IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Edmond,*
2014 BCSC 1375

Date: 20140722
Docket: X076439
Registry: New Westminster

Between:

Regina

Respondent

And

Edmond Edward Edmond

Appellant

Before: The Honourable Madam Justice Arnold-Bailey

On appeal from: Provincial Court of British Columbia, August 13, 2012, (*R. v. Edmond,* Surrey Registry No. 184513-1)

Reasons for Judgment

Counsel for Crown (Respondent):	Nicholas M.D. Reithmeier
Counsel for the Accused (Appellant):	Graham T. Kosakoski
Place and Date of Hearing:	New Westminster, B.C. January 28, 2014
Place and Date of Judgment:	New Westminster, B.C. July 22, 2014

I. INTRODUCTION

[1] This is a summary conviction appeal pursuant to s. 830 of the *Criminal Code*, R.S.C. 1985 c. C-46 in relation to a decision of a judge of the Provincial Court of British Columbia convicting the appellant of assault with a weapon, contrary to s.267(1)(a) of the *Criminal Code* (Count 1). A conditional stay was entered on Count 2, possession of a weapon for a purpose dangerous to the public peace contrary to s. 88(1) based on the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729. In both counts the alleged weapon was stated to be a pipe. In relation to the conviction for assault with a weapon the appellant received a suspended sentence with probation for two years.

II. BACKGROUND

[2] In the spring of 2010, the appellant rented his basement suite in Surrey, BC. to the complainant, Mr. Doyle, and his girlfriend, Ms. Raczova. The appellant resided in the main unit of the residence.

[3] The living situation between the appellant and the tenants became acrimonious after Mr. Doyle and Ms. Raczova gave notice that they were going to move out. Mr. Doyle testified that he wanted to leave because he believed the appellant had come into their rented suite without permission on a prior occasion. Ms. Raczova testified they decided to leave because she was pregnant and the suite was too small.

[4] The strained relationship between the appellant and Mr. Doyle ("the complainant") erupted on July 3, 2010. On that day, the two men engaged in several heated exchanges concerning the complainant's tenancy in the appellant's house. In the morning, the appellant entered the complainant's suite without giving notice. The complainant became angry and "push[ed] him towards the door to get him out". He admitted to telling the appellant if he ever entered his house again, he would break his arm. The complainant then went to the shared laundry space and saw the appellant with prospective tenants. He told them they should not rent the suite;

specifically, he made a comment to the effect of "you don't want to live here" and called the appellant a "creep".

[5] The trial judge accepted the complainant's version of the events that occurred thereafter. The appellant entered the suite with a pipe. He then struck the complainant with the pipe in the neck. The complainant was then able to take the pipe away when the appellant tried to strike him a second time. He wrestled the appellant to the floor. The complainant testified he was not seriously injured as a result of the encounter.

[6] The appellant appeared to concede, through his counsel, that he entered the complainant's suite with something (whether it was a work-out bar or pipe is unclear) but submitted that he only struck the complainant after the complainant lunged at him.

[7] The appellant's defence at trial was that he acted in self-defence. The trial judge did not find his defence raised a reasonable doubt and entered convictions for the assault with a weapon charge and possession of a weapon for a purpose dangerous to the public peace, entering a conditional stay for the latter.

III. THE TRIAL

[8] The trial proceeded over two days. The appellant was represented by counsel, Mr. Redekopp. The Crown called two witnesses: the complainant and Ms. Raczova. Ms. Raczova testified she was present in the suite when the altercation occurred but did not witness much of the incident.

[9] The Crown closed its case and the defence did not call any evidence.

[10] When the Crown made its closing submissions, there were no comments from the bench, whereas during the defence's closing submissions, the trial judge interrupted defence counsel over 60 times.

IV. THE BASIS OF THE APPEAL

[11] The appellant appeals his convictions on the basis that the conduct of the trial judge created a reasonable apprehension of bias.

[12] In written submissions, the appellant contended that the trial judge's actions during the trial resulted in both actual and perceived unfairness. During oral submissions, however, he limited his position to perceived unfairness.

[13] Specifically, the appellant says the trial judge erred by proceeding to weigh the evidence prior to hearing all the evidence, and prior to hearing the submissions of counsel.

[14] The appellant points to a number of comments that he submits led to perceived unfairness in the trial. He says that the combined effect of all these comments creates a reasonable apprehension of bias.

[15] I will deal with the issues in the following manner.

[16] First, I will address one specific issue that arose during cross-examination of the complainant. The judge made a comment about credibility in the context of discussing the complainant's call to 9-1-1. Originally, the appellant stated that the matter resulted in actual unfairness. Since revising his position during the appeal hearing, this issue is probably best thought of as generally contributing to the overall state of the perceived unfairness.

[17] Second, I will set out portions of the closing submissions relevant to the alleged perceived unfairness so as to create a reasonable apprehension of bias. The appellant contends that the trial judge did not interrupt the Crown counsel once during closing submissions, whereas the trial judge interrupted defence counsel over 60 times. I will include a large excerpt from the closing submissions so as to demonstrate the overall nature of the exchanges. The excerpt also contains specific comments that the appellant says give rise to a reasonable apprehension of bias.

