

CANADA / JUDGMENT

R. v. Eddison

2021 BCCA 168

COURT

British Columbia Court of Appeal

DECIDED

27 April 2021

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2021 BCCA 168 R. v. Eddison

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Eddison,

2021 BCCA 168

Date: 20210427

Dockets: CA46237; CA46409

Docket: CA46237

Between:

Regina

Appellant

And

Paul Benjamin Eddison

Respondent

- and -

Docket: CA46409

Between:

Regina

Respondent

And

Paul Benjamin Eddison

Appellant

Corrected Judgment: The summary and text of the judgment was corrected at paragraphs 4-6, 69, 84 and 87-88 on May 4, 2021.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated June 28, 2019 (R. v. Eddison, 2019 BCPC 139, Vancouver Docket 250205-2-C).

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(via videoconference):

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(via videoconference):

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Place and Date of Hearing:

Vancouver, British Columbia

October 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 27, 2021

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

Summary:

The accused was charged with six offences relating to an altercation with two police officers, Constables S. and K. He was convicted at trial of two counts for assaulting and threatening Cst. S. but was acquitted of the four counts relating to Cst. K., who suffered a serious fracture to her leg while attempting to assist Cst. S. as he grappled with the accused. The Crown appeals the acquittal on one count of unlawfully causing bodily harm contrary to s. 269 of the Criminal Code (Count 6). It submits that the judge erred in his application of the law to the factual findings he made, which were sufficient to support a conviction on Count 6. The accused appeals his convictions on two counts (Counts 4 and 5) on grounds of abuse of process, based on the police's alleged failure to secure and preserve CCTV video footage of the altercation from a nearby business. Held: Crown appeal allowed; accused's appeal dismissed. The judge erred by giving erroneous legal effect to decided facts and by failing to consider whether the Crown had proved the essential elements of Count 6. Either of the two plausible scenarios he identified relating to the manner of Cst. K.'s injury were sufficient to support a conviction on the charge of unlawfully causing bodily harm, on a proper application of the law. The judge did not err in his consideration of Counts 4 and 5. He clearly explained why he rejected the accused's submissions regarding abuse of process and accepted that there was no evidence to support any police misconduct including that they had not carried out a proper investigation. Rather, he accepted the testimony of one officer that she had reviewed the CCTV footage and that it did not depict anything of evidentiary value. Conviction entered on Count 6 and remitted to the trial court for sentencing.

Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

- [1] During an altercation between two members of the Vancouver Police Department (the "VPD") and Paul Eddison, one of the police officers, Constable Pamela Karellas, suffered an open fracture to her left tibia and fibula. Mr. Eddison was charged with six offences under the Criminal Code, R.S.C. 1985, c. C-46 arising out of the altercation with Cst. Karellas and her co-officer, Constable Russell Sargent. Following a nine-day trial, Mr. Eddison was convicted of two offences: Count 4, assaulting Cst. Sargent in the execution of his duty contrary to s. 270(1); and Count 5, uttering a threat to Cst. Sargent contrary to s. 264.1(1): *R. v. Eddison*, 2019 BCPC 139 (the "Reasons"). However, he was acquitted of the four counts relating to Cst. Karellas: Count 1, aggravated assault contrary to s. 268(2); Count 2, assaulting a police officer causing bodily harm contrary to s. 270.01(1)(b); Count 3, aggravated assault of a police officer contrary to s. 270.02; and Count 6, unlawfully causing bodily harm contrary to s. 269.

- [2] The Crown appeals the acquittal on Count 6. It says the judge erred in applying the law to the factual findings he made, and that had he done so correctly, Mr. Eddison would have been convicted on Count 6. Specifically, the Crown argues that while the judge could not find the facts necessary to convict Mr. Eddison of assaulting Cst. Karellas, either of the two plausible versions of events he identified would be sufficient to prove the separate offence of unlawfully causing bodily harm.
- [3] Mr. Eddison says the judge accurately set out the legal principles applicable to a charge of unlawfully causing bodily harm but that the Crown did not prove its case beyond a reasonable doubt. Alternatively, he says the complex evidentiary record does not permit the Crown to establish with a reasonable degree of certainty that the verdict on Count 6 would have been different when applying correct legal principles. He says there was insufficient evidence to establish guilt on any of the charges relating to Cst. Karellas.
- [4] Mr. Eddison appeals the convictions on Counts 4 and 5. At trial, he argued that all charges should be stayed pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms (the "Charter") because of two alleged Charter breaches by the police: first, a breach of s. 7 because of the failure of the VPD to secure or preserve CCTV video evidence that he says would have been relevant to his defence; and second, a breach of s. 12 arising from the excessive use of force and deceptive conduct by the police during his arrest. He invoked both categories of abuse of process: that his right to a fair trial had been prejudiced (the main category); and that the state conduct was offensive to societal notions of fair play and decency such that continuation of the trial would harm the integrity of the justice system (the residual category).
- [5] On his appeal, Mr. Eddison argues the judge erred in dismissing his application based on the residual category of abuse of process arising from the police's failure to secure and preserve the CCTV video. He has not appealed the dismissal of his application based on the main category of abuse of process. Mr. Eddison also argues that the Reasons are deficient, as they fail to address critical issues relating to the police's failure to preserve the CCTV footage. He asks that the matter be remitted to the trial court for a retrial.
- [6] For the reasons that follow, I would allow the Crown appeal on Count 6 and dismiss Mr. Eddison's appeal on Counts 4 and 5.

Background

- [7] In the early morning hours of January 15, 2018, Constables Karellas and Sargent were working the night shift in the entertainment area of the Granville Mall. The officers were in uniform and fully equipped. Their police car was unmarked but had push bars on the front, flashing lights inside the windows, and a computer between the front seats. At about 1:35 a.m., the officers had parked the car on the west side of Granville Street near the intersection with Nelson Street. The officers engaged the vehicle's red and blue emergency flashing lights for about five minutes and left the vehicle to speak with a person on the Mall.

They returned to their car and sat for another five minutes with the emergency lights turned off.

