SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Duggan, 2016 NSSC 13

Date: 2016-01-07
Docket: SBW No. 442896
Registry: Halifax

Between:

Steven Allan Duggan

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice James L. Chipman

Heard: January 7, 2016, in Bridgewater, Nova Scotia

Counsel: Alan G. Ferrier, Q.C., for the Appellant
Lloyd Tancock, for the Respondent

By the Court:

Introduction

[1] On July 24, 2015, Provincial Court Judge Paul Scovil convicted the appellant of assault contrary to s.266 of the *Criminal Code*.

[2] The Notice of Summary Conviction Appeal was filed September 1, 2015. The five grounds of appeal are as follows:

> 1. that the Learned Trial Judge erred in law by not properly applying the principles as set forth in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 to the evidence before the Court;
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> 2. that the Learned Trial Judge erred in law by making findings of fact unsupported by the evidence before him;
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> 3. that the Learned Trial Judge erred in law by drawing inferences and/or conclusions from findings of fact unsupported by the evidence before him;
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> 4. that the Learned Trial Judge erred in law by drawing inferences and/or conclusions where there was no evidence to support such inferences or conclusions; and
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> 5. such other grounds as may appear from the transcript of evidence.

[3] In his brief filed November 23, 2015, the appellant groups grounds 2, 3 and 4 together under his first argument pursuant to *Criminal Code* s.686(1)(a)(iii). The argument under ground 1 follows thereafter. The appellant asks this Court to allow the appeal, set aside the conviction and order a new trial.

[4] The Crown submits that the trial judge made no errors in law or misinterpreted any of the facts and thus rendered a decision supported by the evidence. Alternatively, the respondent says that if Judge Scovil made any errors in his analysis of the evidence or issues, such were not of significance and therefore do not render his decision unreasonable or unsupported by the evidence. As for the first (lastly argued) ground of appeal, the Crown submits that the trial judge properly applied the *R. v. W.(D.)* analysis.

Standard of Review

[5] The scope of review of a Summary Conviction Appeal Court was set out by Cromwell, J.A., as he then was, in giving the Court's judgment in *R. v. Nickerson*, [1999] NSJ 210 as follows at para.6:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[6] This description has been repeatedly endorsed by the Nova Scotia Court of Appeal; for example: *R. v. RHL*, 2008 NSCA 100; *R. v. Francis*, 2011 NSCA 113; *R. v. MacGregor*, 2012 NSCA 18 and *R. v. Prest*, 2012 NSCA 45. This standard of review was repeated without reference to *R. v. Nickerson* in *R. v. Pottier*, 2013 NSCA 68.

[7] Given my review of the authorities it is fair to say that the responsibility of the Summary Conviction Appeal Court is to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions.

[8] In so doing, I am mindful of the principles laid out by the Supreme Court of Canada in *R. v. Sheppard*, [2002] SCC 26 and *R. v. REM*, [2008] SCC 51.

The Evidence at Trial

[9] The trial took place during the afternoon of July 17, 2015 and morning of July 24, 2015. The evidence was followed by oral submissions and Judge Scovil rendered his oral decision on the same day.

[10] The Crown called the appellant's wife, Carolyn Duggan, and Royal Canadian Mounted Police officer Cst. Tamu Bracken. During Ms. Duggan's direct examination the Crown introduced exhibit 1, consisting of two photographs. The first photograph showed bruising on Ms. Duggan's right arm. The second photograph showed an area of redness on Ms. Duggan's back.

[11] The Defence called Ms. Duggan's husband, the appellant, Steven Allan Duggan.

[12] The trial transcript is 158 pages. In reviewing the transcript, it is clear the charge arises from an August 10, 2014 domestic incident involving the appellant and his wife. The incident occurred in the driveway of the couple's home, situate on Windsor Road, Sherwood, Lunenburg County, Nova Scotia.

