On Appeal from a summary conviction in the Provincial Court on April 29, 2022

Date: 20231206
Docket: CR 23-01-39615
(Winnipeg Centre)
Indexed as: R. v. Negash
Cited as: 2023 MBKB 177

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PETROS MUSSIE NEGASH,	)	
	)	Ian Histed
applicant	)	for the applicant
- and -	)	
	)	Deann Sahulka
HIS MAJESTY THE KING,	)	for the respondent
	)	
respondent.	)	
	)	Judgment Delivered:
	)	December 6, 2023

TOEWS J.

INTRODUCTION

[1] The appellant appeals his convictions after a trial in the Provincial Court for motor vehicle flight from police and drive dangerously. The learned provincial judge (the judge) sentenced the appellant to a 15-month suspended sentence with 100 hours of community service. The convictions arose as of a result of a traffic stop conducted by two Winnipeg City police officers who stopped the motor vehicle that the appellant was driving on Kennedy Avenue in the City of Winnipeg at about 11:05 pm on Monday, September 21,

2020. The traffic stop was initiated by the police on the basis that the tail and brake lights of the motor vehicle which the appellant was driving were not functioning. While the appellant disputes the finding of the judge that he was asked to produce his driver's licence, the legal propriety of the traffic stop here and the legal propriety of a demand for a driver's licence by the police in the context of a traffic stop in these circumstances has not been questioned by the appellant at trial or in these proceedings.

[2] I note that the judge acquitted the appellant of resisting arrest.

[3] While there are additional issues summarized by the judge in his reasons which I have set out in the course of these reasons, the main issues before the court on appeal are whether in convicting the appellant for motor vehicle flight from police and drive dangerously the judge erred in fact and law in applying the correct legal test for self-defence and the defence of necessity. I will also address the additional issues identified by the judge in his reasons.

THE FACTS

[4] The judge found that at the traffic stop the appellant refused to roll down his window and produce his driver's licence when requested to do so by the police. The appellant was argumentative with the police officers and the judge found that the appellant was not acting "logically" and was not listening to directions from the police. (lines 21–25 T 24 Reasons for Judgment delivered April 29, 2022 – "Reasons for Judgment")

[5] The judge found that the appellant began to record the interaction with the police on his mobile phone some time after he had been stopped by the police and after the

commencement of his conversation with the police. He rejected the testimony of the appellant that the entirety of the conversation with the police was captured by the video he took on his mobile phone. While the video does not capture the arresting officer asking the accused to produce his driver's licence or telling him why he was stopped, the judge accepted the testimony provided by the arresting officer that he had asked the accused for his driver's licence. (line 36, page T 24 Reasons for Judgment). Accordingly, the judge held that since the traffic stop was lawful, the appellant was required to produce his driver's licence and remain until the traffic stop was complete.

[6] However, the judge found that the arresting officer did not have reasonable grounds to then make an arrest for possession of drugs for the purpose of trafficking on the basis of the observations he made. (lines 1-25, T25 Reasons for Judgment) He held: "[t]he arrest was premature, without proper grounds and not founded in law." (lines 25 and 26, T25 Reasons for Judgment)

[7] As the appellant refused to roll down his window, the arresting officer advised him that the consequences of failing to open the window would be that the officers would smash it. As a result of the appellant's continued failure to roll down his window or produce his driver's licence, the arresting officer smashed the window of the driver's door with his baton.

[8] At this point, the appellant stated he panicked and fled from the police officers in his car. On the evidence before him, the judge held that the appellant fled at a high rate of speed, going through a red light at the intersection of Kennedy Street and Broadway Avenue. On the basis of the evidence of the flight and the other circumstances

surrounding his manner of driving, the judge convicted the appellant of the two convictions which he now seeks to overturn. The judge had a reasonable doubt as to whether the appellant was resisting arrest when he was taken into custody after a brief foot chase by the river near the Legislative Buildings.

