

SUPREME COURT OF YUKON

Citation: *R. v. Kolasch*, 2018 YKSC 22

Date: 20180425
S.C. No. 17-AP012
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

APPELLANT

AND

HARRY KEVIN KOLASCH

RESPONDENT

Before Madam Justice M. Bielby

Appearances:
Lauren Whyte
Vincent Laroche

Counsel for the Appellant
Counsel for the Respondent

REASONS FOR JUDGMENT

OVERVIEW OF APPEAL

[1] The Crown appeals from the acquittal, after trial, of Harry Kevin Kolasch of one count of resisting arrest. It does not appeal from his acquittal on two other charges, tried at the same time, being possession of stolen property of a value not exceeding \$5000 i.e. a DVD, and of breach of a probation order; see *R. v. Kolasch*, 2017 YKTC 64.

STATEMENT OF FACTS

[2] On New Year's Eve, 2016, the manager of the McDonald's restaurant in Whitehorse, Yukon, called the police to complain that a man had thrown a cheeseburger in the restaurant, and had attempted to kick him when followed out of the

premises. When an RCMP constable arrived in response, the man we now know was Mr. Kolasch was walking away from both the McDonald's and the nearby Superstore. The entire incident was caught on a surveillance recording that was played in evidence during the trial. The majority of the constable's trial testimony was given before the surveillance recording was played.

[3] Upon arrival, the constable called to Mr. Kolasch to stop, that he was under arrest. He had to repeat this twice. When he turned and stopped the constable grabbed him by the arm although he had stopped and his hands were by his side. The constable then twisted him around twice, bent him over the hood of an adjacent car, threw him down to the ground and went down with him. While the recording did not show Mr. Kolasch's face at that point, his feet could be seen moving in an up and down motion. The constable then drew back his right arm and delivered a significant blow. Immediately thereafter, he made a similar motion. Mr. Kolasch was subsequently handcuffed and taken away.

[4] Mr. Kolasch testified, admitting that he had been drinking for several days prior to the incident. He did not recall much of it but did state that his hearing was poor and that everything had happened so quickly he had not realized the person who grabbed him was a police officer until he was on the ground and saw the yellow stripe on the man's trousers.

[5] The trial judge concluded that the Crown had not established that the constable was entitled to arrest Mr. Kolasch pursuant to the provisions of s. 495(1) of the *Criminal Code* so that any actions by Mr. Kolasch which otherwise might be considered to be resistance would not constitute the offence of resisting arrest. She also concluded that

even had the constable's arrest been valid, any struggling by the much older, smaller Mr. Kolasch was not for the purpose of resisting arrest but rather because the constable had thrown him off-balance, particularly given Mr. Kolasch's earlier consumption of alcohol. She concluded that the constable had used excessive force.

[6] The appeal is dismissed.

ISSUES

[7] The Crown argues that the trial judge engaged in reviewable error in:

- a. finding that the constable was not entitled to arrest Mr. Kolasch in the circumstances so that the arrest did not meet the requirements of s. 495(1) of the *Criminal Code*; and
- b. in otherwise finding that the arrest was illegal because the constable exercised excessive force.

STANDARD OF REVIEW

[8] Errors of law are subject review on the standard of correctness. The application of a legal standard to the facts of a case is a question of law; see *R. v. Araujo*, 2000 SCC 65. Errors of fact and errors of mixed fact and law are subject to the standard of palpable and overriding error. The allegation that a verdict is unreasonable and cannot be supported by the evidence is tested by asking "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered"; see *R. v. CGM*, 2015 ABCA 375; *R. v. Biniaris*, 2000 SCC 15, at para. 36.

[9] Findings of credibility and of fact by a trial judge are entitled to great deference and should only be interfered with on appeal if they are unreasonable, or in other words,

display palpable and overriding error; see *FH v. McDougall*, 2008 SCC 53; *Housen v. Nikolaisen*, 2002 SCC 33.

ANALYSIS

Did the trial judge engage in reviewable error in finding that the constable was not entitled to arrest Mr. Kolasch in the circumstances so that the arrest did not meet the requirements of s. 495(1) of the Criminal Code?

