SUPREME COURT OF NOVA SCOTIA
Citation: *R.K. v. R.*, 2024 NSSC 127

Date: 20240328
Docket: 514469
Registry: Sydney

Between:

R.K.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: section 486.4 and 486.5 Criminal Code of Canada

Judge: The Honourable Justice Patrick J. Murray

Heard: August 31, 2023, in Sydney, Nova Scotia

Counsel: R.K., self-represented Appellant
Peter Harrison, for the Respondent

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated May 16, 2024.

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 486.5 - Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice

By the Court:

Introduction

[1] This is an appeal from a conviction by the Appellant, R.K. The appellant was found guilty of committing an assault between March 14, 2020 and March 30, 2020, at or near Sydney, Nova Scotia, contrary to s. 266(b) of the *Criminal Code.* The Appellant also appeals the sentence imposed of 30 days incarceration and 24 months probation.

[2] In his written decision dated February 22, 2022, the Honourable Judge A. Peter Ross found that the evidence at trial left him with no reasonable doubt that Mr. K. committed the assault upon the Complainant, […], on the dates alleged. The conviction was entered as one offence that occurred during what the Complainant referred to as the "quarantine period" in late March, 2020. Mr. K. filed a Notice of Appeal on April 28, 2022.

Appellant's Grounds - Substantive and Procedural

[3] Mr. K. argues the learned trial judge (the "trial judge") misapprehended the evidence, erred in his analysis of the evidence, and erred in his findings on credibility. As a result, the Appellant says the verdict is unreasonable and cannot be supported by the evidence.

[4] The Appellant submits the trial judge only gave weight to the testimony of the Complainant, and did not consider the influence that, he says, the Complainant's […], [...], had on the young Complainant, or the impact of […].

[5] The Appellant says he was denied procedural rights, including a right to trial by judge and jury, the right to provide evidence favourable to him, the right to subpoena witnesses, and denied his charter rights over the course of the trial, including a lack of full disclosure by the Crown.

[6] The Crown submits that misapprehension of the evidence is a stringent standard for the Appellant to meet. Any misapprehension must be material and not peripheral to the issues at trial. It must go to the substance of the issue, rather than

mere detail. (***R. v. Lohrer***, 2004 SCC80; ***R v. Morrissey***, (1995), 97 C.C.C. (3d) 193).

[7] In terms of reasonableness of the verdict, the Appellant says the trial judge erred in assessing credibility. Credibility s a question of fact, and the appeal court will not interfere unless the credibility finding is not supportable on any reasonable review of the evidence. (See ***R. v. Rahman***, 2014 NSCA 67)

Background

[8] The Appellant was is charged with assaulting […] in March 2020. The Appellant separated from […], [...], when [...] was […] years old. It appears the Appellant and Ms. [...] […]. Ms. [...] had moved to […] for work, and […].

[9] In March, [...] accompanied […], on a trip to […]. This vacation was cut short by the outbreak of the covid pandemic; all were forced to return home after four days and to quarantine for the required period at their homes. The Appellant began lobster fishing in May 2020. During the quarantine period [...] did his school work from […] house in Sydney. [...] remained there until mid-June, when […], with the assistance of […], removed […] house and took them to […], where they have lived with […].

[10] The charges arose from events that allegedly occurred in the latter half of March, 2020. [...] testified that […] handled him roughly on several occasions. The defence was "simple denial, coupled with attempts to undermine [...]'s credibility and to accuse him of being a tool of […] in her effort to pry away […]" (trial judge's decision).

Grounds of Appeal

[11] The Appellant's grounds of Appeal are as follows:

1. The Trial Judge misapprehended the evidence as presented.
2. The Trial Judge erred in his analysis of the evidence.
3. The Trial judge erred in his weight considered on credibility of the accuser in some evidence.
4. The Trial Judge's verdict is unreasonable and cannot be supported by the evidence.

5. The Trial judge denied the right to Supreme Court Hearing when requested.
6. The Crown did not provide full disclosure of all evidence for consideration and Appellant was denied right to provide evidence favorable to Appellant.
7. The Trial Judge erred by refusing the right of the Appellant to subpoena witnesses favorable to Appellant's arguments.
8. The Trial Judge did not consider denial of Charter Rights on several occasions over the course of the trial.

Criminal Code Provisions – Appeals

[12] The operative *Criminal Code* sections for an appellate matter such as this are sections 813, 822(1), 687(1), and 686 which read as follows:

Appeal by defendant, informant or Attorney General

813. Except where otherwise provided by law,

(a) the defendant in proceedings under this Part may appeal to the appeal court

(i) from a conviction or order made against him,

(ii) against a sentence passed on him, or

(iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder;

Certain sections applicable to appeals

822 (1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where
(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

(d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.

Order to be made

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
(a) direct a judgment or verdict of acquittal to be entered; or
(b) order a new trial.