- [8] The officers noticed a large man, Mr. Eddison (whom I will alternatively refer to as the accused), sitting on a nearby bench mouthing words and gesturing with his hands as he stared at the officers. Mr. Eddison walked unsteadily towards the police car and spoke to Cst. Sargent, appearing frustrated and angry. When he arrived at the police car he said words to the effect, "You're really going to make me walk all the way over here." He then asked for a cigarette. Cst. Sargent indicated that he did not have any cigarettes and asked Mr. Eddison to go away. He could smell a strong odour of liquor coming from Mr. Eddison. (Indeed, his blood alcohol readings taken at the hospital after he was arrested were in excess of 0.30 mg/ml.) Cst. Karellas, who was driving the police vehicle, moved the car a short distance southwards to get away from Mr. Eddison. However, Mr. Eddison followed the police car and continued to ask Cst. Sargent to give him a cigarette. Cst. Sargent again indicated that he did not have a cigarette. Mr. Eddison repeated his demand for a cigarette and eventually said, "Give me the fucking cigarette or else I'll fucking kill you."
- [9] Cst. Sargent believed he had grounds to arrest Mr. Eddison for uttering a threat. He got out of the police car and saw Mr. Eddison back away from him and adopt what he perceived as a fighting stance. Mr. Eddison stated, "Watch out, or I will fuck you up." Cst. Sargent told him that he was under arrest. Mr. Eddison replied, "No, I'm fucking not." Cst. Sargent determined that he would need to physically take Mr. Eddison into custody. He elected to use "physical empty handed control tactics", given Mr. Eddison's intoxication and apparent fighting stance. He moved forward about two metres, grabbed the upper clothing of Mr. Eddison and took control of his right arm with the intention of using a leg sweep to bring him down. Mr. Eddison grabbed Cst. Sargent and pushed him back towards the police car. Cst. Sargent then regained some control and executed a leg sweep, which brought Mr. Eddison to the ground with the officer on top of him. Cst. Sargent estimated that the altercation was about 10 seconds in length.
- [10] At about the same time, Cst. Sargent heard a loud bang followed by a scream from Cst. Karellas. He saw her on the ground a few feet away, with her leg bent at an unnatural angle and screaming that it was broken.
- [11] On the ground, Mr. Eddison continued to resist and was thrashing about underneath Cst. Sargent. Cst. Sargent restrained Mr. Eddison's upper body and received assistance from a civilian who was standing nearby, Mr. Kieran Foran, who held on to Mr. Eddison's legs. Eventually, other police officers arrived and managed to control the accused. He was handcuffed and taken into custody.
- [12] Cst. Sargent did not see how Cst. Karellas was injured. Mr. Eddison did not give evidence. Cst. Karellas and Mr. Foran testified about the mechanism of her injury.

- [13] Cst. Karellas described hearing Mr. Eddison threaten Cst. Sargent, and saw her colleague get out of the vehicle. As she saw the confrontation developing she got out of the police car and walked around it to assist Cst. Sargent. She reached the two men just as Mr. Eddison was taken to the ground. She said Mr. Eddison saw her approach as he was "flailing around on the ground" and kicking with both of his feet. One of his kicks landed on Cst. Karellas' left leg above the shin. She yelled in pain and tried to step backwards on to her left leg but collapsed. She felt a bone protruding from her skin and her foot appeared to be bent backwards.
- [14] Mr. Foran gave a different version of the events leading to Cst. Karellas' leg fracture. He testified that he saw Mr. Eddison approach the police car and speak with the officers through the passenger door window. Mr. Foran turned away but when he looked back, he saw the male officer struggling with Mr. Eddison. In the course of the struggle, Mr. Eddison retreated or fell backwards into an open door of the police car while Cst. Sargent was trying to swing him to the ground. Mr. Foran testified that Cst. Karellas got hit by the car door after it was impacted by Mr. Eddison's falling body. Mr. Foran said that Mr. Eddison's back was to Cst. Karellas and that he would not have known she was there.
- [15] A third witness, Vladyslav Hryhorenko, also gave evidence about how Cst. Karellas was injured. Mr. Hryhorenko was the staff person working at the front desk of HI Vancouver Central Hostel during the incident. The hostel is located on the west side of Granville Street, south of the location of the altercation.
- [16] Mr. Hryhorenko described a sequence of events that was inconsistent with the testimony of the other three witnesses. He had observed Mr. Eddison smoking for about a half hour before he saw three police officers, including a small female officer who engaged with Mr. Eddison in "some sort of argument, nothing interesting." A few minutes later he heard sirens and saw a lot of police cars arriving on the scene. He saw the police trying to handcuff Mr. Eddison and put him in a police car or wagon. In doing so, Mr. Eddison fell backwards on to the female police officer, who also fell down. He recalls an ambulance attending the scene. He stated that he did not see anybody get kicked and did not see any police officer mistreating the accused: Reasons at paras. 235-244.
- [17] The judge ultimately found Mr. Hryhorenko's evidence on the manner of Cst. Karellas' injury to be unreliable and rejected his evidence about the confrontation between Mr. Eddison and the police. The judge reviewed Mr. Hryhorenko's evidence about his interaction with police officers after the arrest in considering Mr. Eddison's application for a stay of the charges based on the alleged breach of s. 7 of the Charter. He also reviewed the evidence of eight other police officers who attended at the scene of the altercation in considering Mr. Eddison's applications based on both s. 7 and s. 12 of the Charter.
- [18] Mr. Hryhorenko stated that after watching the altercation, two uniformed male police officers approached him and asked to review the video footage from the external CCTV cameras mounted outside the hostel. This was not an infrequent occurrence at the hostel,

given its location. He looked at the video with the officers and said it depicted the actions he had described in his testimony. He said the police officers took a statement from him and asked to make a copy of some of the footage. He directed them to speak with the general manager but he could not recall whether the officers indicated that they would return to do so. Mr. Hryhorenko said the incident stuck in his mind because he saw the female officer being injured, and later learned from the police officers that her leg had been broken. About 10 or 11 months after the incident, he was contacted by the police asking about the availability of video footage and again directed them to the general manager. He did not know if the video would still be available: Reasons at paras. 245-256.

- [19] Constable Natalie Eades, one of the officers who attended at the scene, was tasked with canvassing the establishments on both sides of Granville Street to check for CCTV video that may have captured the events. She did so on the same night and made detailed notes of the results of her search for video evidence at the hostel and other businesses. She stated that she spoke to a male staff member at the hostel and identified two external CCTV cameras. She viewed the video footage from both cameras beginning approximately 20 minutes before the altercation. One of the cameras faced north towards the location of the interactions between Mr. Eddison and the officers. She said that a white glare from lights on the awning of the hostel washed out any specific details of the incident. It was her opinion that the video had no evidentiary value, so she did not seize the CCTV footage.