[9] The judge considered the appellant's defences of self-defence and necessity, asking the question: "Does the accused's defences of self-defence and necessity meet the foundational requirements [for defences of self-defence and necessity]?" (lines 28 and 29, T25 Reasons for Judgment)

[10] A similar question was asked by the judge earlier in his reasons when he set out the issues which were in dispute, asking: "Has the accused met the foundational requirements for defences of self-defence and necessity?" (lines 25 and 26, T8 Reasons for Judgment)

[11] The judge made the following findings in respect of the applicability of the two defences raised by the appellant:

> The accused testified that he did not expect the officer to smash his window, that he panicked and took off. The defence did not establish an evidentiary basis as to why the accused believed he needed to defend himself from police nor did they establish that he was at risk of imminent harm or that his reaction to flee was necessary. (lines 31-35 T25 Reasons for Judgment)
>
> [The arresting officer] told the accused the consequences of failing to open the window would be, they would smash it. The accused did not listen to what was being said. While he panicked, it was not a reasonable course of action to flee from … police at a roadside stop in his car. He could have chosen not to take off in his car. The defences of self-defence and necessity are not available to the accused in these circumstances, as doing so potentially put both officer safety and public safety at risk. (lines 37 – 41 T 25, lines 1 and 2 T26 Reasons for Judgment)

STANDARD OF REVIEW

[12] The parties agree on the standard of review applicable to these proceedings. As stated in the Factum of the appellant, the question of what amounts to self-defence is a question of law that should be reviewed on the standard of correctness. The Crown agrees that the same standard of review is applicable to the defence of necessity. (Factum of the respondent at p. 17)

[13] As stated at page 6 of the appellant's Factum, while the ultimate finding of the accused's actions in self-defence were reasonable is a question of fact and therefore subject to deference by the reviewing court, the application of the test to the facts found by the judge is a question of law.

[14] I agree with the position of counsel in respect of the standard of review to be applied to the facts and the law. As stated by the court in ***R. v. Tran***, 2010 SCC 58, [2010] 3 S.C.R. 350 (QL), at para. 40:

> **40** … the interpretation of a legal standard (the elements of the defence) and the determination of whether there is an air of reality to a defence constitute questions of law, reviewable on a standard of correctness. The term "air of reality" refers to the inquiry into whether there is an evidential foundation for a defence. Statements that there is or is not an air of reality express a legal conclusion about the presence or absence of an evidential foundation for a defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 50 and 55; *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595, at p. 682; *Parnerkar v. The Queen*, 1973 CanLII 149 (SCC), [1974] S.C.R. 449, at p. 461. …

THE POSITION OF THE APPELLANT

[15] The appellant states that the case law is clear that the burden of proof of proving beyond a reasonable doubt that the defences of self-defence and necessity do not apply is on the Crown. The appellant argues that by stating that the appellant "did not establish

an evidentiary basis as to why the accused believed he needed to defend himself from police" or "that he was at risk of imminent harm or that his reaction to flee was necessary" (lines 31-35 T25 Reasons for Judgment), the judge has misdirected himself as to who bore the onus of proof.

[16] As well, the appellant argues that the judge failed to consider the appropriate elements of each defence and that together with the misdirection in respect of the onus of proof, the judge's conclusion that the appellant's actions were not reasonable is owed no deference.

[17] The appellant further argues that the judge misdirected himself in holding that the defences of self-defence and necessity are not available if officer or public safety are put at risk.

[18] Finally, the appellant argues that the judge unfairly limited his cross-examination of one of the officers in respect of his disciplinary records in respect of an unrelated matter for the use of "aggressive" language against members of the public.

THE POSITION OF THE RESPONDENT (THE CROWN)

[19] The Crown sets out the statutory elements of self-defence at paras. 33 and 34 of its Factum. Those provisions are set out at s. 34 of the ***Criminal Code of Canada*** (the "***Code***") which provides:

> **34 (1)** A person is not guilty of an offence if
> **(a)** they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
> **(b)** the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
> **(c)** the act committed is reasonable in the circumstances.

> **(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> **(a)** the nature of the force or threat;
> **(b)** the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
> **(c)** the person's role in the incident;
> **(d)** whether any party to the incident used or threatened to use a weapon;
> **(e)** the size, age, gender and physical capabilities of the parties to the incident;
> **(f)** the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
> **(f.1)** any history of interaction or communication between the parties to the incident;
> **(g)** the nature and proportionality of the person's response to the use or threat of force; and
> **(h)** whether the act committed was in response to a use or threat of force that the person knew was lawful.
>
> **(3)** Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[20] As pointed out by the Crown, the defence of necessity is not codified, but the case law has established that there are three elements to the defence. In ***R. v. Latimer***, 2001 SCC 1, [2001] 1 S.C.R. 3 (QL), at para. 28, the court identified these elements as follows:

> **28** *Perka* outlined three elements that must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.

