SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. LeBlanc*, 2016 NSSC 362

Date: 20161122
Docket: SYD No. 450524
Registry: Sydney

Between:

Gerard Kevin LeBlanc

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 9, 2016, in Sydney, Nova Scotia
Oral Decision:	November 22, 2016
Counsel:	Blair Kasouf, for the Appellant Darcy MacPherson, for Her Majesty the Queen

By the Court:

Introduction

[1] This is my decision on an appeal by Mr. Gerard Kevin LeBlanc, from conviction and sentence imposed by the learned trial judge. Following a three day trial held December 14, 15 and 16, 2015 the Honourable Judge Jean Whalen in a decision given on January 14, 2016 convicted the Appellant on the charge of assault contrary to section 266(b) of the *Criminal Code of Canada*.

[2] At his sentencing hearing on March 17, 2016 Judge Whalen suspended the passing of sentence and placed Mr. LeBlanc on probation for 12 months with conditions. In addition, he was ordered to do 50 hours of community service work during the period of probation.

[3] Mr. LeBlanc is appealing both the conviction and sentence. There are four grounds of appeal, three in relation to the conviction and one in respect of sentence.

Background

[4] Mr. LeBlanc was charged that on or about September 4th, 2014 at or near Sydney, that he did commit an assault on (J.E.), contrary to section 266(b) of the *Criminal Code of Canada*.

[5] Mr. LeBlanc was employed as a residential care worker at the […]. He with another worker was assigned to care for the Complainant.

[6] The Appellant provided a concise statement of facts. I will not repeat those entirely but refer to them briefly as follows:

[7] On the morning in question J.E. was following housekeeper Patty MacDonald around the unit and into a stairwell when staff became aware of a fire alarm being activated. Mr. LeBlanc investigated and in the stairwell area had an encounter with J.E. in the presence of Patty MacDonald and subsequently redirected J.E. to a rocking chair and later to his room and then deactivated the two-stage fire alarm system.

[8] There was some verbal exchange between Ms. MacDonald and Mr. LeBlanc and she left the unit and was later encountered by her friend and co-worker, Carol

Lynn McPherson. Eventually, Ms. MacDonald reported to management alleging that Mr. LeBlanc had assaulted J.E. in the stairwell. Mr. LeBlanc denies this.

[9] Other evidence was given by staff responding to the alarms, namely, Kyle Richardson R.N. and manager, Kristen Yurczszyn, LPN, who was the charge nurse that morning, and Laura Nicole Chaisson, RCW, was the other staff person assigned to two-on-one supervision with J.E.

Grounds of Appeal

Ground #1 – Assessing Credibility - *WD*

[10] In Ground # 1 the Appellant states the learned trial judge failed to properly apply the burden of proof in accordance with the well-known guidance in the case of ***R v. WD***, [1991] 1 SCR 742.

[11] In addressing the burden of proof the trial judge stated that the Accused's evidence must be considered not in isolation, but in the context of all the other evidence and the witnesses called by the Crown.

[12] There are several points to be considered in this respect.

[13] It is argued by the Appellant that the trial judge focused on which of the two versions she preferred, the Accused's or Patricia MacDonald. For example, the trial judge categorized the Accused's evidence as a denial, which she said was neither "inherently believable or unbelievable".

[14] So in terms of the denial, did the trial judge believe him or not believe him? If it was the latter, did his evidence otherwise leave her with a reasonable doubt? The Appellant argues this type of analysis is lacking in the decision.

[15] The Appellant argues further that Mr. LeBlanc's evidence amounted to more than a denial.

Ground #3 – Crown Witness Mistaken or Untruthful

[16] In Ground #3, the Appellant submits that the trial judge ruled on the evidence of Patricia MacDonald as if requiring the Defence to establish that she was either lying or mistaken as to Mr. LeBlanc striking and slapping the Complainant.

[17] The Appellant argues it was not necessary to determine whether Patricia MacDonald was lying or mistaken. He says this shifted the focus of the trial away from the entire evidence and made it a he said/she said affair. In the result he says the focus was placed on the evidence of main Crown witness with little emphasis being on the evidence of the Accused or the remaining Crown witnesses.

[18] Is there merit to the Appellant's argument in this regard? Up to and including page 2 of the decision there is a logical flow to and an explanation of the law in terms of principles in ***WD*** and the burden of proof made by the trial judge.

