CITATION: R. v. Lemieux, 2024 ONSC 1878
COURT FILE NO.: CR-23-038-00AP
DATE: 2024/04/02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	M. Crystal, for the Appellant
Appellant	)	
	)	
– and –	)	
	)	
Michael Lemieux	)	J. McFadden, for the Respondent
Respondent	)	
	)	
	)	**HEARD:** December 21, 2023

REASONS ON SUMMARY CONVICTON APPEAL

S.K. STOTHART J.

[1] This is a summary conviction appeal by the Crown from an acquittal and stay of proceedings ordered by Justice A.H. Perron on January 17, 2023.

Overview

[2] Michael Lemieux was charged with one count of assaulting a police officer, contrary to s. 270(1)(a) of the *Criminal Code of Canada.* This charge arose out of a brief interaction between the respondent and a police officer late at night on Clarence Street, in North Bay, Ontario.

[3] At the commencement of the trial, the respondent brought a *Charter* application, alleging violations of his ss.7, 8, 9 and 10 *Charter* rights. It was agreed that the trial would proceed in a "blended fashion" with the evidence called applying to both the *Charter* application and the trial itself.

[4] Following a trial that spanned several days, the trial judge found the respondent not guilty. He then went on and found that there had been violations of the respondent's ss.7, 9 and 10 *Charter* rights, and found that the appropriate remedy was a stay of proceedings in accordance with s.24(1) of the *Charter*.

[5] The Crown as appellant appeals against the acquittal and the trial judge's decision with respect to ss.7, 9 and 24(1) of the *Charter*. The appellant does not appeal from the finding that the respondent's s.10 *Charter* rights were infringed.

Evidence at trial

[6] Although several witnesses testified at trial, I will summarize only the evidence that relates to this appeal.

[7] On October 7, 2020, at around 11:35 p.m., the North Bay Police Service received a call from a female who was screaming that there was a "psycho" outside her apartment. The information received was conflicting, with the caller saying she had either let this person into her residence, or the male was climbing in through a window. The police were not able to get a full description of the perpetrator other than the fact that it was a male. The call came from 866 Clarence Street, which is an apartment building in North Bay.

Constable Geoff Whittle

[8] Cst. Geoff Whittle testified that he was dispatched to attend the Clarence Street address. As he was nearing the apartment building, he observed a male (later determined to be the respondent) walking southbound on Clarence Street. The male was wearing dark clothing and had a backpack on. The officer described the male as staring at him intently. The officer decided that he should determine the identity of this person before continuing on.

[9] Cst. Whittle turned his vehicle around and pulled up behind the respondent, close to the sidewalk. Cst. Whittle put his window down and asked the respondent where he was coming from. The respondent responded with words like "why the fuck do you care." Cst. Whittle told the respondent that he was looking for someone and then asked again where he had been coming from. The respondent replied that "he didn't have to say shit to him." The respondent was belligerent and told the officer to "fuck off" and began to walk away.

[10] Cst. Whittle testified that as the respondent was walking away, he asked him to stop. Cst. Whittle began to get out of his police vehicle and the respondent quickly took several steps towards him, with his arms extended, and slammed the vehicle door on the officer's left arm. Cst. Whittle testified that the respondent said something to the effect of "stay in the fucking car."

[11] At this point Cst. Whittle exited the vehicle with the intent of arresting the respondent for assaulting a police officer. Cst. Whittle caught up to the respondent, who was walking southbound, and grabbed him around the collar/shoulder area and said, "what do you think you're doing slamming a door on me." At this point, the respondent grabbed the officer by his vest and the two were "both kind of grabbing each other."

[12] Cst. Whittle testified that he used his hip to flip the respondent on to the ground. He then went on top of the respondent and tried to pin him down. At one point he pushed the respondent's head down. Another officer arrived and they handcuffed the respondent. Shortly after, they realized that the respondent's ankle had been broken.

[13] Cst. Whittle testified that he was not significantly injured when the car door was slammed on him. At most he suffered a mark or marks.

Constable Ryan Schreyer

[14] Cst. Schreyer testified that he was responding to the same call when he observed a police vehicle pulled over on the east shoulder of Clarence Street.

