

41PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v Shaw*, 2022 NSPC 41

Date: 20221125

Docket: 8509782, 8509785

Registry: Windsor

Between:

His Majesty the King

v.

Robert Adam Shaw

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| Judge: | The Honourable Judge Ronda van der Hoek, |
| Heard: | October 24, 2022 and October 28, 2022 in Windsor, Nova Scotia |
| Decision | November 25, 2022 |
| Charge: | Section 266 of the Criminal Code |
| Counsel: | William Fergusson, for the Crown Chrystal MacAulay, for the Defendant |

By the Court:

[1] The defendant, Mr. Robert Shaw, is charged with assaulting his then domestic partner and daughter. The only issue for determination of this Court is whether the prosecution has proven the two allegations beyond a reasonable doubt.

[2] These are my reasons explaining my decision to find Mr. Shaw guilty of both charges.

Principles applicable on a criminal trial:

[3] The Crown bears the onus in a criminal trial to prove the elements of the offence beyond a reasonable doubt. Mr. Shaw is not required to prove he did not commit the offence. In a trial such as this there are two witnesses to the incidents, however I remind myself that a trial is not a credibility contest. Only after considering all of the evidence as a whole does the Court reach a conclusion as to whether the Crown has met its onus. Should I reach the determination that I am not satisfied that every element of the offence has been proven, there is a reasonable doubt and Mr. Shaw will not be convicted. The beyond reasonable doubt standard is heavy and does not equate with probable or likely guilty. Instead, it lies much

closer to absolute certainty than to the civil standard of proof on a balance of probabilities.

[4] Mr. Shaw testified and as a result the Court must apply the Supreme Court of Canada's direction in *WD* when assessing the credibility of his testimony. I find clarity in the five-step dictum set out by Paciocco JA in his learned paper "*Doubt about Doubt: Coping with WD and Credibility Assessment*" (2017 22 Canadian Criminal Law Review 31):

I cannot properly resolve this case by simply deciding which conflicting version of events is preferred;

if I believe evidence that is inconsistent with the guilt of the defendant I cannot convict the defendant;

even if I do not entirely believe the evidence inconsistent with the guilt of the defendant, if I cannot decide whether that evidence is true, there is a reasonable doubt and the defendant must be acquitted;

even if I entirely disbelieve evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and

even where I entirely disbelieve evidence inconsistent with guilt, the defendant should not be convicted unless the evidence that is given credit proves the defendant's guilt beyond a reasonable doubt.

[5] In setting out the evidence and my findings of fact I do not propose to re-create the entirety of the testimony at trial. That said, I did listen carefully to all of the evidence, and reflected upon it. Only after considering the foregoing as well as the submissions of counsel and the relevant law, did I reach any conclusions.

[6] In assessing the evidence of each witness, I considered such things as the truthfulness and reliability of their testimony. Those two considerations embrace such things as intrinsic and extrinsic consistency in the evidence, plausibility, balance, possible interest, the ability to recall and communicate what was observed and how that ability may be impacted by such things as the passage of time, the consumption of drugs and alcohol, or other factors. The Court also considered whether a witness was being sincere, candid, biased, reticent and/or evasive during testimony.

[7] I am aware that I may accept some none or all of evidence of a witness. And, once again, acceptance of evidence did not occur until after the Court had considered the evidence as a whole.

The evidence and findings of fact:

[8] It makes sense to address first the allegation of assault involving Mr. Shaw's former domestic partner. I will refer to her variously as Ms. A. or the complainant.

[9] Ms. A was a plainspoken witness who testified in a straightforward, simple manner, and was generally compelling. She and Mr. Shaw separated three months prior to his visit to the garden shed, which she understood was for the purpose of

retrieving personal belongings. Some time earlier, she had placed those belongings in the shed and “shut down his medical marijuana grow”.

[10] Shortly after entering the shed, Mr. Shaw became “really frustrated” and yelled and cursed at her. She attributes his upset to her placement of his belongings and the termination of the medical marijuana operation.

