

CANADA / JUDGMENT

R. v. Manhas

2020 BCCA 354

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 354 R. v. Manhas

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Manhas,

2020 BCCA 354

Date: 20201215

Docket: CA46232

Between:

Regina

Respondent

And

Rauvin Tara Manhas

Appellant

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated

June 28, 2018 (R. v. Manhas, 2018 BCPC 406, North Vancouver

Docket 65187-2-C).

Counsel for the Appellant:

E.V. Gottardi

C. van Wiltenburg

Counsel for the Respondent:

M.J. Sheardown

Place and Date of Hearing:

Vancouver, British Columbia

September 16, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 15, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

Summary:

The appellant was convicted of assault with a weapon and using a firearm while committing an offence, following an incident on the Sea to Sky Highway in which he pointed a firearm at another driver. The central issue at trial was whether he was acting in self-defence. He appeals his conviction on the grounds that the judge (1) relied on speculative reasoning; (2) misapprehended evidence; (3) provided insufficient reasons on a material issue; and (4) improperly assessed the elements of self-defence. Held: Appeal allowed and a new trial ordered. The trial judge erred by misapprehending evidence that was relevant to the appellant's perceptions and motivations within s. 34(1)(a) and (b) of the Criminal Code. The judge also erred by adopting an unduly narrow or literal approach to the evidence in her assessment of s. 34(1)(a). The appropriate remedy is a new trial.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] Following a Provincial Court trial, the appellant was found guilty of committing an assault with a weapon contrary to s. 267(a) of the Criminal Code, R.S.C. 1985, c. C-46 and using a firearm while committing an offence contrary to s. 85(1) of the Code. Judicial stays of proceedings were entered with respect to pointing a firearm and possession of a weapon, contrary to s. 87(1) of the Code.
- [2] The appellant challenges the convictions on several grounds, specifically that the trial judge erred by: (1) relying on speculation to conclude that the appellant was not credible and was not acting in self-defence; (2) misapprehending evidence material to self-defence; (3) providing insufficient reasons for preferring the evidence of the complainant over the appellant on a material issue; and (4) improperly assessing the elements of self-defence.
- [3] For the reasons that follow, I would allow the appeal and order a new trial.

Background

- [4] The allegations arose from an incident which occurred on the Sea to Sky Highway, just south of Squamish, B.C. around 1:00 a.m. on September 9, 2017.
- [5] A condensed version of the circumstances and the principal issue at the trial is contained at paras. 2-9 of the judge's reasons for judgment which are indexed as 2018 BCPC 406 (the "Reasons"):
- [2] Briefly, the accused and the complainant were stopped in traffic on their way to Vancouver due to a multi-vehicle collision. The highway had been closed for several hours and there was a lineup of vehicles stretching a great distance back from the accident scene toward Squamish.
- [3] Mr. Manhas arrived at the end of the line and parked his vehicle on the shoulder behind the last vehicle in line. He exited his vehicle to make inquiries about the situation. Mr. Burton arrived shortly after and was proceeding down the open southbound lane when he stopped because Mr. Manhas was gesturing at him. Mr. Manhas took exception to Mr. Burton attempting to queue jump by passing the line of vehicles parked on the shoulder. The men exchanged words and then each returned to their vehicles. Mr. Manhas said Mr. Burton threatened to tie him up and drag him down the road behind his vehicle.
- [4] After a few minutes, Mr. Burton got out and approached Mr. Manhas, who was sitting in the driver's seat of his vehicle. As he neared Mr. Manhas, he observed him to be holding a shotgun in his hands, with the barrel pointed at Mr. Burton.
- [5] Identification of Mr. Manhas as the person who pointed the shotgun at Mr. Burton was not contested. There was no issue taken that the shotgun is a firearm. The issue to be decided is whether the evidence raises a reasonable doubt that Mr. Manhas wielded the firearm in self-defence.