[10] The offence that is the subject of this appeal is created by s. 129(a) of the *Criminal Code of Canada* which reads:

129. Every one who

(a) resists or wilfully obstructs a public officer or peace office in the execution of his duty...

is guilty of... an... offence...

[11] The Crown argued that the constable was in the execution of his duty of arresting Mr. Kolasch when the latter resisted that arrest. It thus became relevant to determine whether the constable could lawfully arrest him in the circumstances. If not, he would not have been acting in the execution of his duty to arrest when any act of resistance occurred, and the s.129 offence would not be made out.

[12] The circumstances in which an arrest is lawful are defined by s. 495 of the *Criminal Code* as follows:

495(1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing an indictable offence...

[13] The Crown argues that the trial judge was in error in finding, at para. 50 of her judgment, that there was no evidence before the Court that the constable considered that Mr. Kolasch had committed an indictable offence or was about to commit an indictable offence when he was arrested. The constable testified to various reasons for arresting Mr. Kolasch. One of them was that he arrested Mr. Kolasch because of the assault arising from his having attempted to kick the McDonald's manager on his way out of the restaurant, and so that therefore this conclusion of the trial judge was palpably and overridingly in error.

[14] It is true that at no point in her reasons did the trial judge expressly find that the testimony of the constable was unreliable on this or any point. That does not mean, however, that she accepted his evidence as true. She did not. Her statement in para. 50 was therefore incomplete; she would better have stated that there was no "reliable" evidence before the Court that the constable arrested Mr. Kolasch because he believed him to have committed an indictable offence, rather for some other reason. That omission does not, however, render unclear her analysis or conclusions as to credibility.

[15] The constable testified that after he took Mr. Kolasch to the ground, Mr. Kolasch squirmed, grabbed, and squeezed the Constable's pouch that contained OC spray and his magazine pouch, then Mr. Kolasch's hand moved toward his handgun. At that point he punched him in the face, pulling a second punch when he realized the first had rendered Mr. Kolasch unconscious.

[16] The constable testified that during the incident Mr. Kolasch was very violent, resisting and that the constable feared for his life because he was scared that Mr. Kolasch was going to get his weapon.

[17] The trial judgment can only be interpreted as a rejection of this evidence, in favour of that contained in, and inferred from, the surveillance video and the evidence of an eyewitness, a Superstore security officer. That officer testified to seeing a brief struggle as the constable tried to put Mr. Kolasch under arrest before they both fell to the ground between two parked cars. He saw the constable deliver several subduing blows to Mr. Kolasch but did not know where he hit him. Mr. Kolasch then lay unconscious on the ground.

[18] The trial judge did not simply ignore the constable's evidence. She expressly recounted the reasons he gave for the arrest at paras. 11 and 13 of her decision, so she was alive to the fact that evidence had been given which, if believed, would meet the requirements for arrest set out in s. 495(1). However, the tenor of her decision is a rejection of that evidence as incredible.

[19] That includes her review of the differing reasons the constable gave for the arrest. While he first testified his intention was to determine identity, he later stated that he arrested Mr. Kolasch because he may have been intoxicated, and because after the issues at McDonald's he had moved onto another retail operation.

[20] She then questioned the reliability of the constable's evidence that his intention was to establish identity, observing that even on the constable's own evidence he did not ask Mr. Kolasch who he was, nor either the McDonald's manager or the Superstore security officer. She noted that the constable's concern that Mr. Kolasch's behaviour might be repeated at another retail premise, Superstore, conflicted with the fact Mr. Kolasch was walking away from Superstore at the time the constable first encountered him.

[21] The trial judge went on to make comments that can only be interpreted as expressing her incredulity for the constable's explanation of his conduct during the arrest. She observed the "amazing" detail with which the constable recalled the incident, describing each and every move by him and Mr. Kolasch, many months after the incident. She reviewed the evidence in the surveillance video, second by second, which could only have been for the purpose of comparing it to the constable's evidence. There was no suggestion that the recording was inaccurate in any way.

