IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. DeCoste, 2008 NSSC 279

Date: 20080925
Docket: CRAT 293098
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Edmond Jeffrey DeCoste

DECISION

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	July 8th, 2008, in Antigonish, Nova Scotia
Decision:	September 25th, 2008
Counsel:	Ronald J. MacDonald, QC, for the Crown Wayne MacMillan, for the Defence

By the Court:

[1] This is an appeal by the Crown from the acquittal of the respondent by Judge John Embree of the Provincial Court.

[2] The respondent was charged that he:

> "...on or about the 10th day of June, A.D. 2006, at or near Antigonish, Nova Scotia, did in committing an assault upon Virgil DESSOUROUX cause bodily harm to him, contrary to Section 267(b) of the Criminal Code of Canada."

[3] The Notice of Appeal sets out the following grounds of appeal:

> "1. That the learned trial judge erred in finding that the Respondent did not have the intent to cause bodily harm based on the facts of the case;
>
> 2. That the learned trial judge erred in finding that the level of intent needed to vitiate consent in an assault causing bodily harm charge was the actual specific intent to cause bodily harm."

[4] The test I am to apply in this summary conviction appeal is set out in the case of **R. v. Nickerson**, 178 N.S.R. (2d) 189 at page 191 where Cromwell, J.A., speaking for our Court of Appeal stated:

> "**[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 ss. 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), 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 (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], 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."

[5] The evidence in this case was that the accused and the complainant were outside Piper's Pub in Antigonish after a night of drinking. The trial judge found that both men agreed to fight on the street. He found as follows:

> "[23] Mr. Dessouroux took off a jacket he was wearing and the two combatants walked out into the street and engaged each other. Mr. Dessouroux and the Defendant both three punches at each other. One of the Defendant's punches struck Mr. Dessouroux in the head and he fell to the ground. The Defendant did nothing more of an aggressive nature at that point, and some witnesses suggested they thought the fight was over. However, Mr. Dessouroux got up and approached the Defendant and the fight continued with more punches being thrown. The fight ended when Mr. Dessouroux threw a punch that missed and the Defendant threw a punch that connected with Mr. Dessouroux's chin area knocking him down to the ground. The back of Mr. Dessouroux's head hit the pavement on the street. He was knocked unconscious."

[6] He also found that:

"[27] Injuries were sustained by Mr. Dessouroux and they were caused by the Defendant in this fight. Those injuries constitute bodily harm as defined in the **Criminal Code**."

[7] The trial judge then set out the central issue before him. He said:

"[31] For an offence under Section 267(b) to be made out there must be proven to have been an assault and bodily harm caused as a result of that assault. For an offence under Section 267(b) the Crown does not have to prove that the Defendant intended to cause bodily harm. The mental element of such an offence, is the mental element required for the offence of assault, and objective foreseeability that the assault would subject the victim to the risk of bodily harm. I refer to **The Queen v. Nurse** (1993), 83 C.C.C. (3d) 546, a judgment of the Ontario Court of Appeal, and **The Queen v. Dewey** (1998), 132 C.C.C. (3d) 348, a judgment of the Alberta Court of Appeal, as authorities for those statements of the law.

...

[33] In the case of the Defendant here, he and Mr. Dessouroux both consented to, and did participate in a fist fight. The intentional application of force by the Defendant to Mr. Dessouroux caused bodily harm to Mr. Dessouroux. The principal issue is whether the consent of Mr. Dessouroux to participate in this fist fight is vitiated. According to **Jobidon**, that consent is vitiated if the Defendant intended to cause, and did cause, bodily harm to Mr. Dessouroux. [Further see **The Queen v. Jobidon** at page 490, and **The Queen v. Paice**, [2005] 1 S.C.R. 339 at paragraph 18.]"

[8] The trial judge dealt with the burden of proof when he said:

"[36] Regarding any burden of proof, I stated at the outset, that the burden is on the Crown here to prove all of the elements of the offence charged beyond a reasonable

> doubt. The Defendant bears no burden to prove that Mr. Dessouroux did consent to any application of force. In applying the law as set out in **Jobidon**, the Crown bears the burden of proving beyond a reasonable doubt that the Defendant intended to cause bodily harm to Mr. Dessouroux, and did cause bodily harm to him, if the Crown seeks to have vitiated the consent of Mr. Dessouroux, which consent, the Court has already determined, was present."

[9] He then concluded:

> "[45] In the result, the Crown has proven an intentional application of force by the Defendant on Mr. Dessouroux. However, there was consent to that application of force and the actions of the Defendant did not go outside the range of the consent. The application of force caused bodily harm to Mr. Dessouroux. However, the Crown has not shown that Mr. Dessouroux's consent should be vitiated because the evidence does not establish beyond a reasonable doubt that the Defendant intended to cause bodily harm."

[10] The Crown here argues that the trial judge's conclusions about the respondent's intention were unreasonable. I reject that argument.

[11] The trial judge clearly was aware that it was not a simple matter of the accused saying that he did not intend to cause bodily harm. He pointed out that such a statement would be self-serving and that he had to assess that issue in light of all of the evidence. He then proceeded to do so and found that, considering the accused's evidence with all the other evidence, it left him with a reasonable doubt and applying the **R. v. W.(D.)**, [1991] 1 S.C.R. 742, principal he gave the benefit of the doubt to

the accused and found him not guilty. I find no error in how he assessed the evidence and his conclusion was reasonable.

[12] I dismiss the first ground of appeal.

