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COURT OF APPEAL FOR ONTARIO

WEILER, CRONK and GILLESE JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	Roger A. Pinnock
	)	for the respondent
Respondent	)	
	)	
- and -	)	
	)	
STEVEN CARSON	)	Michael J. Neville
	)	for the appellant
Appellant	)	
	)	
	)	Heard: March 23, 2004

On appeal from the convictions entered by Justice George T. Valin of the Superior Court of Justice on December 5, 2002 and the sentences imposed on December 5, 2002.

BY THE COURT:

[1] The appellant was charged with forcible entry, forcible confinement and assault and two counts of breach of a non-contact clause contained in his recognizance of bail. He was convicted on the assault and breach of recognizance charges and acquitted of the remaining charges. He was sentenced to a total of ten months incarceration, less ten months credit for pre-trial detention, resulting in a sentence of one-day incarceration on each of his three convictions, to be followed by twelve months probation. He appeals his convictions on the assault charge and on one of the breach of recognizance charges, as well as the sentences imposed.

(1) BACKGROUND

[2] This case arises from a series of altercations between the appellant and his then fiancée on the night of December 11, 1999. The background facts are somewhat unusual.

[3] The appellant and the complainant are both police officers on the same police force in Pembroke, Ontario. In the months preceding the relevant incidents, they were involved in a domestic relationship and had been living together in the complainant's home. They had also become engaged to be married. However, the relationship was fragile and at times appears to have been turbulent.

[4] In May 1999, the appellant was suspended from work and subsequently charged with uttering threats against his former wife's boyfriend. At about the same time, the complainant took a three-month leave of absence from work due to stress. During this period, both parties increased their consumption of alcohol beyond the levels that previously had been normal for them. Sometime in the late summer or early fall of 1999, when the complainant read the Crown disclosure brief relating to the threatening charge against the appellant, she became very upset and the relationship between the parties deteriorated. This culminated in a request by the complainant in early November 1999 that the appellant move out of her house. Although the appellant did so, he continued to see the complainant and, on occasion, to spend the night with her at her home.

[5] On the night of December 7, 1999, the appellant and the complainant became involved in a lengthy argument while at the complainant's house. The complainant had been drinking heavily earlier in the evening and, during the course of the argument, she struck the appellant in the face and head several times, injuring her hand in the process. When the appellant obtained a bag of ice for her hand, the complainant struck him in the face with it and kicked him in the lower back with her foot. The appellant did not retaliate. Instead, he left the complainant's house and returned to his parents' home.

[6] The appellant and the complainant saw each other socially on December 10, 1999 and again during the afternoon on December 11, 1999. Both occasions were uneventful.

[7] On the evening of December 11, 1999, the appellant and the complainant went out to dinner with two other couples. The complainant again consumed large quantities of alcohol. Nothing untoward happened during the dinner or subsequently, when all three couples returned to the complainant's house for a nightcap. When the other two couples left the complainant's house at about 11:30 p.m., the complainant and the appellant went to bed, intending to spend the night together. However, they again became involved in an argument, which caused the appellant to get dressed and leave the complainant's house. After a short time, the appellant changed his mind and returned.

[8] When the appellant arrived at the complainant's house, he knocked loudly on the door. The complainant came downstairs and unlocked the door. She alleged that the appellant then forced his way into the house. A physical confrontation ensued in the hallway and the kitchen. The complainant claimed that the appellant pushed her onto the floor and, when he decided that she should go to bed, attempted to force her upstairs. The complainant vigorously resisted by sitting down on the floor, grasping the handrail of

the staircase leading to the bedroom, and positioning herself between the wall and the banister so that the appellant was prevented from moving her. The complainant testified that she pushed her head back so far that she dented the wall with her head. She alleged that the appellant persisted notwithstanding her efforts to resist him and that, ultimately, he succeeded in picking her up and taking her upstairs. According to the complainant, the fighting continued once they were in the bedroom. She said that the appellant threw her on the bed onto her back and then straddled her by sitting on top of her chest. She stated that the appellant then attempted to choke her and to smother her with a pillow while forcibly confining her in the bedroom.