[22] She compared this evidence to the constable's repeated statements that he acted as he did to get control of Mr. Kolasch as against the recording that evidenced no need to take such extreme actions to do so. She found the constable's testimony that Mr. Kolasch was "very violent" and that he feared for his own life to be "amazing", given that the video showed only that Mr. Kolasch's legs were moving up and down when he was on the ground, not in a manner that was kicking anyone. His upper body was not shown on the recording once he was on the ground. She also observed that the constable was much younger and stronger than the admittedly impaired Mr. Kolasch, comparing that to the constable's evidence that he administered the punches as he need to control him.

[23] The trial judge went on to, in effect, reject the constable's evidence that he had arrested Mr. Kolasch because of the need to identify him, or because the latter may have committed an indictable offence. Rather, as she observed at para. 57 of her judgment, the constable did not testify that he had, at any point, considered whether he was able to arrest Mr. Kolasch without a warrant. As soon as he saw Mr. Kolasch, he told him he was under arrest. The event was over in seconds. As such, as noted, her

remarks in para. 50 of her reasons for judgment must be interpreted to mean that s. 495(1) did not justify the arrest because there was no “reliable” evidence before her that the constable made the arrest because Mr. Kolasch had committed an indictable offence or was at risk of committing an indictable offence.

[24] This ground of appeal is, therefore, an attack on those credibility findings. They are entitled to great deference. I do not conclude that they were unreasonable, or otherwise displayed palpable and overriding error. They have the advantage of being supported, at key points, by the surveillance recording.

[25] It was not necessary for the trial judge to consider, therefore, whether the arrest was also rendered unlawful pursuant to s. 495(2) or, if so, whether the deeming provisions found in s. 495(3) would nonetheless “save” the arrest. She found it was unlawful because it failed to meet the requirements of s. 495(1).

Did the trial judge err in finding in finding that the arrest was illegal because the constable exercised excessive force in arresting Mr. Kolasch?

[26] Given her above conclusions, it was not necessary for the trial judge to consider whether the arrest was unlawful for another reason, that constable used excessive force in effecting the arrest. She nonetheless made that express finding, which would become relevant had she been found to have incorrectly interpreted s. 495.

[27] The Crown argues that she erred in finding the constable used excessive force because pursuant to s. 25 of the *Criminal Code* he was entitled to use as much force as was necessary for him to fulfill his duties in law, so long as he acted on reasonable grounds. That section reads:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law...is,

if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[28] In the 2016 decision of *R. v. Power* (leave to appeal to the Supreme Court of Canada refused), the Saskatchewan Court of Appeal, in application of the directions found in *R. v. Nasogaluak*, 2010 SCC 6, stated:

...a determination of whether force is reasonable in all the circumstances involves a consideration of three factors. First, a court must focus on an accused's subjective perception of the degree of violence of the assault or threatened assault against him or her. Second, a court must assess whether the accused's belief is reasonable on the basis of the situation as he or she perceives it. Third, the accused's response to the force must be no more than necessary in the circumstances. This needs to be assessed using an objective test only, i.e. was the force reasonable given the nature and quality of the threat, the force used in response to it and the characteristics of the parties involved in terms of size, strength, gender, age and other immutable characteristics.

[29] The Crown argues that the trial judge found the constable's perception of being under threat by Mr. Kolasch to have been reasonable in s. 97 of her judgment where she states "There was nothing, other than the fact that [Mr. Kolasch] was alleged to have thrown a cheeseburger at somebody in McDonald's, while in an intoxicated state, and that he may have attempted to try and kick the manager who was following him, *to indicate that some degree of care might well be needed to be taken with respect to Mr. Kolasch at that time.*" With respect, this extract cannot be interpreted to mean that the trial judge found that the constable's self-described fear for his life because Mr. Kolasch was going to get his gun was credible, or reasonable in these circumstances.

[30] This argument is another invitation to ignore the credibility findings of the trial judge in favour of those that would exonerate the constable. The trial judge did not find the constable's evidence as to a perceived threat to have been credible and so need not have moved on to complete the *Power* analysis, including a determination of whether his subsequent beating of Mr. Kolasch was a reasonable response to same, even assuming that the *Power* analysis is applicable in relation to force exerted by an arresting peace officer as opposed to an accused person.

CONCLUSION

[31] The appeal is therefore dismissed.

BIELBY J.