[19] On page 283 of the transcript the learned trial judge then begins to discuss whether the main Crown witness lied or was mistaken. The trial judge stated:

> Mr. LeBlanc's evidence falls into two categories. One, a denial. It's difficult to elaborate on a denial. There's nothing inherently untruthful or contradictory in Mr. LeBlanc's denial.
>
> The defendant's evidence must be contrasted with the evidence of all of the Crown witnesses to be given it's context.
>
> J.E., the complainant, did not testify because of his limited verbal skills.
>
> And the second category, evidence intended to undermine the credibility of the allegations. That is Ms. MacDonald is lying to cover her inappropriate actions or she is mistaken.

[20] Further, the Appellant raises the argument that the evidence of the other Crown witnesses are not analysed or considered beyond, that they did not embellish, and there was no evidence of collusion.

[21] I have some difficulty with the characterization of the evidence of the Accused, as evidence which "undermines the credibility" of the Crown witnesses. This I gather is what the Appellant refers to as shifting the burden of proof.

[22] The Accused, as stated by the trial judge, is entitled to have his evidence and his credibility assessed in the context of the entire evidence, including all of the Crown witnesses. Based on an initial reading of the concise judgement, this argument appears to have merit.

[23] My obligation however is to deal with and assess the judgment as a whole. I shall expand on this further in the disposition of this appeal that follows later in this decision.

Ground #2 – Circumstantial and Contextual Evidence

[24] In this ground of appeal, the Appellant alleges the trial judge erred by disregarding evidence favourable to the Accused.

[25] The Accused gave considerable evidence of the Complainant being overstimulated, and as a result his potential to act out. His "level was up", so to speak that day. He stated when there is an incident it's a major blowout, but he didn't have an incident that day because Mr. LeBlanc redirected him. His last real incident was 13 months previously, based on the evidence.

[26] The Appellant submits that the other contextual evidence of staff is more consistent with his testimony in that the staff said the young man seemed to be fine after the incident. Their observations in the aftermath, he says corroborate the Appellant's evidence that there was no assault.

[27] In addition Laura Chaisson testified stating, "she (referring to Patty MacDonald exited the door and said, 'I won't shut up' and 'I'm not going to tolerate this'." (Page 167)

[28] Kristen Yurchesyn testified in cross examination, "but that's all I heard was a slight verbal, 'don't tell me to shut up' or whatever. I figured you know, two adults, a verbal dispute".

[29] There was no analysis of this evidence in the trial judge's decision. The Appellant submits this was in error. He submits the trial judge only referred to Ms. MacDonald's evidence and her friend, Ms. MacPherson, while stating, "is her narrative enough to carry the day". The Appellant argues that the other three Crown witnesses observed no difficulties, no agitation or marks and nothing remarkable about Mr. LeBlanc, other than him de-activating the alarm.

[30] The Crown in response submit the Appellant's testimony is coloured by his perception of J.E. as a "powder keg". The Crown submits it is readily apparent in her decision that the trial judge did not believe the Appellant. It is implicit that his evidence failed to raise a reasonable doubt citing the case of ***R v. Vuradin***, [2013] 2 SCR 639.

Disposition of Appeal

[31] In terms of the length of the judgment, that alone, is not a factor that gives rise to a judgement being in error. What judgments lack in length can be and is often made up in brevity and the clarity of the reasons.

[32] In ***Vuradin***, the court stated as follows:

> 10. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": ***R. v. Dinardo***, 2008 SCC 24 (CanLII), [2008] 1 S.C.R. 788, at para. 25.

[33] This was not a ground of appeal *per se* but the Appellant made repeated references to the brief nature of the judgement. I am satisfied the reasons of the trial judge are sufficient to allow for Appellate review.

[34] In assessing the grounds of appeal before me the common thread is how the judge dealt with the burden of proof and the assessment of credibility.

[35] In addition, did she deal adequately with the all the evidence or was a key piece of evidence not dealt with or not dealt with sufficiently?

[36] I think it is helpful to consider the plain and straightforward explanation of the standard of review given by Justice Saunders in ***R v. Skinner***, 2016 NSCA 54, at paragraphs 15 - 28 as contained in the Appellant's brief.