[15] As Cst. Schreyer drove by, he noticed that Cst. Whittle was still in the police vehicle and there was a male standing on the sidewalk median area, either on the sidewalk or the grass area, on the driver's side of the police vehicle.

[16] Cst. Schreyer testified that he drove by slowly. When he looked back in his passenger side window, he saw Cst. Whittle on the ground wrestling with the male. This all occurred within seconds.

[17] He quickly turned around to provide assistance. When Cst. Schreyer arrived, Cst. Whittle was slightly on top of the male, attempting to gain control of him. Cst. Schreyer assisted in handcuffing the male. When they stood the male up, he began to complain of pain in his leg. According to Cst. Schreyer, he could see that the male's ankle was obviously broken.

Sergeant Jason Long

[18] Sgt. Long testified that he was also responding to the original call and driving along Clarence Street when he observed Cst. Whittle's police vehicle parked on the east side of the road. Sgt. Long pulled over on the same side of the street facing Cst. Whittle's police vehicle.

[19] Sgt. Long testified that he observed Cst. Whittle and Cst. Schreyer on the sidewalk over a male who was face down on the sidewalk. The male was yelling, swearing, and complaining of a sore ankle. When Sgt. Long looked at male's ankle, he could tell that it was obviously broken. Sgt. Long called for an ambulance.

[20] Sgt. Long directed Cst. Schreyer to remove the handcuffs. The male tried to get up and he told the male to stay down on the ground. His concern was that the male would further injure his ankle if he tried to stand on it. Sgt. Long remained with the male and reassured him that an ambulance was on its way. He arranged for a blanket and later assisted in loading the male into an ambulance. Sgt. Long then followed behind in his police vehicle and attended the hospital.

Michael Lemieux

[21] The respondent testified that he was walking down the street when a vehicle pulled up and someone yelled at him "where are you going?" He looked over and said, "none of your business."

[22] The respondent testified that the vehicle turned around and pulled up beside him. At this point he could tell it was a police vehicle. The officer in the vehicle asked him what his name was, and the respondent replied, "what's your name" and kept walking. The officer tried to engage him again and the respondent told him that he did not want to talk to him and to leave him alone. The respondent kept walking.

[23] The respondent testified that on the third occasion the police vehicle pulled up over the curb, on to the grass, and the side mirror almost hit him. The officer went to open the door of the police vehicle and the respondent immediately put his hands out and closed the door. The respondent testified that the door wasn't open even two inches and the car door did not hit the officer's legs or body. The respondent testified that he was getting scared and wanted to stop things before they proceeded any further.

[24] The respondent was challenged in cross-examination about the location of Cst. Whittle's police vehicle. The respondent insisted that the vehicle was not on the road, it was on the sidewalk/ grass/boulevard.

[25] The respondent testified that after closing the door, he walked away. As he was doing this, he could feel the back of his leg getting stepped on or pulled to the ground and someone tugging on his backpack. He turned around and the officer flipped him over his hip onto the ground. The respondent testified that the police continued to beat him while he was on the ground, smashing his face repeatedly into the ground.

[26] The respondent testified that he was taken to the hospital by ambulance where they confirmed that his ankle was broken. According to the respondent, Sgt. Long accompanied him in the ambulance and that they had a conversation about what happened. The respondent was challenged in cross-examination about Sgt. Long being in the ambulance and he maintained that he was 100 percent sure Stg. Long was in the ambulance and rode with him to the hospital. The respondent testified that Sgt. Long was sitting in the corner by the door of the ambulance and that they talked about him providing a blood sample.

[27] The respondent testified that he had other injuries as a result of the beating and photographs were entered as exhibits at trial depicting injuries to the respondent's face.

Principles of Law

The standard of review

[28] The appellant brought this appeal under s.830 of the *Criminal Code* which provides that the Crown may appeal against a verdict of acquittal of a summary conviction court on the ground that: (a) It is erroneous in point of law; (b) it is in excess of jurisdiction; or (c) it constitutes a refusal or failure to exercise jurisdiction.

