SUPREME COURT OF NOVA SCOTIA
Citation: *Davidson v. His Majesty the King*, 2022 NSSC 327

Date: 20221110
Docket: SK 5146298
Registry: Kentville

Between:

Jennifer Davidson

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Jamie Campbell
Heard:	October 7, 2022, in Windsor, Nova Scotia
Counsel:	Jennifer Davidson on her own behalf William Fergusson, K.C., on behalf of the Respondent

By the Court:

[1] Jennifer Davidson has appealed the decision of The Honourable Judge Rhonda Van der Hoek of the Nova Scotia Provincial Court delivered on December 17, 2021. Ms. Davidson was found guilty of assault, mischief and uttering a threat. She was later sentenced to an 8 month conditional discharge and required to pay restitution of $1,855.55. The sentence has not been appealed.

Summary

[2] At the time of the incident that gave rise to the charges Ms. Davidson was a supervising social worker with the Department of Community Services. She was represented at the trial by Mr. Pat MacEwen. The allegations were that she assaulted T.B., committed mischief by kicking his vehicle and uttered a threat to cause bodily harm to I.S. During the trial, Ms. Davidson did not deny that she did what was alleged but asserted that her actions were in self defence.

[3] The trial judge found that the Crown had proven beyond a reasonable doubt that the defence of self defence did not apply. Ms. Davidson approached the truck in which T.B. and I.S. were sitting. She believed that they were stalking her and posed a threat to her and to members of her family based on her previous interactions with them. At the time of the incident, they had neither approached her nor uttered any threats toward her or anyone else. The trial judge made no error in reaching the conclusion that Ms. Davidson had not acted in self defence. The appeal is dismissed.

[4] The names of T.B. and I.S. have been anonymized not for the purpose of protecting their privacy but because this case refers to child welfare matters. The use of the names of those witnesses could serve to identify the child or children involved.

Grounds of Appeal

[5] Ms. Davidson represented herself on the appeal.

[6] She raised constitutional issues on the appeal that were not raised at the trial. First, she says that the case against her infringed the guarantee of liberty and security of the person under section 7 of the *Charter*. Second says that her equality rights were breached.

[7] Ms. Davidson claims that the trial judge was biased against her, as a social worker in the field of child protection.

[8] Ms. Davidson says that she was denied procedural fairness in the trial.

[9] Ms. Davidson says that the trial judge erred in the application of the test of reasonableness in assessing the defence of self defence.

[10] She also says that the trial judge did not apply the correct test for *mens rea*.

[11] Ms. Davidson says that the trial judge did not assess credibility correctly.

Standard of Review

[12] The Court of Appeal in *R. v. Pottie,* 2013 NSCA 68, recently cited by Derrick J.A. in *R. v. Stanton,* 2021 NSCA 57, described the standard of review for a judge sitting as a Summary Conviction Appeal Court judge.

[13] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[14] Trial judges make findings of fact and draw inferences from those facts. The judge hearing the appeal must consider whether those findings of fact made by the trial judge are unsupported by the evidence, clearly wrong or otherwise unreasonable or the inferences drawn from the facts are ones that could not reasonably have be made. The often used term is that there must have been a "palpable and overriding error" in assessing the evidence.

[15] A summary conviction appeal is not a "do over", a second opportunity to have the case heard or a chance to see if another judge might have a different view of things. It does not allow for an appellant to provide evidence that they now believe might have been helpful to their case but that was not put before the trial judge.

[16] The trial judge must apply the correct procedural and substantive law. Questions of law must be assessed on the standard of correctness.

[17] Any error made by the trial judge must be one that would have affected the result of the trial. A summary conviction appeal is not a search for every misspoken word or misunderstood bit of evidence.

Facts

[18] Ms. Davidson had been T.B.'s social worker in child welfare matters. She transferred the file to Lenny Omwenga, a male social worker in the office. Ms. Davidson was the supervising social worker. She kept in contact with Mr. B. however because Mr. B. wanted his concerns dealt with by a supervisor. Ms. Davidson said that she was aware that Mr. B. had suffered brain injury following an accident and did not follow directions from the court or from Children and Family Services. She said that she assigned the file to a male social worker because the women social workers did not want to deal with Mr. B.