[21] The Crown argues that both the defences of self-defence and necessity are severely restricted and intended to cover situations of "last resort" in respect of self-defence or restricted to those "rare cases" in which true involuntariness is present in

respect of necessity. See ***R. v. Cinous***, 2002 SCC 29, [2002] 2 S.C.R. 3 (QL), at paras. 123-24 in respect of self-defence and ***Latimer*** at para. 27 in respect of the defence of necessity.

[22] The Crown argues that the judge did not misdirect himself with regard to the onus of proof in respect of the defences raised by the appellant. It notes that in order for a trier of fact, in this case a judge, to consider either defence the evidence must establish that there is an air of reality to the defence. This air of reality or evidential foundation must apply to each element of the defence. Without establishing this air of reality or evidential foundation in respect of each element of the defence, the trier of fact may not consider the defence. However, it is important to note that this evidential foundation imposes a burden on the accused that is merely evidential, rather than persuasive. (See ***Cinous*** at para. 52)

[23] The Crown argues that the judge properly considered this initial or evidential burden by reviewing the evidence in relation to each defence and concluded the appellant had not met this evidential burden.

ANALYSIS AND CONCLUSIONS

[24] As the court explained in ***Cinous***:

> **51** The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu*, *supra*; *Squire*, *supra*; *Pappajohn*, *supra*; *Osolin*, *supra*; *Davis*, *supra.* This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1.

> **52** It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at p. 466:
>
> > Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the " major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." [Emphasis added.]
>
> The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. This idea was crucial to the finding in *Osolin* that the air of reality test is consistent with the presumption of innocence guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.
>
> **53** In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, *supra*; *Park*, *supra.* The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin*, *supra*; *Park*, *supra*; *Davis*, *supra*.
>
> **54** The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*,*supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park*, *supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[25] In his Reasons for Judgment, the judge summarized the issues in dispute as follows:

- Did Constable Beattie inform the accused that this was a ***Highway Traffic Act*** stop?

- Did Constable Beattie have the necessary grounds to affect a warrantless arrest for drugs?
- Did the accused drive in a manner that was dangerous?
- Did the accused resist a peace officer?
- Had the accused met the foundational requirements for defences of self-defence and necessity?

(Lines 22-26 T8 Reasons for Judgment)

[26] Before considering those specific issues, it is instructive to consider the judge's findings of credibility in this matter. In that respect, while the judge found that there were certain discrepancies between the testimonies of the two officers, he found that the evidence was relatively consistent when describing their initial contact with the appellant while driving his motor vehicle and that where there were inconsistencies between the testimonies of the officers concerning the remainder of their interaction with the appellant, he set out his reasons why he accepted the testimony of one officer over the other or the testimony of one or both of the officers in contrast to the evidence of the appellant in respect of the various determinations he had to make.

[27] It is clear that after he carefully and extensively reviewed the evidence, he found the evidence of the appellant was significantly problematic in a number of material respects, generally accepting the evidence of one or both of the officers over the testimony of the appellant. Examples of this include:

- Rejecting the testimony of the appellant describing Constable Beattie as being aggressive and acting in an intimidating manner, noting that the video contradicts

that assertion and shows Constable Beattie using a calm tone of voice, repeatedly directing the accused to open his window, telling him that he could film all he wanted (lines 12-16 T9 Reasons for Judgment);

- Rejecting the appellant's testimony that the entirety of the conversation with the officers was captured by the video he took and that the argumentative nature of the appellant on the video was consistent with his behaviour in court (lines 14-19 T24 Reasons for Judgment);
- Rejecting the appellant's testimony that Constable Beattie never asked for his driver's licence (lines 5 and 6 T26 Reasons for Judgment);
- Finding that the appellant did not provide the licence despite being asked "most likely because he did not listen or focus on Constable Beattie's instructions", and "…repeatedly asking questions, talking over the officer instead of responding to what the officer asked of him." (lines 9-17 T26 Reasons for Judgment)

[28] The judge accepted the appellant's arguments in respect of the necessary grounds for a warrantless search for drugs and whether the appellant resisted a peace officer. Accordingly, those two determinations are not being challenged on this appeal. It is the determinations made by the judge in respect of the other three, as well as an additional dispute which I will address later in these reasons, which I must consider in determining whether the judge's determinations in respect of each met the applicable standard identified earlier in these reasons.