[9] The appellant presented a starkly different version of events in his trial testimony.

[10] The appellant acknowledged returning to the complainant's house after their argument but said that the complainant let him into the house without opposition. He claimed that, in her inebriated state, she then assaulted him. After an altercation in the kitchen, the appellant told the complainant that she was drunk again and that she needed to sleep and to go upstairs and calm herself. He claimed that, thereafter, he attempted to guide the complainant to the stairs, whereupon the complainant fell down on the floor at the foot of the staircase. She braced herself against the wall, grasped one of the handrails, and repeatedly smashed her head against the wall with sufficient force that the wall was damaged.

[11] The appellant claimed that he continued in his attempts to take the complainant upstairs because he thought that she was having a breakdown and feared that she would hurt herself if she continued to strike the wall with her head. He wanted her to calm down, to stop banging her head against the wall, and to refrain from striking him, as she had done a few nights earlier. He testified that when he picked the complainant up from the floor, she fought with him, clawing at his face and scratching his eye.

[12] Eventually, the appellant succeeded in carrying the complainant to her bedroom. He put her on the bed and, when she tried to continue fighting, he held her down on the bed, lying on top of her, to calm her down and to keep her from hitting him. He denied striking the complainant or attempting to choke or smother her. He claimed that, at the time, he was in love with the complainant and was still engaged to marry her. He also said that when the complainant rose from the bed, she swallowed a handful of pills. When the appellant attempted to remove them from her mouth, the complainant bit his fingers. Shortly thereafter, the complainant ran from the house to the neighbours, claiming that the appellant had assaulted her and attempted to choke and smother her.

[13] As a result of these events, the appellant was charged with forcible entry, forcible confinement and assault. The complainant was not charged with any offence.

[14] When the appellant was subsequently released on bail, the terms and conditions of his recognizance of bail required that he not communicate with the complainant, directly

or indirectly. Contrary to this requirement, the appellant entered into a brief conversation with the complainant on January 12, 2000 when he encountered her sitting in her parked car on the street. The complainant immediately reported the contact to a senior officer on the police force. At trial, the appellant maintained that the complainant was not on duty during this encounter.

[15] The appellant alleged that the complainant lured him into this contact by rolling down the window of her car, initiating a conversation with him and inviting further discussion. He also claimed that on other occasions the complainant had tried unsuccessfully in various ways to involve him in a breach of his recognizance, including parking her police cruiser at work in a place that required the appellant to pass her on his way into the police station, driving to his parents' home and pulling her vehicle into their driveway, and driving past the appellant on the street when he was walking his dog.

[16] Within days of his discussion with the complainant on the street, the appellant telephoned her at work, claiming to be someone else in order to speak with her. This incident gave rise to the second breach of recognizance charge against the appellant. He does not appeal his conviction on that charge.

(2) ISSUES

[17] The appellant makes three arguments in support of his conviction appeal. First, he asserts that the trial judge erred by rejecting the defence of necessity with respect to the assault charge. Second, also in connection with his assault conviction, he submits that the trial judge erred by not applying the principle of "*de minimus non curat lex*" to ground an acquittal on the assault charge. Third, with respect to his challenged breach of recognizance conviction, the appellant maintains that the trial judge erred by rejecting his defence of entrapment.

[18] On his sentence appeal, the appellant argues that, in the particular circumstances of this case, the trial judge erred by failing to grant an absolute or conditional discharge.

(3) CONVICTION APPEAL

[19] We did not find it necessary to call on the Crown in respect of the conviction appeal. In our view, the appellant's challenges of his assault and breach of recognizance convictions may be dealt with summarily.

(a) Assault Conviction

[20] The assault of which the appellant was convicted concerns the events that transpired at the base of the stairs in the complainant's home as the appellant was attempting to get the complainant upstairs to her bedroom.