[19] The incident that resulted in charges being laid against Ms. Davidson took place on January 3, 2020. She went to the liquor store in Hantsport in the evening. When she left the store and got into her car, she drove past a truck a realized that it was Mr. B. and another man. She had experienced some confrontations with them and was concerned that they were following her and essentially stalking her because of a report that she had made about Mr. B.

[20] Ms. Davidson drove toward the vehicle in which she had seen Mr. B. She got out of her car. Mr. B. started to record the incident on his phone. Mr. B. said that he stayed in the vehicle and waited for the police. Ms. Davidson had told him that she had called 911.

[21] Ms. Davidson walked around the vehicle. Mr. B. was recording the incident on his phone. Ms. Davidson spoke to Mr. S., who was the other man in the truck. She said, "What is your last name [I.], you old fucking man. Get out of your…. Get out you old fuck, you want to see what you're fucking with, stalk me, threaten. Get out of the fucking truck. You want some? You want to play? Let's play. Get out. Let's play [I.] , you old fuck."

[22] Mr. S. said, "You're sick lady."

[23] Ms. Davidson said, "I will rip your fucking throat out and you will not see your family. That's an assault. That's an assault. You're stalking me. Follow me and stalk me. That is not okay."

[24] Mr. B. said that Ms. Davidson reached into the open window of his vehicle and grabbed his phone. She elbowed him in the face. She kicked the passenger side door of the vehicle and dented it.

[25] Mr. B. heard sirens and Ms. Davidson got in her car and left. The police questioned Mr. B. and Mr. S. about what had happened.

[26] At the trial Ms. Davidson did not deny that she had approached the truck in which Mr. B. and Mr. S. were sitting. Her position is that her actions were justifiable because she felt that she needed to preserve herself and avoid a pending attack. She felt that things were escalating, and she was not getting the protection that she needed.

[27] There is of course a context for what happened. Ms. Davison did not randomly attack Mr. B. and Mr. S. The issue is whether that context provides the factual basis to allow for the defence of self defence to apply. As the trial judge properly noted, the evidence was sufficient to make out an "air of reality", so that the Crown had to prove beyond a reasonable doubt that self defence did not apply.

[28] Ms. Davidson had dealt with T.B. in the past but direct responsibility for his file had been moved to Mr. Omwenga. Mr. B. had supervised access with his child and had a history of alcoholism.

[29] Ms. Davidson said that Mr. B. had shown signs of improvement and there was no evidence of him drinking. He was self reporting attendance at AA. Because of those things CFS loosened some of restrictions on supervised access. A week after that decision was taken Ms. Davidson left the office to start her long delayed vacation. That was December 12, 2019. She stopped at a local liquor store and saw Mr. B. carrying what she believed to be a case of beer. She called Mr. Omwenga. She updated the agency lawyer and left for vacation.

[30] Mr. B. testified that he was called and told that he had been spotted in the liquor store buying alcohol. That was contrary to the restrictions that had been set out for him by CFS. He told the caller that he had not been in the liquor store and wanted to plead his case. Mr. B. said that he had been sober for three years. He denied that he was upset or angry about the allegation and said that he was disturbed, shocked and trying to manage the situation in a professional way.

[31] A meeting was held to discuss the matter. Ms. Davidson had to go to the office on December 23. That just happened to be the same date on which the meeting had

been arranged with Mr. B. and Mr. Omwenga. Ms. Davidson testified that she did not know what Mr. B. knew about the referral or that she had reported him as having been in the liquor store. She was nevertheless called into the meeting.

[32] In that meeting Ms. Davidson found Mr. B. and two men whom she had never met. Ms. Davidson said that one of the men jumped up and started yelling at her, calling her a "lying bitch" and telling her that she would "pay for this". She said that she was blindsided and baffled. Mr. B. was there encouraging the behavior. She said that the threats were endless. They told her that she should not sleep and that she should worry. They told her that she would regret this and that she would lose her job. She was finally able to end the meeting and get the men out.

