
CANADA / JUDGMENT

R. v. Underhill

2013 BCSC 7

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 7 R. v. Underhill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Underhill,

2013 BCSC 7

Date: 20130107

Docket: 26144

Registry: Vancouver

Regina

v.

Graham Dacre Underhill

Corrected Judgment: The text of the judgment was corrected

at paragraph [129] on January 7, 2013

Before: Associate Chief Justice Cullen

Reasons for Judgment

Counsel for the Respondent:

E. A. Wolfram

Counsel for the Appellant:

R. C. Gibbs, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

November 2, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 7, 2013

[1] This is an appeal from a conviction for assault. The appellant Graham Underhill was charged with assault causing bodily harm of his wife Diana Underhill (Nielsen) on July 29, 2011. The learned trial judge found him guilty of the lesser included offence of assault. The primary issue at trial was whether the appellant was justified in applying force to the complainant by virtue of s. 39(1) of the Criminal Code:

Every one who is in peaceable possession of personal property under a claim of right, ... is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

[2] At the time of the underlying events on July 29, 2011, the parties were married to one another. In the previous month, the appellant had indicated an intention to end their marriage, but in the immediate period before July 29, there were signs of a reconciliation. On July 29, both parties were at the family home in Whistler. It was anticipated, at least by the complainant, that she, a friend, and the appellant would be travelling together to a family summer home on Gambier Island.

[3] At one point before departure, the appellant told the complainant that she was not coming to Gambier Island with him, that he was going by himself. He then prepared to leave by taking his shoes out of the closet in the front hall of the house. According to the appellant, the complainant came up to him and pushed him in the chest. The trial judge found "there was some sort of push in or near the closet". The appellant went outside and sat on a bench to put on his shoes. He had his briefcase beside him. The briefcase contained his vehicle keys, house keys and boat keys, keys to various other properties, his wallet, credit cards, various other financial documents, \$1,500 in cash, his daughter's passport and a pre-nuptial agreement which he and the complainant had entered into. It was his intention to take his daughter with him and drop her off with friends en route to Gambier Island. She was intending to travel with those friends to the United States and required her passport for that purpose.

[4] As the appellant was putting on his shoes, the complainant came out of the house, grabbed the appellant's briefcase and "walked quickly away down the stairs and along the walkway" (Respondent's factum, paragraph 12).

- [5] What happened thereafter is in some dispute, but it is essentially uncontested that the appellant chased after the complainant, applied a measure of physical force to her, and the complainant, as a result, suffered from a fractured nose, swelling under her right cheek bone, early bruising on the right side of her neck towards the front and she was "quite tender" on her chest on the right and left side of her breast bone.
- [6] Both the complainant and the appellant testified, and a tenant of the Whistler property named Line Gleeton, who saw portions of what occurred through two windows in her suite and through the peep hole in her door, also testified. The appellant's son and daughter also testified with respect to some of the background issues.
- [7] Ms. Gleeton testified she saw the complainant running outside fast followed by the appellant.
- [8] She then heard the complainant say something like "you're going to break my ribs" and she looked again and saw the two of them on the ground with the appellant holding the complainant "in his hands". The appellant was talking about his briefcase. They were on the ground for one to two minutes, then they "split up". After that, she saw the complainant touch her nose that appeared to be bloody.
- [9] In cross-examination, she asserted that when she first saw the two they were running "really fast". When she saw them on the ground, the appellant was lying on his back and the complainant was on top of him. He was holding her with his arms and she had her back to him. She was moving around a lot while the appellant held her. She did not see the appellant strike the complainant. He just held her. It was while they were in that position that she heard the complainant say "you're breaking my ribs" and he talked about the briefcase. She testified that from there he let go and was looking for the briefcase.
- [10] The complainant testified that after she grabbed the briefcase she walked at a medium to quick pace down the stairs and along the walkway. The appellant came after her and grabbed her by the forearms from the back. She was holding the briefcase in both hands against her chest area. He grabbed her by her biceps from behind and they fell to the ground. He pushed her down to stop her. They struggled. The complainant "was clutching the brief to [her] chest" and he was trying to get it back.
- [11] She testified she told the appellant to get off. He said "no, let go, let go". She said "I'll let go if you get off."
- [12] She testified that he had an arm across her throat and one hand hanging on to the briefcase and she was hanging on with both arms to the briefcase. As she turned her face away, he hit her in the face with his right elbow. The right side of her face was toward him. She heard "the crack of her nose" and got up and said "Graham, I think you broke my nose". She then let go of the briefcase and "stuff was kind of flung around" and she went into the house.

- [13] She believed his right elbow hit her twice. She let go of the briefcase when she heard the crack of her nose. She said in cross-examination that when she fell to the ground she flipped over onto her back and "he came down on [her] chest" with his right knee. His left knee was on her right side. He was trying to grab the briefcase while she "wiggling around trying to get him off". He then put his left forearm across her neck and struck her two times in the face with his right elbow. She turned her head away from the blow.
- [14] She indicated some confusion, when it was put to her, that in those circumstances, she would have presented the left side of her face to the blow not her right. She subsequently testified that "the elbow strike" was a "backward elbow strike" where it went from left to right not from right to left.
- [15] Ms. Underhill testified she knew the appellant would have had his various keys in the briefcase and she agreed on cross-examination that "she supposed his wallet, credit cards, other documents and possibly cash would be in the case" (Respondent's factum, paragraph 13).
- [16] She testified she "hadn't really thought it through [but] she hoped that taking the keys would stop the situation of him leaving her ..." (Respondent's factum, paragraph 14).