[11] While standing in the shed, in her estimation some 0 to 10 feet from the door, she began to cry. She believes her crying infuriated Mr. Shaw who pushed past her, “kinda like shoved me with his hand”, while saying simultaneously saying he was “fucking leaving, I’ve had enough of this bull shit”.

[12] The shove caused the complainant to hit “the countertop a little bit”. On cross-examination she described a 12 x 14’ countertop on the wall near the door, and she was standing between the far wall and that counter when she was shoved. She also estimated the overall width of the area where the incident occurred as four feet, and somewhat wider than the 32-inch door.

[13] In her estimation, “there was room for him to get around without shoving”. When asked on cross examination to agree that a turn on her part was needed to allow Mr. Shaw to exit the shed without touching her, she conceded the point adding “perhaps, maybe, but not with a hand on my shoulder”.

[14] The complainant reported the incident to police a month later after Mr. Shaw sent her a voice message imparting a threat to “light my neighbour’s car on fire”. During this portion of her testimony, the complainant, who had otherwise maintained composure, started to cry. She explained that she was scared as it was not an amicable separation. She maintained that demeanour when asked if she was alone with Mr. Shaw when the incident in the shed occurred; she says the children were in the house at the time.

[15] The complainant’s testimony, on both cross examination and direct, was clear, straightforward, and easily understood. She provided a sufficient level of detail and clearly described the shed and the manner in which she was touched as would be expected given the passage of time, the brevity of the touching, and the significance the event held in her life. In her opinion, there was adequate space for Mr. Shaw to pass without touching her, and there was no reason to do so in the manner he did- shoving her into a counter as he left the shed.

[16] Under cross-examination the complainant was unshaken, and I thought quite balanced. While the relationship was over at that time, she reported the shove to police only after becoming aware of the threat by telecommunication device.

[17] There were no points in her testimony where the complainant demonstrated animus toward Mr. Shaw, nor was there any suggestion of a motive to fabricate the allegation or exaggerate it. She was both a credible and reliable witness.

[18] I will now consider the evidence of Mr. Shaw as it relates to the shed incident with the caveat that I did not assess his evidence until all of the evidence had been considered. Mr. Shaw testified in an unfocused manner and can best be described as an over sharer. He spent considerable time talking about peripheral matters and had difficulty focusing on the task at hand. He regularly deviated off-topic providing information about his mental health, his childhood, and his current marital situation. It appeared his counsel had a real challenge keeping Mr. Shaw focused on simply answering the questions posed on direct examination.

[19] Mr. Shaw testified that he was in the midst of a mental health crisis during his visit to the shed and, as described by him, was in a “bad place”. His ability to recall events and accurately testify about them was, by his own account, impaired by his use of a problematic prescription medication that made him feel “fuzzy”. At the relevant times, Mr. Shaw’s brain was described as racing, he was experiencing posttraumatic stress disorder, and an extreme sense of victimization at the hands of his family. His mannerisms while testifying were dramatic and the direction of his evidence was, at times, quite difficult to follow. That said, the Court focused on

what he said and not so much his demeanour recognizing demeanour evidence must be approached with caution.

[20] Mr. Shaw does not dispute touching the complainant, but says “I did not put my hands on her in violence, but to get out of that situation... I wanted to get out of that door, and she was holding me in there and I panicked. I was not trying to hurt her; I was trying to get out the door”.

[21] Mr. Shaw says he attended the shed, not to retrieve his belongings, but because he had nowhere else to go. He says he found his building destroyed and was “on a lot of medication that really destroyed me... I was under such an amount of distress and felt trapped”. He explained that the building was dear to him because he had put a lot of work into it, was sick and using the building to grow medical marijuana. He explained that the complainant had shut off the power to the shed on the day he suggested he would leave the relationship. The plants had died, and the fans were still running blowing soil all over his belongings.

[22] Mr. Shaw says the two argued back and forth about his belongings and he asked her why she was “doing this to my stuff”, he “felt panicked, felt fear and I just wanted to get out. Being locked with people holding me causes me panic”.

