IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Ward, 2003 NSSC 045

Date: 20021101
Docket: S.PHa(PH) No. 01118
Registry: Port Hawkesbury

Between:

Kevin Lloyd Ward

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Frank Edwards
Heard:	October 18, 2002, in Port Hawkesbury, Nova Scotia
Written Decision:	November 1, 2002
Counsel:	Wayne MacMillan, Esq., for the Respondent Gerald A. MacDonald, Esq., for the Appellant

By the court:

[1] The Appellant, Mr. Ward, was convicted by a Provincial Court Judge of assault with a weapon contrary to Section 267(a) of the Criminal Code. He appeals on the basis that the Crown failed to prove his guilt beyond a

reasonable doubt. He also claims that improper cross-examination by the Crown rendered his trial unfair.

[2] The charge arose from an altercation between the Appellant and the Complainant, James MacLean. The only evidence of what occurred came from the Complainant and the Appellant. The Learned Trial Judge rejected the Appellant's evidence and accepted that given by the Complainant.

[3] During cross-examination of the Appellant by the Crown, the following exchange took place.

> "Q. Now did you have any conversations with Mr. Ehler over the last while about this trial?
>
> A. Just asked him if he got a summons to come to Court.
> Q. A subpoena?
>
> A. A subpoena, yes.
>
> Q. When did you discuss that with him?
>
> A. Oh, the last time I was talking to him was likely over a month ago when I was working doing screens.
>
> ***Q. And did you discourage him from attending this trial?***
>
> ***A. No, not in any way?***
>
> ***Q. Did you have anyone else discourage him from attending this trial?***
>
> ***A. No.***

Q. Now, Mr. Ehler was in a position to see this whole event?

A. No he wasn't.

Q. Why wasn't he?

A. Because the lockers were in Jeff Ehler's way of what he could view. He was in the corner and the lockers are out from ...

Q. So you were watching Mr. Ehler throughout the time that you had involvement with Mr. MacLean?

A. No, but I know where he was located because he ... he never left his ... left that spot until the contact started between me and Jamie.

Q. Did you have discussion with Mr. Ehler about what he had seen?

A. No, he had his opinion and I had mine.

Q. And how do you know he had an opinion that was different than yours?

A. Well there was a statement that Darrell Grant took at work.

Q. Are you talking about a different statement ... different than the one he gave the police? Have you seen two statements from Mr. Ehler?
A. Yes I have.

Q. Did you get into any discussions with Mr. Ehler about his statements?

A. Nothing serious. We were just talking about uh ... everyone seemed to see a different thing in the uh ... in the shack that day."

[4] From the above passage, one can infer that the Crown had subpoenaed a witness, Ehler, who was a no-show at trial. The Crown's questions also convey its suspicion that the Appellant may have had something to do with Ehler's non-attendance. Further, the Crown effectively demonstrated to the trier of fact that at least one witness to the event would have contradicted the Appellant.

[5] This line of questioning by the Crown was inappropriate and unfair. Surprisingly, Defence Counsel did not object. As I indicated to Counsel at the conclusion of the appeal hearing, the cross-examination put the Accused in an impossible situation. He was being confronted with the fact that Ehler could contradict him without any opportunity to challenge Ehler's version. To a limited but significant extent the Crown had gotten Ehler's evidence before the Court without having to subject him to cross-examination.

[6] Also, the Crown was able to plant the suspicion that the Appellant may have had something to do with an unfavourable witness' failure to attend. This is particularly disturbing in a case where credibility is a pivotal issue between two competing witnesses and one of those witnesses is the Accused. The questions would obviously have a negative impact on the Court's overall impression of the Appellant. They should not have been asked unless the

Crown had presented some admissible evidence which would provide a foundation for them. When the Crown's witness did not appear, the Crown apparently elected to proceed without him rather than ask for a warrant and seek an adjournment. In that circumstance, the Crown was precluded from making any further reference to Ehler's non attendance or the content of his now discarded evidence.

[7] As I indicated to Counsel, this conduct undoubtedly would have been grounds for a mistrial if the case was being heard by a jury. Should the result be any different where the trial is by judge alone? Unfortunately, the Learned Trial Judge does not reference this exchange in his decision. Had he done so, then perhaps the effect or non-effect of the Crown's impropriety could have been determined.

[8] As the record stands, an objective observer would have no way of knowing whether the improper questions had any effect on the trier's assessment of the Appellant's credibility. The trial Judge in question is an experienced, capable jurist. I may be confident that he was not consciously or subconsciously influenced by the improper questions. But that is not the test. What would the objective observer sitting in that courtroom perceive? Justice must appear to be done.

[9] I agree with the Appellant's contention that the Crown's questioning rendered his trial unfair, I would allow the appeal on that basis alone.

[10] As to proof beyond a reasonable doubt, the trial judge in his decision said the following:

> "There is conflicting evidence between the testimony of Mr. MacLean, who is the complainant, and testified as a Crown witness, and the principal defence witness, here, Mr. Ward, the defendant. Whenever there are conflicts in the evidence between a Crown witness and a defence witness, it does not boil down to a situation as to which side does the Court accept. That's not the test that's applicable here. The Crown bears the burden throughout of proof beyond a reasonable doubt, and after considering the evidence before the Court, assessing the credibility of witnesses and examining conflicts in the evidence, if there's any reasonable doubt as to any element of the offence charged, then the benefit of that doubt goes to the defendant.
>
> I'm satisfied, here, that Mr. MacLean explained the events of December 6, 2000 in an honest and straightforward fashion to the best of his ability to recollect them.
>
> Mr. Ward's evidence, in my view, was significantly self-serving, attempting to paint Mr. MacLean in the worst possible light, his own circumstances in the best possible light uh ... to the exclusion of credibility and forthrightness. I'm satisfied Mr. Ward was the aggressor in the circumstances, here, and not Mr. MacLean. That Mr. MacLean was initially pushed by Mr. Ward, and that Mr. MacLean, thereupon, pushed Mr. Ward back, and that started the physical altercation between the two of them."

[11] At page 60, the trial judge also stated:

> "Mr. Ward's description of the event was not a credible one and I don't accept it. In those circumstances, I'm satisfied that all of the elements of this offence have been established beyond a reasonable doubt, and I'm satisfied Mr. Ward did, in committing an assault on James Kenneth MacLean, use a weapon as alleged in the count and I find him guilty of that."

[12] In ***R. v. W(D)*** [1991] 1 S.C.R. 742, the Supreme Court of Canada suggested an appropriate jury instruction concerning the criminal burden and standard of proof in trials where credibility is important. The Court said that the appropriate instruction is as follows:

> "First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

[13] The rigid application of the above has been subject to some criticism. The point is, however, that the rejection of the Accused's version of events does not automatically mean that he is guilty. There must be some recognition that even if the Accused is not believed, his evidence may still be capable of raising a reasonable doubt. I do not see such a recognition demonstrated in the decision in this case.

[14] On the one hand, the Learned Trial Judge seems to indicate that it is not merely a situation where the Court chooses whom to believe. On the other hand, it is arguable that that is exactly what the trial judge did. The Learned Trial Judge should have indicated that not only did he not accept the Appellant's evidence but that that evidence was not capable of raising a reasonable doubt. He should then have indicated that, on the basis of the evidence which he did accept, he was convinced of the guilt of the accused beyond a reasonable doubt. I am satisfied that this omission in the record further justifies allowing this appeal.

[15] Order accordingly.

J.