

CANADA / JUDGMENT

R. v. Evanshen

2020 BCSC 1626

COURT

Supreme Court of British Columbia

DECIDED

30 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1626 R. v. Evanshen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Evanshen,

2020 BCSC 1626

Date: 20201030

Docket: 27813

Registry: Vancouver

Between:

Her Majesty the Queen

Respondent

And:

Luke Jared Evanshen

Appellant

Before: The Honourable Madam Justice Watchuk

On appeal from: Provincial Court of British Columbia, February 4, 2019 (conviction) and April 25, 2019 (sentence) (R. v. Evanshen, North Vancouver Docket No. 64950-1)

Reasons for Judgment

The Appellant appearing on his own behalf:

L.J. Evanshen

Counsel for the Respondent:

M.L. Crisp

Place and Dates of Hearing:

Vancouver, B.C.

July 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2020

Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [10]

II. LAW

[11] - [19]

A. Statutory Basis for Summary Conviction Appeals

[11] - [12]

B. Appeal from Conviction

[13] - [15]

C. Sentence Appeal

[16] - [18]

D. The Assessment of Credibility

[19] - [19]

III. THE REASONS OF THE TRIAL JUDGE

[20] - [42]

A. Count 1 - Assault of Gavin Gambhir

[21] - [32]

B. Count 2 - Assault of Cst. McKerracher

[33] - [42]

IV. ISSUES

[43] - [46]

A. Appeal from assault convictions

[43] - [46]

V. DISCUSSION

[47] - [105]

A. Assistance from the Trial Judge - Trial fairness

[48] - [52]

B. Unreasonable Verdict

[53] - [98]

1. Count 1

[57] - [74]

(a) Video evidence

[61] - [63]

(b) The Crown's Discretion Whether to Call a Witness

[64] - [73]

(c) Conclusion - Count 1

[74] - [74]

2. Count 2

[75] - [98]

(a) Injuries

[91] - [97]

(b) Conclusion - Count 2

[98] - [98]

C. Appeal from Sentence

[99] - [105]

VI. CONCLUSION

[106] - [106]

I. INTRODUCTION

- [1] On this summary conviction appeal, Luke Jared Evanshen was charged with and convicted of assaulting Gavin Aman Gambhir (Count 1), and assaulting Police Constable Michael McKerracher (Count 2). Counts 3, 4 and 5 were charges of uttering threats to cause death or bodily harm to three individuals. On Count 3 Mr. Evanshen was found not guilty, and Counts 4 and 5 were stayed. All of the relevant events occurred on July 25, 2017. Although Mr. Evanshen has now changed his name to Dominus Rex Maximus Marcus Aurelius Israel Benjamin Jacob Joseph, I will refer to him by his former name as stated on the Information, #64950-1.
- [2] On June 1, 2018, in North Vancouver Provincial Court, the trial commenced before the Honourable Provincial Court Judge B. Dyer (the "Trial Judge"). The appellant represented himself. The trial continued on October 17-18, November 1, and December 7, 2018.
- [3] In oral reasons on February 4, 2019 (the "Reasons"), the Trial Judge found the appellant guilty of Counts 1 and 2, and not guilty of Count 3. Crown counsel directed a stay of proceedings on Counts 4 and 5.
- [4] On February 6, 2019, the appellant filed a Notice of Appeal against his conviction.
- [5] On April 25, 2019, the Trial Judge sentenced the appellant to a 30-month conditional discharge concurrent on Counts 1 and 2.
- [6] On June 27, 2019, the appellant filed a Notice of Application for extension of time to appeal (sentence). On September 25, 2019, this Court granted the appellant an extension of time to file his Notice of Appeal from sentence.
- [7] On December 4, 2019, the appellant delivered to the Crown and the Court the transcripts of proceedings required for his conviction and sentence appeals.
- [8] On January 27, 2020 the appellant's application to this Court pursuant to s. 683(5)(e) of the Criminal Code, R.S.C. 1985, c. C-46, to stay the probation order to which he was sentenced was dismissed.
- [9] May 27, 2020 was scheduled for the hearing of both the conviction appeal and the sentence appeal. That hearing date was adjourned to July 8 due to the COVID-19 pandemic and the appeal proceeded on that date.
- [10] For the reasons that follow, I would dismiss the appeals against both convictions and sentence.

II. LAW

A. Statutory Basis for Summary Conviction Appeals

- [11] The authority for a summary conviction appeal is s. 813 of the Criminal Code. That section states that a defendant may appeal from a conviction and against sentence.
- [12] Section 822 of the Criminal Code provides that some of the indictable appeal sections of the Code, namely ss. 683-689 with the exception of ss. 683(3) and 686(5), apply to summary conviction appeals.

B. Appeal from Conviction

- [13] The test to be applied by an appellate court in determining whether a verdict is unreasonable or cannot be supported by evidence is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15 at paras. 36-37. The focus of the inquiry is whether there is any evidence to support the Trial Judge's findings based on the totality of evidence before him or her, and whether the verdict logically flows from those findings: *R. v. Ceal*, 2012 BCCA 19 at para. 25.
- [14] Under s. 686(1)(a) of the Criminal Code, the court may allow the appeal where it is of the opinion that:
- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice.
- [15] With respect to credibility assessments, which figure prominently in this case, a reviewing court "cannot interfere with those assessments unless it is established that they 'cannot be supported on any reasonable view of the evidence'": *R. v. R.P.*, 2012 SCC 22 at para. 10.

C. Sentence Appeal

- [16] Section 687(1) of the Criminal Code states that on the hearing of an appeal against sentence the court of appeal may, unless the sentence is one fixed by law, consider the fitness of the sentence and (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or (b) dismiss the appeal.
- [17] Deference is owed to the decision of a sentencing judge. Appellate intervention is only justified where (1) the sentencing judge has committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that had an impact on sentence; or (2) the sentence is demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at paras. 54-55.