[23] Asked about the physical contact with the complainant, Mr. Shaw testified that after hearing her testimony he did not understand what he was charged with. He says he remembers “*grabbing her and pulling her* and getting out of the door. I remember her saying you were not allowed to do that to me, and I remember getting out as fast as I could”. He went on to explain, “I did not really so much put my hands on her so much as I just put my arm out this way and *pushed her*”. He explained that it is a narrow entry, and “I just pushed her to get out. I don’t know what happened to her after that, I just wanted to get out. It happened so long ago, and I cannot really recall what was discussed”.

[24] Asked about his purpose in touching the complainant, Mr. Shaw explained that it was “to get out, she was always doing this, and there was no other way out. The building was small, filled with so many rooms and I did nothing to put hands on her to be aggressive or violent”.

[25] On cross-examination Mr. Shaw was asked if it were possible for him to leave the shed without having physical contact with the complainant, he testified, “no, not with an area that small, I would have to at least rub shoulders with her even if she had moved out of my way”. He then inexplicably added, “I looked at her and said, ‘you move out of my way, you can’t keep me here. I need to get out of here’ *and she pulled that door tighter, and we fought over that door handle and,*

I'm not gonna lie, I am a big man, I got a lot of strength, and I pushed her out of the way. We were seven feet apart and I told her numerous times to get out of my way, I needed to get out of there. I was pacing in the back and then I had to get out".

[26] Inexplicably, Mr. Shaw's evidence was much more detailed than that of the complainant. He spoke of grabbing and pulling and pushing her, whereas she spoke only of a shove. He offered much more detail at the end of his evidence while caught up in a rant that included her holding the doorknob, a fight over it and her not letting him leave after he repeatedly told her he needed to get out. It was, quite simply, incredible. That scenario, also not presented to the complainant on cross-examination, benefits from less weight and ultimately appeared either made up or contrived. The bottom line, Mr. Shaw fails to appreciate that what he described was the commission of an assault on the complainant.

Conclusion on count one:

[27] The Court easily finds that Mr. Shaw, while in a confused and angry state, pushed the complainant out of his way as he exited the shed. The complainant was not obstructing his exit, she did not grab the door handle and try to keep him in the building, instead she was surprised by the push and shove that resulted in her

making contact with the counter. She did not consent to this contact that occurred in the context of a high level of distress and agitation on the part of Mr. Shaw.

[28] The complainant's evidence is accepted in its entirety. Mr. Shaw was not a reliable or credible witness with respect to this incident. The Crown has proven the elements of the offence beyond a reasonable doubt and shall have a conviction on this count.

Count Two: The incident in the truck:

[29] I will refer to Mr. Shaw's teenage daughter as "the daughter". Mr. Shaw's daughter was a teenager when she testified about an incident that occurred on December 27, 2020. While initially shy and nervous, she was overall well spoken and clear in her recall of events. That she remains estranged from her father was apparent when she referred to him as her "biological" father.

[30] The daughter explained that she and her younger sister were in a truck driven by Mr. Shaw returning home from a paternal family Christmas dinner in Truro. She and her father argued about her aunt's offer of cell phone that he believed she did not deserve.

[31] The daughter explained that Mr. Shaw was driving the truck in a reckless manner. She estimated it was travelling “really fast, 120 km an hour”. She says she asked her father numerous times to stop and focus on the road, noting that he was always in the passing lane, riding tailgates, and passing cars. She testified that she did not feel safe, and he was not focused on driving.

[32] The daughter says she told Mr. Shaw that she did not feel safe, and that he needed to let her out and pull over for her aunt or mother to come to get her. She explained that she was using her cell phone to call her mother and also send text messages. Her younger sister was in the back seat crying and her father would not stop the truck.

[33] In reaction to all of this, she says her father told her “he is her father acting normally, and having a backbone, and sticking up for himself for the first time, insisting he was doing nothing wrong”. She reiterated telling him she wanted him to pull over and let her and her sister out. He would not do so.

The assault:

[34] While the arguing between these two continued about “any number of things”, including Mr. Shaw’s anger toward her and “not deserving the things I have”, she says Mr. Shaw suddenly grabbed her left arm, she pulled it away

saying, “don’t fucking touch me”. He grabbed the back of her neck with his right hand, near her two neck tendons, and pushed her head down. She says she nearly hit the gear shifter but resisted the push and tried to get away. She asked him why he did that, and he told her it was because she swore at him. The aftermath she says, was a blur.

