CITATION: R. v. B[redacted], 2018 ONSC 4940
COURT FILE NO.: SCA(P) 905/2015
DATE: 20180817

ONTARIO

SUPERIOR COURT OF JUSTICE

SUMMARY CONVICTION APPEAL COURT

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	C. Nadler, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
- and -	)	
	)	
	)	
D[redacted] B[redacted]	)	M. Montes, for the Appellant
	)	
	)	
	)	
Appellant	)	
	)	
	)	
	)	**HEARD:** July 17, 2018

REASONS FOR JUDGMENT

[On appeal from the judgment of Richard Schwarzl J.
dated March 18, 2015]

André J.

[1] Mr. D[redacted] B[redacted] appeals his conviction by Ontario Court of Justice Richard Schwarzl on March 18, 2015 for the offence of assault with a weapon. He submits that the trial judge erred in law by misapprehending the evidence and applying a stricter standard of scrutiny to his evidence than to the Crown's evidence.

SUMMARY OF THE FACTS

[2] On April 19, 2011 at approximately 11:45 a.m. Jerry Carew, a city by-law enforcement officer, attended Mr. B[redacted]'s residence in response to a property standards complaint. After knocking on the front door and receiving no response, Carew went into Mr. B[redacted]'s backyard and began to take photos. While doing so, Carew heard a bang coming from the house. He turned and saw Mr. B[redacted] standing at the back door behind a glass screen door. Carew then went to speak to Mr. B[redacted].

[3] Carew testified during the trial that Mr. B[redacted] violently and abruptly opened his back door and lunged out of the house causing Carew to take a half step backwards. Mr. B[redacted] was holding a small camera and pointing it in Carew's face. Carew identified himself as a by-law enforcement officer and offered a business card but was greeted with expletives and told to leave Mr. B[redacted]'s property.

[4] Mr. B[redacted] video-taped the initial eight seconds of his encounter with Carew.

[5] Carew testified that as he began to put his business card in his pocket, Mr. B[redacted] grabbed a hold of his hand.

[6] Mr. Carew cautioned him about assaulting a peace officer. Mr. B[redacted] nevertheless pushed Carew in the chest with his left hand. Carew testified that he tried to push Mr. B[redacted]'s arm away. Mr. B[redacted] then struck him in the face with the camera. Carew then grabbed Mr. B[redacted] by the shirt causing both men to fall to the ground. Carew ended up on top of Mr. B[redacted] who then punched him several more times with camera in hand. Carew managed to back away to the front of the house where he then called the police.

[7] Mr. B[redacted] admitted to rudely asking Carew to leave his property. Before doing so, he retrieved his camera and audio recorder from inside his house. He testified that as he reached for Carew's business card his arm made incidental contact with Carew's arm. Thereupon Carew forcefully put him to the ground.

[8] Mr. B[redacted] further testified in-chief that:

> Well, what I feel important is very simple, I got sucker-punched, as far as I'm concerned. He offered me a business card, I reached out for it and I end up on my back and charged. I didn't have any intentions of touching him, certainly not assaulting him with a weapon.

> Transcript of the trial, January 26, 2015, page 113.

[9] Mr. B later provided the following answer to the Crown's question:

> Q. Now sir, you testified yesterday that it was your position that you were essentially sucker-punched?
>
> A. Yes.
>
> Transcript of the evidence, January 27, 2015, page 43.

DECISION OF THE TRIAL JUDGE

[10] The trial judge concluded, at para. 71 of his decision, that he did not believe that Mr. B's evidence raised a reasonable doubt. He concluded that Mr. B's evidence that his intention was not to confront Carew but simply to have a conversation with him was "profoundly contradicted by the totality of the evidence that showed the defendant's intention was anything but peaceful."

[11] The trial judge identified "two significant internal inconsistencies" in Mr. B's evidence. He noted at para. 73 that:

> First, in examination in-chief, the defendant said several times that he was tossed like a rag doll by Carew but then declared that Carew had in fact sucker-punched him in the face when he reached for the complaint's business card. Not only is this inherently inconsistent, it is inconsistent with the evidence of the police that the defendant appeared uninjured.

[12] The trial judge noted at para. 74 that: "I believe the complainant on all material facts and where his evidence conflicts with that of the defendant, I prefer

Carew's." Regarding the video evidence tendered by Mr. B[redacted] during the trial, the trial judge concluded that:

> The photos of the property amply justify the complaint which Carew was tasked to investigate. The defendant was manifestly and immediately antagonistic with Carew, taking no time to be civil and making no effort to find out what was going on. The defendant remained bellicose with Carew throughout this matter.

[13] The trial judge found as a fact, at para. 80, that Mr. B[redacted] "deliberately punched [Carew] in the face while holding his camera. … I find that after being struck in the face, Carew responded in a measured and controlled fashion by putting the defendant to the ground, taking care that the defendant did not strike his head on the ground. I accept Carew's evidence that while on his back the defendant continued to lash out at the bylaw officer because of his uninhibited hostility."

ANALYSIS

[14] This appeal raises the following issues:

1. What is the appropriate standard of review?

2. Did the learned trial judge misapprehend the evidence?

3. Did the learned trial judge apply a different standard of scrutiny to the defence evidence than he did to that called by the Crown?

WHAT IS THE APPROPRIATE STANDARD OF REVIEW?

Findings of fact made by a trial judge are entitled to significant deference, and cannot be set aside unless the trial judge committed "palpable and overriding error or made findings of fact including inferences of fact that are clearly wrong, unreasonable or unsupported by the evidence." *H.L v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1. S.C.R 401 at para. 4. The standard of review of a trial judge's interpretation of the law is correctness. *Housen v. Nikolaisen*, 2002 SCC 33 2 S.C.R. 235, at para. 8.