[33] Ms. Davidson said that while this was happening Mr. B. was leaning forward taking pictures and she had to physically move his hand to get away from him. She testified that the third time Mr. B. held the phone up it hit her on the side of the face, and she said, "Get out."

[34] She said that while the men were nice to the male social worker, Mr. Omwenga, they never took their eyes off her. She told the police later that the threats were different from ones she had experienced before.

[35] Mr. Omwenga said that the meeting was about agency concerns. He said that it was not unusual for clients to attend meetings with support people and Mr. B. came with his AA sponsor and a younger man. Mr. Omwenga said that Mr. B. was like most clients when concerns are being addressed. He was a little frustrated and defensive.

[36] Mr. Omwenga said that there was an element of defensiveness with Ms. Davidson saying she saw Mr. B. at the liquor store and Mr. B. denying that. Mr. Omwenga said that the meeting ended without an agreement. He did not testify about hearing anything rising to the level of threats directed to Ms. Davidson. Ms. Davidson said that Mr. Omwenga would perceive things differently. Mr. B. said that the meeting ended with him telling Ms. Davidson that he was going to the liquor commission to get proof that she was there, and he was not.

[37] The trial judge summarized the evidence about the meeting by saying that it did not go well. She did not accept that Mr. B. or Mr. S. uttered threats to Ms. Davidson. The younger man named "J.", in her estimation, appeared to have been "quite out of line." Mr. B. was "justifiably upset". Mr. Omwenga did not appear to

think that the meeting was out of the ordinary and he did not notice Ms. Davidson appearing distressed after it.

[38] Mr. B. said that he went to the liquor store to get proof that he had not been there on December 12. When he got to the liquor store he returned to his car and saw Ms. Davidson and another employee arrive. Mr. B. and his friend Mr. S. went back into the store where Mr. B. again took pictures of Ms. Davidson.

[39] Mr. Omwenga testified that there was a confrontation at the cashier. Mr. B. asked if they were at the store to get rid of the evidence. Mr. Omwenga said that he and Ms. Davidson decided to leave the store and the confrontation.

[40] Ms. Davidson called the police and gave a statement. She warned them about Mr. B.'s criminal record, his failure to follow court orders and his brain injury. She said that the police did not get back to her after that. She felt that her concerns were not taken seriously by the police or by her employer.

[41] The next time Mr. B. and Ms. Davidson encountered each other was 11 days later, on January 3, 2020. Mr. B. and Mr. S. said that they were leaving an AA meeting. Mr. B. noticed Ms. Davidson in the liquor store close to the meeting. He pointed that out to Mr. S. He said that it seemed curious and turned the car around. When Ms. Davidson saw them, Mr. B. said that she followed them up the road. They pulled into a drug store parking lot and Ms. Davidson got out of her car. Mr. B. started to record the incident on his phone. Mr. B. said that he stayed in the vehicle and waited for the police. Ms. Davidson had told him that she had called 911.

Self Defence

[42] The trial judge carefully reviewed the law of self defence. She concluded in part that had Ms. Davidson perceived the men in the vehicle as a threat to cause bodily harm to her, the reasonable response was to wait in her own car for the police to arrive. Ms. Davidson, in her factum said that the trial judge:

> "failed to take into consideration the depth of my concerns with respect to the complainants, their intentions and who's contact first amounted to criminal acts. The test failed to consider and recognize the biological deficit, the strength deficit, the gender deficit, and the power dynamic that was at play. I was at a great disadvantage as I was facing three men, then two men with the possibility of a third lingering. I was a single mother of three children that was feeling helpless and invisible because nobody was helping me with previous concerns and reports to police."