- [18] Different standards of review apply to different kinds of findings. In *R. v. Bacon*, 2020 BCCA 140, the Court of Appeal explained the various standards of review as follows:
- [40] On questions of fact and inferences of fact, a reviewing court must ask "whether there is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33. Madam Justice Bennett explained this standard as it applies in the criminal law in *R v. Nuttall*, 2018 BCCA 479:
- [269] To state it simply, a palpable and overriding error is an obvious error that erodes the result.
- [41] This same standard applies to findings of credibility (*R v. Gagnon*, 2006 SCC 17 at para. 10). That means that a finding of fact based on acceptance by the judge of a witness's testimony may only be interfered with if the trial judge made an error that, as noted by Justice Moldaver in dissent in *R v. Le*, 2019 SCC 34 at para. 206, is "plainly seen" (*Housen* at para. 6), and is "shown to have affected the result" (*H.L.* at para. 55).
- [42] Questions of law, on the other hand, are reviewed on a standard of correctness. This standard applies to an absence of evidence to support a finding of fact because such an absence is not a question of fact but a question of law alone (*Nuttall* at para. 272).

D. The Assessment of Credibility

- [19] In cases where a trier of fact is presented with contradictory evidence, the trier of fact must assess the credibility of the witnesses and analyse or weigh the contradictory evidence with a view to determining whether the Crown has proven its case beyond a reasonable doubt. Under the well-established framework set out in *R. v. D.W. (W.D)*, [1991] 1 S.C.R. 742 at para. 11, the following principles apply to the assessment of credibility in the criminal context:

First, if you believe the evidence of the accused, obviously you must acquit;

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

III. THE REASONS OF THE TRIAL JUDGE

- [20] Although the Reasons deal with the evidence in a manner that is not linear, on a thorough review of the Reasons the Trial Judge found the following facts and accepted the evidence as follows:

A. Count 1 - Assault of Gavin Gambhir

[21] On the afternoon of July 25, 2017, the appellant went to the Steve Nash fitness facility in West Vancouver to exercise. Afterwards, he went to a nearby store and purchased a six-pack of "Filthy Dirty IPA" (with an alcohol content of either 7% or 7.2%) and consumed them all between approximately 6:00 p.m. and 7:30 p.m. After drinking the beer, the appellant returned to the gym to get his bag from the locker room.

[22] Mr. Gambhir was the fitness manager of the appellant's gym. When he was working that evening, he received information that the appellant had, earlier in the day, made threatening remarks and that the appellant had left the gym clearly frustrated and upset. When the appellant returned to the gym to get his bag, Mr. Gambhir went to meet the appellant, in the company of three employees, and told him his membership was to be revoked.

[23] The Trial Judge described Mr. Gambhir's testimony about what happened next, including the two head butts which founded the charge of assault in Count 1, at paras. 17-24 of the Reasons:

[Mr. Gambhir] again received no response but noted the accused was very fidgety and not making eye contact with him. The accused then left the change room with his gym bag with Mr. Gambhir and his 3 employees following behind.

In the training area outside the change room, suddenly the accused started yelling at Mr. Gambhir "liars" 8 or 9 times and saying he did nothing with Mr. Gambhir each time asking in a relaxed but assertive tone that he please leave the gym.

During his departure the accused on a number of occasions facing Mr. Gambhir both approached him to within a few feet and assuming what Mr. Gambhir described as a fighting stance called him a liar. Gambhir reacted by stepping backwards not wanting the accused to feel threatened but feeling threatened himself. He again asked the accused to leave. No contact occurred at this point.

The accused then turned and still angry continued to depart from the facility with Mr. Gambhir and his 3 employees following. Just before leaving the gym, the accused turned and stepped towards Mr. Gambhir one more time and again called him a liar. Gambhir put his hands in a defensive like posture and again asked him to leave in a more assertive tone of voice. The accused then walked into the mall hallway outside the Steve Nash gym with Mr. Gambhir following. At this point, the accused stopped half way down the hall between the Steve Nash gym and the exterior mall exit door. He was then being filmed both by a following gym member and a gym employee.

At this point the accused turned and screaming words to the effect that he was "God" or "would see him in God" at Mr. Gambhir, bumped or butted his forehead against Mr. Gambhir's head. It was a small tap, not hard at all according to Mr. Gambhir.

Again Mr. Gambhir put his hands up, stood back and asked the accused in an assertive manner not to touch him and to please leave Park Royal. The accused's response was to point his finger one inch from Mr. Gambhir's nose while calling him a liar. Mr. Gambhir said he then felt threatened by the accused and just wanted him out.

At this point, one of his employees called the police.

The accused then turned and walked to the exterior mall exit door, went out but then again, when just outside the door, turned towards Mr. Gambhir who was following and ran at him and head butted him a second time. He estimated the force of the blow to be 12-15 lbs, "not very hard" but hard enough to get a reaction out of him. Mr. Gambhir pushed him away and the accused then left, walking towards the bus stop. He said he wasn't injured by the accused and that throughout his dealing's with him, he was motivated to have regard to the safety of gym members present this evening as well as his own.

[24] The Trial Judge then referred to the evidence of the appellant. In brief, the appellant testified that Mr. Gambhir was verbally and physically aggressive towards him and accosted him in the gym change room, falsely accusing him of earlier misconduct and banning him from the gym. The appellant said he felt very threatened by him. As he walked through the change room towards the exit, Mr. Gambhir and Mr. Henriksen, the facility's assistant manager, blocked his way and inhibited his departure. The appellant walked through the men into the gym area and said words to the effect "you're Satan". The appellant then testified that he walked out of the gym into the mall, followed by Mr. Gambhir, Mr. Henriksen and several others. The appellant was yelling at them that they were liars or Satan, and referred to himself as God. He testified that when he was approximately five feet outside the exit doors, Mr. Gambhir forcefully pushed him twice, both times causing him to stagger but not fall. The appellant then walked away towards the bus stop.

