



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Dove*, 2022 NLCA 6

Date: February 7, 2022

Docket Number: 202101H0040

BETWEEN:

NOELLE ELIZABETH DOVE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L., Goodridge and Knickle JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
Harbour Grace

Appeal Heard: January 20, 2022

Judgment Rendered: February 7, 2022

Reasons for Judgment by: Knickle J.A.

Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant: Jeffrey Slade

Counsel for the Respondent: Sheldon Steeves

Authorities Cited:

CASES CITED:

R. v. Morrissey, [1995] O.J. No. 639, 22 O.R. (3d) 514 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. MacIsaac*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199; *R. v. Vokurka*, 2013 NLCA 51, 339 Nfld. & P.E.I.R. 248, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

STATUTES CONSIDERED:

Criminal Code, RSC 1985, c. C-46, sections 264.1(1)(a), 267(a), 348(1)(b).

KNICKLE J.A.:

INTRODUCTION:

[1] The appellant appeals convictions of three criminal offences. After a trial by a judge of the Provincial Court, she was convicted of committing a break and enter (section 348(1)(b)), assault with a weapon (section 267(a)), and uttering threats to cause death or bodily harm (section 264.1(1)(a)), all under the *Criminal Code*. In convicting the appellant, the trial judge was satisfied beyond a reasonable doubt that the following occurred.

[2] The appellant, uninvited, forcefully entered her boyfriend's home by kicking in one of two entrance doors. The roommate of the boyfriend was at home during the incident and witnessed much of what transpired between the boyfriend and the appellant. While in the home, the appellant locked herself in her boyfriend's bedroom and then helped herself to several packages of his cigarettes. The boyfriend and the roommate managed to open the bedroom door and the boyfriend confronted the appellant that she had stolen his cigarettes. He told her she was not leaving with his property.

[3] In the course of the incident, the appellant had a physical altercation with the boyfriend. She threatened to kill him and stabbed him twice with a knife which she took from a kitchen drawer inside the home. The police were called by the roommate during the incident. They attended at the scene and observed two stab wounds to the boyfriend's torso area, as well as damage to the doorframe of the home. They also observed the appellant to be distraught and

crying outside the home. The boyfriend received treatment for his injuries and spent one night in hospital.

[4] At trial, the appellant testified that when she stabbed the boyfriend, she was both acting in self defence and that the stabbing was an accident. The trial judge did not accept her evidence and convicted her of all three offences.

[5] The appellant now asks this Court to set aside the convictions on the basis that the trial judge misapprehended the evidence. These purported errors, argues the appellant, resulted in verdicts that are unreasonable and cannot be supported by the evidence.

DISCUSSION

[6] There is no dispute that there was conflicting evidence as between the appellant, her boyfriend, and his roommate, which the trial judge was obliged to address.

[7] For example, while there was agreement that the appellant entered the home of the boyfriend, there was a marked difference between the appellant and the boyfriend and his roommate as to how she came to be there. The boyfriend and his roommate were explicit that the appellant not only had no permission or invitation to enter the house, prior to entering the home, she was told repeatedly to leave. The appellant testified that she did have permission to enter the house, despite, as the trial judge observed, that the boyfriend and his roommate refused her entry, and she admitted kicking the locked door in her effort to enter the home.

[8] While there was no dispute that the doorframe to the home was damaged, the appellant testified that the damage was there previously to her having kicked the door or entering the home. In contrast, the boyfriend and his roommate testified that the damage was caused by the appellant kicking the door.

[9] Also, while the appellant denied making any verbal threats, both the boyfriend and the roommate testified that the appellant threatened the boyfriend that she would “slice” or “slit” his throat. The boyfriend testified further that the appellant slapped him and knocked his glasses off his face. The appellant denied having slapped him. The roommate did not see a slap, but did hear the boyfriend’s glasses as they landed on the floor.

[10] There was no issue that the appellant stabbed the boyfriend twice with a knife. The conflict was as to how she came to do this and why. The boyfriend

admitted he grabbed at the appellant's arm in an effort to prevent her from leaving with the cigarettes, but the appellant testified further that the boyfriend had pinned her to the wall. She testified that he had held his arm over her neck, and she started swinging her arms with the knife in her hand, to escape him.

[11] In contrast, the boyfriend and his roommate testified that prior to the stabbing, the appellant had ample opportunity to leave the premises, but chose not to leave. Instead, after leaving the bedroom, she went to the kitchen. She found the knife, passed by an available exit from the premises, and then further engaged with the boyfriend. It was then that the stabbing occurred.

