NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Boliver*, 2014 NSCA 99

Date: 20141104
Docket: CAC 422908
Registry: Halifax

Between:

Richard Temple Boliver

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge, and Bryson, JJ.A.
Appeal Heard:	September 24, 2014, in Halifax, Nova Scotia
Written Release	November 4, 2014
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Fichaud and Beveridge, JJ.A. concurring
Counsel:	Wayne Bacchus, for the appellant Mark Scott, for the respondent

Reasons for judgment:

[1] Richard Boliver was convicted of resisting arrest and damage to property arising from a confrontation with Bridgewater police on March 14, 2009 (ss. 129 and 430(4) respectively of the *Criminal Code of Canada*). He was also convicted of intoxication in a public place contrary to s. 87(1) of the *Liquor Control Act*. Following his conviction, Mr. Boliver was sentenced to a fine and twelve months' probation, resulting from a joint recommendation of Crown and Defence counsel.

[2] Mr. Boliver appealed to the Honourable Justice C. Richard Coughlan, sitting as a Summary Conviction Appeal Court (SCAC). Essentially Mr. Boliver's appeal attacked the trial judge's antecedent decision on his various *Charter* motions (2012 NSPC 33). Justice Coughlan dismissed Mr. Boliver's appeal (2013 NSSC 359). Mr. Boliver now seeks leave to appeal, and if granted, appeals his convictions.

[3] Mr. Boliver lists eight discrete grounds of appeal, with respect to which leave of this Court is sought:

1. The Summary Conviction Appeal Court judge erred in law by not applying the proper test(s) to determine if the very late disclosure of a "can say" has caused a violation of the Appellant's s. 7 *Charter* right [to] full and timely disclosure.
2. The Summary Conviction Appeal Court judge erred in law by finding that the violation of Appellant's ss. 10(a) and 10(b) rights did not make the Appellant's arrest unlawful.
3. The Summary Conviction Appeal Court judge erred in law by adopting the trial judge's reasoning to find that the Appellant's arrest was lawful and not in violation of the *Charter*.
4. The Summary Conviction Appeal Court judge erred in law by adopting the trial judge's decision to refuse to grant an appropriate and just remedy for the *Charter* violations of ss. 10(a) and 10(b) that were found to have occurred.
5. The Summary Conviction Appeal Court judge erred in law by adopting the trial judge's conclusion of deemed police inadvertence to justify not granting a remedy for the ss. 10(a) and 10(b) *Charter* violations without any supporting evidence of inadvertence before the trial judge.

6. The Summary Conviction Appeal Court judge erred in law by finding that trial fairness had been maintained.
7. The Summary Conviction Appeal Court judge erred in law by adopting the trial judge's decision and reasoning with respect to the Appellant's guilt or innocence without considering all the evidence.
8. The Summary Conviction Appeal Court judge erred in law by not staying the charges and finding that there was no miscarriage of justice given the totality of the proceedings.

[4] In his factum, Mr. Boliver argues grounds 1 and 6; 2, 3, and 4; and 7 and 8 together as three general categories.

[5] Mr. Boliver's grounds of appeal are repetitive. His grouping of them in his factum admits as much. I prefer the Crown's restatement of the issues which captures all arguments raised by the appellant:

1. Did the Summary Conviction Appeal Court Justice err in law by deferring to the trial Judge's exercise of discretion regarding an available remedy for the ss. 10(a) and 10(b) violations?
2. Did the Summary Conviction Appeal Court Justice err in law by deferring to the trial Judge's treatment of the issues of lost evidence and late disclosure?
3. Did the Summary Conviction Appeal Court Justice err in law by deferring to the trial Judge's conclusions with respect to facts and assessments of credibility?

Leave:

[6] Leave of this Court to appeal from a decision of a Summary Conviction Appeal Court is sparingly granted. Both parties cite the correct test and jurisprudence for leave – for example: *R. v. Pottie*, 2013 NSCA 68 and *R. v. MacNeil*, 2009 NSCA 46.

[7] The breach of Mr. Boliver's *Charter* rights, discussed below, favours granting leave.

