PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Irving*, 2013 NSPC 104

Date: 2013-11-07
Docket: 2618184
Registry: Pictou

Between:

Her Majesty the Queen

v.

Leslie Irving

Judge: The Honourable Judge Del W. Atwood

Heard: November 7, 2013, in Pictou, Nova Scotia

Charge: Assault, para. 266(b) of the *Criminal Code*.

Counsel: Andrew O'Blenis, for the Nova Scotia Public Prosecution Service
Stephen Robertson, Nova Scotia Legal Aid, for Leslie Irving

By the Court:

[1] Thank you very much. The Court has for decision the case of Leslie Irving. Ms. Irving is charged in a single count summary information with a charge under section 266 of the *Criminal Code*.

[2] The Court heard the evidence of the complainant, Mr. MacDonald, as well as the evidence of Ms. Irving. I apply the principles set out in *R v. W.D.* If I believe the evidence of Ms. Irving than I ought to find her not guilty. Even if I were not to believe the evidence of Ms. Irving but that evidence leave me in a state of reasonable doubt, I should find her not guilty; if I do not know whom to believe, then I am in a state of reasonable doubt and would be required to find Ms. Irving not guilty. Even if I do not believe the evidence of Ms. Irving and even if the evidence should not leave me in a state of reasonable doubt, I must ask myself nevertheless whether, based on the evidence that I do accept, I find the prosecution to have proven each and every element of the offence beyond a reasonable doubt; if I am not so satisfied then I must find Ms. Irving not guilty.

[3] It is not a matter or preferring the evidence of one over the evidence of the

other. The standard of proof is proof beyond a reasonable doubt. The burden of proof is borne throughout by the prosecution, proof beyond a reasonable doubt.

[4] Assault is defined in para. 265(1)(a) of the *Code* as follows: “A person commits an assault when, without the consent of another person, he applies force intentionally to that other person directly or indirectly.”

[5] In this particular case, I would observe that there is a significant lack of evidence on one particular point and that is evidence of the injuries described by Mr. MacDonald. As I pointed out in the recent decision of *R. v. Jacklyn-Smith*, 2013, NSPC 71, a proper investigation involves more than doing check-list items and taking statements and then filling out forms.

[6] In this particular case, certainly applying the principles set out by the Supreme Court of Canada in *R. v. Nikolovski*, [1996] S.C.J. No. 122 at para. 28, a video recording or photo imagery of Mr. MacDonald’s injuries that he described here in Court would have been strongly corroborative of Mr. MacDonald’s testimony. However, no photography has been presented to me as it didn’t get done.

[7] There is no evidence before the Court that would suggest the taking of photography would have been difficult or impossible; as my colleague Judge Whalen in Sydney, Cape Breton, observed recently: “It is a disturbing tendency that the principle of zero tolerance in relation to domestic abuse has morphed into a policy of zero investigation.”

[8] Photographic evidence should have been collected in this case but was not or, at least if it was, it wasn’t presented to the Court.

[9] With respect to the testimony of Dale MacDonald, I found that testimony highly questionable. First of all, I question the veracity of Mr. MacDonald’s evidence that the 911 operator told him to remain at the site where he was in danger. That is completely counter-intuitive. The purpose of the 911 system is to detect life-threatening situations, to help remove persons in danger from those life threatening situations and to provide immediate policing or emergency medical intervention. It boggles the mind that Mr. MacDonald would have been told by a 911 operator ,“stay right where you are being pummelled”. I find that highly incredible.

[10] I also found disturbing the manner in which Mr. MacDonald presented his evidence. He did, indeed, go into great histrionics, in my view, ridiculing the flaccidity of Ms. Irving's arm. I find that highly distasteful and, in my view, emblematic of an individual who is trying to get one over on an ex-partner when he has a bully pulpit to do so in the courtroom.

[11] I also found highly incredible Mr. MacDonald's account of how it was that Ms. Irving's parents arrived at the scene. He describes essentially Ms. Irving swarming him in his vehicle and then, all of the sudden, Ms. Irving's parents appear out of no where.

[12] What happened here was exactly, in my view, as Ms. Irving described. After Mr. MacDonald played out his power trip by withhold his signature from the passport application, Ms. Irving did what was completely appropriate to do so, she tried to retrieve the form from Mr. MacDonald. She was the one who had collected the form from the post office. Took the form from Mr. MacDonald and then went back inside her home. She looked out her window. She saw Mr. MacDonald on his cell phone, and she knows exactly what is about to unfold. She

calls her parents for the very good reason that, indeed, the police had been called by Mr. MacDonald.

[13] I found Ms. Irving's evidence to be highly credible, highly trustworthy. I accept what Ms. Irving said. I don't believe an assault occurred at all. Even if there were a burden of proof, if a motion had been brought for a directed verdict based on the evidence of Mr. MacDonald, I certainly would have considered it because in my view not only would a reasonable jury, properly instructed, not convict on this evidence, an unreasonable jury would not have done so either.

[14] Ms. Irving, your obligation to the Court is concluded. You're free to go ma'am and the undertaking that you signed last, well it says "the 7th of Stellarton, 2013", so I would assume it was sometime around the date the charge was laid, around the 7th of July. That undertaking #1560240 comes to an end and you're free to go ma'am.

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J.P.C.