CITATION: R. v. Bhadresa, 2022 ONSC 4691
COURT FILE NO.: CR-21-920-00AP
DATE: 2022 08 15

ONTARIO

SUPERIOR COURT OF JUSTICE

SUMMARY CONVICTION APPEAL COURT

B E T W E E N:	)
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HER MAJESTY THE QUEEN	)
	)
	) Sarah Burton for the Respondent Crown
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	)
- and –	)
	)
	)
RAJIV YOGESH BHADRESA	)
	)
	) Eugene J. Bhattacharya for the Appellant
	)
	)
	)
	) **HEARD:** February 25, 2022
	) by Zoom conference

JUDGMENT ON SUMMARY CONVICION APPEAL

[On appeal from the judgment of Justice I. Jaffe
dated April 19, 2021]

D.E HARRIS J.

[1] This is an appeal from convictions for assault and utter death threats. The Appellant also argues a sentence appeal.

[2] The Appellant and his wife had been married fourteen years. It was alleged by Mrs. Bhadresa that on the night of May 12, 2020, the Appellant became enraged at her and, in the midst of berating her, grabbed her throat and threw her down to the ground.

[3] During these tumultuous events, both husband and wife proclaimed that they wanted the other to kill them. According to the complainant, the Appellant also threatened to kill her.

[4] The Appellant's grounds of appeal almost exclusively concentrate on rearguing the trial issues. The "different levels of scrutiny" argument is also advanced. None of these arguments have any merit. However, the Appellant also argues that the trial judge erred in her examination of the complainant's after-the-fact emotional state.

INTRODUCTION

[5] This trial was a classic credibility contest between complainant and accused. Both testified. A police officer who received the initial complaint also testified. The familiar dilemma for the trial judge was how, with diametrically opposed accounts of the same events, the Crown could prove the complainant's version true to the high beyond a reasonable doubt standard. The trial judge initially concluded that the complainant was a credible witness and the Appellant was not. His evidence did not raise a reasonable doubt.

[6] The trial judge sifted through the evidence to ascertain whether there was confirmation of the complainant's testimony. She found some support in the complainant's emotional upset as attested to by the police officer. With respect, this evidence was of no probative value. For this reason, the appeal must be allowed.

THE EVIDENCE

[7] The marriage was an unhappy one. It was Mrs. Bhadresa's evidence that on May 12, 2020, she spoke to the Appellant's uncle about their taxes but did not immediately tell the Appellant about the conversation. He was angered by this and pushed her. She stumbled back. The Appellant then grabbed her by the throat and pushed her again. She fell. He then threw a knife on the floor. When Mr. Bhadresa tried to pick it up, the Appellant shouted at her that he was going to kill her and then himself. He banged his head repeatedly against the fridge. When Mrs. Bhadresa asked him to stop, he pushed her again.

[8] Mrs. Bhadresa tried to leave the home. As she was leaving, the Appellant pushed the door closed and pulled her in. The door hit her hand as it was closing. He pushed her down on the sofa and again repeated that he would kill her and himself.

[9] In fear, Mrs. Bhadresa went into the bedroom. The Appellant followed her and repeatedly banged his head against a mirror in the hallway. The mirror broke. Mrs. Bhadresa picked up the broken glass and in frustration threatened to kill herself. The Appellant grabbed the glass and put it up to his own throat, saying "Kill me, kill me." Both their hands were cut but quite superficially. The Appellant then headbutted Mrs. Bhadresa. Mrs. Bhadresa tried to call the Appellant's father but the Appellant grabbed the cell phone and threw it on the floor.

[10] Mrs. Bhadresa eventually retreated to the bedroom and remained there for the night. She did not leave the home because she was scared that the Appellant would not let her. The Appellant slept on the couch in the living room.

[11] The next morning Mrs. Bhadresa packed some of her belongings and went to a nearby park and called the police. Cst. Howell met Mrs. Bhadresa at the park. She noted that Mrs. Bhadresa was frantic and crying. She observed minor scratches on her hands and wrist. A few of Mrs. Bhadresa's fingers were bandaged.