- [6] The Crown called Mr. Burton, the complainant, James Ennis, an independent witness, and two police officers. Mr. Manhas also testified. All of the civilian witnesses are mature males, of good character, who were sober, and not known to each other.
- [7] Mr. Manhas possessed and was transporting the shotgun legally. It was in his vehicle to be dropped off at a gun shop to have a safety accessory attached. Mr. Manhas purchased the gun shortly before the incident to carry in the back country to protect against predators such as bears.
- [8] The credibility and reliability of the testimony of the witnesses is central to the determination of whether the Crown has proved beyond a reasonable doubt that Mr. Manhas was not acting in self-defence when he retrieved the firearm from under the back seat of his vehicle, loaded it with a novelty shell, which was a real casing containing a penknife, and pointed it at Mr. Burton.
- [9] As the ethnicity, ages, physical size, and height of each of the men impacted the interaction between them, I will describe that now. Mr. Burton is a Caucasian male who is 57 years of age. He is almost six-foot-six-inches tall and has a fit and muscular physique. Mr. Manhas is a South Asian male. I do not have a note of his age, but he appeared to me to be in his thirties. He is approximately five-foot-six to five-foot-eight in height, by my estimation, and has a slim to medium physique.
- [6] The judge summarized what she considered to be the material evidence at paras. 10-28 of the Reasons. To paraphrase:
- Mr. Burton testified that he saw some vehicles passing the stalled traffic in the open southbound lane, so he pulled out and followed. He encountered Mr. Manhas waking up the road toward him and stopped to ask whether the highway had reopened. Mr. Manhas was angry and stuck his arm well into his vehicle and made a "fuck off" gesture with his hand in Mr. Burton's face. After further exchanges, Mr. Burton asked Mr. Manhas to remove himself from his vehicle and to stop. Mr. Manhas did so.
 - Mr. Burton said he saw Mr. Manhas walk toward his vehicle, and that he was mumbling as he stood outside the car. Mr. Burton got out of his car to see what Mr. Manhas was saying. Mr. Manhas continued to use hostile and profane language and Mr. Burton became upset. The two men stepped toward one another. Mr. Burton said his arms were down by his sides and Mr. Manhas put his hands on Mr. Burton and pushed him back. Mr. Burton pushed his chest out and told Mr. Manhas to stop. He also snickered to himself, as he is a much larger man than Mr. Manhas. Mr. Burton said he did not react other than to tell Mr. Manhas to leave him alone and go back to his car.
 - Mr. Burton returned to his vehicle. He could hear Mr. Manhas continuing to talk, so he got out again to determine what Mr. Manhas was saying. As he walked towards Mr. Manhas, Mr. Manhas leaned out his window, moved his elbow and exposed the barrel of the firearm which was cradled in his hands and pointed at Mr. Burton's chest.

- Mr. Manhas testified, after the initial exchange by Mr. Burton's car, that Mr. Burton got out of his vehicle and approached Mr. Manhas and pushed him with both hands to his chest. Mr. Manhas asked him what he thought he was doing and said he was pushed again and travelled back several feet. He also described being chest-bumped or body-checked.
 - Mr. Manhas told Mr. Burton that what he had done was an assault and was told he "had a big mouth for a little guy." Mr. Manhas said Mr. Burton then opened the hatch of his SUV and showed him a rope and said that "after he kicked his ass he was going to tie him up and drag him down the road."
 - Mr. Manhas told Mr. Burton he was insane for threatening to kill him, but Mr. Burton continued to chest-bump him, causing him to move backwards. Mr. Burton then raised his fists as though he was going to hit Mr. Manhas, so Mr. Manhas put his hands on his arms to prevent any blows. Mr. Manhas then told Mr. Burton to calm down, but was chest-bumped back until he was up against his truck. At that point, Mr. Burton had his finger pointed in Mr. Manhas' face and was telling him to get back in his truck. Throughout this interaction, both were swearing and arguing. Mr. Manhas said he told Mr. Burton he had a firearm in his truck, but this did not seem to diminish his aggression.
 - Each man then got back into their cars. Mr. Manhas did not call the police or otherwise seek help from other drivers. Instead, he took his shotgun and openly loaded it, hoping Mr. Burton would see. When Mr. Burton got out and approached Mr. Manhas' car again, Mr. Manhas raised the shotgun so it would be visible.
 - Mr. Ennis, a third party witness, testified that he saw Mr. Manhas telling Mr. Burton off about trying to queue jump and Mr. Burton was being belligerent about being told what to do. Mr. Burton got out of his car and approached Mr. Manhas standing outside of his car.
 - Mr. Ennis described Mr. Burton as being menacing and aggressive, but also in control and measured in his tone. He kept his hands at his sides. He described Mr. Manhas as standing up for himself, both physically and verbally, and although he was backing up, he was "not giving up his ground easily." He also heard a snippet to the effect that Mr. Burton had a rope and could drag Mr. Manhas, and he saw him gesture to the back hatch but did not see him open it. He saw no physical contact between them at any time.
 - The two men then got back in their vehicles. A minute or two passed, then he saw Mr. Burton get out and walk, in an unremarkable manner, toward Mr. Manhas. Mr. Burton said something about Mr. Manhas pointing something at him and that it was not allowed in Canada. Mr. Manhas made a comment about being afraid for his safety.
- [7] The judge also found that Mr. Manhas then immediately exited his vehicle to speak to a group of women who had pulled in behind Mr. Burton's vehicle: Reasons at para. 42. There had been no evidence to this effect at trial, a fact that is material to the disposition of this appeal as I discuss in greater detail below.