(3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and

(a) affirm the sentence passed by the trial court; or
(b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Powers of court on appeal against sentence

687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

Standard of Review

[13] In the case of ***R v. Hweld***, 2018 NSSC 288, reversed on other grounds, 2020 NSCA 36, Justice Peter Rosinski discussed the standard of review in summary conviction appeals. My learned colleague in his decision included a discussion regarding the difference between the standard of review for appeals before the Nova Scotia Court of Appeal and the Nova Scotia Supreme Court, as a Court of Appeal. His lordship referred to several decisions of our Court of Appeal: that of Justice Peter Bryson, in ***R v. Alkhatib***, 2013 NSCA 91; Justice Farrar in ***R v. Pottie***, 2013 NSCA 68; and Justice Fichaud in ***R v. Francis***, 2011 NSCA 113. I have added emphasis to paragraph 16 of ***Hweld***, in which Justice Rosinski's refers to his decision in ***R v. Garland***, 2014 NSSC 445:

> [14] I will repeat what I said in *R. v. Garland* 2014 NSSC 445:
> …
> 33 More recently, Justice Bryson, sitting as a chambers judge in *R. v. Alkhatib* 2013 NSCA 91, reiterated the differences in the approach taken by the Court of Appeal when reviewing an appeal heard by a summary conviction appeal court (a superior court justice), in contrast to that of a superior court justice acting as a summary conviction appeal court:
>
> 13 Justice Farrar in *R. v. Pottie*, 2013 NSCA 68 explained the standard of review for summary conviction appeals:
>
> [15] In the recent decision of *R. v. Francis*, 2011 NSCA 113, Fichaud, J.A. considered the standard of review to be applied in an appeal pursuant to s. 839(1)(a) of the *Criminal Code*. In summary, there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.
>
> **[16] 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. (Emphasis added)**
>
> [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine

> whether the SCAC judge erred in law in the statement or application of the principles governing its review (see Francis, para. 7; see also *R. v. R.H.L.*, 2008 NSCA 100; *R. v. Travers*, 2001 NSCA 71; *R. v. Nickerson*, 1999 NSCA 168, para. 6). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

The Allegations at Trial

[14] The allegations as summarized by the trial judge were as follows:

> 1. [...] claims that […] twisted his arm on multiple occasions. He says that the Accused "took my arm with one hand and twisted it around" and that "this happened maybe twice during the quarantine period but it happened a lot in my life." At trial he demonstrated how it was done, using gestures.
>
> 2. He further claims that [...] bent his fingers back – "pulled it back, like it was going to break." He did not remember what exactly precipitated these actions, nor where in the house they occurred, but says [...] did this at least 5 times during the quarantine period.
>
> 3. Thirdly [...] says that [...] pulled his hair, which was quite long. He says this occurred about 3 or 4 times around the time of his […] or before. His hair, I might note, was what I would call quite long when he testified in July of 2021, but he says it was even longer in March of 2020. Again he showed how [...] would do this. He thought this happened "upstairs", when [...] got "mad and frustrated if I didn't do something right."
>
> 4. Lastly [...] alleges that [...] grabbed him by the neck on one occasion, when he was helping [...] complete some carpentry near the basement stairs. The context for this is important, because [...] connects it to his inability to hold up a board. He says they were covering a roof support, finishing work around the stairs mostly done the previous fall, but left unfinished in this one detail. He says they had meant to complete this before the […] trip but did not get it done and so had to do it upon their return. He says the Accused "came at me…put his hand right on my neck", again demonstrating how. He says it "started to get hard to breathe; I was starting to get a bit worried."

[15] In his defence, the Appellant introduced nine exhibits, including photos, videos, and documentation (boarding passes, weather reports, vehicle, phone

records, emails) that he says refute the allegations. The trial judge confirmed that the Defendant had no burden, which remained on the Crown to prove the essential elements of assault beyond a reasonable doubt.

Analysis - Grounds of Appeal (*Grounds 1-4 in the Notice of Appeal)*

Misapprehension of Evidence and Credibility

[16] The Appellant's grounds relate, firstly, to the trial judge's findings on the evidence, particularly with respect to credibility.

[17] The Complainant testified that during the quarantine period he and [...] worked on various jobs around the house and property, when [...] got upset, he twisted his arm, bent his fingers back, and pulled his hair.

[18] The trial evidence focussed on three projects at the Appellant's home. These were: 1) work on the stairs leading to the basement; 2) work (on a trench) in the backyard pool area; and 3) work on the Appellant's antique car, a 1985 Pontiac, in the driveway.

[19] With respect to the work on the stairs, [...] testified that they were finishing a project that had been earlier worked on, with one piece of wood left to install. [...] said the board got too heavy and he let it drop, upsetting [...] who grabbed him by the throat. He described the grip as tight, and said he was getting a little worried. [...] described [...] as being mad, turning red and gritting his teeth.

[20] [...] also described occasions where [...] would grab him with one arm and twist it around, not just in the middle but way around. The "finger bend" was when Mr. K. would use his hand to bend at the second or third joint of […]'s finger. The Complainant said he would bend his wrist back to lessen the pressure.

[21] The Appellant introduced photographs allegedly showing that […]'s hair had not been cut as of […], and on […], suggesting that [...] was being untruthful when he said he cut his hair to avoid [...] pulling it. He also pointed to photographic evidence that allegedly should have raised a doubt about when the work on the stairs was finished and thereby undermined the Complainant's credibility.