[29] The Crown as an appellant is not entitled to contest an acquittal on the basis of an error of fact or of mixed fact and law. This precludes the Crown from arguing that an acquittal was unreasonable or, provided the trial judge took a legally correct approach to the evidence, that the verdict was not supported by the evidence: *R. v. Rudge*, 2011 ONCA 791 at para. 35; *R. v. Morin*, [1992] 3 S.C.R. 286 (S.C.C.) at pp. 294-295; *R. v. B.(G.)*, [1990] 2 S.C.R. 57 (S.C.C.)

[30] On a Crown appeal, the Crown must not only establish that the trial judge erred in law, it must go on and demonstrate with a reasonable degree of certainty, that the verdict would not necessarily have been the same had the error not been made. In doing so, the Crown is not required

to demonstrate that the verdict would necessarily have been different: *R. v. Graveline,* 2006 SCC 16, at para. 14; *R. v. Rudge,* at para. 36.

[31] Acquittals are not lightly overturned. The onus on the Crown as appellant to show that the verdict would not necessarily have been the same had the errors not occurred is a "heavy one" and the Crown must meet this onus with a reasonably degree of certainty: *R. v. Sutton,* 2000 SCC 50 at para. 2.

[32] The Crown, as appellant, cannot appeal from an acquittal on the sole basis that it is unreasonable. The concept of an "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt: *R. v. Biniaris,* 2000 SCC 15 at paras. 32-33.

Credibility

[33] Trial judges are uniquely placed to assess the credibility of witnesses and their findings of credibility at trial attract significant deference on appeal unless a palpable and overriding error can be shown. As such, appellate intervention based on a trial judges' credibility findings will be rare: *Regina v. G.F.,* 2021 SCC 20 at para. 99; *Regina v. Dinardo,* 2008 SCC 24 at para. 26; *Regina v. Gagnon,* 2006 SCC 17 at paras.10-11.

[34] Whether a witness is credible is a question of fact: *R. v. J.M.,* 2021 ONCA 150 at para. 54; *R. v. R.G.B.,* 2012 MBCA 5 at para. 59.

[35] The Crown cannot appeal on the basis that a trial judge made a credibility assessment that was unreasonable. Rather, the Crown must establish that the trial judge committed an error in law. It is only when reasonable doubt is tainted by a legal error that appellate intervention from acquittal is permitted: *R. v. J.M.H.*, 2011 SCC 45 at para. 39; *R. v. K.S.*, 2017 ONCA 307 at para. 11; *R. v. L.B.*, 2024 ONCA 88 at para. 29.

Misapprehension of evidence

[36] A misapprehension of evidence renders a trial unfair and results in a miscarriage of justice 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 or acquittal." *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at para. 93.

[37] In *R. v. Lohrer,* 2004 SCC 80 at para. 2 the Supreme Court defined the stringent standard to be applied in establishing a misapprehension of evidence. If one exists, it must go to substance and not mere detail and play a central part in the reasoning process:

> *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential

> part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction.

Analysis

Reasons for decision

[38] In his reasons for decision, the trial judge stated that the case centered on the credibility of Cst. Whittle and the respondent. The trial judge went on to correctly state that a trial is not a credibility contest and that he was required to determine whether the Crown had proven, on the whole of the evidence, the accused's guilt beyond a reasonable doubt.

[39] The trial judge then instructed himself as follows:

a. If he believed the accused, he must acquit;

b. If he did not know whether to believe the accused or the complainant, he must acquit;

c. If he did not reject the evidence of the accused, he must acquit; and

d. If he rejected and disbelieved the evidence of the accused, he must be convinced beyond a reasonable doubt that the Crown has proven each and every element of the offence.

[40] The trial judge then turned to the assessment of the evidence in this case. In doing so, he referred to two aspects of the evidence. Firstly, he stated that the respondent was the only person who testified about the exact location of Cst. Whittle's police vehicle. As such, he found that the respondent's evidence was uncontradicted on this point. Secondly, he found that the contradiction between the respondent and Sgt. Long about whether Sgt. Long was in the ambulance while *en route* to the hospital could be explained by the fact that the respondent was in extreme pain and shock following his injury.