[35] Asked if she tried to get out of the truck, the daughter says, “no, I did not try to get out”.

[36] On cross-examination the daughter was asked about her testimony regarding not feeling safe, she began to cry and agreed with defence counsel. She reiterated that she told Mr. Shaw both before and after the assault that she did not feel safe. She disagreed with the proposition that the touching occurred when she turned her body toward the passenger door, adding, “no, that was before. I was turned texting mom. I was facing straightforward when he grabbed me. We were talking and he was driving, and he grabbed me”. She said it was heated on his end, and agreed she was upset by the conversation.

[37] She also did not accept defence counsel’s suggestion that she was reaching for the door to jump from the moving truck when her father grabbed her in reaction. She explained, “I was already feeling unsafe, I would not do that, jump

from a moving vehicle. And, I was facing forward, he did not mention anything about me jumping out, he grabbed me completely unprompted. He was driving recklessly and not focused on the road but instead on yelling at me and trying to upset me. He brought up past driving arguments”.

[38] The daughter also testified agreeing that the truck was old, but she was unaware of the door locking mechanism. She also disagreed with the proposition that her father reached over her to lock the door, saying she does not remember him reaching around her and instead believes he reached no further than her neck. She was, however, prepared to propose with 80% certainty that she would have noticed if he had reached for the door, adding she believed the truck doors locked automatically.

[39] Also on cross examination, she elaborated explaining that her father grabbed her arm in a catching motion before she could move it away and immediately grabbed her neck. She says her face was pushed close to the gear shifter and she took notice that her nose would have hit and broken on the shifter had she not physically resisted the downward push on her neck.

[40] The daughter was also quite emotional when asked on cross-examination if she needed medical attention. She did not.

[41] The daughter explained that at the time she did not know how to initiate a complaint to police and only did so sometime later after her parents separated and with her mother's encouragement and explanation that the situation should not have happened.

Assessing the testimony of Mr. Shaw's daughter:

[42] Overall, I found Mr. Shaw's daughter a credible witness. Her testimony benefited from sobriety and shock at seeing her father, in his words "stand up for himself", in an unsafe location and with such an extreme demonstration- yelling, remaining in the passing lane, and speeding on a 100 series highway, with two children in the vehicle. And, while she was not asked, it certainly appeared that nothing of this nature had occurred previous involving these two. The daughter's effort to reach her mother and report her fear also had a ring of truth.

[43] The daughter was also a reliable witness. While her evidence was brief, the only concerning point related to the truck locking mechanism- not knowing on direct and believing it was automatic on cross examination. That said, the Court did not detect an effort to mislead, but instead an effort to recollect. That testimony appeared to arise from her surprise at the suggestion Mr. Shaw believed she was going to jump from the moving vehicle, and did not represent an intrinsic

inconsistency that worried the Court. Finally, she was also balanced in her concession of a 20% possibility Mr. Shaw may have reached over her to the door lock. I was likewise not concerned about exaggeration or untruthfulness when she provided additional evidence that she believed she could have hit and broken her nose on the gear shifter. Her direct evidence supported such a risk even without her saying so.

[44] Despite the passage of few months between the incident and reporting, there did not appear to be an inability to recall the particulars of what was a rather short event. That she could not recall all the details of the arguments was likewise not surprising or concerning. It would be surprising if she had been able to provide such a level of detail with respect to words spoken.

[45] Finally, she did not appear to have considered that her father grabbed her to avoid a jump from the truck, given he was driving recklessly, and she was expressing concern for the safety of herself and her younger sister. She proposed reasonable ways to cease an end to the drive- her mother or her aunt driving, but not a reckless and dangerous door opening while travelling at speed on the highway. She did not provide evidence about her father's mental health issues; it was not clear if she was aware of them. They stand as proven facts on his evidence, and may explain why she found her father's actions inexplicable.

