

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v. Basso*, 2022 NSPC 3

**Date:** 20220228

**Docket:** 8215859

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Laurence Gary Basso

<b>Judge:</b>	The Honourable Judge Paul Scovil,
<b>Heard:</b>	September 20, 21, 22, 23, 24, 27, in Halifax, Nova Scotia and December 17, 2021, in Bridgewater, Nova Scotia
<b>Decision</b>	February 28, 2022
<b>Charge:</b>	267(b) Criminal Code
<b>Counsel:</b>	Peter Dostal, for the Crown James Giacomantonio, for the Defendant

**By the Court:**

[1] Joseph Patrice Simard was ejected from Metro Turning Point (MTP) homeless shelter in Halifax, Nova Scotia, for not following the rules of the shelter. Mr. Simard had nowhere else to go so he sat on a milk crate outside the door of the shelter and refused to leave the premises. The shelter then called the police to have Mr. Simard removed. From the time Constable Basso of the Halifax Regional Police pulled up in his police vehicle to when Mr. Simard was lying on the ground after being struck once by Constable Basso, less than four minutes had passed. As a result of an investigation of the Serious Incident Response Team (SIRT), who investigate allegations of police wrongdoing, charges were laid against Constable Basso.

[2] Constable Basso was charged that:

On or about February 25, 2018 at, or near Halifax, Nova Scotia, did in committing an assault upon Joseph Jean Marc Patrice SIMARD cause bodily harm to him contrary to section 267(b) of the Criminal Code.

**FACTS**

[3] Kendra Turvey was working at the Metro Turning Point (MTP) shelter on February 25, 2018. She was a Client Support Worker on the overnight shift. Joseph Patrice Simard was a resident there since December of 2017.

[4] During a bed check Ms. Turvey found Mr. Simard consuming alcohol. The policy of MTP was that residents were not allowed to have alcohol on their person while in the shelter. Residents could leave their bottles at the desk and pick them up when they exited. If you are found with alcohol you are banned from the shelter for 24 hours. It was a rigid policy with no exceptions, and Mr. Simard knew it.

[5] Ms. Turvey had Mr. Simard gather his things which consisted solely of a backpack and a plastic bag containing the bottle of vodka he was found with. Mr. Simard left MTP but stayed outside the exit door sitting on a milk crate. Ms. Turvey told him he could not stay on the property and had to leave.

[6] Ms. Turvey had called all the local shelters to see if she could find a place overnight for Mr. Simard. No places had a bed available. It was -2° celcius and starting to snow. The lack of beds elsewhere was communicated to Mr. Simard who

was determined to stay on the property and have the police take him to the drunk tank where he would be warm and safe for the night.

[7] Given that Mr. Simard refused to exit the property, Ms. Turvey called police to have him removed. She described Mr. Simard as quite intoxicated, at a level of eight out of ten. The recording of the call she made to 911 has her advising police dispatch of Mr. Simard being outside, quite intoxicated and a person who is not typically violent.

[8] Ms. Turvey was able to watch when Constable Basso arrived by way of video surveillance. She was also viewing Mr. Simard's and Constable Basso's interaction. She saw the two tussle over Simard's backpack and Constable Basso's fist striking Mr. Simard. This caused her to put on her coat and go outside. Ms. Turvey had sneakers on and could be seen having to use the police vehicle to maintain balance in the snow.

[9] When Ms. Turvey came outside Mr. Simard was lying in the snow and the officer was telling Mr. Simard to put his hands behind his back. She watched as the officer got Mr. Simard to his feet and placed him in the police cruiser. Constable Basso gathered Mr. Simard's belongings, which were a backpack and a plastic bag. The officer took a bottle of alcohol out of the bag and poured it out.

[10] After the officer had gone Ms. Turvey called Halifax Regional Police and obtained Constable Basso's name. She then called her supervisor and made her own notes regarding the incident. Additionally, Ms. Turvey filled out a Shelter Nova Scotia incident report regarding the incident.

[11] In her evidence Ms. Turvey testified that Constable Basso had said to her that Mr. Simard "was being an asshole and punched me in my leg." She also indicated that after the punch itself Constable Basso treated Mr. Simard with respect.