[18] Finally, I will address the appellant's submissions on this appeal in turn. The appellant categorized the judge's problematic comments and conduct into three types: the trial judge's comments indicated premature findings of fact; his repeated rhetorical questions opined on material facts; and he ridiculed the appellant's arguments. I will also outline some general observations that I have made regarding the trial.

[19] Some statements by the trial judge do not contribute to a reasonable apprehension of bias and some do. It is the cumulative effect of the latter that must be assessed. I will conclude by examining the effect of the comments more globally in the analysis section.

1) The trial judge's comment during cross-examination

[20] During defence counsel's cross-examination of the complainant, counsel noted that the transcript of the 9-1-1 call indicated that the complainant was talking to a third party - someone named "Josh". The complainant said that there was no Josh present and that the transcript must be erroneous. Defence counsel sought to then play the audio-recording to explore this issue. The trial judge denied this request. The following exchange took place (Appeal Record, Tab 2, pp. 32-33):

> Mr. Redekopp: Your Honour, I was not expecting that he would do this. We're going to need to play the recording to him in order for him to verify whether or not it is his voice that said this. And we may have to bring this witness back in order to get the proper equipment here. I -- I went through this with my friend and she indicated well, we have the transcript why don't you just put the transcript to him. Appears as if he's disagreeing with the transcript. We're going to have to --
>
> The Court: Well, does it -- does it cause an essential issue I have to be concerned about?
>
> Mr. Redekopp: Goes to his credibility, Your Honour.
>
> The Court: Well, that's -- that's a fallback position always, that one word, credibility. I mean, the issue here is whether or not he was struck with this weapon, is it not?
>
> Mr. Redekopp: The issue --
>
> The Court: I'm not overly focused as to what was said in the 9-1-1 call.
>
> Mr. Redekopp: The -- well again, the issue has to do with the entire constellation of events that led to this. And in this particular case we have

> people around who apparently were not around and I'd like to find out if there were people around. Goes to the issue of whether or not there was any other witness or any other person there.
>
> The Court: Ms. Lloyd? Do you object to the 9-1-1 call being played?
>
> Ms. Lloyd: Well, I would agree with the court that it doesn't seem to go to the material issue of whether the assault occurred. But if my friend is wanting to embark on an inquiry as to whether there are other witnesses, the witness has said there was no one else there.
>
> The Court: Seems like a collateral issue, Mr. Redekopp. The question was put to him, it was answered. I mean, you're going to mark the exhibit, the exhibit will speak for itself. The Crown isn't saying the -- the transcript's inaccurate. I think I can leave it at that. It's certainly a question of weight.
>
> Mr. Redekopp: We'll leave it at that, Your Honour.

[21] The appellant points to the fact that the trial judge called credibility a "fallback position" and submits that the trial judge implied only guilty parties resort to reliance on credibility arguments.

[22] The respondent submits that in the context of the trial this is not a sound interpretation of what was said. Further, counsel for the accused at trial had the last word on the matter and stated that he was content to the let the issue go to the weight to be attributed to the complainant's evidence.

[23] In my view, credibility is never a "fallback position"; rather, it is one that is most often at the heart of a criminal trial: *R. v. Hossu* (2002), 162 O.A.C. 143, 167 C.C.C. (3d) 344 (C.A.) at para. 19. However, while I do not agree with the trial judge's comment, it cannot be said that the logical implication of the comment is that the trial judge believed only guilty parties rely on credibility arguments. This takes the comment beyond its context in the trial where the trial judge concluded that the issue was collateral and that the matter would go to weight.

[24] I do not find this unfortunate comment to be demonstrably unfair when considered in context. Therefore, in and of itself, I do not find it gives rise to a reasonable apprehension of bias.

2) The trial judge's comments during closing submissions

[25] The appellant submits that the trial judge made premature findings of fact and then "cross-examined defence counsel repeatedly on these findings throughout closing submissions, interrupting counsel on more than sixty occasions".

[26] The following is a lengthy excerpt from the trial transcript. I include a large portion of it to demonstrate the nature of the exchange between defence counsel, Mr. Redekopp, and the trial judge. The excerpt picks up a short while after Mr. Redekopp has begun his submissions. The trial judge has already interjected to say "I would expect the landlord to knock first and have somebody answer the door" and, among other things, "does he have to bring a pipe with him to show an apartment?" (Appeal Record, Tab 5, pp. 60-67).