[22] Along with various details and alleged inconsistencies not related directly to the alleged assaults, the Appellant argues that all of these things together should have raised raise doubt as to […]'s credibility. He submits the trial judge erred in his assessment of […]'s credibility and the weight given to his evidence.

[23] In regard to […]'s testimony about working in the backyard, the appellant pointed to the time of year, providing weather information such as temperature and snowfall to show that what [...] said about working around the pool in March, was implausible. There was "four (4) feet of frost in the ground", said the Appellant and heavy machinery could not have been brought in to work on the pool in the latter two weeks of March.

[24] The Appellant submits on appeal that these are concrete facts that showed very clearly that the allegations made by […] were false. This, he says, demonstrates his innocence.

[25] Accordingly, he asserts the trial judge erred in his understanding of the evidence, in attributing excessive weight to the testimony of […], and preferring it to his own evidence.

[26] The Appellant further says these things corroborate his theory that the Complainant's […], [...], put [...] up to making these allegations.

[27] The Appellant submits the trial judge erred in accepting the Complainant's evidence, submitting that he could not remember when and where he was assaulted. He argues this is further evidence that the Complainant's […] influenced […], pointing to the difference in the time of disclosure of the assaults made by each of them, [...] claiming it was in March 2020 and […] claiming she found out in June 2020.

[28] The Appellant submits that there was further evidence before the Court that the trial judge should have accorded more weight in assessing credibility. Exhibit #7 for example, photos of the stairs, shows the "header plate" that he said was installed in December 21-23, 2019. Exhibit #6 shows the build sheet for the 1985 Pontiac, which the Appellant says proved that the vehicle had no fuel injector, as claimed by [...] Exhibit 4 shows equipment and heavy machinery in the front yard and some snow down on March 19, 2020. Three photos dated August 27, 2018 showed work around the pool in the backyard.

[29] A further example of a point that the Appellant says goes to credibility, is whether [...] said that [...] ran over his foot with the car. [...] denied this, and testified that [...] never did that, and that [...] would not do such a thing. The Appellant's evidence is that [...] did say that the Appellant drove over his foot, thereby, he says, casting doubt on […] credibility.

[30] In respect of the video of […] leaving […] with […] in […], [...] agreed at trial that he carried bags to the car in his statement to police. He admitted in cross-examination that a video put in evidence by the Appellant showed he was not carrying anything when he left. This is another point which the Appellant says undermines the Complainant's credibility.

[31] This is an appeal. It is not for this Court to retry the case on its merits. The standard of review is whether the trial judge made a palpable and overriding error in his findings of credibility, as credibility is a question of fact.

[32] Credibility assessments are afforded "substantial deference" on appeal and generally fall strictly in the domain of the trial judge, who has had the benefit of seeing and hearing the witnesses in the context of all the other evidence addressed at trial. (*Mack's Criminal Law Trial Book,* 2023 Edition)

[33] Having reviewed the trial record, the trial judge's summary of the allegations at trial is stated accurately. He addressed each of the issues, and certainly the main ones in the evidence. He made it clear that his reasons would be confined to those aspects of the evidence that informed the verdict. In my review, there are several aspects I will comment upon in the judge's reasons. In regard to the accused's evidence, the trial judge said:

> Occasionally the accused appeared to exaggerate somewhat, or to distort the evidence of the complainant in order to criticize it. According to him [...] said he was assaulted in the driveway. There is no evidence of this, from [...] or anyone else.

[34] In his direct testimony, [...] stated that the assaults generally happened during work or various projects he would work on with […]. [...] confirmed on cross-examination that nothing happened during their work in the driveway, however.

[35] In terms of the groundwork, and the Appellant's assertions about the amount of snow on the ground, the trial judge states in his decision:

> In the context of the timing of the ground work around the pool, he says there was "four feet of frost in the ground", and "two feet of snow in the back yard". That is a lot of frost, and his own photos of the front yard from […] cast doubt on his claim about the amount of snow in the back.

[36] The trial judge dealt specifically with the allegation of hair pulling, noting that Mr. K. denied ever pulling […] hair. Once again, the trial judge reviewed the photos, noting that the timing of the photos, […], did not disprove what [...] said, because he said that he cut his hair during the time he lived with […], a 90 day period that extended beyond […]. The Appellant, as noted in the decision, presumed that […] would have cut his hair earlier, but as noted by the trial judge, that is not necessarily what [...] said. I did note in cross-examination that [...] thought it was his hair that got pulled when they were working on the pool (Vol. #2, transcript, page 89). The trial judge did not refer to this in his decision.

[37] I am not going to detail every aspect of the evidence addressed at trial, or every aspect discussed by the trial judge in his decision. I am focussing on the grounds of appeal, in re-examining and re-weighing the evidence. A good example of the level of analysis at trial may be found in the trial judge's discussion of the various exhibits, including the web based printout from a weather site (Exhibit # 5):

> The accused contends that the foregoing demonstrates that [...] is being untruthful in this respect, and thus should not be believed in regard to the assaults. I have considered this argument, but [...] was not as definite about the timing of this work (when exactly in spring it was done) as the accused's argument presumes. The situation on the ground may have been very different a mere three weeks later.

