

Date: 2002-03-12

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Herridge, 2002NSPC005]

HER MAJESTY THE QUEEN

versus

EVERETT HERRIDGE

DECISION
s. 430(4) Criminal Code

HEARD: before the Honourable Judge A. Peter Ross, Provincial Court of
Nova Scotia, Sydney, Nova Scotia, January 29, 2002, February
26, 2002

DECISION: March 12, 2002

RELEASED: March 12, 2002

COUNSEL: Gerald MacDonald, for the Crown
Everett Herridge, on his own behalf

INTRODUCTION

- [1] Mr. Herridge was charged with mischief by wilfully damaging tires on a motor home and motor vehicle of his next door neighbour, Mr. Louis MacQuaid. The incident is alleged to have occurred at Mr. MacQuaid's property, 26 Forman Street, North Sydney on September 6th, 2001. Mr. Herridge first appeared before the Court on October 23rd, 2001, entering a plea of not guilty. The trial was conducted on two days, January 29th and February 26th, 2002 in Provincial Court in Sydney.
- [2] The issues in this case are quite straight forward. The facts are not complicated, though there are credibility issues. The Crown contends, and its witnesses testify, that Mr. Herridge slashed the tires on Mr. MacQuaid's vehicles late one evening, was caught in the act by Mr. MacQuaid, who recognized him, and fled into his own yard. The Defendant contends that he was nowhere near Forman Street at the time of the offence, testifying, with his wife in support, that he was looking after a house in another part of town. He thus presents an alibi defence, implicit in which is the assertion that Mr. MacQuaid is mistaken in his identification of the true culprit. This denial is bolstered by character evidence.

THE EVIDENCE

- [3] The order of the witnesses also provides a logical sequence for a consideration of the points in issue, and I will thus touch briefly on certain portions of testimony, beginning with the complainant.
- [4] Louis MacQuaid resides at 26 Forman Street. This is a duplex, the other half being occupied by his ex-wife, Lisa Pittman. They share custody of their son Tony. Mr. MacQuaid stated that he, his ex-wife and his son had just arrived home at about 10:00 p.m. on September 6, 2001 when he heard the Defendant's dogs making noise. Looking out the window, he claims to have seen the Defendant with a knife looking around the rear corner of his motor home. He says the defendant jabbed three times into the side of the rear tire of the camper. He called out the defendant's name and exclaimed "what the f... are you doing" after which he says the defendant fled like a "scalded dog" into his own yard. Mr. MacQuaid's account was quite detailed. He described the Defendant's clothing as a three-quarter length light brown coat and jeans. He said the Defendant fell down twice when running to the yard, once over a wheelbarrow and again over a child's toy. Mr. MacQuaid said he had a clear view of the camper which was 15 to 20 feet away. He described the length and shape of the knife, and said that the defendant "turned right around ... it was him... like here and now." Apparently the last he saw of the Defendant, he was hiding near his own doorstep. The police were called.
- [5] Mr. MacQuaid spoke briefly about some past friction between he and the Defendant. He also offered the fact that one week before the damage to his tires, he had made a complaint to the SPCA about the Defendant's dogs.
- [6] The only direct eye witness identification of the Defendant comes from the complainant himself. Eye-witness identification must always be regarded with great care by the Court. It has been the source of many of the more notorious miscarriages of justice. In assessing the evidence here, I bear in mind that these events occurred at night. I am also mindful of the possibility that the alleged motive for this act - Mr. MacQuaid's complaint about the dogs - has another side, namely, that Mr. MacQuaid himself might be inclined

to regard Mr. Herridge as someone with an axe to grind, and thus the person who would do this damage to his property.

[7] This being said, the eye-witness identification of the complainant, even when divorced from the other evidence in the case, has considerable force. Firstly, Mr. MacQuaid was obviously sincere in his belief. The sincerity of this belief is evident at the very outset - he called out the Defendant's name when he saw the person at the rear of his motor home, and moments later when he told his son to call the police, he again named the Defendant. Thus he was certain in his own mind both then and at trial that the defendant was the person. Further, Mr. MacQuaid was familiar with Mr. Herridge, was capable of recognizing him, and claims to have done so. It is not a case of the identification of a total stranger some time after the event. Mr. MacQuaid gave every appearance in Court of being honest and sincere, and although it was after dark, there was evidence from he and other witnesses about lighting in the area and the proximity of the motor home and Mr. Herridge's yard to his vantage point. In cross examination, the defendant being self represented, Mr. MacQuaid responded in words such as "I don't know why you would do it". Strengthening the identification evidence is the assertion, which I accept, that the person who slashed the tire fled into Mr. Herridge's back yard and hid by his doorstep. This seems more likely to be the response of Mr. Herridge, upon detection, than the flight path which would be taken by someone who did not live there. As a final point, Mr. MacQuaid said that the lights in the Herridge residence were on just after the event, but were off by the time the police arrived.