Did Constable Beattie inform the accused that this was a *Highway Traffic Act* stop?

[29] In my opinion, the finding that the appellant was advised of the reason why he was stopped and that he was requested to produce his driver's licence is amply supported by the evidence. The appellant did not dispute that his taillights and brake lights were not working and that the police had grounds to conduct a ***Highway Traffic Act*** stop as a result. After considering the evidence before him, including the conduct of the appellant as evidenced by the video he took on his mobile phone, the judge rejected the appellant's evidence that he was not asked for his driver's licence. Accordingly, based on the evidence before him, the judge concluded that this was a valid traffic stop and the appellant was required to remain on the scene until the traffic stop was complete.

[30] The failure or refusal by the driver of a motor vehicle to produce a driver's licence upon the request of a police officer is an offence pursuant to ***The Highway Traffic Act***. In this context it is of interest to note that because of his failure to produce his driver's licence, it appears the officers had the statutory authority under provincial legislation to arrest the appellant.

[31] This authorization to arrest is found at Part 5 of the ***The Provincial Offences Act***, C.C.S.M. c. P160, which allows a person to be arrested without a warrant if the police witness the person committing an offence. Arrest without a warrant is permitted if the arrest is necessary to establish the person's identity, to preserve evidence or to stop the offence from continuing or being repeated or another offence.

[32] There is ample evidence on which the officers could have arrested the appellant for his failure to identify himself as required. However, the officers did not arrest him pursuant to the provincial statutory authority. Nevertheless, despite no arrest being made

under the provincial authority, the appellant was under a legal obligation to remain at the traffic stop until the traffic stop was complete. This he failed to do.

Did the accused drive in a manner that was dangerous?

[33] The judge found that the appellant's own testimony confirmed that he was speeding. The appellant's mobile phone video recorded him going through a red light at the intersection of Kennedy Street and Broadway Avenue in downtown Winnipeg. The judge concluded that based on all the remaining evidence with regard to the charges of motor vehicle flight from the police and dangerous driving, including the police evidence which he accepted, he concluded that the Crown had proven both the dangerous driving and the flight from police in his motor vehicle.

[34] I find that the judge made no error in arriving at these factual conclusions or in the application of the law to these facts.

Had the accused met the foundational requirements for defences of self-defence and necessity?

[35] In my opinion, the judge did not misdirect himself on the onus of proof. The judge specifically directed his mind to whether the evidence established that the foundational requirements of self-defence and necessity had been met. In particular, the judge found that "[t]he defence did not establish an evidentiary basis as to why the accused believed he needed to defend himself from police nor did they establish that he was at risk of imminent harm or that his reaction to flee was necessary." (lines 31-35 T25 Reasons for Judgment)

[36] It is apparent on a reading of the judge's reasons that at this point he is considering the "air of reality" or the threshold burden in relation to each defence and not the ultimate onus which falls on the Crown to establish beyond a reasonable doubt. The judge's role in this context was summarized by the court in ***R. v. Mustard***, 2016 MBCA 40, 326 Man.R. (2d) 282 (QL) at paras. 20-24 where it held:

> **20** The assessment of whether there is an air of reality is to be made on consideration of the entire record. The evidential foundation may arise from any "evidential source on the record. There is no requirement that the evidence be adduced by the accused" (*Cinous* at para 53). The trial judge assumes the version of the evidence most favourable to an accused to be true (*Cinous ibid*; and *R v Grant*, 2015 SCC 9 at para 20, [2015] 1 SCR 475).
>
> **21** There are several actions of a trial judge in applying the air of reality test that, if taken, are errors of law for the purposes of section 686(1)(a)(ii) of the *Code*. A trial judge cannot assess the quality, credibility or reliability of evidence, substantively weigh the probative value of evidence, make findings of fact or draw determinative inferences (*Cinous* at paras 54, 87; *Pappas* at para 22; and *Grant ibid*).
>
> **22** While a trial judge has no ability to weigh, in any way, direct evidence, if the evidence in whole or in part, is circumstantial, the trial judge is to engage in a "limited weighing" of the evidence for the purposes of deciding whether there is an air of reality (*Cinous* at paras 88-91; and *Pappas* at paras 23-25).
>
> **23** The limited weighing of evidence for the air of reality test, while important, is also a modest and discrete exercise. As is the case of a preliminary inquiry judge considering a committal based in whole or in part on circumstantial evidence, a trial judge assessing whether there is an air of reality to a defence weighs all of the evidence, but only to the extent of whether it is "reasonably capable of supporting the requisite inferences" (*Cinous* at para 90; and see *R v Arcuri*, 2001 SCC 54 at para 23, [2001] 2 SCR 828).