The testimony of Mr. Shaw:

[46] Mr. Shaw also provided testimony with respect to this incident. He testified that he told his daughter she was not getting a cell phone and was upset that his family was giving her things behind his back, and “they did not know what was going on”. He said, “a \$2000 cell phone? I was not having it”. He explained that he was upset because his daughter was not carrying herself the way he wanted, and he told her she was not having a cell phone. He explained that he had recently fixed the one she had for \$300. He says he told his daughter that her mother had “no say”, and this was the first time he was standing up for himself. His doctors told him to do so.

[47] Mr. Shaw explained, “this was the situation when I stood up. I wanted her to be responsible. In the truck she said, ‘go fuck yourself’. I handled it like my father did, I slammed my hands off the steering wheel and told her I did not deserve to be talked to like this. I stood up to her and a couple of minutes later... No wait, I have PTSD, she started acting like her mom. She told me to pull the truck over, she was getting out. I laughed at her and said, ‘you are not getting out, we are on the 101 Highway’, and she turned, and I thought she was reaching for the door. Now I know it was her cell phone. As soon as I reached for her shoulder to pull her back,

she did that and I grabbed her shirt and of course, she went down because I had to lock the old truck door”.

[48] Asked about what happened in the truck and what he was thinking, Mr. Shaw testified that he thought he was “handling things as a father, but she was grabbing the door handle to jump. Now I know I was wrong to escalate in the truck. Driving was not the best place and time. I allowed my anxieties to take over. I tried to do what I thought was right. I tried to do what I thought was right, in my eyes I grabbed her because I thought she was grabbing the door to leave the truck”.

[49] Mr. Shaw also disputes that he was driving fast at the time, agrees he was “pretty heated” but was not speeding in any sort of way. He says it was a chaotic scene, maybe she perceived it her way, and he says he told her to “stay away from that door, and that he was preparing to pull the truck over”. He reports his daughter saying, “I am not trying to get out, I am texting mom”.

[50] On cross-examination, the Crown Attorney put the evidence of his daughter to Mr. Shaw, and he acted somewhat surprised by the Crown Attorney’s summation of that testimony. Mr. Shaw maintains that he did not grab his daughter’s arm but instead her shoulder, that he grabbed her the first time and she pulled back, so he grabbed her again. He explained that he was in the process of

shifting gears and her head never went near the gear shifter. He expanded upon his testimony adding that at the same time he looked back at his other daughter and told the complainant she was not getting out. He says he did nothing for the rest of the trip.

[51] The Court found it strange his testimony that she grabbed the door when he testified earlier that he did not see her touch the door. It cannot be both. Once again, he expanded the level of detail on cross examination with respect to the interaction- words spoken, observing the other daughter, etc.

[52] Asked on cross-examination if things race and run together when he gets stressed, Mr. Shaw agreed and said things happened quickly, adding he has PTSD and is dealing with it, he then talked at length about the medication he uses and agreed he was on medication at the time of the incident. That medication was described as “troublesome medication, that did not work well and, instead, increased his anxiety”.

[53] Mr. Shaw was neither a credible nor reliable witness when testifying about the incident involving his daughter. His reliability was impaired by medication, anxiety, stress, and not thinking clearly. He started an intense argument with his daughter about a cell phone in unsafe circumstances. He decided this was the time

and place to slam the steering wheel, like his father who he testified treated him poorly, and stand up for himself for the first time ever. His evidence was exaggerated and imprecise.

[54] I do not accept that his daughter reached for the door, instead, I find she was trying to manage the reckless driving situation by bringing her father's attention to it and texting her mother. I also accept that the notion of leaving the truck was raised by the daughter in the context of wanting her aunt or mother to drive her, not to jump from a moving vehicle. I find Mr. Shaw did not observe his daughter reaching for the door handle, instead his judgement was affected by all the foregoing, and he simply grabbed his daughter, she pulled away, he grabbed her neck and pushed her head down in anger.

Defence Position:

[55] Defence counsel argues the common law defence of necessity is applicable to the facts of the case involving the assault on Mr. Shaw's daughter. She sets out the test explained in Ewanchuk *Criminal Pleadings and Practice in Canada*, 3rd edition:

“The defence of necessity may be available in an urgent situation of clear and imminent peril when compliance with the law is demonstrably impossible. The defence is not available (a) where the evil averted was a lesser evil than the offence committed to avert, or (b) where the evil could have been averted by

anything short of the commission of that offence, or (c) where more harm was done than was necessary for averting the evil.”