The Appellant's Evidence

- [17] The appellant's evidence of the events leading to the charge differ from the complainant. He testified that the complainant came out of the house while he was seated on the bench putting on his shoes, pushed him backward on the bench, grabbed his briefcase and "ran off very quickly towards the carport".
- [18] He got up and followed after her. He testified he was about five steps behind her. She ran down two sets of stairs and after the second set "she went face first, chest first onto the boardwalk that goes out to the carport". She kept moving "towards the grass". He caught up with her about 20 feet away from the home. She put the briefcase underneath her chest with both arms around it and he put his hand on her to hold her to the ground.
- [19] He was about five steps behind her when she fell and had no contact with her.
- [20] His intention in chasing her was to retrieve his briefcase because of all that was in it.
- [21] He attempted to pull the briefcase out from underneath her sideways. He asked her many times to let go of it. He grabbed her from behind, put his arms and hands on both of her arms and tried to turn her over. She braced herself. He laid beside her almost on top of her and rolled her so she was on her back with the briefcase on top. He tried to pick up the briefcase, they struggled, he got one of her hands free, she was kicking at him and hitting at him with her knees and feet.

- [22] He was finally able to get the briefcase away from her but some items had fallen out of the briefcase as it was partly open. Once he had the briefcase, he moved away from the complainant.
- [23] He denied striking her with his elbow or striking her at all. After she got up, she came toward him and he noticed "a tiny bit of blood" in her left nostril. She looked at him and said "You will pay". "She squeezed her nostrils and forcefully blew her nose" so the blood started to flow out onto her hands.
- [24] He agreed the complainant said something to him about not releasing the briefcase and "hurting her ribs" but he was not paying attention to what she was saying.
- [25] He agreed when he was pulling at the briefcase after turning her over onto her back, "it started to pick her up". He did not know "if [he] actually got her off the ground". He had earlier said "it pulled up her too" but he testified he didn't know if it actually pulled her off the ground. He thought the struggle may have been longer than one to two minutes.
- [26] In his Reasons for Judgment, the learned trial delineated the competing versions of events of the complainant and appellant and summarized the evidence of Ms. Gleeton. He noted at para. 4 that "This is a case which is essentially one of credibility which is often the case with spousal assault allegations." He noted the onus and standard of proof which lay on the Crown and he instructed himself on the principles enunciated in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 in circumstances in which an accused testifies and where credibility is a central issue in the case.
- [27] No issue is taken by the appellant as to the correctness of the legal principles enunciated by the learned trial judge underpinning his approach to his task of considering the evidence.
- [28] The learned trial judge found that "Clearly it was wrong for [the complainant] to have taken [the appellant's] briefcase, it was his personal property ..."
- [29] He found that the briefcase was "full of valuable documents". He referred to evidence of the complainant after the incident while talking to a 911 operator said "You elbowed me in the face" apparently to the appellant. He noted:

It is certainly some corroboration of the complainant's evidence about having been elbowed in the face.

- [30] He also referred to her saying to the operator as follows:

I had his briefcase and he continued to roll me around and over the rock bed and I am -- my face my nose is bleeding I have a bruise on my cheek from where he hit me.

- [31] The learned trial judge noted of the incident:

It was an obviously charged and emotional dispute. Complete clarity and precision of detail often suffers in such circumstances. This is why the courts look to corroboration if at all possible of the evidence.

[32] In analyzing the evidence, he observed that the appellant was:

... in peaceable possession of his briefcase. What followed once his wife took it could hardly be described as attempting to re-obtain peaceable possession of it by means other than force. There were alternatives. They may not have worked, but certainly there were clear alternatives.

[33] He then mentioned calling the police if she drove off and if as the appellant alleged she had been drinking and consumed drugs, he suggested the appellant "could have tried to reason with his wife" or he "could have called his 16-year-old daughter who was at home to intercede on this behalf". The learned trial judge found however that the appellant "was angry and acted of the moment and more or less spontaneously". He noted some evidence that the complainant suffered from malignant hypertension and transient ischemic attacks and questioned whether the appellant "did not think of his wife's fragile health situation or extremely high blood pressure".

[34] He referenced the appellant's evidence that he "was unhappy not mad" and found that to be unbelievable and did not accept it. He found: "... it lacks an air of reality to suggest that he was anything other than angry when she took his briefcase with all those valuable documents in it."

[35] The learned trial judge posed the question for the court as being "How much force is reasonable or necessary in the circumstances?" He noted that the need to examine "all of the surrounding circumstances"; he accepted that the appellant's briefcase "was essentially his home office" contained "all sorts of important documents" and "he would have perceived that his wife taking that could result in some sort of, if nothing else, financial harm to him".

[36] He observed at para. 84 of his Reasons:

The court has to look at what was the nature of the force used. The court has to consider that force was resorted to before anything else. Nothing was attempted but force.

[37] In para. 86, he found, in the circumstances, "Some level of physical force, perhaps, was justifiable even within the matrimonial relationship using s. 39 of the Code for justification." He held: "In my view that should be minimal force."

[38] He noted in para. 87 that once the complainant ended up on the ground the appellant "commenced to continue his physical interaction". He concluded that the appellant should have had in mind the complainant's "compromised health condition" and if he thought that she broke her nose when she fell to the ground or suffered an injury he should have asked her if she was all right. He went on to hold as follows in paras. 88 to 91:

- [88] She presented no physical match for him. I am satisfied that ultimately, probably unintentionally his elbow, right or left, hit her in the face. I do not find there is sufficient proof to satisfy me beyond a reasonable doubt that he intended to hit her in the face with an elbow and cause bodily harm. He did though, I am satisfied. Her nose was broken as a result.
- [89] I do not accept the wife tripped and fell on her face and that is probably when she broke the nose. That is his theory. Why she would then continue her resistance defies common sense if a painful injury like that occurred. More likely, it occurred as she says. His elbow hit her in the nose, she experienced immediate pain and heard the noise. She let go of the briefcase and said, "You've broken my nose." That is corroborated to some extent by her calling the operator at 911 within a moment or two after the incident that, "You elbowed me in the face." She was directing the comment to her husband.
- [90] However you look at it, there was significant physical contact by Mr. Underhill in his attempt to recover his property. The law does not justify the level of force used. It was unreasonable and excessive in the circumstances. There were alternatives that could have been resorted to.
- [91] I am satisfied it was Mr. Underhill who caused his wife to fall to the ground either directly or indirectly. He was either by chasing her and being right behind her on this boardwalk, actually physically grabbed her as she says, causing her to end up on the ground with him. If this section in the Criminal Code is going to be used between spouses to recover by force personal property which is just documentation in this case, however you look at it, that force must be minimal.
- [39] The learned trial judge went on to consider the decision of the Supreme Court of Canada in *R. v. Szczerbaniwicz*, 2010 SCC 15, which both the appellant and the respondent agree is the leading case on the interpretation of s. 39, and he posed the question of whether the appellant used force that was reasonable in all the circumstances.
- [40] He noted that there was no physical danger to the appellant and that the complainant "had not threatened to take his documents and doing something with them, other than peripherally taking the keys and perhaps somehow using them to facilitate a trip to Gambier Island".
- [41] The learned trial judge then held as follows in paras. 101 to 103 and 106 and 107:
- [101] It is a difficult question deciding where is the line. Has an individual crossed it? What can Mr. Underhill do to recover his briefcase? Force, in my view, should have been a last option. When he embarked upon a course of physical force initially without thinking because he was angry and upset, in my view, he went down a perilous path.

[102] In conclusion, considering the totality of the evidence, in my view, he used more force than the situation called for even though his wife had no right to take his briefcase. He was in peaceable possession of it. It was, in fact, his wife and not a stranger. She had not physically threatened him in any way.

[103] There were alternatives available to him which he did not explore because of his emotional status. He should have been cognizant of her very high blood pressure, but lost sight of that in the heat of the moment. The Supreme Court of Canada finds that a push or a shove is over the line. This court is certainly not going to conclude that the level of violence utilized here is not over the line.

...

[106] In spite of his protestations to the contrary, I find that Mr. Underhill acted impulsively out of anger. He unwisely initiated the use of force to recover his property. I was not terribly impressed with his conduct on the witness stand in seeking to basically distance himself entirely from any involvement with his wife of any positive nature that could somehow be construed against him.

[107] it was not a measured application of reasonable force to retrieve personal property which s. 39 envisages. Rather, it was an excessive use of force. I am satisfied that the section does not allow for him to do what he did here and I find him guilty of assault. I do not find him guilty of assault causing bodily harm. I am satisfied that what occurred here was a sad and pathetic ending to a relationship once and for all and that he, as I say, used too much force. I find him guilty of common assault.

The Appellant's Argument

[42] The appellant asserts that in finding him guilty of assault the learned trial judge erred in his interpretation of s. 39(1) of the Criminal Code and applying it to the facts of the case. The appellant thus contends that as such, the error is an error of law, subject to the standard of correctness rather than the higher standard of palpable and overriding error which is applied to appellate review of findings of fact.

[43] The appellant submits the test for the application of s. 39(1) is found in *R. v. Szerbaniwicz*, 2010 SCC 15 at para. 17 in which the Court held as follows:

I accept the submission that a subjective belief about what force is required is relevant, but the subjective belief must be based on reasonable grounds, that is, it must be based on grounds that are objectively reasonable in the circumstances.

[44] He relied further on para. 19 of *Szerbaniwicz*, quoting from *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (ONCA) as amplifying the test. That quotation reads as follows:

The sections of the Code authorizing the use of force in defence of a person or property, to prevent crime, and to apprehend offenders, in general, express in greater detail the great principle of the common law that the use of force in such circumstances is subject to the restriction that the force used is necessary; that is, that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or harm it is intended to prevent ... [p. 113]

- [45] The appellant noted that in *Szczerbaniwicz* the majority found that the appellant in that case "used force because his wife threw to the floor a framed and easily replaced piece of paper of sentimental value". The appellant characterized *Szczerbaniwicz* as a case in which the harm was trivial and the response was out of proportion to the harm.
- [46] Counsel for the appellant submits that the learned trial judge erred in his interpretation of s. 39(1) in several ways. First, he contends that the trial judge held that s. 39(1) justifies only "minimal force" and contends that this is reversible error, as the only limitation on the force is that it must be necessary and proportional to the taking and retention of the briefcase.
- [47] Counsel for the appellant further submits the learned trial judge erred when he "erected an alternative to force barrier" requiring the appellant in effect to exhaust non-violent alternatives before resorting to the use of force. The appellant submits the alternatives to force identified by the learned trial judge were not viable, and in any event, the law recognizes that in emergent circumstances, the accused is not required to measure the force used to a nicety. The appellant submits that in analyzing s. 39(1) as he did, the learned trial judge in effect required the appellant to disprove his guilt, rather than the Crown to prove it beyond a reasonable doubt. Counsel submits that the test adopted by the learned trial judge was purely objective and an "idealization of how [the appellant] should have behaved".
- [48] The appellant submits the present case is distinguishable from *Szczerbaniwicz*, arguing that what was at stake for the appellant was potentially far greater than what was at stake in that case. He submits that, in the present case, the amount of force required "depended entirely on [the complainant]" and given that she continued to struggle to retain the briefcase after falling to the ground, the necessity for force was ongoing and commensurate with her struggle to resist his attempts to retrieve his property.
- [49] It is the appellant's contention that the learned trial judge in the present case erred in treating *Szczerbaniwicz* as creating a general standard with his observation that "the Supreme Court of Canada finds that a push or shove is over the line. This Court is certainly not going to conclude that the level of violence used here is not over the line." The appellant submits the facts in *Szczerbaniwicz* are different than the present case, given what was at stake and the prevailing circumstances.