[25] As the Trial Judge reviewed, in cross-examination the appellant was insistent that the video evidence showed that Mr. Gambhir had touched him first as he was leaving the gym and mall, and said that he had acted in self-defence at all times. He said that as he was leaving the mall he turned to face Mr. Gambhir to defend himself from physical aggression approaching him from behind. He initially did not agree that his head had connected with Mr. Gambhir's but when pressed said that he could not recall, he was not sure. Later when asked if he had head butted Mr. Gambhir, he denied doing so, saying that Mr. Gambhir had postured his body close to his, putting his nose in his face. He said that Mr. Gambhir had head butted him not once but twice. The Trial Judge observed that the video evidence did not confirm his evidence in this regard. The appellant further testified that after he and Mr. Gambhir touched, the latter then punched him in full force three times.

[26] With respect to this count, the Trial Judge accepted the testimony of Mr. Gambhir. He found that he was credible and gave his evidence in a fair and objective way. The Trial Judge also found that Mr. Gambhir's testimony was corroborated by video evidence presented by the Crown, and was not contradicted or shown to be unreliable in cross-examination.

- [27] On the other hand, the Trial Judge did not find the appellant to be a credible witness. He had consumed a significant amount of alcohol prior to the events in question, which the Trial Judge found materially affected his mental processes, behaviour and conduct that evening. This was reflected, he observed, in the many biblical and unusual references the appellant made to Mr. Gambhir as well as later to the police. The Trial Judge also noted that the appellant was at times either unresponsive to or evasive in answering questions, and that there were inconsistencies in his direct evidence and cross-examination, though not all on material points. In the result, the Trial Judge found that wherever the evidence of the appellant differed from that of Mr. Gambhir or the police officers, he preferred their evidence to that of the appellant.
- [28] The evidence of the sequence of events accepted by the Trial Judge was that: the appellant lightly head butted Mr. Gambhir in the hall leading to the mall exit; outside the mall he again head butted Mr. Gambhir with more force; and, Mr. Gambhir then pushed the appellant in self-defence.
- [29] The appellant's evidence that Mr. Gambhir pushed him outside the mall was consistent with the evidence of Mr. Gambhir.
- [30] However, the Trial Judge did not find the appellant to be a credible witness. His testimony that Mr. Gambhir assaulted or head butted him outside the mall was not believed, nor was his denial of head butting Mr. Gambhir.
- [31] The Trial Judge found that Mr. Gambhir, in pushing the appellant after he head butted Mr. Gambhir, was acting in his own self-defence. Further, when the appellant head butted Mr. Gambhir, he was not acting in self-defence.
- [32] The Trial Judge found that the Crown had proven beyond a reasonable doubt that the appellant assaulted Mr. Gambhir with the two head butts. The first head butt alone would have had been de minimus.

B. Count 2 - Assault of Cst. McKerracher

- [33] The Trial Judge accepted the evidence of Cst. McKerracher, the victim of the assault in Count 2. Constables McLean and Sorg also testified. He found all of the police witnesses to be credible.
- [34] The Trial Judge found that the appellant left the mall and took a bus towards his home instead of waiting for the police to arrive in order to avoid an interaction with the police.

[35] Cst. McKerracher, who was in plainclothes, had received information that the appellant was arrestible for assault. He was provided with the appellant's address and saw somebody who resembled the description he had been given of the appellant get off a bus nearby. He approached the appellant, identified himself as a police officer, and shined a flashlight on the badge around his neck. When he asked the appellant if he was Luke, the appellant quickened his pace and did not reply.

[36] Cst. McKerracher told the appellant he needed to stop and give his name. The appellant responded aggressively that his rights were being infringed and that his name was "God".

[37] Cst. McKerracher could smell liquor on the appellant's breath. He got closer to the appellant and told him he was not free to go.

[38] The circumstances that followed were described by the Trial Judge at paras. 38-41:

The accused then adopted an aggressive fighting stance of fighting posture in front of him with his hands in closed fists at mid chest level and was breathing heavily. McKerracher then radioed for police assistance believing the accused was about to fight or run away.

He then told the accused he was under arrest but didn't recall what he had said or then specifying a reason for it.

He tried to grab his arm. The accused was then yelling loudly and aggressively and tried to pull away when told he was under arrest. He attempted a "Step through take down" manoeuvre with the accused which was ineffective as the accused stepped out of it. He grabbed his shirt and the accused then grabbed his lapels. They spun a few times in a stand up wrestling match. Then McKerracher saw the accused lock his right arm and believing he was about to be punched in the face, hit the accused with a closed fist punch in the centre of his face. He then unsuccessfully attempted to use an arm bar to take him down. Ultimately he was able to kick his feet out and take the accused to the ground cutting both his own knees on the ground in the process.

He then tried to get the accused on to his stomach in order to hand cuff him telling him to stop resisting. He was unsuccessful as the accused was very strong.

[39] Other officers then arrived on the scene. Cst. McLean, the second officer on the scene, saw the appellant and Cst. McKerracher grappling, each having their hands on the upper body of the other, and spinning in circles. He heard Cst. McKerracher demand that the appellant get on the ground before he saw them go down. Cst. McLean advanced with a police dog and repeatedly told the appellant to stop fighting, commands which the appellant ignored. The officer released his dog, who put his mouth on the appellant's leg and then fastened onto his backpack. Officer McLean assisted in handcuffing one arm of the accused, who was violently resisting, and Cst. McKerracher was able to cuff the other. He observed the appellant attempt to fight vigorously even 20 minutes after being hand cuffed. The appellant resisted everything they tried to do with him.

