NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Kagan***, 2009 NSCA 43

Date: 20090429
Docket: CAC 292390
Registry: Halifax

Between:

Paul David Kagan

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Bateman and Oland, JJ.A.
Appeal Heard:	March 30, 2009, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Bateman, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.
Counsel:	Luke A. Craggs, for the appellant James A. Gumpert, Q.C. and Sarah Stiner, student, for the respondent

Reasons for judgment:

[1] Paul David Kagan appeals his conviction for aggravated assault. He was tried by Justice Glen McDougall, sitting without a jury.

[2] The conviction resulted on a re-trial of charges stemming from events which occurred on December 8, 2000. On that day the appellant bear-sprayed and stabbed his college roommate, Jason Kinney. At issue was whether, in so doing, Mr. Kagan had acted in self-defence.

[3] In 2003 Mr. Kagan was tried before a judge sitting with a jury and convicted of the offence. On appeal to this Court jury misdirection was found, the conviction set aside and the matter remitted for re-trial. That appellate decision is reported as **R. v. Kagan**, 2004 NSCA 77; [2004] N.S.J. No. 226 (Q.L.).

BACKGROUND

[4] In September, 2000, Mr. Kagan, a first-year computer engineering student at Dalhousie University in Halifax, was assigned to live in a three bedroom apartment in Fenwick Towers, a student residence. He occupied the apartment alone until early October when Jason Kinney, a 25 year old student in Dalhousie's Music Department, joined him.

[5] Although the apartment was non-smoking and Mr. Kinney had described himself as a non-smoker on the residence application, he did in fact smoke. Mr. Kagan initially joined Mr. Kinney in smoking marijuana, mainly on the balcony of the apartment but sometimes inside the apartment or in another apartment in the building. They socialized together, sometimes going to downtown bars.

[6] Mr. Kinney's occasional smoking of cigarettes in his bedroom annoyed the appellant. It became a point of friction between them as did the sharing of housekeeping duties and Mr. Kinney's use of Mr. Kagan's cutlery and dishes.

[7] On December 7, 2000, Mr. Kagan complained about Mr. Kinney's smoking and marijuana use to the facilities manager, Pat MacIsaac. Mr. MacIsaac offered Mr. Kagan an opportunity to immediately move into a fully furnished bachelor

apartment in the same building, equipped with linens, cable, telephone and internet. Mr. Kagan declined the offer.

[8] The following morning, which was the day of the attack, Mr. MacIsaac offered the same suite to Mr. Kinney. He accepted and arranged to obtain the keys later that day. Mr. Kagan was aware that Mr. Kinney would be moving.

[9] That afternoon, when Mr. Kinney was leaving the apartment to attend a guitar recital, he was attacked. There is no dispute that Mr. Kagan sprayed Mr. Kinney with bear repellant and stabbed him. However, Mr. Kagan's account of how the event happened and where it took place differs in material respects from that of Mr. Kinney. I will discuss the differences in more detail later in these reasons.

[10] Dr. Graham Glancy, a forensic psychiatrist called by the defence, testified that Mr. Kagan exhibits some of the symptoms of Asperger's Syndrome. Asperger's is one of a group of conditions known as autism spectrum disorders. The impact of the Asperger's diagnosis on Mr. Kagan's perception of events was central to his claim of self-defence.

GROUNDS OF APPEAL

[11] Mr. Kagan has raised a number of issues on this appeal. He alleges the following errors:

> The judge failed to correctly state and apply the burden of proof as set out in **R. v. W.(D.) [D.W.]**, [1991] 1 S.C.R. 742;
>
> The judge erred in his application of the law of self defence to the evidence at trial;
>
> The judge erred in finding that prior experiences of the defendant amounted to evidence of disposition to violence;
>
> In misapprehending and failing to give effect to the evidence of the forensic psychiatrist, the judge erred in his assessment of Mr. Kagan's credibility.

> In determining whether Mr. Kagan acted in self-defence, the judge failed to properly give effect to the impact of Asperger's Syndrome on his perception of the danger he faced from Mr. Kinney.