[37] I have read this closely and adopt these on this appeal. I repeat for example that on questions of law the trial judge must hit the "bull's eye". There is no deference shown.

[38] On matters involving fact and credibility, we are reminded that these are factors largely within the domain of the trial judge, who had a front row seat in the trial and viewing of the witnesses.

[39] On matters such as these the trial judge's decision is shown more deference than errors of law, which are judged on correctness. Matters of fact and credibility will not be disturbed unless they are found to be unreasonable or unsupported by the evidence.

[40] Using the analogy of Justice Saunders on matters of fact and credibility, if the trial judge did not hit the bullseyes but stayed within the outer rings, those grounds of appeal are dismissed.

[41] The burden is on the Appellant in both instances.

[42] I turn first to my decision on Grounds 1 and 3.

Grounds 1 and 3 – Failure to Apply *WD* and Requiring the Defence to Prove main crown witness was mistaken or untruthful.

[43] When I consider the judgement as a whole I find the trial judge did respect the burden of proof and did not displace or misapply it. She was keenly aware that the Crown carried the burden and that the Accused should be given the benefit of any reasonable doubt.

[44] In reviewing the decision I find the trial judge clearly rejected the Appellant's evidence. She found that Ms. MacDonald got involved due to the actions of Mr. LeBlanc. Implicitly she did not believe him nor did his evidence raise a reasonable doubt. An exact recantation of ***WD*** is not necessary, as long as the burden of proof at trial is properly applied.

[45] By finding that the main crown witness Ms. MacDonald did not lie or was not mistaken, the trial judge found her to be credible. As a judge is presumed to know the law, this finding of credibility was therefore beyond a reasonable doubt.

[46] Was this in error to approach credibility in this fashion? The Defence says it was unnecessary for the judge to do so.

[47] I find the judge was not in error to approach the case as she did.

[48] The Defence argues the trial judge turned the matter into a credibility contest. In her reasons she stated of the three persons present during the alleged assault, the Complainant was unable to testify.

[49] Thus, the evidence of the two remaining witnesses Ms. MacDonald and Mr. LeBlanc became the focus.

[50] In its submissions the Crown argued that an assault took place, as described by Patricia MacDonald. The Crown argued that she had the opportunity to observe the incident and no one else did, aside from Mr. LeBlanc and the Complainant.

[51] The Crown urged the court to accept the testimony of Ms. MacDonald. In a similar vein the Defence in its written submission acknowledged that beyond the circumstantial and contextual evidence, "it becomes a he said/she said".

[52] Reading the judgement as a whole, concise as it may be, I don't think the learned trial judge lost sight of the burden of proof or misapplied the burden in a criminal case. There are examples throughout the ruling that the trial judge was well aware of what the burden was and upon whom the burden rested, namely the Crown.

[53] She was entitled to accept the testimony of Ms. MacDonald and quite clearly she did.

[54] In terms of ***WD,*** the judgement further reflects the trial judge's awareness of it, citing as she did the proper test at page 282. She stated at the end of her judgement that the Crown had met their burden of proving the case beyond a reasonable doubt. (Page 285)

[55] I am therefore dismissing Grounds 1 and 3 of this Appeal.

[56] I turn now to my decision on Ground #2.

Ground # 2- Failure to consider contextual evidence, so called.

[57] In terms of this ground, the Appellant says there was other evidence, that should have been considered. This contextual and/or circumstantial evidence was essentially ignored, says the Appellant. For example, the Complainant smiling and remaining calm after the incident is not consistent with an assault upon him moments earlier.

[58] A further example, is the evidence of the duty nurses, Kirsten Yurchesyn, and Carol Chaisson**,** who were nearby.

[59] Both of these witnesses stated they overheard Ms. MacDonald saying to Mr. LeBlanc, "you can't talk to me like that", "you can't tell me to shut up" or words to that effect. Ms. MacDonald in her evidence denied these statements.

[60] In direct evidence Ms. MacDonald was asked about this and she answered, "it was him hitting J.E., that I said you can't do that". (Page 134.)

[61] An Appeal Court must be careful not to retry the case, something which is the domain of the trial judge.

[62] From the transcript it is apparent the judge was alive to this evidence, noting at least once on the record that the "words" were heard, meaning the witnesses were not present in the stairwell (Page 252) and again at pages 261, 262, in relation to the evidence of Ms. Chaisson referred to in summation.