[13] Counsel's summations take up 10 pages and the decision follows in the transcript at pp.169-180. For the first 8.5 pages of his decision, Judge Scovil reviews the evidence over the two half-days of trial. His Honour then comes to his decision, which reads as follows at pp.177-180:

> In relation to this, as indicated by counsel, it is well known to counsel and courts and judges everywhere, in relation to these types of cases, particularly where credibility is an issue, it is important to consider *R. v. W.(D.)*, which is a Supreme Court of Canada case. Basically what that says, and it's fairly common sense, if I accepted what the accused said, that he didn't do anything to her, that she just fell off to the side, then of course he's not guilty and I should acquit him. Even if I reject that and I don't believe that, I still have to look at all his evidence. If on the whole of his evidence it raises any reasonable doubt on any element of the offence that he's been charged with, that doubt has to go to the benefit of him and he would have to be acquitted.
>
> Even if I reject his evidence in its entirety and it doesn't raise a reasonable doubt, it doesn't end there. I have to look at the whole of the Crown's case. If I'm left even just accepting what the Crown says or their evidence, or looking at their evidence, if any of that leaves me in a reasonable doubt as to what occurred, I have to acquit. That's what that means.
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> Reasonable doubt has been outlined by our Supreme Court of Canada in *R. v. Lifchus*. I'm cognizant of that. It talks about what reasonable doubt means. And I'm also cognizant that I can't prefer one evidence over the other. I can't say I, I prefer Mr. Duggan's over Mrs. Duggan's evidence or Mrs. Duggan's over Mr. Duggan's. It would displace the burden of proof. What I have to do is look at all the evidence, all the testimony, look at that and analyze it to make a determination. If I can determine what happened or if I…if there's any

reasonable doubt of any of the elements of the offence, such as to benefit the accused.

In relation to his evidence, I do not accept his evidence. I do not find any of his evidence believable where it conflicts with the complainant, Mrs. Duggan. He took every opportunity to paint her as a drunk. I found him exaggerating. I found it was not one that had the ring of any kind of credibility with it. His description of her drinking at the, at the barbecue events did not fall within the four squares of what the facts would have been. That she had indicated she'd had about four ounces and about four drinks and that makes sense. He was not as…she was not as drunk as he would want us to believe. It makes no sense that he'd be watching her constantly as he said at the party, concerned about her drinking, but not sure how much she drank, but then paints her as being drunk.

In relation to this, it appears quite clearly from his evidence that he was angry the whole day with the complainant, from the beginning to end. That their relationship was on the end. That he was angry that he had to be where he was. Didn't want to be there. That anger continued throughout, and the opportunity as he talked about her being, the complainant being sarcastic, to me were just simply exaggerations to try and gain sympathy for him. They did not appear true.

And also there are major inconsistencies with what was said by the officer as to their conversation. The officer indicated quite clearly the accused said that he was…that she…the complainant would tell her that, that he had hit her. He did not seem to indicate that at all in his evidence. That causes me concern. All of this causes me concern and causes me to reject in its entirety his evidence. Unless it's consistent with the, with what Ms. Duggan indicates, I still have to look at the whole of his evidence. Does it raise a reasonable doubt? None of it does and I reject his evidence.

As I've said, I have to go on and look at the evidence of the complainant. Her evidence was given in a, I'd suggest a fairly straightforward fashion. The accused argued me…with me…to me today that she had 16 ounces to drink. That is not clear at all from the evidence. I found while she had something to drink, she may have had some intoxication in relation to that, but not such as that she could not remember or had not control of herself. I do not find that she just simply, as the accused would want us to believe, suddenly fall back against the van.

I believe the evidence of Ms. Duggan, that the accused in his anger, grabbed her by the arm and threw her against the van. And that the assault as indicated took place.

In relation to this, the, what he had said to the officer was, was telling but not determinative of this issue. He was concerned because he knew that the officer would be told what had happened and he wanted to immediately start building an offence or in relation to that, a defense to what had took, took place.

> But in the end I am satisfied beyond any reasonable doubt, he had grabbed her as indicated and threw her against the van, making out the assault, and I convict him accordingly.

Grounds 2, 3 and 4

[14] The appellant submits that Judge Scovil erred on several occasions during the course of his decision by making findings of fact unsupported by the evidence and drawing inferences negative to the appellant from facts that had not been proven or from facts that were capable of more than one inference. The appellant goes on to submit as follows:

> It is submitted that the evidence clearly established that Mrs. Duggan had consumed somewhere between eight (8) and sixteen (16) ounces of vodka topped off by Tia Maria in the three-hour period when they were absent from their residence at the cottage. By any reasonable measurement, this is a considerable amount of alcohol being consumed by Mrs. Duggan in a short period of time. For the Learned Trial Judge to conclude that she had about four (4) ounces and about four (4) drinks makes no sense whatsoever.

[15] The respondent rebuts the above by pointing out in their brief that there are ample transcript references (pp.27, 29, 44, 50, 62, 63 and 104) to ambiguous evidence concerning Ms. Duggan's alcohol consumption.

