SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Denny*, 2017 NSSC 9

Date: 2017-01-10
Docket: PIC No. CRP443241
Registry: Pictou

Her Majesty the Queen

v

Hope Denny

Respondent

Judge: The Honourable Justice N. M. Scaravelli

Hearing: August 18, 2016, Pictou, Nova Scotia

Decision: January 10th, 2017

Counsel: Jody McNeill for the Crown

Stephen Robertson for Ms. Denny

The Court:

[1] This is a summary conviction appeal by the crown following the acquittal of the respondent on the charge that she:

> On or about the 27th day of November, 2014, at or near Stellarton, in the County of Pictou, Nova Scotia, did commit an assault on Courtney Madeline Stevens, contrary to section 266 of the Criminal Code.

Background:

[2] The respondent was charged with common assault. The presiding judge found the accused not guilty. The crown appealed, stating the trial judge erred in calling upon the crown to prove that the actions of the complainant were justified under section 35 of the *Criminal Code*. The respondent conceded this ground of appeal but argued that the acquittal should nonetheless stand because the trial judge's decision also indicated a reasonable doubt on the issue of whether the parties had engaged in a consensual fight.

[3] The Notice of Appeal alleges the learned trail judge erred:

1. By placing a burden on the crown to justify the actions of the complainant under section 35 of the *Code.*
2. By failing to find the actions of the complainant reasonable by failing to consider the respondent was a trespasser in the complaint's residence.

[4] As to the respondent's submission that the evidence supported the trial judge's finding of reasonable doubt as to whether the respondent complainant engaged in a consensual fight, the appellant submits:

1. The trial judge's decision regarding consent was unreasonable considering the totality of the evidence;
2. The trial judge failed to consider the validity of consent by reason of the respondent's threat of violence.
3. The trial judge erred by failing to consider whether consent was vitiated as a matter of law.

For the reasons that follow I will allow the appeal, and order a new trial.

Standard of Review

[5] An appeal may be granted on the grounds that the verdict is unreasonable or cannot be supported by the evidence and is wrong in law. The standard of review is well summarized in *R. v. Benoit,* 2010 NSJ 129, which includes references to *R. v. Nickerson* [1999] N.S.J. No. 210; *R. v. Yebes,* [1987] 2 S.C.R. 168; *R. v. Backman,* [1982] N.S.J. No. 450; and *R. v. Clark,* [2005] 1 S.C.R. 6. The standard of review for summary conviction appeals is one of reasonableness. This means the question on appeal is whether the trial judge's decision was reasonable and could be supported by the evidence. The appeal court may reweigh evidence in

order to make this determination, but it should not merely substitute its own view for that of the trial judge.

[7] Findings of fact and factual inferences made by the trial judge must not be interfered with unless there is a palpable and overriding err. *Housen v. Nikolaisen* [2002] S.C.J. 31. The reviewing court may also consider questions of law. In *R v Sutton*, 2000 SCC 50, McLachlin CJC stated:

> Acquittals are not lightly overturned. The test … requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred.

Summary of Evidence and Decision

[9] The respondent was charged with assault under section 266 of the *Criminal Code*, which reads:

> 266. Every one who commits an assault is guilty of
>
> (b) an offence punishable on summary conviction.

[10] The complainant, Courtney Stevens, was the first witness. She testified that she had been in a relationship with the respondent. The respondent and a friend were over at her apartment when she told the respondent that she did not want her there. After the respondent left, the complainant gathered up the personal belongings of the respondent, who had been staying with her for two weeks, and

placed them in the hallway. She texted the respondent to tell her to pick them up. The respondent returned to the apartment and banged on the door, demanding to be let in. Ms. Stevens let the respondent in so that she could retrieve additional items. After the respondent collected these items, Ms. Stevens repeatedly asked her to leave. She eventually attempted to physically push the respondent out of her apartment, after which the respondent began attacking her, resulting in both women falling to the ground. A photo exhibit was produced that the complainant testified was of her swollen and bruised eye which remained that way for a couple of days. She went to the hospital after the assault, though was not given anything, and testified that she had pain and headaches lasting for about two weeks.

[11] The second witness was Tiffany Denny, who is the best friend of the complainant and the second cousin of the respondent. She was at the apartment on the night of the assault. She testified that the respondent was talking about one of her ex-girlfriends when the complainant, who was in a relationship with the respondent, told her to leave. The respondent left, then returned to pick up her belongings. Initially, the complainant was not going to let her into the apartment, but finally did allow her in to retrieve her mirror. After she was in the apartment, the respondent and complainant argued more. Ms. Denny testified that:

> [S]he sat down to talk to Courtney about it and then [they] were just arguing some more and I remember Hopie saying she felt like hitting her and then Courtney was saying "just do it". But that didn't happen and then she just tried to push her out, she kept yelling, telling her to leave, and I guess as soon as she pushed her they tumbled over a chair and Hopie punched her and they were just hitting each other back and forth.