STANDARD OF REVIEW

[12] The trial judge's application of the burden of proof and the law of self-defence are reviewed on a correctness standard.

[13] The alleged misapprehension of the evidence and the challenge to the credibility findings attack the reasonableness of the verdict. A verdict is unreasonable if the essential findings leading to it are demonstrably incompatible with evidence that is neither contradicted by other evidence or rejected by the trial judge. The verdict must be one that a properly instructed jury, acting judicially, could reasonably have rendered (**R. v. Abourached**, 2007 NSCA 109, [2007] N.S.J. No. 470 (Q.L.); **R. v. Beaudry**, [2007] 1 S.C.R. 190; **R. v. Yebes**, [1987] 2 S.C.R. 168 and **R. v. Biniaris**, [2000] 1 S.C.R. 381).

[14] Here Mr. Kagan says the judge misapprehended the psychiatric evidence. The proper approach to appellate review where the judge is alleged to have misapprehended an essential component of the evidence was discussed by Fichaud, J.A. for this Court in **R. v. C.S.M.**, 2004 NSCA 60, at paras. 42 to 44. If a judge is mistaken about the substance of material parts of the evidence and that evidence plays an essential role in the reasoning process leading to a conviction, the verdict is unreasonable.

[15] A judge's credibility findings are entitled to deference. In reviewing such findings for error an appellate court must give due regard to the trial judge's advantage in seeing and hearing the witness and consider all of the evidence relevant to credibility (**R. v. C.S.M.**, **supra** at para. 50). An appellate court may intervene when the assessments of credibility made at trial cannot be supported by any reasonable view of the evidence (**R. v. Burke**, [1996] 1 S.C.R. 474 at paras. 5 and 7).

ANALYSIS

[16] My discussion of the issues on appeal requires a somewhat detailed review of the theories of the Crown and the defence and the judge's factual findings.

[17] It was Mr. Kagan's evidence that when he attacked Mr. Kinney on December 8, 2000, he was in fear of him. He testified that during the time they were living together Mr. Kinney had been increasingly aggressive and threatening toward him. Consequently, Mr. Kagan maintained that he was acting in self-defence at the time of the attack.

[18] Mr. Kinney, while acknowledging that there was tension between them, denied that he had threatened, intimidated or been violent toward Mr. Kagan at any time.

[19] The evidence of Mr. Kagan and Mr. Kinney differed, as well, on their interaction immediately preceding the attack on December 8. The judge found that the following took place:

> Jason Kinney returned to apartment 1808 after meeting with Pat MacIsaac [having arranged to move to another apartment]. He remained there until just before noon. With his guitar strapped over his shoulder he departed apartment 1808 and went down the elevator to the main floor. He had a guitar recital to attend. When he arrived at the main floor he became concerned that he might not have closed his bedroom door so he took the elevator back up to the 18th floor and re-entered the apartment. Upon leaving the apartment for the second time he overheard Paul Kagan say to someone on the telephone: "Okay. He's gone now."
>
> Mr. Kinney again went down the elevator to the main floor. Concerned about his belongings he once again returned to the apartment to check on things. He then left again and pressed the button to summon the elevator. At that point Paul Kagan opened the door to the hallway and asked him if he planned to get his own cutlery. Mr. Kinney's reaction was to give Mr. Kagan the finger and to tell him to fuck off. Mr. Kagan indicated that he took that to mean yes and then closed the door. Mr. Kinney once again returned to the apartment to verbally confront Mr. Kagan. He went as far as the doorway to Mr. Kagan's bedroom and asked him if there was anything else he wished to say. Mr. Kinney was upset with Mr. Kagan but I find that he did not physically make contact with him. In so finding, I accept Mr. Kinney's version of what took place. As he was leaving the apartment Mr.

> Kinney told Mr. Kagan to clean up the kitchen as it was like a pig sty or something to that effect.
>
> This time when he left the apartment he heard Mr. Kagan lock the door behind him. This further irritated Mr. Kinney so he proceeded to unlock the door.
> . . .