[16] The appellant then points out that the trial judge erred by reciting evidence wherein the appellant called Ms. Duggan a "grumpy piece of shit" as opposed to, "a drunken piece of shit". He goes on to suggest the judge had no basis for drawing an inference that the appellant was angry with his wife during the time in question.

[17] The Crown counters the above argument by referring to the transcript (pp.127, 128, 129, 131, 132, 133 and 134) for support that the trial judge had ample evidence to conclude the appellant was angry.

[18] Finally, the appellant says that the judge had no basis to arrive at the following conclusion:

> In relation to this, the, what he had said to the officer was, was telling but not determinative of this issue. He was concerned because he knew that the officer would be told what had happened and he wanted to immediately start building an offence or in relation to that, a defense to what had took, took place.

[19] By way of response, the Crown counters with this:

> It is interesting to note that the Appellant denied that anything had happened when they returned home as described by the victim. The victim did not make a report to police and did not say to the Appellant that she was going to do so, either at the time of the events in the driveway or the following morning when she called to see if she could return to collect her belongings. She did not demand that he do anything, she sought his consent to her attending. She did not arrive unannounced, she called ahead. She stated that [she] was only collecting belongings and then leaving. It is inconceivable therefore that the Appellant would have any reason to expect any problems in the morning which would justify involving the police unless he was purposely being proactive for the purpose of preparing for some action that he anticipated in the future.

[20] The Crown concludes their argument on grounds 2, 3 and 4 with these comments:

> Of course what is not apparent from the written transcript of testimony is the demeanor of the witnesses and the manner of presentation which is a significant part of any trial where credibility and findings of fact are central issues for the trier of fact.
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> …
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> Trial Judges by very definition have to and regularly do made extensive findings of facts and credibility with respect to all elements of criminal charges and with respect to testimony of various witnesses. A Trial Judge is permitted to and regularly does determine whether all, part of or none of the testimony of any witnesses is to be accepted.
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> In the present case it is submitted that having made appropriate findings of fact, having made appropriate findings of credibility and having properly decided which testimony of the various witnesses should be accepted, the only reasonable conclusion which the Trial Judge could reach was that the Crown had proven all constituent elements of the charge beyond any reasonable doubt.

[21] Having reviewed the entirety of the transcript, I find that Judge Scovil did not err in law in the manner suggested by the appellant. To the contrary, it is my finding that there existed ample evidence for his determinations of fact and for the inferences and conclusions he drew. In my view, the alcohol consumption of Ms. Duggan was not pinned down with specificity. In any event, there is nothing in the evidence to cause me to conclude she was an unreliable or incredible witness. The fact that Ms. Duggan consumed alcohol on the day in question (over a number of hours) does not cause me to question her veracity.

[22] Similarly, when I review the transcript I have no difficulty with the trial judge's conclusion that the appellant was angry. I would add, as the Crown has emphasized, that Judge Scovil had the benefit of assessing demeanor. He clearly articulated his reasons for preferring the demeanor of Ms. Duggan over her husband and I see no basis for disturbing this finding.

[23] I would add that whereas Judge Scovil's recitation of the evidence is not flawless, it clearly passes muster. I say this with reference to the authorities and alleged errors cited by the appellant in the context of all of the evidence. For example, whereas the trial judge stated Ms. Duggan said that she "had about four ounces and about four drinks and that makes sense", given the whole of the evidence, I do not find this comment to be anywhere near fatal. With respect to the authorities, I refer to *R. v. Beaudry*, [2007] 1 S.C.R. 190, wherein Justice Charron states as follows at para.58:

> However, it must not be forgotten that, as Arbour J. clearly indicated, the *Yebes* test does not vary depending on whether the trial is a jury or a non-jury trial. The test to be applied is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered". In every case, it is the *conclusion* that is reviewed, not the process followed to reach it. I agree that, as Arbour J. explained in the passage quoted above, errors or a faulty thought process in a judge's reasons can sometimes explain an unreasonable conclusion reached by the judge. But a verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further than that. In every case, the court must determine whether the *verdict* is unreasonable and, to do so, it must consider all the evidence.