[38] I find that this observation by the trial judge to be insightful. He noted that the Appellant "fastened" on the March time frame, in producing the "photographs and the climate data" to support his position that the work could not possibly have been done during that time of the year. In a similar vein, the trial judge, who was in the best position to assess the evidence, said Mr. K. was "fixated" on a statement […] made about getting his hair cut shorter, so that [...] would not pull it.

[39] In regard to the work around the stairs, the trial judge assessed the evidence of both [...] and […]. He noted that [...] agreed that most of the work was completed in December of the previous year but also that [...] was "quite definite about the location of the work". The judge concluded that the Complainant's

answers "did not reveal any uncertainty about where the "board" in question was installed". In regard to the Appellant's attempts to impugn […]'s credibility on this point by presenting additional photographs to show that the work was completed in December, the trial judge said:

> The photographs he produced, Exhibit 7, - those which offer primary support for his testimony – had not been shown to the complainant. This I not to say that the accused deliberately withheld these photos, but given that [...] did not have a chance to address them, their evidentiary effect is diminished.

[40] The Crown pointed out that this is what is normally regarded as a ***Brown and Dunn*** (1893), 6 R. 67 (HL) issue.

[41] It is the trial judge's role to assess all of the evidence and not parse it into individual pieces. The trial judge dealt with each of the Appellant's assertions in the decision, based on the evidence he heard. He was "alive" to all of the issues.

Procedural Grounds of Appeal *(Grounds 4-8 in the Notice of Appeal)*

Trial in Supreme Court

[42] The Appellant claims he was denied his right to a trial in the Supreme Court of Nova Scotia. Respectfully, Mr. K. had no such right, given the nature of the charge against him. The law is clear that it is the Respondent Crown that has the authority to elect the mode of proceeding.

[43] This is a discretionary decision, and it is a longstanding rule that the Crown may proceed by Indictment, or by Summary Offence, which election determines the mode of trial. Having elected to proceed summarily in this case, it is the Provincial Court that had exclusive jurisdiction to conduct his trial.

Denied ability to Subpoena Witnesses

[44] The Appellant claims he was denied the right to provide evidence favourable to him at the trial. The record indicates that the Appellant was given ample opportunity to satisfy the Court that the subpoenaed witnesses had material evidence to give. The trial judge explained the law governing the issuance of subpoenas, and provided the Appellant on numerous occasions with the opportunity to explain the materiality of the proposed witnesses, which were considerable in number.

[45] The Clerk informed the trial judge, that there were a large number of subpoenas sought to be issued by the Appellant. The trial judge decided it was prudent to review those with the Appellant by conducting a screening process. In doing so, the judge reviewed the specific test with Mr. K., in the *Criminal Code*, explaining that it "is whether the witness is likely to give material evidence". (Pages 26-31, 124-131 of Volume 2)

[46] In both written and oral submissions, the Appellant repeatedly asserted that the arresting officer, Constable Brendan Martin, who is also his neighbour, had relevant evidence to give.

[47] The Appellant's submission is that Constable Martin knew the history and evolution of the situation in […], as the arresting officer in the criminal court, and as a neighbour who lived […]. In his factum Mr. K. stated:

> If there was such an assault, it would be highly likely there are witnesses. Secondly the arresting officer lives […] where one the claims assaults had happened in plain view of each other's homes […] foot apart.

[48] The Crown's view is that Constable Martin had no relevant evidence to give because he knew nothing about the case. Constable Martin was informed by email that the Appellant was "arrestable", but otherwise had no part in the investigation.

[49] The trial judge concluded that the possible relevance of Constable Martin as a witness could only be in regard of an alleged violation of s. 9 of the *Charter of Rights and Freedoms,* for which an Application would be required. (See page 40 of transcript in Volume 2)

[50] The Crown argues that it is apparent from the trial record that the Appellant was throughout the trial permitted to provide further justification for the issuance of subpoenas. Further, the transcript indicates the trial judge continued to comment that the relevance of the proposed witnesses may not be apparent until all of the evidence against the Appellant had been presented. (See pages 37, 50 and 72 of transcript)

[51] Based on my review of the transcript, I would concur that this is the case. Much of the proposed evidence seemed to be speculative in nature. For example, the Appellant contended he would not do such a thing (commit an assault) because

he would be in plain view of the neighbours. Also, his elderly neighbours sit by their window, and would have seen an assault if it happened.

[52] The Appellant complained about the investigation throughout the trial, taking issue for example, with the police not speaking to his former live-in-girlfriend, asking "Would the Crown not want to hear the evidence of another adult living in the home at this time?"

[53] The Appellant further argued that he was denied the right to question the officer that laid the Information, Seargeant Erin Donovan.

[54] In his factum, Mr. K. submitted he had previous contact with this officer as a result of a motor vehicle accident in 1997. Having arrested him before, he submits, this officer was clearly in conflict and any weight be given to her testimony should be questioned.

[55] A review of the record shows that the trial judge's rulings were thought through on the basis of relevancy to the issues at trial. These decisions included permitting the Appellant to call the Complainant's mother, [...], following the conclusion of the Crown's case. (Transcript at page 128)

[56] In respect of Sgt. Donovan, there was a discussion between the Court and Appellant about him calling her. At the commencement of the trial, the Appellant informed the Court that she was not present to testify. He was informed by the trial judge that it is for the Crown to determine whom they call as witnesses. He was also informed that an informant might not have material evidence to give. The Appellant said it was always his understanding that the officer who lays the information testified. The Court indicated that it is not necessarily the case, and it is not unusual for the informant not to be called (Pages 5 and 6 of Volume 2).

