IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.H.L., 2007 NSSC 382

Date: 20071221
Docket: S.H. No. 282793(A)
Registry: Halifax

Between:

R.H.L.
(A Young Person Within the Meaning of the *Youth Criminal Justice Act)*
Appellant

v.

Her Majesty the Queen
Respondent

Restriction on publication: Restriction on publication pursuant to s. 110(1) of the *Youth Criminal Justice Act*.

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: December 11 & 21, 2007, in Halifax, Nova Scotia

Written Decision: January 16, 2008

Counsel: Mr. Chandra Gosine for the appellant
Mr. John Nisbett for the respondent

Publishers of this case please take note that section 110(1) of the *Youth Criminal Justice Act* applies and may require editing of this judgment or its heading before publication. The subsection provides:

110.(1) Identity of offender not to be published - Subject to this section, no person shall publish the name of a young person, or any other information related to the young person, if it would identify the young person as a young person dealt with under the *Act*.

By the Court: [Orally]

[1] R.H.L. was convicted of assaulting a peace officer and sentenced.

[2] R.H.L. was arrested on June 7, 2006. In an interview room at the police station he was instructed to take a seat in a particular location in the room. Rather than going directly to that seat, R.H.L planted his feet and put his shoulder in Constable Rudderham's chest. R.H.L. was combative and unruly. The reason he had been arrested and placed in the police vehicle initially was that he was creating a disturbance and was being very belligerent, cursing, yelling and swearing.

[3] Constable Moran and Constable Rudderham arrived in the police wagon and R.H.L. was placed in the wagon. Constable Rudderham, who was driving the police van, described R.H.L.'s conduct while in the van as kicking, yelling, and thrashing about. As he was placed in the back of the police wagon, he was told that he was being arrested for creating a disturbance and breach of peace. At that point he continued to hurl obscenities at Constable Rudderham.

[4] At the police station he was taken to a booking area and from there to the interview room. The room itself is 7 feet by 9 feet, has one door, one light, and a bench 20 inches wide and 30 inches long. It has two benches, one against the wall and another one that is bolted to the floor on the other side of a table. Constable Rudderham described the room as follows: "When you enter, there would be a bench on the left against the wall." R.H.L. was advised of his right to counsel. He was informed that the handcuffs would be removed and he would be searched. At that point, R.H.L. mouthed obscenities to Constable Rudderham. He was directed again to have a seat so that his handcuffs would be removed, allowing him to call legal counsel.

[5] The seat in question would have been to Constable Rudderham's left and to R.H.L.'s right. Constable Rudderham was standing in the doorway and Constable Moran was behind him to his right when R.H.L. decided that he would go through Constable Rudderham, for whatever reason. "He put his shoulder down and came into me," said Constable Rudderham, and if he had gone through him, Constable Rudderham said that he would have "gone out the door." However, given the fact that Rudderham was larger than R.H.L., R.H.L. basically bounced off of him. He was again directed to have a seat against the wall on the bench and he was put on

the seat. Due to his demeanour, legal counsel was not contacted for him at that time.

[6] R.H.L was then advised that he was under arrest for assaulting a police officer and again given his right to counsel. He was then taken back to the booking area and handcuffs were then removed.

[7] Constable Rudderham agreed that during the alleged incident R.H.L. was still in handcuffs, but denied that R.H.L. had any difficulty manoeuvring himself. Constable Rudderham denied that he and R.H.L. were jostling each other for a seat on the bench. He maintains that he was at the door to the room and that R.H.L. was directed to the room, and that if he had done as instructed his handcuffs would have been removed. He agreed that there were two benches, one on either side of the table.

[8] Constable Moran corroborated essentially all of the evidence of Constable Rudderham in that when his handcuffs were still on, R.H.L. failed to follow instructions, and that R.H.L. leaned forward with his right shoulder and pushed into Constable Rudderham on his way over to the other side of the room. She said that R.H.L. used enough force that if it had been her at the door she would have been at least pushed backwards. She described Constable Rudderham as being quite large and therefore difficult to move away from the doorway.