[20] The judge's findings on these preliminary events did not accord with Mr. Kagan's evidence. He had testified that Mr. Kinney had come into his bedroom and physically confronted him on the second entry into the apartment.

[21] As to the attack, itself, Mr. Kagan went on to recount that it was when Mr. Kinney unlocked the door and "rushed into" the apartment that he sprayed him with the bear repellant. This, he testified, angered Mr. Kinney who flailed his arms in an effort to strike Mr. Kagan, while screaming "You're dead". In response, Mr. Kagan said he stabbed Mr. Kinney just as he was moving back out of the apartment. According to Mr. Kagan the attack took place over just a couple of seconds. He was unable to explain how he came to stab Mr. Kinney in the back or to describe Mr. Kinney's eventual retreat to the elevator.

[22] On the other hand, it was Mr. Kinney's evidence that immediately upon unlocking the apartment door, before he could cross the threshold, he was confronted by Mr. Kagan who dowsed him with bear repellant. Mr. Kinney instantly fell to his knees, temporarily blinded and in pain with his back facing the door. He had such difficulty breathing he thought he had been sprayed with a fire extinguisher given the volume of substance that filled his mouth and eyes. Mr. Kinney staggered away from the apartment, calling for help and banging on adjacent apartment doors. He felt an intense burning sensation, could not see and made his way groping along the corridor wall, toward the sound of the elevator which was some distance down the hall. As the elevator doors opened he felt what he thought was a punch to his back. The force of the blow knocked him into the elevator. He later learned that he had been stabbed. The lone occupant of the elevator, James Midgley, took him to the facilities office of the building where he was helped by two of the staff members, Linda Wright and Sarah Gaultois.

[23] The judge did not find Mr. Kagan to be a credible witness, accepting Mr. Kinney's evidence where the two differed. He said:

> [37] In the case of Paul Kagan's testimony his demeanor on the witness stand and the answers he provided to questions put to him by both defence and Crown counsel has to be evaluated taking into consideration Dr. Glancy's diagnosis. Dr. Glancy described Mr. Kagan as being pedantic. Indeed, he exhibited this characteristic by repeating most every question that was put to him by counsel before attempting to answer it. On occasion he would ask the question to be repeated over and over again before offering a response. On other occasions he would seek clarification of a question to the point where he appeared to be searching for the reason or purpose for the question. In many instances this left the Court with the impression that Mr. Kagan was attempting to provide an answer that he thought would be better for the Court to hear. This, in my opinion, has affected his credibility. This, and the numerous inconsistencies in his testimony between this trial and the first trial have left me in doubt as to the truthfulness of some of the answers he has given.
>
> [38] As a result, when trying to reconcile the differences in the evidence presented by the accused and the complainant, I am more inclined to accept that of the latter where differences exist. The corroborating evidence of other witnesses is also of great assistance in assessing the truthfulness and reliability of the testimony given by the two main parties to this event.
> (Emphasis added)

[24] As is evident from this passage and others in his decision and contrary to Mr. Kagan’s submission, the judge did consider Dr. Glancy's opinion about the impact of the Syndrome on Mr. Kagan's demeanour.

[25] Dr. Glancy was subjected to a robust and seemingly effective cross-examination at trial which challenged the foundations of his Asperger’s diagnosis. Unfortunately, the judge did not make an express finding as to whether Mr. Kagan suffered from the disorder. However, it appears from his analysis that he accepted that Mr. Kagan exhibited some of its symptoms.

[26] The judge’s credibility finding was based not only on Mr. Kagan’s manner of testifying, but, as the judge stated, on the contradictions within his evidence and with the evidence of witnesses which corroborated Mr. Kinney’s version of events.

[27] Each of the judge’s concerns is supported on a review of the record. For example, Mr. Kagan provided answers to his counsel’s questions on direct fluidly and, in the most part, with little hesitation. This changed markedly on cross-examination where he would invariably ask that a question be repeated. Not only

did he hesitate in providing answers to the Crown's questions, he often used vague language in describing important events - words such as "I would have . . ."; "I could have . . ."; or "It is possible . . .". The judge reasonably concluded that Mr. Kagan was evasive and searching for the answer he thought he should give, rather than providing a truthful response.