[41] Following this analysis, the trial judge concluded:

> I therefore accept Mr. Lemieux's testimony prior to him being grounded by the police and cannot determine if his recollection of what happened after is incorrect due to the shock of having his leg broken by the police.
>
> Under those circumstances, I am unable to reject Mr. Lemieux's evidence, and as directed by the Supreme Court of Canada I must therefore accept his version of events. Mr. Lemieux's own evidence is that he pushed the door and the same came into contact with Constable Whittle. Using the strict interpretation of an assault this is clearly Mr. Lemieux intentionally applying force that Constable Whittle did not consent to, however Mr. Lemieux's action seemed to be a simple reflex of him about to be hit by the car door. It is not clear that he in fact had intention of hitting Constable Whittle by pushing the door. In my view the doctrine of *de minimus non curat lex* also applies by accepting Lemieux's version of events and any contact by

> the door was minimal. Accordingly, I am not satisfied beyond a reasonable doubt that the Crown has proven each and every element of the offence and there will be a finding of not guilty on the charge.

[42] Assessing credibility is not a science. The Supreme Court of Canada has recognized that 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 version of events. That is why, in the absence of a palpable and overriding error by the trial judge, his/her perceptions should be respected: *R. v. Gagnon*, 2006 SCC 17 at para. 20.

[43] Where credibility is a determinative issue, deference is in order and intervention will be rare. There is no general requirement that the reasons be so detailed that they allow an Appeal Court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence or answered each and every argument of counsel: *R. v. Dinardo*, 2008 SCC 24, at para. 30.

[44] A trial judge's reasons are not to be viewed on a stand-alone, self-contained basis. The sufficiency of reasons is judged not only by what the trial judge has stated, but by what the trial judge has stated in the context of the record, the issues, and the submissions of counsel at trial: *R. v. M. (R.E.)* (2008) SCC 51 at para. 37.

[45] The trial judge's findings of fact in this case are difficult to discern. While he provided a summary of the testimony at trial, the trial judge did not go on and clearly make findings of fact.

[46] The trial judge stated that he accepted the respondent's evidence, but then went on to state that he was unable to reject the respondent's evidence and therefore was required to accept the respondent's version of events. This appears to be an error. There is a difference between accepting a witness's evidence and not being able to reject a witness's evidence. However, when I read the trial judge's reasons as a whole, I find that what he was attempting to convey was that in accordance with the guidance in *R. v. W.D.*, if he rejected the evidence of the accused but was left in doubt by it, he was required to acquit.

[47] An appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. In *R. v. Walker*, 2008 SCC at para. 20, the Supreme Court held:

> Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e. a decision which, having regard to the particular circumstances of the case, is reasonably ineligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision…Moreover "where it is plain from the record why an accused has been convicted or acquitted, and the

> absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene"… The duty to gives reasons "should be given a functional and purposeful interpretation" and failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confer entitlement to appellate intervention.

[48] In the circumstances of this case, when read as a whole, the reasons for decision demonstrate that the trial judge had doubt with respect to whether the Crown had proven, beyond a reasonable doubt, the intent required for assault.

[49] The trial judge found that the respondent's actions seemed to be a reflex action and that it did not appear that he had the intent to hit Cst. Whittle with the car door.

[50] A reflexive action can negate both the *actus reus* and *mens rea* for the offence of assault. A reflexive action can be viewed as an involuntary act over which the accused has no control. This negates the *actus reus.* It can also be viewed as an immediate and unpremeditated response to an external stimulus and therefore although the accused acted voluntarily, he did so without conscious thought. This negates the *mens rea*: *R. v. Mullin* (1990), 56 C.C.C. (3d) 476 (P.E.I. C.A.); *R. v. Pirozzi* (1987), 34 C.C.C. (3d) 376 (Ont.C.A.); *R. v. Wolfe* (1974), 20 C.C.C. (2d) 382 (Ont.C.A.); *R. v. Starratt* (1971), 1 O.R. 227 (Ont.C.A.); *R. v. Fontaine*, 2017 SKCA 72.

[51] In this case, the respondent testified that he pushed the door shut. As such, this was not a case where the accused had no voluntary control over his physical actions.

