NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Finck*, 2008 NSCA 42

Date: 20080506
Docket: CAC 263933
Registry: Halifax

Between:

Lawrence Ross Finck

Appellant

v.

Her Majesty The Queen

Respondent

Judge(s):	Oland, Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 2, 2008
Held:	Appeal allowed per reasons for judgment of Oland, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Appellant in person Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] The appellant was charged with assault contrary to s. 266(a) of the *Criminal Code*. Justice Glen G. McDougall presided at the trial by judge and jury, at which the appellant pleaded self-defence. The jury found the appellant guilty of assault, and the judge sentenced him to a four month term of imprisonment.

[2] Pursuant to s. 675(1)(a) of the *Criminal Code*, the appellant appeals from conviction. For the reasons which follow, I would allow the appeal and order a new trial.

Facts

[3] The charge of assault arose from an incident at the East Coast Forensic Hospital. On June 15, 2004, the appellant was a patient there, on remand for a court ordered assessment. He, John Andrews, Wade Beals, and Alfred Ayles, shared a living unit which included a common area called the "day room."

[4] That evening, the four were in the day room. Mr. Andrews was upset when he finished a telephone conversation. He pulled a chair from under the feet of Mr. Beals who was watching television, and sat down. Some time passed with, it appears from videotapes of the day room, conversation within the group. Then Mr. Beals got up, walked behind Mr. Andrews, and punched him in the back of the head. Mr. Andrews got up and went to a wall. The appellant approached him. Mr. Andrews, his arms at his sides, took a few steps towards the appellant and then back to the wall. The appellant punched him twice. Staff responded. The appellant, Mr. Beals and Mr. Ayles were locked down in their individual rooms, and Mr. Andrews was moved to another living unit, for the night. The following day, Mr. Andrews gave a statement to the police.

[5] The appellant was committed to stand trial after a preliminary inquiry at which he was represented by counsel. He elected trial by judge and jury.

[6] At the trial, the Crown called Mr. Andrews and Arthur Hill, a correctional worker assigned to the East Coast Forensic Hospital. The appellant, who represented himself, testified on his own behalf, but called no further evidence.

The exhibits at trial included videotapes of the incident taken from cameras monitoring the day room. While they recorded images, they did not record sound.

[7] Mr. Andrews testified that he had neither provoked nor threatened the appellant. The appellant did not deny that he struck Mr. Andrews. According to his evidence, a few minutes before he did so, Mr. Andrews had threatened him by saying "I'm going to kick your glasses into your face and I'll get a pen and I'll stab you." The appellant pleaded self-defence.

[8] The Crown submitted that there was insufficient evidence for the defence of self-defence to go to the jury. The judge determined that the air of reality test had been met, and included self-defence in his charge to the jury. After deliberating for over two days, the jury returned a verdict of guilty. The judge sentenced the appellant to four months' imprisonment and issued a DNA order under s. 487.05(1)(b) and s. 487.052(1) of the *Criminal Code*.

Analysis

[9] In his notices of appeal, the appellant set out seven grounds pertaining to his conviction, and three pertaining to the DNA order. At the hearing of his appeal, he advised that only one ground was to be considered. Reproduced from his notice, it reads:

> 5.) MacDougall J. erred in law and fact in his charge to the jury, written instructions and his jury exhortations, constituting a bias to the accused and therefore a miscarrage of justice occured. This error was more than evident and manifested by refusing the un-assisted accused the "stare decisis" common law authority regarding a s. 34(1) CCC self-defence charge to the jury and refusing the accused the ability to contact legal counsel Ms. Amy Roburn to obtain the same.

[10] The appellant's arguments on this ground were directed to the judge's instructions to the jury and to the appellant's defence to the assault charge, namely self-defence. It is helpful to set out how matters arose and were determined during the course of the trial.

[11] After the Crown and the appellant had presented their evidence, the Crown submitted that there was no air of reality to the appellant's defence of self-defence. It urged the judge not to include that defence in his charge to the jury.