[28] In addition, Mr. Kagan described bizarre behaviour on the part of Mr. Kinney during the time they lived together. He had not raised these incidents when testifying during the first trial. As one example, he alleged that Mr. Kinney put Mr. Kagan's dishes in the garbage can and urinated on them. Not something, which, if true, he was likely to have omitted in his evidence at the first trial.

[29] Mr. Kagan's minimization of the amount of bear repellant used and its effects on Mr. Kinney was inconsistent with the evidence of other witnesses. Both Linda Wright and Sarah Gaultois, who assisted Mr. Kinney when he was brought to them by Mr. Midgley testified at trial. They each provided detailed evidence of Mr. Kinney's physical distress and incapacity, referring to the fact that an orange liquid (later learned to be bear spray), was literally dripping off his face.

[30] At trial, Mr. Kagan maintained that he had stabbed Mr. Kinney just outside the door of the apartment, within seconds of hitting him with the bear repellant. However, Linda Wright and Constable Kevin MacDonald testified that immediately after the attack, Mr. Kagan told them he had stabbed Mr. Kinney near the elevator. Mr. Midgley testified that he heard footsteps running away from the elevator as Mr. Kinney fell into it. This evidence corroborated Mr. Kinney's version of the attack.

[31] I am not persuaded that the judge misapprehended or ignored Dr. Glancy's evidence about the impact of Asperger's Syndrome on Mr. Kagan's testimony or that he erred in his credibility assessment.

[32] I will now address Mr. Kagan's complaint that the judge erred in his application of the law of self-defence to the evidence. The section of the **Criminal Code** at issue here is:

> 34(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[33] There is no question that Mr. Kagan's assault on Mr. Kinney caused grievous bodily harm. In addition to the debilitating effects of the bear repellant, he suffered a collapsed lung from the stabbing. Dr. Graham Bullock, who treated Mr. Kinney upon admission to the hospital, testified that there was a high likelihood that he could have developed an attention pneumothorax from the collapsed lung which can lead to a loss of blood pressure and death.

[34] There are three aspects to the defence to be considered here:

(1) Mr. Kagan must have been subjected to an unlawful assault by Mr. Kinney or reasonably believed that he had been assaulted;

(2) when Mr. Kagan inflicted the injury (grievous bodily harm) he must have been under a reasonable apprehension of the risk of death or grievous bodily harm; and

(3) in inflicting the injury he must have reasonably believed that he could not otherwise preserve himself from death or grievous bodily harm.

[35] To negative a claim of self defence the Crown must prove beyond a reasonable doubt that one or more of the above elements are not established on the evidence (**R. v. Cinous**, [2002] 2 S.C.R. 3 at para. 94).

[36] In **R. v. Charlebois**, [2000] 2 S.C.R. 674 Bastarache, J. described self-defence as involving a subjective and objective test, approving the following description from **R. v. Reilly**, [1984] 2 S.C.R. 396, at page 404:

> Subsection (2) of s. 34 places in issue the accused's state of mind at the time he caused death. The subsection can only afford protection to the accused if he apprehended death or grievous bodily harm from the assault he was repelling and if he believed he could not preserve himself from death or grievous bodily harm otherwise than by the force he used. Nonetheless, his apprehension must be a

> *reasonable* one and his belief must *be based upon reasonable and probable grounds*. The subsection requires that the jury consider, and be guided by, what they decide on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, so long as there exists an objectively verifiable basis for his perception.
> (Emphasis added)

[37] This subjective/objective test is explained, as well, in **R. v. Cinous**, **supra** by McLachlin, C.J. and Bastarache, J. writing for the majority of the Court:

> 94 Each of the three elements under s. 34(2) has both a subjective and an objective component. The accused's perception of the situation is the "subjective" part of the test. However, the accused's belief must also be reasonable on the basis of the situation he perceives. This is the objective part of the test. Section 34(2) makes the reasonableness requirement explicit in relation to the second and third conditions. *Pétel* held that the same standard applies to the first component of the defence, namely, the existence of an assault. With respect to each of the three elements, the approach is first to inquire about the subjective perceptions of the accused, and then to ask whether those perceptions were objectively reasonable in the circumstances.
> (Emphasis added)