[8] Mr. Herridge took the stand in his own defence. He said that at the time Mr. MacQuaid's tires were being slashed, he and his wife were minding house for Dr. David Richardson and Jane Sievenpiper. He began his testimony by saying that the first he heard of the matter was a phone call from the police three months later. Given the fact that Mr. Herridge was in Court on the 23rd of October to enter his plea, his is obviously mistaken about this. While not much turns on this point, he nevertheless claims to have been surprised at the allegations which were made against him. In support of his alibi defence he said that he was at the Richardson house in another part of town, with his wife, minding this house while its owners were away for a couple of days. He says they went to the Richardson house in the afternoon and returned home only for a period of one half hour at most, sometime around 6:30 or 7:00, long enough to attend to his dogs. This was his usual practice when he minded the Richardson house. This, he said, is why his house was in darkness that evening. He said he next returned home the following day at 9:00 a.m..

[9] In cross examination Mr. Herridge reiterated and emphasized that on the evening of September the 6th his dogs were out on only one occasion, between 6:00 and 7:00 p.m.. He acknowledged the obvious fact that if the dogs were out, only he or his wife would have let them out. He claimed to have nothing against Mr. MacQuaid, stating that he assumed the people who made the recent complaint about his dogs were from the senior citizen apartments nearby. He said "I don't know what I did to him to bring this on to me". He said he was not bothered by the fact that on another earlier, occasion he was warned by the SPCA not to have his dogs outside for extended periods, barking.

- [10] Nancy Noble is the Defendant's wife. She is employed by Dr. Richardson in his veterinary practice and confirmed that she and her husband mind house for them from time to time. She corroborated the Defendant's testimony about being at 61 Queen Street, house sitting, at the relevant time. She confirmed what he said about the usual practice of returning to their own home around 6:00 or 7:00 to attend to their dogs. She indicated that their two young children were with them at the Richardson home as well. She, too, indicated that she believed the recent complaint to the SPCA about the dogs had come from a senior citizen's residence. At the same time, it appears from Ms. Noble's evidence, and even from that of the Defendant, that there had been some direct dealings between them and Mr. MacQuaid and/or Mr. MacQuaid's ex-wife, about the dogs; in particular, that they had spoken about certain complaints within the previous month during which foul language was directed at Ms. Noble by Mr. MacQuaid. It seems distinctly possible that the Defendant felt some resentment toward Mr. MacQuaid over the dogs.
- [11] The evidence of Dr. David Richardson and Ms. Jane Sievenpiper was essentially to the same effect and I will speak of it together. They work in a veterinary practice in North Sydney and know the defendant both as a worker within that business, as a client, and as someone who has done work for them around their home. The first aspect of their evidence related to the defence of alibi. They confirmed that on the date and time when Mr. MacQuaid's tires were slashed they were out of town, with the defendant and his wife having been retained to mind their house in their absence. This service had been performed on a number of occasions. Obviously, though, they do not know when the defendant might come and go while house sitting. The fact that he was performing this duty does not deprive him of the opportunity to go to MacQuaid's home and do what is alleged. Nor, in my view, does the fact that he was "house sitting" make it less likely that the defendant, were he inclined to do such a thing, would do so on that particular night rather than on a night when he would be occupying his own dwelling.
- [12] The more significant feature of the testimony of these two acquaintances is the evidence of good character. Mr. Herridge is described as being trustworthy and conscientious, "absolutely honest" and "incapable of doing what he is accused of". Coming from such sources, who offered this evidence willingly and sincerely, this character evidence weighs in favour of the Defendant. It makes his denial more likely to be true.
- [13] When the trial resumed on February 26th, the Crown called two witnesses in rebuttal of the alibi defence. Lisa Pittman testified that she and Mr. MacQuaid arrived home around 9:30 to 9:45. She stated she let her own dog out and then heard the dogs barking next door. Evidently a Herridge dog got into Ms. Pittman's yard one time before. Mr. MacQuaid expressed concern that Herridge's dogs might get over the fence, and suggested she bring her dog in. When doing so, Ms. Pittman states that she saw the defendant's dogs, in the Herridge yard, but close to the fence. She said the area was sufficiently lit by two spotlights, one over each of the back doors of the duplex. She said neither the rose bushes nor the fence obstructed her view. On cross examination she acknowledged that she knew of no reason why Mr. Herridge would harm her or her son or Mr. MacQuaid, but she calmly and convincingly denied that she was lying or being coached in her evidence.

- [14] Anthony MacQuaid is the son of the complainant and Ms. Pittman. He remembers his father coming in and telling him to call 911 because Mr. Herridge had slashed his tires, after which he went out to view the damage. Moments prior to this, he was talking on the phone to his girlfriend, and noted the dogs barking. He said he was seated by a window with the blinds down, but with the window itself open. He said he had heard the dogs bark many times before, that he recognized the sound, and could tell what direction it was coming from. He described the barking as consistent and coming from more than one dog. Although uncertain of the exact time, he knows it was dark at the time, and is able to place this observation in sequence with other events that evening. When he went outside to view the damage, the dogs were no longer there.