[12] Michelle Wheeler was called to the stand by the crown and confirmed the policy of MTP of ordering residents to leave if they have alcohol in their possession. Ms. Wheeler was the House Manager for MTP and the shift supervisor at the time. She also confirmed that there were some 20 cameras both inside and out at the MTP that recorded the daily ongoings. It was not unusual to be asked to retrieve portions of tapes for law enforcement officers. This could occur several times a week or several times a month. She was able to authenticate the video of the incident and confirm she had turned the same over to Sergeant Cheeseman of the Halifax Regional Police.

[13] Ms. Wheeler had an incidental contact with Mr. Simard several days after the incident. Visually she saw bruising around Mr. Simard's nose and eyes.

[14] Constable Basso transported Mr. Simard. After he arrived at the police station Mr. Simard was seen by Senior Operations paramedic Michelle Brown of Emergency Health Services (EHS). EHS had been called as a result of the altercation. Ms. Brown's job was to determine if Mr. Simard could be processed in cells or if he needed to be transported to hospital.

[15] Ms. Brown had asked Constable Basso what happened. Constable Basso advised her that Mr. Simard had assaulted him and that he struck Mr. Simard once. Constable Basso also said that Mr. Simard had remained on his feet and had not lost consciousness. Ms. Brown's on-site clinical determination was that Mr. Simard had soft tissue injury to the face as well as an amount of dried blood around the right nostril. His nose was midline and non tender.

[16] On cross examination Ms. Brown testified that Constable Basso had told her he had delivered a single strike to Mr. Simard, indicating "he punched me, I punched him."

[17] The court heard evidence from Special Constable Stephen Longtin, who was the booking officer on duty when Mr. Simard was brought in. Special Constable Longtin is francophone, as was Mr. Simard, and therefore there was considerable interaction between the two. Special Constable Longtin was asked to apologize to Constable Basso on behalf of Mr. Simard. A note was prepared by Special Constable Longtin which was given to Constable Basso.

[18] In both direct evidence and cross examination Special Constable Longtin gave testimony of Mr. Simard apologizing for his actions.

[19] Arguably the most important exhibit entered in this trial was the video of the incident that was retrieved from MTP. This exhibit was introduced through Sergeant Michael Cheeseman of the Halifax Regional Police, who had obtained it himself. Several other exhibits were introduced through Sergeant Cheeseman.

[20] Exhibits included Constable Basso's Initial Officer Report, the SBOR report (Subject Behaviour Officers Report), Constable Basso's officer notes, photos of Joseph Simard, photos of the scene, transcription of radio traffic between Constable Basso and the dispatcher, Mr. Simard's CPIC record and transcripts of audio recordings capturing Mr. Simard and Constable Basso in the Police Booking area.

Many of these exhibits were introduced through the lead investigator for the Serious Incident Response Team (SIRT). Mr. Gordon Vail, the investigator, is a retired RCMP officer. Mr. Vail introduced pictures of the scene taken in daylight, and with no snow on the ground. These gave a better appreciation of the topography in the immediate area of interaction between Constable Basso and Mr. Simard.

[21] Joseph Jean Marc Patrice Simard was on the receiving end of the blow delivered by Constable Basso. He had originally testified regarding the matter in December of 2018, at a previous trial. Sometime after that Mr. Simard passed away in British Columbia. His testimony from 2018 was introduced at this trial pursuant to Section 715(1) of the Criminal Code. As Mr. Simard was francophone, he was assisted by a translator at that trial.

[22] Mr. Simard arrived in Nova Scotia in November of 2017 and was homeless then and continued to be at the material times.

[23] Mr. Simard was a 55 year-old man, according to Mr. Simard's testimony, with no family in Nova Scotia. He was sheltering at the Metro Turning Point. He indicated on the day in question he had consumed a 26-ounce bottle of liquor he had hidden in his backpack, and was therefore asked to leave MTP. He knew the rules and that he would be out of the shelter for 24 hours.

[24] He exited the MTP and sat on a milk crate outside the door. The staff of MTP came outside and told him to vacate the premises. When he refused, they called the police. Mr. Simard testified he wanted the police to come and take him to the drunk tank. He knew there were no beds available in the other shelters. He knew there were no other places in the neighbourhood to take shelter in, and it was below freezing and snowing. He thought he would be safe in the drunk tank.

[25] Mr. Simard's memory of the incident is fragmented. He recalled the officer being in front of him and telling him that "we are not a hotel." He next recalled being face first on the ground with tight handcuffs on him.