[12] When the Appellant was arrested, injuries were noted to his head, including two large bumps on the top of his forehead and a large bruise in the middle of his forehead. There were superficial scratches on his face.

[13] The Appellant testified and denied that he had assaulted or threatened his wife. He agreed that the two had a verbal disagreement because his wife had not told him about the phone call with his uncle. The Appellant said that he wanted to speak to her father. This made her angry and she threatened to kill herself. The Appellant hit his head on the fridge twice and said he was going to kill himself. He went outside to calm down.

[14] Upon returning, he tried to speak to his wife but she ignored him. This upset him and he slammed his head against the mirror three or four times out of frustration. He went to the second bedroom and after a few minutes, Mrs. Bhadresa came in with a broken piece of mirror and indicated that she was going to kill herself. The Appellant was able to disarm her. Eventually, Mrs. Bhadresa returned to her bedroom and the Appellant fell asleep in the second bedroom.

[15] The Appellant testified that he was concerned for his wife's safety. But he never thought to call the police nor try to call Mrs. Bhadresa's father, nor did he check on her during the night. When asked why he did not call her father, he said it was "too late" in India. However, with the time difference it would in fact have been late morning in India. When the Appellant left for the work in the morning, he did not check in on Mrs. Bhadresa upon leaving.

THE TRIAL JUDGE'S REASONS

[16] The trial judge began by reviewing the evidence and counsels' positions. In her conclusions, she first reviewed the many consistencies between the complainant and the Appellant, including the fact there had been a fight, the origin of the fight, that Mrs. Bhadresa grabbed the Appellant's hand to stop him from hurting himself and that he grabbed her hand to prevent her from hurting herself.

[17] The trial judge rejected the Appellant's evidence for reasons of credibility and reliability. She was critical of the Appellant's testimony that he was concerned for his wife's safety. There were several reasons why she rejected his evidence in this regard, adding that his actions or lack of actions were inconsistent with being concerned for her safety.

[18] The trial judge carefully addressed defence counsel's position that the complainant's evidence suffered from material inconsistencies. She rejected this argument. She then continued,

> However, finding that Ms. Bhadresa was a credible witness does not mean automatically we can accept her evidence. An equally relevant, but distinct consideration is the reliability of her evidence and assessing the reliability of her evidence, I have considered the extent to which Ms. Bhadresa's evidence is corroborated together with her ability to observe, recall and communicate the events in question.
>
> As of many he said/she said cases, there's not much independent evidence that corroborates her account, however, ***P.C. Howell's evidence offered some support for Ms. Bhadresa's account which addresses the emotional state as observed by the officer is consistent with someone who would had [sic] recently experienced an emotionally charged event such as an assault.*** As well, the injuries the officer observed on Mr. Bhadresa and the Band-Aid on Ms. Bhadresa's hand, could not only be seen as supporting Mr. Bhadresa's account but also support Ms. Bhadresa's evidence.
>
> Aside from the emotional state, there was no suggestion that Ms. Bhadresa's ability to observe or recall the evidence of May 12th was impaired in any way and she was able to clearly provide the court with detailed descriptions of the alleged event.
>
> Additionally, the lack of any material inconsistency that Ms. Bhadresa's evidence is, in my view, not only relevant to her credibility but also some assurance regarding the reliability of her evidence.
>
> I explained why I disbelieved Mr. Bhadresa's evidence on material issues and considered in the context of all the evidence, his evidence does not raise a reasonable doubt.

> I turn now to whether the Crown has proven the charges. (Emphasis added)

[19] The trial judge then went through the two counts and explained that because she accepted Mrs. Bhadresa's evidence and rejected the Appellant's evidence, she found the Appellant guilty on the assault and the threatening counts. For example, she said,

> Based on Ms. Bhadresa's evidence which for the reasons already explained I accept, I find that the Crown has proven the charge of assault beyond a reasonable doubt.