Background Facts:

[8] The SCAC judge described the confrontation between police and Mr. Boliver at the Bridgewater Mall on the night in question:

> [5] Richard Boliver and Ryan Whynot came out. Richard Boliver, who had consumed a minimum of six alcoholic drinks, quickly became the focus of police attention when he began confronting the police in general and Constable Russell in particular. Richard Boliver was loud, aggressive and quickly became out of control in this confrontation with Constable Russell. He attracted a significant amount of attention. Royce Boliver was asking the crowd, which had gathered, to involve themselves in the incident. Richard Boliver was causing a disturbance and acting in a manner consistent with an inebriated state. Richard Boliver was advised he was under arrest.
>
> [6] A violent struggle ensued, in which Constables Gibson and Bennett attempted to gain control of Richard Boliver by handcuffing him. The officers were successful in getting one of Mr. Boliver's wrists attached to handcuffs. Constables Bennett and Gibson and Richard Boliver fell to the ground. Mr. Boliver, a very large man, thrashed about with one wrist handcuffed and the handcuffs flailing from his one cuffed wrist.
>
> [7] Mr. Weagle was asked by Constable Russell to assist the police by attempting to control Richard Boliver's legs. The crowd was becoming more vocal.
>
> [8] Constables Gibson and Bennett tried a number of holds, hand strikes, and pressure point applications, to no avail. Constable Russell issued a warning to Richard Boliver if he did not stop resisting and put his hands behind his back he would be tasered. Mr. Boliver did not comply and he was tasered. The first deployment of the taser did not render Mr. Boliver compliant. It was only after the second deployment of the taser Mr. Boliver's struggles subsided to the point he could be handcuffed and brought to the patrol car.
>
> [9] In the patrol car Richard Boliver's actions remained out of control. They were violent. He was screaming, cursing and banging on the window. He kicked the rear door with so much force he damaged it, leaving it bowed outward.
>
> [10] Richard Boliver was transported to the RCMP cells. Emergency Health Services (EHS) was contacted to remove the taser darts. Mr. Boliver was placed in a cell. When EHS arrived they started an assessment on Mr. Boliver and he refused to be assessed. EHS left. Then Mr. Boliver changed his mind. EHS returned and Richard Boliver was taken to the hospital. Mr. Boliver's emotional state was such that it was not possible for the police to explain the reason for his detention and/or the nature of the charges and/or his right to counsel until after his return to the police station from the hospital.

Standard of Review:

[9] As this Court stated in *Pottie,* appeals under s. 839 of the *Criminal Code* are restricted to questions of law to which a correctness standard of review applies. As *Pottie* explains, this Court's jurisdiction is grounded in error alleged to have been committed by the SCAC judge:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[10] The standard of review with respect to alleged *Charter* breaches was discussed in *R. v. West*, 2012 NSCA 112:

> [74] The standard of review for a *Charter* breach was set out in *R. v. B.(T.W.),* 2012 MBCA 7, at ¶24:
>
> > 24 In *R. v. Farrah (D.),* 2011 MBCA 49, 268 Man.R. (2d) 112, Chartier J.A. wrote (at para. 7):
> >
> > By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
> >
> > a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
> >
> > b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant*, at para. 129).
> >
> > c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see

> *R. v. Shepherd (C.)*, [2009] 2 S.C.R. 527, 391 N.R. 132, 331 Sask.R. 306, 460 W.A.C. 306; 2009 SCC 35, at para. 20).
>
> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant*, at para. 86, and *R. v. Beaulieu (G.)*, [2010] 1 S.C.R. 248, 398 N.R. 345; 2010 SCC 7, at para. 5).
>
> [at ¶24; see also *R. v. V.(S.E.)*, 2009 ABCA 108, at ¶3-5]
>
> The issue is whether there were reasonable and probable grounds to detain/arrest Mr. West. Reasonable and probable grounds are grounded in factual findings to which deference is afforded. Whether they amount to reasonable grounds, objectively, however, is a question of law (*R. v. Shepherd*, 2009 SCC 35, at ¶18, ¶20).

