

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Butler*, 2015 NSSC 183

**Date:** 2015-06-22

**Docket:** CR. ANT No. 433536

**Registry:** Antigonish

**Between:**

Her Majesty the Queen

Appellant

v.

Gavin Richard Butler

Respondent

**Judge:** The Honourable Justice N. M. (Nick) Scaravelli

**Heard:** May 11, 2015, in Antigonish, Nova Scotia

**Decision Date:** June 22<sup>nd</sup>, 2015

**Counsel:** Catherine Ashley, for the Crown

Nicole Rovers, for the Defence

[1] Following trial in Provincial Court, the Respondent Gavin Richard Butler was convicted of the offences of dangerous driving, contrary to section 249.1 and uttering threats, contrary to section 264.1(1) of the *Criminal Code*. He was acquitted of the charges of assault with a weapon, upon both Kelsey MacDonald and Aaron Phillips, contrary to section 267(b) of the *Code*. Mr. Butler was sentenced to a nine month conditional sentence.

[2] The crown appeals the acquittal of the charge of assault with a weapon upon Kelsey MacDonald. The crown requests a guilty verdict be entered and seeks an equivalent sentence of nine months conditional sentence to be served concurrently.

### **Background**

[3] Prior to the incident, Kelsey MacDonald and the respondent Gavin Butler had been in an eight year relationship and had a four year old daughter. Although still residing together, their relationship had ended shortly before the incident of July 10<sup>th</sup>, 2014. On that evening Ms. MacDonald and Mr. Phillips had arrived at her home to retrieve personal items. Ms. MacDonald observed Mr. Butler running down the driveway towards her vehicle. She left the area in her vehicle and was pursued by Mr. Butler in his vehicle. Ms. MacDonald stopped in a parking lot

where Mr. Butler drove his vehicle in front of her preventing her from being able to drive forward. She backed up her vehicle and drove away whereupon Mr. Butler jumped on the hood of her vehicle and then rolled off as Ms. MacDonald left the parking lot and drove down the highway. Mr. Butler pursued her in his vehicle. He pulled alongside the vehicle and bumped her vehicle with his vehicle forcing it onto the shoulder of the road. After driving away a second time Mr. Butler then again pursued her in his vehicle and again bumped her vehicle onto the shoulder of the road.

### **Ground of Appeal**

[4] The Notice of Summary Conviction Appeal states the following ground:

The learned trial judge made an error of law when he convicted Gavin Richard Butler of dangerous driving, but not of assault with a weapon. The learned trial judge held that although Butler used his vehicle to intentionally force Kelsey MacDonald's vehicle off the road, he did not intend to apply force directly to Kelsey MacDonald..

### **Standard of Review**

[5] The standard of review for summary conviction appeals is set out in the facts of both parties. It is well summarized in *R. v. Benoit* [2010] N.S.J. 129 which includes references to *R. v. Nickerson* [1999] N.S.J. 210; *R. v. Yebes* [1987]

2 S.C.R. 168; *R. v. Backman* (1983) 53 N.S.R. (2d) 39; and *R. v. Clark* [2005] 1

S.C.R. 6. In *Benoit* the court explains that the standard of review for summary conviction appeals is one of reasonableness. This means the question on appeal is whether the trial judge's decision was reasonable and could be supported by the evidence. The appeal court may re-weigh evidence in order to make this determination, but it should not merely substitute its own view for that of the trial judge.

[6] Findings of fact and factual inferences must not be interfered with unless there is a palpable and overriding error. *Housen v. Nikolaisen* [2002] S.C.J. 31.

### **Relevant Criminal Code Provisions**

[7] The offence of assault with a weapon contains the elements of the offence of assault.

265 (1) Assault – a person commits an assault when:

- (a) Without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) He attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

[8] Assault with a weapon under section 267 of the *Code* reads:

267 - Everyone who, in committing an assault,

(a) Carries, uses or threatens to use a weapon or imitation thereof . . .

is guilty of an indictable offence . . .

[9] The definition of weapon is set out in section 2 of the *Criminal Code*:

“*weapon*” means anything used, designed to be used or intended for use

(a) In causing death or injury to any person, or

(b) For the purpose of threatening or intimidating any person and, without restricting the generality of the foregoing, includes a firearm;

### **Position of the Appellant**

[10] The crown submits the evidence supports a conviction of assault with a weapon and that it was unreasonable for the trial judge to enter an acquittal.

[11] The trial judge made a finding that the respondent intentionally bumped Ms. MacDonald’s vehicle with his vehicle. Given this finding, the crown submits it discharged its burden of establishing that the respondent intentionally applied force or threatened to apply force to another person while using a weapon without the consent of the other person. Moreover, case law clearly establishes that a motor vehicle can be characterized as a weapon.

### **Position of the Respondent**

[12] The respondent submits the crown had the burden of proving the vehicle was a weapon. In order to discharge the burden in this case, the crown was required to prove the defendant subjectively intended to use the vehicle to apply force to Ms. MacDonald. Although the trial judge did not specifically refer to the definition of a weapon and its elements, he ultimately concluded that the respondent did not have the requisite intention to convert his vehicle into a weapon.