[52] However, on the totality of the evidence, it was open to the trial judge to have doubt about whether the respondent intended to close the door on Cst. Whittle. The respondent's evidence was that he immediately put his hands out and closed the door. The respondent testified that the door wasn't open even two inches and the car door did not hit the officer's legs or body. The respondent testified that he was getting scared and wanted to stop things before they proceeded any further. In those circumstances, it cannot be said that the trial judge erred in law in having doubt about whether the respondent's actions were an immediate and unconsidered response to the situation.

[53] That determines this appeal.

Did the trial judge misapprehend the evidence?

[54] The appellant submits that the trial judge misapprehended the evidence when he found that the respondent's evidence about the location of Cst. Whittle's vehicle was the only evidence on this issue and as such was uncontradicted.

[55] In his reasons, the trial judge stated: "No one else testifies as to where the vehicle stopped in relation to the road or the curb. Accordingly, Mr. Lemieux's testimony on this point is not contradicted."

[56] In my view, the trial judge did misapprehend the evidence on this issue.

[57] Firstly, there was other evidence about where Cst. Whittle's vehicle was parked. Cst. Schreyer testified that the vehicle was parked on the east shoulder of Clarence Street. Sgt. Long testified that the vehicle was parked on the east side of the road and that he parked his vehicle facing Cst. Whittle's vehicle.

[58] Secondly, the Crown witnesses, Cst. Whittle, Cst. Schreyer or Sgt. Long, were not cross-examined or challenged on their evidence about where Cst. Whittle's police vehicle was parked. The first time the court heard any suggestion that Cst. Whittle's police vehicle was parked up over the curb was in the respondent's evidence.

[59] The rule in *Browne v. Dunn* requires that if a party intends to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity while the witness is in the witness box to provide any explanation that the witness may have for the contradictory evidence. *R. v. Quansah,* 2015 ONCA 237 at para. 75.

[60] Failure to cross-examine a witness at all on a specific issue tends to support an inference that the opposing party accepts the witness's evidence in its entirety or at least on the specific point. This implied acceptance disentitles the opposing party to later challenge the witness's evidence on this point in closing submissions or rely on it in inviting the trier of fact to disbelieve their evidence. *R. v. Quansah,* at para. 79.

[61] While the rule in *Browne v. Dunn* does not require that the opposing party put every piece of evidence that they intend to contradict the witness on, cross-examination should confront the witness with matters of substance, which are critical issues of fact, on which the party seeks to impeach the witness's credibility. *R. v. Quansah,* at para. 81.

[62] In this case, the trial judge erroneously disregarded the rule in *Browne v. Dunn* in his ruling and that worked an unfairness to the Crown's case.

[63] Having found that the trial judge misapprehended the evidence with respect to where Cst. Whittle's vehicle was parked, I must go on and consider whether the appellant has established that that the error identified played an essential part not just in the narrative of the judgment but in the reasoning process resulting in the acquittal.

[64] In my view, the location of Cst. Whittle's vehicle did not play an essential part in the reasoning process resulting in an acquittal in this case. Even if the trial judge found that Cst. Whittle's vehicle was parked on the side of the road, as opposed to up over the curb, Cst. Whittle's vehicle had to be sufficiently close that the respondent was able to respond quickly and push the door closed before Cst. Whittle was able to get fully out of the vehicle.

[65] I am unable to conclude that the misapprehension of the evidence on this point was such that it played an integral part of the reasoning process that resulted in an acquittal.

Did the trial judge err in applying the doctrine of de minimis non curat lex?

[66] After finding that it was unclear whether the respondent had the intent to hit Cst. Whittle, the trial judge went on to find, in the alternative, that the doctrine of *de minimis non curat lex*

should be applied to the events because any contact by the door was minimal and Cst. Whittle suffered no significant injuries.

[67] The appellant submits that the doctrine of *de minimis non curat lex* did not apply to the circumstances of this case. I agree.

[68] It remains unclear whether the principle of *de minimis non curat lex* operates as a defence in Canadian criminal law. To date the Supreme Court of Canada and the Ontario Court of Appeal have declined to recognize or reject its existence in criminal proceedings: *Canadian Foundation for Children, Youth, & the Law v. Canada (Attorney General)* (2004), 180 C.C.C. (3d) 353 (S.C.C.) at para. 44; *R. v. Kubassek*, [2004] O.J. No. 3483 at para.18.