Trial Reasons

- [20] The judge summarized the evidence of all of the witnesses in considerable detail; the Reasons are 475 paragraphs in length. After reviewing the evidence, the judge first considered and ruled on Mr. Eddison's Charter applications to stay the charges. Mr. Eddison relied on both categories of abuse of process set out in *R. v. Babos*, 2014 SCC 16: the main category, whether the right to a fair trial was prejudiced, and the residual category, whether the conduct of the state was such that proceeding with the trial would be harmful to the integrity of the justice system. On the main category, Mr. Eddison argued that his right to a fair trial was undermined by the failure of the VPD to secure and preserve the CCTV footage from the hostel. With regard to the residual category, Mr. Eddison argued that the VPD's failure to secure the CCTV footage was either a deliberate act or unacceptably negligent conduct. He also argued that the VPD officer's conduct--in using excessive force during the arrest, in covering up the circumstances of the altercation, and in fabricating evidence--supported a stay under the residual category.
- [21] The Crown argued that Mr. Eddison had failed to establish any breach of his Charter rights but, even if he had, this was not one of the "clearest of cases" that would warrant a stay of proceedings. It conceded that it had a duty to disclose all relevant information in its possession, and in circumstances where the state is responsible for lost evidence, a duty to explain what happened to it. However, the Crown said that the evidence of Cst. Eades should be accepted--and if it was, there was no basis for a finding that the accused's defence was

prejudiced in any way by the failure to secure the hostel's CCTV video. The Crown further submitted that Mr. Eddison had failed to establish on a balance of probabilities any of his allegations of excessive force or deceptive conduct.

- [22] The judge rejected Mr. Eddison's abuse of process arguments based on the police's alleged failure to secure the CCTV video from the hostel. He found the evidence of Cst. Eades to be both credible and reliable in establishing that the CCTV video footage she viewed "did not depict anything of evidentiary value with respect to the altercation between Cst. Sargent and the accused": Reasons at para. 309. The judge then considered Mr. Hryhorenko's evidence about viewing the video with two unidentified male police officers. The judge did not specifically reject that evidence, but stated:
- [312] The identity of these two VPD members remains a mystery. Whatever CCTV footage Constable Eades and Mr. Hryhorenko viewed is no longer available.
- [313] However, the accused does have the benefit of the testimony of Mr. Hryhorenko, who says he went to a window of the hostel and at that time saw the accused falling backwards onto Constable Karellas. He said that he did not see anybody kick anyone. What he observed through the window is consistent with what he testified he viewed on the CCTV footage with the two VPD members.
- [314] I find that the accused's right to a fair trial has not been irreparably harmed by a failure of the state to secure and/or preserve CCTV footage from the hostel. The accused has failed to establish that he has suffered serious prejudice by the failure of the state to seize and/or secure CCTV footage from the hostel.
- [Emphasis added.]
- [23] The judge concluded that the conduct of Cst. Eades was not unacceptably negligent in failing to preserve the CCTV footage. He found that Mr. Eddison had failed to establish any breach of his s. 7 Charter rights: Reasons at paras. 315-316.
- [24] The judge also rejected Mr. Eddison's allegations of a breach of his s. 12 Charter rights. He noted that Mr. Eddison is a large and imposing man who was intoxicated at the time of the altercation with Cst. Sargent. He concluded that Mr. Eddison failed to establish on a balance of probabilities that the VPD members involved in his arrest had applied excessive force. He found that Mr. Eddison had not presented any evidence in support of his allegation that the police engaged in a pattern of deception to minimize or cover up the circumstances of the altercation and arrest. With reference to the residual category of abuse of process, he concluded that Mr. Eddison had failed to establish any state misconduct that would undermine the integrity of the judicial process: Reasons at paras. 337-345.
- [25] The judge then turned to consider the six counts against Mr. Eddison. He summarized Mr. Eddison's arguments at paras. 346-370. Mr. Eddison submitted that the evidence of Constables Sargent and Karellas was not reliable, and urged the judge to place more weight on the evidence of Mr. Foran. He asked the judge to reject the police officers' evidence that

Mr. Eddison had threatened to kill Cst. Sargent. He submitted that Mr. Eddison was too inebriated to form the intent to threaten Cst. Sargent. Alternatively, he argued that the arrest was unlawful, as there were no reasonable grounds for an arrest, and that he was entitled to resist arrest. In the further alternative, Mr. Eddison argued that even if the arrest was lawful, his actions did not amount to an assault of Cst. Sargent or that if an assault occurred, that he was too intoxicated to recognize that Cst. Sargent was a police officer.

- [26] With regard to the assault charges against Cst. Karellas, Mr. Eddison submitted that the critical issue was determining the cause of her leg fractures. Mr. Eddison again urged the judge to reject the evidence of Cst. Karellas and accept the evidence of Mr. Foran. He further argued that even if Cst. Karellas was injured by a kick, there was insufficient evidence to establish that it was intentional and stated that the doctrine of transferred intent would not apply. Finally, with regard to Count 6, the judge noted Mr. Eddison's submission that the evidence fell short of establishing that he had engaged in an unlawful act that caused injury to Cst. Karellas.
- [27] The Crown's arguments were summarized by the judge at paras. 371-382. The Crown submitted there was ample evidence to establish that the accused threatened Cst. Sargent and intentionally assaulted him thereafter. With regards to Counts 1-3, the Crown urged the judge to accept Cst. Karellas' evidence that her leg was fractured as a result of Mr. Eddison's intentional kick. It also submitted that the doctrine of transferred intent was sufficient to establish aggravated assault, based on Mr. Eddison's intent to assault Cst. Sargent and given the gravity of her injury. With regard to Count 6, the Crown submitted that it only needed to prove that the accused was engaged in an unlawful act and that bodily harm resulted. To this end, it said that the conduct of the accused would give rise to an objective foresight of bodily harm, and that bodily harm resulted.
- [28] Based on the submissions of the parties, the judge considered the following five issues in turn: 1) did the accused threaten Cst. Sargent; 2) the defence of intoxication; 3) was the arrest lawful; 4) was the accused aware that Cst. Sargent was a police officer; and 5) what caused Cst. Karellas' injury.
- [29] The judge had little difficulty in arriving at conclusions on the first four issues:
- a) Threat to Cst. Sargent: He found that the evidence of the two officers concerning the initial interactions between Mr. Eddison and Cst. Sargent--and the threatening statements made by Mr. Eddison--to be credible and reliable. He concluded that the Crown had established beyond a reasonable doubt that Mr. Eddison threatened Cst. Sargent: Reasons at paras. 389-394.