- [8] Following their confrontation, Mr. Manhas approached Mr. Burton's vehicle to "reassure [Mr. Burton] he was not a threat", while Mr. Burton spoke with police over the phone: Reasons at paras. 16 and 22. The police then arrived and arrested Mr. Manhas.

Reasons of the Trial Judge

- [9] The judge observed that the credibility and reliability of the witnesses was central to the determination of the self-defence issue.
- [10] She accepted Mr. Ennis' evidence in its entirety, and preferred it to the evidence of both Mr. Manhas and Mr. Burton where it conflicted. The judge rejected Mr. Burton's evidence that he had not been aggressive or threatening in his actions. Rather, she found that Mr. Burton was unduly offended, lost his temper and attempted to verbally and physically intimidate Mr. Manhas.
- [11] In what the appellant submits is a key passage of the Reasons as they relate to the issues on appeal, the judge found:
- [31] Based on the evidence of Mr. Ennis and Mr. Manhas, I accept that Mr. Burton threatened to tie Mr. Manhas up and drag him behind his car. I find this comment could reasonably be interpreted, particularly by a person of colour, to be racist in tone and, therefore, intentionally hateful and demeaning. I do accept his evidence that Mr. Manhas was continuing to speak to him once the two men had returned to their vehicles after the interaction between them outside their vehicles.
- [12] Mr. Manhas did not specifically testify that he viewed Mr. Burton's comment about the rope as racist.
- [13] With respect to Mr. Manhas' testimony, the judge said:
- [32] The evidence of Mr. Manhas was inconsistent in some areas from the account given in his statement. There were also inconsistencies in his evidence under oath. There were a number of improbabilities in his account. In particular, about why he did not retreat to his vehicle earlier, when he said Mr. Burton first threatened to attack him, and why he continued to sit in an unlocked vehicle, with the windows open, when he feared for his life. I found some of his testimony to be contrived or exaggerated. I find he may well have pictured a rope in his mind's eye, but that Mr. Burton did not open his hatch and show him a rope. I accept that he very quickly realized the seriousness of his conduct and immediately began to recast the events in an attempt to justify his decision to produce his shotgun and point it at Mr. Burton.
- [14] After reviewing the legal framework on self-defence which included *R. v. Williams*, 2013 BCSC 1774 and *R. v. Pétel*, [1994] 1 S.C.R. 3, the judge specifically rejected Mr. Manhas' evidence that Mr. Burton repeatedly pushed him with his hands or chest finding that there was little physical contact, if any, between them. On the judge's analysis, the force or threat to which Mr. Manhas responded was the threat made by Mr. Burton to tie Mr. Manhas up

and drag him down the road. The judge did not believe that Mr. Manhas subjectively viewed that threat as realistic or imminent in the circumstances.

