COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bacchus, 2024 ONCA 43
DATE: 20240123
DOCKET: COA-23-CR-0357

Doherty, MacPherson and Gillese JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Kevin Bacchus

Appellant

Chris Rudnicki, for the appellant

Linda Shin, for the respondent

Heard: January 12, 2024

On appeal from the convictions entered on September 29, 2022 by Justice Russell M. Raikes of the Superior Court of Justice, with reasons at 2022 ONSC 5432.

REASONS FOR DECISION

[1] Following a five-day trial in Sarnia in June 2019, Raikes J. of the Superior Court of Justice convicted the appellant, Kevin Bacchus, of two criminal offences – aggravated assault and assault with a weapon contrary to sections 268 and 267 (a) of the *Criminal Code*. The trial judge imposed a conditional sentence of 22 months on the appellant, a period of probation for two years following the

conditional sentence, as well as certain other ancillary orders. The appellant appeals the convictions.

[2] The appellant and the complainant, James Hastings, have known each other since childhood. They were on friendly terms until a 2017 Christmas party hosted in the home occupied by the complainant, his then-wife, Jackie Hastings, and their children. During that party, the complainant believed he found Ms. Hastings, who was employed in the appellant's dental practice, engaged in sexual activity with the appellant. There was a physical altercation between the two men and the appellant was badly injured by blows from a baseball bat.

[3] Both the complainant's marriage and his relationship with the appellant were ruptured by this event.

[4] In June of the following year, 2018, the complainant accosted the appellant while he was walking with his wife and children en route to vote in that year's provincial election. During this confrontation, the trial judge found the complainant "swore at [the appellant]. He threatened him and told him to watch his back. He was angry and red faced. His…verbal threats were meant to scare and intimidate [the appellant]. He was still angry about what he saw at the Christmas party eight months earlier." This incident was the last direct contact between the complainant and the appellant before the October 5, 2019 incident which gave rise to the case at bar.

[5] On October 5, 2019, nearly two years after the 2017 Christmas party and 15-16 months after the election day incident, the complainant attended a college football game in Michigan. He drank a substantial amount of beer. Upon his return, he testified that he received a call from his now former wife about an online posting on a website that "outed" spouses who cheated. She believed the post was made by someone in the complainant's family and wanted it taken down.

[6] The complainant was upset and offended by this reminder of his ex-wife's infidelity. He had heard that posts could be removed from the website for a fee. He decided that the appellant should pay the fee. He decided that this was a conversation that had to happen in person. Shortly before 4 p.m., the complainant drove his truck to the appellant's home uninvited and unannounced.

[7] The evidence about what happened after the complainant arrived at the appellant's home diverged significantly. Both men testified that the other man started the serious and violent physical altercation that ensued. During the altercation, the appellant used bear spray against the complainant and he stabbed him many times with a knife. The appellant claims he was not aiming anywhere in particular, testifying that he was swinging the knife "anywhere that I thought it would stop him from attacking me…wherever I hit, I hit."

[8] The appellant acknowledges that the complainant was seriously injured. In his factum he says:

> [The complainant] was very badly injured. He had a stab wound near his left ear, a stab wound in his scalp, in which a tip of [the appellant's] knife was imbedded, 3 lacerations to his left forearm, 2 stab wounds to his left shoulder, and lacerations to his left temple and right index finger. He was covered in blood and bleeding badly. Driven by instinct, he went to the neighbours – the Spanos, a family of doctors – for help. After knocking on their door, he collapsed. They immediately began treatment and called 9-1-1.

[9] The trial judge found the appellant guilty of the two offences with which he was charged. He found:

> [The complainant's] evidence about [what] happened is consistent with the physical evidence. The door and door frame were undamaged. The hallway from the side door to the kitchen and the kitchen itself were undisturbed, consistent with no entry by him and no struggle in the house. The blood was found outside the home and bear spray residue was observed outside on the van. No residue was observed in the kitchen.
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> …
>
> [The complainant] did not threaten to kill or harm [the appellant] or his family when he stood on the steps by the side-door.
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> …
>
> [The appellant] went quickly to the kitchen where he grabbed a knife and bear spray. [The appellant] went back to the side-door. [The appellant] opened the door and without warning sprayed [the complainant] with the bear spray. He came outside still holding the spray can and knife. [The complainant] was initially blinded by the spray. [The complainant] was incapacitated. There was nothing to prevent [the appellant] from going back inside, locking the door, and calling police. Instead, [the

> appellant] came outside armed with the bear spray and a knife.
>
> …
>
> I am satisfied that [the appellant] was the aggressor in this altercation….