- b) **Defence of Intoxication:** He accepted the evidence of Constables Sargent and Karellas, as confirmed by the evidence of Mr. Foran and Mr. Hryhorenko that Mr. Eddison was able, despite his level of intoxication, to "sit, stand, smoke, socialize, walk and talk". The judge rejected the defence of intoxication based on his findings of fact and alternatively, because Mr. Eddison was precluded from advancing self-induced intoxication as a defence to a charge of violent criminality by operation of s. 33.1 of the Code: Reasons at paras. 395-406.
 - c) **Lawful Arrest:** Having accepted the evidence of Constables Sargent and Karellas about their interactions with Mr. Eddison prior to his arrest, the judge concluded that the Crown had established the existence of reasonable grounds for the arrest of Mr. Eddison. He concluded that the arrest was lawful: Reasons at paras. 407-413.
 - d) **Awareness of Police Officers:** The judge summarized the evidence that he accepted from the Crown witnesses and concluded there was no persuasive evidence that Mr. Eddison's level of intoxication may have impaired his ability to recognize Cst. Sargent as a police officer: Reasons at paras. 414-421.
- [30] The judge had more difficulty resolving the fifth question: what caused Cst. Karellas' injury. In reviewing the evidence of the three witnesses who testified about the circumstances of her injury, he noted that Mr. Hryhorenko's version of events differed significantly from that of Cst. Karellas and Mr. Foran. He found that Mr. Hryhorenko was "simply wrong" about the sequence of events and that the reliability of his memory was impacted by the passage of time: Reasons at paras. 438-439. In contrast, the judge found both Cst. Karellas and Mr. Foran to be credible witnesses.
- [31] At para. 464, the judge found that Cst. Karellas sustained her injury "when she was either kicked by the accused, based on her version of events, or when the accused fell backwards onto her, based on Mr. Foran's version of events." These versions were the "most plausible of the three versions": Reasons at para. 466. However, the judge noted that the differences in their evidence as to the cause of the injuries was significant. If he accepted Cst. Karellas' version of events as credible and reliable, that would "plausibly establish that the accused's conduct was consistent with an intention to assault her in both her professional and/or personal capacity." However, if he accepted Mr. Foran's version of events, Mr. Eddison's conduct would be inconsistent with an intention to assault Cst. Karellas in any capacity. After considering Cst. Karellas' clinical records as independent documentary evidence, the judge was unable to resolve the credibility contest between the two plausible but conflicting versions of the events.
- [32] The judge concluded that the Crown had failed to meet its burden of proof with regard to the four counts relating to Cst. Karellas:
- [470] The decisive question to ask is whether or not, based upon the totality of the evidence, the Crown has proven the guilt of the accused on the specific charges alleged beyond a reasonable doubt.

- [471] I do not find that the Crown has met its burden of proof in relation to Counts 1, 2, 3, and 6 of the Information. Accordingly, I find the accused not guilty of those charges.
- [33] The judge did not consider Count 6 separately from the other three counts, nor why either version of events he accepted as plausible (those of Cst. Karellas and Mr. Foran) would not be sufficient to support a conviction on the distinct charge of unlawfully causing bodily harm under s. 269.

Crown Appeal

- [34] The Crown advances two grounds of appeal with respect to Count 6. First, it says that the judge erred by giving erroneous legal effect to decided or undisputed facts and by using wrong legal principles to assess the evidence. Alternatively, it argues that the judge failed to provide sufficient reasons for the acquittal, as he entirely omitted to consider proof of the elements of the offence of unlawfully causing bodily harm.

Analysis

- [35] Pursuant to s. 676(1)(a) of the Code, the Crown's right of appeal from an acquittal of an indictable offence is limited to a "ground of appeal that involves a question of law alone". The jurisprudence recognizes four situations where a judge's alleged shortcoming in assessing evidence can amount to an error of law sufficient to support a Crown appeal from acquittal: a) making a finding of fact for which there is no evidence; b) giving erroneous legal effect to decided or undisputed facts; c) using wrong legal principles to assess the evidence; and d) failing to consider all of the evidence: *R. v. J.M.H.*, 2011 SCC 45 at paras. 24-32.
- [36] In this case, the Crown relies on the second and third of these errors. In *R. v. Morin*, [1992] 3 S.C.R. 286, Justice Sopinka elaborated on those errors at pp. 294-295:

If a trial judge finds all of the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts or inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute. In this situation, the court can arrive at the correct conclusion in law without ordering a new trial because factual issues have been settled.

Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle.

[Emphasis added.]

- [37] In short, an appellate court can simply apply the trial judge's findings of fact to the proper legal principles: J.M.H. at para. 28. Put differently, where all elements of the offence have been proved but a trial judge has erred in law in failing to draw the conclusion of guilt required by the facts as found, an appeal court is empowered to enter a verdict of guilty: *R. v. Courville*, [1982] O.J. No. 154, affirmed [1985] 1 S.C.R. 847.
- [38] Under s. 269 of the Code, it is an offence to unlawfully cause bodily harm to any person. The elements of the offence are not controversial. The Crown must prove the following elements beyond a reasonable doubt: that the accused committed an underlying unlawful act; the objective foreseeability of non-trivial bodily harm; and that bodily harm resulted from the unlawful act: *R. v. DeSousa*, [1992] 2 S.C.R. 944. The mental element of the offence thus has two components: objective foreseeability of non-trivial bodily harm; and the mental element required for the underlying offence or unlawful act.
- [39] The Crown argues that a proper application of the factual findings made by the trial judge to the elements of a charge under s. 269 supports a conviction on Count 6. Further, the Crown says the concessions made by Mr. Eddison at trial were such that if he was found guilty of Count 4 (assaulting Cst. Sargent), that unlawful act or predicate offence would be sufficient to support a conviction on Count 6.
- [40] Mr. Eddison raises two principal arguments in response. First, he says the Crown cannot demonstrate that the judge applied incorrect legal principles to Count 6 or otherwise made an error of law. He argues that judges are presumed to know the law and says it is clear from a review of the Reasons as a whole that the judge was aware of the legal principles applicable to Count 6.
- [41] Second, he says the Crown has not satisfied the high threshold for a Crown appeal, arguing that the Reasons reveal a logical route to acquittal. Mr. Eddison refers to *Morin* at p. 347 and *R. v. Graveline*, 2006 SCC 16 at paras. 15-16, for the proposition that there is a "heavy" onus on the Crown to establish with a reasonable degree of certainty that the outcome of the trial may well have been affected by the error. The Crown must accordingly establish that the error would have had a material bearing on the acquittal: *R. v. Goldfinch*, 2019 SCC 38 at para. 135.

Did the judge err in law?

- [42] I am of the view that the judge made both of the errors alleged by the Crown. First, he failed to apply the findings of fact he made regarding Mr. Eddison's actions and Cst. Karellas' injury to the law applicable to a charge of unlawfully causing bodily harm. As summarized above, he concluded that Cst. Karellas' leg was broken either as a result of a kick directed at her by Mr. Eddison (as described by Cst. Karellas) or when Mr. Eddison fell backwards onto her while resisting arrest and assaulting Cst. Sargent (as described by Mr. Foran). On the judge's analysis, there was no third possible mechanism of injury. Either of the two scenarios he described as plausible involves an unlawful act sufficient to support the first element of the charge under s. 269.