- [15] The judge also observed that Mr. Manhas had a number of options open to him other than the threat of or use of force. He could have retreated to his vehicle and locked the doors, approached others to ask for help, or called the police. Instead, he accessed and loaded his firearm and continued to speak to Mr. Burton as he sat with the shotgun in his hands. He did so, she found, because he was "incensed and outraged by the, in his perception, overtly racist content of the threat made by Mr. Burton" and because he was "humiliated as a result of Mr. Burton's physical dominance over him": Reasons at para. 43.
- [16] In the result, the judge was satisfied that the Crown had established beyond a reasonable doubt that Mr. Manhas was not acting in self-defence.

Issues on Appeal

- [17] The appellant submits that the judge erred:
- a. by relying on speculative findings to conclude that the appellant was not credible and was not acting in self-defence;
 - b. in misapprehending evidence which was material to the analysis of self-defence, that is whether the appellant left his car after the incident in order to talk to the occupants of another vehicle that had arrived at the scene;
 - c. by providing insufficient reasons to explain her acceptance of the complainant's testimony and rejection of the appellant's testimony on a material issue; and
 - d. in her assessment of the elements of self-defence under s. 34(1) of the Criminal Code.

Discussion

- [18] By way of introduction I note that the judge's pathway to conviction is not readily apparent in her Reasons, in that she did not expressly state whether she was basing her rejection of self-defence on ss. 34(1)(a), (b) or (c) of the Criminal Code, or on some combination of the three. Section 34(1) provides:

Defence -- use or threat of force

34 (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

- [19] In *R. v. Khill*, 2020 ONCA 151 [Khill], leave to appeal granted [2020] S.C.C.A. No. 97, the Court outlined how this provision is to be applied in a given case:
- [64] Having described the elements of self-defence as defined in s. 34, it is helpful to relate those elements to the facts of this case. The jury, in deciding whether Mr. Khill should be acquitted on the basis of his self-defence claim, had to address three questions:
- Did Mr. Khill believe, on reasonable grounds, that Mr. Styres was about to shoot him? (s. 34(1)(a))
 - Did Mr. Khill shoot Mr. Styres for the purpose of defending himself from being shot by Mr. Styres? (s. 34(1)(b))
 - Was it reasonable in the circumstances for Mr. Khill to shoot Mr. Styres? (s. 34(1)(c))
- [65] Mr. Khill could only be convicted if the Crown convinced the jury, beyond a reasonable doubt, that the answer to at least one of the three questions posed above was "no"

[Citations omitted.].

- [20] A fair reading of the Reasons leads me to conclude that the judge rejected self-defence on the basis of ss. 34(1)(a) and 34(1)(b), being what some authorities have referred to as the "trigger" and the "motive": Khill at para. 42. The Reasons did not specifically address s. 34(1)(c), being the "response," and cannot be read, in my view, as reflecting a conclusion on that element of the defence.
- [21] That being the case, the appellant's task on appeal is to show that the judge made reversible errors in respect of both ss. 34(1)(a) and 34(1)(b).
- [22] This is in keeping with the way the appeal was argued by the parties, who addressed ss. 34(1)(a) and 34(1)(b) in their submissions.
- [23] Since I would allow the appeal on the basis of the second and fourth grounds, I will not address the first and third issues advanced by the appellant.

Misapprehension of Material Evidence: The Neighbouring Car

- [24] The parties agree that the trial judge misapprehended the evidence by finding that Mr. Manhas "immediately [got] out of his vehicle to speak to a group of females who had pulled in behind Mr. Burton's vehicle" after Mr. Manhas pointed the firearm, in that Mr. Manhas never did so: Reasons at para. 42. However, they disagree on the error's significance.

[25] The Complainant testified that after the shotgun incident, he spoke with the women, and they subsequently "decided to talk to the gentleman." Mr. Ennis testified that the women "pulled up alongside my vehicle and [the Appellant] also addressed the vehicle that pulled up and was kind of making his case to them." The Appellant testified that a woman "pulled into the left lane behind [the Complainant's vehicle" and "I was speaking [to the women] from within my car."