- [50] Counsel for the appellant pointed specifically to the learned trial judge's conclusion that while "some level of physical force was justifiable even within the matrimonial relationship", it "should be minimal force" as a mis-statement of the test of s. 39(1) which provides for the use of force where it is necessary and proportionate to the injury or harm caused or reasonably anticipated.
- [51] In relation to the learned trial judge's invocation of alternatives and his assertion that force was only justifiable as "a last option", the appellant submits the alternatives to force identified by the learned trial judge were not viable and in the result the trial judge erred by creating a barrier to his resort to s. 39(1) as a defence to the assault charge. After noting that the trial judge himself observed the alternatives he identified to the use of force "may not have worked", he submitted as follows in his written argument at para. 25:

The law required an analysis of the Appellant's subjective belief as to the nature of the danger or harm from the Complainant's taking of the briefcase, given its contents, his subjective belief as to what force was required to rectify the situation, and an objective analysis of whether the Appellant's subjective beliefs were based on reasonable grounds. It did not mandate speculation by the trial judge as to tactical responses to the situation that "may not have worked", but could have been tried, nor did it mandate His Honour wholly substituting his view of what the Appellant should have done for what the Appellant chose to do in a difficult, emergent situation caused entirely by Ms. Nielsen's deliberate and wrongful actions.

- [52] The appellant further submits that the learned trial judge did not in context adhere to the principle that in such circumstances an accused did not expect it to "weigh to a nicety the exact measure of a defensive action or stop and reflect on the precise risk of consequences ..." set forth in the dissenting judgment of Binnie J. in *Szczerbaniwicz*, supra, at para. 35.
- [53] The appellant's counsel challenged a number of the learned trial judge's findings of fact leading to his ultimate finding of guilt. In particular, he challenged the learned trial judge's finding that the appellant was angry and acted "of the moment" without regard for the claimant's "fragile health situation or extremely high blood pressure" submitting that there is no medical evidence of that condition, noting that the complainant merely claimed diagnoses of "malignant labile hypertension" and "transient ischemic attacks" which he claimed to know nothing of.
- [54] The appellant submits that the complainant "was making off with very valuable documents and heading towards the appellant's car" and submits the question at issue in those circumstances was, "Was the force used necessary to prevent the harm" to "prevent the complainant from absconding with the briefcase and contents".
- [55] The appellant submits that the necessary degree of force depended on the complainant and the extent to which she resisted his attempts to retrieve the briefcase. The appellant further submits that the learned trial judge's finding that the appellant was angry was "entirely unsupported by the evidence". He submits there is no evidence of swearing, gratuitous

violence or any attempt to injure, given the learned trial judge's finding that the broken nose was accidental. He submits in that context there was no basis to find the unnecessary or unreasonable application of force, when the appellant did no more than was necessary to retrieve his briefcase.

- [56] The appellant submits the trial judge "repeatedly" assessed the evidence from a balance of probabilities standard, rather than beyond a reasonable doubt citing passages from paras. 73, 77, 89 and 91 of the learned trial judge's Reasons for Decision.
- [57] The appellant further submits the learned trial judge misapprehended the evidence by "repeatedly asserting that the appellant made an issue as to which elbow, left or right, was used to strike the complainant" when he "did not raise that issue at all".
- [58] The appellant submits that the issue was raised by the complainant's evidence that "the appellant was above her and used his right elbow to strike the right side of her face" reasoning that a blow with a right elbow in those circumstances would have caused injury to the left side of her face. The appellant raised the issue before the learned trial judge who he submits misapprehended the issue of whether it was a blow by the left or right elbow, not with a "backwards" (left to right) blow by the right elbow as the complainant ultimately asserted.
- [59] The appellant also noted some evidence concerning an earlier occasion when the complainant took and hid some boat keys from the complainant when they were on Gambier Island and he was about to leave. She admitted that she had done so in cross-examination, but the learned trial judge expressed some uncertainty in his Reasons about what happened on the earlier occasion, or whether it was just "in the appellant's mind" that she deliberately hid the keys. The appellant submits the misapprehension of that evidence was important in the context of the learned trial judge's assessment of the appellant's actions in relation to the offence.
- [60] The appellant also submitted that the learned trial judge committed reversible error by compelling the appellant's counsel to place an affidavit in evidence sworn by the complainant when what the appellant sought to introduce in evidence in cross-examination was a Notice of Claim, Response and Counterclaim, which had been appended to the affidavit to show an oblique motive on the complainant's part to pursue her allegations of criminal wrongdoing to assist her position in the family law litigation. The appellant submits the affidavit was prejudicial and should not have been placed before the court.
- [61] The appellant also contends that the learned trial judge's invocation of the idea of the appellant applying "indirect force" to the complainant in discussing the evidence of how she fell is an error of law. The appellant submits that in his Reasons for Judgment at para. 91, the learned trial judge was equivocal about whether the complainant fell to the ground because the appellant was chasing her or because he "physically grabbed her" and submits that finding effectively means that by merely pursuing her, the appellant used excessive force.

- [62] The appellant submits the trial judge's consideration of the different physical abilities of the appellant and the complainant led him into error by an assessment of irrelevancies.
- [63] The appellant submits that by in effect ruling that in matrimonial situations the force had to be minimal was an erroneous interpretation of the effect of s. 39(1) and that it was an "idiosyncratic view of how spouses should conduct themselves".
- [64] Finally, the appellant submits that the complainant was simply trying to regain control and possession of his briefcase and he did no more than was necessary to do so, thus, invoking the protection of s. 39(1).