- [40] Cst. Sorg, another officer who attended the scene, similarly described the appellant's conduct once hand cuffed as combative and actively resisting.
- [41] An ambulance was called and the appellant was taken to hospital. His nose had been broken.
- [42] The Trial Judge found that the arrest of the appellant was lawful, and that throughout the majority of Cst. McKerracher's efforts to lawfully arrest him, the accused very actively resisted and assaulted the officer who was in the course of performing his lawful duty. At all material times the appellant knew that Cst. McKerracher was a police officer.

IV. ISSUES

A. Appeal from assault convictions

- [43] The appellant lists several grounds of appeal on conviction in his filed written argument, but does not articulate any grounds for his appeal against sentence.
- [44] The appellant raises the following issues:
- 1) The legal precedent as established in the cases of both R. v. Wright, 2002 BCSC 1198 and R. v. D.L.M., 2018 BCSC 1247, should secure me a judgement of acquittal in this appeal, based upon my right to equal treatment under the law. The facts of both of these aforementioned cases parallel the facts of my own case and appeal. I strongly attest to the integrity of both of these citations in reference. This established legal precedent is far stronger than any of the citations that I have been offered in response to my appeal thus far. The facts, pleadings and considerations of Agin and Gendreau, Gould, Kuzyk and Craig, all of which fully constitute the citations offered in response, and have been cited by the crown in previous instances, do not coincide with this appeal.
 - 2) The Trial Judge's findings of guilt were unreasonable or unsupported by the evidence:
 - a) Especially with regard to the obvious mitigating factor of the injuries sustained to my face.
 - b) The failure to consider relevant evidence and/or necessary inquiry into evidence.
 - During my cross-examination of Gavin Gambhir, several of my questions were wrongfully dismissed by the Trial Judge.
 - Who was the individual that recorded the video evidence and why was this individual excluded from any witness testimony or considered in the Trial Judge's reasons?
 - Mark Henricksen, the caller to police and complainant/witness clearly visible on the video evidence, was present on initial witness list, but his testimony was withheld. I would to cite the judgment of Ivan William Mervin Henry v. Her majesty the Queen, and the precedent it establishes with regard to the withholding of exculpatory evidence by the Crown during matters of criminal appeal.

- 3) That the actions taken against me in both prosecution and executive decision were in violation of both human and Charter rights.
 - 4) The Trial Judge was biased, prejudiced, and discriminated against me.
 - 5) The Trial Judge misapprehended the evidence.
 - 6) The Trial Judge made an unreasonable finding of fact.
 - 7) The Trial Judge erred in failing to apply a legal principle to the assessment of evidence. The trial process was unfair and the Trial Judge did not provide enough assistance to ensure a fair opportunity to make full answer and defence.
- [45] The appellant also states that he was acting in self-defence with regard to both assault charges and submits that this defence was not properly dealt with by the Trial Judge.
- [46] I would re-state the issues on the appeal, having regard to the provisions of the Criminal Code as follows:
- (1) Was the Trial Judge's verdict unreasonable or not supported by the evidence, per s. 686(1)(a) (i) of the Criminal Code?
 - (2) Was the trial unfair to the Appellant in a way that constitutes a miscarriage of justice, per s. 686(1)(a)(iii) of the Criminal Code?
 - (3) Was the sentence imposed by the Trial Judge clearly unreasonable or demonstrably unfit, as contemplated by s. 687 of the Criminal Code?

V. DISCUSSION

- [47] In dealing with the grounds of appeal raised by the appellant, I will refer to his submissions and those of the respondent.

A. Assistance from the Trial Judge - Trial fairness

- [48] The appellant raises trial fairness issues with respect to the assistance provided by the Trial Judge when he represented himself at trial. The law in this regard was recently set out by the British Columbia Court of Appeal in *R. v. Wyatt*, 2018 BCCA 162 at paras. 11-13:
- [11] Trial Judges have an obligation provide some minimal assistance to self-represented accused persons. Failure to do so may result in an unfair trial, leading the appeal court to set aside the conviction and enter a new trial: *R. v. Moghaddam*, 2006 BCCA 136.
- [12] Providing the necessary minimal judicial assistance to a self-represented accused can be difficult, as on occasion--and of course most definitely not always--persons accused of a crime may be unwilling to listen, or have slight intellectual or psychological challenges that are heightened in the stressful atmosphere of the courtroom. A judge presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused.

- [13] ... In considering trial fairness, the overriding question is whether the accused 'received adequate assistance from the trial judge to bring out his defence with 'full force and effect.'"
- [49] In this case, the respondent highlights the following assistance provided by the Trial Judge. In addition to providing adjournments to the appellant to consider his position on calling additional witnesses, the Trial Judge:
- (a) ensured the appellant understood the counts before he entered a not guilty plea;
 - (b) explained the trial process including the Crown's opening and the calling of witnesses, and briefly introduced cross-examination;
 - (c) explained the presumption of innocence, his right to testify, that it would not be held against him if he did not testify, and encouraged the appellant to seek clarification from him if he had any questions at all;
 - (d) ensured the appellant had an ability to write things down and encouraged him to take detailed notes;
 - (e) after the direct examination of the first witness (Mr. Gambhir), offered the appellant advice about cross-examination, including how to attempt to show that a witness had misrepresented things; that short questions could be more effective; to avoid compound questions; and that if he was going to call evidence that he should put his version to the witness; and
 - (f) explained the use that could be made of a witness's prior statement.
- [50] Towards the close of the Crown's case, the Trial Judge reminded the appellant that he was not obligated to testify or to call his own witnesses, that he was presumed innocent, and that the Crown had a high burden. He also informed the appellant that if he testified the Crown would be able to cross-examine him, including on his criminal record if he had one.
- [51] I am satisfied that the appellant received adequate assistance from the Trial Judge to put forward his defence with full force and effect. I would not accede to this ground of appeal.
- [52] The appellant did not make oral submissions regarding the stated ground of appeal of the trial judge having been biased, prejudiced and discriminating against him. From my review of the transcript there would appear to be no merit whatsoever to these claims and I therefore need not consider them further.