> Mr. Redekopp: Yeah. In any event, it was something that yes, I can see where Mr. Doyle and Ms. Raczova would be irritated by his presence there. They obviously should have known that he would be showing the apartment and they would be irritated they haven't been given notice. But it was, I'm going to suggest, completely -- was a little much, I'm going to suggest, to threaten to break his arm in that regard. And it --
>
> The Court: So that entitles your client to grab a pipe and come and strike him with it? Is that --
>
> Mr. Redekopp: Well, Your Honour, he did not do that initially. Mr. Doyle -- he does have, it appears, some easement into Mr. Edmond's living area to use the laundry. […] And given the nature of the recent threat by Mr. Doyle and the fact that Mr. Doyle would be a much more formidable foe to Mr. Edmond than Mr. Edmond on Mr. Doyle obviously with his youth and size, that it would not be unreasonable for Mr. Edmond to take a weapon in his possession.
>
> The Court: What's reasonable about a landlord bringing a pipe to a -- to a conversation?
>
> Mr. Redekopp: Nothing, unless he's been threatened. If he hadn't been threatened I would agree with Your Honour. But he had been threatened. With that threat, Your Honour, something that he could reasonably be -- it would be reasonable for -- I'm going to suggest, for him to expect something to happen. They were both -- this is -- this is a bit of a different situation as well, because --
>
> The Court: Well, what do you -- what do you say about the Crown evidence that he entered their suite without permission?
>
> Mr. Redekopp: Which time? Second time?
>
> The Court: Both times.
>
> Mr. Redekopp: Well -

The Court: I don't recall him ever having permission.

…

The Court: So if somebody -- if your tenant says something that annoys you, you can walk in there without permission? Is that your - - is that your argument?

Mr. Redekopp: No, it's not. It -- in this particular case, Your Honour, I'm going to suggest that the -- that this -- that the entire situation, the entirety of the circumstances here was something that erupted as a result of Mr. Doyle blowing this out of proportion. He had -- the threat -- the threat thereof I'm going to --

The Court: So Mr. Doyle's the one that acted unreasonably here. Is that -- is that your position?

Mr. Redekopp: In -- in threatening to break Mr. Edmond's arm, yes.

The Court: Well, threats are one thing, but striking somebody with a pipe is a little more serious.

Mr. Redekopp: Well, I'm going to suggest that didn't happen until Mr. Doyle actually lunged at Mr. Edmond. And that was Mr. Doyle's evidence --

The Court: What's your theory as to why Mr. Doyle lunged at your client?

Mr. Redekopp: He saw the pipe. I'm not saying that Mr. -- Mr. Doyle didn't have the -- was acting unlawfully when he saw the pipe --

The Court: I know this is a continuation. Did Mr. Doyle have a weapon with him?

Mr. Redekopp: I'm sorry?

The Court: Did Mr. Doyle have a weapon with him?

Mr. Redekopp: No, Your Honour.

The Court: I didn't think so.

Mr. Redekopp: In -- in any event, Mr. -- the threats that were provided by Mr. Doyle and Mr. Doyle's difference in size and abilities and age --

The Court: What's the difference in size? What's the evidence on -- on how big these people are?

Mr. Redekopp: Well, Your Honour, I'm -- I'm sure Your Honour could see that.

The Court: No, no, but I like -- I like the transcript to reflect these types of things.

…

The Court: You had an opportunity to ask. If that's part of your submission that Mr. Doyle is bigger than your client, you had an opportunity to ask him that question. Was that question asked?

Mr. Redekopp: I did not ask that question.

The Court: All right.

Mr. Redekopp: In any event, I'm going to suggest that the fact that -- that there was a threat initially is -- is in and of itself enough for Mr. Edmond to feel that -- that he would have some reason to fear for his safety in confronting Mr. Doyle, which he would reasonably be able to do given Mr. Doyle's behaviour immediately prior to that where Mr. Doyle had confronted those prospective tenants. […]

The Court: So your position is he's -- what your client's upset about is what he said to the prospective tenants, that he told them that he was kind of a creep? Did he --

Mr. Redekopp: And not to rent from him.

The Court: All right. Did he come back and say, "I didn't appreciate what you said about breaking my arm."

Mr. Redekopp: In --

The Court: Is there any evidence of that?

Mr. Redekopp: There's no evidence of that, Your Honour. But the evidence is is that was said to him.

The Court: Yes.

Mr. Redekopp: And that he --

The Court: But I'm just saying, when he came back the second time your position seems to be he's upset about these inappropriate remarks he made to prospective tenants.

Mr. Redekopp: And -- and having armed himself in anticipation of Mr. Doyle who had said that he was going to break his arm. They are --

The Court: Well, if he's so afraid of Mr. Doyle why doesn't he call the police?

Mr. Redekopp: Well, Mr. -- Mr. Edmond is in his own house, too, Your Honour. This -- these -- these matters, they take place -- they're -- they're -- although they're adjoined, he's in his own place.

The Court: So what's so important about your client speaking to Mr. Doyle on this second occasion?

Mr. Redekopp: I don't know that -- why would the importance have anything to do with it, Your Honour?

The Court: Well, you're saying that he's acting reasonably about coming back on the second occasion because he didn't appreciate what Mr. Doyle said. Correct?

Mr. Redekopp: That's correct, Your Honour.

The Court: All right. He doesn't come back on the second occasion, "Look, I didn't appreciate what you said about threatening to break my arm." That doesn't seem to be part of the equation. He comes back a second time because he doesn't like prospective tenants being discouraged.