[26] Mr. Simard's next recollection is being released the next day and not feeling well. He advised the police, who arranged for him to be taken to the hospital for examination. He was having problems with his balance and had pain in his face. He recalled being in the hospital less than 24 hours. When he was released Mr. Simard headed for a makeshift shelter that he created for himself for emergencies in the bush outside Metro Halifax. He stayed there for a few days after which he went back to

MTP. He felt he needed further medical attention. He was again transported to the hospital where he was diagnosed with a broken nose.

[27] In his testimony it was clear that what meager possessions he had in his backpack and plastic bag were extremely important to him.

[28] While he remembers little to nothing regarding the interactions he had at the booking area of Halifax Regional Police Department, he did testify that he had learned that when having problems like this it is best to co-operate with the police.

[29] The crown also called Constable Susan Conrad. Constable Conrad was off duty at the time of the incident, but was assigned on March 3, 2018, to partner with Constable Basso. The pair were delegated to assist the drug section with a possible take down of suspects in a trafficking case. The arrest of suspects was to take place near the International Airport. On the way back to downtown Halifax, Constable Basso had told her he had to go to the MTP to pick up a video. He further said that he had an interaction with a guy there and that the guy was a jerk. Constable Basso stated that this individual was drunk and that he had to arrest him.

[30] Before Constable Basso could retrieve the video from MTP he had been suspended from regular duties and had not been able to pick up the video.

[31] The defence called two witnesses, Constable Basso and an expert, Sergeant Keith.

[32] Constable Basso is 41 and a native of Cape Breton. He joined the Calgary Police Department at age 21 and remained with them until 2004 when he returned to Nova Scotia to work with the Halifax Regional Police. He received his initial five month's training with the Calgary Police Department.

[33] Constable Basso was familiar with MTP, going there either for specific calls or check ins on an almost daily basis.

[34] On the evening of this event Constable Basso responded to an unwanted person call at MTP. His information was that Mr. Simard had been removed from the shelter for consuming alcohol in his bunk and that the individual was refusing to leave the property. Constable Basso was working alone that evening.

[35] Dispatch had advised that there was no other unit to back him up on the call, but Constable Basso elected to go in any event.

[36] Constable Basso's testimony was that he pulled in along side Mr. Simard who was sitting on a milk crate outside the MTP door. Constable Basso rolled down his passenger side window of his marked police cruiser and told Mr. Simard that it was private property and that he had to go. Mr. Simard, on the other hand, wanted to be arrested.

[37] After several minutes Constable Basso exited his vehicle and stood in front of Mr. Simard. In Constable Basso's words, Mr. Simard was "verbally defiant" and refused to exit the premises. Constable Basso then states he took Mr. Simard by the shoulder and tried to get him to stand up to get him on his way.

[38] Constable Basso stated Mr. Simard "like he just went dead weight. Kind of threw himself to his knees and was like, I'm not leaving." Constable Basso compared Mr. Simard's actions to a child throwing a tantrum in a grocery store. Mr. Simard was kneeling in front of Constable Basso when Simard punched his right thigh "with a closed fist." Constable Basso later in his evidence said, "but to be honest, I wasn't even sure at that point what he had kind of punched me with."

[39] In cross examination, Constable Basso agreed that the punch he received from Mr. Simard was on the lower end of the scale. "I felt that I got punched, I looked down saw it, saw a hand and a fist then I stepped back and a delivered a strike."

[40] Later, Constable Basso would indicate he had no recollection of grabbing the arm he was punched with until after seeing the video. This was not in his notes as he did not recall doing that. When Constable Basso indicated this, he was reviewing the video on a frame-by-frame basis at 12:08 of the video.

[41] Constable Basso indicated throughout his evidence that he struck Mr. Simard with an open palm of his hand.

[42] In direct evidence, Constable Basso was examined on the information he had regarding Mr. Simard prior to his arriving at MTP. Mr. Simard's CPIC entry had a notice regarding him labeled "caution violent." Constable Basso stated, "I try not to rely on that kind of stuff too much." Constable Basso did indicate that violence was a potential in any call.

[43] Constable Basso, in both direct and cross examination, had no recollection of the interplay between himself and Mr. Simard regarding Mr. Simard's backpack. This is despite the back and forth of the backpack appearing in the video as pivotal and leading directly to force being applied.