[12] The air of reality test is a threshold test. A defence is to be put to a jury only when there is evidence on the record upon which a properly instructed jury could acquit: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29, at ¶ 49. In *Cinous*, the Supreme Court of Canada stated:

> 51 The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu, supra; Squire, supra; Pappajohn, supra; Osolin, supra; Davis, supra*. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1.
>
> . . .
>
> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra; R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park, supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[13] When the threshold is reached, the issue is "put in play": *Cinous* at ¶ 52. A defence will be in play whenever a properly instructed jury could, based on the evidence, reasonably conclude in favour of the accused: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at ¶ 74.

[14] The judge ruled that the defence of self-defence met the air of reality test. In doing so, he stated:

> But I think there's a little bit more than just Mr. Finck's assertion. There's a video. The video, after the initial assault by Beals, shows Mr. Andrews getting up from his chair. He says he was in a dazed stated (sic). I would suspect that if he took one or more off the noggin he probably was. But he left the chair, went directly in front of Mr. Finck, apparently, and then down the side wall.
>
> No contact was made between Mr. Finck and Mr. Andrews at that time. Mr. Finck then followed. But the video shows Mr. Andrews walking towards Mr. Finck.

[15] Before delivering his charge to the jury, the judge gave copies of his draft instructions to the Crown and the appellant for their review and comment. The appellant pointed out that the judge's draft only defined unlawful assault as an intentional application of force to his body without his consent. He unsuccessfully urged the judge to include ss. 265(1)(b) and 264.1 of the *Criminal Code* in his charge.

[16] In his charge to the jury, the judge reviewed the requisite elements for assault. He then discussed the defence of self-defence. His charge reads in part:

> To decide whether Mr. Finck was acting in lawful self-defence, you may have to consider as many as four issues. Each issue may be converted into a question for you to consider and answer.
>
> Was Mr. Finck unlawfully assaulted by Mr. Andrews?
>
> Did Mr. Finck provoke the unlawful assault by Mr. Andrews?
>
> Did Mr. Finck intend to kill or cause really serious injury to Mr. Andrews?
>
> Did Mr. Finck use more force than was necessary to defend himself against Mr. Andrews?
>
> <u>First question: Was Mr. Finck unlawfully assaulted by Mr. Andrews? An unlawful assault is the intentional application of force directly or indirectly by any means to Mr. Finck's body without his consent. If you are satisfied beyond a reasonable doubt that Mr. Finck was not unlawfully assaulted, Mr. Finck was not</u>

> acting in lawful self-defence. Your consideration of self-defence will be at an end. (Emphasis added)

[17] After being charged, the jury retired shortly before noon to deliberate. Before 5:15 P.M., the jury foreman sent a note to the judge asking him for clarification on self-defence, and for a copy of his charge. The judge discussed how to respond with the Crown and the appellant. In the course of those discussions, the appellant referred to the alleged threat made by Mr. Andrews to him, to which the judge responded:

> **THE COURT:** Mr. Finck, if that was all there was, I would have granted the Crown motion not to even charge on self-defence, because that in and of itself does not meet, I think, the air of reality test.
>
> **MR. FINCK:** Okay, just . . .
>
> **THE COURT:** Where I was persuaded to give them the charge on self-defence was based on the video and the fact that Mr. Andrews appeared to step in your direction as you were approaching him.
>
> **MR. FINCK:** Okay.
>
> **THE COURT:** That's what persuaded me to give the self-defence.
>
> **MR. FINCK:** With respect to the . . . yeah.
>
> **THE COURT:** (But the words?) themselves, I don't think they constitute an assault.
>
> **MR. FINCK:** Pardon?
>
> **THE COURT:** They don't . . . the words alone that you allege that Mr. Andrews said to you would not have persuaded me that the air of reality test had been met or (inaudible due to talkover) . . .