[63] While she did not deal with this evidence specifically in her decision, the learned trial judge appears to have weighed the evidence and resolved any doubt as to credibility in making her findings.

[64] In ***Vuradin*** the court stated that credibility determinations by a trial judge attract a high degree of deference. Absent being unsupported and unreasonable, credibility findings should not be disturbed on appeal.

[65] As to whether the trial judge ignored or did not deal with certain evidence that would suggest there was no assault, the judge stated the issue before the court was whether the assault occurred as described by Patty MacDonald. This determination was made on her assessment of the evidence.

[66] It's true that in criminal matters the evidence must be considered as a whole and not "parsed". Although her statement was brief, the trial judge referred to the other Crown witnesses, and generally found their evidence to be neither embellished or colluded.

[67] In ***Skinner*** the court stated at paragraph 21:

> When errors are said to have occurred in such things as a trial judge deciding what facts to accept and what reasonable inferences to draw from those facts; or apportioning weight to the evidence the judge chooses to accept; or resolving matters of credibility; those errors are tested on appeal using a much different yardstick. **There, considerable deference is paid to the trial judge's decision and a broader latitude of tolerance is invoked when such rulings are challenged in this Court**. (Emphasis added)

[68] As stated I am satisfied the trial judge was alive to the evidence of all the witnesses, and placed emphasis on that which she found to be most relevant to her decision, those being the witnesses who were present, when the assault is alleged to have taken place.

[69] I do not find there was an error in this regard to this ground (Ground 2).

Ground # 4 – Sentencing Appeal

[70] The fourth ground of appeal is: did the trial judge err by refusing to grant the Appellant a conditional discharge having regard to the age and character of the Accused and the nature of the offence and the circumstances surrounding its commission.

[71] In her decision Judge Whalen reviewed in some detail the principles of sentencing. She said for example that sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.

[72] She noted that in each case the court must impose a fit sentence in the community and that the nature and gravity of the offence is properly the central factor in sentencing and it must be the first rule that prompts the court.

[73] Further, she said that other common law principles of sentencing must be appropriately applied and in the end the punishment must be proportionate to the moral blameworthiness of the offender. She stated the cardinal principle, that being that the punishment must fit the crime.

[74] She noted the provisions of section 718.2(a) and also s. 718.2(a)(ii) which state whether the offender in committing the offence abused a position of trust or authority in relation to the victim, must be considered. She noted that the failure to express remorse following a conviction is not an aggravating factor, the expression of sincere remorse is a mitigating factor.

[75] The trial judge noted that Mr. LeBlanc, had a history of gainful employment and as a result of the offence lost his job. With respect to aggravating factors Mr. LeBlanc was a personal care worker, he was in a position of trust, that J. E. was a vulnerable person, and that the assault was unprovoked.

[76] She agreed with the Crown that the assault was born out of frustration and interfered with J. E.'s integrity. She noted that Crown and Defence were not that far apart. The Crown seeking a period of probation with the Defence seeking a conditional discharge.

[77] She reviewed the law with respect to a discharge and the two conditions precedent to the exercise of that jurisdiction. The first consideration being whether it is in the best interest of the Accused that he should be discharged either

absolutely or upon condition. The second condition being that a grant of discharge is not contrary to the public interest.

[78] The trial judge stated that the powers given by former section (s. 662.1) should not be exercised as an alternative to probation or to a suspended sentence. She noted that a common reason for requesting a discharge is the desire to avoid specific consequences of a conviction often relating to immigration status, professional qualifications or other employment issues.

[79] She stated that the test is simply whether permitting the offender to avoid the stigma of a conviction undermines the public interest in some definable way, with respect to the second part of the test.

[80] Further she noted, referring to ***Ruby*** (*Sentencing*, 4th ed. Toronto: Butterworths, 1994) at paragraph 9.8 that the total picture that must be examined. And at paragraph 9.15 discharges maybe refused where the court finds that it is in the public interest to see that future or potential employers or social organizations know of the activity and have a chance to evaluate it.

[81] The trial judge stated that Mr. LeBlanc had no prior conviction and that he came before the court as a first time offender. She found given Mr. LeBlanc's career and the fact that this happened at his place of work, that it was contrary to the public interest to hide his record from those who would have concerns. This is a key finding on this appeal.