[56] A case argued to be on point is *R. v. Morris*, CanLII 1216 (AB QB) where the Court was sitting as a summary conviction appeal court. The decision has largely been referred to with respect to the necessities of life, but was reference in *Perka v. The Queen*, 1984 CanLII 23 (SCC) which upheld the continued existence of the common law defence and provided some clarity as to parameters. It is invoked as justification. The defendant must show that he operated under a conflicting legal duty that rendered his wrongful act right. It is premised on a duty recognized in law. Must not be internal to the accused, but stem from a perceived maximization of social utility resulting therefrom.

[57] In *Morris*, a husband held an intoxicated wife in a car to avoid her jumping from it to walk in a dark and lonely location to confront police. The Court said, “perhaps, paraphrasing some of the judgements in *Morgentaler*, it is not the absolute certainty of the projected harm that is required but the accused’s belief, *based on reasonable and probable grounds*, that the harm will occur”. The court went on to say that, “*where an accused believes upon reasonable and probable grounds* that serious harm will befall himself or some other person, he is justified in committing a criminal offence to avert that harm if there is such an emergency

that no other course of conduct is reasonably possible in order to prevent that harm; but this defence does not apply where the offence committed gives rise to more serious harm than that sought to be prevented.”

[58] Mr. Morris was said to have been suddenly confronted by an emergency situation created by the complainant and was placed in a position to choose the lesser of evils, he could allow his wife to get out of the truck and walk in a dark road and in an intoxicated condition showing wanton and reckless disregard for her life and safety which would have constituted criminal negligence on his part, but instead his actions fell within the necessity defence when he held her in the car and brought her home.

[59] The Morris facts are said to be comparable to the facts that face Mr. Shaw. Alternatively, the defence suggests the section 43 defence also applies. I will return to deal with that shortly.

[60] In order to accept that the defence of necessity applies to the circumstances at hand, I would have to make a finding of fact that Mr. Shaw believed his daughter was about to jump from a moving truck. In Latimer, the court explained that a modified objective test is used to assess and that involves “an objective

evaluation, but one takes into account the situation and characteristics of the particular accused person”. (R. v. Latimer, 2001 SCC 1 at para. 32)

[61] I have already reached the conclusion that Mr. Shaw’s evidence on these points was neither reliable nor credible. I simply do not accept that Mr. Shaw reached such a conclusion. If he did so, it was not as a result of a reasonable perception of the circumstances, rather, Mr. Shaw put into play a dangerous situation of his own creation. His daughter did not reach for the truck door to leave, rather she asked him to stop the truck and provide another opportunity for her to be driven home. Mr. Shaw was at the time impacted by his anger, mental health conditions, and his ineffective medication, as a result his perception of events was flawed. He was not acting under a duty of care to his daughter when he engaged in actions that placed her at risk.

[62] Finally, s. 43 of the Criminal Code justifies a parent’s use of force by way of correction toward a child who is under his care if the force does not exceed what is reasonable under the circumstances. As I have previously found, it was not reasonable for Mr. Shaw to take the action he did which constituted an assault committed upon his daughter. He did not do so for the purpose of correction. Instead, the assault committed upon her was sudden, inexplicable, and arose in the context of anger.

[63] As such the defence of necessity and the applicability of section 43 of the *Criminal Code* have not been established on these facts. Mr. Shaw grabbed his daughter's arm and pushed her neck downward toward the gear shifter. His daughter was not about to jump from the truck, and he did not believe she would do so. The Crown has proven beyond a reasonable doubt that he grabbed her without consent and the Crown will have a conviction with respect to Mr. Shaw's daughter.

[64] In reaching these conclusions, I have rejected Mr. Shaw's evidence as unreliable and not credible; I do not accept any evidence inconsistent with his guilt. Only after assessing all of the evidence given credit have I determined that I am satisfied of his guilt beyond a reasonable doubt.

[65] Judgment accordingly

van der Hoek J.