[21] The appellant submits that, in rejecting the defence of necessity, the trial judge misapprehended the evidence and failed to consider relevant evidence. He says that both errors tainted the trial judge's reasoning process, resulting in an unreasonable conviction for assault. He asserts that the complainant was in imminent peril because she was smashing her head against the wall with such force that she broke the wall, and that his actions were designed to prevent this peril. The trial judge said that the appellant, "did not express any fear or concern about any injury the complainant might cause to herself when she was at the bottom of the stairs. His evidence was that he wanted her to go upstairs to go to sleep". This was contrary to the appellant's evidence. In fact, the appellant testified that "He didn't want her to hurt herself", that he "didn't want her to keep banging her head in the wall" and that he was trying to take care of the complainant, "To get her up, quit banging her head in the wall and get her to sleep". He was also concerned that the complainant was having a breakdown.

[22] Notwithstanding that the trial judge misapprehended the appellant's evidence in this regard, we are satisfied that the defence of necessity could not succeed. Three requirements must be present for the defence of necessity to be raised: (i) imminent peril or danger; (ii) no reasonable legal alternative to the course of action undertaken; and (iii) proportionality between the harm inflicted and the harm avoided: *R. v. Latimer* (2001), 150 C.C.C. (3d) 129 at para. 28 (S.C.C.). The standard that governs is a modified objective test, which takes into account the situation and characteristics of the particular accused. As the Supreme Court stated in *Latimer* at para. 33:

> *The accused person must*, at the time of the act, *honestly believe*, on reasonable grounds, *that he faces a situation of imminent peril that leaves no reasonable legal alternative open* [emphasis added].

See also: *R. v. Perka* (1984), 14 C.C.C. (3d) 385 (S.C.C.).

[23] In this case, although the appellant may honestly have believed that he faced a situation of imminent peril, he did not testify that he believed he had no legal alternative open to him. Having regard to the objective component of the test, alternatives were open to the appellant: for example, he could simply have backed away from the complainant and waited to see if she stopped banging her head; alternatively, he could have attempted to place something behind the complainant's head to cushion the blows. Thus, even if the trial judge misapprehended the evidence with respect to the first element relating to the defence of necessity, a requisite component of the defence was not made out.

[24] The appellant submits, in the alternative, that the trial judge's decision is contrary to the principle of "*de minimus non curat lex*", that 'the law does not concern itself with trifles': see *R. v. Hinchey*, [1996] 3 S.C.R. 1128. This principle seeks to avoid the

criminalization of harmless conduct by preventing the conviction of those who have not really done anything wrong. The application of the principle goes only so far as to preclude the criminalization of conduct for which there is no reasoned apprehension of harm to any legitimate personal or societal interest: *R. v. Murdock* (2003), 176 C.C.C. (3d) 232 (Ont. C.A.). The appellant acknowledges that this argument was not raised at trial, but submits that this court has a complete evidentiary record on which to deal with the issue.

[25] We would not give effect to this submission. *Hinchey* dealt with the acceptance of a benefit by a public servant. In that case, the Supreme Court of Canada explicitly did not decide on the applicability of the *de minimus* principle as a defence to criminal culpability. *Murdock* concerned trafficking in a controlled substance. Neither case involved the use of force or domestic violence. The extent of injuries resulting from the use of force, while an important factor, is not the sole determinative of the personal or societal interest in a crime. The harm to society occasioned by domestic violence, even of a minor nature, cannot be understated.

[26] The appellant also submits that, on the findings of the trial judge, the complainant was guilty of assault concerning the sequence of events that transpired immediately after the appellant's return to her home and, again, in respect of the events in her bedroom. He correctly points out that the trial judge found that the complainant was the aggressor during the altercation in the bedroom. Moreover, the trial judge expressly rejected the complainant's version of events in the bedroom as not credible or reliable. Thus, her allegations of choking, smothering and forcible confinement were rejected. In our view, these considerations are more appropriately factors for consideration on the appellant's sentence appeal. They do not displace the fact of the appellant's conduct at the foot of the stairs in the complainant's home, or afford a defence to that conduct.

[27] Accordingly, we would dismiss the appeal concerning the appellant's conviction for assault.

(b) Breach of Recognizance Conviction

[28] The appellant appeals his conviction for his January 12, 2000 breach of his recognizance on the basis that he was entrapped by the complainant. He submits that the proceedings concerning this charge should have been stayed as an abuse of process.