Mr. Redekopp: Yes, that's correct, Your Honour.

The Court: Does he knock on the door?

Mr. Redekopp: Not according to the evidence, no, Your Honour.

The Court: No. He enters.

Mr. Redekopp: Yes.

The Court: Yes. He enters the residence and somebody's already conveyed to him, "I'm not -- I don't appreciate you coming in here without notice."

Mr. Redekopp: And -- and it appears Mr. Doyle also --

The Court: All right, so he entered the suite without permission, with the pipe on him. Strikes me as being somewhat unreasonable. Am I missing something?

Mr. Redekopp: Your Honour, the -- the situation had devolved to the point where both parties were entering back and forth. Mr. Doyle had entered into his living area on the pretext, I'm going to suggest, of -- of obtaining the laundry. Why is it so important for Mr. Doyle to get the laundry at that point? He just -- he'd just thrown Mr. Edmond out of the -- out of his apartment, threatened to break his arm, and now had gone into -- to Mr. Edmond's apartment for the purpose of obtaining the laundry. Is that an important thing to do? Was that a wise thing to do either, Your Honour? It appears as if back -- there was a back and forth going on here, Your Honour. Certainly when it came to Mr. Doyle I'm going to suggest even though he had an easement to go into Mr. Edmond's apartment for the laundry, he certainly changed that purpose when he decided that he was going to speak to these prospective tenants in Mr. Edmond's house. So Your Honour, I'm going to suggest that it appears as if there was at least some sort of implicit back and forth going on here. Now, Mr. Edmond had entered --

The Court: I'm not familiar with that legal principle, implicit back and forth going on.

Mr. Redekopp: Well, I'm -- it's not a legal --

The Court: I -- I missed that lecture at law school.

Mr. Redekopp: It's -- it's not a legal principle, Your Honour. But it is -- it was certainly with -- with respect to Mr. Doyle came into Mr. Edmond's living area, there was no need for him, it was just to get his laundry […]

The Court: Well, the inference I've drawn is Mr. Doyle's a much more courageous individual than I am. I mean, he -- he got into a physical struggle with somebody with an iron pipe and he did get struck, according to him.

Mr. Redekopp: Which -- which I'm going to suggest in itself is somewhat odd if Mr. Doyle had said that he had lunged at Mr. Edmond as he was swinging the pipe, it would be more natural for someone to retract from something like that.

The Court: Well, sometimes the best defence is a good offence.

Mr. Redekopp: But at the same time, the fact is is that -- that Mr. -- it appears as if Mr. -- Mr. Doyle was struck first time as he lunged at Mr. Edmond. That's -

The Court: Was he supposed to run away?

> Mr. Redekopp: Not run away so much, Your Honour, but it would -- it would be more reasonable to perhaps at least if someone sees it coming up the first time to back away, at least somewhat. And then -- and then if necessary, yes --
>
> The Court: So you're asking me what the reasonable victim would do here.
>
> Mr. Redekopp: Sometimes you have to.
>
> The Court: What about the reasonable landlord? I'm just having some difficulty why he can't come and speak to him without a pipe in his hand. And if he's so afraid of somebody, why is he entering their suite without permission?
>
> Mr. Redekopp: Your Honour, the -- I'm going to suggest that there is a reason for him to enter the suite. He had to confront Mr. Doyle with respect to what he had said --
>
> The Court: Well, confront's a good word, yes.
>
> Mr. Redekopp: And Mr. Doyle himself was obviously very animated, very upset and had threatened him. And in that regard, Your Honour, I'm going to suggest that arming himself, especially in those --
>
> The Court: Do you have some case law you want to present to support that position?
>
> Mr. Redekopp: Well, it's *R. v. Kerr*, Your Honour. I could get the case. I'm sure Your Honour's heard that case.
>
> The Court: Let's not assume too much. What does that case say?
>
> Mr. Redekopp: That case was with respect to an issue of an inmate that had armed himself with -- with a knife in anticipation of being attacked while within prison. The Supreme Court of Canada determined that --
>
> The Court: I suppose the Crown could argue the facts are somewhat distinguishable.
>
> Mr. Redekopp: Well, the -- the facts are somewhat distinguishable, except that Mr. Edmond was also in his own house.
>
> The Court: Well, no he wasn't at this point.
>
> Mr. Redekopp: But in any event, Your Honour, it is -- when faced with the situation where one could reasonably expect to have to defend himself, that possession of a weapon in that case is not necessarily for a purpose dangerous to the public peace. And when -- and --

[27] This kind of exchange carried on throughout the course of the defence counsel's submissions. Another particularly noteworthy part of the exchange is the following (Appeal Record, Tab 5, p. 68):

> Mr. Redekopp: … And it sound[s] like that's what Mr. Doyle was doing, he wanted to be the -- he wanted to lunge at Mr. -- at Mr. Edmond so that he could be -- have that aggressive and offensive stand. And --

> The Court: So, but an intruder comes into my residence at two o'clock in the morning with a metal pipe I'm not allowed to lunge at him? Is that -- otherwise the intruder would be acting in self-defence?
>
> Mr. Redekopp: I'm sorry, is -- this -- this didn't happen at two o'clock in the morning.
>
> The Court: So the intruder comes in at two o'clock in the afternoon. Could I characterize your client as an -- an intruder?
>
> Mr. Redekopp: I'm going to suggest not, Your Honour. This is not a stranger, this is not an individual that --
>
> The Court: All right, did he have permission of anyone to be in there?