[10] The appellant advances three grounds of appeal against his convictions. First, the appellant contends that the guilty verdict was unreasonable because the trial judge's finding that the appellant "could not and did not" believe he was under threat is incompatible with some of his other findings of fact, including the complainant's larger size, his previous attacks on the appellant at the Christmas party event, his rejection of the complainant's testimony that he "simply came by for a friendly chat" and the complainant's own testimony that he was unannounced and uninvited at the appellant's home.

[11] We do not accept this argument.

[12] There are two avenues on which an appellate court can find a verdict is unreasonable: (1) if the verdict is not one that a properly instructed jury acting judicially could reasonably have rendered; and (2) in a judge alone trial, if the verdict is reached "illogically or irrationally" even if the evidence may be reasonably capable of supporting the verdict (the *Beaudry/Sinclair* error: *R. v. C.P.*, 2021 SCC 19, paras. 28-30).

[13] Unreasonable verdicts under *Beaudry/Sinclair* are exceedingly rare. The *Beaudry/Sinclair* error is not an invitation for appellant courts to substitute their

credibility assessments and preferred findings for those of the trial judge: *R. v. C.P.*, 2021 SCC 19 at para. 30.

[14] In our view, the trial judge came nowhere near making a *Beaudry/Sinclair* error in this case. As in many criminal trials, his credibility assessments and findings were a combination of both positive and negative facts relating to witnesses' testimony standing alone and in comparison to other witnesses. This is normal in the course of a criminal trial. None of what the trial judge said in his judgment comes anywhere close to the label 'unreasonable'.

[15] The appellant's second ground of appeal is that the trial judge misapprehended the evidence in two important respects and that these misapprehensions call into serious question the validity of the trial judge's decision.

[16] First, the appellant submits that the trial judge erred by saying that the appellant testified that "[the complainant] broke the lock on the side door and it popped open".

[17] The respondent concedes that the trial judge made this error but submits that it was not material as it went to a detail and not the substance of the evidence and it was not essential to the trial judge's credibility assessment. We agree. The broken lock was a trivial, not a central or important, element in the trial judge's credibility assessment.

[18] Second, the appellant contends that the trial judge erred by concluding, contrary to the testimony of the appellant, on the issue of his use of bear spray, "[t]here is no residue evident in the kitchen" but "bear spray residue was observed outside on the van." This supported, wrongly says the appellant, the trial judge's conclusion that the appellant initiated the physical part of the altercation outside the house, rather than the complainant initiating it inside the house.

[19] We do not accept this submission. The trial judge was entitled to infer that the orange residue found on the van was bear spray and that this contradicted the appellant's claim that he only sprayed the complainant in the kitchen. Moreover, the trial judge was also entitled to find that the odour of bear spray in the kitchen after the altercation was caused by the leaking bear spray canister found in the kitchen garbage and on the appellant's clothing.

[20] Third, the appellant contends that the trial judge erred in his approach to the winter audio recording of a conversation in a car between the complainant and his ex-wife in 2018 in which the complainant said, in several different and vulgar ways, that he was going to pay back the appellant for ruining his marriage.

[21] Before trial, the appellant brought a *Scopelliti* application listing ten proposed areas of evidence: see *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.). This list included the evidence from the 2018 audio recording.

[22] Obviously, the appellant does not challenge the trial judge's ruling to admit the recording into evidence as it ultimately established that the complainant could be an angry and potentially violent man.

[23] Rather, the appellant challenges the trial judge's use of this evidence which the trial judge described in this fashion:

> I pause to observe that neither [the appellant] nor [his wife] testified to having heard the audiotape made by Jackie Hastings. Neither witness testified that Jackie Hastings told them of [the complainant's] statements in the car. Thus, the audiotape is relevant to my assessment of [the complainant's] credibility and reliability but not to the defendant's knowledge or state of mind on October 5, 2019.

[24] The appellant does not quarrel with the trial judge's conclusion that the audio tape was relevant to the assessment of the complainant's credibility and reliability. However, he contends that this evidence was also admissible and relevant on the issue of who was the aggressor in the October 19 encounter and, therefore, should have been addressed by the trial judge.

[25] We are not persuaded by this submission. A trial judge need not address every aspect of each issue or refer to every piece of relevant evidence. It is clear from a review of the trial judge's extensive reasons that he understood the history of bad blood between the appellant and the complainant and the deteriorating nature of their relationship over the course of two years. Possessed with this

understanding, he was entitled to conclude that in relation to the October 5, 2019 incident "I find that [the appellant] was the aggressor this time."

[26] The appeal is dismissed.

[27] The notice of appeal sought leave to appeal sentence, but in his written argument the appellant advised he abandoned his sentence appeal. Accordingly, the sentence appeal is dismissed as abandoned.

"Doherty J.A."
"J.C. MacPherson J.A."
"E.E. Gillese J.A."