The Position of the Respondent

- [65] The respondent Crown agrees with the appellant that the leading case interpreting s. 39(1) is *Szczerbaniwicz* and submits the term "no more force than is necessary" has a similar meaning when used in other sections justifying the use of force, and involves the objective reasonableness of an accused's subjective belief in the need to apply force.
- [66] The Crown disputes the contention of the appellant that s. 39(1) permitted him to resort immediately to use force to regain possession of his briefcase, submitting that use of no more force than is necessary requires an assessment of whether the use of force was necessary at all.
- [67] The Crown submits that "the evidence must establish that harm sought to be prevented could not have been prevented by less violent means". The Crown further submits it is necessary to examine what harm the appellant subjectively feared would flow from the circumstances and submitted that there was no evidence on that point. The Crown says that there was no evidence of an intent by the complainant to damage the briefcase or its contents. The Crown questions the reasonableness of any belief entertained by the appellant that the force he used was necessary to prevent damage to or loss of the briefcase and its contents, noting that the complainant made no express threat to do anything, that previously when she had his boat keys that she ultimately returned them when matters resolved and that the appellant had no reason to believe that the complainant knew what was in the briefcase beyond his keys.
- [68] The Crown draws a distinction between the justification for force used to prevent the complainant from leaving with his briefcase and the subsequent use of force to recover it.
- [69] The Crown notes that the trial judge made no finding as to how the complainant fell to the ground, whether the appellant caused it "directly or indirectly" but submits the focus of the learned trial judge's concern was the application of force "after the victim was on the ground".

- [70] The Crown submits the learned trial judge was correct in concluding that excessive force was used after the victim was on the ground, given that she was prevented from "going any further".
- [71] The Crown submits the trial judge's conclusion at para. 102 that the force "was more force than the situation called for even though his wife had no right to take his briefcase" and that he used "too much force" in para. 107 equates to a finding that the application of force was objectively unreasonable and disproportionate to the apprehended harm.
- [72] The Crown contends the conclusion of the learned trial judge that the appellant acted out of anger is a finding of credibility deserving of deference and it provides a context for his finding that the application of force was ought not "measured" (i.e. proportionate to its objective or the harm anticipated). The Crown submits that the learned trial judge did what he was required to do in determining whether the appellant used no more force than was necessary. The respondent says the central question was "Whether the continued use of force to remove the briefcase from the victim's grasp was necessary and reasonable, both subjectively and objectively once there was no possibility of her leaving".
- [73] The respondent contends that at that point there were alternatives including "holding [the complainant] on the ground until she gave him the briefcase". The respondent further submits that the learned trial judge did not hold that the force used should be minimal, his use of that phrase "must be considered in the context of his judgment as a whole". The respondent notes in para. 97 the learned trial judge stated the test as whether the appellant "used force that was reasonable in all the circumstances".
- [74] As far as the appellant's argument that the learned trial judge created an alternate to force barrier to the resort to s. 39(1), the respondent says the test is whether the harm sought to be prevented could have been prevented by less violent means and that includes "options available other than the use of force". In that regard, the respondent says the learned trial judge was simply performing the analysis required by s. 39(1).
- [75] The respondent notes that despite the alternatives he identified the learned trial judge concluded some force was reasonable. The respondent concedes in those circumstances the appellant was not required to "weigh to a nicety the exact measure of defensive action or stop and reflect upon the precise risk of consequences ..." but submits that principle applied to the actions of the appellant in preventing the complainant from going further with his property, but not to removing it from her once she was on the ground. The Crown submits that "once the harm has been removed and accused is not entitled to continue his application of force". The respondent further submits there was no evidence as to why the appellant had to remove the briefcase from the complainant once she was on the ground. The respondent submits the analysis of the learned trial judge was focused on the circumstances after the complainant ended up on the ground and he concluded in those circumstances the continued application of force would be justified by s. 39(1) if it were minimal force.

- [76] The respondent submits the trial judge clearly expressed "the need to have no reasonable doubt on any of the elements of the offence" and his references to the "preponderance of evidence" in para. 73 was taken out of context by the appellant as it related to a finding that the appellant was not credible is in his denial of sending two e-mails to the complainant before the assault.
- [77] The respondent says the appellant's complaint about the learned trial judge's language in para. 77 when he said "I find it quite difficult to see ..." is similarly taken out of context as he was simply analyzing or applying common sense to the appellant's suggestion that the complainant had "orchestrated events and committed perjury" for an oblique purpose related to a subsequent family law action.
- [78] The respondent similarly contends that the learned trial judge's finding in relation to how the complainant's nose was broken ("more likely it occurred as she said") was part of a credibility assessment, not a declaration of a standard of proof.
- [79] The respondent also argues that the appellant's characterization of the complainant's evidence on how she was struck in the face was not inconsistent between February 21 and February 23 while under cross-examination. The respondent points out that the complainant was not originally asked how the blow was struck so her subsequent characterization of it as coming from left to right was not only possible but not in conflict with what she had said before. The respondent also contends that the admission of the affidavit was not an error and in any event there is no indication that the learned trial judge relied on it. The respondent says the trial judge applied the appropriate legal principles "in determining that the force used by the appellant to retrieve his personal property was unreasonable in all of the circumstances and that his actions were therefore not protected by the operation of s. 39(1) of the Criminal Code.

DISCUSSION AND CONCLUSION

- [80] In this case, as in *Szczerbaniwicz*, the trial judge was confronted with the applicability of s. 39(1) justifying the use of force to defend possession of property in the context of the matrimonial or domestic dispute.
- [81] The appellant has challenged both the learned trial judge's findings of fact and his interpretation and application of the law.
- [82] As, to some extent, the learned trial judge's impugned findings of fact form the basis of the appellant's challenge to his application of the law, it is convenient to deal with that aspect of the appeal first.
- [83] Considering the learned trial judge's findings of fact, there is a deferential standard of review. In *Housen v. Nikoaisen*, 2002 SCC 33, the standard was articulated in para. 10 as:

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error....