[29] We disagree. For entrapment to apply, the court must conclude that the appellant was convicted of an offence that was the work of the state. In the circumstances of this case, the complainant's status as a police officer is not itself sufficient to support this conclusion.

[30] Accordingly, we would also dismiss the appeal relating to the appellant's conviction for breach of recognizance.

(4) SENTENCE APPEAL

[31] The defence argues that the appellant ought to be granted either an absolute or conditional discharge. According to defence counsel, the appellant's exemplary record as a police officer, the fact that he served five months of pre-trial incarceration, the extreme stigma that he suffered in the community given the nature of the allegations against him, the relatively minor nature of the assault, and his difficult pre-trial incarceration in protective custody, are all factors that militate towards some form of discharge. Moreover, the full context of the assault suggests that the appellant was not trying to hurt the complainant but, rather, was attempting to protect her, and himself, from further harm.

[32] The Crown submits that the appellant should be sentenced to a further period of incarceration, two years of probation, a non-contact order with the complainant, a firearm prohibition, and a DNA order. The Crown argues that the appellant's criminal record is an aggravating factor. It further asserts that the circumstances of the assault indicate that the appellant's conduct was not spontaneous. Finally, the Crown asserts that since violent conduct in the domestic context and disobedience to court orders through breaches of recognizance need to be deterred through proper sentencing, a discharge in this case would be contrary to the public interest.

[33] In fashioning an appropriate sentence in this case, it was important that the totality of the circumstances and the full context of the events on the night in question be considered. In our view, the trial judge erred by failing to do so.

[34] The trial judge found that the complainant inflicted serious injury on the appellant. In contrast, the injuries to the complainant were minor. These findings support the appellant's version of the full sequence of events leading up to and following the assault on the staircase.

[35] The trial judge also made serious adverse findings concerning the complainant's credibility. In acquitting the appellant of the forcible entry and forcible confinement charges, the trial judge rejected the complainant's evidence concerning many of the key events in question. In addition, and significantly, the trial judge rejected the complainant's claim that she was assaulted by the appellant in the hallway of her home, in the kitchen and in the bedroom. Indeed, in connection with the altercation in the bedroom, the trial judge held that the complainant was the aggressor.

[36] The trial judge also held that on a number of prior occasions when the appellant was assaulted by the complainant, he did not retaliate but, rather, walked away. On this occasion, the trial judge found that the complainant was intoxicated and was behaving somewhat irrationally. That finding is supported by the complainant's conduct in

persistently banging her head against the wall and by her aggression against the appellant in the bedroom.

[37] The trial judge correctly observed that there is a societal interest in seeking to deter domestic violence and to protect the victims of domestic violence. In this case, however, the trial judge also found that the appellant was a victim of domestic violence.

[38] The sentencing judge rejected certain of the Crown's submissions concerning sentence on the basis that they would have an unnecessarily harsh impact on the appellant's prospects to continue his employment as a police officer. This is a legitimate factor, among others, to be taken into account at a sentence hearing. Neither the appellant's personal interest nor the societal interest would be served by the imposition of a sentence, not otherwise warranted, that would preclude the appellant's continued employment as a police officer.

[39] When the unique circumstances of this case are considered, we do not agree that a sentence of incarceration was warranted. The trial judge's reasons do not suggest that there is a need for specific deterrence and the entry of a conviction against the appellant on the charges at issue on this appeal may have significant negative repercussions for him. As well, the appellant has already served the equivalent of a ten-month custodial sentence. The courts have recognized that in those unusual cases where the granting of some form of discharge is in the best interests of the accused and is not contrary to the public interest, sentencing relief is available: see *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.) and *R. v. McDowell*, [1980] O.J. No. 488 (C.A.). This is such a case.

(5) DISPOSITION

[40] For the reasons given, this is an appropriate case for the grant of a conditional discharge. Accordingly, the convictions on the charges at issue are set aside, findings of guilt are substituted in their stead, and a conditional discharge is granted with probation for twelve months on the terms imposed by the trial judge.

RELEASED:

"April 16, 2004"

"KMW"

"K. M. Weiler J.A."

"E.A. Cronk J.A."

"E.E. Gillese J.A."