[38] In claiming self-defence Mr. Kagan relied, in particular, on the decision of the Supreme Court of Canada in **R. v. Lavallee**, [1990] 1 S.C.R. 852. There, Angelique Lyn Lavallee was a battered woman in a volatile common law relationship. She killed her partner late one night by shooting him in the back of the head as he left her room. She had frequently been a victim of his physical abuse. A psychiatrist testifying for the defence provided the opinion that Ms. Lavallee's shooting of the deceased was a final desperate act of a woman who sincerely believed that she would be killed that night. He described her ongoing terror, her inability to escape the relationship despite the violence and the continuing pattern of abuse which put her life in danger. A jury acquitted Ms. Lavallee but the verdict was overturned by a majority of the Manitoba Court of Appeal. On further appeal to the Supreme Court of Canada the acquittal was restored. At issue was whether the psychiatric evidence was properly before the trial court, and, if so, whether the trial judge's instructions with respect to it were adequate. The Court held that expert testimony relating to the ability of the accused to perceive danger from her partner may go to the issue of whether she "reasonably apprehended" death or grievous bodily harm on a particular occasion.

[39] Drawing an analogy to Ms. Lavallee's circumstances, it was Mr. Kagan's position at trial that the Asperger's Syndrome heightened his perception of danger. Given Mr. Kinney's past aggression toward him and threatening response to the bear spray, Mr. Kagan said he reasonably apprehended death or grievous bodily harm, thus acted in self-defence in quickly following the spray with the stabbing.

[40] The judge recognized that a key point was the impact of the Asperger's Syndrome on Mr. Kagan's perception of the circumstances surrounding his attack on Mr. Kinney. The trial judge accurately described the issue before him:

> [22] I will not spend a lot of time on the elements of the offence itself since the accused is not really denying it happened. The focus will be mainly on the reasonableness of the accused's apprehension of death or grievous bodily harm and whether, the accused, on reasonable grounds, believed he could not otherwise preserve himself from such a fate. In making these determinations the Court must consider the reasonableness of the accused's apprehension and belief in light of "....the history, circumstances and perceptions" of the accused. (See **Lavallee**, *supra*). While so doing, the Court cannot lose sight of where the burden of proof lies. It is not for the accused to prove self-defence although there has to be an objectively verifiable basis for his perception. Rather, the onus is on the Crown to prove beyond a reasonable doubt that Mr. Kagan was not acting in lawful self-defence.

[41] He summarized Dr. Glancy's evidence:

> [27] Dr. Glancy testified that people with Asperger's can function at quite a high level. Mr. Kagan is in this category.
>
> [28] Persons suffering from Asperger's quite often have difficulty developing peer relationships. This is noticeable at any early age. They are usually slow in reaching developmental milestones. They seldom develop long-lasting peer relationships. They appear strange or odd to others. They fail to maintain eye-to-eye contact in conversation with others. They have difficulty feeling and expressing emotions and understanding the emotions of others. They can be quite blunt which can be perceived as rude by those they interact with. They tend to suffer from mild paranoia and have a lower tolerance of change which can lead to frustration. They develop anxiety when things are not the way they fervently wish them to be.

> [29] Asperger's patients are typically loners. They can be awkward or clumsy when they are young but they can develop quite good motor skills as they get older.
>
> [30] Since they do not normally develop long-lasting or warm relationships with others, they are usually distrustful of others. Asperger's sufferers like structure and routine in their lives. In stressful situations they can develop a heightened level of anxiety.