### **Analysis**

[13] Both assault and assault with a weapon are general intent offences to the extent that subjective intent to harm or threaten to harm a person is not a required element. However, where a person is alleged to have used an object that is not normally considered a weapon, it can only be classified as a weapon if it was “used” or “intended” to be used as a weapon.

[14] The definition of weapon found in section 2 of the *Criminal Code* sets out three scenarios where an object is to be considered a weapon: first, where an object is used as a weapon. Second, where an object is designed to be a weapon, and third, when the possessor of an object intends to use it as a weapon. The first two categories are assessed objectively, that is, whether a reasonable person would conclude the object was used or designed to be used as a weapon. The third

category focuses on the subjective intent of the user where the issue is whether the possessor intended to use the object as a weapon. This interpretation of the third category was reviewed by Jones, J. in *R. v. Roberts*, [1990] N.S.J. 315:

An examination of the new definition shows that the objective test has been removed and the subjective test has been retained and broadened. Viewed in the light of the history of the section I do not see that any major change has been made. The word "person" has been removed. I think it is implicit in the new section. The use or intention can only be imputed to the accused. If the object is designed as a weapon then it is easier to infer the necessary intent. In *Regina v. Kilpatrick*, 31 C.C.C. (3d) 334 Clarke, D.C.J. stated at p. 338:

"Admittedly, the old definition of 'offensive weapon' or 'weapon' had a dual test; one subjective and the other objective. The objective component of the old definition, however, which defines 'offensive weapon' or 'weapon' to mean

(a) anything that is designed to be used as a weapon

was omitted from the new definition. Parliament has shifted the emphasis from the objective criterion of design to the subjective test of 'use' or 'intended use'.

Under the new definition a spiked shoe or some other seemingly innocuous article if used or intended for use in causing death or injury to persons could constitute a weapon. **It is not the design of the 'object' but the state of mind of the possessor which converts it into a 'weapon'**. (emphasis added)

That Parliament intended such a shift is supported by the wording of the new definition. The clause 'whether designed for such purpose or not' found in para. (a) necessarily implies that the words 'intended for use' have a meaning different from 'designed for use'. The words 'designed' and 'intended' are not used synonymously. Therefore, 'intended for use' must refer not to the state of mind of the manufacturer or the vendor or some notional reasonable person but to the possessor of the 'object'. As the Interpretation Act, R.S.C. 1970, C. I-23, s. 14, provides that the definition of any word in a statute applies to those words throughout the statute unless a contrary intention appears, I also find that the words 'intended for use' bear the same meaning in both paras. (a) and (b) of the new definition."

[15] The reasons given at trial concerning the section 267 *Criminal Code* charge are somewhat unclear in determining how the trial judge decided on the elements of the offence. Specifically, it is not easily determined whether the trial judge found that the accused had general intent to assault the victim or the accused had specific intent to use the vehicle as a weapon.

[16] After hearing evidence from Ms. MacDonald and Mr. Phillips, the trial judge found that Mr. Butler had intentionally bumped Ms. MacDonald's car twice in order to force her to the side of the road and that this constituted operating a vehicle in a way that is dangerous to the public contrary to section 249(1)(a) of the *Criminal Code*. He stated:

[48] I accept the evidence of Aaron Phillips about the manner in which Mr. Butler was driving his vehicle and about Mr. Butler bumping the vehicle that Kelsey MacDonald was driving onto the shoulder of the road. I also accept Aaron Phillips' testimony about Mr. Butler chasing him down the road and about him uttering threats to him including the words that he was going to fucking kill him. Those words being uttered by Mr. Butler is entirely consistent with him chasing after Kelsey MacDonald's vehicle, entirely consistent with Mr. Butler's anger about the fact that his partner of some eight years was appearing to be involved in a relationship with Mr. Phillips, and was also consistent with the words that Mr. Butler admitted using, saying to Mr. Phillips that he should stick to his own family and leave Mr. Butler's family alone.

[49] When a person operates a motor vehicle in the way that Mr. Butler did by following Ms. MacDonald's vehicle, by driving alongside Ms. MacDonald's vehicle, by intentionally bumping Ms. MacDonald's vehicle with his vehicle and forcing it onto the shoulder of the road on two occasions,



that is operating his motor vehicle in a way that is dangerous to the public, contrary to section 249(1)(a) of the *Criminal Code*. I find that the crown has proven beyond a reasonable doubt that on July 10<sup>th</sup>, 2014, Gavin Richard Butler committed the offence of operating a motor vehicle in a manner that was dangerous to the public, contrary to section 249(1)(a) of the *Criminal Code*.

[17] Mr. Butler testified at trial he did not bump Ms. MacDonald's car and that he only pursued her out of concern that she may have been driving under the influence of drugs. However, the trial judge found that in fact, Mr. Butler pursued Ms. MacDonald in order to confront her and his testimony that Ms. MacDonald was under the influence of drugs was meant to discredit her as a witness.

[18] The assault with a weapon charge was settled on these facts. The following is the only discussion of the assault charge and the accused's intention in that regard:

[51] The offence of assault is defined in section 265 of the *Criminal Code*. An assault is committed when a person applies force intentionally to another person, directly or indirectly. It is also the offence of assault when a person:

. . . attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose.

