PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Ross*, 2019 NSPC 78

Date: 20191217
Docket: 8249913
Registry: Kentville

Between:

Her Majesty the Queen

v.

Andrew Ross

Judge:	The Honourable Judge Ronda M. van der Hoek
Heard:	November 15, 2019
Decision	December 17, 2019
Counsel:	Jim Fyfe, for the Crown Kyle Williams, for the Defendant

By the Court:

Overview

[1] After driving Ms. Henderson's car into a guardrail, Mr. Ross left the vehicle with the keys and the two argued on the side of a 100 series highway as she tried to retrieve them. Upon grabbing the keys from his hand, it is alleged, he pushed her shoulder and she fell to the ground. As a result, Mr. Ross is charged with committing assault contrary to section 266(b) of the *Criminal Code*, R.S., c. C-34.

[2] At trial the Crown called three witnesses: Ms. Henderson, the complainant, Mr. Raymond Hartery, a Good Samaritan who observed the altercation and called police, and Constable Peters, the attending officer.

[3] Mr. Ross testified, denying he pushed Ms. Henderson, offering instead that she must have fallen by accident or due to inadvertent, non-intentional, contact he may have made with her as he turned to walk away. Finally, he also suggests he may have touched her in self defence.

Issue

1. If it is found that he did touch Ms. Henderson, was it accidental to which criminal liability does not attach?

2. Is self defence available in the circumstances?

Decision

[4] After considering all the evidence, I found Ms. Henderson a credible witness who provided reliable evidence on the essential elements of the offence of assault. I reject Mr. Ross' evidence and, based on the evidence I do accept, find he intentionally or recklessly touched Ms. Henderson. Neither accident nor self defence are made out, and as a result, he is guilty of assault.

The Law

[5] According to section 265(1) of the *Criminal Code*, an assault occurs when a person, without the consent of another person, applies force intentionally to that other person directly or indirectly.

[6] Case law has clarified the hallmarks of assault. It arises from the least touching, the strength of which is immaterial, it must not be done by accident or through honest mistake, and it must relate to the application of the force or the manner in which the force is applied. See: *R. v. Dawydiuk*, 2010 BCCA 162, *R. v. Palombi*, 2007 ONCA 486, *R. v. Ewanchuk*, [1999] 1 SCR 330, 131 C.C.C. (3d) 481 (S.C.C.), *R. v. George*, [1960] SCR 871, 1960 CanLII 45 (SCC), and *R. v. Burden*, (1981) 25 CR (3d) 283 (BCCA).

[7] On the facts of this case there is certainly no suggestion Ms. Henderson consented to Mr. Ross touching her. So, the court must consider whether it accepts her testimony that he did so intentionally as she described. In that context I must also decide if the touching occurred as she described – a downward push delivered with force sufficient to cause her fall.

Accident

[8] While Mr. Ross says he did not touch Ms. Henderson at all, he offers the alternative argument that *if* he did do so, the touching was as a result of accident. The Supreme Court of Canada in *R. v. Gauthier*, 2013 SCC 32, addressed situations where defence counsel raises alternative defences that are incompatible with its principal theory. The Court concluded such defences should not be excluded if they benefit from an air of reality.

[9] I find that Mr. Ross is permitted to advance the defence of accident. Accident does meet the air of reality test, it being possible, based on his evidence that he touched her while turning after a heated argument and as a result was not aware that he did so. However, an air of reality is not on its own sufficient to prove he did not touch her intentionally. After considering all the evidence I will address the availability of self defence.

The Evidence

[10] It is common ground that Ms. Henderson delivered the couple's premature twins one short month before this incident, and while these parents regularly stayed in the city near the hospital, they did from time to time travel to their respective homes in the Annapolis Valley. It is also worth noting that the two were separated and only their children bound them together.

[11] On the date of the offence, Mr. Ross drove Ms. Henderson's van to the Valley because she, impacted by a large abdominal incision due to delivering the children, was unable to drive. There is no dispute the two argued about various subjects as they travelled along Highway 101, however that is the point where their evidence, in large measure, parts ways.

[12] Ms. Henderson testified that she was surprised when Mr. Ross suddenly drove her van into the highway guardrail while travelling at speeds, she estimates, between 100 and 105 km/h. She was very upset because this was her first new vehicle.