[57] Ultimately, the Court indicated that if the Appellant felt the officer had material evidence to give, he could have her subpoenaed. The Court, however, stated it could not issue an order forcing the Crown to call the informant, Sgt. Donovan.

[58] My review of the record of the hearings on April 19 and July 19, 2021, indicates that the Appellant was not refused, but was initially told he could apply to have the officer subpoenaed. When the matter of subpoena was discussed further,

the Appellant informed the Court that there were only four witnesses for the Defence that included himself, his […] […], [...] and Sergeant Angus Boudreau. (Pages 126, 131 of Volume 2)

Charter Issue

[59] The Appellant, in Ground 6 and 8, submits that the Crown did not disclose all evidence (audio and video) for the statements given and the arrest date. He argues that the outcome would have been different if he had full disclosure.

[60] Mr. K. also submits that while being arrested, he was not given a reason, claiming that it was only hours later when he was being "booked" that he was told what the charges were.

[61] Mr. K. says the trial judge refused to deal with the *Charter* issues and "made the defense (sic) move forward".

[62] The discussion between the Appellant and the trial judge about the claim that the Appellant was not informed about the reasons for arrest was as follows:

> **THE COURT:** Mr. K. You just said on the one hand that he didn't know what you were being arrested for and then you went on to say he told you were being arrested for assault. So, both of those things can't be true.
>
> **MR. K.**: No, no except…but this is what I'm trying to say. Of you let me finish what…in his police statement that he gave to the crown, he stated that he informed me that I'm being arrested for assault.
>
> **THE COURT:** Hmm-mm.
>
> **MR. K.:** That's what he told me, in the police car.
>
> **THE COURT:** Right.
>
> **MR. K.:** He did not inform me because he told me, he said this car is audio and video recorded.

[63] Mr. K. claimed that he was not informed in the car, and that Constable Martin lied when he said he informed Mr. K. of the reason for his arrest, leading to the following exchange:

MR. K.: And in that car I asked him. I said what am I being arrested for. He said, I don't know, you'll find out when you get to police station and the charging officer will tell you.

THE COURT: Okay

MR. K.: That's two conflicting stories right there.

THE COURT: Okay.

MR. K.: That's not me conflicting it. That is me knowing the difference between right and wrong and telling one thing and then telling a lie.

THE COURT: Okay. I'll tell you…let me…

MR. K.: That's what …I…

THE COURT: Alright. Are you finished now Mr. K.? I know enough about it to tell you what's wrong with your thinking if you'd like…give me a chance, I will. None of that is relevant to whether you committed an assault on […].

MR. K.: I am…

THE COURT: It might be…if you could just hang on a second Mr. K. If you could just give me…

MR. K.: Yeah.

THE COURT: If you could not talk for maybe 30 second. Alright? Is that possible? Alright. It might be relevant to whether your charter rights were infringed. If you think your charter rights were infringed you have to make a separate charter application to the court, in writing, giving your basis why you think you were arbitrarily detained under section 9 of the *Charter*. I haven't had any such notice. But that's not relevant…

MR. K.: I didn't…

THE COURT: That's not relevant to whether you committed an assault on […]. So, he would not be an admissible witness to give relevant evidence at trial. Nothing you have told me makes him a relevant witness at trial.

MR. K.: Okay. So, I have to make application to you, in writing, for my charter…

THE COURT: Yeah, but based on what I've heard, that application has zero chance of success. Based on what you've told me and what I know of the law, that application

would be a waste of time and I don't intend to entertain frivolous charter applications. I would suggest you forget about it.

MR. K.: How is that frivolous Your Honor?

THE COURT: Well…

MR. K.: It's conflict…

THE COURT: I'm not going to argue with you about it, Mr. K. If that's the only thing you wanted to discuss, I'm not going to spend any more time on it now.

MR. K.: Okay.

[64] The Crown's response in their brief is outlined below:

43. The commentary by the Appellant on the issue of what transpired between himself and Cst. Martin is confusing. On the one hand the Appellant seems to suggest Cst. Martin is a friend who will support his defence and then comments Cst. Martin is lying to say he informed him of the reason for the arrest. Perhaps the truth can be found in a scenario where Cst. Martin told the Appellant he was being arrested for assault, but, as he was not involved in the file, could not tell the Appellant the reason – i.e., the factual allegations of the assault

44. Judge Ross did comment that based upon the evidence heard, a *Charter* application would be a waste of time and suggested the Appellant forget about it. While Judge Ross certainly discouraged the application, he by no means precluded it. Had the Appellant decided to pursue a *Charter* violation, he was at liberty to file the application. As is evident throughout the transcript, the Appellant was not deterred by comments or suggestions from the bench in pursuing a course of action – had he decided to advance a *Charter* argument, it is unlikely anything other than a direct ruling from the bench would have prevented him from doing so. Judge Ross did not "refuse to deal with the *Charter* rights issues", he simply required the appropriate application be made. No Charter application was forthcoming from the Appellant.