[18] The judge's advice to the appellant that words alone unaccompanied by any gesture do not constitute an assault under the *Criminal Code* was correct. See *R. v. Flowers,* [2006] N.B.J. No. 402, 2006 NBCA 96 at ¶ 13, citing *R. v. Byrne* (1968),

3 C.C.C. 179 (B.C.C.A.); *R. v. Steele* (1973), 5 N.S.R. (2d) 259, (N.S.S.C.(A.D.)), [1973] N.S.J. No. 65 (QL), at ¶ 17.

[19] In response to the jury's request regarding self-defence, the judge decided to provide written copies of his jury charge. These were delivered to the jurors the following morning. A few hours later, after the jury had indicated that it found itself at a stalemate, the judge gave an exhortation to the jury. The jury did not reach a decision that day. At the end of the next day, after rehearing the tape of all the appellant's testimony, and after hearing the judge's response to a further question, one that did not specifically refer to assault or to self-defence, the jury returned its verdict finding the appellant guilty of assault.

[20] What the appellant argues under his sole ground of appeal is that the judge erred by instructing the jury only on s. 265(1)(a), and by failing to instruct on s. 265(1)(b) and on s. 264.1 (uttering threats). In the *Criminal Code*, both these provisions appear in PART VIII Offences Against The Person and Reputation, under the sub-heading "Assaults." For the disposition of this appeal, I need consider only s. 265(1) which reads:

> **Assault**
>
> 265. (1) A person commits an assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> >
> > (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; . . .

[21] His ruling and subsequent discussion with the appellant shows that the judge placed the defence of self-defence before the jury because the videotape showed that Mr. Andrews moved towards the appellant before the appellant struck him. In his view, the defence of self-defence met the threshold test of air of reality; that is, the evidence disclosed a real issue to be decided by the jury.

[22] However, according to the evidence, including the videotapes of the incident, Mr. Andrews did not apply force to the appellant, intentionally or

unintentionally, directly or indirectly. An application of force is essential for an assault charge pursuant to s. 265(1)(a), the sole provision under which the judge instructed the jury. A jury might have found that Mr. Andrews' steps towards the appellant constituted an attempt or threat, by an act or gesture, to apply force to another person, pursuant to s. 265(1)(b), the provision under which the judge decided not to charge the jury. As the Crown acknowledged at the appeal hearing, the more appropriate of the subsections for charging assault in this case was not s. 265(1)(a), but s. 265(1)(b).

[23] The judge's instructions, limited as they were to s. 265(1)(a), could only result in a guilty verdict. Under that provision, unless and until it was first established that there had been an unlawful assault by the application of force, the jury could not proceed to consider the appellant's argument that he had acted in self-defence. Yet, on the basis of Mr. Andrew's movements, the judge had accepted that there was an evidentiary foundation for self-defence, and that that defence should be presented to the jury for determination. By charging only under a provision that on the evidence foreclosed the very defence that he had ruled met the air of reality threshold, and by failing to charge assault under s. 265(1)(b), the judge erred in law.

[24] The Crown argues that despite the error, the conviction should be upheld. First, it submits that the judge erred in determining that there was enough of an air of reality to leave self-defence to the jury. In addition it says that this is a case where the court could apply the curative proviso, namely s. 686(1)(b)(iii) of the *Criminal Code*. I will consider each of these arguments in turn.

[25] As respondent on an appeal from conviction, the Crown can raise errors of law made at trial that worked to the advantage of the accused, either to resist the quashing of the conviction, or if the conviction is quashed, to support its position as to the remedy: *R. v. Harvey*, [2002] 4 S.C.R. 311, 2002 SCC 80, adopting Doherty, J.A. in (2001), 57 O.R. (3d) 296, [2001] O.J. No. 4749 at ¶ 34, which followed *R. v. Keegstra*, [1995] 2 S.C.R. 381 at ¶ 23. Whether or not there is an air of reality to a defence is a question of law, subject to appellate review: *Cinous* at ¶ 55.