- [43] Second, I find that the judge failed to adequately consider whether the Crown had proved all of the elements of the charge under s. 269. Had he done so, he would have come to the conclusion that the Crown did indeed prove all of the elements of the offence, based on the findings he made.
- [44] A review of the Reasons as a whole does not assist Mr. Eddison. While the judge set out the positions of the parties at trial, it is evident that the judge failed to consider the elements of s. 269 separate from those of the three other charges (Counts 1-3) arising from the assault of Cst. Karellas. Counts 1-3 required the Crown to prove the general intent necessary for an assault charge. The judge's focus, in his lengthy analysis of what caused Cst. Karellas' injury, was on the question of whether the evidence established that Mr. Eddison intended to (and did in fact) kick her. The Crown's inability to prove that Cst. Karellas' injury was caused in the manner she described meant that it could not prove the requisite mens rea for Counts 1-3. However, the failure to prove the necessary intent for those counts did not relieve the judge from considering whether the elements were proved for the distinct charge of unlawfully causing bodily harm. He was required to consider that question separately in light of his findings of fact and the elements of that specific offence. Given his factual findings and lack of analysis on Count 6 as distinct from Counts 1-3, it is not possible to conclude that the judge applied the law correctly.
- [45] I would find that the requisite mens rea for Count 6 is easily established on either of the two scenarios which the judge found to be credible. It matters not which version of events ultimately transpired; the judge narrowed it down to two possible scenarios, and either is sufficient to support a conviction on the count of unlawfully causing bodily harm.
- [46] As Mr. Eddison notes, the judge's statements summarizing the parties' positions contain errors regarding the substance of Count 6:
- [370] Finally, the accused submits that in relation to the allegation of assault causing bodily harm to Pamela Karellas, the evidence falls short of establishing that the accused was engaged in an unlawful act that caused the injury to Constable Karellas.
- [376] [The Crown] submits that in relation to the elements necessary to establish aggravated assault as set out in count 1 of the Information, and assault causing bodily harm is set out in count 6 of the Information, the Crown does not have to establish that the accused was aware that he was engaged with police officers. Further, with respect to count 6, the Crown says that it needs to prove only that the accused was engaged in an unlawful act and that bodily harm resulted.
- [Emphasis added.]
- [47] In setting out both parties' arguments on Count 6, the judge described the charge incorrectly. In para. 370, he describes Count 6 as an allegation of "assault causing bodily harm", and makes the same error in para. 376. Mr. Eddison argues that when the Reasons are viewed as a whole it must be concluded that these are merely "slips of the tongue". He

relies on R. v. Sonstelie, 2013 ABCA 7 at para. 16, for the proposition that it may be possible by reference to the reasons for judgment as a whole to conclude that an inapt statement was the result of a slip of the tongue or an awkward phrase. Whether or not these are mere slips, the Reasons as a whole make it clear that the judge failed to consider the elements of Count 6 at all or in any way distinctly from the other counts relating to Cst. Karellas.

- [48] In addition, the judge did not fully set out the parties' positions regarding Count 6 or consider them in arriving at his verdict. The Crown argued that Mr. Eddison's assault on Cst. Sargent commenced when the officer was getting out of the police car and Mr. Eddison backed up into a fighting stance, raised his fists and said, "Watch out, I'll fuck you up." Crown counsel submitted that Mr. Eddison's assault on Cst. Sargent (Count 4) was the underlying unlawful act to prove Count 6:

The Crown must merely prove that the accused was engaged in an unlawful act, which gave rise to the objective foresight of bodily harm, and that bodily harm resulted. As I say there is no requirement that the accused intentionally applied force to Constable Karellas, either directly, or applied force to her in directly when he intentionally applied force to Constable Sargent in the course of assaulting him.

- [49] Defence counsel's submissions on Count 6 have particular significance to the arguments now raised on appeal. Mr. Eddison's written submissions included:

- [140] The Crown would have to establish that Mr. Edison was resisting arrest, which led to Cst. Karellas' injury. (It is also possible to establish the unlawful act of assaulting Cst. Sargent.) The resistance could have occurred either while Mr. Edison was standing up or on the ground. It is conceded that if Mr. Eddison was resisting arrest, it was reasonably foreseeable that some harm could occur. It is not necessary that the Crown establish that the specific harm was foreseeable.

[Emphasis added.]

- [50] In his written submissions, defence counsel also conceded that Mr. Eddison had resisted Cst. Sargent's attempt to take him to the ground. His only defence was that he was entitled to resist an unlawful arrest or was unaware that Cst. Sargent was a police officer. In closing submissions at trial, the defence conceded the element of objective foreseeability of non-trivial bodily harm. In the defence's submission at trial, its available defences to Count 6 were limited to defences on the underlying unlawful act of Count 4; namely, that Cst. Sargent did not have grounds to arrest Mr. Eddison; that he did not assault Cst. Sargent; or that due to his intoxication, Mr. Eddison did not know he was a peace officer. But if the judge rejected those defences to Count 4, as Mr. Eddison's counsel stated in closing submissions:

In -- in any event if there's an unlawful event, which could be consistent with the assault of Constable Sargent or resisting arrest, Your Honour finds that that's established, and it's through that that the harm is caused, that satisfies Count 6.

[Emphasis added.]

[51] This is consistent with what the defence repeated shortly after:

If he's resisting a lawful arrest and he was aware of that, that is sufficient to establish an unlawful act, and if that's what eventually led to the bodily harm, the Crown can establish a conviction on that point.

However, if Mr. Eddison was not resisting arrest, or if he was not aware of it, or if the arrest was not lawful, that acts as a defence here, and the Crown cannot establish the unlawfully causing bodily harm

It -- it is fairly conceded that on this point resisting arrest does lead to some risk of bodily harm in -- and it doesn't have to be bodily harm of a peace officer, in that if I'm in a public street, resisting arrest with an officer, and through that it's -- it's a reasonable inference to suggest that some bodily harm could occur to someone, but that's not really in issue here.

But it's more the underlying facts that our submissions are focused on, and what is the unlawful act? It's our submission that there was no assault to Constable Sargent, and it's our -- also our submission that either this arrest was unlawful, or not for the stated grounds like Constable Sargent said of uttering threats, or Mr. Eddison was not aware that he was under arrest and he lacked the specific intent for resisting arrest.

[Emphasis added.]

