

CANADA / JUDGMENT

R. v. Meadows

2020 BCSC 1388

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1388 R. v. Meadows

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Meadows,

2020 BCSC 1388

Date: 20200917

Docket: 67829-1

Registry: Chilliwack

Regina

v.

Candice Robyn Meadows

Before: The Honourable Mr. Justice Crabtree

On appeal from: A decision of the Provincial Court of British Columbia,

dated June 5, 2019 (R. v. Meadows, Chilliwack File No. 67829-1)

Reasons for Judgment

Counsel for Crown (Appellant):

P.R.J. Blessin

Counsel for Accused (Respondent):

T.E. La Liberté, Q.C.

K.B. Wilkinson

Place and Dates of Hearing:

Chilliwack, B.C.

November 12, 2019

May 22, 2020

June 16, 2020

Place and Date of Judgment:

Chilliwack, B.C.

September 17, 2020

INTRODUCTION

- [1] The Crown appeals the acquittal of Candice Robyn Meadows (the "respondent") on the charge of assault causing bodily harm, contrary to s. 267(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]. The trial was heard on April 15, 2019, and the respondent was acquitted in a decision of the Provincial Court of British Columbia, dated June 5, 2019.
- [2] The Crown appeals the learned Provincial Court judge's decision, stating:
1. the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L. (Eng.)), was breached;
 2. the trial judge breached the duty of fairness to the Crown, by determining the case on a theory that was neither tested during the evidence, nor argued during submissions;
 3. the trial judge erred in finding self-defence justified the respondent's use of force toward the complainant; and
 4. the trial judge erred in finding the defence of others justified the respondent's use of force toward the complainant.
- [3] Issues 3 and 4 raise the same issue for consideration.
- [4] In supplemental submissions, the Crown submits the foregoing issues are errors of law requiring the order of acquittal to be set aside and an order for a new trial.
- [5] For the reasons that follow, the Crown appeal is dismissed.

OVERVIEW

- [6] The incident occurred on November 25, 2017, at Friendly Mike's Pub (the "Pub"), in Chilliwack, B.C. Earlier in the evening, the respondent, her mother, and a friend, had spent time at a casino across the street. They left the casino and made their way to the Pub, for a drink and to socialize.

- [7] While at the Pub, an argument occurred involving the respondent, the server, and the bartender, as to the quality of a drink served to the respondent. Ms. Longstaff, a staff member who had earlier completed her shift and remained after work to socialize with her boyfriend and another couple, was seated near by. She noticed the interaction at the bar and joined in the verbal argument.
- [8] The argument escalated into a barroom brawl, described by the trial judge in the following way (at paras. 41-42 of her reasons):
- [41] The context of these events are important. Ms. Meadows states that during the verbal argument at the bar Ms. Longstaff and her three companions all approached Ms. Meadows. Ms. Meadows is in the Pub with her friend Steve and her elderly mother. As seen in Exhibit 1, there are 12 to 17 other people who are all focused on Ms. Meadows and her companions at various points. At one point Ms. Meadows is held around the neck by an unidentified man who was standing to her left. Ms. Meadows struggled to free herself from that man, only to be pushed by another unidentified man standing to her right. Ms. Meadows' friend, Steve, is pulled and pushed. In that chaos, Ms. Meadows was concerned about her elderly mother who was on the floor of the Pub being trampled. Other people in the Pub were obviously concerned as well, because they attempted to help Ms. Meadows' mother and get her to safety.
- [42] Ms. Meadows states that she was trying to get to her mother but was being blocked by several other people who had pushed and pulled her and in one instance put her in a neck hold. The unidentified man who had Ms. Meadows in a neck hold did not leave her side when she broke free of the neck hold, but rather returned and approached her again. After Ms. Meadows breaks free from the neck hold, she is not only pushed by another man standing to her right, but an unidentified female also approaches her from the left, and several other persons approach her from the front.
- [9] In the course of her reasons, the trial judge reviewed the evidence and found that during the physical interaction the respondent grabbed hold of and pulled out a clump of the complainant's hair, and the complainant did not consent to the physical interaction. On this basis, the trial judge held the respondent assaulted the complainant; and in doing so, caused her bodily harm.
- [10] The trial judge then turned to a consideration of the defence of self-defence and the applicability of s. 34 of the Criminal Code. For the balance of the reasons, when reference is made to "self-defence", it is intended to incorporate self-defence and the defence of others. At para. 32 of reasons for judgment, the trial judge stated:
- [32] For Ms. Meadows to be convicted of the offence of assault the Crown must prove beyond a reasonable doubt all essential elements of the offence. The Crown must prove that the application of force was intentional and unlawful. The Crown must also disprove that Ms. Meadows acted in self-defence or in defence of another person.