[43] She went on to say:

> "The Judge's decision about waiting in my car was blissfully ignorant to what I had endured and the risk I was facing having no external help. Metaphorically I did sit in my car, metaphorically I did sit in my car for 10 days when I gave a statement to police, called them twice, advised my employer and emailed and called my manager with no adequate response. When I made childcare arrangements, I was in that car, waiting, and no help came. I DID walk away several times and it did not help me."

[44] Ms. Davidson says that a "fight response" to the situation was not far-fetched or removed from reason. She argues that a fight response to a traumatic situation is normal, especially when other attempts to manage the situation failed. She could either confront them then or wait until they caught her by surprise when she was not in a position to protect herself.

[45] During oral argument on the appeal Ms. Davidson said that had she been a man she would not have been required to sit passively in her car but would have been entitled to get out and defend herself. She noted that a person is not required to wait to be injured before defending themselves.

[46] The argument speaks to Mr. Davidson's sense of frustration. It does not accurately reflect the law of self defence as properly set out and applied by Judge Van der Hoek. On January 3, 2020, Mr. S. and Mr. B. were sitting in a vehicle posing no present threat at that time to Ms. Davidson. They said nothing to her at that time and took no action that could be perceived as amounting to a threat. Ms. Davidson believed they were taking pictures of her. As the trial judge noted, that may be disturbing but it is not the application of force or the threat of force.

[47] Ms. Davidson was the one who got out of her vehicle. She engaged Mr. B. and Mr. S. She walked away and was on the phone with her children's father. Mr. B. and Mr. S. did not get out of their vehicle or make any attempt to follow her. Nothing stopped her from getting into her car and driving away. She came back toward them, began to berate them, and uttered the threats towards Mr. S., assaulted Mr. B. and kicked the vehicle in which they were sitting.

[48] That is not what self defence looks like.

[49] Ms. Davidson offered a perspective that is not consistent with the law of self defence. She argued that she had tried to get help from the police and her employer and got none. She felt that her only option was to physically confront the two men

at a time when she was not taken by surprise. The problem is that if the logic of that response is played out, it resolves nothing. Had Ms. Davidson been able to threaten or strike either of the two men whom she believed were a threat to her and to her family, the threat would remain. Her actions would not have protected her or her family from any violent intentions that they may have had.

[50] Her actions, having regard to all the circumstances, were not reasonable.

[51] The trial judge made no error in concluding that the Crown had proven beyond a reasonable doubt that self defence did not apply.

Section 7

[52] Ms. Davidson's *Charter* argument is that she was denied her liberty while Mr. B. and Mr. S. were given permission to exercise their liberties without restriction. She says that they took pictures of her in close quarters and their words registered as threats in her mind. She says that she was traumatized by the situation and was collecting Workers' Compensation benefits for post traumatic stress disorder.

[53] She argues that because of what she experienced, she believed she need to preserve herself, to avoid a pending attack. She says that she could not walk away another time as there was "an escalating pattern with no adequate intervention."

[54] Ms. Davidson has framed this as a section 7 *Charter* claim. It is really another way of saying that she was acting in self defence. There was, as the trial judge found, no evidence of a "pending attack". Ms. Davidson may have been frustrated and fearful. But on January 3, 2020, there was no attack pending from the two men who remained in their vehicle, waiting for the police to arrive.

Bias

[55] Ms. Davison alleges that the trail was biased against her. She says, "I can't help but conclude that she has a visible biased (sic) against social workers and their practice field in child welfare." Mr. Davidson makes this claim based on the fact that the judge used the word "jargon" to describe the organization of the hierarchy in child welfare, her reference to the use of hearsay on child welfare matters, and that she gave "gave no credit to the work we do."

[56] There is no evidence to support the contention that the judge was biased against Ms. Davidson or against social work or social workers. She made findings

of fact that were supported by the evidence that was properly before her. She made no disparaging comments about social workers.

[57] Ms. Davidson suggested that the trial judge gave Mr. B. a smoke break while he was giving his evidence and told him that he could go and have a smoke in the truck with another witness, Mr. S. She said that:

> "The Judge then tells Mr. B. to take the statement with him and she gives him permission to sit with Mr. S. outside to smoke. There is clear evidence at this stage that Mr. S. will do anything for Mr. B. Permission was given during the middle of Mr. B.'s testimony for Mr. B. to go to sit outside with Mr. S. in Mr. B.'s truck, away from any ears, with his police statement to read."