Section 10(a) and (b) Charter Violations:

[11] Section 10(a) of the *Charter* entitles everyone arrested or detained "to be informed promptly of the reasons therefor". Section 10(b) entitles everyone who is arrested or detained "to retain and instruct counsel without delay and to be informed of that right". The information obligation described in s. 10(b) of the *Charter* is subject to the need to secure officer or public safety: *R. v. Suberu*, 2009 SCC 33 at ¶ 2 and ¶ 42; *R. v. Debot*, [1989] 2 S.C.R. 1140 at p. 1164.

[12] Section 29(2) of the *Code* also requires that everyone who arrests a person must give notice "when it is feasible to do so" of the reason for the arrest.

[13] This is what the trial judge found respecting the circumstances prior to Mr. Boliver's arrest:

> [47] However, it was apparent to all of the officers that Mr. Boliver had consumed alcohol. It was apparent to them that he was behaving in a highly agitated, belligerent and irrational manner. In light of the proximity of a large crowd, his actions were not only causing a nuisance and disturbance, they ran a grave risk of inflaming or provoking a large disturbance. If some of the members of the crowd (consisting as it did, at least in part, of lounge patrons who may also have been drinking) were to involve themselves, the attendant risk of injury or harm posed to the police, the accused, and other by-standers, would rise exponentially.
>
> . . .

> [52] When one considers the criteria in *Deadman* (*supra*), certainly, a breach of the peace was taking place as a result of the accused's actions, and there was a concern on the part of the officers involved, legitimately based, that it could expand. The accused, who had been drinking, was adjacent to between 10-20 other onlookers, many of whom (likely) had been drinking themselves. The accused's brother, Royce, was making statements to the crowd inviting them to get involved in some fashion, and Cst. Gibson testified that many were making known some antipathy towards himself and the other officers. Quite apart from everything else, there was a need to de-escalate that situation immediately. Failure to have done so would have exposed the police themselves, the accused and also potentially some of the crowd to a risk of injury had the matter gotten out of control.

[14] The trial judge described the rapidity and violence of Mr. Boliver's actions:

> [62] In deciding the issue of the reasonableness of the force used, I accept the evidence of Gibson and Bennett as to the extent of the struggle with the accused, and the vigour with which he resisted their efforts to place him under arrest. The rapid escalation of Mr. Boliver's efforts in that regard placed these officers, in particular, and Cst. Russell and Mr. Weagle, potentially, in danger of harm, whether from the accused's flailing arms, the handcuffs hanging from one of his wrists, his thrashing legs, or from the potential intervention of certain members of the crowd.
>
> . . .
>
> [95] He proceeded very quickly to a state of increasing agitation and hostility towards the police in general and Cst. Russell in particular, punctuated with outbursts of hostility, and abusive anger, both focused and unfocused. ***When Gibson and Bennett attempted to place him under arrest, he violently resisted them, to the extent that the taser had to be deployed.*** After finally being cuffed and placed in the back of the police car he inflicted such damage upon it that the rear passenger door was bowed.
>
> [Emphasis added]

[15] In *R. v. O'Donnell* and *R. v. Cluett* (1982), 55 N.S.R. (2d) 6, at ¶ 42 (rev'd on unrelated grounds: [1985] S.C.J. No. 54), a five member panel of the Appeal Division of the Nova Scotia Supreme Court adopted the decision of the Ontario Court of Appeal in *Koechlin v. Waugh* (1957), 118 C.C.C. 24, which in turn

endorsed the following propositions from the House of Lords in *Christie v. Leachinsky*, [1947] 1 All E.R. 567 at p. 572:

> 1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
>
> 2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
>
> 3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.
>
> 4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.
>
> 5. ***The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away.***
>
> [Emphasis added]

[16] The fifth proposition in *Christie* parallels the "safety" exception to the immediacy of being informed of the right to counsel described in *Suberu* and *Debot*.