DID THE TRIAL JUDGE MISAPPREHEND THE EVIDENCE?

The Law

[15] A misapprehension of evidence may refer to a failure on the part of the trial judge 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 evidence." *R. v. Morrissey,* [1995] 22 O.R. (3d) 514 at p. 538.

[16] To set aside a conviction on the basis that the trial judge misapprehended the evidence, the appellant must meet a stringent standard. The misapprehensions must be of substance rather than detail, they must be material rather than peripheral to the judge's reasoning and the alleged errors must play an essential part in the reasoning process, not just of the narrative. A mere misstatement or inaccuracy in the trial judge's treatment of the evidence does not

constitute a reversible error. *R. v. Lohrer*, 2004 SCC 80 3 S.C.R. 732, at paras. 1-2.

[17] When a trial judge commits a misapprehension of the evidence, it does not matter whether the rest of the evidence was capable of supporting a conviction. A misapprehension that affects the reasoning process amounts to an unfair trial that can only be corrected by quashing the conviction. *Lohrer*, at para. 1.

THE APPELLANT'S POSITION

[18] Mr. B[redacted]'s counsel insists that the learned trial judge misapprehended the evidence by finding that Mr. B[redacted] testified that "Carew sucker-punched him **in the face** when he reached for the complainant's business card," (emphasis added). He further submits that given Mr. B[redacted]'s testimony that "I got sucker-punched **as far as I'm concerned**," (emphasis added) it could not be presumed that Mr. B[redacted] stated that he was literally punched. As a result, Mr. B[redacted] argues it was not open to the trial judge to make a finding that he testified that he was literally sucker-punched.

ANALYSIS

[19] It was open to the trial judge to find that Mr. B[redacted] testified that Mr. Carew had indeed sucker-punched him. The fact that Mr. B[redacted] added the qualifier, "as far as I'm concerned", does not limit the trial judge's discretion

regarding his understanding or interpretation of Mr. B[redacted]'s testimony. Indeed, it was quite reasonable for him to have concluded that Mr. B[redacted] testified that he had been sucker-punched.

[20] That said, it was not open to the trial judge to conclude that Mr. B[redacted] testified that Carew had sucker-punched him **in the face**. There was no evidence called in the trial to support this conclusion. Mr. B[redacted] never testified to that effect. Accordingly, the trial judge misapprehended the defence evidence when he concluded that Mr. B[redacted] had testified to that effect.

[21] However, as the court in *Lohrer* stated at para. 2, to constitute reversible error, the misapprehension "must go to the substance rather than to the detail, [it] must be material rather than peripheral" to the judge's reasoning and the alleged errors must play an essential part in the reasoning process, not just of the narrative."

[22] Is the misapprehension of the evidence in this case of substance rather than detail, and did it play an essential part in the reasoning process, not just of the narrative? The trial judge observed, at para. 73 of his judgment, that Mr. B[redacted]'s credibility "was further eroded by two significant internal inconsistencies." One of these significant internal inconsistencies, the trial judge

concluded, was Mr. B[redacted]'s alleged testimony that Mr. Carew had sucker-punched him in the face.

[23] It is difficult to understand how this testimony is internally inconsistent with Mr. B[redacted]'s earlier testimony that Carew had tossed him like a rag doll. More problematic is the fact that the trial judge relied on this misapprehension when he concluded that "it is inconsistent with the evidence of the police that the defendant appeared uninjured". The trial judge concluded that "[t]hese internal contradictions reveal a wide gulf in the defendant's perception and memory of the event that made me leery of the rest of his narrative of what happened." at para. 73.

[24] It is clear therefore, that the trial judge's misapprehension of the evidence was of substance rather than detail and was material rather than peripheral to his reasoning. Furthermore, given that the misapprehension coloured the judge's assessment of the rest of Mr. B[redacted]'s narrative of what happened, it clearly played an essential role in his reasoning process. To that extent, the misapprehension of the evidence constitutes an error in law which justifies a reversal of the trial judge's decision.

[25] The Crown submits that the trial judge noted at para. 71 of his judgment that he found Mr. B[redacted] to be an unreliable and incredible witness "for several

reasons" to that extent, the alleged misapprehension of the evidence was of minor consequence. However, the trial judge categorized the evidence regarding Mr. B[redacted] being sucker-punched "in the face" as a significant inconsistency. He also stated that this internally inconsistent evidence, along with others, made him "leery" of Mr. B[redacted]'s further testimony of what happened.

[26] At paras 62 and 63, the trial judge clearly articulated the law as it relates to the burden of proof in cases where the question of guilt or innocence turns on the conflicting evidence between the Crown and defence witnesses. However, his decision to treat Mr. B[redacted]'s evidence with great incredulity or disbelief was partly based on a misapprehension of the evidence. To that extent the trial judge's assessment of whether he believed Mr. B[redacted]'s evidence or, if not, whether it was capable of raising a reasonable doubt in the Crown's case, was influenced by his misapprehension of the evidence. Therefore, his decision cannot stand.

[27] Given this decision, it is unnecessary to decide whether or not the trial judge applied a different standard of scrutiny to the defence evidence than he did to the Crown's evidence. Suffice it to say that it was open to the trial judge to place whatever weight he deemed to have been appropriate on the video-taped evidence.

CONCLUSION

[28] The conviction is set aside and a new trial is ordered.

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André J.

Released: August 17, 2018

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- and -

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Appellant

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