[44] After being struck by Constable Basso, Mr. Simard fell to the ground. Constable Basso then handcuffed Mr. Simard, arrested him for assaulting a peace officer, and placed him in the rear of his police cruiser.

[45] Constable Basso gave a great deal of evidence concerning his training and how it impacted his concerns after being struck by Mr. Simard. He said that usually, such assaults would continue until the accused was subdued. Constable Basso felt he did not know what would come next after being punched in the thigh by Mr. Simard. His instinct, he said, and his training, was to end the confrontation as quickly as possible and place the person under control.

[46] Given Mr. Simard's hands were extended in front of him, Constable Basso had concerns that Mr. Simard could grab his leg for an easy take down. His position could be compromised if the incident turned to a struggle on the ground.

[47] In cross examination, Constable Basso agreed that Mr. Simard was about two or three feet in front of him when Mr. Simard was kneeling on the ground and that the backpack was closer to Mr. Simard, but between the two of them.

[48] After Mr. Simard was brought to his feet there was no further aggression shown. In fact, Constable Basso's evidence, as well as the video, shows Mr. Simard as being quite compliant.

[49] Constable Basso, as well, was advised of the apologies from Mr. Simard throughout the booking activity at Halifax Regional Police Headquarters.

[50] In cross examination the crown asked Constable Basso about a conversation that Constable Basso had with other officers after the incident. First, in the booking area Constable Basso described the incident as follows:

I'm like, "You gotta get off the property" and he went punched me in the leg. I was like really, is this what you want to do right now?"

[51] In the video of the booking area, you could see Constable Basso demonstrating the punch he received to his leg with a hard, loud smack. On cross examination, he agreed this was an exaggeration and that he was not recreating Mr. Simard's punch. Later in the video, Constable Basso says, "he punched," then "I hit him harder." This was followed by laughter in the booking area.

[52] Constable Basso denied that this was an indication that it was fair game for him to strike Mr. Simard back, but rather black humour in a difficult work arena.



[53] The defence also called an expert who was qualified to give expert opinion as follows: “To provide opinion about the training police officers receive concerning circumstances in which they may be viewed as acceptable under the National Use of Force Framework in using various levels of force, including when effecting an arrest.”

[54] The biography (curriculum vitae) of the expert, Sergeant Kelly Keith, was introduced to the court in Voir Dire to have him qualified as an expert. Sergeant Keith’s expert report was introduced at the Voir Dire as well.

[55] In reviewing the expert’s report tendered by the defence at the Voir Dire, I was left with a great number of reservations concerning the same. This included areas where Sergeant Keith attempted to usurp the role of the trier of fact and at other times crossed into opinions that were those of advocacy for the accused. At paragraph 14 of his report, Sergeant Keith stated that “if police officers were held accountable to hindsight 20/20 viewing of an incident it would paralyze them.” As indicated, this crossed the line out of what Sergeant Keith’s qualifications were into advocacy for an acquittal.

[56] At the end of the day, Sergeant Keith was qualified as an expert, and he was allowed to testify. The court was clear that the difficulties with the report, and any which arose with his testimony, would go towards the weight this court would assign it.

[57] Sergeant Keith’s testimony included a review of the National Use of Force Framework as well as an overview of police training regarding the use of force. He did confirm that police cannot use force out of anger or retribution. At one point in his evidence, Sergeant Keith indicated that Mr. Simard was in a position of disadvantage being on his knees while Constable Basso was on his feet. Elsewhere, he stated it was reasonable to perceive that Mr. Simard was going to take the legs out from under Constable Basso.

[58] Sergeant Keith’s viva voce testimony displayed less of the problems that this court had identified in his report at the Voir Dire to determine if he was a qualified expert. Nonetheless, his testimony raised concern regarding his overall objectivity and still came across as very much an advocate for Constable Basso.

## **AGREED STATEMENT OF FACTS**

[59] Two Agreed Statement of facts were entered at trial, Exhibit 31 agreed that:

1. On February 26, 2018 at around 8:36am, Mr. Simard was examined by Doctor Neil Petrie at a Halifax region hospital. During Mr. Simard's assessment, Petrie observed a non-displaced nasal break/fracture on Mr. Simard's face.
2. Based on his recollections as recorded in his notes (note attached as Appendix "A"), Dr. Petrie could not determine when the nasal break/fracture occurred.