[42] Dr. Glancy's evidence that Mr. Kagan exhibited some of the symptoms of Asperger's Syndrome was relevant to his subjective perceptions at the time of the attack. However, as the Court cautioned in **R. v. Lavallee**, **supra** at pp. 890-91:

> Obviously the fact that the appellant was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other than in self-defence. The focus is not on who the woman is, but on what she did. In "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985), 8 *Harv. Women's L.J.* 121, at p. 149, Phyllis Crocker makes the point succinctly:
>
> > The issue in a self-defence trial is not whether the defendant is a battered woman, but whether she justifiably killed her husband. The defendant introduces testimony to offer the jury an explanation of reasonableness that is an alternative to the prosecution's stereotypic explanations. It is not intended to earn her the status of a battered woman, as if that would make her not guilty.
> >
> > . . .
> >
> > Ultimately, it is up to the jury to decide whether, <u>in fact</u>, the accused's perceptions and actions were reasonable. Expert evidence does not and cannot usurp that function of the jury. The jury is not compelled to accept the opinions proffered by the expert about the effects of battering on the mental state of victims generally or on the mental state of the accused in particular. But fairness and the integrity of the trial process demand that the jury have the opportunity to hear them.

[43] Defence counsel posed a hypothetical to Dr. Glancy which tracked Mr. Kagan's version of the altercation. Included in the hypothetical was a history of intimidating behaviour by Mr. Kinney toward Mr. Kagan, the presumption that Mr. Kagan feared Mr. Kinney and the fact that both the spraying of the bear repellant and the stabbing took place at the apartment door all within just a couple of

seconds, as Mr. Kagan had testified. It was Dr. Glancy's opinion that in those circumstances the hypothetical person with Mr. Kagan's traits would fear for his safety, feel trapped and would believe that his violent reaction was the only way to protect himself from harm.

[44] When confronted by Crown counsel on cross-examination with a hypothetical that conformed to Mr. Kinney's version of the relationship and resulting attack, Dr. Glancy was unable to explain the hypothetical attacker's behaviour. He testified:

> Well, assuming all the elements are provable in the court, it would appear to be that there is something absolutely missing from this. It seems almost no reason for P. [the hypothetical Mr. Kagan] to stop J. [the hypothetical Mr. Kinney] and to spray and stab him. . . .

[45] In discussing the two hypotheticals the judge observed:

> [32] In cross-examination by Crown counsel, Dr. Glancy expressed the opinion that Mr. Kagan's mental condition would not prevent him from knowing what he did was wrong. He felt that Mr. Kagan was capable of making rational choices but if he was paranoid then he would be extremely sensitized to the feeling of being trapped. Dr. Glancy likened the situation to that of the battered woman syndrome case of **R.** v. **Lavallee**, *supra*.
>
> [33] Crown counsel also put a detailed hypothetical scenario to Dr. Glancy which differed in certain material respects to the one put to him by the defence. Dr. Glancy indicated that if all the elements of the hypothetical could be proved in court then he would have to reconsider the opinion he had earlier provided to the Court. One of the things that Dr. Glancy would have expected to hear from Mr. Kagan is that his former room-mate, Mr. Kinney, was a violent man and that living with him was a negative experience. He would also have expected Mr. Kagan to say that he was afraid of Mr. Kinney although what he would say to anyone would depend on the level of trust he had for the person he was talking to.

[46] The judge analyzed the three elements of self-defence in the context of the facts as he found them to be. For ease of reference I repeat them from para. 34, above:

> (1) Mr. Kagan must have been subjected to an unlawful assault or reasonably believed that he had been assaulted by Mr. Kinney;

(2) when Mr. Kagan inflicted the injury (grievous bodily harm) he must have been under a reasonable apprehension of the risk of death or grievous bodily harm; and

(3) in inflicting the injury Mr. Kagan must have reasonably believed that he could not otherwise preserve himself from death or grievous bodily harm.

[47] On the first element, the judge concluded that the tense situation between the roommates, Mr. Kinney's words of displeasure and his return to the apartment on three occasions on that day "could cause a reasonable person to apprehend that physical harm could occur". I will assume that the judge was not satisfied that the Crown had proved beyond a reasonable doubt that Mr. Kagan had not been unlawfully assaulted.