- [11] The trial judge reviewed the elements of the defence, analysed the relevant evidence, and found the respondent did not start the brawl. The trial judge concluded the respondent acted in defence of her mother, stating at paras. 46-47:
- [46] I accept the testimony of Ms. Meadows that the scene at the Pub was chaotic and that there were a number of people pushing her, pulling at her, yelling and swearing. This description of the scene is consistent with the testimony of Ms. Reid, Ms. Longstaff, and Exhibit 1. Ms. Meadows stated that Ms. Longstaff simply was caught in the melee when she stepped between Ms. Meadows and the man who had grabbed Ms. Meadows by the neck. This testimony was not challenged in cross-examination. This testimony is consistent with Exhibit 1.
- [47] I find that Ms. Meadows acted in defence of her mother who was in imminent danger of harm. Her mother was injured that evening. The force exerted by Ms. Meadows was reasonable in the circumstances of a barroom brawl where Ms. Meadows had made repeated attempts to free herself from those surrounding her, but to no avail.

ISSUE 1: RULE IN BROWNE v. DUNN

- [12] The rule in *Browne v. Dunn* is not absolute in the sense that a failure to cross-examine a witness on a particular point of evidence requires that the evidence of that witness is disbelieved. The remedy available is dependent on a number of factors. As noted in *R. v. Quansah*, 2015 ONCA 237 (at para. 117), the factors include:
1. the seriousness of the breach;
 2. the context of the breach;
 3. the timing of the objection;
 4. the position of the offending party;
 5. any request to permit recall of a witness;
 6. the availability of the witness for recall; and
 7. the adequacy of an instruction to explain the relevance of the failure to cross-examine.
- [13] A timely objection to a breach of the rule in *Browne v. Dunn* is important and a relevant factor in the decision about remedy.
- [14] In this case, the Crown choose not to object at trial when the opportunity arose. This precluded the trial judge, in the event a breach was found, from determining the appropriate remedy. Based on the Crown's submission on appeal, I am not satisfied that there was a failure to cross-examine on a material point, or that this would form a separate ground on which to set aside the conviction.