B. Unreasonable Verdict

- [53] In addition, the appellant submits that the Trial Judge's findings of guilt were unreasonable or unsupported by the evidence, that the Trial Judge misapprehended the evidence, and that the Trial Judge made unreasonable findings of fact. The respondent Crown characterises these grounds as the issue of whether the assault convictions were unreasonable verdicts. I will consider these grounds raised by the appellant as an issue of unreasonable verdict.

- [54] The findings of guilt were founded on findings of the credibility of the witnesses. The Trial Judge instructed himself at the outset of his Reasons on the application of reasonable doubt to the issue of credibility and cited the relevant law. In arriving at the findings of guilt beyond a reasonable doubt on Counts 1 and 2, the Trial Judge considered the credibility of the appellant and of the complainants throughout his Reasons.
- [55] The Trial Judge reviewed the evidence of the complainants, Mr. Gambhir and Cst. McKerracher, and the appellant. The Trial Judge made credibility assessments after further setting out the relevant legal principles. The Trial Judge again self-instructed on the W(D) principles at the conclusion of the Reasons.
- [56] The Trial Judge found some of the evidence of the appellant to be true and credible. With regard to the two assaults, he rejected the appellant's evidence of those events because he did not find the appellant to be a credible witness, importantly due to his alcohol consumption prior to the incidents that gave rise to the charges. The Trial Judge found that that would have materially affected his mental processes at that time. The Trial Judge also observed that the appellant was unresponsive or evasive in answering questions, and that there were a number of inconsistencies in his evidence. At times he did not recall the events or their sequence.

1. Count 1

- [57] The Trial Judge found that the assault on Mr. Gambhir had been proven beyond a reasonable doubt at paras. 106-107 of the Reasons. Self-defence was considered and rejected:

I find that on his departure from the Steve Nash gym on the evening of July 25 when the accused throughout was in my view manifesting strong symptoms of being impaired by the alcohol he had just consumed, that he twice head butted Mr. Gambhir, on the second occasion more severely than on the first which if standing alone would not in itself merit a criminal conviction. Thus the Crown has proven he assaulted Mr. Gambhir beyond a reasonable doubt. When Mr. Gambhir pushed him away he was clearly acting in his own self defence.

I find that when Mr. Evanshen twice head butted Mr. Gambhir he was not acting in his own self defence and Crown has proven this beyond a reasonable doubt.

- [58] In arriving at these conclusions, findings of credibility were also made regarding the issue of self-defence in the assault on Mr. Gambhir. The Trial Judge did not accept the appellant's explanation. For example, at para. 102 of the Reasons, the Trial Judge noted:

A further example is his explanation as to why he turned his body to face Mr. Gambhir on his way out - either that he feared he would be punched in the back of the head or in self defence. This evidence makes little sense to me. Surely the accused well understood at the time that he was then an unwelcome patron of the gym and was being escorted outside, nothing more.

[59] The appellant relies on *R. v. Wright*, 2002 BCSC 1198. However in that case, the Trial Judge erred in his W(D) assessment by choosing one version of events over another (para. 11). In this case, the Trial Judge correctly applied W(D) at para. 114 of his Reasons. The Trial Judge stated that even though he rejected the appellant's evidence, that there was sufficient evidence to convict beyond a reasonable doubt.

[60] I will discuss here two additional issues raised regarding Count 1.

(a) Video evidence

[61] In his submissions regarding Count 1, the appellant queries who recorded the video evidence and why that person did not testify. With regard to the admissibility of the video, the respondent points to the fact that the video was played for Mr. Gambhir. Mr. Gambhir identified himself in the video and confirmed it accurately depicted what happened. The appellant did not testify that the video was inaccurate.

[62] As noted by the Alberta Court of Appeal, "a trial judge is entitled to authenticate a video recording by using circumstantial evidence of one or more witnesses, provided such evidence establishes to the requisite standard of proof that the video in question is a substantially accurate and fair depiction of what it purports to depict": *R. v. Bulldog*, 2015 ABCA 251 at para. 37.

[63] I do not find any error in the use of the video at trial. I would not accede to this ground of appeal.

(b) The Crown's Discretion Whether to Call a Witness

[64] The appellant further submits that regarding Count 1, the Crown failed to call certain witnesses that it ought to have called, including the maker of the video and Mark Henriksen.

[65] The Crown is not obligated to call every witness who might have relevant evidence. As stated in *R. v. Jackson*, 2005 BCCA 539 at para. 15:

As was made clear in *R. v. Cook*, there is no requirement that the Crown call all the witnesses who might have relevant evidence... In order to prove its case, the Crown must call all witnesses whose evidence is "essential to the narrative" . . . If the Crown does not call all such witnesses, it risks not proving all of the elements of the offences charged. In some cases, where no explanation is given for the failure to call the complainant, the trier of fact may consider drawing an adverse inference (*R. v. Cook* at para 51). Where . . . the evidence "essential to the narrative" has been given, drawing an inference that another witness' evidence, on the same matter, would be adverse to that given, would ignore the principles that the Crown has discretion in putting in its case, including which witnesses to call, that there are many reasons why a particular witness would not be called, and that the defence may call a witness who he thinks may be helpful to his case.