[65] Having considered the record, I concur with the Crown's position. The fact is that no charter application was made by the Appellant. The trial judge met the duty upon him to assist the Appellant procedurally. His comments on the chances of success were based on the law and on the evidence and submissions he heard.

[66] His decision not to debate it further with the Appellant did not alter his ruling that a separate Charter Application would need to be made to the Court with respect to non disclosure by the Crown. The Appellant has referred to audio and

video recordings of statements given to police, but also talks about there being an audio and video recording of him in the police vehicle.

[67] The Crown submits they have provided full disclosure to the Appellant, as required by ***R v Stinchcombe***, [1991] 3 S.C.R. 326. The Crown has said it is unable to respond further to this ground of appeal without further particulars.

[68] I find this ground of appeal to be tenuous in terms of relevancy and lacking in clarity. The Appellant has made numerous arguments in this appeal, some that form grounds of appeal, and some that do not. On the issue of the need for a Charter application, it is not apparent the judge erred or that the evidence at trial provided any basis to claim that a violation of the Appellant's Charter rights had occurred.

Procedural Issues Generally

[69] Given the grounds of appeal, and the fact that the Appellant is and was a self represented litigant, I believe some additional comments are merited with respect to procedure generally.

[70] It is my view that the record demonstrates that the trial judge, throughout the many hearings, was patient and understanding of the dynamics of the trial. I will cite but a few examples.

[71] In response to the Appellant pointing out what he felt were contradictions in the evidence of the Crown witnesses, the judge stated, "I'll have to think about how these inconsistencies will matter in the end". He encouraged the Appellant to talk about them and give a further explanation. The judge followed up to make sure he had a clear understanding of the evidence being put forth by the Appellant. (Examples are contained at page 288, the board versus the header plate; and page 295 when the trial judge reviewed two photos in Exhibit 8 twice)

[72] The trial judge took his time with the Appellant and guided him through his evidence. When evidence was not relevant, the trial judge explained why. He would ask the Appellant what he hoped to prove by the evidence, the limitations, or even that it may not be in the Appellant's interest or be favourable to him. For example, in regard to the calling of Ms. [...], explaining redirect of his own

evidence (at page 317), and why the police, who took the statements, had no relevant evidence to give.

[73] The trial judge permitted adjournments when it was necessary to allow for witnesses or for transcripts or exhibits to be obtained. The trial was conducted in an orderly fashion.

Impact or Influence on allegations by Ms. [...]

[74] The principal argument of the Appellant at trial is that […] was coached into making these allegations by […]. The trial judge was aware of this allegation by the Appellant. In the decision the trial judge discussed this under the heading of "Ulterior motive":

> Mr. K.'s principal argument is that [...] has been coached into making these allegations by […], [...]. Her presumed motivation is to gain an advantage in the ongoing […] proceedings where […] are being adjudicated. (Another possible motive would be to supply an after-the-fact justification for removing […]). He suggests that because he is living with his […] in […] he is susceptible to undue influence. In this sense he does not blame […], […], for lying, but contends that the assault allegations are fabrications concocted by Ms. [...] for an ulterior purpose, and that [...] has been conscripted to assist in this fraud.
>
> As I considered this possibility, I also considered the observations made and noted above concerning [...]'s testimony. Needless to say, it would be difficult for a […] year old to "stay on script" throughout all the interviews and legal processes involved in a proceeding such as this. [...]'s accounts were not flat, simple assertions, repeated word for word. His were detailed, consistent, and seemingly genuine accounts of events from actual memory. There were inherently plausible and were not seriously contradicted by other evidence. I did not get the sense that he was giving a rehearsed performance.

[75] Ms. [...] gave evidence, and the Appellant was given the full opportunity to question her. As the trial judge noted, she answered each one.

[76] Other that the long history between them and the strong belief by the Appellant, there was very little evidence, if any, at trial that pointed to [...] being informed or coached by […].

Decision on Appeal of Conviction

[77] The trial judge in his decision held that his reasons would be confined to aspects of the evidence that were most relevant. The charges in question arose from incidents during the time frame in the latter half of March, 2020.

[78] The judge expressly recognized that his assessment of credibility and reliability was a critical aspect of his decision. He further ruled that the evidence given by the Complainant and the Accused would, in particular, be of central importance, while recognizing that the trial is not simply a credibility contest and that the criminal burden of proof rests with the Crown. "The Accused is under no obligation to prove or disprove anything", he said.

[79] Having considered the entire record at trial, I find there was a basis in the evidence for the trial judge to accept the Complainant's evidence. He found the Complainant was forthright and even though he may not have been totally accurate as to dates and times, his testimony about the events themselves was not uncertain, nor were the substance of his allegations seriously challenged. In his assessment of the evidence and credibility, the trial judge found that [...] was unmoved, finding that his testimony was a genuine product of memory and that it directly related to the assaultive behaviour described by him.

[80] The trial judge noted that [...] was unable to recall whether [...] said anything during the events, but also found he did not hold any animosity toward [...] nor did he attempt to place him in a bad light. The judge checked himself (on the one the occasion) when [...] stated that [...] would "make sure no one was around". That said, the trial judge concluded on the evidence that the Complainant made no shows of emotion and showed no hesitation in answering questions put to him by defence counsel.

