SUPREME COURT OF YUKON

Citation: *R. v. Lowe*, 2011 YKSC 42

Date: 20110509
S.C. No. 10-AP005
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ROBERT KEVIN LOWE

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

David Christie — Counsel for the appellant
Ludovic Gouaillier — Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal from a conviction in the Territorial Court on a charge of assault against Reginald Ram, contrary to s. 266 of the *Criminal Code*. The issue on this appeal is whether the trial judge erred by failing to provide adequate assistance to the appellant, who represented himself, and thereby failed to ensure that the appellant received a fair trial.

FACTS

[2] The appellant was tried with two co-accused, John Singh and Wade Colquhoun, on January 8, 2010. Each of the co-accused was represented by counsel. The

appellant, Mr. Singh and Mr. Colquhoun were jointly charged with assaulting Mr. Ram. Mr. Singh faced additional charges of assault with a weapon and uttering threats against Mr. Ram and his common-law wife. At the outset of the trial, Mr. Singh entered a guilty plea to the common assault charge, however the trial proceeded on the other charges against him.

[3] At a number of points during the trial, reference was made to a statement the appellant had made to the RCMP on August 6, 2009. A transcript of that statement was disclosed to each of the accused by Crown counsel before the trial. During the trial, Crown counsel advised the trial judge that he had spoken to the appellant about the Crown's intention to have the statement ruled voluntary and that the appellant was prepared to admit that it was. The trial judge advised the appellant of the necessity for the Crown to prove voluntariness, and that the appellant had a right to challenge the admissibility of the statement under the *Charter of Rights and Freedoms*. The trial judge asked the appellant if he understood this requirement and this right. The appellant acknowledged that he did. The trial judge then asked the appellant if he waived the requirements relating to those issues, and the appellant indicated that he did. The trial judge advised the appellant that the Crown did not intend to proffer the statement as evidence, but that the Crown may use the statement for the purpose of cross-examining the appellant, should he give evidence himself. The trial judge asked the appellant if he understood this proposition, the appellant acknowledged that he did.

[4] There were only two witnesses called for the Crown: the victim and the investigating RCMP officer, Constable Bulford.

[5] As the Crown's direct examination of Constable Bulford was coming to a close, the following exchange took place between Crown counsel, the appellant and the trial judge:

> "MR. GOUAILLIER: Your Honour, Mr. Lowe is unrepresented. However, I spoke to him about his statement and technically we have to enter into *voir dire*, but Mr. Lowe indicated to me that he's – he's prepared to admit that the statement was given voluntarily.
>
> THE ACCUSED LOWE: Yes, that's correct, sir.
>
> THE COURT: All right. You understand you have the right to have the Crown prove beyond a reasonable doubt that it was freely and voluntarily obtained from you?
>
> THE ACCUSED LOWE: Yep.
>
> THE COURT: You also understand you have the right to challenge the admissibility of the statement on the grounds that it was obtained from you contrary to your rights under the *Canadian Charter of Rights and Freedoms?*
>
> THE ACCUSED LOWE: Yes, I understand.
>
> THE COURT: You understand all of that?
>
> THE ACCUSED LOWE: Yes, sir.
>
> THE COURT: And you're waiving the necessity of them doing any of that?
>
> THE ACCUSED LOWE: It's not necessary.
>
> THE COURT: Is the Crown intending to –
>
> MR. GOUAILLIER: Not to tender.
>
> THE COURT: -- proffer the statement?
>
> MR. GOUAILLIER: Not to tender as part if its case.
>
> THE COURT: But the potential to use it for cross-examination.
>
> MR. GOUAILLIER: Yes.

THE COURT: All right. Do you further understand, sir, that the Crown is not intending to offer that statement in evidence, but they could, if it's admitted, use it for the purpose of cross-examining you, should you give evidence yourself.

THE ACCUSED LOWE: Yes, sir.

THE COURT: You understand that?

THE ACCUSED LOWE: Yes, I do."

[6] The appellant's cross-examination of Constable Bulford was as follows:

"Q I just wanted to double check on something, and that was, did you give Reginald the names of the co-accused before he gave his statement?

A At the hospital?

Q At the hospital, yes.

A Are you -- like you're asking did I provide him the names?