[28] After allowing defence counsel to make a lengthier portion of submissions, the Court then intervened again. Mr. Redekopp started to say that "according to the -- to the strict terms of the *Residential Tenancies Act*, well without written --", the Court said (Appeal Record, Tab 5, p. 71):

> The Court: I don't know why you characterize them as strict. Sounds pretty reasonable to me.
>
> Mr. Redekopp: Well, without -- without -- without following that, he -- he --
>
> The Court: Strict is disqualifying sprinters for touching the line when they exchange the baton, but this is -- that would be strict.

[29] These excerpts contain most of the passages that the appellant takes issue with. As noted above, he groups the nature of these interventions into three categories: premature finding of facts; rhetorical questions that opine on material facts; and ridiculing the appellant's arguments. I will address each category in turn.

a) Premature Finding of Facts

[30] The appellant submits that the judge made premature findings of fact and that this is the most problematic issue from the perspective of trial fairness.

[31] The appellant points specifically to the trial judge's comment that the complainant behaved courageously and inserted himself into the scenario by saying that the complainant was a "much more courageous individual than I am". The appellant says that this passage indicates the trial judge thought that the complainant was blameless and the appellant was not. This inference is further supported, says the appellant, by the trial judge's comment that "the best defence is

a good offence". The appellant submits that it was clear the trial judge believed and communicated that the complainant was the one acting in defence, not the appellant.

[32] The appellant further submits that the complainant described the item the appellant held when entering the basement suite as a "work-out dumbbell thing, something you put the weights on" and that the trial judge interpreted this as a "iron pipe," continuously referring to it as a pipe throughout his exchange with defence counsel during final submissions. The appellant argues that this language is inflammatory and evidence that the judge predetermined the facts prior to hearing all the submissions.

[33] The respondent says that the impugned comments do not indicate the trial judge prejudged the case prior to hearing all the submissions. The comments were made in response to specific submissions by counsel and formed part of a larger organic exchange between defence counsel and the Court. The respondent says just prior to these comments, the trial judge had asked counsel for case law and other questions that probed the ultimate issues in the trial.

[34] With regards to the "iron pipe" issue, the respondent points to the transcript of the complainant's evidence in which he describes the item as a "pipe" and uses this word many times while giving his evidence. Ms. Raczova describes the item as a "long, black, thing. Something you would use for your car, like, it was metal". The respondent says that although neither witness called the pipe "iron", it cannot be said that the language was inflammatory, nor does it support the contention that the trial judge made premature findings of fact.

[35] Defence counsel, Mr. Redekopp, emphasized the uncontested fact that the complainant had threatened to break the appellant's arm if he entered his suite again. Mr. Redekopp seemed to suggest this threat prompted the appellant to enter the suite armed with a weapon and that he only struck the complainant after the complainant lunged at him, whereas the complainant testified that he lunged at the appellant as he was beginning to swing the pipe.

[36] In my view, the central issue in the trial was whether the appellant, as the accused, raised a possible defence of self-defence, and, if so, whether the Crown disproved self-defence beyond a reasonable doubt: *R. v. Williams*, 2013 BCSC 1774 at paras. 37-38.

[37] I make no comment as to the ultimate likelihood of success of this defence; however, I note the trial judge prematurely indicated that he found the complainant to be "courageous" and that "the best defence is a good offence". Both of these comments convey a strong sense that the trial judge had already decided the central issue and had determined that the appellant was not acting in self-defence; whereas the complainant, despite acting "offensively", was the one acting in self-defence and was courageous in doing so.

[38] As to the matter of the "iron pipe", I do not find this comment to have been overly inflammatory. While it is true that there was sparse evidence that supported a finding of fact on the material of the item, the trial judge could have so found based on Ms. Raczova's evidence. Moreover, the material of the weapon was not a central issue in the trial. I do not find that this comment alone supports a finding of reasonable apprehension of bias on the part of the trial judge.

b) Inappropriate rhetorical questions

[39] The appellant submits the trial judge was using aggressive rhetoric throughout the trial and closing submissions. The trial judge did not, submits the appellant, ask most of his questions to clarify the evidence or understand counsel's submissions; rather, he interrupted counsel to aggressively share his conclusions.

[40] He underscores the following excerpt (also quoted above):

> The Court: What's your theory as to why Mr. Doyle lunged at your client?
>
> Mr. Redekopp: He saw the pipe. I'm not saying that Mr. -- Mr. Doyle didn't have the -- was acting unlawfully when he saw the pipe --
>
> The Court: I know this is a continuation. Did Mr. Doyle have a weapon with him?
>
> Mr. Redekopp: I'm sorry?
>
> The Court: Did Mr. Doyle have a weapon with him?
>
> Mr. Redekopp: No, Your Honour.