[58] The transcript does not indicate that the trial judge gave permission for Mr. B. to sit in the truck with Mr. S. The trial judge said, "this is important". She told Mr. B. that he was still under oath. "If you smoke, you go out and have a smoke, but this is important…don't talk about your evidence with Mr. S., who's the next witness, okay? So, don't chat like…you know what was happening before and what I talked about, or what I'm trying to figure out, or anything like that." Mr. B. said, "I won't. The judge then said, "Nothing except the weather type thing, okay? And preferably nothing all. Okay?" Transcript August 3, 2021, at p. 66.

[59] That was the standard caution given to a witness when a recess is taken. It is not evidence of bias.

Procedural Fairness

[60] Ms. Davidson says that she is "requesting that the Supreme Court do a judicial review under the grounds of procedural fairness. The duty of procedural fairness is to ensure that administrative decisions are made using fair and open procedure." The decision of the trial judge was a judicial decision, not an administrative one. That said, judges in criminal matter are required to follow the rules that govern criminal procedure.

[61] Ms. Davidson that that while Mr. S. and Mr. B. was given "free rein" to speak in depth about their feelings of her and their experience with the Department of Community Services, she and Mr. Omwenga were not permitted to provide the information that they had about Mr. B.'s child welfare file. She says that she was unable to explain her state of mind. She had knowledge about Mr. B. and his long standing file, particularly as it related to his treated of women and children.

[62] The trial judge noted that evidence about why Mr. B. was involved with CFS was not something that she wanted to have dealt with in the trial. She said that it "may be a blurry line". There was nothing wrong with that decision. The judge was simply noting that some information would be required for context, but the purpose of the trial was not to relitigate child welfare matters.

[63] Ms. Davidson argued that she was denied the opportunity to put before the court the reasons why she feared Mr. B. But that information would not address the issue of why a person in her circumstances, with her background and experience, would reasonably believe that it was necessary to get out of her car and confront Mr. S. and Mr. B. who were not then making any threats of physical violence against her at that time. Mr. B.'s background with child welfare authorities would not change that. His treatment of women and children would not change that. His record of violence would not change that.

[64] The more evidence that Mr. B. had been physically violence and abusive to others, the less reasonable it would be to physically engage him knowing that the police had already been called and he was not making any attempt to get out of his truck.

Charter Section 15

[65] Ms. Davidson says that what she experienced with Mr. B. and Mr. S. was a breach of her equality rights under section 15 of the *Charter*. She says that she was ignored and dismissed when she reached put for help and was unfairly excluded form the same protection services offered to the complainants based on long standing and deeply rooted sexist responses to women in violent situations. She says that Mr. B. and Mr. S. adopted the victim role and created an environment of blame shifting. She says that the focus of the court proceedings was on the audio recording and her "reactive response to violence" rather than on the events that led to her response.

[66] Ms. Davidson has framed her disagreement with the trial judge's decision about the reasonableness of her reaction in terms of equality. But the trial judge carefully and specifically addressed the test for the application of self defence which is assessed objectively while having regard to the characteristics and experiences of the person who is asserting the defence. The person must subjectively believe that force or the threat of force is being used and that subjective belief must be assessed on an objective standard. The judge noted that Ms. Davidson believed that Mr. B. and Mr. S. had driven to her home community and had no legitimate reason to be

there. She believed that they were stalking her and believed that they would cause her bodily harm. She believed that she heard words from them on two occasions to the effect that they wanted to make her pay, not sleep, lose her job and other things. She had called the police earlier and had not heard back.

[67] When she got out of her car and approached the other vehicle, she told the police that she was responding to "weeks and weeks of violence".