And Exhibit 15 agreed that:

1. That on March 2, 2018, Mr. Patrice Simard attended to the Cobequid Hospital, located in Sackville, Nova Scotia. On that day, a CT. scan was administered and Mr. Simard was advised that he had a broken nose but no brain injury.

## LAW

[60] The crown in this matter rests its case primarily on the video of the incident as well as video from the booking area of the Halifax Regional Police Department. videos, together with other witnesses and the circumstantial case regarding the element of bodily harm were put forwarded by the crown as proof of the charge before the court.

[61] What is abundantly clear here, like all cases before the courts, is that proof of guilt must be found beyond a reasonable doubt before conviction can take place.

[62] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Constable Basso is presumed innocent of the charges unless the Crown proves each element beyond a reasonable doubt.

[63] Justice Cory speaking for the majority in **R. v. Lifchus**, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt as follows:

**36** Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[62] Justice Iacobucci, of the Supreme Court of Canada for the majority, said in **R. v. Starr**, 2000 SCC 40 that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities”. Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person beyond a reasonable doubt – which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[63] In this matter, given that the accused has testified, I must also apply the principles of **R. v. W.D.**, [1991] 1 S.C.R. If having heard all of the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence called by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I must ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt, if not then I must acquit.

[64] Credibility plays a crucial role in the matter before this court.

[65] While a trial judge must give reasons for how they resolved credibility issues, the Supreme Court of Canada has recognized that it is difficult, “to articulate with precision the complex intermingling of the impressions that emerge after watching and listening to witnesses”. It is not a “purely intellectual” exercise. See **R. v. R.E.M.**, [2008] 3 S.C.R. 3.

[66] Judges are entitled to accept all, some, or none of a witness’s evidence.

[67] Trial judges must scrutinize and examine all of the evidence when considering the credibility of any single witness. In **R. v. D.D.S.**, [2006] NSJ No. 103 (NSCA), Justice Saunders of our Court of Appeal stated as follows:

77 Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[68] Credibility cannot be determined by following some prescribed set of rules. Having said that, trial judges can and have assessed credibility by using a number of guideposts. While not exhaustive, Justice Mossip in **R. v. Fillion**, [2004] O.J. No. 3419 (Ont. SCJ) set out a series of factors which are instructive. He stated:

- In assessing the reliability and credibility of witnesses testimony, I have considered factors that judges invite juries to consider such as:
- does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?
- Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?
- Does the witness seem to have a good memory? Does any inability or difficulty that the witness has and remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?
- Does the witness's testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same event? Did the witness say or do something different on an earlier occasion?
- Do any inconsistencies in the witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important, or minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?
- The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

[69] There is no dispute that Constable Basso assaulted Mr. Simard on two occasions. The first was when the officer grabbed Mr. Simard's right shoulder by the jacket and jerked him off the milk crate, and secondly, when Constable Basso punched Mr. Simard in the face. The issue is whether a justification for these assaults is available pursuant to Section 25(1)(b) of the **Criminal Code**.

[70] Section 25(1)(b) states as follows:

25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law  
...  
(b) as a peace officer or public officer,  
...  
is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[72] Section 25 was considered by the Supreme Court of Canada in **R v Nasogaluak**, [2010] 1 S.C.R. 206, Justice LeBel said this at paragraph 32:

The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

And further at paragraph 34 and 35:

34 Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of

that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is [page228] justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

35. Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[73] This court was also directed by counsel to **R v. Partington**, 2021 ABPC 20, **R v. Boag**, 2021 ONSC 4818, **R v. Boumeester**, 2018 ABPC 25, **R. v. Wilcox**, 2015 ABPC 147.

## ANALYSIS

[74] I will deal first with the evidence of Constable Basso and the credibility thereof.

[75] In assessing Constable Basso's evidence in relation to key points. I have concerns about his being forthright with the court.

[76] Constable Basso was adamant that he struck Mr. Simard with a palm strike to the face. The video, of which more will be said later, clearly shows Constable Basso using a closed fist punch delivered with what could be termed as a haymaker. I do not accept his evidence with regards to using a palm strike.

[77] When asked in direct examination regarding the topography of the scene, Constable Basso described it as "a steady incline all the way from Barrington Street up to Brunswick Street." And further "like steep to the point on the other side there are steps going up." While he did indicate that it "leveled off a little bit" the testimony was to the effect that this took place on a marked slope.