[52] As I have indicated, the judge concluded that Cst. Sargent had reasonable grounds to arrest Mr. Eddison after he first uttered a threat. The judge found Cst. Sargent to be a credible and reliable witness. The judge accepted the officer's evidence regarding his confrontation with Mr. Eddison. That included his evidence that Mr. Eddison forcefully stated that Cst. Sargent better "watch out" and adopted a fighting stance. Further, he accepted that Mr. Eddison pushed back against Cst. Sargent when he first attempted a takedown. The judge rejected all of Mr. Eddison's defences to Count 4: resisting unlawful arrest; inebriation; and not knowing that Cst. Sargent was a police officer.

[53] Of course, the Reasons must be examined in context, taking into account the submissions and the evidence presented. Once the judge made his factual findings (that he set out in great detail), he was required to consider the elements of Count 6 with a view to the law and the parties' submissions, including their concessions. There is nothing in the Reasons that suggests the judge did so. The only part of the Reasons dealing with the four counts relating to the injury to Cst. Karellas are at paras. 422-471. I have summarized those above. The only paragraph dealing with the required elements for any of the counts relating to Cst. Karellas is para. 471, which reads:

I do not find that the Crown has met its burden of proof in relation to Counts 1, 2, 3 and 6 of the Information. Accordingly, I find the accused not guilty of those charges.

- [54] Counts 1-3 required the Crown to prove general intent to commit an assault. When the judge could not decide which of the two credible versions of how Cst. Karellas suffered the leg fracture had been established beyond a reasonable doubt, he correctly concluded that the Crown had not proved the necessary mental element for those three counts. However, this conclusion did not mean that Mr. Eddison should also be acquitted of Count 6. In order to satisfy the mental element of that offence, the Crown only had to prove that harm was reasonably foreseeable (the defence admitted that it was) and that Mr. Eddison committed an underlying wrongful act. As the judge found Mr. Eddison guilty of Count 4, it follows that he was satisfied that the Crown had proved the mental element for that offence beyond a reasonable doubt.
- [55] The judge does not explain how he could find Mr. Eddison not guilty of Count 6 after also finding that he assaulted Cst. Sargent while resisting a lawful arrest. This is particularly problematic in light of the concession made by defence counsel at trial: if Mr. Eddison was found to be resisting a lawful arrest, that would be sufficient to establish an unlawful act and a conviction on Count 6, if his resistance to the arrest (the assault on Cst. Sargent) eventually led to the bodily harm.
- [56] In short, I would conclude that the judge erred in law.

Was there a logical route to acquittal?

- [57] Mr. Eddison also submits that, even if the judge did not address the elements of the offence of unlawfully causing bodily harm, the Crown cannot meet the high threshold for overturning an acquittal. This is because the Reasons show a logical route to acquittal; specifically, the assault of Cst. Sargent (Mr. Eddison's unlawful act) was not proven to be causative of Cst. Karellas' injury. Mr. Eddison stresses that if the Reasons are read as a whole there is a reasonable inference that the Crown failed to prove beyond a reasonable doubt that the assault of Cst. Sargent was a significant contributing cause of the injury to Cst. Karellas.
- [58] Mr. Eddison refers to *R. v. Kaplan*, 2019 BCCA 356, for the proposition that a judge is not required to show precisely how he or she arrived at each conclusion:
- [80] . The judge was under no obligation to show in a frame-by-frame fashion how he arrived at his conclusion: *R.E.M.* at para. 17. The judge's reasons showed he was alive to the issues and responded to the substance of what was in issue: *R. v. J.M.H.*, 2011 SCC 45 at para. 32. His reasons were reasonably intelligible to the parties and provide for meaningful appellate review.
- [59] Mr. Eddison further argues that Cst. Sargent decided to take him to the ground using a leg sweep before he assaulted him, such that a reasonable inference can be drawn that the Crown has failed to prove beyond a reasonable doubt that the assault of Cst. Sargent was a significant contributing cause of Cst. Karellas' injury.

- [60] I am of the view there is little merit to this argument.
- [61] First, this argument was not advanced at trial. Mr. Eddison conceded at trial that if he was found to be resisting a lawful arrest, "that is sufficient to establish an unlawful act and if that's what eventually led to the bodily harm, the Crown can establish a conviction [on Count 6]". While he has now developed an argument based on the suggestion that the Crown failed to prove that the assault on Cst. Sargent "led to the bodily harm", that argument was not advanced at trial in the way it is now made on appeal--and for good reason. There was no reasonable basis for the suggestion that the unlawful act of assault of Cst. Sargent did not commence until partway through the confrontation between the two men, or that the unlawful acts of Mr. Eddison were not causative of Cst. Karellas' injury.
- [62] Mr. Eddison did not take that position at trial presumably because it was evident that his unlawful acts were part of a continuum that started with his threat and continued with his denial that he was under arrest; his adoption of a fighting stance; his utterance of an additional threat; and his physical resistance when apprehended. His concession that if the arrest was found to be lawful he had no defence to the assault of Cst. Sargent was driven by those circumstances.
- [63] Mr. Eddison's argument on appeal effectively asks this Court to make a new finding that is inconsistent with the facts found by the judge. Mr. Eddison now says that his unlawful act did not begin until he physically assaulted Cst. Sargent by pushing him backwards. In addition to being inconsistent with the judge's findings, the argument is contrary to the law. Mr. Eddison was resisting a lawful arrest after Cst. Sargent told him he was under arrest for uttering a threat, following which Mr. Eddison moved backwards, raised his arms and asserted that he was not under arrest and again threatened the officer with harm. The judge accepted Cst. Sargent's evidence about the incident, which was broadly corroborated by the evidence of Mr. Foran and Mr. Hryhorenko, albeit not as to the specifics or exact manner of Cst. Karellas' injury.
- [64] As the Crown notes, at trial the parties interchangeably referred to "assaulting" Cst. Sargent and "resisting" a lawful arrest by him. While Mr. Eddison was not charged with resisting arrest, he was found by the judge to have done so (when his defence to the assault charge was rejected). The offence of resisting a lawful arrest equally suffices as the element of "unlawful act" within s. 269. Further, resisting arrest under s. 129 of the Code does not require assaultive conduct: *R. v. Kennedy*, 2016 ONCA 879. Accordingly, Mr. Eddison's unlawful act began shortly after he first uttered the threat and Cst. Sargent moved to arrest him.
- [65] Mr. Eddison refers to *R. v. Maybin*, 2012 SCC 24, for the proposition that in order to prove causation, the Crown must establish that the accused's conduct was a "significant contributing cause". However, that decision does not assist Mr. Eddison. It concerned the question of when an intervening act by another person severed the causal connection between an accused's act and the victim's death, thereby absolving the accused of legal

responsibility. That is evidently a very different situation. Regardless, I am of the view that the concept of legal causation flowing from an unlawful act as explained in *Maybin* fully supports the position of the Crown. As noted at para. 38: "[l]egal causation does not require that the accused must objectively foresee the precise future consequences of their conduct." Mr. Eddison threatened Cst. Sargent, resisted arrest and fought against the lawful attempt to take him into custody. Mr. Eddison's unlawful actions were a cause of the injury to Cst. Karellas, whether he directly kicked her or she was injured when he fell backwards into her and the police car door. While he may not have foreseen the precise consequences of his conduct, it was objectively foreseeable that his altercation with Cst. Sargent could lead to an injury to him or to Cst. Karellas if she provided assistance.

