IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: R. v. Cameron, 2013 NSSC 379

Date: August 21, 2013

Docket: Pic 412164

Registry: Pictou

Between:

R.

-versus-

Paul Cameron

Judge:	The Honourable Justice N. M. Scaravelli
Heard:	August 21, 2013 in Pictou, Nova Scotia
Written Decision:	November 22 , 2013
Counsel:	Peter R. Lederman, for the appellant
	Alonzo Wright, for the respondent

By The Court:

[1] This is a summary conviction appeal. The appellant appeals his conviction following trial on the following charge:

> "On or about February 15 (2012) at or near Trenton, did commit an assault on Robert Leo Kenney contrary to s. 266 of the Criminal Code."

Background:

[2] The appellant was a sergeant with the Stellarton Police force in Pictou County, Nova Scotia, on February 15, 2012. While on duty and in uniform, the appellant travelled in a marked police vehicle to an address in the neighboring Town of Trenton for the purpose of inquiring as to the whereabouts of his niece, for whom a missing person's report had been filed with the Westville police. He was accompanied by a constable who was also on duty at the time. The appellant reported where they were going to the Stellarton dispatcher.

[3] Upon finding the apartment where his niece was located, the two police officers gained entry to the apartment with the consent of the occupant/complainant. While inside the apartment, an altercation ensued in which the appellant pushed the complainant onto the floor. At trial the appellant claimed he acted in self-defence in response to the complainant's gesture towards him.

[4] Provincial Court Chief Judge Patrick Curran (as he then was) found the appellant guilty of common assault contrary to section 266 of the Criminal Code. He found the appellant was not acting in the course of his duty as a police officer when he travelled outside of his jurisdiction to the apartment in Trenton. The trial judge was satisfied on the whole of the evidence, that the Crown established beyond a reasonable doubt that there was no self-defence. He found the assault was at the low end, and upon conviction, immediately granted the appellant an absolute discharge.

Grounds of Appeal:

[5] The appellant's Notice of Appeal lists the following grounds:

1. The Learned Trial Judge erred in mixed fact and law in finding the appellant was outside his jurisdiction.
2. The Learned Trial Judge erred in failing to consider and apply the provisions of The Police Act.
3. The Learned Trial Judge erred in failing to apply section 25 of the Criminal Code.
4. Such further grounds as may appear.

Standard for Review:

[6] Where it is necessary to consider the trial evidence on appeal, Duncan J. summarized the law in *R. v. Kontuck*, 2012 NSSC 204:

> [11] The appellant has not raised a challenge, *per se*, to the findings of fact made by the trial judge, but as will become apparent the argument does rely on the premise that the trial judge failed to adequately consider the testimony that the Crown says was important to the determination of whether certain words uttered by the respondent should have been held to be a threat. To the extent that the argument requires a review of the trial evidence, I rely for guidance on *R. v. Nickerson*, [1999] N.S.J. 210 (NSCA) where it is stated:

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

[12] Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, outlined the scope of appellate review of evidence relied upon to support a verdict as follows:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett* v. *The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.
>
> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38 - 40.
>
> [17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence...".

[7] It is well established that questions of law are reviewed for correctness. Factual issues are reviewed for palpable and overriding error. The judge's application of the law to the facts is reviewed as a question of fact, unless there is an extricable legal error. *R. v. CJ,* 2011 NSCA 77.

Evidence at Trial:

[8] The appellant testified he had been a police officer for approximately nine years consisting of six years with the Halifax Police Department and three years with the Stellarton Police Department. Policing in Pictou County is made up of: Westville Police service; Stellarton Police service; and the combined New Glasgow and Trenton Police services. The RCMP is responsible for policing the Town of Pictou and rural Pictou County.

[9] While on duty on the evening shift with Constable Veenhuis, the appellant was contacted by his sister from Westville requesting assistance in locating her 13 year old daughter, the appellant's niece, who with another girl had not returned home for two days. The appellant advised his sister to report the matter to the Westville police. Later in the evening the appellant was able to trace a telephone number provided by his sister to an address in Trenton in the name of Robert Kenny. The appellant advised his dispatcher where he was going and he and Constable Veenhuis travelled to Trenton to "do a door knock" at Mr. Kenny's residence, in an attempt to locate his niece.