[78] When one looks at the pictures at tab six Exhibit 7, of the area in question, taken in daylight, with no snow cover, it shows that the interaction occurred on a leveled area in front of the MTP door. When shown on the video, Constable Basso was on a level area in front of Mr. Simard. When the officer dealt with Mr. Simard, he showed no

signs of there being sloping ground. It was sloped and slippery immediately adjacent to the police cruiser, but not where the altercation took place.

[79] Constable Basso's testimony was a complete blank as to why the backpack became an interaction between himself and Mr. Simard. He could not recall it happening or why it took place. The swinging back and forth of the backpack is pivotal in leading up to Constable Basso's strike to Mr. Simard's face. The testimony that Constable Basso could recall conversation before Mr. Simard struck his leg, but nothing about the backpack interplay leads me to conclude that Constable Basso was not being forthright with the court regarding this aspect of what occurred.

[80] It is also concerning that Constable Basso was not entirely accurate when dealing with EHS personnel, Ms. Brown. Constable Basso would have been aware of the necessity of accuracy in advising Ms. Brown of what took place, as she was called to the cell area to ascertain the physical well being his prisoner, Mr. Simard. When asked by Ms. Brown if Mr. Simard fell, Constable Basso told her that he did not and that he, Constable Basso had held Mr. Simard the entire time. The obvious inference was that Constable Basso's concern was that EHS personnel would discover that his punch to Mr. Simard's face was sufficient to cause him to immediately fall to the ground.

[81] Further concern is raised when considering Constable Basso's notes regarding the incident, his General Occurrence Report labeled "Initial Officers Report," and the Subject Behaviour Officers Response Report (SBOR) as well as his officer notes.

[82] The obligation in law for officers to prepare accurate, detailed, and comprehensive notes as soon as possible after an event is well known. (See **Wood v. Schaeffer**, 2013 SCC 71 paragraphs 67.)

[83] In Constable Basso's Initial Officers Report, he noted Mr. Simard "threw himself to the ground as dead weight" and further that Mr. Simard, "punched him in the right thigh and then began to reach to grab Constable Basso by the legs." The video shows Mr. Simard being dragged off the milk crate by Constable Basso causing Mr. Simard to be dropped to the ground. While I will say more about the "punch to the leg" later, there is no evidence on the video of Mr. Simard reaching to grab Constable Basso by the legs.

[84] Again, in Constable Basso's General Occurrence Report at pages 36 and 45 Constable Basso again noted that "I took Simard by the shoulder to try and get him to stand up and he threw himself to the ground. While I was standing in front of Simard,

I tried to take him by the shoulder again to get him to stand up out of the snow and leave and he punched me in the leg and then reached forward with both hands like he was going to grab my legs.” This does not accord with the video evidence.

[85] Constable Basso’s notes are also contradicted by his evidence that he was not sure what Mr. Simard punched him with at one point in his testimony.

[86] In that General Occurrence Report hardcopy, Constable Basso also stated he was standing on a slope up above Mr. Simard. The combination of the video and still shots of the area show Constable Basso would have been on level ground during that part of the interaction. He also recounted that he struck Mr. Simard on the side of the face as it was the only accessible area that he could strike. He specifically stated that he did not strike Mr. Simard in the nose, and assumed the bloody nose occurred when Mr. Simard fell to the ground. The video shows the fist of Constable Basso going towards the frontal area of Mr. Simard’s head.

[87] Constable Basso’s handwritten notes again state that Mr. Simard threw himself to the ground. As well the notes contain that Mr. Simard punched his thigh and then reached towards his legs. This was all contrary to the video evidence.

[88] Importantly, I must consider what is not included in Constable Basso’s notes, that being the interplay between himself and Mr. Simard with the backpack. Again, this, together with its omission from Constable Basso’s notes, are concerning.

[89] At the end of a review of Constable Basso’s credibility, I find the material aspect of the incident wanting and I reject it.

[90] In relation to the other aspect of the defence evidence, the expert, I will comment more on that later.

[91] I can say that while the crown made some attempts to show that Constable Basso intentionally neglected or avoided obtaining the video from MTP, there is no real evidence to suggest this. I am convinced that the retrieval of the video by Constable Basso would have occurred at some point. It is likely it would have been very close to the date when it was actually obtained.