[52] In this case I find that the crown has proven beyond a reasonable doubt that Mr. Butler intentionally used his vehicle to apply force to a vehicle that Kelsey MacDonald was driving and in which Aaron Phillips was a passenger. I do not find that the crown has proven beyond a reasonable doubt that Mr. Butler knew that Aaron Phillips was a passenger in this vehicle at the

time that he applied force to this vehicle with his vehicle when Mr. Phillips was in the vehicle. I also find that Mr. Butler's intention was to force the vehicle off the road and not to apply force to Kelsey MacDonald or to Aaron Phillips. I also find that he did not attempt or threaten to apply force to Kelsey MacDonald and Aaron Phillips simply by virtue of his intending to apply force to the vehicle in which they were located. I therefore find Mr. Butler not guilty of committing an assault on Aaron Phillips and using a weapon. I also, therefore, find Mr. Butler not guilty of committing an assault on Kelsey MacDonald and using a weapon to commit that assault.

[19] The trial judge's reasoning is ambiguous in that it is open to different possible interpretations. On the one hand given that Mr. Butler was convicted of operating a motor vehicle in a manner that was dangerous to the public, and the finding that Mr. Butler intended to force Ms. MacDonald's car off the road, it is difficult to conclude that Mr. Butler's behaviour was not reckless enough to meet the elements of assault. For the court to then find Mr. Butler not guilty of assault with a weapon, could only mean (assuming the trial judge was well versed in the law), that he decided Mr. Butler had not intended to use his vehicle as a weapon, thus lacking the intent requirement. This conclusion is supported by the trial judge's finding that Mr. Butler intended to force Ms. MacDonald's vehicle off the road, but he did not intend to apply force to Ms. MacDonald which is almost to say that Mr. Butler's intention was to use his vehicle as a tool to accomplish a goal rather than a weapon to apply force to her person.

[20] On the other hand, at no point in the reasons given by the trial judge does he discuss the intention element in the definition of weapon nor does he discuss section 267 of the *Criminal Code*. In determination of intention, the trial judge outlines section 265 of the *Criminal Code* which outlines the common assault provisions of the *Criminal Code*. This may indicate the judge focussed the issue of intention as it relates to assault in general rather than the intention to use the vehicle as a weapon, which may lead one to conclude that the trial judge made no finding of fact regarding the intention to use the vehicle as a weapon, but did make a finding of fact that the intention element of assault had not been proven.

[21] The ambiguity regarding the trial judge's decision on the point of assault raises the issue of sufficiency of reasons. In *R. v. Sheppard* [2002] S.C.J. 30, the court explains that reasons are important to both meaningful appellate review and to ensure the public that justice has been done. However, *Sheppard* makes it clear that a decision based on ambiguous or flawed reasons can still be upheld. An appeal court can uphold a decision if the trial judge's reasons allow for the proper determination of whether that decision was correct, which requires that the reasons address conflicting evidence and that the results can be explained from the record.

[22] In my view the reasons for the trial judge's decision are not so flawed that the correctness of the decision is undeterminable. The trial judge makes clear

findings regarding the evidence and the majority of his decision explores the testimony given at trial. The trial judge clearly states which testimony should be accepted as a fact and which should not. The only real ambiguity in the decision regards whether the mens rea elements of the assault with a weapon charge have been made out.

[23] As discussed, the standard of review in this matter is one of reasonableness. In determining whether the trial judge's decision was reasonable, the appellant court must look to the trial court's findings and, to an extent, re-weigh the evidence.

[24] The relevant facts that were decided regarding the assault with a weapon charge were that Mr. Butler intentionally bumped Ms. MacDonald's car, that he did not intend to apply force to Ms. MacDonald, and that he did not threaten to apply force to Ms. MacDonald. From these facts, it could be open to find Mr. Butler guilty of common assault; however, the charge is assault with a weapon and as stated above, the offence requires that the accused had used or intended to use his vehicle as a weapon.

[25] Given that the evidence presented at trial suggested that there was relatively little damage to the vehicles and that the vehicles were travelling at relatively slow

speeds when they collided, and that the trial judge found that Mr. Butler's goal in colliding with Ms. MacDonald's car was to force her to pull over, and not to apply force to her with his car, a reasonable conclusion would be that Mr. Butler did not use or intend to use his vehicle as a weapon. As such, the mens rea element required for Mr. Butler's car to be considered a weapon under the *Criminal Code* would not be met. It follows it would not have been unreasonable for the trial judge to find Mr. Butler not guilty of assault with a weapon.

[26] This is a case where it may have been possible to conclude that Mr. Butler both used, and intended to use, his vehicle as a weapon, given the evidence at trial and the trial judge's finding that Mr. Butler intentionally bumped Ms. MacDonald's car. However, in this appeal the crown's onus is to prove that the acquittal on the assault with a weapon charge was unreasonable and not that a guilty verdict would have been reasonable.

[27] Accordingly, the appeal is dismissed.

Scaravelli, J.