[48] The judge then addressed the second and third elements together. After referring to **R. v. Lavallee**, **supra**, he posed the following questions:

> [46] Was it then reasonable for Paul Kagan, given his history, circumstances and perceptions to fear that Mr. Kinney was about to kill him or cause him grievous bodily harm? Furthermore, was it reasonable for Paul Kagan, again, considering his history, circumstances and perceptions, to believe that he could not otherwise save himself from the apprehended harm other than by using the force that he did?

[49] The judge rejected Mr. Kagan's assertion that he acted in fear of Mr. Kinney. Not only was there no evidence that Mr. Kinney had a history of violence to others, the judge did not accept Mr. Kagan's evidence that Mr. Kinney had been physically aggressive toward him at the time of the attack or in the past. These conclusions were supported by the record. Indeed, when questioned on cross-examination Mr. Kagan would not describe Mr. Kinney as violent. Additionally, Mr. MacIsaac testified that when Mr. Kagan had refused the offer of the alternate apartment, he told Mr. MacIsaac that he was not afraid of Mr. Kinney.

[50] In addition to the detailed list of factual findings contained at para. 40 of his reasons, in concluding that Mr. Kagan had not acted in self-defence, the judge highlighted the following points which I find are supported on the record:

> The first discharge of spray which hit Mr. Kinney directly in the face at close range was enough to put him on his knees, leaving him virtually defenceless;
>
> Mr. Kinney was not flailing his arms and threatening to kill Mr. Kagan nor trying to attack him. He was crying out for help not retribution;
>
> Mr. Kinney could not see, was gagging and had difficulty breathing as he stumbled down the hallway toward the elevator, away from Mr. Kagan, desperately looking for help;
>
> It would have been obvious that Mr. Kinney could not have pursued Mr. Kagan had he chosen to escape using the stairway near the entrance to their apartment.
>
> Unlike Ms. Lavallee, Mr. Kagan was not subjected to a long history of abuse and violence by Mr. Kinney;
>
> Again, unlike Ms. Lavallee's circumstances, there was no hopelessness of escaping the relationship as Mr. Kagan knew that Mr. Kinney had arranged to move out;
>
> Mr. Kagan stabbed Mr. Kinney at the elevator, not at the door of the apartment as he described. To do so he pursued and attacked a retreating and disabled Mr. Kinney.

[51] Mr. Kagan further complains that in reaching his conclusions the judge misused evidence of his propensity for violence. Dr. Glancy testified that in gathering information about Mr. Kagan to assist in his diagnosis, he learned that over the years Mr. Kagan was given to periodic, unprovoked violent outbursts. In the course of discussing and rejecting Mr. Kagan's evidence of Mr. Kinney's alleged violent past, the judge made a fleeting reference to Dr. Glancy's evidence of Mr. Kagan's own violent tendencies. Read in context, it is clear that the judge did not use this information as evidence of Mr. Kagan's propensity for violence nor did he draw any other unfavourable inference from it.

[52] In summary, I am not persuaded that the judge misapprehended Dr. Glancy's evidence or failed to take it into account in considering Mr. Kagan's claim of self-defence.

[53] There was simply no foundation for Mr. Kagan's professed fear of Mr. Kinney due to his alleged violent past. As found by the trial judge, Mr. Kinney, retreating and disabled from the bear repellant, was pursued and stabbed by Mr. Kagan. Indeed, on the evidence accepted by the trial judge, even Dr. Glancy could not offer the opinion that Mr. Kagan would have believed that his violent reaction was the only way to protect himself. To use the language from **R. v. Reilly**, **supra**, there was no objectively verifiable basis for Mr. Kagan's perception that he was in danger of death or grievous bodily harm from Mr. Kinney.

[54] The judge did not err in his application of the law of self-defence to the facts as he found them.

[55] Finally, for the reasons which follow, I would find there is no merit to Mr. Kagan's assertion that the judge failed to correctly apply the burden of proof as set out in **R. v. W.D.**, **supra**. There Cory, J., for the Court, detailed the reasoning path a trier of fact must follow in assessing reasonable doubt when the accused has testified and credibility is in issue (page 758):

> 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.

