

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mikasinovic, 2018 ONCA 573

DATE: 20180622

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Watt, van Rensburg and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nedeljko Mikasinovic

Appellant

Michael W. Lacy and Lawrence Gridin, for the appellant

John Patton, for the respondent

Heard: June 12, 2018

On appeal from the conviction entered by Justice Robert F. Goldstein of the Superior Court of Justice, sitting with a jury, on February 6, 2017, and from the sentence imposed on May 25, 2017, with reasons reported at 2017 ONSC 863 and 2017 ONSC 3192.

REASONS FOR DECISION

[1] After leaving a restaurant with friends, the appellant was involved in a physical altercation with two individuals, Marc Casaponsa and Tim Runge. He was charged with the assault of Casaponsa and aggravated assault of Runge. At his first trial, a jury found the appellant not guilty of assaulting Casaponsa but was unable to reach a verdict on the count of aggravated assault of Runge.

[2] After his second trial for the aggravated assault of Runge, the appellant was convicted of assault causing bodily harm. He appeals that conviction and seeks leave to appeal his sentence of 14 months' imprisonment and two years' probation.

[3] The conviction appeal consists of one ground – whether the trial judge erred in leaving assault bodily harm with the jury as an included offence and verdict. The appellant says that, in light of the uncontested nature of Runge's injuries, there was no reasonable view of the evidence that would have permitted the jury to acquit on aggravated assault but to convict him of assault causing bodily harm.

[4] The appellant points to the expert medical opinion evidence that Runge suffered a serious and permanent brain injury, and would have died if left untreated. He says that this is consistent with endangering life, disfiguring, wounding or maiming, the consequences required for a conviction of aggravated assault. The appellant points to the fact that the sole distinguishing feature between assault bodily harm and aggravated assault is the degree of harm visited upon the victim. In this case, the unequivocal nature of the expert evidence established the consequences of aggravated assault. On this evidence the only available verdict was guilty of aggravated assault. By leaving the included offence of assault bodily harm for the jury's consideration, the appellant argues that the trial judge invited a compromise verdict.

[5] The appellant also asserts that, in answering a jury question, the trial judge intensified the concern over a compromise verdict because he told the jury that “assault causing bodily harm is a less serious offence than aggravated assault”. This instruction is said to have provided the jury with a consideration that was relevant to sentencing, not conviction, and to have increased the chances of a compromise verdict. Finally, the appellant argues that trial counsel’s concession that the jury should be instructed on both aggravated assault and assault causing bodily harm should not influence the result on appeal. Counsel’s concession resulted from a flawed understanding of the *mens rea* for the two offences.

[6] We disagree. First, we do not accept the appellant’s characterization of the expert evidence in this case as being dispositive of the degree of harm necessary to meet the requirements of an aggravated assault. The trial judge was required to instruct the jury on and to leave as an available verdict any included offence that had an air of reality: *R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273, at para. 75. There was no evidence from a treating physician as to the actual scope of the resulting harm to Runge. Rather, Dr. Roger Smith, qualified as an expert neuroradiologist, testified based on the MRIs and CAT scan of Runge’s brain that the effects of the brain injury would range from a bad headache to the potential, without treatment, of death. Runge also testified about his medical treatment and condition. The jury may have been left in a reasonable doubt that the degree of

harm experienced by Runge rose to the level required for an aggravated assault, yet concluded that it amounted to bodily harm as the judge defined it.

[7] Second, throughout the trial, including submissions on the charge, defence counsel reasonably acknowledged that assault bodily harm was an available verdict. This case is unlike *R. v. Wong*, [2006] O.J. No. 2209, 211 O.A.C. 201 (C.A.), relied on by the appellant, where this court concluded that the trial judge erred in leaving assault causing bodily harm with the jury as an available verdict. There, this court's assessment was consistent with that of defence counsel at trial, who objected to the included offence being left with the jury. Unlike this case, everyone agreed in *Wong* that the victim's injury (an 18 inch gash from a knife) was an aggravated assault if the act was intentional.

[8] The position of counsel at trial is important in determining whether an included offence ought to have been left with the jury, having regard to the accused's constitutional right, within limits, to control his or her own defence: *Luciano*, at para. 77. See also *Wong* at para. 11: "the trial judge's obligation to instruct on included offences will depend on the evidence led, the issues raised, and the positions of the parties". In this case, defence counsel specifically asked that the jury be instructed on the included offence of assault causing bodily harm.

[9] Third, the trial judge's instructions, including the statement that "assault causing bodily harm is a less serious offence than aggravated assault", provided

together with his accurate instructions on the components of the three offences, attracted no objection from defence counsel at trial, and reveal no error.

[10] The conviction appeal is therefore dismissed.

[11] The appellant seeks leave to appeal his sentence on grounds relating to two factors the trial judge found to be aggravating: (1) that the appellant was the aggressor throughout the events; and (2) that the injury to the victim was a severe, permanent brain injury that endangered his life.

[12] On the first factor, the appellant says that the trial judge erred in attempting to discern the basis on which self-defence was rejected. He argues that the trial judge erroneously concluded that the appellant was the aggressor by ignoring that he had been acquitted at the earlier trial of the assault on Casaponsa.

[13] We disagree. The trial judge made it clear that he could not determine what the jury must have concluded in rejecting the self-defence claim. He was required, under s. 724 of the *Criminal Code*, to accept the findings that were essential to the jury's verdict, and to find any other relevant fact that was disclosed by the evidence at the trial. Based on the evidence, he arrived at his own entirely reasonable conclusion that the appellant had been the aggressor throughout. Further, the trial judge properly rejected the appellant's argument that the result of the earlier trial precluded a finding that he was the aggressor. The focus here was on the appellant's conduct in relation to Runge, and there was no question that the

evidence, particularly the surveillance videos, supported the trial judge's conclusions.

[14] On the second factor, the seriousness of the injury was properly taken into account as an aggravating factor by the trial judge. The jury must have acquitted the appellant of aggravated assault because they had a reasonable doubt that Runge's injury was a wound, a disfiguring, or a maiming, and did not endanger his life. There is nothing inconsistent between the basis of that acquittal and the trial judge's conclusion that Runge's brain injury was severe, permanent, and had the potential to endanger his life if left untreated.

[15] The conviction appeal is dismissed.

[16] There is no basis to interfere with the sentence. Leave to appeal sentence is granted, and the sentence appeal is dismissed.

"David Watt J.A."
"K. van Rensburg J.A."
"Fairburn J.A."