[13] The second issue is whether the trial judge applied the proper legal test when he held that the Crown had to prove that the accused had intended to cause bodily harm when he struck the complainant.

[14] The Crown argues that the test is not whether there was an intention to cause bodily harm but simply that there was an intent on the part of the accused to apply force which was objectively foreseeable to create a risk of bodily harm.

[15] I reject that argument. All the cases I have been provided with, including **R. v. Paice**, [2005] 1 S.C.R. 339, stand for the principal that the intention required is an intention to cause bodily harm. Cases by a number of Courts of Appeal prior to the **Paice** case held similar views. See for example **R. v. Crosby**, [2005] P.E.I.J. No. 1, from the Prince Edward Island Court of Appeal and **R. v. Doherty**, [2000] N.B.J. No. 299, from the New Brunswick Court of Appeal.

[16] Both cases were rendered prior to **R. v. Paice**, *supra*, and had decided the issue as was later rendered in **Paice** by the Supreme Court of Canada.

[17] In **Crosby** the accused was charged with manslaughter after a consensual fight which resulted in the victim's death. The trial judge had refused to give the jury the issue of consent. The appeal court ordered a new trial. Mitchell, J.A., held that the jury in that case should have been instructed that in order to convict the accused of manslaughter the Crown had to prove beyond a reasonable doubt that the accused intended to cause more than trivial bodily harm or that the victim did not consent to the application of force.

[18] In **Doherty**, *supra*, the New Brunswick Court of Appeal dealt with an appeal from a trial decision that found the accused guilty of manslaughter in circumstances where he struck the victim after the victim had attempted to strike him. The victim later died as a result of the blow to his head.

[19] The trial judge had found that the accused's punch to the victim's head was an unlawful assault despite finding that while he intended to strike the victim in the head he did not intend to cause him any serious injury.

[20] The court of appeal overturned the conviction and held that before the blow thrown by the accused could be considered an unlawful assault the trial judge would have had to find that he had intended to cause bodily harm.

[21] Drapeau, J.A., speaking for the court referred to **R. v. Jobidon** and said:

> "**20** It must be emphasized that Jobidon does not stand for the proposition that all blows exchanged in consensual fist fights constitute unlawful assaults. Such an approach would unduly enlarge the scope of criminal liability contemplated by Parliament when it chose, by the language it employed in s. 265(1)(a), to make the absence of consent to the application of force an essential feature of the crime of assault. As a result of Jobidon, courts must focus, perhaps more than ever before, on the intention of the combatants.
>
> **21** Even in circumstances where serious harm is inflicted in the course of an altercation, the injured party's consent to the application of force to his or her person will preclude a finding of unlawful assault against the combatant who stands accused, unless the Crown establishes that such serious harm was intended by the latter's application of force. That view was expressed in 1984 by The Law Reform Commission of Canada in Working Paper 38: Assault, at p. 24:
>
> > As regards the present law, it is clear that ... in general, where the contact is intended to cause death or serious harm, consent is no defence."

[22] He then concluded:

> "**23** In the case at bar, Justice McLellan found that Mr. Doherty did not intend to cause Mr. Gillan any serious injury. In my view, it follows from that finding of fact, which is not challenged by the respondent, that Mr. Gillan's consent is effective and that, as a consequence, Mr. Doherty did not commit an unlawful assault when he punched Mr. Gillan on the jaw. On the facts as determined by the trial judge, Mr. Gillan's consent to the application of force to his person precludes a finding that Mr. Doherty committed an unlawful assault. It follows that there is no basis for Justice McLellan's finding that Mr. Doherty's punch constituted an unlawful act within the meaning of s. 222(5)(a). The trial judge erred in law in convicting Mr. Doherty of manslaughter."

[23] In this case the Crown asked the court to apply the same standard of objective foreseeability, which is all that is needed to prove the offence of assault causing bodily harm, in circumstances where the complainant's consent is not the central issue.

[24] In **R. v. Paice**, *supra*, the Supreme Court of Canada changed the approach to this offence where the court was dealing with a consensual fight. The court was obviously aware of the cases from various courts of appeal like **Crosby** and **Doherty** and held that an intention to cause bodily harm must be intended in order to vitiate consent when the complainant has initially consented to an application of force by the accused.

[25] In **R. v. Quashie**, [2005] O.J. No. 2694, the Ontario Court of Appeal held:

> "57 Based on the authorities, in my view, it was an error for the trial judge to fail to instruct the jury that in order for bodily harm to vitiate consent, they had to find both that the appellant had intended to inflict bodily harm on the complainant and that the appellant had caused her bodily harm."

[26] To accept the Crown's position on policy grounds as suggested by Crown counsel would be contrary to the present state of the law. While the court should discourage fights it is clear that a person can consent to the application of force by another and until a finding is made that the accused intended to cause bodily harm that consent permits punches to the head. Most fights involve an attempt to strike the other person in the head. That should be expected when one consents to a fist fight.

[27] The fact that the Crown must prove an intention to cause bodily harm raises the bar but does permit the court to sanction activities resulting in bodily harm if the court is satisfied beyond a reasonable doubt that the accused intended bodily harm.

[28] I conclude that the trial judge here was clearly aware of the issue before him and he was not convinced that the Crown had proven that the appellant had intended to cause bodily harm when he struck the complainant. He therefore applied the proper legal test in the circumstances and I dismiss this ground of appeal.

[29] The appeal is dismissed.

J.