[13] Mr. Ross testified that Ms. Henderson was hitting him while he was driving and that is the reason he pulled the van to the roadside, "bumping" the guardrail. Ms. Henderson denies hitting Mr. Ross while the van was in motion.

[14] Mr. Ross says after the vehicle stopped, he left it and went to the rear door with a plan to retrieve his tools and walk away. While he was standing there, he says Ms. Henderson left the van. He denies pulling her from the van or assisting her to leave it in any manner.

[15] Ms. Henderson testified that when the van stopped, Mr. Ross opened the door and started to leave, taking her car keys with him. As he was doing so, she tried unsuccessfully to retrieve her keys by grabbing at him. She agreed that she was very upset about the damage Mr. Ross caused to her van and does not deny yelling at him while grabbing at him for her keys. She likewise agrees that Mr. Ross went to the rear of the vehicle to remove tools, adding they were tools she paid for which increased her anger because there were ongoing issues between the two regarding car seats and the financial needs of the babies.

[16] Ms. Henderson tried but could not leave the vehicle by the passenger door because it was against the guardrail. Despite the abdominal incision, she climbed over the vehicle's middle console and left the vehicle.

[17] On the side of Highway 101 she says she was upset and reaching trying to get the keys from Mr. Ross who was laughing at her, smirking and trying to increase her upset by engaging in mocking behaviours. She says she was in

excruciating pain and getting more upset. She demonstrated how the taller Mr. Ross held the keys above her head so that she could not reach them.

[18] Mr. Hartery, a "Good Samaritan" was driving on Highway 101 and pulled his car to the roadside when he saw a man and a woman engaged in an altercation. He called police.

[19] Mr. Ross was asked what the Good Samarian parked across the street would have seen, he says, we "were on the highway roadside bouncing around". He testified that one could tell it was a domestic dispute because Ms. Henderson was throwing things on the side of the highway. Those things, he says, were his tools. He says he eventually turned his back on Ms. Henderson and walked away. When he turned to look back, he saw her lying on the ground, partway on her stomach and her side, kicking, yelling and screaming. He says he did not push her.

[20] Mr. Hartery says he saw a man drag a woman from a van that was parked on the side of the highway facing oncoming traffic. He watched as the man pushed the woman to the ground and the argument continued after the push. He did not notice keys or tools.

[21] Ms. Henderson testified that she eventually reached up and grabbed her car keys from Mr. Ross, and when they were in her hand, he pushed her shoulder in a

downward motion while he turned away from her. She described the action as "shoving her to the ground as he turned away – all in one fluid action". The push, she says, was not an accident and as a result of the fall she injured her knees and experienced a great deal of pain and difficulty due to her surgery incision.[1]

[22] Under cross examination Ms. Henderson says she does not recall if Mr. Ross had a toolbox in his hand when she was pushed because she was focused on the keys. Likewise, she was not focusing on the positioning of his hands, or whether he pushed then turned or did both actions at the same time. She does know he pushed her. She also reminded the defence counsel, if her words were less than clear, that English is not her mother tongue.

[23] Constable Peters attended at the roadside and found Ms. Henderson in the van crying with injuries to her knees. She also saw Mr. Ross walking down the highway away from the van and arrested him. She photographed Ms. Henderson's injuries and the damaged van parked against the guardrail facing forward in the direction of the traffic flow.

Position of the Parties

The Defence:

[1] Exhibit 1: *Photographs of Injuries*

[24] Defence counsel says Mr. Ross did not intend to push Ms. Henderson and there was in fact no contact. However, if the court finds there was contact, it occurred incidentally as he turned away from Ms. Henderson or it occurred for the purpose of self defence as she was trying to take her keys from him *after* having been struck by her in the van as she tried to grab the keys.

[25] He also argues Ms. Henderson's testimony suffered from a material error in her description of being pushed by Mr. Ross versus Mr. Ross turning and pushing her. He concludes that while Ms. Henderson says she was pushed, she cannot say what was in Mr. Ross' mind at the time.

***The Crown*:**

[26] The Crown says the Court cannot ignore the car accident as the starting point in this incident. Mr. Hartery saw a domestic incident involving a man pushing a woman to the ground. He certainly misapprehended such things as the direction of the car, and says the argument continued after the push, certainly not consistent with the order of events according to either Mr. Ross or Ms. Henderson, but while unreliable on these and other aspects, his testimony may still be accepted in part regarding a push.