[81] This is a case where the accused testified and the trial judge assessed Mr. K.'s evidence in the context of all the evidence at the trial. The trial judge recognized the dynamics at play during the trial, and the history of acrimony between […], which resulted in protracted […] proceedings. He was aware that the accused believed strongly that the charges were motivated by [...]'s desire to gain advantage.

[82] The trial judge also appreciated that Mr. K. regarded the "accusations as injuries" and "expressed shock and sorrow at being accused of assaulting someone […]".

[83] In my view, the trial judge dealt with it appropriately. He acknowledged the significance of the submissions of the Appellant, he provided the context for them, and finally he explained his reasons for rejecting them. The trial judge stated that it was the Appellant's "presumed intention" that Ms. [...] was seeking to "gain advantage" stating further, "[...]'s accounts were not flat, simple assertions repeated word for word".

[84] The guiding principles contained in ***R v. WD***, [1991] 1 S.C.R. 742, apply here. These principles do not have to be recited verbatim. It is their application that is germane.

[85] The trial judge did not misapprehend the evidence but assessed it carefully and accurately, and did not omit any critical aspects of the evidence. He assessed the credibility of the witnesses and did so having regard to the evidence that was given, including the numerous exhibits.

[86] The trial judge's directions on the subpoenaing of witnesses was informative and fair. It was up to the Appellant to prepare and file the subpoenas for which he sought approval.

[87] The trial judge correctly identified credibility as the central issue. The tenor of his reasons makes clear that he found the Complainant to have testified as normal […]-year-old in difficult circumstances. He found his testimony to be credible and reliable in the context of all of the evidence.

Conclusion

[88] For all of the above reasons, I respectfully find the Appellant has not established that the grounds of appeal of his conviction have merit. I find no error of law and no palpable and overriding error has been made in the trial judge's findings of fact or assessment of credibility.

[89] In conclusion, the appeal by Mr. K. of his conviction is dismissed.

Appeal of Sentence

[90] The grounds of appeal contained in the Notice dealt solely with the Appeal of Mr. K.'s conviction. There was no specific ground pertaining to the sentence

imposed, but the Appellant did state in his factum that the "Relief sought was to "Overturn conviction and sentence".

[91] The grounds of appeal on sentence will therefore be those which this Court has been able to glean from the briefs filed by Mr. K., which made reference to his "punishment" under Ground 4, unreasonable verdict and under the heading Caselaw, wherein he stated no consideration was given to his health concerns when he was sent to the correctional facility, citing section 7 of the *Charter*.

[92] In addition, the Appellant submitted the judge erred in the type of sentence he imposed, stating that he was subject to threats while in custody, and his health was compromised due to lack of dietary needs and unsanitary conditions at the correctional facility.

[93] He submitted these things led him to being hospitalized, but also says that he was treated because of other medical issues.

[94] The trial judge began his decision by stating that the sentencing phase of the trial is concerned with the behaviours that have been found to occur and it asks "what is a fit and proper sentence" in all of the circumstances. This is in accordance with section 687(1) of the *Criminal Code.*

[95] In his decision, the trial judge considered the circumstances of the offender including the Appellant's medical condition, the Pre-Sentence Report, and other aspects such as the Appellant's claim that the Victim Impact Statement of [...] was penned by […].

[96] The Appellant was critical of the judge for imposing "zero communications with […]", who was not involved in the charges. Mr. K. further asserted that the no contact provisions in the Probation Order with […] was an "absolute destruction of the defence and […]".

[97] In terms of the facts, this was a young victim, who suffered an assault at the hands of […]. It was a […] by […] with a degree of violence.

[98] These are some of the that factors that caused the Crown to recommend a period of custody (in a facility) of 4 months. The principles of denunciation and deterrence were clearly at play. The trial judge was keenly aware of this, as well as the principle of proportionality, all of which are codified in the *Criminal Code* at s. 718 - 718.3, as well as in the caselaw on sentencing.

[99] In his reasons the sentencing judge recognized, in spite of the aggravating factors that were present, the need to consider the circumstances of the accused in an attempt to achieve the proper balance, in adhering to fundamental principle of sentencing, that the sentence imposed be proportionate to the gravity of the offence and degree of responsibility of the offender.

[100] The judge had this to say about the Appellant's health:

> **THE COURT:** … Mr. K. undoubtably has health issues. He has filed a doctor's letter to show that he suffers from Crohn's Disease and a joint condition. These require that he take certain medications. They cause him discomfort to some degree. I get the sense that Mr. K. exaggerates the extent of his illness. After all, he is able to work in the crab and lobster fishery, among the more arduous jobs a person can do. Many others have such conditions and worse. These are no excuse for committing an assault and though they do have some bearing on the impact of a jail sentence on this particular accused, again, they cannot distract the Court from its proper function.

[101] The trial judge further agreed with the Appellant stating that Mr. K. had a legitimate point, stating that the youthful victim's words should not be put to paper by someone who was clearly in an antagonistic position with Mr. K.