> The Court: I didn't think so.
>
> Mr. Redekopp: In -- in any event, Mr. -- the threats that were provided by Mr. Doyle and Mr. Doyle's difference in size and abilities and age --
>
> The Court: What's the difference in size? What's the evidence on -- on how big these people are?
>
> Mr. Redekopp: Well, Your Honour, I'm -- I'm sure Your Honour could see that.
>
> The Court: No, no, but I like -- I like the transcript to reflect these types of things.
>
> …
>
> The Court: You had an opportunity to ask. If that's part of your submission that Mr. Doyle is bigger than your client, you had an opportunity to ask him that question. Was that question asked?
>
> Mr. Redekopp: I did not ask that question.
>
> The Court: All right.

[41] The appellant submits that the trial judge was not legitimately curious as to whether the complainant had a weapon or whether counsel had asked the relevant question; instead, he was using aggressive rhetoric and commentary to share his already formed conclusions.

[42] The appellant contends that the key issue in the trial was who struck first and whether the appellant acted in self-defence. On this point, the defence counsel attempted to underscore the inconsistencies in the complainant's testimony and in contrast to Ms. Raczova's. The following exchange took place (Appeal Record, Tab 5, pp. 67-68):

> Mr. Redekopp: And Ms. Raczova testified that Mr. Edmond entered into the suite with the pipe behind his back and had -- was -- said nothing about, "What are you going to do about it," or did not say anything about that, but rather was concerned more with what he -- what Mr. Doyle was saying to the prospective tenants.
>
> The Court: So you're saying there's a contradiction --
>
> Mr. Redekopp: There's a -- there is a contradiction here.
>
> The Court: Seems to happen occasionally when these trials take place two years after the incident, but --

[43] The appellant says that the trial judge gave the impression of dismissing the inconsistencies in a perfunctory manner.

[44] The respondent submits that the trial judge had a "probing style of judging a case" and that one cannot conclude that the trial judge used aggressive rhetoric without considering cadence, tone, and intonations. The respondent says that some of the judge's comments may be seen as providing "active feedback" to the appellant's counsel with respect to certain issues.

[45] The above excerpts are just some examples of the rhetorical comments made by the trial judge that appear unnecessarily disputatious. Although it is true that cadence, tone, and intonation are meaningful, the words that are exchanged can sufficiently exemplify the general tenor and nature of the proceedings. The trial judge interrupted the defence counsel at almost every turn. His questions were often not questions at all, but rather combative posits that foreshadowed the ultimate outcome.

[46] Trial judges are permitted to ask questions of counsel during submissions but they ought to be in the nature of seeking clarification on a point of evidence or law or otherwise designed to keep the trial on track. Often, in the present case the trial judge's commentary was unnecessary and did not serve to probe a relevant issue. The trial judge appeared pugnacious as most of the submissions made by defence counsel were immediately met with critical comments from him that were often confrontational or dismissive. Such comments do not appear to have been a genuine attempt to clarify counsel's position to better understand the evidence or the law. Moreover, the alleged inconsistency as to whether and in what manner the appellant confronted the complainant upon entering the suite (as between the testimony of the complainant and Ms. Raczova) is important to the factual matrix of the case.

c) Sarcasm and ridicule

[47] Finally, the appellant says that the trial judge's comments included ridicule and sarcasm, and together they created an overall appearance that is incompatible with fairness.

[48] The appellant submits that the following excerpt (quoted above) is such an example:

> Mr. Redekopp: …So Your Honour, I'm going to suggest that it appears as if there was at least some sort of implicit back and forth going on here. Now, Mr. Edmond had entered --
>
> The Court: I'm not familiar with that legal principle, implicit back and forth going on.
>
> Mr. Redekopp: Well, I'm -- it's not a legal --
>
> The Court: I -- I missed that lecture at law school.

[49] The respondent submits that there are different styles of judging and the specific comments underscored by the appellant should be taken in context. While this type of comment does not represent the "paradigm of judicial perfection", the respondent submits that we must assume that judges are impartial and there is a very high onus on those seeking to dislodge that assumption. The respondent's position is that the appellant seeks the most negative possible interpretation of the trial judge's comments.

[50] In my view, judges are not expected to refrain from commenting upon counsels' submissions, nor are they restricted from pointing out the problems in those submissions as long as they do not unreasonably interfere with their presentation. Moreover, the modest use of innocuous humour is not incompatible with the role of the judge as an independent, impartial adjudicator. However, judges are expected to impartially listen to the submissions of counsel for all parties and to uphold the integrity of the court process by displaying a certain amount of decorum and civility while presiding.

[51] In the present case the trial judge made comments during the course of counsel's submissions that were unnecessarily derisive, sarcastic, and contained hints of mockery. For example, it was unnecessary for the trial judge to seize upon counsel's use of the word 'strict' and compare the *Residential Tenancy Act* to Olympic rules. It seems as though by this point in counsel's submissions the trial judge had become antagonistic; he took any opportunity to question and to berate defence counsel.

d) Further Observations

[52] I wish to make a few other observations regarding the trial and comments from the trial judge, although they do not fit neatly within the appellant's three categories of problematic commentary.

