IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***A. J. Synyshyn***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
	)	***A. Y. Kotler***
Respondent	)	*for the Respondent*
	)	
- and -	)	*Appeal heard and*
	)	*Decision pronounced:*
CLAYTON EWERT	)	***March 12, 2019***
	)	
	)	*Written reasons:*
(Accused) Appellant	)	***March 25, 2019***

LEMAISTRE JA (for the Court):

[1] After entering guilty pleas to other charges, the accused was convicted, by judge alone, of attempted murder for shooting an RCMP officer who attended his residence to arrest him. The accused appealed his conviction for attempted murder and sought an acquittal. If he was successful on his conviction appeal, he sought leave to appeal his sentence and to be sentenced on charges that were judicially stayed after the conviction (see *Kienapple v The Queen*, [1975] 1 SCR 729).

[2] At the conclusion of the hearing, the conviction appeal was dismissed with brief reasons to follow and leave to appeal the sentence was denied. These are our reasons.

[3] After the accused's partner complained that he had assaulted her and her friend and uttered threats, two RCMP officers went to the accused's residence to arrest him. Having been advised that there were firearms in the residence, the officers put on their body armour before approaching the residence. When the accused saw the officers in the yard, he threatened to shoot them and ran into his residence. One officer took cover in the yard behind a tree and another took cover behind the garage. Both drew their firearms, as did a third officer who arrived at the scene.

[4] The accused armed himself with a shotgun and fired two shots from an upstairs window striking one of the officers with both shots. The officer survived his injuries.

[5] The accused pled guilty to a number of general intent offences. He pled not guilty to offences requiring proof of specific intent, including attempted murder. At the trial, the accused asserted that he was aiming at the side of the garage and that he intended to scare the officers, not shoot anyone.

[6] When the officer was shot, he was behind a tree that was 3.7 feet away from the north-west corner of the garage. Two witnesses provided expert evidence regarding firearms at the trial. Both experts identified pellet strikes on the lower edge of the north-west corner of the garage and on the tree. The Crown's expert testified that the likely point of aim of the firearm was between the garage and the tree.

[7] The accused's expert opined that the point of aim of the firearm was within 10 feet in any direction from the bottom corner of the garage where the shotgun pellets struck it, but that it was not likely that the accused was aiming at the middle of the garage. His opinion was based, in part, on re-enactments

he performed with variables that were similar, but not identical to, those present at the scene of the shooting.

[8] The trial judge placed limited weight on these re-enactments (as well as re-enactments performed by the Crown's expert) because the re-enactments failed "to replicate all the variables" with precision.

[9] The trial judge relied on the testimony of both experts regarding the likely point of aim and other evidence in rejecting the accused's testimony as to his intent. Based on the totality of the evidence, the trial judge inferred that the accused intended to kill the officer.

[10] The trial judge found the accused guilty of all of the offences charged. A number of the offences were judicially stayed pursuant to *Kienapple*. The accused was sentenced to 13 years (less pre-sentence custody of 1,654 days) for attempted murder, six months consecutive for assault causing bodily harm, and six months concurrent for two counts of uttering threats and a second count of assault causing bodily harm.

[11] On the conviction appeal, the accused asserts that the trial judge erred in law: 1) by reducing the Crown's burden of proof to something less than proof beyond a reasonable doubt; 2) by rejecting the evidence of re-enactments of the shooting by the two experts; and 3) by failing to properly apply the law regarding the specific intent required for attempted murder. He also argues that the verdict was unreasonable because the evidence established a reasonable alternative to guilt.

[12] We are not persuaded that the trial judge imposed a burden of proof on the Crown that was lower than proof beyond a reasonable doubt.

[13] In his reasons, the trial judge properly acknowledged that, in order for the accused to be convicted of attempted murder, the Crown had to prove beyond a reasonable doubt that the accused meant to kill the officer and that he discharged the firearm at the officer. He considered the totality of the evidence and concluded that these elements had been proven beyond a reasonable doubt. The reference by the trial judge to the "likely aim point" was only one of the factors he considered in reaching this conclusion and referred to the location the firearm was pointed, not whether the accused intended to point it there.

[14] The accused argues that the trial judge failed to consider his expert's opinion as to the point of aim based on his rejection of the re-enactments. We disagree. Nor are we convinced that the trial judge misstated the evidence or failed to give legal effect to it (see *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 32).

[15] The trial judge considered the accused's expert's opinion along with all of the other evidence when he stated that the experts "provide[d] credible and reliable opinion evidence based upon their assessment of the physical evidence and the photographs and had identified a single point of aim."

[16] The accused also contends that his expert's opinion as to the point of aim supports his testimony that he was shooting at the garage, not the officer, in order to scare him. He argues that this evidence should have raised a reasonable doubt about his intent and permitted the trial judge to draw the inference that the accused was shooting at the garage, not at the officer.

[17] In light of the totality of the evidence, we are not persuaded that the trial judge failed to properly apply the law regarding the specific intent

required for attempted murder nor that the verdict was unreasonable pursuant to section 686(1)(a)(i) of the *Criminal Code* (see *R v Sinclair*, 2011 SCC 40 at para 69).

[18] The trial judge considered the possibility that the accused was aiming at the middle of the garage, but rejected it based on the accused's admission that "he shot towards the officer" and the evidence which led him to conclude that the point of aim "was near where [the officer] was situated". Moreover, the trial judge considered the totality of the evidence when he concluded that "the only reasonable inference is that the intention was to kill [the officer] and not to scare him." See *R v Villaroman*, 2016 SCC 33 at paras 25-43.

[19] The trial judge carefully considered the accused's testimony regarding the circumstances and his actions immediately prior to the shooting. He concluded:

> [I]t is the totality of the evidence – being [the accused's] knowledge of weapons, his knowledge that the firearm was capable of killing [the officer], the emotion confirmed to be anger or mad, an earlier threat of killing, deliberate actions once he made the threat to shoot the officers if they did not get off his property such as the unlocking of the gun safe, the loading of the weapon, the firing of the shotgun, the knowledge where [the officer] was located and firing that shotgun in the direction of [the officer] and the aim point as suggested by the experts. That if any or some of these steps were not present or [the accused's] mental expressed state was not as he described the inference I would make may have been different.

[20] We are satisfied that the trial judge's conclusions were reasonable in light of the evidence and that "the verdict is one that a properly instructed

jury or a judge could reasonably have rendered" (*R v RP*, 2012 SCC 22 at para 9).

[21] In the result, the conviction appeal was dismissed and, therefore, leave to appeal the sentence was denied.

leMaistre JA

Monnin JA

Burnett JA