[26] Even without sound, the videotapes of the incident, which supported the charge of assault, show a tense situation which includes retaliation and physical aggression. Some minutes after Mr. Andrews pulls the chair from under Mr. Beals' feet, Mr. Beals strikes a seated Mr. Andrews. Mr. Andrews moves away from the

seating area and later over to a wall. One of the occupants of the day room stands at the doorway, perhaps as a lookout. When the appellant approaches him, Mr. Andrews, his arms down, steps forward towards him and then back. According to the appellant, Mr. Andrews had already threatened to kick the appellant's glasses into his face and to get a pen and to stab him. While there is no evidence that he had a pen or ready access to one, Mr. Andrews did have the present ability to kick or strike the appellant. Punches had already been thrown. In these circumstances, I cannot say that there was no air of reality to the defence of self-defence, and that self-defence should have been withheld from the jury.

[27] I turn then to the Crown's submission that the curative proviso can apply to maintain the conviction. Section 686(1)(b)(iii) reads:

> 686. (1) On the hearing of an appeal against a conviction . . . the court of appeal
>
> . . .
>
> (b) may dismiss the appeal where
>
> (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, . . .

[28] In *R. v. Hibbert* 2002 SCC 39 Arbour, J. for the majority, citing *R. v. Bevan*, [1993] 2 S.C.R. 599, set out the test at ¶ 71: Whether there is any reasonable possibility the verdict would have been different had the error not been made.

[29] In *Hibbert*, the trial judge's instructions on the inference of guilt arising from the rejected alibi erroneously provided the jury with a direct route to conviction. Arbour, J. observed that the curative proviso is applied to essentially two classes of error:

> 71 . . . The application of the proviso was recently reviewed in *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86. As I indicated in that case, the case law distinguishes between trivial errors, or errors that had no effect on the verdict, and serious errors of law which could have tainted the conviction. In the former case, the proviso can readily be applied. In the latter, it should not be applied unless the evidence of guilt is so overwhelming that any other reasonable jury would inevitably convict.

She continued for the majority:

> 72 The Crown concedes that the trial judge's instructions were in error. The error in this case was not a trivial error nor one that would be unlikely to have had any effect on the verdict. As stated above, the trial judge's erroneous instructions implied that the jury could find evidence of concoction allowing them to infer that the accused was guilty. This is a serious error that provided the jury with a direct route to guilt. Despite the circumstantial evidence that points to the accused, I do not think that one can confidently say that a conviction is a foregone conclusion in the sense that any other reasonable jury would inevitably convict. The jury deliberations were long in both trials. In the present appeal, the jury deliberated for several days.
>
> 73 It is obvious that the jury needed proper guidance after a trial that was not an open and shut case. Not only is it possible that the erroneous alibi instructions played a part in the conviction, but without the benefit of actually hearing the evidence and assessing the credibility of the witnesses for the defence, it is not in my view possible to conclude that any other reasonable jury would also inevitably convict.

[30] The error here, namely the failure to instruct the jury on s. 265(1)(b), is not a trivial one. Rather, as in *Hibbert*, limiting the charge to the jury to s. 265(1)(a) was a serious error which could have tainted the conviction. That restriction provided the jury with a direct route to guilt by precluding it from considering the claim of self-defence. This, despite the judge having determined that the evidence satisfied the air of reality test and that self-defence should go to the jury. The error is not one that could be, or was, corrected when the jury charge is considered as a whole. It is noteworthy that the jury's first question to the judge concerned self-defence, and that it deliberated for two and a half days before reaching a verdict. I am not persuaded that even if the jury had been provided with s. 265(1)(b), it would have inevitably convicted the appellant.

[31] I would allow the appeal and order a new trial. The appellant having already served his sentence, the Crown in its discretion, might see fit to stay the

proceeding.

Oland, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.