[56] As Fichaud, J.A. explained for this Court in **R. v. Abourached**, **supra** two essential concerns underlie the **W.(D.)** instruction:

> [16] . . . . First, the trial judge may err by discounting the accused's testimony just because he has believed the Crown witnesses. The accused has not really been disbelieved. He has been marginalised. Second, a verdict based on a choice of whom to believe may ignore the concept of reasonable doubt. The first principle

> underlies Justice Cory's first instruction. The second underlies the third instruction. Both principles underlie the second instruction.

[57] The fact that a judge does not explicitly articulate the **W.(D.)** instruction is not, of itself, reflective of error. Fichaud, J.A. wrote in **R. v. Lake**, 2005 NSCA 162:

> [15] *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction. [citations omitted]

[58] Recently in **R. v. R.E.M.**, 2008 SCC 51 McLachlin, C.J., for the Court concisely stated the issue as follows:

> 46 Similarly, in *Dinardo*, the Court, *per* Charron J., held that the trial judge was not required to recite the rule set out in *W.(D.)*, provided the reasons demonstrated he had seized the substance of the critical issue of a reasonable doubt in the context of a credibility assessment.

[59] Although the judge here did not refer to **R. v. W.(D.)**, **supra** it is abundantly clear that he did not determine guilt on the basis of a credibility contest.

[60] Thus, we must consider the reasons as a whole and intervene only if it is apparent that the judge did not apply the essential principles underlying **W.(D.)** (**R. v. Lake**, **supra** at paras. 16 and 17). A number of passages illustrate the judge's appreciation of the proper principles. He was aware that he could not simply chose between the alternative versions offered by the Crown and defence (**R. v. D.S.C.**, 2004 NSCA 135,[2004] N.S.J. No. 432 (Q.L.) at para. 21):

> [35] The somewhat different versions of what transpired on December 8, 2000 and in the weeks and months leading up to that fateful day need to be considered and weighed in an effort to determine what actually took place.
>
> [36] It is not simply an exercise in comparing the version of events presented by the complainant — Mr. Kinney — with the one presented by the accused — Mr.

> Kagan. One would not expect both versions to be exactly alike. What one person perceives and later recollects seldom matches what someone else might have perceived and then years later tried to recollect. Assessment of witness credibility is also an important consideration for the trier of fact.

[61] The judge considered the evidence of the accused in the context of the whole of the evidence. He analyzed the testimony of Mr. Kagan and Mr. Kinney; looked for corroboration in the evidence of the additional witnesses; provided reasons for finding that Mr. Kagan was not a credible witness and accepted Mr. Kinney's evidence. In concluding he said:

> [57] After considering all the evidence, including the evidence of the accused, I am not left with any doubt as to his guilt.

[62] Mr. Kagan refers to the judge's comment, reproduced at para. 24 above, that the inconsistencies in Mr. Kagan's evidence "left him in doubt about the truthfulness of some of his answers". This, he says, is evidence that the judge wrongly shifted the burden of proof to Mr. Kagan. While I would agree that the wording used is unfortunate, looking at that isolated comment in the context of the reasons as a whole, I am satisfied that the judge did not shift the burden of proof to the accused. It is clear from the following excerpts that he placed the burden on the Crown:

> [10] Crown counsel must prove beyond a reasonable doubt that the wounding of the complainant resulted from the force that the accused intentionally applied.
>
> . . .
>
> [15] In a case where there is some evidence of self-defence, it is important to remember that it is not the accused's responsibility to prove that he was justified in using force; it is Crown counsel's responsibility to prove beyond a reasonable doubt that the accused was not justified in using force.
>
> . . .
>
> [17] As stated earlier it is not necessary for the accused to prove that he was acting in self-defence. It is for the Crown to prove beyond a reasonable doubt that the accused was not acting in lawful self-defence.

[63] I am not persuaded that the judge rejected the evidence of the accused, simply because he believed that of the Crown witnesses or that he ignored the concept of reasonable doubt by basing his verdict on a choice of whom to believe, rather than the whole of the evidence.

DISPOSITION

[64] Having found no error, I would dismiss the appeal.

Bateman, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.