- [66] Further, the principle that every finding need not be set out in reasons, as explained in *Kaplan*, does not assist Mr. Eddison. As the argument made on appeal was not advanced at trial, the judge did not consider this issue. Accordingly, the judge did not find or infer that Mr. Eddison's unlawful act in assaulting Cst. Sargent (while unlawfully resisting arrest) was not a significant contributing cause of the injury to Cst. Karellas. He was not asked to make such a finding because it was conceded that if the arrest was lawful, his actions in resisting arrest were unlawful. There is a difference between accepting a conclusion that is not fully explained in the reasons but can be understood in the context of the reasons as a whole (as in *Kaplan*), and asking an appellate court to arrive at a new conclusion that was not reached by the trial judge.
- [67] In summary, I am of the view that the judge erred by giving erroneous legal effect to the decided facts and by failing to consider whether the Crown had proved the essential elements of Count 6; the offence of unlawfully causing bodily harm. I therefore need not consider the alternative ground of insufficiency of the Reasons.
- [68] I would allow the appeal, set aside the acquittal verdict on Count 6 and direct that a conviction be entered on that count.

Mr. Eddison's Appeal

- [69] Mr. Eddison raises a single ground in his appeal: that the judge provided insufficient reasons for dismissing his application for a stay of proceedings on the residual category of abuse of process, relating to the "critical issue" of the lost CCTV video evidence. His argument is based on the judge's failure to address Mr. Hryhorenko's evidence about viewing CCTV video evidence with two unidentified uniformed male police officers, who allegedly interviewed him. Mr. Eddison argues that the Reasons fail to satisfy the functional test set out in *R. v. Sheppard*, 2002 SCC 26 because they did not deal with the substance of a critical issue raised by the defence at trial.
- [70] Mr. Eddison says the judge did not specifically reject Mr. Hryhorenko's evidence about viewing the CCTV video with two unidentified male police officers. Rather, he says that the judge implicitly accept that evidence, because he concluded that Mr. Eddison suffered no

prejudice from the failure to secure the video (as Mr. Hryhorenko could and did testify about what he had seen in the video). Mr. Eddison says there was no need to engage in that analysis if the alleged video did not exist. Alternatively, Mr. Eddison argues that if the judge disbelieved Mr. Hryhorenko about viewing the video with two unidentified police officers, his failure to explain why that evidence was not accepted means that he failed to engage with a critical issue raised by the defence.

- [71] Mr. Eddison also says the judge did not deal with his submission at trial that the actions of the police were unacceptably negligent in failing to preserve the video. This is because the judge focused only on whether Cst. Eades was negligent in failing to preserve the video she had viewed. The judge failed to deal with the focus of the residual category application, which was the unacceptably negligent conduct of the two unidentified officers. Mr. Eddison says the failure to deal with his arguments about that conduct leaves him unable to understand the basis for dismissal of his application for a stay based on the residual category of abuse of process.
- [72] The Crown contends there is no substance to the suggestion that the alleged loss of evidence was sufficiently prejudicial so as to impact Mr. Eddison's right to make full answer and defence. The Crown says the factual determinations made by the trial judge are sufficient to dismiss any possible application for a stay based on abuse of process arising from allegedly missing video evidence, whether on the main or residual ground. This is because the "lost video" was of marginal relevance to the altercation between Cst. Sargent and Mr. Eddison and was not relevant to how Cst. Karellas was injured. Rather, the Crown says that the judge simply decided that any evidence from the video or Mr. Hryhorenko's recollection was available to the defence in the form of Mr. Hryhorenko's testimony.
- [73] The Crown further submits that the Reasons easily meet the test for sufficiency of reasons set out in *Sheppard and R. v. R.E.M.*, 2008 SCC 51. It submits that the Reasons fully summarize the evidence and the submissions that Mr. Eddison now re-emphasizes on appeal. When reading the Reasons as a whole and in context, the Crown says it is clear that the judge rejected Mr. Eddison's contention that there was sufficient evidence about a failure to secure the alleged video to establish police misconduct to warrant a stay of proceedings.

Analysis

- [74] The parties agree that consideration of the sufficiency of reasons requires an appellate court to read the reasons as a whole, in the context of the evidence and the arguments at trial. In *R.E.M.*, after referring to *Sheppard* and subsequent jurisprudence, Chief Justice McLachlin summarized the approach appellate courts are to take when considering sufficiency of reasons as a ground of appeal:
- [35] In summary, the cases confirm:

- (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see Sheppard, at paras. 46 and 50; Morrissey, at p. 524).
- (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
- (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

[Emphasis added.]

- [75] In Sheppard, the Court provided a more detailed summary of the law on the duty of a trial judge to give reasons, including the proposition, relied on by Mr. Eddison, that reasons are of particular importance where the evidence is confused and contradictory:
- [55] Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.
- [76] In this case, Mr. Eddison relies on the evidence about Mr. Hryhorenko's interview with the two unidentified police officers and the allegedly missing CCTV video as confusing or contradictory evidence on a key issue. He says that the judge's failure to resolve this contradictory evidence means that he cannot know why his application was dismissed and why he was convicted. The Crown says it is clear from the record why the abuse of process arguments were rejected, even though the judge's Reasons did not specifically reject Mr. Hryhorenko's evidence about his alleged discussion with the two unidentified police officers. It refers to Justice Binnie's statement in Sheppard:
- [46] These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene.

[Emphasis added.]

