

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>P. A. Cleveland</i>
)	<i>on his own behalf</i>
<i>Respondent</i>)	
)	<i>D. C. Sahulka and</i>
<i>- and -</i>)	<i>A. Y. Kotler</i>
)	<i>for the Respondent</i>
<i>PEREZ ADARYLL CLEVELAND</i>)	
)	<i>Appeal heard and</i>
<i>(Accused) Appellant</i>)	<i>Decision pronounced:</i>
)	<i>April 29, 2019</i>

LEMAISTRE JA (for the Court):

[1] The accused appeals his convictions for two counts of assault contrary to section 265(1)(b) of the *Criminal Code*. The trial judge concluded that the accused threatened to apply force to the complainants by confronting them while in possession of a knife and chasing them as they fled in fear.

[2] The accused was represented by counsel throughout his trial (trial counsel). At the conclusion of the Crown’s case, he brought a motion for a directed verdict of acquittal. After the trial judge denied his motion, the accused elected to call no evidence and the Crown argued that the evidence established that the accused’s conduct amounted to an assault in law.

[3] After hearing argument from trial counsel, the trial judge adjourned the proceedings so that trial counsel could provide further written argument. At some point after the adjournment, the accused discharged his trial counsel and retained a new lawyer who provided the written argument.

[4] While he did not file a factum or other written materials on this appeal, the grounds of appeal in the accused's amended notice of appeal are: 1) the trial judge erred by misapprehending relevant facts; 2) the trial judge erred in applying the law; and 3) the accused received ineffective assistance of counsel.

[5] We are not persuaded that there is any merit to the accused's appeal.

[6] The accused has not established that the trial judge was mistaken as to the substance of the evidence, failed to consider evidence relevant to a material issue or failed to give proper effect to the evidence (see *R v Whiteway (BDT) et al*, 2015 MBCA 24 at paras 31-32). The trial judge carefully considered the evidence first when determining the motion for a directed verdict and a second time when deciding whether there was proof beyond a reasonable doubt as to the accused's guilt. A review of the record does not demonstrate any misapprehension of the evidence by the trial judge. Moreover, the evidence supports the trial judge's findings of fact and inferences.

[7] We are also not convinced that the trial judge erred in his application of the law (see *R v Shepherd*, 2009 SCC 35 at para 20; and *R v Bear (CW)*, 2013 MBCA 96 at para 24). The trial judge considered the accused's assertion that his conduct did not amount to an assault pursuant to sections 265(1)(b) or (c). In fact, the trial judge agreed with the accused's argument that

section 265(1)(c) was not applicable in the circumstances of this case. In our view, the trial judge applied the law correctly when he concluded that the accused armed himself with “the knife for the purpose of tacitly threatening the complainants” before confronting and chasing them, and was therefore guilty of assault.

[8] Finally, the accused has not established a factual foundation to support his allegation of ineffective assistance of counsel. While the trial transcripts contain assertions made by the accused that there was evidence that was not presented at trial; that he did not discuss with trial counsel whether he would testify; and that he did not have a knife during the incident, there is no evidence to substantiate those assertions (see *R v Le (TD)*, 2011 MBCA 83 at paras 178-79). In addition, the trial judge raised the issue of reopening the trial to allow for further evidence on two occasions. However, when the accused’s new lawyer took over, he made no effort to reopen the case.

[9] We are all of the view that there is no basis for appellate intervention.

[10] The appeal is therefore dismissed.

leMaistre JA

Monnin JA

Burnett JA