[69] In *R. v. Yombo,* the Quebec Court of Appeal appeared to recognize the utility of the doctrine to prevent abuses of process in criminal proceedings, but the court noted that the doctrine would only apply in exceptional circumstances or in the "clearest or most obvious cases": *R. v. Yombo*, 2023 QCCA 12 at para. 16.

[70] Whether a case qualified for application of the doctrine of *de minimis* is a question of law. An appellate court may therefore review the decision according to the standard of correctness. However, deference is owed to the underlying findings of fact: *R. v. Yombo*, at para. 17.

[71] In this case, the trial judge appeared to conclude that because the contact between the door and the officer was minimal and the officer did not suffer significant injuries the *de minimis* principle should be applied. In my view the trial judge erred in this regard.

[72] The offence of simple assault does not require proof that the victim was injured. Indeed, the offence of simple assault covers many circumstances where there is no injury at all. Further, the offence of simple assault does not require that the intentional application of force be substantial.

[73] In this case there were no clear findings of fact on which the trial judge applied this doctrine. If the trial judge applied the doctrine of *de minimis* to a finding of fact that the respondent intentionally closed the vehicle door on the officer, then this was an error. Intentionally slamming or closing a door on another person is an assault worthy of sanction.

The Charter issues

[74] The appellant appeals against the trial judge's conclusion that the respondent's s. 7 and s. 9 *Charter* rights were violated. The appellant further appeals against the trial judge's conclusion that the only appropriate remedy was a stay of proceedings pursuant to s. 24(1) of the *Charter*.

[75] Both parties have asked that I comment on the correctness of the trial judge's decision regardless of my conclusion with respect to the conviction appeal. The appellant submits that the trial judge's findings on the *Charter* application must be addressed given the high public interest in ensuring that the police understand that they may make general inquiries while responding to serious calls for service late at night.

[76] I would note that the trial judge purported to stay the proceedings after acquitting the accused. Technically, there were no proceedings to stay at that point, so his *Charter* decision is a nullity.

[77] Given my conclusion with respect to the conviction appeal, I find that it is not necessary nor useful for me to provide further comment on the reasons for decision with respect to the *Charter* application. Any analysis that I would provide would add little to the existing *jurisprudence* about the scope of police powers to investigate crime, or about detention and s. 9 of the *Charter*.

[78] The difficulty in this case is that the trial judge did not make clear findings of fact upon which his *Charter* analysis can be assessed. He did not address the evidential burden. He did not address which evidence he accepted, which evidence he rejected, and why. It may be that he accepted the respondent's evidence, but that is unclear on the record before me.

[79] In a criminal trial the burden always rests on the Crown to prove each and every essential element of the offence beyond a reasonable doubt. This is a high standard of proof. Where the accused brings an application alleging violations of s. 7 and s. 9 of the *Charter*, the legal and evidentiary onus rests primarily on the accused as applicant to establish, on a balance of probabilities, that there has been a violation.

[80] Without clear findings of fact, I am simply not in a position to review the correctness of the trial judge's conclusion with respect to the respondent's *Charter* application. Findings of fact are crucial to appellate review.

[81] My decision to not address the trial judge's decision on the *Charter* application should not be construed as my agreement with the decision. I am simply unable to conduct an appropriate appellate analysis.

Conclusion

[82] On a Crown appeal, the appellant must establish not only that the trial judge erred in law but must also go on and demonstrate with a reasonable degree of certainty that the verdict would not have necessarily been the same had the error not been made.

[83] While I have found that legal errors occurred in this case, I find that the appellant has not met the further requirement of demonstrating that the verdict would not have necessarily been the same had those errors not been made.

[84] When the trial judge's reasons are read as a whole, they demonstrate that he was left in doubt with respect to whether the respondent possessed the intent required for assault. I find that the legal errors identified in this case do not impact that overall assessment or conclusion.

[85] For these reasons, the appeal is dismissed.

Justice S.K. Stothart

Released: April 2, 2024

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SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

Appellant

– and –

Michael Lemieux

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REASONS ON

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