[10] The police knocked at Mr. Kenny's apartment and gave him the name of the person they were looking for. Mr. Kenny allowed them into the apartment. The appellant believed Mr. Kenny was under the influence "of something." The appellant found his niece and her friend sitting on a coach in the living room. Another male was present and there was "drug paraphernalia everywhere." The appellant believed the girls were under the influence of drugs and were upset when he questioned them about what drugs they had consumed. The appellant testified that Mr. Kenny's demeanor changed as he denied supplying drugs to the girls. As the appellant turned towards Mr. Kenny, he observed him coming towards him with his hands up as he was talking. The appellant testified that he perceived a threat and pushed Mr. Kenny, who stumbled over something on the floor. The appellant told Mr. Kenny to remain seated on the floor. As another male occupant moved as if to grab something on or under a coffee table between them, the appellant kicked over the table.

[11] After moving the girls to the kitchen area, the appellant located a large amount of cash on the couch. He also located a cross-bow and a rifle on the premises. The appellant determined a drug warrant would be required and instructed Constable Veenhuis to contact the New Glasgow Police. After turning the matter over to the New Glasgow Police, the appellant left with the two girls.

[12] Under cross-examination, the appellant testified that the Westville and Stellarton Police share the same dispatcher and chief. The appellant also spoke with a Westville Police officer regarding his missing niece. The appellant did not contact the New Glasgow/Trenton Police prior to travelling to Trenton. When Mr. Kenny raised his hands, the appellant could not recall if his fists were clenched.

[13] Constable Veenhuis was called to testify by the Crown. He accompanied the appellant to check out the Trenton address. Normally, police would contact the other police department when travelling to their jurisdiction which did not occur on this occasion. Upon entering the apartment and confronting the girls they noted a "bong" on the coffee table and other items. The appellant kicked over the coffee table and got into a verbal argument with his niece.

[14] Beginning at page 78, paragraph 11, of the transcript of the Direct Examination of Constable Paul Veenhuis:

> "Q. Okay, what happened next?
>
> A. Ah, Mr. Kenny was upset that his table got kicked over. He was like, you know, "what the fuck did you do that for?", and took a step towards Cameron when he did that, and Cameron gave him a two-handed shove back.
>
> Q. Okay, and when you say that Mr. Kenny said, "what the fuck did you do that for?" and you held your hands up …
>
> A. Yeah.
>
> Q. … can you describe that for the court?
>
> A. Yeah. Well, when he said it, he kind of more like an exasperation or maybe surprise or whatever but, you know, it's like "what the fuck did you do that for", like, you know. Just like that.

> Q. Alright, you had … holding your hands out and would that in a threatening manner or a threatening gesture?
>
> A. Ah, I feel he was doing it more in a … I don't know what the word I'm looking for … like a concerned manner, like just surprised manner. You know, like, "what the hell did you kick my table over for?
>
> Q. Okay.
>
> A. Yeah.
>
> Q. And you said that he took a step forward, is that right?
>
> A. When he did it, you know, "what the fuck did you do that for?", and kind of moved in towards … towards Sgt. Cameron a little bit. More just, I think, the way his body, the way it went, or the way he threw his arms or how ever it was, he just moved forward towards Cameron a bit.
>
> Q. Okay, and what did Sgt. Cameron do?
>
> A. Sgt. Cameron gave him a shove back with two … like … open … open hands in the chest and shoved him back.
>
> Q. What happened to Mr. Kenny?
>
> A. He tripped and fell. There was a … like I said, the room was pretty dim but there was a … there was piles of stuff. It seemed to be everywhere. There was like an old computer, some electronics or whatnot were in behind Mr. Kenny and when Sgt. Cameron pushed him, he hit the … all the electronics that were there and fell backwards onto the floor. He ended up sitting on his butt with his back up against the couch.

[15] Constable Casey of the New Glasgow police service testified that at approximately 3:00 a.m. while on patrol in Trenton, he observed an oncoming marked Stellarton police vehicle. Constable Casey attempted to flash his emergency vehicle lights "just to say hello." At approximately 3:10 a.m., Constable Casey received a call from dispatch that the appellant was heading to an address in Trenton to look for his niece. Later Constable Casey travelled to the address in Trenton where he met and was briefed by the appellant. Constable Casey interacted with Mr. Kenny. He was

of the opinion that Mr. Kenny was under the influence of drugs. He was subsequently arrested for unsafe storage of a firearm and transported to the police station.