- [66] At trial, the appellant was concerned that Mr. Henricksen had not been produced as a witness. He said he wanted Mr. Henricksen to admit that he had lied and that his steroid use caused him to act aggressively. Mr. Henricksen had attended at the trial, but for medical reasons was unable to testify. The trial Crown chose to proceed without his testimony. The Trial Judge explained to the appellant that he had the option of calling his own witnesses. The Trial Judge later raised with the appellant the possibility of an adjournment so that he could explore the possibility of calling Mr. Henricksen as a witness. The Trial Judge also advised the appellant that duty counsel was available to assist him.
- [67] The Trial Judge stood down court to give the appellant some time to consider whether he would like to seek an adjournment. The appellant chose to seek an adjournment and his case was adjourned until December 7, 2018.
- [68] On December 7, 2018, the appellant returned to court but had not taken any steps to call any witnesses. The appellant eventually decided to close his case and not take further steps to call any additional witnesses. The Trial Judge explained to the appellant that he did not want the appellant to feel rushed or that he was not able to have a fair opportunity to present his case. After this explanation, the appellant chose to close his case rather than call additional witnesses.
- [69] The Crown exercised its discretion and called the witnesses it needed to prove the essential elements of its case. The appellant was given ample opportunity to call additional witnesses but declined to do so.
- [70] I do not find any error in the trial proceeding without the evidence of Mr. Henricksen or the video operator. I would not accede to this ground of appeal.
- [71] On December 7, 2018, the appellant returned to court but had not taken any steps to call any witnesses. The appellant eventually decided to close his case and not take further steps to call any additional witnesses. The Trial Judge explained to the appellant that he did not want the appellant to feel rushed or that he was not able to have a fair opportunity to present his case. After this explanation, the appellant chose to close his case rather than call additional witnesses.
- [72] The Crown exercised its discretion and called the witnesses it needed to prove the essential elements of its case. The appellant was given ample opportunity to call additional witnesses but declined to do so.
- [73] I do not find any error in the trial proceeding without the evidence of Mr. Henricksen or the video operator. I would not accede to this ground of appeal.
- (c) Conclusion - Count 1

[74] The finding of guilt for the assault offence set out in Count 1 was supported by the evidence of the complainant which the Trial Judge evaluated and accepted. The guilty verdict logically flowed from the Trial judge's findings of fact and credibility based on the totality of the evidence before him and was therefore not unreasonable.

2. Count 2

[75] After reviewing the evidence of the officers, which he found to be credible, the Trial Judge also found that the assault of Cst. McKerracher was proven beyond a reasonable doubt. His reasons were brief (at paras. 108-110):

... I find that Constable McKerracher learned in a police dispatch and I understood as well from Constable Griffith, a fellow officer, and between approximately 9:27-9:34 p.m. that Mr. Evanshen had threatened and assaulted someone at the gym and was thus arrestible for these 2 charges.

As a result, he attended on 17th Street essentially looking for him and located him thereon and eventually arrested him for these charges. I find that the test referred to in *R. v. Storrey* at paragraph 17 is met and that the arrest was lawful and made in accordance with s. 495(1)(a) of the Criminal Code of Canada.

I find that the accused knew at all material times that Constable McKerracher was a police officer and that throughout the majority of Constable McKerracher's efforts to lawfully arrest him, the accused very actively resisted and assaulted McKerracher in the course of his performing his lawful duty.

[76] To be sufficient, a trial judge's reasons must indicate the basis for the conviction and allow for meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26. However, even where these are absent, it is not a reversible error if, on an examination of the entire record, it can be understood how the verdict was reached by the trial judge. As the Court explained in *R. v. R.E.M.*, 2008 SCC 51 at paras. 15-16:

This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

It follows that courts of appeal considering the sufficiency of reasons should read 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; *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at p. 524).

[77] The Crown's position in her closing submissions had been that the assault of Cst. McKerracher occurred when the appellant "bladed his feet, put his hands at mid-level chest height, closed his fist and began deep breathing". While she explicitly relied on s. 265(1)(b) of the Criminal Code, non-contact assault, a substantial portion of her submissions regarding Count 2 concerned the appellant's vigorous efforts to resist arrest later in his

interaction with Cst. McKerracher. As I understand the Crown's submissions, her purpose in doing so was to underscore the appellant's heightened mental state and behaviour at the time as support for Cst. McKerracher's evidence that he had been concerned for his safety in the face of the appellant's posturing for a fight. However, the manner in which the Trial Judge summarized the Crown's position in his Reasons suggests that he may have misapprehended it (at para. 85):

As to count 2, the alleged assault of Constable McKerracher said to be in the cause of resisting his lawful arrest, Crown submitted that the accused knew McKerracher (albeit in plain clothes) was a police officer, he was told he was under arrest and he strenuously resisted arrest. Further, the arrest without warrant was lawful pursuant to s. 495(1)(a) CCC and the decision in *R. v. Storrey* [1990] 1 SCR 241 at paragraph 17. In arresting the accused, Constable McKerracher was entitled to rely on a fellow officer's instructions as occurred here.

- [78] The Trial Judge did not make any specific finding with respect to what conduct constituted the assault against Cst. McKerracher. However, his findings that the officer's arrest was lawful and that "throughout the majority of Constable McKerracher's efforts to lawfully arrest him, the accused very actively resisted and assaulted McKerracher in the course of his performing his lawful duty" indicate, in my view, that it was the appellant's conduct during his post-arrest interactions with the officer that grounded the Trial Judge's finding of guilt. The appellant's assumption of the aggressive stance with bladed feet occurred at point when he had been detained but not yet arrested.
- [79] Although the Trial Judge's Reasons did not address the alleged assault against Cst. McKerracher upon which the Crown relied, I find that his finding of guilt was, nevertheless, supported by the evidence and not unreasonable.
- [80] Count 2 in the Information charged that the appellant "did assault Police Constable Michael McKerracher, with intent to resist the lawful arrest of himself, contrary to Section 270(2) of the Criminal Code". Section 270(2) sets out the punishment for the offence but the offence itself is defined in subsection (1). Given how the Crown particularized the offending conduct in the count, s. 270(1)(b) is the relevant provision. It provides that it is an offence to assault a person with intent to resist or prevent the lawful arrest or detention of himself or another person.
- [81] An element of the offence is an assault, which is defined in s. 265(1). A person commits an assault when he (a) without consent, applies force intentionally to another, directly or indirectly; or (b) attempts or threatens, by an act or a gesture, to apply force to another if he has, or causes the other person to believe upon reasonable grounds that he has, present ability to effect his purpose (the third definition of assault is not relevant here). The requirement that the appellant have committed an assault is not diminished by the fact that the offence of assault with intent to resist arrest occurs within the context of police officers attempting to effect a lawful arrest.

