

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. MacIsaac, 2015 ONCA 587

DATE: 20150831

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Laskin, Lauwers and Hourigan JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Gordon MacIsaac

Appellant

Frank Addario and Andrew Burgess, for the appellant

Kevin Rawluk, for the respondent

Heard: April 7, 2015

On appeal from the conviction entered on December 16, 2013 by Justice Diane M. Lahaie of the Ontario Court of Justice, sitting without a jury, with reasons reported at 2013 ONCJ 787.

Hourigan J.A.:

[1] Mr. MacIsaac appeals his conviction on one count of aggravated assault, which resulted from an on-ice collision during a recreational hockey game in Ottawa.

[2] Central to the determination of guilt at trial was the issue of whether the collision was an unavoidable accident, as submitted by the appellant, or a deliberate blindside hit, as submitted by the Crown and found by the trial judge.

[3] For the reasons that follow, I would allow the appeal and order a new trial. In my view, the appellant did not receive a fair trial because the trial judge engaged in impermissible speculative reasoning in reaching her verdict.

A. FACTS

[4] This appeal stems from a collision between two players during a March 15, 2012, hockey game in the “no-contact” Ottawa senior men’s league. The appellant played for the Tiger-Cats and the complainant played for the Pirates. During the final 47 seconds of the game, with the complainant’s team up by two goals, the pair collided. The complainant was knocked to his back on the ice. He suffered several lacerations to his face, two missing front teeth and a concussion. At the time of trial, he continued to experience debilitating daily headaches as a result of the incident.

[5] The appellant was charged with one count of aggravated assault. The court heard from 11 witnesses, including the appellant, the complainant, one of the game’s referees, and various members of both hockey teams.

[6] The Crown’s position was that the appellant deliberately delivered a blindside hit to the left side of the complainant’s head. The complainant and the

three Crown witnesses who observed the incident all gave slightly different accounts. The complainant testified that he entered the area behind his team's net from the right side (from the perspective of someone facing the net). He skated behind the net and was on the left side of the net with his head turned to his right when the appellant struck the left side of his head.

[7] The goalie on the complainant's team, David Winton, testified that he saw the appellant leap off the ice, raise his arms and hit the complainant in his shoulder and head area. Mr. Winton said the appellant's arms hit the complainant's head and that the appellant's facemask may have hit the complainant's face.

[8] Jonathan Clark, another teammate of the complainant, said the appellant "stood tall" with his arms raised up and delivered a "line drive" hit. While he did not see the appellant's skates leave the ice he said he was not looking at the appellant's feet.

[9] Jonathan Desjardins, one of the referees, testified that the appellant entered the Pirates' zone from the left side and the complainant entered from the right side. Mr. Desjardins stated that the appellant and the complainant were facing each other when the appellant lifted his skates about six inches off the ice, raised his arms above his shoulders and hit the complainant. The appellant's forearm made contact with the complainant's head, causing it to snap back.

Although Mr. Desjardins repeatedly stated that the pair was facing each other when the collision occurred, he believed that the complainant would not have been anticipating the hit. Mr. Desjardins immediately attended to the complainant after the collision. He noticed that the complainant had suffered a number of injuries, including a cut on his chin, a gash above his lip on the left side, and two missing front teeth. Half of his face was covered in blood. Mr. Desjardins and Mr. Winton believed the incident was a deliberate hit and not an accidental collision because the appellant's arms were raised and his feet were lifted off the ice.

[10] The Crown witnesses differed as to where the puck was at the time of the collision. Mr. Desjardins claimed that both the appellant and the complainant were skating towards the puck. The complainant testified that neither he nor the appellant had the puck. Mr. Winton did not remember exactly where the puck was. He said the complainant did not have the puck but that it may have been in the general area of where the hit occurred. Mr. Clark believed that a number of other players were fighting over the puck in a corner, away from the point of impact.

[11] The Crown also called two of the complainant's other teammates, one of whom was his brother, who testified that after the incident the appellant skated by the Pirates' bench and said "that's retaliation for the trip," referring to an

incident earlier on the same play where one of the appellant's teammates was tripped.

[12] The defence position was that the incident was an accidental, unavoidable face-to-face collision.

[13] The appellant said he skated towards the complainant, who had the puck, to try to steal the puck and score a goal. He claimed that when the pair was beside the Pirates' net, the complainant suddenly turned, which caused them to collide. The appellant said he and the complainant were "nearly facing each other" when they collided and there was no reason the complainant would not have seen him coming.

[14] Two of the appellant's teammates, Kenneth Shouldice and Jason Shorey, agreed that the appellant and the complainant had been facing each other, while another teammate, Ryan Robinson, testified that he saw both men moving towards the puck but could not tell if they made eye contact. Mr. Shorey said he saw both the appellant and the complainant brace themselves before colliding.