Q Yes, that's what I'm asking.

A No. No

Q Thank you. During the time that I was at the RCMP station giving my statement, just after the fact, did you remark about attending Reginald's residence on occasion for possible domestic disturbances?

A I don't think so. Like me, myself personally --

Q Yes, you yourself, personally.

A -- attending that residence to deal with a domestic?

Q Or some sort of complaint?

A Not that I recall, no.

Q Do you recall after – after you turned off the equipment and you were escorting me back -- I'm trying not to lead too much, but --

THE COURT: Well, you can, because you're cross-examining.

THE ACCUSED LOWE: Oh, okay.

THE COURT: Lead away.

THE ACCUSED LOWE:

Q Sorry, I just -- during my statements that I was discussing about Reginald's girlfriend being abusive --

A Mm-hmm.

Q -- and that, I was of belief that it was possibly the girlfriend that had given him these injuries and discussing about that I was talking with him that night in question and seeking help and circumstances like that. And as we were walking down that hallway you remarked something about you'd been there somewhat frequently dealing with -- with them and that it seems that she's a leading character in deciding what he does or can say?

A I don't recall making specific remarks about being there for any kind of a domestic disturbance. I know I have - I don't remember if I did what I did say to you - I know I have dealt with Mr. Ram and Ms. Gallinger before.

Q Okay

A And I do recall saying that I was going to have to go back and see Mr. Ram again, to speak to him, because of the information that you provided me in my -- in your statement. I would have to see him and speak to him about the events again.

Q Okay.

A I -- and I -- honestly I do not recall any specific remarks I may have made.

Q All right. That's fine. Thank you, that's all I have."

[7] When the Crown closed its case, the following exchange occurred:

"MR. GOUAILLIER: That's the Crown's case.

THE COURT: Mr. Coffin.

MR. COFFIN: Yes, calling no evidence on behalf of Mr. Singh.

THE COURT: Mr. Lowe, again, you can indicate to me now or you can wait until you hear what Ms. Hawkins has to say.

THE ACCUSED LOWE: I don't have anything further to add that's already been submitted in my statements to the police.

THE COURT: All right. Well, the issue right now is whether you wish to call any witnesses or testify yourself.

THE ACCUSED LOWE: No, I don't sir.

THE COURT: You don't?

THE ACCUSED LOWE: No. The only witness I had is not answering his phone.

THE COURT: All right. Ms. Hawkins.

MS. HAWKINS: If I could just have one moment, Your Honour. Not calling any evidence, Your Honour.

THE COURT: Very well. We'll hear from the Crown." (my emphasis)

[8] When the appellant was asked to make his closing argument, he said the following:

"THE ACCUSED LOWE: Yeah, I don't have a whole lot to say about everything that's been said or shown here today. It's obvious that there is no – there was no video or physical evidence of the – this incredible assault and beating that we've been accused of.

I'm also standing on the fact that the discussion that I had with Mr. Ram was about domestic abuse from his girlfriend and her family and I'm trying to seek him to get help, to get out of the situation.

Sorry. I'm believing that accusing three doorman of a possible beating is to cover up the embarrassment that his – that it was possibly his girlfriend, when he returned home, that he received this from.

The mention of this chair that had hit Mr. Ram was actually, I was the one that was moving the chair, pulling it out

> from underneath him while he was laying on the floor, that Mr. Singh actually had no contact with this chair whatsoever. And that was actually put in my statement. That's pretty much all I have to say, sir." (my emphasis)

LAW

[9] One of the most recent cases from the British Columbia Court of Appeal on the duty of a trial judge to assist a self-represented accused is *R. v. Martin*, 2010 BCCA 526. The facts in that case are of no assistance in the case at bar, as Mr. Martin was involved in a much more complicated trial over a much longer period of time. However, Bennett J.A., speaking for the Court, provided a helpful summary of the law on the question of assistance to the self-represented litigant. The summary began at para. 14 with a quote from Mr. Justice O'Halloran, in *R. v. Darlyn* (1946), 88 C.C.C. 269 (B.C.C.A.):

> "There are two traditional common law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed. The first is, that if the accused is without counsel, the Court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect. The second is, that it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point to emphasize, not until he is found guilty, but until he is found guilty according to law." (my emphasis)

[10] At para. 15, Bennett J.A. clarified that the duty to assist does not require the trial judge to step into the empty shoes of the absent barrister, but rather that the judge do what is "reasonable in the circumstances within the exercise of his or her discretion."