[27] As for Ms. Henderson, the Crown argues that she was a good witness, clear that she was pushed and went to the ground while Mr. Ross laughed at her and left. English is not her mother tongue, but her account was credible and reliable and not successfully challenged on cross examination. Mr. Ross' evidence should be rejected as nonsensical in the circumstances.

Assessing the Evidence

The Law

[28] Mr. Ross benefits from the presumption of innocence. The Crown bears the heavy burden of proving his guilt beyond a reasonable doubt. That onus never moves to Mr. Ross asking him to prove he did not commit the offence. In deciding whether the Crown has met its burden, I must consider the whole of the evidence and not engage in a credibility contest where I simply prefer one side to that of the other.

[29] Proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (*R. v. Lifchus*, [1997] 3 S.C.R. 320) Instead, the burden of proof lies "much closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, [2000] 2 S.C.R. 144). Finally, a "reasonable doubt does not need to be based on the

evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt". (*R. v. J.M.H.*, 2011 SCC 45)

Assessing the Testimony of Mr. Hartery

[30] I will dispense with Mr. Hartery's testimony in short order. While he made a call to police, he did not provide a statement to them until some seven months later. As a result, there are incomprehensible errors in his recollection of what he saw that day. For example, Mr. Hartery thought he saw a man pull a woman from a vehicle. Neither Mr. Ross nor Ms. Henderson say this occurred and in fact deny it did. He thought the vehicle was facing oncoming traffic, yet Mr. Ross, Ms. Henderson and the arriving officer do not support such positioning of the vehicle.

[31] The only point where his testimony accords in some manner with that of another witness is seeing the man push the woman to the ground. His reliability is in doubt due to these numerous inconsistencies, but I am aware I can accept some, none, or all of what a witness says. Since neither Mr. Henderson nor Mr. Ross agree with his first two observations, it is difficult to consider him a reliable witness on those points, however I do find that whatever he saw caused him enough concern to call police. I also find that he truly believes he saw that which he testified seeing. His incorrect recollection has become firm in mind over time,

and serves as an important reminder of why statements must be taken from witnesses when memory is fresh, while also demonstrating the danger of a court relying on testimony from a witness who has not provided one contemporaneous to observed activity.

Assessing the Evidence of Ms. Henderson

[32] Overall, I found Ms. Henderson a credible, believable witness. She answered all questions asked of her clearly and carefully. I was also aware of her language challenges.

[33] Discrepancies in her testimony were, I find, inconsequential. That she was pushed on the shoulder resulting in the fall and the resultant injuries to her knees I accept. Mr. Ross' hands were above her holding the keys, taking advantage of his height a push downwards in the circumstances is not incomprehensible. That he was playing "keep away" with her keys also suggests his state of mind while dealing with the vulnerable woman whose property he had just damaged and whose life was also put at risk on the edge of busy highway.

[34] On cross-examination, Ms. Henderson said she was unsure whether Mr. Ross had a toolbox in his hand because she was focused on retrieving her keys. Her testimony, I note, did support Mr. Ross' retrieval of tools and her feelings

about them. I do not recall her being asked if she threw some of them away at roadside so there was little real focus on the tools.

[35] Ms. Henderson says she was not focused on Mr. Ross' hand positioning other than to see the keys, and that accords with common sense, however she was aware that he used a hand to push her.

[36] Defence counsel takes issue with her memory and testimony about grabbing the door when Mr. Ross first left the van and she tried to follow him. She says he got out and I find her grabbing the van door does not mean it did or did not shut, but simply that she grabbed the door and exited the vehicle.

[37] I did find her evidence somewhat impacted by her stated lack of memory and while credible, her reliability was certainly not perfect. That said, I can expect some unreliability given her state at the time – fragile in both body and mind – after the accident on the highway and the recent traumas involving surgery and childbirth. I am aware that I can accept some, none, or all of what she says. I accept that she did not want to be with Mr. Ross in the van that day and was very upset when he drove it into the guardrail. That he left the vehicle taking her car keys, leaving her trapped inside, I also accept. I find these actions cruel, insensitive and demeaning.

[38] Her testimony that she saw him "go for the tools" while she was still in the car speaks to her credibility, as she says she got out of the van as soon as he did so. To her credit, she did not agree that she was dragged out of the car as the Good Samaritan testified.