[12] Ms. Denny then pulled the respondent off the complainant and told her to leave.

[13] The Respondent did not testify.

[14] In argument, counsel for the crown anticipated that the respondent would argue that her actions were done to retrieve and secure her items left in the apartment, and sought to negative this justification by demonstrating that she already had control of her possessions when the assault occurred. The crown submitted that the evidence showed an application of force without consent, and that there was no realistic application of self defence. At this point, Judge Atwood asked crown counsel to justify the complainant's use of force under the section 35(1) *CC* defence of property provisions. After hearing counsel's submissions on the point, Judge Atwood said it was not necessary to hear from the defence.

[15] In his oral decision, Judge Atwood referred to evidence about how the respondent entered the apartment and stated that he had a reasonable doubt about the applicability of self defence, as he was not satisfied that the complainant was

justified in applying force to the respondent to push her out of the apartment. Turning to the issue of consent, he cited *R v Jobidon*, [1991] 2 SCR 714 and *R v Gur*, 71 NSR (2d) 391, regarding the inapplicability of the defence of consent in relation to assault causing bodily harm or assault with a weapon. He distinguished this matter on the basis of it being a common assault charge. Judge Atwood accepted Ms. Tiffany Denny's evidence as an "impartial observer", and stated his recollection of her testimony: "I remember Hopie saying that she felt like hitting Courtney. Courtney said 'just do it' and at that point Courtney pushed Hopie, they were hitting back and forth." In my view this certainly raises a reasonable doubt as to whether [what] the Court is dealing with here is essentially a … consensual fight, which unfortunately Ms. Stevens lost.

The Law of Consent in the Assault Context

[16] The definition of common assault contained in the *Criminal Code* is well known:

> 265. A person commits an assault when:
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly

[17] The absence of consent can be shown in three ways: that no consent was provided as a matter of fact; that consent given was not valid; or that consent in the

circumstances is not available as a matter of law. *Morris Manning & Peter Sankoff, Criminal Law*, 5th ed (Markham: LexisNexis Canada, 2015) at §20.18

No consent as a matter of fact

[18] Whether the complainant of the assault consented is a question of fact. In the assault context, "consent" is defined as a voluntary agreement where the recipient of the contact has full knowledge of relevant factors that might have affected such an agreement. While consent is a subjective concept, determined based on the state of the complainant's mind at the time of the assault, the complainant's words and actions may be used to raise a reasonable doubt about whether they were in fact consenting. As a question of fact, the standard of review is reasonableness.

[19] In the present matter, the trial judge expressed a reasonable doubt on the basis that the complainant stated "just do it" and then pushed the accused. Judge Atwood refers to this sequence of events twice in his decision. The crown argues that the evidence shows that the phrase "just do it" was followed not by physical contact, but by a repeated persistence that the accused leave the apartment and then afterwards an attempt to physically remove her with a push. As a result, the crown

submits that Judge Atwood's reliance on this testimony to find reasonable doubt was based on a material misapprehension and misrepresentation of the evidence.

[20] Based on a reading of the transcript, the testimony is ambiguous as to the exact timing of the push. It was not unreasonable for the judge for draw the conclusion that the complainant did in fact push the respondent after saying "just do it." Therefore, the crown's argument that there was a material misapprehension of the evidence must fail.

[21] The crown argues that the trial judge made an error of law by failing to consider all of the evidence. The entirety of the events were within the context of the complainant trying to remove the respondent from her property. This context includes her initial eviction of the respondent, her unwillingness to let the respondent back into the apartment, and the fact that the assault occurred while the complainant was pushing the respondent and continually telling her to leave.

[22] Judge Atwood states in his decision that the words "just do it" and the subsequent push raised a reasonable doubt regarding the absence of consent of the complainant. While not explicit in his decision, I am not satisfied that the entirety of the evidence was not considered. As a result, the evidence was reasonably

capable of supporting the trial judge's conclusion and this determination should not be disturbed on appeal.

Consent not validly provided

[23] On the other hand, even if consent is otherwise apparent on the facts, it can be invalidated by the actions of the accused. As consent is agreement to participate in the activity, it follows that the agreement must be valid. This is addressed under section 265(3) of the *Criminal Code*, which states:

> 265(3). For the purposes of [assault], no consent is obtained where the complainant submits or does not resist by reason of
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant

[24] While Judge Atwood was entitled to hold a reasonable doubt as to the factual lack of consent on the evidence, the record indicates that he failed to turn his mind to the question of whether that consent was valid. Failing to consider the applicability of section 265(3) to the facts amounts to a reversible error.