[68] The trial judge considered Ms. Davidson's response to the situation and easily concluded that Ms. Davidson subjectively perceived that the men were stalking her, and she was afraid. Then the judge analysed the matter objectively. She considered the facts that Ms. Davidson was a CFS supervisor and social worker, employed in a high stress work environment who was involved in decision making about child welfare matters. The trial judge asked herself whether a person with those characteristics "would perceive the actions of the men to represent a force or threat of force." The men did not approach Ms. Davidson. She approached them. She followed them because she believed they were photographing her. They remained in their vehicle and never got out of it. She approached them and engaged them. Any reasonable person who perceived them as a threat would have stayed in the car and waited for the police. That is both an accurate description of the law of self defence and a proper application of it.

[69] Self defence does not apply when a person who is not facing a threat of physical violence at the time, decides to make a pre-emptive strike so that a physical confrontation will take place on more favourable terms. It does not apply when a person is harassed, insulted, or verbally abused and refuses to take it anymore. There must physical violence or the threat of physical violence.

Mens Rea

[70] Ms. Davidson argues that the correct legal test for *mens rea* was not applied. She says that the audio tape was considered but the totality of the evidence was not given adequate consideration by the judge. She says that there was no conscious intention to apply force but rather to respond verbally in an attempt to defend against a pattern of behaviours that were harming her, causing her to fear for her safety and the security or her home and the safety of her children. She says that her actions do not show any intention to "commit a prohibited act." Her motivation, she said, was to confront the men and make their behaviour stop. "It was a fight response to a number of aggressive acts towards me and their behaviour was festering and getting

worse. I took appropriate steps to alleviate the situation and nothing meaningful was done for me and as a result the behaviour was allowed to continue."

[71] A person is presumed to intent the logical consequences of their actions. Ms. Davidson struck Mr. B.. There was no evidence and no argument to suggest that the act was an accident or an involuntary movement. Ms. Davidson intended to strike Mr. B.. Whether she believed that was done in self defence does not negate the *mens rea* element.

[72] Similarly, she intended to kick the vehicle. Whether she intended to damage or not does not address that mental element.

[73] She spoke words to Mr. S. that conveyed a threat. Whether she intended to physically harm him does not matter. The speaking of those threatening words and the intent to utter them establish the mental element.

Misapprehension of Evidence

[74] Ms. Davidson argues the trial judge did not assess credibility correctly. She said that there is a large list of inconsistencies between the testimony of Mr. B. and that of Mr. S. She says that their evidence was not credible.

[75] Trial judges are given considerable deference by appellate courts in dealing with issues of credibility. Trial judges have the benefit of seeing and hearing witnesses in the context of the trial itself. Judges in appellate courts read transcripts. A trial judge's assessment of credibility, as a finding of fact, will be overturned when the assessment cannot be supported by any reasonable review of the evidence.

[76] In this case Judge Van der Hoek carefully considered the evidence in assessing credibility. She addressed the credibility of each witness with regard to each issue and acknowledged when witnesses were more credible on some issues than others. She did not make a simple statement that she accepted or did not accept the evidence of a witness. Her findings of credibility were not merely conclusory statements. She explained why she accepted or did not accept evidence.

Conclusion

[77] Ms. Davidson has put forth several reasons why she believes that the decision of the trial judge was wrong and why the process used was fundamentally flawed.

[78] Ms. Davidson struck Mr. B., damaged his truck, and threatened Mr. S. There was ample evidence to allow the judge to reasonably reach that conclusion. There was no evidence to support the contention that Ms. Davidson was, at the time of the assault, responding to physical violence or a threat of physical violence that was in any way imminent. Mr. B. and Mr. S. remained in their vehicle and took no steps to approach Ms. Davidson. Any evidence to establish Mr. B.'s disposition toward violence, his lack of respect for women and children, his refusal to abide by court orders, or the level of animosity expressed in his encounters with Ms. Davidson more than a week before, would not change the fact that when he was struck by Ms. Davidson he was just sitting in his truck.

[79] The trial judge in this case made no reversable error. The appeal is dismissed.

Campbell, J.