[9] R.H.L. testified that he was not being rude and claimed that when he was told to sit down, Constable Rudderham was standing where he walked, and that he brushed shoulders with him. He claimed that Constable Rudderham started flipping out as if he had whacked his shoulder or something like that.

- He claims he was shocked when he was told that he was being charged for assault.

- He claims that he sat on the right bench.

- He claims that he wasn’t on that bench at first because he wanted to go to the left, because all of “them guys” (presumably the police) were on that side of the room.

- He claims that when he got up he brushed shoulders with Constable Rudderham.

[10] In cross-examination, R.H.L. stated that there were two benches and a table in the interview room. He acknowledged that he was told by Constable Rudderham to take a seat at one of the benches. At that point he was moving to go to the other side of the table and as he did he brushed by Constable Rudderham. He denied that Constable Rudderham told him to have a seat. It was himself, he claims, who decided to change from one side of the table to the other. He denied bouncing off his chest and simply said he brushed shoulders with him. He denied dropping his shoulder down but agreed he was handcuffed, and denied planting his feet and trying to hit him with his shoulder in the middle of his chest. He claims that he brushed shoulders only, because he wanted to go to the other seat. He denied that he was trying to get out the door. He claims that there was just a little bit of contact with Constable Rudderham.

[11] In her decision, Judge Williams stated R.H.L was not pleased at all that he was arrested on June 7, 2006 and that he was combative and argumentative and surly. Her description of the evidence of Constable Rudderham and Constable Moran was that there was a touching of the officer by R.H.L., in fact, that he planted his right shoulder into Constable Rudderham's chest area. He described it as brushing up against while the officer described it as leaning into and contact being made. She stated there was no issue that there was contact. The issue is the degree of contact.

[12] Judge Williams found as follows:

> I find as a matter that at the time you were not in the best of spirits and you were quite upset. Your counsel said that there was evidence to suggest it could have been an accident, although I did not hear those words come out of your mouth.
>
> You admit to making contact. You admit to it being a brushing. The officer described it as something with a little more force than that. But the long and the short of it is that everybody agrees that there was contact.
>
> On the basis of the evidence I did hear, I am not persuaded that it was accidental. If it had been accidental I would have thought you would have told me if you thought it had been an accident.

> I find that there was an assault; that there was an intentional application of force. It was not the push of the century. It did not knock Constable Rudderham on his backside but it was intentional and it should not have happened. So as a result I find you guilty of assaulting the officer.

[13] The appeal is based on the following grounds:

1. It was an accident.

2. The principle of *de minimis non curat lex*.

3. The trial judge failed to apply *R.* v. *W.(D.)*, [1991] 1 S.C.R.742.

[14] Admittedly, the trial judge did not do an analysis on the defence of accident and did not apply in that sense the details of *R.* v. *W.(D.)* in a complete form. However, it is evident that after hearing the evidence the trial judge determined that she was not persuaded that it was an accident. She also added that if it had been accidental she would have thought that R.H.L. would have told her that he thought it was an accident. The issue of accident had only been raised by counsel in closing argument.

[15] Based on the evidence before her it is evident that the claim of an accident did not appear to have an air of reality and therefore the Court did not have to consider it. Although she didn't place the burden on the crown to prove it was not an accident, it is, in my opinion, clear from the record that there was little or no evidence upon which it could be argued that the conduct of R.H.L. in the manner in which he struck Constable Rudderham could be seen as accidental.

[16] The trial judge's findings were that it was an intentional application of force. Although it may not have been, as she said, "push of the century", the application of force was sufficient to constitute the offence.

[17] I also find that the principle of *de minimis non curat lex* is of no application here because the evidence does not support such a finding. Furthermore, I have difficulty in applying that principle today because in the case of *R.* v. *Robart*, [1997] N.S.J. No. 149 the *de minimis* argument was only raised on appeal. In

Robart the appellant had been convicted of assault at trial. During a struggle over a car key the appellant pushed and shoved the complainant and wedged himself between her and the steering wheel. The co-accused Johnson pulled her from the car and fought with her leaving her with cuts and bruises. At the appeal, the appellant submitted, among other arguments, that his touching of the complainant was trifling and that *de minimis* applied.