[16] Constable Casey testified it was not uncommon to see another police agency in another jurisdiction in the community. "Sometimes we would get a heads up that another police agency was coming into the Town."

[17] The complainant, Mr. Kenny, testified he invited the officers into his apartment after he was told they were looking for a female person. He testified the presence of bong and water pipe paraphernalia was because he constructed them as a hobby. Later on direct examination, he acknowledged he sold these items. Mr. Kenny admitted to smoking marijuana and the drug "methylenedioxy pyrovalerone" known on the street as "bath salts" on that date. He said he was "One hundred percent sober." He acknowledged the girls would have smoked marijuana.

[18] Upon entering the apartment, the appellant and his niece got into a yelling match. The appellant was very upset and pushed Mr. Kenny from behind. When he turned around, the appellant pushed him with both hands on his chest. Mr. Kenny tripped over some equipment and landed on the floor. He was told to remain on the floor.

[19] Under cross examination, Mr. Kenny acknowledged all present were smoking bath salts. Mr. Kenny also acknowledged having consumed "a few drinks" that day. He

denied raising his hands to the appellant prior to being pushed. He acknowledged having given a police statement denying the presence of marijuana in his apartment.

Analysis:

[20] At trial, the appellant claimed he was acting in self-defence and relied upon section 25 of the *Criminal Code:*

> *Protection of persons acting under authority*
>
> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (*a*) as a private person,
> (*b*) as a peace officer or public officer,
> (*c*) in aid of a peace officer or public officer, or
> (*d*) by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[21] The protection offered a police officer pursuant to section 25 would apply to self-defence.

[22] The trial judge rejected the self-defence under section 25on two grounds: (1) lack of authority as a police officer; and (2) lack of justification in the circumstances. He acknowledged the crown's obligation to negative the application of defence beyond a reasonable doubt.

[23] In finding the appellant guilty of assault, the trial judge held that the "real question" was whether "the appellant had any right to apply force at all to Mr. Kenny under the circumstances." He found that the appellant was not acting in the course of his duty as a police officer when he went to the apartment. The trial judge said:

> "In his understandable desire to assist his sister and protect his niece on February 15th, Sgt. Cameron forgot which role he was playing. Sgt. Cameron was not acting as a police officer when he went to Mr. Kenny's apartment. He was not part of the police force which had received a missing person's complaint, nor was he acting at the request of, or even with the knowledge of, that force. He made no attempt to notify the New Glasgow Police, the force which had jurisdiction over Trenton, of where he was going and what he was doing, although he had to pass completely through New Glasgow to get from Stellarton to Trenton.
>
> Even his actions at the scene belied the suggestion that he was acting as a police officer. Although the implication of his testimony was that he believed he was dealing with potentially dangerous drug offenders, he left those very persons alone and un-handcuffed in a room with a gun, with his niece and her young friend in the next room with only one junior officer to protect them, while he went outside for several minutes to attempt to explain himself and the situation to the New Glasgow Police who had been called belatedly.
>
> Sgt. Cameron was in uniform, but not acting under the authority of it. Neither was he a private person "required or authorized by law to do anything in the administration or enforcement of the law" who would be protected under section 25(1)(a) of the **Criminal Code**. He was not authorized to do any such thing in that capacity.

[24] Rather than a police officer acting in the course of duty, the trial judge held that the appellant was a guest, who was obliged to leave the apartment upon revocation of the invitation. When the complainant became upset, he found the appellant "should have retreated, niece in hand, and called it a night."

[25] With respect, the finding that the appellant was no longer acting as a police officer when he crossed into the neighboring Town of Trenton cannot reasonably be

supported by the evidence. Although it was unusual to travel to another area without notifying that police agency, the evidence was that it does occur. There was no evidence that in doing so, a police officer would be acting without authority. The appellant notified his dispatcher where they were going. Constable Casey expressed no jurisdictional concerns having observed the Stellarton police vehicle in Trenton. He was later informed of this by his dispatcher. At the most, the evidence established no more than an unofficial protocol to notify the other department. Police officers under the *Police Act* have jurisdiction within the Province.

[26] The *Police Act*, SNS 2004, c. 31, provides:

> 42 (1) A member of the Provincial Police, the Royal Canadian Mounted Police, a municipal police department, another police department providing policing services in the Province or the Serious Incident Response Team is a peace officer and has
>
> (a) all the powers, authority, privileges, rights and immunities of a peace officer and constable under the common law, the Criminal Code (Canada) and any other federal or Provincial enactment; and
>
> (b) the power and authority to enforce and to act under every enactment of the Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a member of the Provincial Police, the Royal Canadian Mounted Police, a municipal police department, another police department providing policing services in the Province or the Serious Incident Response Team.