ISSUE 2: PROCEDURAL FAIRNESS

- [15] The Crown argues the trial judge erred in determining the case without providing the Crown the opportunity to make submissions on what turned out to be the pivotal issue.
- [16] The relevant circumstances to this ground of appeal are as follows.
- [17] Following completion of the evidence, counsel proceeded to submissions. Having called a defence, counsel for the respondent proceeded first. In their submission, counsel focused on the Crown's failure to prove the essential elements of the offence. The thrust of counsel's submission was that the Crown had failed to establish that the respondent assaulted the complainant; and on that basis, should be acquitted. Counsel did not raise or argue that the respondent was acting in self-defence. No reference was made to s. 34 of the Criminal Code. The basis of their argument was that the assault did not occur.
- [18] In their submissions at trial, the Crown took the position the offence had been established. The Crown reviewed the evidence relevant to the allegation of assault, articulating the basis on which the essential elements of the offence of assault causing bodily harm were established. The Crown was responsive to the defence submissions. The Crown did not address the elements of self-defence, or whether it was applicable in the circumstances.
- [19] Counsel for the respondent provided a brief reply. But in doing so, no reference was made to the defence of self-defence.
- [20] At the conclusion of submissions, the trial judge reserved decision on the matter.
- [21] In reasons for judgment dated June 5, 2019, the trial judge found that the respondent committed the physical act of assault by pulling a chunk of hair from the complainant's scalp. Having done so, the trial judge considered and ultimately determined that the respondent acted intentionally and was acting in defence of her mother. The trial judge acquitted the respondent; and, in doing so, stated at paras. 47-48:
- [47] I find that Ms. Meadows acted in defence of her mother who was in imminent danger of harm. Her mother was injured that evening. The force exerted by Ms. Meadows was reasonable in the circumstances of a barroom brawl where Ms. Meadows had made repeated attempts to free herself from those surrounding her, but to no avail.
- [48] Based on the whole of the evidence I found that the Crown has not proven an absence of self-defence or defence of others and, therefore, has not proven beyond a reasonable doubt that there was an intentional and unlawful application of force.
- [22] The Crown submits, based on the principles of natural justice and as a matter of trial fairness, they ought to have been provided the opportunity to address the applicability of s. 34 of the Criminal Code and the defence of self-defence, prior to the matter being determined, because the issue had not been addressed by either counsel during the course of submissions.

- [23] Counsel for the respondent argues the Crown was required to address the essential elements of the offence, including negating self-defence. The Crown's failure to address the defence at trial cannot now be the basis on which to argue they were not given the opportunity to address the issue.
- [24] The essential elements relating to assault causing bodily harm, as noted in *R. v. D.L.W.*, 2013 BCSC 1327, are the following:
1. the accused intentionally applied force, directly or indirectly, to the complainant;
 2. the complainant did not consent to the application of force by the accused;
 3. the accused knew that the complainant did not consent; and
 4. the force applied caused bodily harm.
- [25] The respondent argues the trier of fact had an obligation to consider the defence of self-defence, relying on the Supreme Court of Canada's decision in *R. v. Cinous*, 2002 SCC 29 [Cinous]. It is submitted that the testimony heard at trial, together with the video evidence introduced, establish an evidential foundation for consideration of the defence. While the matter was not specifically raised by the defence, the Crown is obligated to argue the point at trial and the trial judge is still required to consider the issue.
- [26] Cinous, at para. 51, clarified the test for when a defence shall be put to the jury:
- [51] The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation.
- [27] The air of reality test was more recently described by the Supreme Court of Canada in *R. v. Cairney*, 2013 SCC 55 at para. 21:
- [21] Neither of these approaches is strictly correct. "[T]he air of reality test [is not] intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day": *R. v. Cinous* ... at para. 54, quoted by Fish J. in *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248, at para. 16. The question is whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether the elements of the defence of provocation are made out: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 41; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21. The trial judge may engage in a limited weighing of the totality of the evidence to determine if a jury acting reasonably on that evidence could draw the inferences necessary to have a reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation; see the companion case *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452. This Court, per Abella J., described the appropriate approach to the air of reality test in *Mayuran*:

In determining whether a defence has an air of reality, there must be an examination into the sufficiency of the evidence. It is not enough for there to be "some evidence" supporting the defence (Cinous, at para. 83). The test is "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (Cinous, at para. 65). For defences that rely on indirect evidence or defences like provocation that include an objective reasonableness [page431] component, the trial judge must examine the "field of factual inferences" that can reasonably be drawn from the evidence (Cinous, at para. 91). [para. 21]

[28] It is not disputed the obligation of a trial judge is to ensure that all relevant defences, whether raised by the accused or not, are considered. While Cinous involved a jury trial, the obligation of the trial judge is equally applicable in a judge alone trial.

[29] Addressing the defence of self-defence at trial involves a two-step process: R. v. John, 2011 BCSC 479 at paras. 11-13, 82-94.