[24] At para.59 Justice Charron continues:

> …Although there may be a connection between an error made in interpreting evidence and an unreasonable verdict, the two issues must not be confused. Doherty J.A. of the Ontario Court of Appeal explained this well in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, as follows:
>
> > A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to a finding that a verdict is unreasonable. In cases tried without juries, a finding that the trial judge did misapprehend the evidence can, however, figure prominently in an argument that the resulting verdict was unreasonable… [Emphasis added; p. 220.]

[25] In *R. v. Delorey*, 2010 NSCA 65, Justice Oland (Beveridge and Farrar JJ.A. concurring) discussed the standard of review for a misapprehension of evidence. At para. 27, the Court adopted the standard described in *R. v. Peters*, 2008 BCCA 446:

> Material misapprehension of the evidence can justify appellate intervention. The standard is a stringent one: the misapprehension of the evidence must go to the substance rather than to the detail; it must be material to the reasoning of the judge and not peripheral; and the errors must play an essential part not only in the narrative of the judgment but in the reasoning process itself. If this standard is met, appellate intervention is justified, even if the evidence actually does support the conclusion reached.

[26] In *R. v. Deviller*, 2005 NSCA 71, Justice Cromwell (Chipman and Oland JJ.A. concurring) outlined the law generally with respect to misapprehension of evidence at paras. 10-12:

> [10] What is a misapprehension of the evidence? It may consist of "... a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence ...": *R. v. Morrissey*, (1995) 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an "unsupportable inference" from the evidence or characterizes a witness's evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: *Morrissey* at p. 217; *R. v. C.(J.)*, 2000 145 C.C.C. (3d) 197 (Ont. C.A.) at para. 11. In *Morrissey*, for example, the trial judge stated that the evidence of two witnesses was "essentially the same", a conclusion not supported by the record. This was held to be a misapprehension of the evidence. In *C. (J.)*, the trial judge was found to have erred by characterizing the accused's evidence as "internally inconsistent" when this conclusion was not reasonably supported by the record: at para. 9.
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> [11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. A conviction is a miscarriage of justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction…
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> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

[27] Having regard to Judge Scovil's assessment of the evidence and the test set forth by the Supreme Court of Canada and our Court of Appeal, I find no basis for the argument that he misapprehended the evidence. To the contrary, I find the trial judge's review of the evidence in his decision to be accurate. Further, the evidence is supportive of the inferences he drew.

[28] At the end of the day, based on all of the evidence, I have determined Judge Scovil's verdict to be reasonable.

Ground 1

[29] The appellant acknowledges Judge Scovil correctly outlined the principles set forth in *R. v. W.(D.)*; however, he asserts that on a number of occasions he erred in applying the test to the facts of this case. Having said this, the appellant has not identified any instances where the trial judge reversed the burden of proof or ignored the presumption of innocence.

[30] In reviewing the decision, it is apparent that the trial judge recognized the requirement not to let a credibility contest affect the need to respect the concept of proof beyond a reasonable doubt. As his decision attests, he was cognizant of applying a proper analysis. In *R. v. J.P.*, 2014 NSCA 29, Justice Beveridge (Oland and Farrar JJ.A. concurring) had cause to review a trial judge's *W.(D.)* analysis and stated:

> [58] Frequently the resolution of criminal charges depends on the views taken by a trial judge about the weight of the evidence he or she has heard. By weight, I include both an assessment of the reliability and the credibility of the Crown's evidence, and the evidence, if any, proffered by the accused. As already described, that assessment, if conducted free of error, is entitled to a very high degree of deference.

[31] Justice Beveridge went on to note problems with the trial judge's application of *W.(D.)*, stating:

> [73] I agree with the appellant that the announced analytical path by the trial judge reversed the onus of proof. There is no requirement on an accused to convince the judge by his evidence—all that is needed is for a reasonable doubt to be raised. It is for the Crown's evidence to convince. Furthermore, mere doubt or even non-acceptance of the appellant's evidence on some point cannot be used to cast doubt on the credibility of his other evidence.

[32] I find no such problems with Judge Scovil's *W.(D.)* analysis as he not only found the appellant's evidence not credible but properly examined the remaining evidence in determining the Crown proved its case beyond a reasonable doubt. Accordingly, I find the trial judge's assessment was conducted without error.

Conclusion

[33] For the reasons set out above, I find the trial judge dealt with credibility and competing evidence and made reasonable findings of fact. Given the authorities and the body of evidence, Judge Scovil did so correctly. There was ample evidence to support the trial decision and I would not disturb it. In the result, I dismiss the appeal.

Chipman, J.