[11] At para. 16, Bennett J.A. referred to the comments of Ryan J., as she then was, in *R. v. Parton*, [1994] B.C.J. No. 2098 (S.C.), at paras. 5-17, which had previously been adopted by the British Columbia Court of Appeal in *R. v. P.H.L.W.*, 2004 BCCA 522:

> "One of the most difficult situations a trial judge must face is the case of an unrepresented accused.
>
> Mastering the substance and procedure of criminal law takes many years. A lay person, no matter how intelligent or well-motivated, generally comes to the courtroom unequipped to conduct a trial.
>
> In some cases the person accused cannot afford the services of a lawyer. In other cases the person accused prefers to conduct his-or-her own defence. Occasionally the accused is adequately informed but usually the person does not have even the most rudimentary understanding of such things as the charge he-or-she faces, the burden on the Crown, or the role of the defence. Unfortunately it is not uncommon for the accused to have derived his-or-her notions about the legal system from unrealistic television or movie portrayals. …
>
> …
>
> In summary then, the case law appears to require the trial judge to provide assistance to an unrepresented accused with respect to the applicable procedural law in each case. The trial judge must, in addition, try to ensure that the accused's defence is brought out in full force and effect." (my emphasis)

[12] Later in *Martin*, at para. 47, Bennett J.A. quoted from the Supreme Court of Canada decision in *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45, on the issue of what constitutes a "fair trial":

> "At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362, *per* La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."

[13] In its earlier decision of *R. v. Moghaddam*, 2006 BCCA 136, the British Columbia Court of Appeal dealt with an appeal from an accused convicted of dangerous operation of a motorcycle following a trial in which he represented himself. The trial judge had refused to allow the accused to cross-examine a police witness about events that

occurred after the date of the incident giving rise to the dangerous driving charge, ruling that those events were irrelevant to the question of his guilt or innocence. However, as the Court of Appeal held at para. 6:

> "…[the trial judge] appeared not to apprehend the centrality to the appellant's defence of his challenge to the officers' credibility arising from alleged bias against him on the part of Constable Siddiqui. Second, when the appellant made submissions that the officers were exaggerating what they said about his driving, the trial judge did not assist the appellant by explaining that he could testify as to his version of the driving incident. Whether the nature of the appellant's driving constituted "dangerous driving" was, of course, central to proof of the case against him."

[14] In *Moghaddam*, the only two witnesses to the appellant's dangerous driving were the two police officers. Their credibility was the focus of the appeal. As noted at paras. 27-29, it came out during the trial that Constable Siddiqui had served a traffic ticket on the appellant in 1997 and the appellant alleged that the Constable was angry over subsequent proceedings which took place in traffic court. However, the appellant's main complaint about Constable Siddiqui arose from an incident that occurred on January 30, 2000, approximately 4 months after the incident of dangerous driving under appeal. On that date, Constable Siddiqui attended at the appellant's home to serve a warrant, which he had failed to note had been previously vacated. When the appellant tried to explain that to the Constable, they had a physical altercation that resulted in the appellant requiring 13 stitches to his head. Constable Siddiqui was formally reprimanded by the RCMP and directed to have no further contact with him.

[15] The trial judge ruled the appellant could not cross-examine Constable Siddiqui or give evidence concerning this incident on the grounds of irrelevance.

[16] Interestingly, at para. 31, the Court of Appeal referred to the exchange between the trial judge and the appellant at the close Crown's case about whether the appellant would be calling any evidence:

> "COURT: All right. Now Mr. Moghaddam, what do you wish to do with respect to this matter. Are you intending to call evidence, call witnesses?
>
> ACCUSED: No, Your Honour. There's no witnesses.
>
> COURT: Okay. I want -- something I just need to be sure you understand clearly that if you have any new information that you want to consider, it must come to me in the form of evidence. It cannot come as submissions. You can make arguments based on the evidence I have already heard, but if there's things you want to say and I know at different points when you were asking questions, I told you that that -- you could not give evidence while you asked questions, that you had to -- if you wanted that information before me, you would have to testify and give it to me. Now, if you testify, which you're not required to do, it's totally your choice, if you testify, then Mr. Mahoney has the opportunity to cross-examine you. And you may or may not want that to happen. That is often one of the considerations that people have.
>
> If you testify, then I have your evidence to consider along with all the other evidence, and to weigh and make my decision based on everything I have heard as evidence which is what people have testified to under oath, as well as what the exhibits say to me.
>
> Apart from that, if you want to simply argue, make your arguments and submissions on the basis of the evidence that I have heard, you are certainly welcome to do that as well. That is totally your choice. If you do not want to testify, but you have other witnesses you want me to hear from that have relevant evidence, then this is the time that you should call them."

The appellant chose not to testify and made submissions.

[17] At para. 35 of *Moghaddam*, Lavine J.A. referred to the Court's earlier decision in *R. v. B.K.S.* (1998), 104 B.C.A.C. 149:

> "A trial judge has an obligation to ensure that an accused receives a fair trial. When faced with an unrepresented accused the trial judge should, within reason, assist the accused in the conduct of his defence and guide him through the trial process so that his defence is effectively brought out. Just how far a trial judge should go in doing so is necessarily a matter of discretion. As in all cases involving the review of the exercise of judicial discretion, an appellate court should only intervene if the judge proceeded on a wrong principle or if a miscarriage of justice resulted." (citations omitted) (emphasis already added)

[18] At para. 44, the Court, notwithstanding the trial judge's earlier and fairly extensive remarks about whether the appellant would call evidence (see para. 19 above), said this:

> "The appellant's decision not to testify obviously followed from the trial judge's ruling that the events of January 30, 2000 were irrelevant. If that ruling was wrong in law, then the appellant's decision was made on the basis of a legal error. But even if the trial judge's ruling was not an error of law, by preventing the appellant from testifying as to those events she effectively made for him the decision whether or not to testify. She never suggested, even after he made it clear that he believed the officers were exaggerating, that he put before the court, in the form of evidence, his version of the driving on September 17, 1999. She then decided the case on the basis that there was no evidence to contradict that of the officers." (my emphasis)

[19] Continuing at paras. 48-53, the Court considered the judge's duty to make opening explainatory remarks, and cited with approval the decision of Fruman J.A. in *R. v. Phillips*, 2003 ABCA 4 (aff'd 2003 SCC 57):

> "[50] Whether the trial of an unrepresented accused is fair, however, is not determined, as a matter of law, by a single failure to provide explanations at the opening of the trial about the trial process, the elements of the offences, cross-examination, or any other aspect of the trial. Nor does the law require that trial judges provide certain explanations at the beginning of a trial. This is because, as Fruman J.A. commented (at para. 22):

> Perhaps some judges are beguiled by the consistency and simplicity of boiler-plate language. But trials involving unrepresented accuseds are rarely consistent or simple. Their need for guidance varies depending on the crime, the facts, the defences raised and the accused's sophistication. The judge's advice must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial.

[51] Madam Justice Fruman reiterated the principles articulated in *Darlyn*, *B.K.S.*, and *Parton* (at paras. 23 and 25):

> How far a trial judge should go in assisting an accused is therefore a matter of judicial discretion: *McGibbon*, *supra*, at p. 347.
>
> …
>
> In cases in which the trial judge's guidance is alleged to have been inadequate, trial fairness is determined by considering whether the lack of guidance compromised the unrepresented accused's ability to properly bring out his defence.

[52] In dismissing the appeal in brief oral reasons, McLachlin C.J.C. agreed with the majority of the Alberta Court of Appeal that the accused had a fair trial. The Supreme Court must be taken to have agreed that a trial judge is not required to provide specific explanations at the opening of a trial where an accused is unrepresented in order for the trial to be considered fair. Instead, that determination requires an evaluation of the trial judge's actions in light of the facts and circumstances of the particular case, involving a "careful and detailed examination of the complete trial record", as Fruman J.A. states (at para. 26).

