

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Archibald, 2007 NSSC 21

Date: 20070119

Docket: Cr. S.AT. No. 267112

Registry: Antigonish

Between:

Robert Francis Archibald

Appellant

v.

Her Majesty the Queen

Respondent

DECISION

Judge: The Honourable Justice Douglas L. MacLellan

Heard: December 14, 2006, in Antigonish, Nova Scotia

Counsel: Lawrence O'Neil, Q.C., for the appellant
Allen Murray, Esq., for the respondent

By the Court:

[1] The appellant Robert Francis Archibald appeals his conviction by Judge John Embree of the Provincial Court on a charge of assault contrary to Section 266(b) of the *Criminal Code*.

[2] The Notice of Appeal alleges the following grounds:

1. That the Learned Trial Judge mis apprehended the evidence
2. That the Learned Trial Judge came to an unreasonable verdict
3. That the learned Trial Judge did not apply the proper test when evaluating the credibility of witnesses
4. Such other grounds as may appear.

[3] The test which this Court must apply to this summary conviction appeal is set out in the case of *R v. Nickerson* (2002) 178 N.S.R. 189 where Cromwell, J.A. said: [page 191]

The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see ss. 822(1) and 686(1)(a)(I) and *R v. Gillis*

(1981), 45 N.S.R.(2d) 137; 86 A.P.R. 137; 60 C.C.C.(2d) 169 (C.A.), per Jones, J.A., at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is unreasonably 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.

Trial Evidence

[4] The information upon which the appellant was tried alleged an assault by him on Marie Ann Jack on the 31st day of August 2005, at or near Lochiel Lake, in the County of Guysborough, Province of Nova Scotia.

[5] The complainant Ms. Jack testified that she had been living with the appellant for seven years prior to the assault and that she had separated from him on September 12th, 2005.

[6] She was asked by Crown counsel if she recalled where she was on August 31st, 2005 between 7 p.m. and 8 p.m. She responded that was the time that she

went to the accused's father's place in Aspen. She said that prior to driving to his father's place, the appellant got upset with her about how she was dressed. She said they had already started out from their home in his vehicle and that he turned around and went back up to the house so she could change her clothes. She said that while she was in the vehicle the appellant grabbed her by the chest. She said it caused a bruise on her body. She said she then went into the house and changed her clothes. She said they then drove to his father's place but his father was not home so they just drove around for a while.

[7] On cross-examination the complainant was questioned about a statement she had given to the police in which she reported the assault. She was shown the statement which was dated September 13th, 2005, and in which she had reported that the appellant had assaulted her six days prior to giving the statement making it September 7th, 2005.

[8] Constable Sheri Curley testified that she was a member of the R.C.M.P. and that she had contact with the complainant on September 13th, 2005. She said Ms. Jack came to the Stellarton Detachment of the R.C.M.P. and gave her a statement.

She said that Ms. Jack showed her a bruise on her upper right chest just below her collarbone.

[9] On cross-examination Constable Curley was asked if she had taken a photo of the bruise. She responded that she had but that the photo was not available to be introduced into evidence because it was a digital photo and a copy had not been made.

[10] The appellant testified. He was asked to tell what happened on the day of the incident described by the complainant. He said that the day he and the complainant went to his father's place and his father was not home was on the Thursday before he went into the hospital in Antigonish. He said they were in New Glasgow and stopped at his father's place on the way home. He said that on Sunday following that visit he and the complainant went back to his father's place and he was not home again. He said that they then went for a drive "over the mountain" and then came back home.

[11] Judge Embree in his decision dealt with the issue of the date of the alleged assault. He found that the date here was not an essential ingredient of the charge

and also that finding that the assault occurred on September 7th (six days before the complainant's statement to the police) would not prejudice the accused. He therefore decided that:

So I would intend to and do amend the information to reflect the evidence that's before me and I don't consider that that causes any prejudice to Mr. Archibald in the circumstances. So pursuant to the provisions of Section 601, the Court makes that amendment.

[12] The trial judge then looked at the conflicting evidence of the complainant and the appellant. He said:

There are conflicts in the evidence here. I have heard testimony on behalf of the Crown from the complainant, Ms. Jack, and from Cst. Curley. The defendant also testified. There are significant conflicts in the testimony between Ms. Jack and Mr. Archibald going to the very heart of the allegation that's before the Court. When such conflicts arise in the testimony, the Court does not look at it from the perspective of which side do I accept. The Court does not apply that standard and that's prohibited reasoning.

The Court examines any conflicts that arise in the evidence in the course of considering the credibility of witnesses and what may be reliable evidence or not, but the Crown continues to bear the burden throughout of proof beyond a reasonable doubt. And after considering issues of credibility and conflicts that may arise in the evidence, if there is any reasonable doubt on any element of the offence charged as a result of that consideration, then Mr. Archibald is entitled to the benefit of that doubt.

[13] He then found that the complainant was credible. He said: [page 34]

I found Marie Jack to be a credible witness. She had some difficulty recalling some aspects of the matter with precision but she was obviously trying her best to do that and consider the questions that was posed to her. She recalls the events that are relevant here as having occurred basically six days before September the 13th when she gave her statement to the RCMP.