[27] To the extent that rejection of self-defence appeared to rest on an assumption that on a finding that the appellant was somehow not acting as a police officer and was operating outside his "jurisdiction" when he left Stellarton, it would be an error of

law. The evidence at most could only sustain a finding that the Stellarton officers were not following normal procedures. Moreover, the trial judge did not find that attempting to find the appellant's niece was not a legitimate police task, as he did find that the appellant would have be entitled to remove his niece from the premises.

[28] In addition to finding the appellant was not acting in his capacity as a police officer, the trial judge held that there was no valid claim of self-defence arising from the complainant's behaviour. While the appellant testified that he perceived a threatening movement, the trial judge stated: "In my view, the gesture he used did not suggest a threat."

[29] He also noted the appellant exhibited two different descriptions of the gesture under direct and cross-examination. . one with hands open (which the trial accepted), the other with fists clenched. He said:

> . . . The spontaneous gesture of Sgt. Cameron, when he described Mr. Kenny's movement that he said justified the push, showed that there was no air of reality to his claim of justification. Even in the heat of the moment, that movement was not one which caused Sgt. Cameron, or could have caused anyone, let alone a police officer trained to act calmly, to fear the application of force that might be met by a pre-emptive strike.
>
> I neither believe or have a reasonable doubt that Sgt. Cameron's testimony supports such a fear nor do I have a reasonable doubt, on the whole of the evidence, that self defence has not been negated. I have a lot of negatives in there but what I'm meaning to say is that I'm satisfied on the whole of the evidence that the Crown has established that there was no self defence.
>
> This is not a case of police brutality, nor of a significant application of force. If it weren't for the unpredictable and unintended damage to the computer, there would

> be precious little to the whole case, apart from the misguided misuse of apparent authority in the face of provocation and understandable emotion.

[30] As to the circumstances in which the appellant pushed Mr. Kenny, the appellant submits the trial judge failed to turn his mind to the central issue of credibility in the face of contradictory evidence. That he failed to adequately consider the evidence and that his finding that Mr. Kenny's actions were not threatening was patently unreasonable. Put another way, the trial judge's reasoning was inadequate and not supported by the evidence.

[31] It is well accepted that a trial judge is not required to articulate the alternatives to be considered in determining reasonable doubt as set out in *R. v. W. (D.)* [1991] 1 SCR 742. It is the substance, not the form of *R. v. W. (D)* that must be considered. In *R. v. Dinardo*, [2008] 1 SCR 788, Charon J. stated:

> [23] In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt.

[32] A trial judge is entitled to deference in findings of fact supported by evidence. However, the judge is required to provide reasons explaining why the evidence is beyond a reasonable doubt, especially where credibility is an issue. Clearly, the trial judge is in the best position to assess credibility. In *R. v. R.E.M.*, 2008 SCC 51, the court reviewed it's historical decisions and summarized an Appeal Court's approach to adequacy of reasons:

> **35** In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial. . .

[33] The appellant claimed he acted in self-defence when he pushed the complainant. As stated, the protection offered a police officer pursuant to section 25 of the *Criminal Code* applies to self-defence. The use of force is examined on a subjective/objective basis considering the surrounding circumstances.

[34] While it would have been preferable for the trial judge to provide a more detailed reasoned path to his verdict, his findings are supported by the evidence and confirm he was live to the issue of credibility and self-defence. In finding the complainant did make an open-handed gesture, the trial judge implicitly rejected the complainant's evidence in this regard. Regarding the circumstances surrounding the incident, the trial judge found the situation involving the appellant's niece was emotional and that the incident occurred in the heat of the moment. This is supported by the evidence. The trial judge did not accept the appellant's evidence of belief of a perceived threat. His finding that the open-handed gesture did not suggest a threat is supportable from the evidence including the evidence of

Constable Veenhuis. The trial judge concluded he did not have reasonable doubt based on the consideration of the whole of the evidence.

[35] Having reviewed the evidence at trial, I find it is reasonably capable of supporting the trial judge's findings and that the trial judge sufficiently explained why the appellant was convicted.

[36] Accordingly, the appeal is dismissed.