[92] Essential to the evidence before me is the video itself. While the camera faces directly at the back of Mr. Simard, it is clear and of great assistance in the finding of facts. Crucial is the ability to enhance and enlarge the area containing Mr. Simard and



Constable Basso. The video player allows you to advance frame by frame the picture in a telling account of what took place.

[93] At 11:51 Constable Basso can be seen in front of Mr. Simard with Mr. Simard's backpack in his right hand. He is about two to three feet in front of Mr. Simard. The video shows Constable Basso offering the backpack to Mr. Simard, then swinging it away. Constable Basso appears to be smiling at this point. Constable Basso swings the bag to his left, then abruptly swings it to his right. Mr. Simard can be seen reaching for the bag. At a point in frame 11:59, Mr. Simard can be seen clearly holding on to a shoulder strap of the bag. Constable Basso swings the bag up and away from Mr. Simard. Constable Basso swings the bag down, at which point Mr. Simard has the bag in both hands.

[94] As it swings to Constable Basso's right, it pulls Mr. Simard's arms with it. While I am convinced there may have been incidental contact by Mr. Simard with Constable Basso's thigh area, it would have been transitory and low level. Certainly not a punch. Constable Basso instantly brings his right arm back in letting go of the backpack and delivers a powerful closed fist blow to the frontal area of Mr. Simard's head. Mr. Simard immediately drops to the ground.

### **Did the blow result in bodily harm?**

[95] The proof beyond a reasonable doubt regarding whether the blow by Constable Basso to Mr. Simard's face caused his nose to break and thus causing bodily harm is one that is based on circumstantial evidence.

[96] Circumstantial evidence, unlike direct evidence, requires a Court to consider a number of pieces of evidence, which in and of themselves do not prove guilt but when viewed together, and as a whole, moves the factfinder to the conclusion of guilt beyond a reasonable doubt.

[97] In **R. v. Villaroman**, 2016 SCC 33, Justice Cromwell, for the Court, noted that "in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilty" (para.30). He went on to explain that the modern state of the law is that inferences consistent with innocence do not require proven facts:

35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn

from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

36 I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

37 When assessing circumstantial evidence, the trier of fact should consider "other plausible [page1020] theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[98] Justice Cromwell went on to contrast the approach to exculpatory circumstantial evidence to that governing inculpatory evidence, citing **Martin v. Osborne** (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court stated that "[i]n the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation" (emphasis in original). The Court explained that "according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed" (emphasis omitted). Justice Cromwell commented that this "idea – "that to justify a conviction, the circumstantial

evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative” – was a helpful way of describing the line between plausible theories and speculation” (para.41).

[99] I find here that the blow to Mr. Simard’s face by Constable Basso resulted in the fracture of the same. I conclude that there is no other reasonable alternative based on the following factors.

[100] Constable Basso’s blow, as stated earlier, was powerful and in the middle of Mr. Simard’s facial area. Mr. Simard then went to the ground, but not a full-face plant. Throughout the booking Mr. Simard lay in the back of the police vehicle and was rubbing his head. The EHS attendant recognized tenderness in the eye and nose area. Mr. Simard had difficulty with balance.

## **SECTION 25 AND REASONABLE FORCE**

[101] Was Constable Basso, on reasonable grounds, justified in what he did, and in doing so, to use as much force as was necessary for that purpose?

[102] To begin, Sergeant Keith’s evidence in this regard is given little weight by the court for reasons given earlier in this decision. Sergeant Keith’s opinions were weighed heavily on Constable Basso being punched by Mr. Simard in the thigh. Also, the terms of Sergeant Keith’s evidence were less than objective. Sergeant Keith’s evidence failed to factor in Constable Basso’s testimony that he was not sure what Mr. Simard punched him with.

[103] Using the standard set out by the Supreme Court of Canada in (*Nasogaluak*), the blow to Mr. Simard’s face was excessive, and unreasonable. I find that Mr. Simard may have made contact with Constable Basso’s leg, but it was not a punch. Even if it was, the very low threat posed by the 55-year-old, according to Mr. Simard’s testimony, intoxicated Simard who was on his knees, was extremely minimal, if any at all at that point. While the grabbing and pulling Mr. Simard off the milk crate may have passed the standard under s. 25, the blow to Mr. Simard’s face did not. While we are not to judge the niceties of police actions, such as this, Constable Basso’s reaction went beyond what was reasonably necessary.

[104] Accordingly, I convict him of the offence as charged.

Paul Scovil, JPC