...

Ms. Jack's testimony, it seems to me, having heard it and watched her and listened to her, would be evidence that one would expect from someone who went through the event that she described in the course of her evidence, both in terms of how the matters unfolded at the time and the way she described it and her subsequent actions.

[14] In dealing with the appellant's testimony the trial judge said: [page 37]

Mr. Archibald's evidence, particularly as it relates to the central allegation here, I don't accept. I consider that either as a result of not a clear recollection of events or otherwise, that some aspects of his testimony ultimately aren't accurate. It would appear that he dealt in his testimony with some things in a way to try to portray Ms. Jack in a light that wasn't favourable.

He brought out things about the car accident and actions on her part may have partly gone to answer the question that he was asked about the nature of the relationship and whether there were any problems or not. And he brought that out as an example of the only issue that was causing difficulty, but there were other aspects that he carried on with that weren't necessary, in my view, to a resolution of this matter.

He denied completely that the incident happened here but also denied all of the circumstances that gave rise to it in terms of the incident of going to his father's house and how that happened, and going down the driveway and coming back, and none of that, he said, occurred. He described a completely different incident in and around the same time frame, apparently.

That description of how those events allegedly occurred about going to New Glasgow and going to his father's and those circumstances, in my view, was only an attempt to contradict and intentionally, and not in a forthright fashion, cast doubt on the circumstances under which the complainant is alleging this assault occurred.

He also testified about and, basically, in a non-responsive way to any questions that were being asked in an attempt to try to provide alternate means for bruising which wasn't being solicited by anybody but Mr. Archibald brought out. And, again, I don't consider that that's credible and reliable evidence.

His general explanation about the nature of the relationship is also at odds with Ms. Jacks trying to portray the relationship at that point as not having problems when I think it's readily apparent from other credible and reliable evidence that there was, in fact, issues and problems to the point where Ms. Jack felt the need to leave altogether.

I don't accept his testimony with regard to the grabbing incident and his denial of that and it doesn't leave me with any reasonable doubt about that element of the offence or any other. I'm satisfied that on or about the 7th of September, 2005, Ms. Jack was grabbed in the way she described, that it left a bruise, that it was in the course of a verbal dispute where Mr. Archibald was angry and that it constitutes an assault. It was an intentional application of force without consent and that Mr. Archibald is guilty of the offence charged here.

[15] At the hearing of this appeal, the appellant requested that the Court consider fresh evidence. The fresh evidence was a document from St. Martha's Hospital in Antigonish indicating that the appellant was a patient there from August 15th to

August 20th, 2005. In addition, the appellant filed an affidavit in which he indicated that on the day of his trial he was on numerous medications for a number of different ailments and that he was confused by the trial and did not make himself clear in his evidence which he thought to be was to the effect that the complainant left his home on the Monday following his return from the hospital which he said was August 22nd, 2005 and therefore he could not have assaulted her on September 7th, because she was not living with him at that time. He also maintained his denial of ever assaulting the complainant as she described in her evidence.

[16] The Crown agreed to the admission of the fresh evidence but argued that it would not have affected the result at the trial.

[17] Crown counsel in his brief put the issue as follows:

The issue to be decided by Your Lordship essentially would appear to be whether this proposed new evidence is capable of having any impact on the outcome at trial. Should Your Lordship find it would, then you may very well determine the new trial is in order. Should Your Lordship find that it wouldn't, then no such trial should be ordered.

[18] Based on the apparent confusion over the date of the offence and the fact that when the appellant testified the information was alleging an offence on August 31st, 2005 and not September 7th, 2005, I conclude that the fresh evidence establishing that the appellant was talking about August 22nd when he testified that the complainant left home would have an impact on the trial result.

[19] The evidence in this trial was certainly confusing from both the complainant and the appellant. The complainant made no attempt to correct the suggestion from Crown counsel that the assault took place on August 31st, 2005 as set out in the information. It was only after she was cross-examined on her statement that she testified that it happened six days prior to her police statement. Even at that point she appears confused. She had to be asked the question a number of times and finally the trial judge had to request that she respond to the suggestion that the date alleged was incorrect. Finally she confirmed that the assault occurred a week before she left home.

[20] The appellant's evidence was equally confusing. He was asked by defence counsel to respond to the testimony of the complainant. The question and answer is as follows:

Q. All right. You tell the Court about what happened on that day.

A. Which day?

Q. Well, now...

A. The 13th?

Q. ...whatever day. I meant the . . . whatever day it was, the trip to your father's place in the van...

[21] The appellant then proceeded to tell about a trip to New Glasgow and how he and the complainant had stopped at his father's place on the way home.

[22] The trial judge concluded that the appellant's evidence should not be accepted partially because: [page 37]

He described a completely different incident in and around the same time frame, apparently.

[23] I conclude that the confusion about the time of the alleged assault did impact the evidence at the trial and the fresh evidence would have clarified the appellant's position, namely, that the incident could not have occurred on the date indicated in

the complainant's statement to the police. The appellant was entitled to have his position clearly put to the trier of fact.

[24] I would therefore allow the appeal and direct that the matter be returned to the Provincial Court for a new trial before a different Provincial Court Judge.

J.