[53] First, the trial judge re-characterized the complainant's evidence favourably to make a point. For example, the complainant testified that he told the appellant if he entered his suite again, he would break his arm. On this point, the trial judge said:

- "Well, it was conditional"; and
- "Yes. He enters the residence and somebody's already conveyed to him, "I'm not -- I don't appreciate you coming in here without notice".

[54] Although the trial judge acknowledged and accepted the actual threat - something along the lines of, "if you ever come in my house again I'll break your arm" - he rephrased the evidence to show the complainant in a better light. On its own, this would not amount to a reasonable apprehension of bias; but, coupled with the various other comments, this re-characterization supports the appearance of bias.

[55] Second, on multiple occasions, the trial judge inserted himself into the evidence or proceedings, using hypothetical examples:

- "So you're asking me what the reasonable victim would do here?"
- "So, but an intruder comes into my residence at two o'clock in the morning with a metal pipe I'm not allowed to lunge at him? Is that -- otherwise the intruder would be acting in self-defence?"
- "So the intruder comes in at two o'clock in the afternoon. Could I characterize your client as an -- an intruder?"

[56] By inserting himself into the trial in this way, the trial judge gave the distinct appearance of having aligned himself with the prosecution before submissions were finished.

[57] Third, the trial judge seemed reticent at the idea that the accused may have acted reasonably, suggesting that he had already determined he had not:

- "So if somebody -- if your tenant says something that annoys you, you can walk in there without permission? Is that your - - is that your argument?"
- "What's reasonable about a landlord bringing a pipe to a conversation?"
- "So that entitles your client to grab a pipe and come and strike him with it?"
- "So Mr. Doyle's the one that acted unreasonably here?"
- "Well threats are one thing, but striking someone with a pipe is a little more serious."

[58] Defence counsel's position seems to have been that it was reasonable for the accused to enter the suite with a weapon in his hand in light of the threat he received from the complainant. Regardless of whether this defence was meritorious, it was an important aspect of the accused's defence. The trial judge was quick to quarrel on this point and demonstrated a truculence that would lead a reasonable observer to believe he had already made up his mind on this point and dismissed it.

[59] Fourth, the trial judge unfairly demanded counsel provide theories and answer questions regarding his case that ought to have been left to the discretion of counsel to deal with:

- "And what's your theory as to why Mr. Doyle lunged at your client?"
- "Well if he's so afraid of Mr. Doyle why doesn't he call the police?"
- "So what's so important about your client speaking to Mr. Doyle on this second occasion?"

[60] Counsel have the right to conduct and argue their case as they see fit without being cross-examined by the court. Trial judges are certainly entitled to ask questions to better understand the case or direct a counsel to move on from a point that is understood or clearly irrelevant, but the nature of the trial judge's interventions here appear to have prevented counsel from effectively making his client's case. Not only did the trial judge put questions to counsel to answer as to the theory of his

case, but he also intervened so often it appears that the defence did not have a proper chance to make their case before the court. Based on both the quality and quantity of interventions by trial judge, a reasonable observer would conclude the trial judge was biased.

[61] Lastly, the trial judge took on the role of Crown counsel by distinguishing authorities and explaining away inconsistencies in witnesses' testimony as pointed out by defence counsel:

- "I suppose the Crown could argue the facts are somewhat distinguishable"
- "Seems to happen occasionally when these trials take place two years after the incident…"

[62] The trial judge may well have come to these conclusions at the end of the trial and reflected them in his reasons for judgment but, during the course of the trial and submissions, the trial judge should not appear to have pre-judged the case. Everyone has the right to be heard by a judge who is impartial and appears to be impartial.

V. THE LAW, ANALYSIS AND FINDINGS

[63] The fairness and impartiality of judges are fundamentally important to our justice system. Those qualities are the cornerstone of a functioning and credible judiciary working to deliver justice. Both principles must be subjectively present in the minds of judges and objectively demonstrated as considered by an informed and reasonable observer: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 94.

[64] To be biased means to have a state of mind that is in some way predisposed to a particular result or that is closed with regard to a particular issue. If a reasonable apprehension of bias arises from the words or conduct of a judge, then he or she is considered to have exceeded his or her jurisdiction and a new trial must be ordered: *R. v. S. (R.D.)*, *supra* at paras. 99 and 105.

[65] The Supreme Court of Canada set out the guiding test for determining a reasonable apprehension of bias in 1976 in the case of *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Although he dissented, the

majority adopted the test as articulated by Justice de Grandpré at page 394, and the test was later endorsed by the Supreme Court of Canada in *R. v. S. (R.D.)*:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [T]he test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[66] The Supreme Court of Canada revisited the issue in its seminal decision, *R. v. S. (R.D.)*, *supra*. The Court noted that the test has an objective two-fold component. The apprehension must be a reasonable one, held by a reasonable person. The reasonable person must have knowledge of relevant circumstances and must know of the traditions of integrity and impartiality that form part of the backdrop of our judicial system and they must be apprised of the fact that impartiality is a duty that judges are sworn to uphold: *R. v. S.(R.D.)* at para. 111. All judges are presumed to be impartial and the threshold for dislodging that presumption is high; it can only be displaced with cogent evidence: *R. v. S.(R.D.)* at para. 117.