[30] The first step involves a determination whether an evidential foundation exists for the trier of fact to consider the defence of self-defence. At the threshold stage, the trial judge determines whether the evidence, if believed, could permit a properly instructed jury (or trial judge) acting reasonably, to acquit.

[31] The second step, assuming there is an air of reality to the defence, involves a determination by the trier of fact whether the Crown has established, beyond a reasonable doubt, the accused did not act in self-defence.

[32] While the ultimate burden of proof on the defence of self-defence remains with the Crown throughout the trial, the evidentiary burden on the accused is to ensure there is an air of reality to each of the requisite elements of the defence: Cinous. Conversely, if the test is not met, a defence is not put to the jury or considered further in a judge alone trial.

[33] In Cinous, the Court summarized the first stage, at paras. 52-55:

[52] It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in R. v. Schwartz, [1988] 2 S.C.R. 443, at p. 466:

Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." [Emphasis added.]

The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. This idea was crucial to the finding in Osolin that the air of reality test is consistent with the presumption of innocence guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms.

- [53] In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, supra; *Park*, supra. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin*, supra; *Park*, supra; *Davis*, supra.
- [54] The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*, supra; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park*, supra. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.
- [55] Whether or not there is an air of reality to a defence is a question of law, subject to appellate review. ...
- [34] To further emphasize the point, Chief Justice Dickson in *R. v. Schwartz*, [1988] 2 S.C.R. 443, stated at para. 42:
- [42] Having said that, I would not wish to be understood to say that the Crown must lead evidence to anticipate each and every possible defence. One of the underlying ideas of the common law principle set out in *Edwards* is that it is not possible for the Crown to know in advance what defence the accused will raise. It is up to the accused to point out evidence, in either the Crown's case or in the defence evidence, if any, that will support a defence. Once the accused raises a defence the Crown must disprove it beyond a reasonable doubt.
- [35] In summary, while the trial judge retains a residual obligation to determine whether a defence should be considered, the obligation does not require the Crown to address a defence in the absence of the issue being raised by the defence or the trial judge.
- [36] The essence of the Crown's submission is that it did not have the opportunity to address the court on the threshold question when raised by the trial judge.
- [37] In the course of submissions, both counsel referred to *N-R Power and Energy Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 271. This was a civil case in which one of the issues raised was whether the application judge decided the outcome on a basis not raised or argued by the parties. In considering the matter, the Court set out the following general proposition at para. 62:

- [62] A judgment based on a claim not made or a theory not advanced and argued cannot stand. The fairness and reliability of the adversarial process demand that each side have notice of the other's claims and a full opportunity to respond to those claims: see *Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P.* (2011), 106 O.R. (3d) 677 (C.A.), at para. 6; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 58-62.
- [38] The foregoing passage identifies the principles in the civil context. Different considerations apply in the criminal context, as an accused is not normally required to put the Crown on notice as to their defence or theory of the case.
- [39] In *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536 at para. 27, Justice L'Heureux-Dubé discussed the origins of whether the principle of a party's right to be heard had developed in the criminal context:
- [27] ... The audi alteram partem principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In Blackstone's *Criminal Practice* (Murphy rev. 1993), the authors remark at p. 1529:

Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles - no man may be a judge in his own cause, and the tribunal must hear both sides of the case. [Emphasis added in original.]