[26] During the appellant's cross examination, the judge intervened in order to clarify what had occurred:

THE COURT: Could I clarify something. Did you get out of your car and go and talk to [the women]?

A: No. So that's what I was getting at I had been speaking with the occupants of the other vehicle -

THE COURT: Right, but I'm not I just want you to answer that one question.

A: Oh. Which -

THE COURT: Did you get out of your vehicle to go and speak to the women in their car?

A: Oh, in their car. No, ma'am. They or the driver of that vehicle, because they had spoken with the man earlier -

THE COURT: No, sir, it's a very simple question. You either spoke to them from within your car or you got out of your car and spoke to them, which is it?

A: I was speaking to them from within my car. From my car. I'm sorry, Your Honour.

[27] Accordingly, despite the appellant's unequivocal evidence that he remained in his car while speaking to the women, and the lack of evidence from the complainant or Mr. Ennis to the contrary, the judge proceeded to find that the appellant "immediately [got] out of his vehicle" to speak to the women after pointing the firearm at the complainant.

[28] Mr. Manhas submits that this error was material to the judge's reasoning on self-defence and her assessment of his credibility.

[29] The Crown's position is that this evidence was not essential to the judge's reasoning, as she gave several other reasons for rejecting Mr. Manhas' claim that he held a reasonable belief that a threat of force was made against him which included:

- not retreating to his vehicle, closing his windows or locking his doors;
- not seeking assistance or calling the police;
- loading his firearm while Mr. Burton remained in his vehicle;
- continuing to speak to Mr. Burton, before and after pointing the firearm; and
- approaching Mr. Burton to "reassure him that he was not a threat."

Reasons at paras. 41-42.

- [30] The Crown primarily addressed s. 34(1)(a) in its submissions on this point while Mr. Manhas focussed on both ss. 34(1)(a) and 34(1)(b). The issue, in my view, touches on both subsections since the absence of fear would speak to both Mr. Manhas' perception of the threat and his motivations in wielding the firearm.
- [31] The relevant principles relating to this issue were recently summarized in *R. v. Razavi Zadeh*, 2020 BCCA 93:
- [38] The standard an appellant must meet to obtain relief on misapprehension of evidence grounds is high: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Webber*, 2019 BCCA 208 at para. 27. The error must be plainly identified. As Justice Lebel explained in *R. v. Sinclair*, 2011 SCC 40 at para. 53, "[t]he plain language or the thrust of the reasons must disclose an actual mistake." In addition, the misapprehension must go to a question of substance, must be material, and must play an essential role in the reasoning process that led to the conviction: *R. v. Swales*, 2014 BCCA 350 at para. 48. One way of determining whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *Lohrer* at paras. 6-9; *Sinclair* at paras. 53, 56.
- [39] It is not enough for the appellant to merely suggest a different interpretation of the evidence. Mere differences of interpretation on factual matters are not misapprehensions of evidence but simple disagreement with the factual findings made below: *Swales* at para. 49. A factual finding not shown to rest on a misapprehension of evidence is, of course, subject to a palpable and overriding error standard of review.

[Emphasis added.]

- [32] A misapprehension of evidence may amount to a miscarriage of justice under s. 686(1)(a)(iii) irrespective of whether the judgment was reasonable: *R. v. Lohrer*, 2004 SCC 80 at para. 1. As Justice Doherty explained in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at 541:

The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.

Cited in Lohrer at para. 1; and R. v. Liu, 2020 BCCA 235 at para. 28.

[33] In my view Mr. Manhas' position is correct. That is because the judge described his post-incident conduct and its relevance to her conclusions regarding self-defence this way:

[42] The conduct of Mr. Manhas after he pointed the firearm, in particular, in engaging a conversation with Mr. Burton about possessing the firearm legally, immediately getting out of his vehicle to speak to a group of females who had pulled in behind Mr. Burton's vehicle, and then approaching Mr. Burton to reassure him that he was not a threat to him, is inconsistent with being terrified and fearing for his safety to the extent that the wielding of a firearm was justified.

[Emphasis added.]