[18] Justice Roscoe questioned the practice of raising new defences on appeal and applied the principles set out in *R.* v. *Marshall* (1997), 159 N.S.R. (2d) 186 at para. 88 and also *R.* v. *Vidulich* (1989), 37 B.C.L.R. (2d) 391.

[19] In the latter decision the court stated:

> An accused must put forward his defences at trial. If he decides at that time, as a matter of tactics or for some other reason, not to put forward a defence that is available, he must abide by that decision. He cannot expect that if he loses on the defence that he has put forward, he can then raise another defence on appeal and seek a new trial to lead the evidence on that defence.

In *Robart*, supra, Roscoe, J.A. stated at paragraph 10:

> One of the difficulties presented with this argument is that it was not raised at the trial. We therefore do not have the benefit of the trial judge's assessment of the evidence of the nature and extent of the force exerted by the appellant on the complainant. At trial the issues were whether the injuries suffered by the complainant were caused by Johnson or the appellant and whether the struggle was consensual. In this Court, the appellant emphasizes the evidence that the appellant wedged himself into the seat and that the two struggled for the key but disregards the evidence of shoving and pushing. The trial judge was not convinced that the appellant caused bodily harm to the complainant, and apparently did not consider whether the appellant was a party to the assault causing bodily harm. It was conceded at the hearing of the appeal that the evidence would support a finding that the actions of the appellant obstructed the complainant with the result that Johnson was able to commit the more serious assault. The totality of the surrounding circumstances of this case clearly distinguish it from those exceptional cases of innocuous behaviour where the de minimis maxim was found to be applicable.

[20] In fairness, I have considered the *de minimis* principle on an appeal from summary conviction in *R.* v. *Downey,* [2002] N.S.J. 442, even though it had not

been considered at trial, and found it was inapplicable in the context of domestic dispute.

[21] Having carefully reviewed the record and the decision of the trial judge, it is my view that the principle has no application in this case.

[22] As to the failure of the trial judge to fully enunciate the *R.* v. *W.(D.)* test, I consider the direction of our Court of Appeal in *R. v. D.S.C.*, 2004 NSCA 135, paras. 19 and 20:

> The principle in the Supreme Court of Canada's decision in R. v. W.(D.), [1991] 1 S.C.R. 742 is straight-forward: the ultimate issue in any criminal case is not who the jury (or judge) believes but whether, in light of all of the evidence, a reasonable doubt about guilt persists. As Binnie, J. put it R. v. Sheppard, [2002] 1 S.C.R. 869 at para. 65, the ultimate issue is not whether the judge believed the complainant or the appellant or part or all of what they each had to say. The issue at the end of the trial is not credibility but reasonable doubt.
>
> It must be remembered that W.(D.) was not concerned with reasons for judgment, but instructions to a jury on reasonable doubt. This is important because a trial judge's reasons cannot and should not be read or analyzed as if they were instructions to a jury: see R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 204. Instructions are to assist the jury in reaching a verdict; reasons for judgment explain why a verdict was reached: ibid. The test for legal error in a judge alone case like this one is not the same as would apply to a judge's charge to a jury. The difference is that the jury must receive proper instructions on the law, including this principle, whereas a trial judge in giving a decision is assumed to know the relevant legal principles absent some basis in the reasons or the trial record for thinking that an error has been made.

[23] Also I make reference to the comments of Justice Cromwell at para. 21 of that decision, to the effect that, looking at the entire evidence and looking at the judge’s decision, the question was whether the trial judge failed to apply the proper test and did not apply in her or his mind the possibility that despite having rejected the evidence of the respondent there might be nevertheless reasonable doubt.

[24] It is evident that the trial judge found on the basis of the entire evidence that there had been an intentional application of force. Furthermore, she discounted the evidence of R.H.L., saying that she was not persuaded by that evidence that it was an accident. R.H.L, by the way, acknowledged that there was contact between

himself and Constable Rudderham. So the only issue was whether it was intentional or not. That was the argument which Judge Williams decided. She found that she was not persuaded by the evidence before her. In my view, she did not accept the evidence of R.H.L. that it was not an unintentional act.

[25] I can find no reversible error, deny the appeal, and affirm the conviction and sentence.

J.