[15] As for the location of the puck, Mr. Robinson and Mr. Shouldice claimed that the complainant and the appellant were both skating towards the puck, while Mr. Shorey said the complainant got rid of the puck immediately before the collision.

[16] All of the defence witnesses testified that they believed the incident was unintentional and unavoidable. The appellant and the defence witnesses who observed the collision all testified that the appellant's feet did not leave the ice and that he did not raise his arms above his shoulders.

[17] The appellant testified that when he skated by the Pirates' bench after the incident he said something to the effect that it could easily have been any one of his own teammates who was injured. He explained that he had been referring to the tripping incident earlier on the same play and suggested that his statement may have been misinterpreted to mean that the hit was retaliatory or intentional. Nonetheless, he insisted the incident was an accidental collision.

B. DECISION BELOW

[18] The trial judge began by stating that most of the witnesses showed a clear bias depending on which of the two hockey teams he belonged to. She found that the referee, Mr. Desjardins, was the sole "completely neutral" witness and that his evidence was credible and reliable. While Mr. Desjardin's account of the appellant and complainant's positions on the ice – with the pair heading towards the puck behind the net – differed from that of the other witnesses, the trial judge accepted the entirety of his evidence aside from his testimony regarding the tripping incident earlier on the same play.

[19] The trial judge also accepted the complainant's testimony in its entirety. The injuries to the left side of the complainant's face were consistent with his testimony about where he was looking and supported the conclusion that this was not a "face to face 'head on' collision." Mr. Winton's account of the incident was also consistent with Mr. Desjardin's evidence, the complainant's injuries and a finding that the appellant delivered a deliberate blindside hit.

[20] The trial judge rejected the evidence of the appellant's teammate Mr. Robinson. She was "not prepared to find beyond a reasonable doubt" that Mr. Robinson had been on the ice at the time of the incident because it was "not logical" for three Tiger-Cats defencemen to be on the ice with the team down by two points and with so little time left in the game. Even if Mr. Robinson had been on the ice, his stated position would not have been conducive to observing what he described in his testimony. Specifically, he would have been looking at the appellant from the back and would not have been able to tell whether his hands were down.

[21] Similarly, the trial judge rejected Mr. Shouldice's evidence on the ground that he would not have been able to see the collision from his stated position. Mr. Shouldice's testimony that the appellant and the complainant were facing each other when they made contact was "illogical" because neither man moved to avoid the collision. The trial judge also found that this testimony was

inconsistent with the complainant's injuries and with the complainant and Mr. Desjardins' descriptions of how the complainant fell to the ice.

[22] Although the trial judge accepted the evidence of defence witness Andrew Cameron, another member of the appellant's team, that the game became more intense as it went along, she rejected his evidence about the location of the puck at the time of the collision because it was not consistent with the testimony of any other witness.

[23] As for Mr. Shorey, the trial judge found that his testimony was biased and included numerous errors. She said his claim that he saw hits similar to the one at issue "all the time" stood in "stark contrast" to Mr. Desjardin's testimony that it was the most serious hit he had seen in the league. The trial judge also stated that Mr. Shorey's account of the hit was inconsistent with the evidence of Mr. Desjardins, Mr. Winton, and the complainant, all of which she accepted.

[24] Turning to the testimony of the appellant, the trial judge first adverted to the standard for assessing credibility set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. She rejected the appellant's evidence on the ground that it was illogical and inconsistent on key points. Specifically, she rejected his claims that he left his usual position as a defenceman in an effort to steal the puck from the complainant and score a goal, that the complainant made an unpredictable turn

rendering a collision unavoidable, and that the appellant did not have sufficient control over his speed to avoid hitting the complainant.

[25] The appellant's account of the hit was inconsistent with the complainant's injuries and with the evidence of the complainant and Mr. Desjardins, which the trial judge accepted. The trial judge found that the complainant did not have the puck at that time because if he had, it would have been "illogical" for him not to have seen and avoided the appellant. Further, if the appellant had truly been aiming to get control of the puck and score a goal, he would have been focused on the puck in the left corner of the ice and would not have been skating at full speed towards the location where the collision occurred.

[26] The trial judge accepted that as the appellant skated by the Pirates' bench after the collision he commented that a member of his own team could have been injured on the play. She explained that there would have been no reason for the appellant to mention another player on his team, even generally, if he was not concerned with the earlier tripping incident.

[27] Given that this comment was made immediately after the hit to the complainant, the trial judge was convinced beyond a reasonable doubt that the appellant intentionally delivered a blindside hit to the complainant's head as retaliation for the tripping incident.