[82] For the purpose of s. 270(1)(b), the assault must also have been committed with the intent to resist a lawful arrest. Essential to that state of mind would have been an awareness on the part of the appellant that he was under, or about to be placed under, arrest: *R. v. Tom* (1992) 79 C.C.C. (3d) 84 at para. 24 (B.C.C.A.).

[83] In this case, the Trial Judge found that Cst. McKerracher's arrest of the appellant was lawful and in accordance with s. 495(1)(a) of the Code. That provision authorizes a police officer to arrest someone without warrant where the officer believes, on reasonable grounds, that the person has committed or is about to commit an indictable offence. As set out in *Storrey* at para. 17, there is a subjective and objective element to the test for a lawful arrest under s. 495(1)(a):

In summary, then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest.

[84] The Trial Judge found this test to have been met, having also found that Cst. McKerracher had learned from police dispatch as well as from a fellow officer that the appellant had threatened and assaulted an individual at the gym, and was thus arrestable for these two charges. Both assault and threatening are hybrid offences that are deemed indictable unless the Crown elects to proceed summarily. Moreover, it is settled law that the officer who effects the arrest need not be the person with the subjective grounds and that he can rely on instructions or directions from a colleague: see, for example, *R. v. Debot*, [1989] 2 S.C.R. 1140. Accordingly, the Trial Judge did not err in finding that the arrest was lawful.

[85] The Trial Judge found that at all material times the appellant knew that Cst. McKerracher was a police officer. That finding is amply supported by the appellant's testimony. The evidence also establishes that after Cst. McKerracher called for backup, he told the appellant he was under arrest. When the officer went to grab the appellant's right arm to effect the arrest, the appellant yelled and pulled away. A struggle between the two men then ensued. The Trial Judge's summary of Cst. McKerracher's evidence about this was reproduced earlier in these reasons. For ease of reference, however, I repeat part of it here (at para. 40):

He tried to grab his arm. The accused was then yelling loudly and aggressively and tried to pull away when told he was under arrest. He attempted a "Step through take down" manoeuvre with the accused which was ineffective as the accused stepped out of it. He grabbed his shirt and the accused then grabbed his lapels. They spun a few times in a standing wrestling match. Then McKerracher saw the accused lock his right arm and believing he was about to be punched in the face, hit the accused with a closed fist punch in the centre of his face. He then unsuccessfully attempted to use an arm bar to take him down. Ultimately he was able to kick his feet out and

take the accused to the ground cutting both his own knees on the ground in the process.

- [86] Although the Trial Judge did not identify the specific conduct that constituted the assault, the appellant's grabbing of the officer's lapels and grappling with him, as well as his locking his right arm in preparation to punch, are sufficient to meet the definition of assault in s. 265. In *R. v. Assante-Mensah*, 2003 SCC 38, the Supreme Court, in discussing the distinction between a charge under s. 270(1)(b) and one under s. 145(1)(a) for escaping lawful custody, cited examples of conduct that can constitute the former (at para. 50):

In my view, these charges are not mutually exclusive. The appellant was aware of his arrest and, in shoving the door into the inspector, the appellant was resisting by intentionally assaultive behaviour the continuing state of arrest initiated by the touch: see, e.g., *R. v. Platten* (2000), 258 A.R. 153 (Alta. Prov. Ct.), at p. 158 (after lawful arrest, the arrestee pushed and flailed against the officer constituting assault under s. 270(1)(b) Cr. C.); and *R. v. Morris* (2001), 283 A.R. 272 (Alta. Q.B.), at p. 278 (the accused's acts constituted an attempted assault under s. 270(1)(b) where, after the arrest, he cocked his fist in preparation for hitting the officer).

- [87] There was sufficient evidence for the Trial Judge to conclude that the appellant's conduct went beyond simply resisting Cst. McKerracher's efforts to effect a lawful arrest and was assaultive. I also find there was sufficient evidence from which to conclude that the appellant assaulted Cst. McKerracher with the specific intent of resisting his arrest. Indeed, the appellant testified that when Cst. McKerracher began to physically engage with him after informing him he was a police officer and that he was under arrest, he (the appellant) tried to topple them both to the ground because he was "resisting for [his] very soul", as he felt the detention and arrest were excessive in the circumstances.
- [88] The Trial Judge took the appellant's submissions of self-defence regarding this count to mean that the arrest was unlawful and involved an excessive use of force, and could have been effected differently. The law is clear that where an officer is acting lawfully in the course of their duties, an accused is denied the defence of self-defence: *R. v. Pena*, [1997] B.C.J. No. 1435 (S.C.) at para. 6; *R. v. Plummer* (2006), 214 C.C.C. (3d) 84 (Ont. C.A.). The Trial Judge found that the arrest was lawful and that Cst. McKerracher was acting in the course of performing his lawful duty. Self-defence was therefore not an available defence to the appellant.
- [89] The appellant relies upon *R. v. D.L.M.*, 2018 BCSC 1247, a summary conviction appeal of an assault on a peace officer. The police entered the "appellant's dwelling without warrant or the appellant's permission; on entry into the apartment by happenstance, seeing her sitting on the toilet, partly undressed but not in a state of distress" (para. 128). The appellant demanded the officers leave, but they remained for some time. The altercation in that case arose when the police tried to physically move the appellant. In response, the appellant struck an officer in the eye. The Court held that the trial judge had erred in finding the police were in the lawful execution of their duties. The Court allowed the appeal and substituted a verdict of acquittal because the police were not in the lawful execution of their duties, which

is an essential element of a charge of assault peace officer.