[17] It is apparent from the trial judge's findings that the officers were fully occupied with responding to Mr. Boliver's violent behaviour at the Bridgewater Mall. This precluded them from informing Mr. Boliver of the reasons for his arrest at that time. His behaviour at the mall meets the behaviour described in the fifth *Christie* proposition.

[18] Regarding Mr. Boliver's arrest itself, the trial judge observed:

> [111] I accept the evidence of Cst. Gibson that the Applicant was informed of the fact that he was being placed under arrest. I further accept Cst. Gibson's

> evidence that the reason for the arrest was public intoxication and a breach of the peace that had unfolded as a result of the Applicant's actions that evening, and the effect that it was either having on the crowd or could potentially have on the crowd.
>
> [112] ***Notwithstanding Cst. Bennett's recollection to the contrary, I find that Cst. Gibson did not get an opportunity to say any more than "you're under arrest". He and Bennett simultaneously placed their hands on either side of the accused to get him to the patrol car, but didn't get more than a step or two in that direction before he began to violently resist, which resistance ended up with him being tasered and handcuffed.***
>
> [113] After being placed in the vehicle, his actions remained out of control. They were violent.
>
> . . .
>
> [116] Even upon being transported to the police station, the accused did not moderate his actions to the point where it was possible to have meaningful interaction with him.
>
> [Emphasis added]

[19] Concluding with respect to the s. 10 *Charter* violations, the trial judge commented:

> [118] ***The accused's emotional state was such that it was not possible for the police to have explained to him the reasons for his detention and/or the nature of the charges that he was facing, and/or his right to counsel, until after his return to the police station from the hospital. I find on the balance of probabilities that it would not have been possible to have provided him with his rights and caution prior to that.***
>
> [119] There is not a great deal of evidence before me as to his status after his return to the police station. That said, it strikes me as somewhat of a common sense proposition that the accused's demeanor and emotional state must have reached a point at some time during the night whereby the necessary information could have been provided to him.
>
> [120] I find, therefore, on a balance of probabilities, that the accused's s. 10(a) and 10(b) rights were violated by the police in this instance. Having made such a finding, I must next determine what (if any) is the appropriate remedy to address this breach.
>
> [Emphasis added]

[20] For his part, the SCAC judge was satisfied that the trial judge did not err in deciding that no s. 10 violation occurred at the time of arrest. He said, "Virtually all of the actions which constituted elements of offences for which he was charged

were committed long before the police would have had a reasonable opportunity to explain the charges to him and his right to counsel."

[21] While acknowledging that Mr. Boliver's rights pursuant to ss. 10(a) and 10(b) of the *Charter* were ultimately violated because he was not told more than "you're under arrest", nevertheless the SCAC judge agreed with the trial judge that this had no effect on the charges against Mr. Boliver. No evidence was obtained as a result of the violation of his rights, so there was nothing to exclude.

[22] The trial judge was also satisfied that the police did not act in a malicious or high-handed manner. The SCAC judge acknowledged that the failure to comply with ss. 10(a) and 10(b) of the *Charter* itself constitutes damage to the administration of justice, but he accepted the trial judge's conclusion that in all the circumstances the breaches did not warrant a remedy. That conclusion is entitled to deference from the SCAC, and ultimately from this Court.

[23] Speaking for a unanimous court in *R. v. Bellusci*, 2012 SCC 44, Justice Fish elaborated on the standard of review regarding a trial judge's choice of remedy for a *Charter* breach:

> [17] It is well established that a trial judge's order under s. 24(1) of the *Charter* should be disturbed on appeal "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": *R. v. Regan*, 2002 SCC 12 (CanLII), [2002] 1 S.C.R. 297, at para. 117; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, at para. 87.
>
> [18] That this is the appropriate standard of review was unanimously reaffirmed by the Court, citing *Regan*, in *R. v. Bjelland*, 2009 SCC 38 (CanLII), [2009] 2 S.C.R. 651 (Rothstein J., at para. 15; Fish J., at para. 51). Speaking for myself and Justices Binnie and Abella, dissenting in the result, I elaborated as follows on the agreed standard of review:
>
> > On an application under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, once an infringement has been established, the trial judge must grant "such remedy as [is] appropriate and just in the circumstances". The remedy granted must vindicate the rights of the claimant, be fair to the party against whom it is ordered, and consider all other relevant circumstances. Appellate courts may interfere with a trial judge's exercise of discretion only if the trial judge has erred in law or rendered an unjust decision. This is particularly true of remedies granted by trial judges under s. 24(1) of the *Charter*, which by its very terms confers on trial judges the ***widest possible discretion***. Finally, appellate courts must take particular care not to substitute their own exercise of discretion for that of the trial