[28] On the issue of consent, the trial judge found that the hit amounted to such a marked departure from the conduct expected in a no-contact hockey league that “consent to such conduct cannot be given.” As for *mens rea*, the trial judge held that the appellant foresaw the risk that his actions would cause serious bodily harm, but nonetheless chose to take that risk. The Crown had established beyond a reasonable doubt that the appellant intended the consequences of his actions, which carried a sufficient risk of injury and objective foreseeability of bodily harm to negative consent. As a result, the trial judge convicted the appellant of aggravated assault.

C. POSITIONS OF THE PARTIES

(i) Position of the Appellant

[29] The appellant submits the trial judge erred in her fact-finding process by reversing the onus of proof and rejecting defence evidence based on speculative reasoning. In the appellant’s view, the trial judge created an amalgam of the inconsistent Crown’s witnesses’ accounts without considering whether the inconsistencies raised a reasonable doubt. She then rejected evidence where it was inconsistent with the assembled Crown narrative. These errors shifted the onus of proof to the appellant to explain his innocence.

[30] The appellant also submits the trial judge misapplied the law of consent and failed to consider whether the appellant had an honest but mistaken belief in

consent. The appellant's evidence was that he had a belief that players in the hockey league consented to any type of bodily contact that was foreseeable in a game, including deliberate blindside checks. The fact that defence counsel did not raise the issue did not relieve the trial judge of her obligation to turn her mind to the defence and whether it was applicable in the circumstances.

(ii) Position of the Respondent

[31] The respondent submits that the trial judge carefully considered the evidence and made factual findings that were well supported on the record. She did not err in her assessment of the evidence, subject it to different levels of scrutiny or engage in speculative reasoning. There was no air of reality to the defence of honest but mistaken belief in consent, which was not raised at trial, because the trial judge found that the appellant delivered a deliberate blindside hit and the appellant admitted that such hits fall outside the scope of the expected play in a non-contact hockey league.

D. ANALYSIS

[32] There are three issues raised on the appeal. First, did the trial judge engage in impermissible speculation? Second, did the trial judge reverse the onus of proof? Third, did the trial judge err in failing to consider the defence of honest but mistaken belief in consent?

[33] I agree with the submission of the appellant that the trial judge engaged in impermissible speculative reasoning in rejecting the evidence of the defence witnesses. This impaired the appellant's right to a fair trial. On this basis, I would order a new trial. It is unnecessary, therefore, to consider the other issues raised by the appellant.

[34] The first example of speculative reasoning is the trial judge's rejection of the evidence of Mr. Robinson at para. 122:

I am not prepared to find beyond a reasonable doubt that Mr. Robinson was on the ice as it was not logical that three Tiger-Cats defencemen would be on the ice in the last minute of the game when the Tiger-Cats were down by two goals.

[35] Obviously, the defence had no burden to prove any fact, including that Mr. Robinson was on the ice, let alone to the standard of proof beyond a reasonable doubt. Leaving aside that part of the statement, which might have been a slip by the trial judge, the balance of the reasons given for this rejection of Mr. Robinson's evidence remains troubling. The trial judge appears to be taking judicial notice of hockey strategy and using that as a basis for rejecting the testimony. Her conclusion about who would be on the ice at the end of the game is entirely speculative and is also contrary to the evidence of Mr. Shorey that, in the final stages of games in the Ottawa senior men's league, teams play the most skilled players, regardless of their positions.

[36] The Crown correctly submits that this passage should not be examined in isolation from the rest of the reasons: *R. v. R.M.*, 2014 ONCA 785, 317 C.C.C. (3d) 145, at paras. 44-47. In addition, the Crown points out that the trial judge went on to find that even if Mr. Robinson was on the ice, his position was not conducive to observing what he described and that his evidence was biased and unreliable.

[37] I agree that if this were the sole example of speculative reasoning that it may not be sufficiently egregious to imperil trial fairness and warrant ordering a new trial. However, this is but one example of speculative reasoning engaged in by the trial judge. In addition, it is hard not to draw a link between the trial judge's conclusion that Mr. Robinson's evidence was biased and unreliable, and her finding that he erroneously testified that he was on the ice at the time of the incident. Thus the speculative reasoning is not entirely benign as the Crown would contend.

[38] The second example of speculative reasoning also includes the trial judge's views on hockey strategy. In rejecting the evidence of the appellant about what he was doing immediately before contact with the complainant, she stated at para. 136:

Mr. MacIsaac was a defencemen who was out of position both because he was deep in the other team's zone and because he was a on the wrong side. It defies logic that Mr. MacIsaac, a defencemen, would have

gone to the net in hopes of scoring a goal and that he would be skating with such lack of control.

[39] Again the trial judge appears to impose her personal knowledge of hockey on the facts of the case. She reached this conclusion in an evidentiary vacuum. There was no evidence about whether players in this league stick to their position at all times. Moreover, the trial judge ignored the fact that the appellant's team was down two goals with less than a minute to go in the game and was, according to Mr. Shorey, planning on pulling their goalie to add another skater. Thus the evidence suggests that their priority was not playing defence, but rather scoring goals.