[84] Where the factual finding involves an inference of fact, the degree of deference is similar as noted by the Court in *Housen* at para. 21:

... First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

[85] That degree of deference applies equally to findings of credibility made by a trial judge: see *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17. The Court in *Gagnon* noted at para 20 as follows:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[86] With those principles in mind, I turn to the arguments of the appellant impugning the learned trial judge's factual findings.

1. Did the learned trial judge err in finding that the appellant was angry and "acted of the moment"?

[87] The trial judge was confronted with evidence of a matrimonial dispute that erupted into a physical confrontation as a result of the behaviour of both parties. It was not a simple case of theft. He made findings of credibility based on the evidence and presentation of both the complainant and the appellant and explained his reasoning for his findings of credibility. He found that the appellant had "significant physical contact" with the complainant which did not end until the complainant's nose was fractured and she let go of the briefcase. He found on the evidence before him that the complainant had medical conditions that rendered her vulnerable and he rejected the appellant's professed ignorance of those conditions. He noted several times that the appellant made no effort to resolve the situation without violence or with less violence and concluded, as he was entitled to, that the appellant was not acting as he testified, solely to retrieve his briefcase, but was physically engaged with the complainant out of anger. While it is so that the appellant did not swear at or continue his assault upon the complainant after retrieving his briefcase, that does not preclude a finding that he was acting in anger and used the circumstances as an excuse to vent that anger.

[88] In my view, there is no palpable and overriding error in the learned trial judge's finding that the appellant was acting out of anger rather than a calm resolve to reacquire his briefcase.

2. Did the learned trial judge err by "repeatedly assessing the evidence from a balance of probabilities standard, rather than beyond a reasonable doubt standard"?

[89] The appellant cites the trial judge's language in para. 73:

I think the preponderance of evidence is ...;

para. 77:

I find it quite difficult to see ...;

para. 89:

More likely; and

para. 91:

Satisfied ... directly or indirectly.

- [90] Having reviewed those paragraphs in their context, I am unable to find that they represent the application of a lower standard of proof as to the essential elements of the offence alleged or as to the Crown's obligation to disprove the application of s. 39(1) beyond a reasonable doubt. In para. 73, the learned trial judge was making a finding, not as to an essential element of the offence or as to the applicability of s. 39(1) requiring proof beyond a reasonable doubt, but rather as to who sent the complainant two e-mails from the appellant's computer prior to the events comprising the offence.
- [91] In making that finding, the learned trial judge looked at the surrounding evidence and found that the complainant's evidence on the point fit more readily with the surrounding circumstances. He was thus simply explaining his reasoning in coming to a conclusion that the e-mails in question were sent by the appellant and not fabricated by the complainant.
- [92] In para. 77, the learned trial judge was simply expressing the scepticism as to the appellant's theory of why the complainant would have "orchestrated events to put him in a bad light". He was expressing his view of the objective improbability of the appellant's theory as to the complainant's state of mind. He was not thereby lowering the standard of proof required for guilt in a criminal trial.
- [93] In para. 89, the learned trial judge used the phrase, in relation to how the complainant's nose was broken, "more likely it occurred as she says". However, in the previous paragraph, he concludes that he is "satisfied" the appellant's elbow hit the complainant in the face but he does not find beyond a reasonable doubt that the appellant intended to hit her in the face.
- [94] The juxtaposition of those findings clearly implies that he did find beyond a reasonable doubt that the appellant's elbow broke the complainant's nose and the references in para. 89 to it being "more likely" than the appellant's version which he found "defies common sense" is in the context of comparing each version to the prevailing circumstances and finding which fit and which did not. In other words, in that passage, the learned trial judge was

explaining his reasoning process rather than articulating the standard of proof necessary for a finding of guilt. In any event, he acquitted the appellant of assault causing bodily harm, in error, on the premise that a specific rather than a general intent was an essential element of guilt on that charge. Therefore, it could not be said that any substantial wrong or miscarriage of justice ensued even if there was as alleged in error in the trial judge's finding as to how the complainant's nose was broken.

- [95] Finally, in para. 91, the appellant takes issues with how the learned trial judge expressed himself in finding "I am satisfied it was Mr. Underhill who caused his wife to fall to the ground, directly or indirectly ...".
- [96] While the learned trial judge expresses some uncertainty about how the complainant got to the ground, that finding is not as to an essential element of the offence or whether s. 39(1) offers justification for the force said to comprise the offence. The trial judge did not find that the complainant's fall to the ground fell outside the scope of s. 39(1), rather he found that the appellant's course of action, taken as a whole, involved "significant physical contact ... in an attempt to recover his property" and constituted "unreasonable and excessive" force in the circumstances.
- [97] I am thus not satisfied that the appellant has demonstrated the learned trial judge erred by lowering the standard of proof of proof beyond a reasonable doubt and I would not give effect to those grounds of appeal.
3. Did the learned trial judge misapprehend the evidence as to the elbow blow to the complainant's face, and the previous instance of the complainant hiding the boat keys?
- [98] The complainant submits the learned trial judge's disposition of the complainant's evidence about how the appellant struck her, breaking her nose, reflects a misapprehension of the evidence, which undermined his findings of credibility.
- [99] In particular, the appellant submits the trial judge's reference to there being confusion in the complainant's evidence as to which elbow it was that struck her, missed the point that her testimony that it was his right elbow did not logically fit with how she testified she averted her face away from him.
- [100] The appellant says the trial judge's failure to grasp the significance of the illogic of her evidence led him into error in his assessment of her credibility.
- [101] As to the complainant's evidence on that point, the trial judge held as follows at para 18 of his Reasons:
- [18] I do not find that her inability to be precise on that point to be critical. It was a highly emotional incident for both parties. They were struggling on the ground and it is difficult to say with precision exactly what occurred and in what chronological sequence. Both of them, in my view, were highly emotionally charged as this incident unfolded.

