CANADA
PROVINCE OF NOVA SCOTIA

Case No. 1018556, 1018557
June 27, 2001

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

SEAN KELLY BREEN
[Cite as: R v. Breen, 2001 NSPC 17]

DECISION

HEARD BEFORE:	**The Honourable Judge C. H. F. Williams, JPC**
PLACE HEARD:	**Halifax Provincial Court**
IN THE MATTER OF:	**Criminal Code s. 266(b)**
COUNSEL:	**Mr. R. Woodburn, Crown Attorney** **Mr. K. Langille, Defence Attorney**

R v. Sean Breen

Delivered orally : June 27, 2001.
The Honourable Judge C. H. F. Williams , JPC

Counsel: Mr. R. Woodburn, Crown Attorney
Mr. Kyle Langille, Defence Attorney

Introduction

The defendant, Sean Kelly Breen, stands charged that he unlawfully assaulted Marie Gauthier and Evelyn Murray on May 30, 2000 in the Halifax Regional Municipality. At the close of the Crown's case the defendant makes motion for a directed verdict.

Admissible Evidence to Establish Threshold Liability

Lisa Cosgrove, the only witness presented by the Crown, was at all material times, a personal care worker at the Northwood Centre, in the Halifax Regional Municipality. On May 30, 2000, she and the defendant were working in a unit that accommodated Alzheimer patients. The persons who allegedly suffered the alleged assault, Marie Gauthier and Evelyn Murray were patients in the unit. They, however, did not testify.

Cosgrove testified that on the evening in question she and the defendant worked the unit and were charged with the care of Gauthier and Murray. She made preparations to wash the face and hands of Murray whom she observed to be drowsy and lethargic. The defendant was attending to Gauthier who was in a wheel chair. While she was in the process of cleansing Murray, who was laying in her bed, the defendant remarked that what she, Cosgrove, had done so far was sufficient. Cosgrove disagreed with the defendant's viewpoint. As a result, the defendant came over, swung Murray's legs over the bed's edge and attempted to have her sit up in the bed. He also pulled near to the bed her four- wheel walker. The defendant attempted to get Murray to stand but she was unable to do so and, as he placed her into her walker her knees buckled and she practically collapsed onto Cosgrove's lap who was kneeling behind her in a crouching position, supporting her weight and holding her.

The defendant remarked that Murray was going to spit at him and then Cosgrove saw him grab Murray's hair and pulled her up lifting her off Cosgrove's knees. Cosgrove then placed Murray on her bed, denounced the defendant's action and demanded that he leave the room. However, before he left the room the defendant lifted Gauthier, in a manner that Cosgrove would not have done and disapproved of, and transferred her from her wheel chair to her bed.

Cosgrove was perturbed by the defendant's conduct, left the room and went in search of the night supervisor. She did not locate the supervisor that evening and neither did she complete an incident report as was the protocol in reporting unusual incidents.

Issue

The issue that I must decide is whether, in my opinion, on the evidence adduced, there is sufficient evidence to put the defendant to his defence. In short, should the defendant succeed in his motion for a directed verdict.

Analysis

First, I am mindful of three fundamental constitutional and legal principles in all criminal prosecutions that hold:

> 1. The defendant is entitled to the right to liberty and security of his person in accordance with the principles of fundamental justice. ***Canadian Charter of Rights and Freedoms***, s.7.
>
> 2. The defendant is presumed innocent until proven guilty according to law. ***Canadian Charter of Rights and Freedoms,*** s. 11(d)
>
> 3. The defendant need not respond to the Crown's case until it has established a case to meet. ***Canadian Charter of Rights and Freedoms***, s.11(c).

These principles ensure that in our criminal justice system, citizens are not "put in jeopardy of conviction unless the prosecution has tendered a quantum of evidence sufficient to establish guilt beyond a reasonable doubt." See: David M. Tanovich**,** "*Monteleone's Legacy; Confusing Sufficiency With Weight"* (1994), 27 C.R. (4th) 174, and also**,** David M Tanovich, "*Upping the Ante in Directed Verdict Cases Where the Evidence is Circumstantial"* 15 C.R. (5th) 21.

Second, the test for a directed verdict was articulated in ***United States of America v. Shephard***, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424, at S.C.R. p.1080 as : " whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty." Further, a motion for a directed verdict should not be granted, "in any case in which there is admissible evidence which could, if it were believed, result in a conviction." However, over the years the *Shephard* test has been in a state of flux particularly on the issue of whether judges can weigh the evidence on a motion for a directed verdict. ***R. v. Mezzo***, [1986] 1 S.C.R.802, ***R. v. Monteleone***,[1987] 2 S.C.R. 154, ***R. v. Litchfield,*** [1993] 4 S.C.R.333**.**

Nonetheless, in ***R. v. Charemski*** 1998 CarswellOnt 1199, 15 C.R. (5th) 1 (S.C.C.), the Supreme Court of Canada addressed the issue of the appropriate role of a trial judge on a motion for a directed verdict in a case of circumstantial evidence. Mr. Justice Bastarache, speaking for the majority, stated at para. 3:

> For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the *Shephard* test (at p. 1080), the Crown must adduce *some* evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden. See Sopinka *et al.*, *The Law of Evidence in Canada* (1992), at p. 136.