- [40] The principle has been considered in a number of criminal cases.
- [41] *R. v. Huon*, 2010 BCCA 143 [Huon], involved a sentence appeal where the trial judge relied on a critical factor not canvassed by counsel. The trial judge held, without the benefit of submissions, the appellant was the driving force in the commission of the offence and treated his role as an aggravating factor. On appeal, the Court held the trial judge erred in failing to raise the issue with counsel and not providing counsel with an opportunity to address it. In allowing the appeal, Mackenzie J.A. stated at para. 6:
- [6] The trial judge did not alert counsel to his view of the appellant's dominant role in the course of counsel's submissions, and there was no opportunity for counsel for the appellant to address it. In these circumstances, in my opinion, the conclusion of the trial judge that the appellant was the driving force cannot stand. It is unfair to rely on a critical aggravating factor not advanced in submissions without at least giving counsel an opportunity to address it in argument.
- [42] In *R. v. Whincup*, 2011 BCCA 520 [Whincup] the accused was convicted of assault with a weapon. The complainant testified that during the assault the accused pulled out a screwdriver and used it in the commission of the offence. At the close of evidence, the Crown advised the Court there was insufficient evidence to link the screwdriver to the offence; and for that reason, would not be relying on it. Neither counsel referred to the screwdriver in submissions. In reasons for judgment, the trial judge relied, in part, on the

evidence of the screwdriver to convict the accused. In allowing the appeal, Neilson J.A., citing Huon, stated at para. 11:

- [11] I am satisfied that concession properly describes the basis on which the appeal must be allowed. If, in deciding a case, a trial judge exercises his or her own initiative to rely on a matter not addressed by counsel, or chooses to treat an issue in a different manner than that in which counsel presented it, it is incumbent on the judge to advise counsel of this, and give them an opportunity to respond before the judge reaches a final decision: *R. v. Anderson*, 2005 BCCA 143 at paras. 13-14, 210 B.C.A.C. 44; *R. v. Huon* at para. 6.
- [43] Two relatively recent decisions of our Court of Appeal that have discussed the principle of a party's right to be heard are: *R. v. D'Allesandro*, 2018 BCCA 118 [D'Allesandro]; *R. v. White*, 2019 BCCA 461 [White].
- [44] D'Allesandro involved two separate matters where the trial judges, prior to the commencement of the trial, on their own motion and without providing counsel the opportunity to make submissions, ordered criminal charges to be stayed due to the unavailability of a sheriff for the courtroom.
- [45] In D'Allesandro at para. 18, Frankel J.A. referred to the Quebec Court of Appeal decision of *R. v. Fraillon* (1990), 62 C.C.C. (3d) 474 (Que. C.A.) [Fraillon], a case where the trial judge ordered a stay on his own motion, based on an infringement of ss. 7 and 11(d) of the Charter. Frankel J.A. referred to Fraillon (at p. 476):

It is first wrong that the trial judge ruled as he did without giving the parties an opportunity to argue the issue. Generally, it is open to the judge to point out to the parties that, in his mission to do justice, he is troubled by a point in the facts or in the law which neither one raised. This is especially the case where it is a right recognized by the Charter. But again, he must point it out to the parties and give them all the time necessary to completely argue the question before he rules on it. Here the parties to their great astonishment learned during the rendering of judgment that it was based, and based solely, on a question that the judge had only raised and resolved *proprio motu*. This manner of proceeding is inadmissible and is sufficient in and of itself to result in the granting of the appeal.

[Emphasis added in D'Allesandro.]

- [46] Frankel J.A. also referred to *R. v. Al-Fartossy*, 2007 ABCA 427, 53 C.R. (6th) 257 [Al-Fartossy], a decision of the Alberta Court of Appeal, overturning a trial judge's decision to exclude evidence based on a Charter breach identified on the judge's own motion, without inviting submissions from the parties. At para. 19 of D'Allesandro, Frankel J.A. referred to para. 25 of Al-Fartossy:
- [25] Here the parties addressed what were considered to be the relevant issues in both their evidence and submissions. The trial judge raised a separate ground that could not reasonably have been anticipated by either party based on this factual record. While it may be that the trial judge was correct in her conclusion, it should only have been reached on a

full record with the benefit of thoughtful submissions from the parties. Failure to provide the parties opportunity to present full submissions is, by itself, an error in law. In the words of this court in *Fraser v. Fraser* (1994), 157 A.R. 98 at para 10: "A fundamental procedural error such as the failure to afford counsel an opportunity to present argument is fatal to the proceedings and must result in a new trial." See also the comments of Haddad J.A. in *R. v. Jahn* (1982), 35 A.R. 583 at para. 23, 19 Alta. L.R. (2d) 193 (C.A.): "The general rule is that a court is not at liberty to pronounce judgment until counsel have been afforded the opportunity to present argument. This stems from the fundamental principle that a litigant ought not to be deprived of his right to have his case fully heard."