[40] The third example, found at para. 137 of the trial judge's reasons, is as follows:

If Mr. MacIsaac was skating in to score a goal or poke the puck away, he would have had to have more control over his speed than he purports to have had.

[41] This finding, like the two previously mentioned, is speculative and based on the trial judge's understanding of hockey, specifically the speed that a player would be skating in that situation. Moreover, the appellant did not testify that he was skating out of control. Rather, he said that he was skating quickly and the collision occurred because the complainant made an unexpected turn.

[42] The fourth example is also found at para. 137 of the trial judge's reasons:

Mr. MacIsaac's evidence in relation to the play is not consistent with the injuries sustained by the complainant and it is not consistent with the evidence of Mr. Desjardins and Mr. Casteron which I accept.

[43] The trial judge did not elaborate on how or why the injuries were inconsistent with the appellant's testimony. The testimony of the appellant was that the front of his helmet hit the complainant's face when they collided. The Crown called no medical or other expert evidence and thus there was no basis upon which the trial judge could reach this conclusion, other than on her review of the description and photos of the complainant's injuries. In my view, the type of injuries that would be suffered as a result of the collision if it occurred as the Crown witnesses testified or as the defence witnesses testified was not a matter that was within the knowledge of the trial judge.

[44] The fifth example is found at para.138 of the trial judge's reasons:

I also reject Mr. MacIsaac's assertion that Mr. Casterton had the puck because it would be illogical for Mr. Casterton not to see Mr. MacIsaac if he had the puck and would have to manoeuvre around him.

[45] The suggestion appears to be that the complainant would have his head up if he had the puck. Once again, this is speculative. In fact, Mr. Casterton testified that there is less need to keep one's head up in no-contact leagues.

[46] It was open to the trial judge to draw inferences that reasonably and logically flowed from the facts established by the evidence. But it was an error of law to draw inferences that did not flow logically and reasonably from established

facts, because doing so draws the trial judge into the impermissible realms of conjecture and speculation: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at pp. 530-531.

[47] Where a trial judge has employed speculative reasoning, unless the Crown can demonstrate that the error caused no substantial wrong or miscarriage of justice, the convictions tainted by that error must be quashed: *Morrissey*, at p. 531.

[48] The examples of the trial judge's speculative reasoning cited above were not on peripheral areas; the issues she was dealing with were central to the case and were highly relevant to the determination of whether the Crown had proven the offence beyond a reasonable doubt. For example, evidence of the appellant's intentions as he skated toward the complainant was critical in deciding if this was a premeditated hit or an accidental collision. The evidence of defence witnesses was rejected in whole or in part based upon the trial judge's understanding of hockey strategy and her views regarding on-ice injuries, unaided by any expert testimony. While an isolated example of speculative reasoning may not have sufficed to render the trial unfair, I agree with the submission of the appellant that the trial judge rejected evidence that was capable of raising a reasonable doubt based on this series of speculative conclusions, and that this reasoning directly lead to her decision to convict.

[49] The appellant was entitled to a determination of his guilt or innocence based on the evidence at trial, not on the hockey experience of the trial judge or her understanding of the injuries to be expected from various types of on-ice collisions. An accused in a criminal proceeding must make any number of strategic decisions based upon the evidence that is presented at trial. He or she bases decisions about what questions to ask, what evidence to lead, whether to testify and what arguments to advance, based on the state of play of the trial. A trial judge ought not to supplement and supplant the evidentiary record, except in very limited situations where taking judicial notice is permitted.

[50] This was not a case in which judicial notice could be taken of the disputed facts. A court can take judicial notice of a fact only if it is: (1) so notorious or generally accepted that no reasonable person would disagree; or (2) capable of immediate demonstration by reference to sources of indisputable accuracy (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48, citing *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.)). Due to concerns about possible prejudice to the accused, the Supreme Court has set strict limits on the use of judicial notice to determine adjudicative facts in criminal trials: *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at paras. 61-62. Those concerns have been echoed more recently by this court: *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289, at paras. 37-42.

[51] Measured against the above principles, hockey strategy is not a proper subject for judicial notice. From the sports pages to social media, it is abundantly clear that reasonable Canadians often disagree about what constitutes a rational hockey strategy in a given situation. Nor is there any source of indisputable accuracy by which to settle these disagreements. Neither branch of the test for judicial notice is fulfilled.

E. DISPOSITION

[52] In my view, the trial judge erred in law in engaging in speculative reasoning, which led to the appellant's conviction and denied him a fair trial. Accordingly, I would quash the appellant's conviction and order a new trial.

Released: August 31, 2015 (JL)

"C.W. Hourigan J.A."
"I agree John Laskin J.A."
"I agree P. Lauwers J.A."