CONCLUSION

- [15] It is sometimes said of a criminal trial that it is "a search for the truth". This claim may be somewhat exalted. It is, however, a search for an outcome based on recognized legal principles and rules of evidence. The burden of proof in a criminal case is very high. The Crown must prove each element of an alleged offence beyond a reasonable doubt. In this case the sole element at issue is the identification of Mr. Herridge as the perpetrator. Reasonable doubt is based on reason and common sense. It is logically connected to the evidence or absence of evidence. The burden of proof in a criminal case does not involve proof to an absolute certainty, although more is required than proof of probable guilt. The reasonable doubt standard falls much closer to absolute certainty than to proof on a balance of probabilities, but is not proof beyond any doubt. If anyone is capable of knowing the absolute "truth" here, it is Mr. Herridge. The Court is only able to render a verdict on the evidence employing the applicable standard.
- [16] Were the Crown's case to rest solely on the eye witness evidence of Mr. MacQuaid, I think an acquittal would be in order. However, there is additional corroborating evidence here which is compelling and highly incriminating. This is the evidence from Anthony MacQuaid and Lisa Pittman about hearing the dogs barking just prior to the discovery of the damage to the tires. Obviously these two witnesses bear a relationship to the complainant and would be naturally sympathetic to him. Nevertheless, they gave every appearance of being honest witnesses. They gave a clear account of their observations from that evening, without embellishment and without any apparent hesitation. They answered questions posed by the defendant directly and calmly. While their evidence was incriminating, they appeared to harbour no grudge or animosity towards the defendant. Had their purpose been to fabricate evidence against Mr. Herridge they could easily have claimed to have seen him, as Mr. MacQuaid himself stated. Further, while undoubtedly sympathetic to the complainant and sorry for his loss, it would not logically or likely follow that they would give false evidence in order to convict a man who was claiming to be innocent.
- [17] I have considered all the testimony relevant to this point - whether the dogs were out in the yard barking at approximately 9:30 to 10:00 p.m. on the date in question - including the evidence of the defendant and complainant. I find as a fact that Mr. Herridge's dogs

- were, at this time, outside in the yard, as described by Ms. Pittman and Anthony MacQuaid. Indeed, while Mr. MacQuaid said that it was "habit" to look out the window, he indicated that this followed upon hearing the dogs next door "go wild". It may well be that had they not, Mr. MacQuaid would not have looked outside and seen what he did.
- [18] This finding of fact has serious ramifications for the defendant's denial and alibi, for he himself readily acknowledges the obvious fact that it is only he or his wife who could have let the dogs out. Despite his profession that he let the dogs out only once that evening between 6:00 and 7:00 p.m., the evidence supports the fact that they were out again at a time just prior to the tires being slashed. Mr. MacQuaid noticed nothing unusual with his vehicles when he returned home that evening, and thus it is clear that the damage occurred in the short interval between the time he arrived home and the time he looked out the window.
- [19] The defendant did not assert that Mr. MacQuaid was lying. Rather, he stated that he was "mistaken" as to identity. Implicit in this argument is an acknowledgement that Mr. MacQuaid would be correct about simple and obvious things, such as the simple observation that the person, whoever it may have been, fled into the Herridge's backyard. As I noted above this seems an unlikely escape route for anyone who would be caught in the act of slashing the tires, but it seems fanciful beyond belief when considered in light of the fact that the Herridge's dogs were in the backyard barking at this very time. The fact that the person went into the Herridge backyard under such circumstances is itself probative of the identity of the defendant, and is consistent with the observation of the Crown witnesses that the dogs stopped barking shortly thereafter, and that the Herridge house went dark.
- [20] The defendant's denial, and his wife's evidence in support of the alibi, require careful consideration. The character evidence adduced by the defendant is worthy of careful consideration. These witnesses believe as strongly that Mr. Herridge did not commit this crime as Mr. Louis MacQuaid believes that he did. Ultimately the Court must weigh and assess the evidence and subject it to the requisite standard of proof. It has been said that no instrument has yet been devised to measure the intensity of human belief. While not a scientific procedure, a trial strives to be an objective and dispassionate weighing of the evidence, unaffected by prior knowledge or personal considerations or sympathies. Applying these principles, I find that the evidence proves beyond a reasonable doubt the identification of the perpetrator of this offence as Mr. Herridge. All other elements of the offence have likewise been proven beyond a reasonable doubt, including the date, place and ownership of the property. A finding of guilty will thus be entered on the record and the matter will proceed to sentence.

Dated at Sydney, Nova Scotia, this 12th day of March, A.D., 2002

A. Peter Ross, JPC