[Emphasis added in D'Allesandro.]

- [47] In D'Allesandro, the appeals were allowed, the stays set aside and the matters remitted back to the trial court on the basis that the trial judges erred in acting on their own motions without hearing from the parties. At para. 24 of D'Allesandro, Frankel J.A. noted that "it was incumbent on the trial judge to ask the parties what they wished to do and, if necessary, give them time to consider their positions."
- [48] In *White*, the trial judge, without notice to the parties, disregarded a concession made by the Crown that fentanyl possessed by the accused was not for the purpose of trafficking. The trial judge rejected the concession without informing counsel of his intention to do so and imposed sentence. The Court expressed the concern that a crucial finding was made without defence counsel having an opportunity to address it, and allowed the appeal.
- [49] In doing so, Abrioux J.A. explained at paras. 36-37 of *White*:
- [36] While I accept that it was open to the judge to reject the Crown's concession and reach his own conclusions concerning whether the fentanyl was possessed for the purpose of trafficking regardless of the position taken by the Crown, in my view, if he was not prepared to accept the Crown's concession, he was obliged to advise counsel of this and give the defence an opportunity to address the point. A failure to do so may amount to a reversible error
- [37] To state the test in slightly different terms, trial fairness requires that a full and fair opportunity be given to both parties to address or make submissions on a point of fact or law that may be troubling the court
- [Internal citations omitted.]
- [50] The foregoing authority supports the proposition that in a criminal proceeding the parties are entitled to the full and fair opportunity to make submissions "on a point of fact or law" raised by the court (*White*, para. 37).

- [51] The respondent submits that the issue of self-defence was apparent on the evidence adduced at trial and the Crown should have addressed this issue in the course of their submissions. Their failure to do so cannot now be a basis on which to argue procedural unfairness.
- [52] The weight of the authorities referred to above support the opposite position.
- [53] Counsel for the respondent submits the issue was apparent on the evidence adduced at trial, as it had been raised and described on multiple occasions in the course of the respondent's testimony.
- [54] Having reviewed the transcript of the respondent's testimony, I do not agree with counsel's characterization the issue was raised on multiple occasions in the course of the evidence, such that Crown could reasonably have anticipated the issue.
- [55] Defence counsel at trial was best positioned to advance relevant arguments on the issue of self-defence but choose not to.
- [56] In view of the position of defence counsel at trial and the evidence adduced, I am not satisfied the issue could reasonably have been anticipated by the Crown. This is not to say that an air of reality to the defence did not exist. The trial judge thought so, otherwise it would not have been addressed in the matter it was.
- [57] However, the relevant issue here is not whether the air of reality test was satisfied, rather the question is whether the parties were entitled to the opportunity to be heard.
- [58] In summary, trial fairness requires a full and fair opportunity be provided to both parties to present and test evidence, and to make submissions on the evidence and issues presented at trial. At the conclusion of the trial, the Crown and defence made submissions on what they considered to be the relevant evidence and law at trial.
- [59] The issue of self-defence was not canvassed in the course of the submissions. This issue was raised by the trial judge proprio motu during deliberations, without counsel being called upon to address the issue raised by the trial judge. As a result, the case was concluded without the issue being tested in the adversarial process, giving rise to concerns of fairness and reliability.
- [60] On this basis, I find the trial judge committed an error in law.