[82] The Appellant's argument on Appeal is as follows:

> The Appellant simply states that while granting a discharge would be in his interest, that it is also not contrary to the public interest. The learned trial judge appears to emphasize that due to his line of work his criminal record should be available in the context of further employment by implication in his RCW field. It is respectfully submitted that today's security clearances and vulnerable criminal records checking including local records, the JEIN system, as well as recent federal replacement of pardons by record suspensions would not hide his convictions from similar facilities. Indeed Mr. LeBlanc is close to his retirement age and received considerable publicity and any prospective employer would be looking for references.

[83] The Court has no cogent evidence before it of what today's security clearances or systems are in place to detect convictions or discharges. In the

review of a trial court's sentencing disposition, it must be kept in mind that sentencing is a highly discretionary function.

[84] In sentencing decisions, Appellant intervention is permissible in limited circumstances: only where the sentencing court proceeds on an error in principle, fails to consider a relevant factor, engages in over emphasis of appropriate factors, imposes a disposition which is a substantial and market departure from the sentences customarily imposed for similar offenders committing similar offences. ***R v. Bartlett***, (2008 CanLII 1535 (ONSC)).

[85] I have reviewed the decision of Judge Whalen on the sentencing of the Appellant. I find it to be thorough. I do not find that she proceeded on an error of principle or failed to consider a relevant factor. Indeed she spent considerable time discussing the impact of a discharge on the future employment and the need in her view to, "not have the conviction hidden from future or prospective employers".

[86] She stated that discharges may be refused where the court finds that it is in the public interest to see that future and potential employers know of the criminal activity and have a chance to evaluate it.

[87] In this case it was important for the court to perform such an analysis with respect to Mr. LeBlanc because of his very positive pre-sentence report, and the nature of the offence.

[88] The Appellant came to be a residential care worker after looking after his mother for a period of 12 years. He also cared for the Complainant for a number of years without incident.

[89] Given the nature of this offence, that this appeared to be out of character for him, and a first offence, did the trial judge place sufficient consideration on the adverse impact of a conviction would have on the Accused's chances of reemployment; and conversely place undue weight on the importance of hiding the conviction as being contrary to public interest?

[90] In the totality of the circumstances, was this an appropriate case to eliminate the Accused's record by imposing a conditional discharge? The Appellant argues that the imposition of a conditional discharge does not have the effect of hiding the Appellant's conviction.

[91] In the ***R v. Donovan***, 2013 NSPC 83, at paragraph 28 the Court stated:

> It is commonly assumed that a discharge does not produce a criminal record. That is not quite correct. It does produce a criminal conviction and a record of a discharge.

[92] This would seem to suggest that a discharge does not eliminate a record. In ***Bartlett*** however, the court stated at paragraph 18:

> Having regard to the totality of the circumstances this is an appropriate case to eliminate the Appellant's criminal record by imposing a conditional discharge to which we'll attach the same conditions as set out in the probation order imposed by the court.

[93] This case would suggest that the Appellant's criminal record would be eliminated.

[94] In the present appeal the Crown has put forth that the Court need only refer to the section of the *Criminal Code* dealing with conditional discharges. Section 730 (1) states, "providing that the court before which the accused appears may, if it considers to be in the best interest of the accused, and not contrary to the public interest instead of convicting the accused by order direct that the accused be discharged absolutely or on conditions".

[95] The Crown in the present appeal states a discharge does not produce a criminal record. I concur.

[96] I note the judge's finding was that the offence was a serious one because of the circumstances in which it occurred. There was the vulnerability of the victim and Mr. LeBlanc being in a position of trust.

[97] As an Appeal Court, it is not for me to impose what sentence I would have imposed, but rather whether the learned trial judge was in error.

[98] Having carefully considered the sentencing decision, I am of the view that Judge Whalen considered appropriate factors and was entitled in law to conclude that in these circumstances, a discharge was contrary to the public interest.

[99] Respectfully, I am therefore of the view that Mr. LeBlanc's appeal on this and the other grounds should be dismissed.

Conclusion

[100] For all for these reasons, I am going to dismiss the appeal filed by Mr. LeBlanc.

Murray, J.