[53] I would adopt the reasons of Fruman J.A. …" (emphasis already added)

[20] Although *Moghaddam* makes it clear that there is no shopping list of things that the trial judge must go through when attempting to assist a self-represented accused, the Ontario Court of Appeal decision *R. v. Gonsalves* (2005), 196 O.A.C. 83 provides guidance:

> "… while we recognize that a contextual approach is required, the trial judge did not provide the appellant with the minimum level of assistance as described in *Tran*. For example, at the outset of the trial he did not provide an explanation to the appellant of the court proceedings and

> how they would unfold. He did not tell the appellant that he was entitled to object to evidence led by Crown counsel. He made no reference to the preliminary hearing transcript and how the appellant could use it in cross-examination. He did not adequately explain the purpose of cross-examination of a witness and how to conduct it. He did not explain the purpose of the voir dires respecting the police officers' and security persons' notes. He did not explain the factors an accused should consider before testifying on his own behalf. The result is that the appellant did not receive a fair trial." (para. 3; my emphasis)

ANALYSIS

[21] It is apparent from the cross-examination of Mr. Ram by Mr. Singh's counsel and the appellant, and from the appellant's cross-examination of Constable Bulford and his closing argument, that his statement to the police likely contained an alternative version of events; specifically that he met Mr. Ram to have a discussion about the domestic abuse the latter was suffering from his girlfriend and her family and was trying to help him get out of that situation. In other words, it is apparent that the appellant's defence was a denial that he assaulted the victim or acted as a party to a physical assault committed by Mr. Singh.

[22] Simply reading the exchange between the trial judge, Crown counsel and the appellant about the admissibility of the appellant's statement to the police (see para. 5 above) suggests that there was no confusion in the appellant's mind about the use that would be made of his statement following the admission that it was voluntarily made. However, a careful and detailed examination of the complete trial record indicates that this was not the case.

[23] It is apparent that the appellant thought his statement to the police was somehow in evidence, because when the Crown closed its case and he was asked whether he had anything to say, he answered "I don't have anything further to add that's already

been submitted in my statements to the police". I agree with defence counsel that the only reasonable inference which can be drawn from those words is that the appellant mistakenly assumed from the earlier discussion about the admissibility of his statement and its voluntariness that the statement would be taken into account by the trial judge and that therefore there was no need for him to testify about his version of events. That inference is further supported by the appellant's closing argument:

> "I'm also standing on the fact that the discussion that I had with Mr. Ram was about the domestic abuse from his girlfriend and her family and I'm trying to seek him to get help, to get out of the situation… and that was actually put in my statement…"

Since the appellant was unable to elicit that version of events through his cross-examinations of the victim or Constable Bulford, and since he had not testified to it, he must have been referring to the content of his statement to Constable Bulford, and appealing to the judge to consider it.

[24] Crown counsel argued that the appellant's remark to the trial judge "I don't have anything further to add that's already been submitted in my statements to the police", could be understood as a reference to the appellant's immediately preceding cross-examination of Constable Bulford. However, taking a contextual approach and considering the entirety of the trial record, I conclude that would not be a reasonable inference to draw. The appellant's cross-examination of Constable Bulford was apparently about a conversation he had with the constable in a hallway either immediately before or after he provided his statement, and the appellant was suggesting that the constable made specific remarks about some domestic difficulties between the victim and his girlfriend. However, the appellant ultimately did not elicit any helpful information from the constable on that topic. Therefore, it would be illogical to

infer that the appellant was referring to that cross-examination when he said "I don't have anything further to add that's already been submitted my statements to the police".

[25] Crown counsel also argued there are other possible inferences which can be drawn from this remark of the appellant. For instance, says the Crown, the appellant may have chosen not to testify for tactical reasons, such as a lack of willingness to submit to cross-examination, or with the knowledge that neither of his co-accused were calling evidence. However, dealing with the last point first, the appellant did not know what Mr. Colquhoun was going to do until after he had made his election (see para. 7 above). Second, one ought not look at the appellant's decision not to testify in isolation. Rather, one ought to take a contextual approach and carefully consider the entire trial record. Having done so, I am led back to the seemingly inescapable conclusion that the appellant assumed he could rely on his statement in his defence. His decision not to testify or call evidence may also have had a tactical component, but I find it was principally because of this misapprehension and not for the reasons suggested by the Crown.