Writing for the minority, Madam Justice McLachlin stated, also in ***Charemski*** at para. 20:

> A properly instructed jury acting reasonably is a jury that will convict only if it finds that the evidence establishes guilt beyond a reasonable doubt. To determine whether this could occur, the judge on the motion for a directed verdict must ask whether some or all of the

> admissible evidence is legally sufficient to permit the jury to find guilt beyond a reasonable doubt. In so doing, the trial judge is determining the *sufficiency* of the evidence. The question is whether the evidence is capable of supporting a verdict of guilt beyond a reasonable doubt. If it is not, the judge must direct an acquittal, since it would be impossible for a reasonable jury to convict legally on the evidence. To permit the trial to continue would be to impinge on the accused's right to silence and right to be presumed innocent until proved guilty, and to risk a verdict that would necessarily be unreasonable.

Further, she opined, also in ***Charemski***, *supra*., at paras. 22-24:

> 22 If the evidence is all direct evidence, the trial judge's task on a motion for a directed verdict is quite simple. An absence of evidence on an essential element will result in a directed acquittal. The existence of evidence on every essential element will result in a dismissal of the motion.
>
> 23 On a motion for a directed verdict, whether the evidence is direct or circumstantial, the judge, in assessing the sufficiency of the evidence must, by definition, weigh it. There is no way the judge can avoid this task of limited weighing, since the judge cannot answer the question of whether a properly instructed jury could reasonably convict without determining whether it is rationally possible to find that the fact in issue has been proved....
>
> .....
>
> The difference between the judge's function on a motion for a directed verdict and the jury's function at the end of the trial is simply this: the judge assesses whether, hypothetically, a guilty verdict is possible; the jury determines whether guilt has actually been proved beyond a reasonable doubt.
>
> 24 This limited judicial weighing at the stage of a motion for a directed acquittal does not infringe the jury's role of determining as a matter of fact whether that guilt has been established.

It therefore seems to me, from a reading of ***Charemski*** that in cases of direct evidence the issue of weighing the evidence does not arise. If there is some admissible direct evidence on all the constituent elements of the offence that is capable of supporting a verdict of guilt beyond a reasonable doubt that will be sufficient evidence to put the accused to answer the case against him. If the evidence does not establish a threshold reliability of guilt, the sufficiency test, then it is impossible for it to meet the ultimate reliability standard, proof beyond a reasonable doubt. As at this stage I do not weigh the evidence or assess the credibility of the witness her testimony is presumed to be true and on the threshold reliability standard if she presents some admissible direct evidence on all the constituent elements of the offence her testimony would satisfy that standard. See also David Tanovich, "*Upping the Ante in Directed Verdict Cases...*" *supra*.

Thus, in the case at bar, charges of assaults, I think that the Crown must adduce sufficient legally admissible evidence on the issues of the direct application of force by the defendant to the persons of Gauthier and Murray, that the force was intentional, unlawful, and without their consents, in order to get beyond the barrier of the motion for a directed acquittal. To address these issues, as put by McLachlin J., in ***Charemski***, *supra.*, at para. 35:

> "'sufficient evidence' must mean sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt; merely to refer to "sufficient evidence" is incomplete since "sufficient" always relates to the goal or threshold of proof beyond a reasonable doubt. This must constantly be borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case.

In my view, here, the Crown must adduce sufficient evidence to establish the identity of the recipients of the alleged force and their requisite mental states vis-a-vis the accused and the applied force. By "identity" I mean the actual existence of the persons, Murray and Gauthier, and who can state that they were the recipients of the alleged force at the time and place alleged. Here, in my view, it would be impossible to discuss the commission of an assault, in law, unless one has evidence capable of supporting a finding beyond a reasonable doubt, that the recipients of the perceived delict were mindful of the applied force and did not sanction it. I think that an assault, in law, presupposes not only a culpable state of mind. Generally, it also presupposes parties who are capable of making choices as to who should or should not touch them. Thus, in my view, it is critical, in an assault prosecution, that the Crown adduce legally sufficient and admissible evidence to establish the identity of the recipient of the force. Without "identity" we cannot meaningfully discuss the essential element of consent and the attendant physical and emotional sensations. Here, we have only a touching of other persons as perceived subjectively by an onlooker to be forceful. That alone, in my opinion, is not evidence on the sufficiency test capable of supporting, in law, a conviction for assaults.

Conclusion

On the evidence adduced, there is no legally admissible evidence on the essential element of consent. Nonetheless, on the legal test of sufficiency I must determine whether *all* the admissible evidence <u>*could*</u> support a verdict of guilt beyond a reasonable doubt, not whether the evidence <u>*does*</u> support that ultimate threshold. Consequently, in my opinion, a properly instructed jury acting reasonably, on the authorities cited and the analysis that I have made, and on the evidence adduced, "could [not] return a verdict of guilty."

In the result, in my opinion, the case against the accused for assaults on Marie Gauthier and Evelyn Murray has not been made out and accordingly there is no case for him to answer. The motion for a directed verdict is granted, the trial is terminated, the charges against the defendant are dismissed and he is acquitted.