- [77] In my view, there is little merit to Mr. Eddison's argument. When the Reasons are examined in the context of the evidence and the parties' submissions, Mr. Eddison is not left in any doubt as to why his application for a stay of proceedings was dismissed. The judge clearly rejected his submission that the police failed to properly investigate the charges against him or that they failed to secure relevant CCTV evidence in a negligent manner.
- [78] The judge set out the evidence in great detail. As I have indicated above, the Reasons include an extensive review and summary of the evidence of all of the witnesses. It is not suggested that the judge failed to refer to relevant evidence or that he misstated the evidence in any way. This includes the evidence of Mr. Hryhorenko, which was fully canvassed by the judge, including his testimony about being interviewed by two uniformed male police officers shortly after the altercation: Reasons at paras. 245-253. The judge set out Mr. Hryhorenko's description of seeing "the small female police officer being injured when the accused fell on her": Reasons at para. 250. He referenced Mr. Hryhorenko's testimony that the video showed the same activity he described in his version of events.
- [79] In addition to fully summarizing the evidence, the judge set out the submissions of the parties on the Charter applications in great detail. Mr. Eddison's submissions are summarized: Reasons at paras. 267-285. Mr. Eddison argues that the judge failed to consider his submission about the negligent conduct of the unidentified officers who allegedly spoke to Mr. Hryhorenko and focused solely on the evidence of Cst. Eades. However, the judge's summary included a lengthy bullet point recital of the defence arguments, including his arguments about the two unidentified police officers (at para. 284):
- That Mr. Hryhorenko testified that he interacted with two VPD members immediately after the altercation between the accused and Constable Sargent and that he reviewed with those officers the footage in which he observed the accused fall onto Constable Karellas, which footage was not preserved or seized at the time by the two VPD members;
 - That the CCTV surveillance footage would be highly relevant, and critical to the defence of the accused. Nothing meaningful was done to preserve or seize the footage after January 15, 2018, and the evidence is no longer available;
 - That while Constable Eades' evidence is inconsistent with Mr. Hryhorenko's evidence, it is possible that Constable Eades viewed the CCTV surveillance footage with a different hospital employee, and failed to watch the proper time frame or camera angle;
 - That the court ought to draw an adverse inference in relation to VPD conduct as they deliberately failed to preserve or seize the CCTV surveillance footage when the two VPD members watch that footage with Mr. Hryhorenko. They would have known that Constable Karellas was injured when the accused fell on her and not do to any kick. This amounts to a cover-up;

- [80] After summarizing the evidence and submissions, the judge made findings of fact, and on the critical issue of credibility, in order to arrive at his conclusions on the Charter applications. In considering the main ground of abuse of process--whether the actions of the state made it impossible for Mr. Eddison to have a fair trial--the judge did focus on the evidence of Cst. Eades about her efforts to secure CCTV evidence. He found that she was a credible and reliable witness. He accepted that she was the VPD officer assigned to the task of doing a canvass of adjacent businesses to locate CCTV evidence, and he accepted her evidence that the video she reviewed at the hostel had no evidentiary value with respect to the altercation between Mr. Eddison and the officers.
- [81] The judge also considered Mr. Hryhorenko's testimony. Without commenting negatively about that evidence, the judge noted that the identity of the two male VPD members who allegedly came into the hostel "remains a mystery" and that whatever CCTV footage Cst. Eades and Mr. Hryhorenko viewed is no longer available. He then stated (reproduced from above for convenience):
- [313] However, the accused does have the benefit of the testimony of Mr. Hryhorenko, who says he went to a window of the hostel and at that time saw the accused falling backwards onto Constable Karellas. He said that he did not see anybody kick anyone. What he observed through the window is consistent with what he testified he viewed on the CCTV footage with the two VPD members.
- [82] With this in mind, the judge then found that the accused's right to a fair trial had not been irreparably harmed by a failure to secure and/or preserve the CCTV footage. Even accepting Mr. Hryhorenko's evidence at face value, the judge concluded with respect to the main category of abuse of process that Mr. Eddison had failed to establish a breach of his s. 7 Charter rights.
- [83] I see nothing incorrect about the judge's approach to the main category of abuse of process. It is apparent from the Reasons that, regardless of whether two unidentified male officers had viewed the CCTV evidence, the judge accepted Cst. Eades' testimony that she had viewed the footage and found nothing of evidentiary value. Further, since Mr. Hryhorenko said the video was consistent with what he seen through the window, it is apparent that Mr. Eddison had the benefit of Mr. Hryhorenko's testimony on that version of events. The judge ultimately rejected that version of events, finding Mr. Hryhorenko's evidence to be unreliable.
- [84] Despite directing his appeal at the residual category of abuse of process, Mr. Eddison's submissions seem to challenge the judge's findings for the purpose of the main category. In my view, the fact that the judge focused on Cst. Eades' actions and appeared to accept Mr. Hryhorenko's evidence at face value in order to consider the main category of abuse of process, has no bearing on the judge's findings on the residual category of abuse of process. When the Reasons are read as a whole, Mr. Eddison's suggestion that the judge failed to resolve contradictory evidence is simply incorrect.

- [85] The judge's conclusions on the residual category of abuse of process are set out in the clearest possible language:
- [343] Similarly, I find that the accused has failed to establish that there is any evidence to support his contention that the police either directly or indirectly conducted themselves in a manner that was intended to deceive the court through fabrication of evidence or covering up of evidence in relation to the investigation of the accused.
- [344] I find that in relation to the residual category of abuse of process, the accused has failed to establish on a balance of probabilities that there was any state misconduct that would undermine the integrity of the judicial process.

[Emphasis added.]

- [86] Contrary to Mr. Eddison's submissions, the judge clearly explained why he rejected the defence submissions on the residual category of abuse of process. The judge accepted Cst. Eades' evidence and he concluded that there was no evidence in support of the proposition that the police directly or indirectly did anything to deceive the court by fabricating or covering up evidence, including evidence about the existence of CCTV video. The only possible inference from these conclusions is that the judge did not accept Mr. Hryhorenko's evidence about his alleged interaction with two male police officers and his viewing of CCTV video with them. Rather, he accepted Cst. Eades' evidence that the CCTV video footage from the hostel cameras "did not depict anything of evidentiary value with respect to the altercation between Cst. Sargent and the accused".
- [87] When the Reasons are examined in the context of the evidence and submissions at trial, it is plain or "clearly intelligible" why the judge found that the defence had failed to establish a breach of his Charter rights on a balance of probabilities. He concluded that there was insufficient evidence to support a claim that there was missing, relevant CCTV evidence or that the police failed to carry out a proper investigation in that regard. To the contrary, he accepted Cst. Eades' testimony about reviewing the CCTV footage, and that of multiple other witnesses, including Mr. Foran and Mr. Hryhorenko, that the police had not mistreated or used excessive force in any manner during their altercation with Mr. Eddison. I would dismiss Mr. Eddison's appeal accordingly.

Disposition

- [88] I would allow the Crown's appeal and set aside the acquittal on Count 6. I would enter a conviction on that count and remit the matter to the trial court for sentencing. I would dismiss Mr. Eddison's appeal on Counts 4 and 5.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Willcock"

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Prepared on 26 October 2026 · Esheria