[25] In the current matter, the complainant's alleged words of consent, "just do it," were given in response to the respondent's indication that she would like to hit the complainant. It is plausible that the presence of the threat, in the context of a heated and escalating argument, could operate to vitiate any apparent consent of

the complainant. As the crown submits, this statement could have been an acquiescence to the imminent assault threatened by the respondent rather than subjective consent to participate, particularly when viewed against the backdrop that this was not the first time that the respondent had assaulted the complainant.

[26] Given the above, it is clear that if the trial judge had not erred in law by failing to consider the effect of the threat, there is a realistic probability that the verdict would not have been the same. However, because this inquiry is a question of fact that is not clear from the evidence or considered by Judge Atwood, the matter should be remitted to trial.

No consent as a matter of law

[27] Finally, valid consent may also be vitiated for public policy reasons. In *R v Jobidon, supra*, the Supreme Court of Canada held that the common law defence of consent was limited by policy considerations where there is intent to cause serious hurt or non-trivial bodily harm. This was expanded on in *R v Paice*, 2005 SCC 22, to create a test requiring that serious bodily harm not only be intended, but actually caused.

[28] The respondent relies on *Jobidon* to argue that consent is a defence to assault provided that the violence by the accused party is reasonable. They say that because the fight between the two women was "even," consent should not be vitiated. Therefore, the respondent submits that the force used by the respondent was not sufficient to vitiate consent.

[29] The crown responds to this by pointing out that Judge Atwood did not consider whether the respondent's application of force was reasonable or excessive. The trial judge briefly addressed the *Jobidon* issue only to say that it does not apply as the charge is common assault rather than assault with a weapon or assault causing bodily harm. While the crown does not address the accuracy of this statement of the law in its factum, it does correctly point out that vitiation of consent has an extended application to circumstances that involve domestic violence as a result of *R v Shand*, [1997] NSJ No 524.

[30] In *Shand*, the accused's husband assaulted her and then on several occasions encouraged her to assault him in order to "even the score". One day, when her husband returned home and got out of his car, she began throwing rocks at him. She was subsequently charged with assault. In her appeal to the Nova Scotia Supreme Court, MacDonald J (as he then was) did not address whether the

requirement of consent was proven beyond a reasonable doubt. In his opinion, any consent would have been vitiated by operation of *Jobidon*:

> It is clear to me that the *Jobidon* principle should apply to assaults flowing from domestic violence. If there was ever a need for Canadians to treat each other humanly and with respect it is in the area of domestic disputes.
> Furthermore, I feel the need to deter family violence is so great, that the *Jobidon* principle should be extended so as to vitiate consent where domestic assaults have only the *potential* of creating non-trivial harm.

[31] Thus, the presence of harm required to vitiate consent in a domestic dispute is reduced when compared to a brawl or fistfight as contemplated by *Jobidon*. Non-trivial harm is still required though; in *R v Peniston*, 2003 NSPC 2, the trial judge cited *Shand* to say that consent was not vitiated in the context of innocuous touching that was considered to be of minimal force and trivial in nature. In that case, the judge determined that assault had not occurred when the accused lightly pushed his wife to assist her over the threshold of their home while she was carrying groceries and their child during a verbal argument.

[32] Although the trial judge turned his mind to the issue of vitiated consent under the *Jobidon* principle, he did not consider the extended *Shand* analysis that applies to domestic disputes. The trial judge did not make a finding that the parties were in a domestic relationship and the evidence is minimal in this regard.

Evidence of a “relationship” over a period of two weeks, of itself, would not appear sufficient to establish a domestic relationship in the family context as contemplated in *Shand.* As a result, I find the trial judge did not err by not considering an extended application of vitiation of consent.

Summary

[33] Whether the complainant consented is a question of fact that should not be disturbed unless it is unreasonable or unsupportable by the evidence. While the decision focused on the words “just do it”, followed by a push, there is no basis to conclude that the trial judge did not consider the entirety of the evidence. The evidence was capable of supporting a reasonable doubt on the issue of consent, and therefore his conclusion should not be disturbed. However, the trial judge did err in law by failing to consider the validity of consent by reason of the accused’s threat of violence. Validity of consent is a factual question based on the subjective state of mind of the complainant and as such it is not determinable on the evidence before the court.

Scaravelli, J.