[90] In this case, however, the Trial Judge found as a fact that Cst. McKerracher was in the lawful execution of his duties. D.L.M. therefore has no application.

(a) Injuries

[91] With regard to Count 2, the appellant raises the injuries to his face as a mitigating factor which ought to be considered in determining if the finding of guilt was unreasonable and unsupported by the evidence. A police dog was also deployed on him. The appellant did not frame these as Charter issues either at trial or on appeal.

[92] It is apparent that the appellant suffered an injury to his face when Cst. McKerracher struck him in the nose. This occurred during what the Trial Judge found to have been a lawful arrest. The officer testified that at the point they were wrestling with each other, the appellant "pull[ed] back and cock[ed] his arm with a closed fist". The officer believed he was about to be punched in the face and threw a closed-fist punch at the appellant's face to distract and disorient him in order to gain control of one of his arms and help get him to the ground. The punch stunned the appellant sufficiently to enable Cst. McKerracher to put him into an arm-bar, though the officer was not immediately able to take him to the ground. The appellant sustained a broken nose as a result of the officer's punch.

[93] With respect to the police dog, Cst. McLean testified that when he arrived on the scene, he found Cst. McKerracher and the appellant grappling. Cst. McLean removed his dog Ranger from his police vehicle in the hopes that the dog's presence would cause the appellant to surrender. While holding the dog's harness, Cst. McLean walked toward Cst. McKerracher and the appellant, and yelled repeated commands to the appellant to put his hands to the side and to stop fighting. However, the appellant continued to struggle with Cst. McKerracher on the ground. Cst. McLean believed that the appellant was trying or struggling to "get away and get up".

[94] Because the appellant continued to resist and disregard his commands, Cst. McLean deployed Ranger. He maintained control of Ranger's harness and instructed the dog to go for the appellant's left leg, as he felt doing so was necessary in the circumstances to try to get the appellant under control. Ranger initially went to the appellant's leg but immediately came off it and fastened onto the appellant's backpack instead. As this did not have any meaningful effect and it looked as if Cst. McKerracher might be losing control of the appellant, Cst. McLean physically assisted with the arrest of the appellant.

[95] The thrust of the appellant's argument appears to be that his arrest could have been undertaken differently and without the excessive force that led to his injuries.

[96] As set out in s. 25(1) of the Criminal Code, a police officer is justified in using force to effect a lawful arrest so long as he acted on reasonable and probable grounds and only used as much force as was necessary in the circumstances. As the Supreme Court observed in *R. v. Nasogaluak*, 2010 SCC 6 at para. 35:

Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *Bottrell v. R.* (1981), 60 C.C.C. (2d) 211 (B.C. C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

See also *R. v. De Silva*, 2018 BCSC 1069 at para. 16.

[97] The appellant's primary injury appears to be the broken nose he sustained as result of Cst. McKerracher's punch to his face. As noted, the officer's evidence was that the appellant had pulled back and cocked his arm with a closed fist, leading the officer to believe he was about to be punched in the face. As a result, he punched the appellant in the face to distract and disorient him. On this appeal it is not necessary for me to determine the legal issue of whether the force Cst. McKerracher used in the course of effecting the lawful arrest was reasonably necessary in the circumstances given the appellant's conduct. The issue raised directly by the appellant, the injuries, will be taken into account on the sentence appeal, dealt with below, as a circumstance of the offence.

(b) Conclusion - Count 2

[98] On the totality of the evidence, the findings of fact for the assault peace officer offence set out in Count 2 were supported by the evidence of the complainant which the Trial Judge evaluated and accepted. The guilty verdict logically flowed from the Trial Judge's findings of fact and credibility and was therefore not unreasonable.

C. Appeal from Sentence

[99] The appellant has not set out any grounds of appeal on his sentence appeal in his submissions to the Court.

[100] The standard of review, as set out above, is deferential. The sentence of the Trial Judge should not be disturbed, absent an impactful error, or a demonstrably unfit sentence: *Agin* at para. 54

- [101] At the relevant time the available sentences for the offences of assault (s. 266) and assaulting a peace officer (s. 270), ranged from an absolute or conditional discharge (s. 730) to a sentence of six months jail. The appellant received a conditional discharge with 30 months probation.
- [102] The Crown submits that a fit sentence was imposed. It relies on the proposition that where an offender has no criminal record, and is convicted of assault of a peace officer, the court has recognized that the fact that the victim is a police officer is a significant consideration as "by virtue of their employment [peace officers] are vulnerable to attack and when this occurs courts must impose sentences that demonstrate the seriousness with which such conduct will be treated": *R. v. Allen*, 2015 ONSC 6092 at para. 34.
- [103] In imposing the sentence in this case, the Trial Judge stated that he granted a conditional discharge because the test set out in the Criminal Code was met. He found that it was in the appellant's best interests to do so, and not contrary to the public interest. The Trial Judge then imposed a sentence that he accurately described as "about the least onerous sentence" that could be imposed.
- [104] The Trial Judge referred to conditions of probation that would assist the appellant in receiving treatment. He described the appellant as a decent human being who does his best but who had had a bad day and a bad night. In doing so, he acknowledged the circumstances of the offender, the appellant, and of the offences. The injuries suffered by the appellant are a part of those circumstances. The sentence as a whole, in my view, has taken into account all of those circumstances including the injuries.
- [105] The Trial Judge had heard several days of evidence, including the testimony of the appellant. He was well positioned to impose a sentence. In the respondent's submission, the appellant received a sentence at the low end of the range. I agree. I would not interfere with the fit and appropriate sentence imposed by the Trial Judge.

VI. conclusion

- [106] The appeals against conviction and sentence are therefore dismissed.

"The Honourable Madam Justice Watchuk"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1626.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-evanshen-2020>

Prepared on 26 October 2026 · Esheria