[39] I do not accept that she dropped to the ground of her own accord given her health. The complete lack of evidence of anything she may have tripped over supports that conclusion.

Assessing the Testimony of Mr. Ross

[40] Mr. Ross testified, and I must apply the three-step test in *R. v. W.D.*, [1991] 1 SCR 742, when assessing his credibility. It is as follows:

> i. First, if I believe the evidence of the accused, obviously I must acquit.
>
> ii. Second, if I do not believe the testimony of the accused but am left in reasonable doubt by it, I must acquit.
>
> iii. Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[41] The test was clarified and explored in elaborate detail in an excellent and oft-cited article prepared by Justice David Paciocco of the Ontario Court of Appeal – "*Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment",*

(2017) 22 Can. Crim. L. Rev. 31. At paragraph 72, Justice Paciocco wrote as follows:

> i. If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;
>
> ii. If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;
>
> iii. You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and
>
> iv. Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

[42] Before considering his testimony, I will first consider the availability of self defence provided for in section 34(1) of the *Criminal Code***:**

> 34 (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.

[43] Mr. Ross' claim that he may have used force in self defence does not mean that he bears a legal burden to establish it. However, there must be an air of reality to the defence, and if so, the Crown bears the onus of disproving the defence beyond a reasonable doubt.

[44] Mr. Ross' evidence, on careful analysis, does not support this defence. His evidence did not establish that he pushed her to defend himself from her actions but rather may have done so as he walked away after she retrieved her keys. He does not deny that he was holding Ms. Henderson's keys in the air taunting her and not allowing her access to them, and Ms. Henderson had them in her hand at the time she fell to the ground. Her efforts to obtain her property did not require him to defend himself from her or those efforts, he should have simply given her the keys. His actions were not reasonable in the circumstances. I do not find that he was defending himself as there was no need to do so. As a result, I do not need to consider this defence in any more detail.

[45] Finally, any earlier attempt by Ms. Henderson to grab at him in the van for the purpose of obtaining the keys before he exited does not aid self defence outside the van. He was not defending himself or his property at either time while engaged in these actions, rather he was depriving her of her property as a means of taunting her.

Credibility and Reliability

[46] Assessing Mr. Ross' credibility, I do not find him a credible or a reliable witness as it relates to important aspects of the case. He says he did not push Ms. Henderson but does not deny taunting her and keeping her keys from her when it

was his stated intention to bring the van to roadside to leave her and walk away. While one does not preclude the other, I find his evidence was self serving and untrustworthy, and I reject it as not raising a doubt. I simply do not believe him.

[47] At once he says he did not push her or touch her but says it could have happened as he turned. I cannot see how this assertion is possible as he fails to remember it or did it without an awareness. Based on the accepted evidence of Ms. Henderson that he pushed her in a downward motion, I cannot accept that he would not be aware of touching her in such a manner.

[48] Mr. Ross smashed Ms. Henderson's car, took her keys and taunted her. If he wanted to leave, he could have done so in a less dramatic manner by simply parking at a highway exit. He also says he was not overly affected by her upset, and that I do not accept as it is inconsistent with his reason for taking the dramatic step of pulling the car to the side of the highway far from an off ramp. If she was hitting him while driving, which I do not accept, why not be upset by it? To say the opposite seeks to minimize his own actions by casting her in a negative and reckless light.

[49] Finally, I simply do not accept, after carefully listening to his testimony, that he accidentally pushed her down to the ground and walked away not noticing that

she was on the ground on the side of the busy highway. It is likewise implausible in the context of accident, that when he did finally notice her there, he continued to walk away not immediately going to her aid.

[50] While I reject his testimony, I am still required to consider all the evidence and only convict if I am satisfied based on the evidence I do accept. I find Mr. Ross intentionally pushed Ms. Henderson's shoulder after she took her keys from his hands held above her. Seeing them gone, he pushed her in a downward motion and turned to walk away. I accept Mr. Hartery's evidence that he saw a push and a fall. I accepted Ms. Henderson's testimony that she was pushed and fell. While Mr. Ross may not have intended the resultant fall to the ground, it occurred as a result of his intentional push. The push may not have led to the same consequences had Ms. Henderson been of sound body, but a push without consent is an assault on these facts, and that I find has been proven beyond a reasonable doubt.

Judgement accordingly.

Ronda M. van der Hoek, JPC