[102] While the trial judge may not have grasped the complainant's precise evidence as to how she was struck by the appellant's right elbow, he did note in para. 17 that "It was somewhat confusing as to her answer" and in para. 50 that "There [sic] a number of inconsistencies in Ms. Nielsen's evidence ... for example whether he used his right or left elbow to strike her in the nose".

[103] As I see it, however, the trial judge understood that there were issues with the complainant's version of the events. His failure to precisely identify the confusion as resting on the complainant's description of the motion of the appellant's right elbow (as forward moving or backward moving) as opposed to the right elbow or left elbow, is not in my view, fatal to his finding as to her credibility as set out in his Reasons at para. 18 quoted above.

[104] In *R. v. Morrissey*, [1995] O.J. No.69 (ONCA) at para. 93, the court held as follows:

When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? 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.

[105] I do not see in the circumstances at bar, that the misapprehension of evidence identified by the appellant is as "to the substance of material parts of the evidence" or that the misapprehension "played an essential part in the reasoning process leading to a conviction". The learned trial judge understood that the complainant's evidence was confused and confusing. He noted there were inconsistencies in it. He attributed those inconsistencies and confusion to the difficulty of being precise in such a highly charged emotional situation. He had the benefit of seeing and hearing the witnesses and his findings of credibility and reliability were based on a much broader foundation than the complainant's description of the motion of the appellant's elbow and the relative position of her face. At any rate, as counsel for the respondent pointed out, the complainant was not inconsistent in her evidence, and it was not inherently implausible.

[106] As to the alleged misapprehension by the learned trial judge of the previous instance when the complainant deliberately hid the motor boat keys to prevent the appellant and his children from leaving, the appellant submits that although the complainant admitted to hiding the keys, the learned trial judge treated the evidence as being less definitive by

characterizing it as something that the appellant "believed" or "suspected she did". The appellant argues the fact that she admitted it in cross-examination at trial, "was highly relevant to Mr. Underhill's subjective belief as to what was reasonable and necessary when Ms. Nielsen stole his briefcase" (Appellant's statement of argument, paragraph 40).

- [107] As I see it, however, what was germane to what the appellant believed was reasonable and necessary at the time of the incident at bar was the appellant's belief and suspicion of the nature of the earlier incident. The complainant's testimony was an after the fact acknowledgment of what she had done and was therefore not something relevant to the contemporaneous state of mind or knowledge of the appellant. I thus see no impact on trial fairness of the misapprehension of evidence which is asserted in relation to this point.
4. Was it an error to request that the affidavit exhibiting a Notice of Claim, Response and Counterclaim be admitted?
- [108] The appellant submits the trial judge erred in requiring him to file an affidavit to which a Notice of Claim, Response and Counterclaim (which he tendered as an exhibit) were attached as exhibit. Although asserting the affidavit was prejudicial to the appellant, it was not produced as part of the record on appeal and the appellant made no submissions as to its content. Moreover, there is no mention of the affidavit contents in the learned trial judge's Reasons for Judgment and no indication that its contents were relied on in any way by Crown Counsel in submissions or cross-examination. Nor is there any indication that counsel for the appellant at trial resisted its admission on the basis of it being prejudicial or made any submissions about the content of the affidavit.
- [109] While in my view it was unnecessary in the circumstances to have the affidavit to which the claim and counterclaim were attached marked as an exhibit, the record before me discloses no impact on the fairness of the trial or prejudice to the appellant by its admission.
- [110] I therefore would not give effect to this ground of appeal.

The Alleged Errors of Law

- [111] The three principal errors of law alleged in the learned trial judge's Reasons in the present case are, firstly, that he raised the threshold for the applicability of s. 39(1) by requiring that the force used be minimal, secondly, that he created a barrier to its application by requiring that an accused exhaust alternative options before resorting to the application of force, and, thirdly, that he erred by requiring the appellant to "weigh to a nicety" the exact measure of a defensive action under s. 39(1).
- [112] As I see it, however, the appellant's challenge to the learned trial judge's interpretation and application of s. 39(1) fails to take into account the particular circumstances of the case at bar, which involved a dispute between a husband and a wife which erupted into a physical confrontation in which the wife sustained a number of injuries, including a fractured nose.

- [113] There was evidence before the trial judge that both the complainant and the appellant behaved provocatively toward one another leading to the confrontation, the husband by initially leading the wife on and then abruptly spurning her, and the wife by seizing and making off with the husband's briefcase in reaction to his behaviour.
- [114] In that context, it was open to the learned trial judge although finding that s. 39(1) justified "some level of physical force ... even within the matrimonial relationship" to hold that it "should be minimal force".
- [115] In both para. 86 and para. 91 when the trial judge used the phrase "minimal force" it is clear he was using it in the context of the circumstances confronting him and not as a general prescription for the application of s. 39(1) in all cases involving a "matrimonial relationship". In para. 86 after reciting the particular evidence of the interaction between the appellant and the complainant, the learned trial judge noted "the circumstances are troubling". Later, after noting in para. 90 that "there was significant physical contact by Mr. Underhill", he noted in para. 91 that what was at issue was "just documentation in this case" and in that context concluded the "force must be minimal".
- [116] I thus am not satisfied that the learned trial judge raised the threshold for the applicability of s. 39(1) from the use of "no more force than is necessary" to the use of no more than minimal force. As I see it, the learned trial judge's finding was simply that in the context of the circumstances before him, which involved a physical confrontation in which each participant had acted provocatively, the reasonable force to use was minimal, to avoid unnecessary escalation or injury.
- [117] Similarly, the learned trial judge's invocation of the Supreme Court of Canada decision in *Szczerbaniwicz* was not, in context, a finding of an absolute limit to the use of force proscribing even "a push or a shove". Rather, the learned trial judge compared the level of force in the case before him to the level of force in *Szczerbaniwicz* finding, not unreasonably, that the appellant's persistent and determined use of force against his wife, given the circumstances, was similarly excessive.
- [118] As to the appellant's contention that the learned trial judge created a barrier to resort to s. 39(1) by holding, in effect, that the appellant had to exhaust alternative options before employing force to regain possession of his briefcase, I do not read the learned trial judge's Reasons as authority for that proposition.
- [119] Although he noted (in para. 84) that "force was resorted to before anything else" and "nothing was attempted but force" and at para. 85 that "there was no attempt to verbally persuade or dissuade his wife", the trial judge nonetheless found that "some level of physical force ... was justifiable ... using s. 39 of the Criminal Code (para. 86).
- [120] In other words, the learned trial judge did not find that the appellant was unable to resort to s. 39(1) without attempting alternative means of recovering the property.