[26] Finally, as was the case in *Moghaddam*, even after the appellant sent what I find was a clear signal to the trial judge that his decision not to testify or call any evidence was based upon his mistaken reliance on his statement to the police, the trial judge did not say anything to clarify the potential confusion or to correct the appellant. Furthermore, there was no suggestion by the trial judge that the appellant might wish to consider taking the witness stand to provide evidence, in order that his version of events might be considered in his defence. In that sense, the trial judge failed to ensure that the appellant's defence was brought out with "full force and effect". This lack of

guidance compromised the self-represented appellant's ability to properly bring out his defence and could give rise to a miscarriage of justice if not rectified.

[27] Of course, with all due respect to the learned trial judge, hindsight is always 20/20 and I do not suggest that he erred by failing to provide the appellant with a "perfect trial", or to quote *R. v. Lyons*, [1987] 2 S.C.R. 309, at para. 88, "the most favourable procedures that could possibly be imagined". The trial judge did make some effort to explain to the appellant what his options were surrounding the admission of his statement to the police. Indeed, if that passage of the trial transcript was the only one at issue, this appeal would likely not succeed. Having said that, it must still be remembered, as quoted above from *R. v. Parton,* that:

> "Mastering the substance and procedure of criminal law takes many years. A layperson, no matter how intelligent or well-motivated, generally comes to the courtroom unequipped to conduct a trial."

[28] Some examples I find of potential points of confusion are as follows:

a) There was reference in the exchange to a "*voir dire*", yet there was no attempt made by the trial judge to explain what a *voir dire* is or its purpose;

b) There was also a reference to the appellant's rights under the *Charter*, but again no further explanation about what those were;

c) There was mention of "the admissibility of the statement", without any particular explanation of what that phrase meant and its importance to the appellant;

d) There was a question from the trial judge to the Crown about whether it intended to "proffer" the statement, to which Crown counsel replied "Not to

tender as part of its case". Once again, there was no explanation as to the legal meaning of the words "proffer" and "tender"; and

e) The trial judge stated to the accused that the Crown was not intending "to offer that statement in evidence, but they could if it's admitted, use it for the purpose of cross-examining you, should you give evidence yourself", with no explanation of the distinction.

[29] While the appellant responded that he understood what all this meant, in the context of the entire exchange and especially in the balance of the trial record, including his remarks on three occasions indicating that he intended to rely on his statement, it is reasonable to infer that, notwithstanding the exchange, the appellant was left with a misunderstanding about the potential use of the statement.

[30] Had the appellant been told by the trial judge that in order for his version of events to be taken into account he would have to testify, he might well have done so. Had he taken the stand, the trial judge would have been obliged to consider his story as part of the evidence, which could have affected the his decision to convict.

[31] Lastly, it is important to note that the evidence supporting the trial judge's finding that the appellant aided and abetted Mr. Singh in the assault was not particularly compelling. First of all, the trial judge concluded that the victim's evidence was subject to a number of frailties: *R v. Singh and Lowe*, 2011 YKTC 21, at paras. 8 and 9. Indeed, the trial judge stated that he would have not accepted the victim's evidence "without finding support or corroboration elsewhere in the evidence". It was his detailed and careful analysis of the video evidence which caused him to conclude that the victim's version of the assault by Mr. Singh had been sufficiently corroborated. However, even

here, his observations seem to be limited to showing the appellant either near or seated at the table where the victim was seated, as well as showing Mr. Singh speaking to the appellant (para. 17). What the trial judge concluded from this detailed review of the video was that:

> "…Mr. Lowe was involved at least to the extent of adding to the number of players on Mr. Singh's team, adding to the intimidation factor, and thus, abetting the commission of the assault, whether or not Mr. Lowe actually struck Mr. Ram." (para. 17)

[32] The presence of the appellant at the table where the victim was seated could have been explained by the appellant's version of the events, which was that he was simply having an innocent conversation with the victim and did nothing to aid or abet Mr. Singh. Had the judge heard and considered this evidence, his verdict may have been different.

CONCLUSION

[33] In the result, the appeal is allowed. Pursuant to ss. 822(1) and (2), and ss. 686(1)(a) and (2)(b) of the *Criminal Code*, I quash the conviction and order a new trial.

Gower J.