[37] In my opinion, a fair reading of the judge's reasons demonstrate that his analysis of the issue was properly restricted to his determination of the threshold burden in respect of each defence. Consistent with the decision of the court in ***Mustard***, any weighing of the evidence by the judge was appropriately limited to the determination of the "air of reality" of both defences.

[38] Furthermore, contrary to the position advanced by the appellant, I do not agree that the judge held as a matter of law that the defences of self-defence and necessity are not available to the appellant because it was police officers who were exercising the force allegedly being applied here. Such a statement as a matter of law would be clearly erroneous as it would fly in the face of the plain wording of s. 34 (3) of the ***Code***.

[39] In my opinion the judge did no such thing. He is not saying that as a matter of law self-defence is not available when it is police officers applying force. His finding in this context must be examined in the context of the entire record, and in particular in relation to the preceding paragraph where the judge held:

> The accused testified that he did not expect the officer to smash his window, that he panicked and took off. The defence did not establish an evidentiary basis as to why the accused believed he needed to defend himself from police nor did they establish that he was at risk of imminent harm or that his reaction to flee was necessary.
>
> (lines 31-35 T25 Reasons for Judgment)

[40] In my opinion, it was for the limited purpose of weighing evidence in the context of the threshold burden that he found the defences "are not available to the accused in these circumstances, as doing so potentially put both officer safety and public safety at risk." [***Emphasis added***] (line 41 T25 and lines 1 and 2 T26 Reasons for Judgment).

[41] Accordingly, in considering the judge's findings in the context of the record as a whole, I find that the judge was not in error in holding that the accused had not met the foundational requirements for the defences of self-defence and necessity to be considered in this case.

Did the judge err in law in inappropriately restricting cross-examination in respect of a police officer's disciplinary conviction with respect to an unrelated incident?

[42] A final issue raised by the appellant arose in respect of the judge's decision to allow but limit the appellant's ability to cross-examine one of the officers on his discipline record. The incident in question occurred when the constable was off duty and involved "aggressive language" directed to the parents of a young person who was in the custody of the RCMP for breaking into his personal residence. That incident was unrelated to this incident. The judge allowed the appellant to adduce some of the details of the circumstances of the disciplinary offence, but did not allow further cross-examination as to the exact language used.

[43] In my opinion, the decision made by the judge here falls within the appropriate scope of his judicial discretion and is entitled deference upon review. The comments of the court in ***R. v. Boyne***, 2012 SKCA 124, 405 Sask.R. 163 (QL) at paras. 46 - 47 are instructive in this respect:

> **46** … The right to cross-examination is "a fundamental feature of a fair trial" (*R. v. Esau*, 2009 SKCA 31, 324 Sask. R. 95 at para. 17) and an accused's s. 7 rights. However, while the right to cross-examination is broad, counsel are generally bound by the rules of relevancy and materiality (*R. v. Mitchell*, 2008 ONCA 757, paras. 17-19).
>
> **47** A witness other than an accused can generally be cross-examined regarding any unrelated disreputable conduct bearing on his or her credibility (see *R. v. Miller* (1998), 131 C.C.C. (3d) 141 (Ont. C.A.) at para. 21; *R. v. Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)). However, these matters should not be too remote in time, or of such a character as to constitute no serious impairment of credibility. The right to cross-examine includes the circumstances underlying the charge or misconduct (*Miller,* para. 22), but is still subject to the trial judge's general discretion (*Miller*, para. 24). This was the case, for example, in *R. v. Majore* (1993), 113 Sask. R. 26 (C.A.) where the court held that the defence could not cross-examine a Crown witness on the factual details of a prior conviction because the

> witness had admitted the conviction and the specific details were irrelevant. The court also has discretion to curtail cross-examination on matters relating solely to credibility where relevance is tenuous (*R. v. Meddoui*, [1991] 3 S.C.R. 320).

[44] In my opinion, the judge did not commit an error in principle nor did he fail to give proper weight to all relevant considerations. The exercise of his significant judicial discretion here in respect of this ruling is entitled to deference.

CONCLUSION

[45] On the basis of the reasons set out in this decision the appeal is dismissed.

_____ J.