33, leave to appeal denied [2004] SCCA No. 340; *R. v. Saulnier*, 2005 NSCA 54 at ¶ 17, 19, 35, 37; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (O.C.A.) at p. 203; *R. v. Robicheau* (2001), 193 N.S.R. (2d) 42 (N.S.C.A.), at ¶ 27, per Roscoe, J.A. dissenting, adopted by the Supreme Court of Canada [2002] 2 S.C.R. 643; *R. v. Mah*, 2002 NSCA 99, at ¶ 41; *Chittick*, at ¶ 21; *R. v. Binnington*, 2005 NSCA 133, at ¶ 10.

[40] The trial judge here applied the essential principles underlying the *W.(D.)* instruction. He made no error in his application of reasonable doubt.

Conclusion

[41] I would dismiss the appeal against convictions. Mr. Phillips withdrew his sentence appeal. I would deny leave to appeal with respect to sentence.

Fichaud, J.A.

Concurred in:

MacDonald, CJNS

Roscoe, J.A.