[34] The trial judge thus pinpointed the misapprehended fact as a key reason for rejecting Mr. Manhas' testimony that he feared Mr. Burton. This indicates, in my view, that the finding was an essential part of her reasoning process.

[35] A review of the Reasons in their entirety supports this conclusion. The judge had previously highlighted Mr. Manhas' options of "retreat[ing] to his vehicle clos[ing] the windows and lock[ing] the doors," suggesting that she understood Mr. Manhas' car to be a kind of safe haven: Reasons at para. 41. As Mr. Manhas' counsel submits, the trial judge's reasons "suggest that she viewed the Appellant's continued presence on the highway as an indication that he did not subjectively fear the Complainant." Immediately leaving his vehicle after pointing the firearm would therefore have suggested that he embellished his fear in his testimony.

[36] I also agree with the appellant that this misapprehension may in turn have affected the judge's assessment of his credibility. It may, for instance, have affected her decision to accept Mr. Burton's evidence concerning his and Mr. Manhas' interactions just prior to Mr. Manhas wielding the firearm. Given the nature of the judge's credibility findings, it would be impossible to reconstruct how the decision may have turned out differently absent the error.

[37] In my view, this error leaves the judge's conclusions respecting Mr. Manhas' subjective mindset on "unsteady ground" to quote the test from Lohrer and R. v. Sinclair, 2011 SCC 40 [Sinclair], in that it affects at least one of the judge's key findings to which I have referred. It clouds her conclusions arising from her consideration of both ss. 34(1)(a) and 34(1)(b).

[38] I would thus accede to this ground of appeal.

Elements of Self-Defence (The Scope of the Threat)

[39] I have referenced s. 34(1) of the Criminal Code and the Khill formulation of the test at paras. 18-19 above, and would reframe the approach in Khill to the circumstances in this case as follows:

- Did Mr. Manhas believe, on reasonable grounds, that Mr. Burton made a threat of force against him? (s. 34(1)(a));
- Did Mr. Manhas point the firearm for the purpose of defending himself from the threat of force? (s. 34(1)(b)); and
- Was it reasonable in the circumstances for Mr. Manhas to point the firearm at Mr. Burton? (s. 34(1)(c)).

- [40] Mr. Manhas "could only be convicted if the Crown convinced the [judge], beyond a reasonable doubt, that the answer to at least one of the three questions posed above was 'no': Khill at para. 65.
- [41] Mr. Manhas frames this ground of appeal in two ways. First, he argues that the judge failed to consider evidence of Mr. Burton's non-verbal threats and "unduly restricted the scope of the impugned threat," which led her to dismiss the threat as unrealistic. Second, he submits that the judge "treated the Complainant's inability to execute the specified threat as a barrier to establishing self-defence." He submits that the "threat" to which Mr. Manhas responded was the more general threat of physical violence, not just the rope threat, and Mr. Burton's inability to carry out the rope threat did not preclude Mr. Manhas from relying on self-defence with respect to the entire interaction.
- [42] The Crown's position is that the manner in which the appellant chose to present his defence is relevant to the judge's analysis of self-defence. It submits Mr. Manhas and his trial counsel were centrally focused on the rope threat such that it was reasonable for the judge, having considered all the evidence of other threats, to conclude that the rope threat was the threat to which Mr. Manhas was responding to.
- [43] The Crown further argues the judge did not fail to consider the more general threat of physical violence, and did not treat Mr. Burton's inability to carry out the rope threat as a bar to self-defence, relying in part on the independent factors referred to by the judge to which I refer at para. 29 above.
- [44] Mr. Manhas submits this issue is directly relevant to the s. 34(1)(a) analysis, which has both a subjective and an objective component, being a reasonable apprehension of force or a threat of force. He argues this is also relevant under s. 34(1)(b), since the presence of a credible threat makes it more likely that Mr. Manhas was acting out of fear or for protection in wielding the firearm.
- [45] This issue is therefore, to a certain extent, interrelated with the misapprehension issue, in that the judge's conclusions on Mr. Manhas' degree of fear may have influenced her findings on his perceptions of Mr. Burton's threats, and vice versa.
- [46] This ground of appeal falls within s. 686(1)(a)(i) of the Code, pursuant to the framework from *R. v. Beaudry*, 2007 SCC 5 [Beaudry] and *Sinclair*. As explained by Justice Fish (dissenting) in *Sinclair*, a Beaudry/Sinclair error may be found:

[16] where a trial judge draws an inference or makes a finding of fact that is (1) plainly contradicted by the evidence relied on for that purpose by the judge, or (2) demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge.