There was no misapprehension of evidence

[12] As stated in *R. v. Morrissey*, [1995] O.J. No. 639, 22 O.R. (3d) 514, at 538 (Ont. C.A.), a misapprehension of evidence “may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence.” This characterization of a misapprehension of evidence was applied by the Supreme Court of Canada in *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732. (See also *R. v. MacIsaac*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199, at paras. 16-18, and *R. v. Vokurka*, 2013 NLCA 51, 339 Nfld. & P.E.I.R. 248, at para. 20, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498). In *Lohrer*, the Court described the requirements to establish a misapprehension of evidence as a “stringent” standard. The Court stated:

[2] *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but “in the reasoning process resulting in a conviction”.

[13] Initially several arguments were raised by the appellant as to how the trial judge misapprehended the evidence. Only one was seriously pressed at the hearing: that the trial judge failed to properly assess the appellant's testimony that the boyfriend assaulted her and prevented her from leaving the residence. The appellant argued that this evidence was relevant to whether she acted in self defence. The appellant argued that the trial judge erred in that he failed to find the appellant a credible witness or that her explanation for entering the home, and the stabbing was plausible.

[14] However, the appellant could point to nothing in the trial judge's decision or in the trial transcript that supports this assertion. She could not identify any misapprehension, omission, or failure on the part of the trial judge in respect of not only the appellant's evidence but any aspect of the evidence.

[15] The trial judge reviewed all of the evidence, including the testimony of the appellant. In so doing, he properly applied the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The trial judge did not find the appellant a credible witness and did not believe her evidence. Nor, in his view, did her evidence raise a reasonable doubt. Of the evidence the trial judge did accept, he was satisfied all offences were established beyond a reasonable doubt.

[16] That he did not find the appellant a credible witness, and did not accept her testimony, does not mean that the trial judge misapprehended the evidence. He thoroughly explained his reasoning for finding that the appellant was not a credible witness and rejecting her testimony. The trial judge stated that her evidence was not only not credible, it "didn't make sense" in light of all the circumstances. He also explained that he found the boyfriend a "forthright" witness who did not "candy coat" his testimony. The trial judge found that the boyfriend's testimony was not only corroborated by the physical evidence, but by the roommate whom the trial judge found to be an "independent" and reliable witness.

[17] Having thoroughly explained his reasoning and the appellant having shown no misapprehension of the evidence, or any error in this reasoning, the appellant does little more than ask this Court to cast aside the facts as found by the trial judge and re-weigh the evidence. This is not the role of an appeal court. As stated in *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6:

[9] ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm...

(Citations in quote omitted)

[18] The assessment of the credibility of a witness is a question of fact and is the purview of the trial judge. The trial judge is in the "unique" position to see and hear the witnesses (*R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at paragraphs 10 and 12; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at paragraph 10). As stated in *Schwartz v. Canada*, [1996] 1 S.C.R. 254:

[32] It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. ...

[19] In the absence of a palpable or overriding error (of which none has been shown), the assessment of credibility of the witnesses, including the appellant, and findings of fact are entitled to deference by an appellate court.

[20] I would dismiss this ground of appeal.

The verdicts are reasonable and supported by the evidence

[21] The verdicts are also reasonable and supported by the evidence accepted by the trial judge. An unreasonable verdict was explained in *R.P.*:

[9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebe*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[22] As discussed above, the appellant has not identified any misapprehension of the evidence by the trial judge. Nor has it been demonstrated that he drew any improper inference, or made a finding of fact that is either plainly contradicted by the evidence, or incompatible with the evidence. To the contrary, his findings of fact are squarely based in the evidence he accepted and support each of the elements of the three offences for which the appellant was found guilty.

[23] I would dismiss this ground of appeal.

CONCLUSION

[24] The appellant has shown no error on the part of the trial judge in his assessment of the evidence or that the verdicts are unreasonable and unsupported by the evidence. The trial judge's decision shows that he not only appreciated the evidence, he thoroughly explained his reasons for his factual findings and relied on the proper legal principles in so doing.

[25] There being no basis to support that there was a misapprehension of the evidence or that the verdicts are unreasonable, I would dismiss the appeal.

F.J. Knickle J.A.

I Concur:_____

D.E. Fry C.J.N.L.

I Concur:_____

W.H. Goodridge J.A.