> judge merely because they would have granted a more generous or more limited remedy. [Emphasis in original; para. 42]

[24] There is nothing in the record here which suggests that the trial judge misdirected himself or that his decision was so clearly erroneous as to constitute an injustice. The SCAC was right not to interfere.

Lost Evidence/Late Disclosure:

[25] Mr. Boliver complains that he was given late disclosure of the evidence of a Crown witness, Arden Weagle, who accompanied the police on the evening in question. Mr. Weagle was a layperson whose existence was disclosed to Mr. Boliver's counsel. The Crown did not initially intend to call Mr. Weagle who had made no record of the evening's events, but the Crown did so in response to Mr. Boliver's various *Charter* motions.

[26] After noting that Mr. Boliver's counsel was well aware of Mr. Weagle's presence at the scene when Mr. Boliver was arrested, the trial judge described the accommodation extended to Mr. Boliver:

> [102] Finally, Mr. Weagle's testimony was adjourned to a much later date (August 31, 2011), a period of four and one half months after the prior (April) Court date, to ensure that Counsel for the accused had ample time to prepare, even within the context of this Application. Any inconvenience, or potential inconvenience, or prejudice to the Applicant, whether perceived or actual, would have more than been cured by the combination of the above referenced remedial measures, most importantly the lengthy delay in the actual taking of Mr. Weagle's evidence, and the additional option which was offered to Counsel for the accused, namely, the option of re-opening his case (which had been closed) if he felt it necessary to do so upon the conclusion of Mr. Weagle's evidence.
>
> [103] Finally, it may be sufficient to point out that both Messrs. Naugler and Weagle were examined and cross-examined extensively in the course of this Application. The benefit of this testimony is now available to the accused when his trial (with respect to the charges that he faces) takes place.
>
> [104] There is nothing in the Applicant's contentions either in relation to disclosure made or not made with respect to either Mr. Weagle or Mr. Naugler, that gives rise to an inability or an impediment to the Applicant's ability to make full answer and defence with respect to the offences with which he is charged.

[27] Challenging trial fairness as the basis of non-disclosure usually obliges the defendant to demonstrate actual prejudice to his ability to fully answer and defend

on a balance of probabilities (*R. v. Korski*, 2009 MBCA 37, ¶ 90; *R. v. Bjelland*, 2009 SCC 38, ¶ 20-21).

[28] In this case, Mr. Boliver argues that he would have used different tactics at trial preparation and trial. He says that if he had Mr. Weagle's statement, he may have questioned police witnesses differently in preparation for trial. He says Mr. Weagle's evidence could have allowed him to challenge the credibility of police officers. He continues that Mr. Weagle may have been a source of other lay witnesses. He says he would not have called Mr. Boliver's brother as a witness, to prove a failure to give reasons for arrest, had he known of Mr. Weagle.

[29] Four points can be made in reply. First, and to repeat, it is clear from the evidence – and the trial judge's findings – that Mr. Boliver's counsel was well aware that Mr. Weagle was present with police on the night in question. Second, it is not apparent how Mr. Boliver's speculative argument about the possible benefit of challenging the police with Mr. Weagle's statement and/or testimony could not be secured by an adjournment and the recalling of witnesses. Third, it is not obvious what possible prejudice Mr. Boliver sustained by calling his brother as a witness to prove what Mr. Weagle could prove. Finally, there were numerous lay witnesses to the fracas outside the Bridgewater Mall. A number were called. Many of them would be known to Mr. Boliver and his family who were partying with those people. That Mr. Weagle may have known someone else who could have given materially different and credible testimony is sheer speculation.