- [121] The learned trial judge's references to the appellant's failure to pursue alternatives to the use of force are applicable in the context of the events that ensued after "the wife ended up on the ground" in other words, after the risk of her fleeing with the briefcase was abated.
- [122] The trial judge observed that the appellant made no further inquiry of his wife or attempted any other alternative to force at that time. The trial judge cited some possible alternatives which he conceded might not be successful but held at para. 62 "These are the sorts of considerations one who is thinking clearly might think of. Rather I think he was angry and acted of the moment and more or less spontaneously." The learned trial judge also found that the complainant had some health issues that made her vulnerable and that the appellant knew of and did not think of her "fragile health situation or extremely high blood pressure".
- [123] His conclusion that "force should have been a last option" in para. 101, was not thus a prescription for the application of s. 39(1) generally, or in matrimonial cases, or even in the case at bar, where the learned trial judge found justification for some application of force, but in context found the appellant "used more force than was called for even though his wife had no right to take his briefcase" (para. 102).
- [124] I conclude in context the learned trial judge, in referring to the appellant's failure to attempt any alternatives to force, was assessing or analyzing the validity of his asserted subjective belief that he did only what he had to do to recover the briefcase and his actions were not fueled by anger or part and parcel of an escalating and acrimonious matrimonial dispute which ended only when the complainant's nose was fractured.
- [125] In other words, the learned trial judge although finding an air of reality to the appellant's asserted belief in the necessity of the use of some force to protect his property, went on to find, beyond a reasonable doubt, that the appellant resorted to more force than was reasonably necessary in all the circumstances.
- [126] I do not find the learned trial judge's conclusion that the appellant's use of force was "not a measured application of reasonable force to retrieve personal property" to violate the precept that "in 'quick response' situations an accused is not expected to weigh to a nicety the exact measure of a defensive action or to stop and reflect upon the precise risk of consequences from such action", as argued by the appellant relying on para. 35 in *Szczerbaniwicz*. It is clear, in the first place, that what the learned trial judge was referring to was the application of "reasonable force" – that is proportionate and necessary force – not simply force. Thus, his use of the phrase "measured application" does not equate to the need to find an "exact" level of force or "defensive action" to use, rather it refers to the need to find a reasonable level of responsive force, within which there need not be an exact measurement.

- [127] In the second place, once the complainant was on the ground, it was no longer a quick response situation. As the appellant himself testified, the struggle went on for several minutes, and the emergent conditions were over once the complainant's flight or apparent flight with the briefcase was prevented.
- [128] Accordingly, I am not persuaded by the appellant's arguments that the trial judge erred in law by misinterpreting s. 39(1), by creating a barrier to its application or by requiring the appellant to "weigh to a nicety" the force which he applied. Nor do I conclude that the learned trial judge did other than he was obliged to do: "to inquire whether the appellant used no more force than was necessary to defend his possession in all the circumstances based on both subjective and objective criteria": (see *Szczerbaniwicz*, para. 22).
- [129] In particular, the trial judge's observations that the complainant was the appellant's wife, not a stranger, would support a conclusion that she could easily be held accountable for any loss: his acknowledgement that the contents of the briefcase were valuable supported a conclusion that the circumstances required some preventative use of force; his observation that the complainant had made no express threats to destroy the briefcase or its contents supported a conclusion that there was no direct evidence of imminent harm which the appellant was responding to; his observation that the complainant had health issues supported a conclusion that she would be vulnerable to any significant use of physical force; his finding that the appellant's motivation was primarily anger at the complainant's provocative conduct, supported a conclusion that he was not acting with calm resolve employing no more than necessary force simply to repossess his briefcase; and, his finding that in the course of his attempt to repossess the briefcase, the complainant's nose was fractured by an unintentional blow from the appellant's elbow supported a conclusion that the nature of the struggle was sufficiently intense to court the infliction of a significant injury.
- [130] Once the complainant's flight with the briefcase was prevented and she was on the ground and subject to the appellant's physical control, it was open for the learned trial judge to find that more than minimal force was, in all the circumstances, unreasonable, given the factors he referred to. At that point, there was no longer any imminent danger to the appellant's property, the complainant was "no match" for the appellant, the complainant's health issues which the learned trial judge found the appellant was aware of rendered her more vulnerable than others in her position to anything more than minimal force, and as well, discussion and persuasion were open to the appellant, although he chose not to pursue such a course.
- [131] Finally, the learned trial judge found that the appellant was angry, and the evidence did not reveal even an attempt by him to prevent the continuance of the situation by using less violent means.

[132] In that context, I am satisfied that the learned trial judge's conclusion that no more than minimal force was required, and his comparison of the present case to *Szczerbaniwicz* where "a push was over the line", was not either a misinterpretation of s. 39(1) or a misapplication of it to the facts at bar.

[133] I thus would not give effect to the arguments of the appellant and order that his appeal be dismissed.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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