[102] The judge made reference to the accused's criminal record, noting that the offences were dated, and also noting that the assault here was quite different, being domestic in nature. Even here, the trial judge considered that the Applicant's record was of marginal importance.

[103] The trial judge further canvassed the Pre-Sentence Report noting that the Appellant came from a good family and had good qualities. The Appellant's mother, father and long-time neighbour all spoke of his generosity and willingness to help others at every opportunity.

[104] Mr. K. is a 41 year old man with considerable training, holding certifications in many trades and occupations, including as a Red Seal welder and metal fabricator.

[105] He is making ends meet and is gainfully employed (seasonally) as a fisherman with [...] who holds fishing licences. He is expected to be able to take over the family's licences and captain the fishing vessel. The judge commented on this as a positive for his future.

[106] I am not going to belabour these reasons in my decision on the appeal of sentence. The sentencing judge identified the main decision he had to make, after dealing with the appropriate terms for the Probation Order, stating:

> **THE COURT:** … Alright, the difficult call here was whether Mr. K. should go to jail, whether he should get a conditional sentence. If he goes to jail or gets a CSO, how long they should be. The Crown is seeking four months in jail. Mr. K. says that is excessive and points to impact on his health and his finances to say that the most he should receive is a CSO.
>
> I have an obligation to impose a sentence which doesn't simply reflect my disapproval but society's disapproval of this conduct. There is a note of denunciation that I think only a conventional jail sentence can express and this is where I come down in this particular case. Now the Crown is looking for four months. It states that four months in jail is proportionate to the gravity of the offence. Proportionality is an important principle. Another one though is restraint. I shouldn't impose a sentence that is any longer than I think is necessary to fulfil the principle of denunciation and there's no exact math with this. But in the end, having had time to think about this, the conduct, having read the Crown's brief, all the relevant material, I conclude that Mr. K.'s sentence should be thirty days in the Cape Breton Correctional Centre, followed by the period of probation for two years which I have already outlined. There are no ancillary orders in this case, I don't believe.

[107] In terms of whether the judge imposed a sentence that was fit and proper, I find the trial judge weighed and considered the relevant facts and applied the proper sentencing considerations. The judge weighed and considered the very things that the Appellant said were not considered.

[108] The trial judge took into account Mr. K.'s medical situation. He took into account that it was a stressful time for the Appellant, placing little importance on his prior record. He felt it necessary to recognize the societal message of an assault […], and the importance of the sentence representing the higher degree of moral blameworthiness, involving […] victim, and the need for general deterrence.

[109] On appeal, I would concur that the imposition of probation was appropriate, even there, the judge limited the terms only as needed, including the no contact provisions.

[110] To be clear, the sentencing judge only limited the contact to be consistent with that imposed by an Order of […]. Thus, the Probation Order read:

> g) For the first four months of this order you are to have absolutely no contact direct or indirect with [...] or [...]. After four months you are to have no contact direct or indirect with [...] or [...] except in accordance with an order and with strict direction of the Nova Scotia Supreme Court […] except through legal counsel.
>
> h) No contact direct or indirect with […] except in accordance with an Order of the Supreme Court […].

[111] Apart from that, the conditions imposed were standard, to keep the peace and be of good behaviour, attend Court when required and report to the probation officer.

[112] There were a wide variety of sentencing options for a finding of guilt in respect of the charge assault contrary to s. 266(b) of the *Criminal Code*. The victim here was a vulnerable person.

[113] Appellate courts are to approach a sentence appeal "mindful of the highly deferential standard of review applicable in sentencing cases". Except where the sentencing judge has made an error of law or of principle that has an impact on the sentence imposed, the appellant court may not vary the sentence unless it is "demonstrably unfit" or "clearly unreasonable". (*Mack's Criminal Law Trial Book,* 2023 Edition, section 8:15)

Conclusion

[114] The open mindedness and sense of fairness of the sentencing judge was on full display in his sentencing decision as was his knowledge of the proper sentencing principles to be applied. He made no error in principle. There was a wide range of sanctions available to him and he is owed deference in his finding.

[115] In conclusion, Mr. K.'s appeal of his sentence is dismissed.

Murray, J.

Between:

R.K.

Appellant

v.

His Majesty the King

Respondent

Erratum

Restriction on Publication: section 486.4 and 486.5 Criminal Code of Canada

Judge: The Honourable Justice Patrick J. Murray

Heard: August 31, 2023, in Sydney, Nova Scotia

Counsel: R.K., self-represented
Peter Harrison, for the Respondent

Erratum Date: May 16, 2024

Erratum Details:

1. In paragraph 58 the word “indirectly” should be replaced with the word “initially” such that it reads, “but was initially told he could apply to have the officer subpoenaed”.

2. In paragraph 101 the word “victims’” should read “victim’s”.

3. In paragraph 104 the word “include” should be replaced with the word “including” such that it reads, “including as a Red Seal welder and metal fabricator.”.

4. In paragraph 113 the word “appliable” should read “applicable”.

5. In paragraph 79 a comma should be placed after the word credibility such that it reads, “In his assessment of the evidence and credibility, the trial judge…”.

6. In paragraph 84 the word “to” should be replaced with the word “do” such that it reads, “ These principles do not have to be recited verbatim.”.