THE LAW

[20] Boiled down to its essence, the trial judge, after rejecting the Appellant's evidence, cited two specific reasons why she accepted the complainant's version of events: 1. Some support for her evidence could be derived from her upset emotional state the morning after the assaults; and 2. There were no material inconsistencies in the complainant's evidence.

[21] With respect, the emotional state evidence was incapable of supporting the complainant's testimony. The law is clear that a complainant's after-the-fact emotional state is capable of being corroborative: *Regina v. White, Dubeau and McCullough* (1974), 1974 CanLII 1495 (ONCA), 16 C.C.C. (2d) 162, 27 C.R.N.S. 66, 1974 CarswellOnt 19 (Ont. C.A.) at para. 14 (Carswell). That does not mean, however, that in each and every situation, this type of evidence is corroborative. Like any circumstantial evidence, the relationship between a proved fact (the emotional state) and the fact in issue (the assault) must be scrutinized.

[22] This was captured in *R. v. Redpath* (1962), 46 Cr. App. R. 319 (C.A), at p. 321, where it was said:

> It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration.

[23] In this trial, the complainant and the Appellant were unequivocal that there had been a rancorous disagreement between them complete with anger and threats of self-harm. The complainant was emotionally upset. No argument was made by either counsel at trial disputing this. The trial judge said in the concluding part of her reasons,

> It's clear that on May 12th, that the marriage between Mr. and Mrs. Bhadresa came to a boiling point. Both of them were upset. Both uttered threats to kill themselves. Emotions were high. And it is also common ground that the marriage had been less than ideal for many months, if not years, prior to May 12th. To a large degree, the evidence of both the complainant and the defendant is consistent, and both described the unsatisfactory state of their marriage…

> …
> It's within that context of admitted volatility, aggression and emotional upset that I have considered the evidence of the complainant.

[24] As was said in White,

> 7 [The trial judge] did not tell [the jury] that evidence which was *equally consistent* with the guilt or innocence of a particular accused could not in law be capable of corroboration against that accused. I refer to *Rex v. Reardon*, 1944 CanLII 112 (ON CA), [1945] O.R. 85, 83 C.C.C. 114, [1945] 1 D.L.R. 795 (C.A.), applying, in sexual cases, the classic rule of *Rex v. Baskerville*, [1916] 2 K.B. 658, 12 Cr. App. R. 81, and to *Rex v. Yott*, 1945 CanLII 370 (ON CA), 85 C.C.C. 19, [1946] 1 D.L.R. 683 (Ont. C.A.). Counsel for the appellant also referred to *Thomas v. The Queen*, 1952 CanLII 7 (SCC), [1952] 2 S.C.R. 344, 15 C.R. 1, 103 C.C.C. 193, [1952] 4 D.L.R. 306, and *Regina v. Hibbitt*, [1959] O.W.N. 286, 31 C.R. 47, 125 C.C.C. 1 (C.A.).
>
> 8 There is no doubt that the charge of the learned trial Judge was defective in this respect, that the defect is a serious one, and that unless the remainder of the charge and the nature of the admissible evidence was such that we are satisfied that no substantial wrong or miscarriage of justice has occurred, it would be necessary to direct a new trial. (Emphasis Added)

[25] Also see *R. v. Ryon* ABCA 36, 2019 ABCA 36 (CanLII), [2019] 4 W.W.R 413 at paras. 64-65

[26] The situation is not dissimilar from consciousness of guilt evidence relating to an accused's after-the fact conduct. It has been recognized for many years that there are situations in which an accused's after-the-fact conduct is equally explained by innocence as it is with guilt. If true, the evidence is of no probative value.

