COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Reis, 2019 ONCA 168

DATE: 20190305

DOCKET: C63626

Doherty, Benotto and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tryden Reis

Appellant

Faisal Mirza and Kelly Gates, for the appellant

Amy Alyea, for the respondent

Heard: February 28, 2019

On appeal from the conviction entered on January 13, 2017, and the sentence imposed on April 24, 2017, by Justice Suhail A.Q. Akhtar of the Superior Court of Justice, sitting without a jury.

REASONS FOR DECISION

[1] The appellant was found guilty of aggravated assault, discharging firearm with intent to wound, and use of a firearm while committing an indictable offence, arising out of an altercation with two men in which one of them was shot.

[2] The appellant and three other men were approached by two men, Nana Tutu and Kaion Brown, as they sat in a gazebo. Tutu had pulled a gun and pointed it at the appellant and his friends a few weeks previously. On this occasion, Tutu approached the appellant and the other men and stated: “Is it a thing? Is it a thing?” An altercation ensued, during which the appellant took Tutu’s gun from him and shot Brown. The trial judge found that the appellant shot Brown deliberately, rejecting his claims of accident and self-defence.

[3] The primary issue on appeal is whether the trial judge erred in rejecting the appellant’s claim of self-defence.

[4] The trial judge properly set out the requirements of the law of self-defence. The appellant was entitled to be found not guilty if he believed on reasonable grounds that force was being used against

him; his actions were committed for the purpose of defending himself; and his actions were reasonable in the circumstances. The trial judge found that the defence met the air of reality test and, as a result, the Crown was required to disprove the defence beyond a reasonable doubt.

[5] The trial judge found that the danger to the appellant posed by Tutu had passed: Tutu was walking away from the appellant, with his gun in his waistband, when the appellant attacked him from behind and took his gun. On this basis, he concluded that there was no reason for the appellant to pursue and attack Tutu. The trial judge found, further, that there was no reason for the appellant to shoot Brown. There was no evidence that Brown had any type of weapon prior to the altercation.

[6] The appellant submits that the trial judge erred in finding that the danger had passed, in view of Tutu's prior conduct and gun violence in his neighbourhood. He characterized this variously as an error in principle, an unreasonable finding, and a palpable and overriding error.

[7] We do not accept this submission.

[8] This was a factual matter and was for the judge to determine. He specifically considered and rejected the appellant's evidence that Tutu was holding a gun and facing him when he charged at him. That finding was open to him on the evidence, and cannot be said to be unreasonable or a palpable and overriding error.

[9] The appellant argues, next, that the trial judge erred in finding that Brown posed no danger to him, and in particular erred in focusing on whether or not Brown had a gun. The altercation was ongoing; Brown was with Tutu when the appellant had been threatened on the prior occasion, and in all of the circumstances it was reasonable to think that he might have been armed.

[10] Again, we disagree.

[11] The trial judge considered and rejected the appellant's evidence that he was terrified and had no intention of shooting Brown or harming anyone. He found that there was no reason to think that Brown was armed with a gun or any other weapon, and that the appellant's actions had been motivated by a desire to make sure that he and his friends were not to be threatened by Tutu or his friends again. This finding is amply supported by the evidence and is neither unreasonable nor does it reveal a palpable and overriding error.

[12] The trial judge considered and rejected evidence that the gun had discharged accidentally or unintentionally. He reviewed video evidence showing the appellant pursuing Brown and striking him after he had fallen. As the trial judge put it, "If one thing is clear from the video, it is that the accused wanted to hurt Brown and hurt him badly." This was the trial judge's call to make and we see no error that requires intervention.

[13] These conclusions are sufficient to dispose of the appeal. The appellant acknowledged that the appeal could not succeed if the trial judge's finding that the danger to the appellant had passed was upheld.

[14] Nevertheless, the remaining grounds of appeal addressed by the appellant at the hearing may be dealt with briefly.

[15] We see no error in the trial judge's treatment of the post-offence conduct. He accepted that flight following the shooting might be explainable in all of the circumstances. However, the appellant's post-offence conduct went beyond this, and in particular involved steps taken to dispose of incriminating evidence, including his clothing and the gun. It was open to the trial judge to find that taken as a whole, the appellant's post-offence conduct was powerful circumstantial evidence of his guilt.

[16] The appellant argued that the trial judge erred in relying on a KGB statement from Nicholas Gray, as discrepancies between the statement and his evidence at trial did not rise to the level of an unambiguous recantation.

[17] We disagree.

[18] The KGB statement was properly admitted for the truth of its contents. The trial judge accepted that Gray's trial evidence was not an outright recantation of the statement, and was entitled to determine what weight to give to his evidence. His decision reveals no error, nor did the trial judge err in dismissing the appellant's application to lead an utterance designed to bolster the appellant's credibility. The trial judge properly applied the exception set out by this court in *R. v. Edgar*, 2010 ONCA 529, in which it was made clear that an out of court utterance by the accused is admissible as evidence of reaction and consistency, but only if the utterance is made in response to an accusation of a crime. In this case, the utterance was made in response to a question, so was inadmissible.

[19] The appeal is dismissed.

"Doherty J.A."

"M.L. Benotto J.A."

"Grant Huscroft J.A."