Cited in *R. v. P.(R.)*, [2012] 1 S.C.R. 746 at para. 28.

[47] An error of the second type may be found where "an essential inference that appears compatible with the evidence from which it is drawn implodes on contextual scrutiny": Sinclair at para. 21.

[48] A Beaudry/Sinclair error may be found even where the verdict was available on the record: Beaudry at para. 97; *R. v. Thompson*, 2019 BCCA 1 at para. 66. The error, however, must have "played a central role in the reasoning process that led to a conviction": Razavi Zadeh at para. 44.

[49] As explained by Justice Berger (concurring) in *R. v. A.(D.J.)*, 2016 ABCA 294, the Beaudry/Sinclair analysis requires a court to

[15] scrutiniz[e] the logic of the findings of fact or inferences drawn from the evidence admitted at trial. It follows that an appellate court must re-examine and, to some extent, re-weigh and consider the effect of the evidence.

[50] At paras. 38 and 39 of the Reasons, the judge stated:

[38] Based on the evidence, I accept the force or threat to which Mr. Manhas responded by wielding the firearm was the threat made by Mr. Burton to tie him up and drag him down the road. I accept that a reasonable inference can be drawn that this statement constitutes a threat to cause death or grievous bodily harm. However, I do not accept that Mr. Manhas subjectively believed the threat to do so was realistic or imminent in the circumstances.

[39] As he observed, in his statement to the police, and I paraphrase, "Even if there was a one percent [chance] he was going to drag me behind his vehicle, I shouldn't have to deal with that." On an objective basis, I find the threat was not capable of being carried out in all the circumstances. I accept that Mr. Manhas stated he was afraid for his safety when he was pointing the gun at Mr. Burton. However, I do not accept Mr. Manhas reasonably believed Mr. Burton was intending to physically assault him.

[51] I agree with Mr. Manhas' first argument on this point. The judge's reasoning process neither explicitly nor implicitly references other more general evidence that Mr. Burton was threatening to "kick [his] ass" as well as tie him up with a rope, a threat Mr. Burton expressed verbally and through menacing body language.

[52] Excerpts from the record highlight the close relationship between the rope threat and the general threat of physical violence. Three comments purportedly made by Mr. Burton speak to the latter:

· "you picked the wrong guy to fuck with";

- "you have a really big mouth on you for a little guy, and I'm going to shut you up"; and
- "after I kick your ass, I'm going to tie you up and drag you down the road."

[53] Other aspects of the testimony also assist on this issue. Mr. Manhas, for example, testified as follows during cross-examination, albeit in reference to the moments before he returned to his car:

Q until you introduced the firearm into the equation the confrontation between the two of you would at most have been a fistfight or some kind of hand-to-hand, if there had been a physical confrontation, correct?

A A fistfight with a man that was six foot five and 250 pounds.

Q But a fistfight as opposed to a confrontation with a - potentially being a weapon?

A Umm, that's correct. I had also - I mean my concern was that the fistfight may end with him carrying out this threat to tie me and drag me.

[Emphasis added.]

[54] He later testified that he interpreted the rope threat as a "threat to kill [him]":

Q I just don't understand, if you're afraid for your life, and then you're engaging in a debate about whether you're properly carrying that firearm, it just doesn't seem consistent?

A I'm telling him that I can have the firearm, that I'm transporting it legally, that the only thing I'm not allowed to do is to point it at people; however, he had been threatening me - he had been threatening to kill me, that's how I interpreted the dragging your vehicle comment, or dragging by rope comment, umm, and that I feared for my life and that he should leave me alone, get away from me.

[Emphasis added.]