[27] The pertinent situations vary greatly but one of the most common is when evidence is erroneously relied upon to attempt to determine the level of culpability in a homicide prosecution (e.g. *R. v. Wiltse* (1994), 1994 CanLII 822 (ON CA), 19 O.R. (3d) 379 (C.A.); *R. v. Charlette* (1992), 1992 CanLII 13156 (MB CA), 83 Man. R. (2d) 187 (C.A.); *R. v. Murray* (1994), 1994 CanLII 1692 (ON CA), 93 C.C.C. (3d) 70 (Ont. C.A.); *R. v. Bob* (1990), 78 C.R. (3d) 102 (Ont. C.A.); *R. v. Rodgerson*, 2015 SCC 38, 327 C.C.C. (3d) 287, [2015] 2 S.C.R. 760 (S.C.C.) at para. 27). In addition, an admission made by the accused or conclusive proof of it may have the practical effect of removing an issue from contention at trial and preclude the inference sought to be drawn (*R. v. Arcangioli*, 1994 CanLII 107 (SCC), [1994] 1 S.C.R. 129 (S.C.C.); see the commentary in *R. v. White*, 1998 CanLII 789 (SCC), [1998] 2 S.C.R. 72, [1998] S.C.J. No. 57 (S.C.C.) at para. 28).

[28] The set of circumstances in which this kind of evidence possesses no value is not closed. In *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 (S.C.C.), Justice Martin summed up the general approach,

> 145 Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

[29] In this trial, the complainant's post-offence emotional upset was incapable of differentiating between guilt or innocence. It was equally consistent with the Appellant's evidence as with the complainant's evidence. There was no rational basis upon which the evidence could advance one over the other. The evidence was neutral and possessed no probative value towards proof of the Crown's case.

[30] It is evident that the trial judge gave weight to the emotional upset evidence as being confirmatory, saying that it lent "some support" to the complainant. This demonstrates a substantial error. The evidence was not confirmatory.

[31] The presence of confirmatory evidence in a credibility contest is of significant importance. O'Connor J.'s words in *R. v. F.(L.)*, 2006 CanLII 34723 (ON SC), [2006] O.J. No. 4173 (Ont. S.C.) are worth repeating,

> [9] Very often in sexual assault and related sexual and physical abuse allegations, proof to the criminal standard relies primarily on the credibility of the complainant and the accused. … Corroboration, as the term was formerly defined in the *Criminal Code*, is no longer necessary for a conviction for sexual related offences. A court may convict on the evidence of a complainant alone. However, unless there is some confirmatory or supportive evidence of the allegations by the complainant, a court may have difficulty concluding beyond a reasonable doubt that the Crown has proven the offence(s). Confirmatory evidence can include a broad spectrum of direct and circumstantial evidence from strong…to moderately supportive…to marginally confirmatory… However, where there is no evidence other than the testimony of the complainant and the accused, their credibility will be critical to resolving the 'he says/she says' conundrum the court faces.

[32] Also see *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104 at paras. 1-2.

[33] The evidence of the Band-Aid on the complainant's hand referred to in the sentence directly after the emotional upset sentence in the trial judge's reasons likely stands on a similar footing. Both the complainant and the Appellant testified that the

complainant was attempting to harm herself with broken glass from the mirror and the injury was caused when the Appellant grabbed her hand to ensure she was not hurt. The trial judge specifically held that because of the protective purpose, she did not conclude that this constituted an assault.

[34] In these circumstances, it is arguable that, at least without further reasons, this evidence could not corroborate the complainant's evidence. However, given the conclusion on the emotional upset evidence, it is not necessary to decide the issue.

[35] The Crown did not invoke the curative proviso with respect to the emotional upset evidence. Nonetheless, it could not avail in these circumstances. The error was not trivial nor was the case against the Appellant overwhelming: *R. v. Van* 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-35.

[36] For these reasons, the appeal is allowed, the convictions set aside and a new trial is ordered. The Appellant is to appear in courtroom 104 at the Brampton courthouse on September 28, 2022 to set a new trial date.

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D.E HARRIS J.

Released: August 16, 2022

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B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and –

RAJIV YOGESH BHADRESA

Respondent

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