ISSUE 3: APPLICATION OF THE DEFENCE OF SELF-DEFENCE

- [61] The Crown argues that the trial judge erred in the application of the defence of self-defence.
- [62] The Crown submits that self-defence and/or defence of others is not available to the person who assaults an uninvolved third party to the incident. The Crown points out that there was no evidence the complainant was, at the relevant time, a threat to the defendant or her mother.

- [63] No authorities were referenced in support of the Crown's submission.
- [64] Having reviewed the trial judge's findings at trial and the reasons for judgment, I conclude that there is no need to address this issue, as the ultimate outcome would not necessarily be different.
- [65] The Crown agrees that to succeed and for the court to overturn the acquittal based on an error of law, requires establishing an error of law and that the outcome would be different.
- [66] As has been previously noted, an acquittal is not lightly overturned. The test for determining whether an acquittal ought to be set aside can be found in *R. v. Vézeau*, [1977] 2 S.C.R. 277, where the Court held not only must an error of law be established, but the court must also find the verdict would not necessarily have been the same had the error(s) not occurred.
- [67] In *R. v. Morin*, [1988] 2 S.C.R. 345 the Supreme Court of Canada at para. 80 described the onus of the second part of the test as "a heavy one" and "the Crown must satisfy the court with a reasonable degree of certainty" that the verdict would necessarily have been the same but for the error.
- [68] In the case at bar, the Crown submits that had it been provided an opportunity to be heard or make submissions on the issue of self-defence, the result would have been different; and on this basis, the court should order a new trial on the matter. The defence submits the verdict would have remained unchanged, due to the trial judge's finding that the Crown failed to establish the defendant intentionally applied force to the complainant.
- [69] In her reasons, the trial judge described the circumstances in which the defendant found herself, immediately before the melee. The complainant had returned to the scene and was positioned directly beside the man who had the defendant in a neck hold and the female who had pushed the complainant.
- [70] The trial judge found the complainant to be a credible witness.
- [71] The trial judge accepted the complainant's testimony, stating at para. 46:
- [46] [T]he scene at the Pub was chaotic and that there were a number of people pushing her, pulling at her, yelling and swearing. This description of the scene is consistent with the testimony of Ms. Reid, Ms. Longstaff, and Exhibit 1. Ms. Meadows stated that Ms. Longstaff simply was caught in the melee when she stepped between Ms. Meadows and the man who had grabbed Ms. Meadows by the neck. This testimony was not challenged in cross-examination. This testimony is consistent with Exhibit 1.

- [72] In the penultimate paragraph of her reasons, the trial judge states that "on the whole of the evidence", she found that "the Crown has not proven an absence of self-defence or defence of others and, therefore, has not proven beyond a reasonable doubt that there was an intentional and unlawful application of force", (para. 48). To ground a conviction, the Crown must not only establish an unlawful application of force but also that the force was intentionally applied.
- [73] While the provisions of the s. 34 and the defence of self-defence provide, in certain circumstances, what would otherwise turn an unlawful application of force into a lawful one, the trial judge in this instance went further. The trial judge found that the Crown had not established an intentional application of force.
- [74] The law recognizes that, in certain circumstances, the lack of capacity and/or accident may cast doubt that an individual intentionally committed an act. For example, in *R. v. Mathisen*, 2008 ONCA 747 the Court described the term "accident", stating that in the criminal context "accident" is used in two ways. It can refer "either to an unintended act (accident as to the actus reus) or to unintended consequences", (para. 70). In respect to the later reference, that of an unintended consequence, it is taken to mean the individual lacked the mens rea for the particular offence alleged.
- [75] In the case at bar, while the trial judge did not specifically articulate the basis on which she found the unintentional application of force, her conclusion is clear and the trial judge's finding was not challenged on appeal. Having reviewed the trial judge's reasons in their entirety, I conclude that the verdict would remain unchanged.

DISPOSITION

- [76] For the foregoing reasons, I would dismiss the appeal and affirm the acquittal.

"T.J. Crabtree J."

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