[55] Mr. Ennis testified that he interpreted Mr. Burton's body language to suggest that the initial encounter could escalate into a "physical altercation." He added that the rope threat was "weird" and that he was more generally concerned for Mr. Manhas' safety stating:

A [Mr. Burton] wasn't really loud or flying off the handle. It was just more menacing, so I - it was just something that I - that I was struck by was he seemed to be careful in the way that he was menacing, so - for what that's worth.

Q Sure. Does it sound careful to you, when you tell somebody you're going to tie him up and drag him down the road?

A That was uncharacteristic to the rest of the event, and it caught my attention

Q That's a serious threat to take somebody's life, is it not?

A I heard a reference to rope and dragging, but that's - which is weird, to me.

Q Right.

A Yeah; I was concerned about things getting out of hand. I was concerned for [Mr. Manhas'] safety, at that point.

[56] The Crown appears to acknowledge the interplay between the two categories of threats when it states in its factum:

78. It can be seen from the appellant's evidence that the statements said to be "additional" threats ("I'm going to shut you up" and "after I kick your ass"), formed a part of the same overall threat emphasized by defence counsel and the trial judge - the threat to tie up the appellant and drag him down the road.

[57] When considered in this overall context, I am of the view that the trial judge's conclusion that "the force or threat to which Mr. Manhas responded by wielding the firearm was the threat made by Mr. Burton to tie him up and drag him down the road" was unduly narrow or literal, even when analysed solely in reference to the moment when Mr. Manhas wielded the firearm from his car: Reasons at para. 38.

[58] Furthermore, s. 34(1)(a) requires courts to consider the reasonableness of an accused's belief in a threat in light of all the circumstances: R. v. Mohamad, 2018 ONCA 966 at para. 215. The judge implicitly acknowledged this in the Reasons:

[35] I must consider the above factors in the context of the relevant circumstances which existed at the time the threat and use of force, being the wielding of the shotgun, was engaged in by Mr. Manhas. I must also carefully consider the perceptions of Mr. Manhas and whether he reasonably believed, in the circumstances, that Mr. Burton was going to assault him.

[59] Respectfully, where the judge fell into error is that she did not in fact consider all the relevant circumstances and, in my view, did not properly perform a s. 34(1)(a) analysis. As such, the judge's error may also be characterized as one of law within the ambit of s. 686(1)(a)(ii) of the Criminal Code.

[60] All of the relevant circumstances in this case included not only the rope threat, but also Mr. Burton's threats to "kick [his] ass" and his menacing body language. A review of the record leads me to conclude that all those threats were inextricably linked, such that evaluating each one essentially on a piecemeal basis imported an artificiality into the actual circumstances giving rise to the incident.

[61] I would add that even a hyperbolic threat, such as dragging the accused behind the complainant's vehicle, when viewed in its proper context, may give rise to a reasonable apprehension of a threat of force. That is because the subtext of a threat may differ from its literal meaning. Furthermore, a person may convey (and the other may interpret) meanings that are not perfectly rational when acting in the heat of the moment. The mere fact that an expressed threat is implausible on its face may not, of and by itself, determine whether it may give rise to a reasonable apprehension of a threat of force.

- [62] The judge acknowledged that the rope threat implied "a threat to cause death or grievous bodily harm," but appears to have concluded that since the rope threat was implausible, so too was any implied threat to use force: Reasons at para. 38.
- [63] For the reasons I have explained, I consider this to be a reversible error. In that regard I agree with the appellant that the error touches both ss. 34(1)(a) and 34(1)(b) as it may have influenced the judge's findings respecting Mr. Manhas' motivations in addition to those relating to his perceptions of the threat.

Conclusion

- [64] For the foregoing reasons I would allow the appeal.
- [65] Pursuant to s. 686(2)(b) of the Code I would order a new trial with respect to all the counts contained in the indictment. The curative proviso of the Code does not apply, in my view, in that it cannot be said that there is no "reasonable possibility that the verdict would have been different had the error in issue not been made": R. v. Bevan, [1993] 2 S.C.R. 599, at p. 617; R. v. Khan, 2001 SCC 86, at para. 28.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Dickson"

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