[30] Again, the trial judge's choice of how to accommodate an accused is a matter of discretion to which deference is owed. As the Supreme Court described in *Bjelland*:

> [20] Before being entitled to a remedy under s. 24(1), the party seeking such a remedy must establish a breach of his or her *Charter* rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to s. 7. Section 7 of the *Charter* protects the right of the accused to make full answer and defence. In order to make full answer and defence, the Crown must provide the accused with complete and timely disclosure: see *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. The purpose underlying the Crown's obligation to disclose is explained by Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589 (CanLII), 237 C.C.C. (3d) 514, at para. 26:
>
> > Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate

> opportunity to respond to the prosecution case and that in the result the verdict is a reliable one.

[21] However, the Crown's failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show "actual prejudice to [his or her] ability to make full answer and defence" (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 74) in order to be entitled to a remedy under s. 24(1).

[22] While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly. In *R. v. Harrer*, 1995 CanLII 70 (SCC), [1995] 3 S.C.R. 562, McLachlin J. (as she then was) provided guidance on what is meant by trial fairness. She stated, at para. 45, that:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused. [SCC Emphasis]

[31] The trial judge concluded that Mr. Boliver was not prevented from making full answer and defence. He did not find a breach of s. 7 of the *Charter*. Those conclusions are well supported in the record. Again, the SCAC judge was right not to intervene.

[32] Similarly, the "lost evidence" from the video that operates simultaneously with deployment of the taser did not materially affect Mr. Boliver's ability to defend the charges. There was ample other eye witness testimony available to the trial judge. As the Manitoba Court of Appeal remarked in *R. v. Kociuk (R.J.)*, 2011 MBCA 85, aff'd 2012 SCC 15:

> 21. The law with respect to a lost evidence motion is uncontroversial. Not every loss of relevant evidence will necessarily infringe on an accused's right to make full answer and defence. As recognized by the Supreme Court of Canada in *La*, "owing to the frailties of human nature, evidence will occasionally be lost" (at para. 20). When evidence is lost or missing, the Crown has an obligation to explain that loss and satisfy the trial judge that it was not due to unacceptable negligence or an abuse of process. ***Where the Crown has satisfactorily explained the loss, the onus shifts to the accused who, in order to be successful, "must establish actual prejudice to his or her right to make full answer and defence"*** (at para. 25). Sopinka J., for the majority, also explained in *La* that the principal

> consideration, in relation to whether the explanation of the Crown is satisfactory, "is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence" (at para. 21).
>
> [Emphasis added]

Also see: *R. v. Bradford* (2001), 139 O.A.C. 341 (Ont. C.A.) at ¶ 8, leave to appeal ref'd, [2001] S.C.C.A. No. 131, and *R. v. Dulude* (2004), 189 O.A.C. 323 (Ont. C.A.), beginning at ¶ 25.

[33] The trial judge recounted the efforts of the police to retrieve the taser-related video. He was satisfied with their efforts. There was no "unacceptable negligence" by police. The trial judge was also satisfied that Mr. Boliver was not prejudiced by the loss of the video – which may have been unhelpful to Mr. Boliver in any event. There were numerous witnesses present when Mr. Boliver was tasered. Mr. Boliver was not prevented from making full answer and defence.

[34] The SCAC judge made no error in declining to disturb the trial judge's conclusions with respect to lost evidence.

Facts and Credibility

[35] Many of Mr. Boliver's submissions invited the SCAC judge to overturn findings of fact and mixed findings of fact and law. He declined to do so. He was right. Credibility findings are findings of fact that cannot be overturned absent palpable and overriding error (*R. v. Rahman*, 2014 NSCA 67, at ¶ 13). That applies to much of Mr. Boliver's attack on the trial judge's findings respecting what happened; what Mr. Boliver and the police did; and whether trial fairness was maintained. The SCAC judge did not have to recite the evidence again in detail. He said that he had reviewed the evidence, and was persuaded that there were no grounds to interfere. The record supports him.

[36] I would grant leave, but dismiss the appeal.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.