[67] In his reasons, Justice Cory discussed the proper role of the judge and the cardinal rule guiding judicial conduct. At para. 118, he said:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[68] The Court revisited the issue in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, in which it emphasized that justice must not only be done, but must be seen to be done. This is a fundamental principle in our country that guides all judicial hearings.

[69] The case law reveals that the inquiry is very fact-specific. A careful examination of the judge's "interventions" is necessary. On this point, the Ontario Court of Appeal in *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47 noted at para. 243 that "[i]solated expressions of impatience or annoyance by a trial judge as a result of frustrations, particularly with counsel, do not of themselves create unfairness." More generally, it said:

> [230] A determination of whether a trial judge's interventions give rise to a reasonable apprehension of unfairness is a fact-specific inquiry and must be assessed in relation to the facts and circumstances of a particular trial. The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial [Citations omitted.]

[70] The types of interventions that may give rise to a reasonable apprehension of bias come in various forms, and it is for this reason the analysis is fact specific: see *R. v. C.S.M.*, 2008 BCCA 397 at paras. 8-9 and *R. v. Russell*, 2011 BCCA 113 at para. 18 where the Court of Appeal considered the comments from *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), leave to appeal to S.C.C. refused, [1986] 1 S.C.R. xiii.

[71] I find the words of Justice Monnin of the Manitoba Court of Appeal particularly helpful as they relate to assessing the nature of interventions by the court. His reasons in *Tymkin v. Ewatski et al.*, 2014 MBCA 4 were dissenting in part, but Justice Chartier and Justice Steel agreed with his analysis. He said at para. 43:

> …In light of the strong presumption of judicial impartiality, the test will not involve a sensitive or scrupulous conscience. Rather, the threshold is quite high and requires that there must be a real likelihood or probability of bias. The case law also establishes that it will not be enough to show that a trial judge intervened in the case, was rude or discourteous, or debated with counsel over the relevance of legal or factual issues. Rather, the impugned behaviour must demonstrate a partiality or predisposition to decide an issue in a certain way, or indicate that the judge had made up his mind prematurely. Each case must be decided on its own facts, and the impugned behaviour must be considered in the context of the entire case by considering the quality and quantity of the interventions or comments and their effect on a party's presentation of their case. [Emphasis added.]

[72] Ultimately, a reviewing court must weigh all of above-mentioned considerations carefully and thoughtfully. In *Vasdev v. Décor Home Enterprises Ltd*., 2012 BCSC 420, Justice Williams aptly summarized the various principles and demonstrated the careful balancing analysis that must occur:

> [51] An appellate court will be cautious in concluding that the manner in which the trial judge conducted the trial goes beyond the broad latitude that will necessarily reflect the reality of managing a trial, making the necessary inquiries to have an adequate understanding of the case and engaging with counsel (or, where applicable, a self-represented party) in the course of submissions.
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> [52] Judges are not required to be entirely passive. It is not only acceptable that a judge may intervene, but there may be situations in which judicial intervention is essential in order for justice to be done: *R. v. Brouillard*, [1985] 1 S.C.R. 39 at 44, 16 D.L.R. (4th) 447…
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> …
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> [55] For all those reasons, a generous leeway will be given to the trial judge in matters such as the one at bar. However, it is a fundamental and well-established tenet of natural justice that the judge's role is essentially an impartial one, and when he or she becomes involved in the trial process by appearing to take up the role of advocate, the vital fairness of the proceeding, including the appearance of fairness, is put at risk.
>
> [56] This concern is exacerbated where the tone or demeanour of the trial judge becomes aggressive, impatient or accusatorial. This is because "justice should not only be done, but should be manifestly and undoubtedly be seen to be done": *Brouillard* at 43.
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> [57] The fact that a judge may have a unique style, which may be interpreted by counsel as "crusty", does not necessarily give rise to a finding of an apprehension of bias: *Cammack & Co. Notaries Public v. Kavanagh*, 2006 BCSC 1298 at para. 73. Rather, the question is whether the judge's conduct, in the particular circumstances of the case, and upon an examination of the proceedings as a whole, effectively denied one party a fair trial or gave rise to a reasonable apprehension of bias: *Garry* at paras. 50-52.

[73] Closing submissions are an important part of a trial. It is at this stage of the proceedings that counsel have the opportunity to clearly communicate to the trier of fact the theory of their case and why the trier should decide in their favour. The Alberta Court of Appeal found that "[f]ailure to provide the parties opportunity to present full submissions is, by itself, an error of law": *R. v. Al-Fartossy*, 2007 ABCA 427 at para. 25. In an early case, the court noted that "[t]his stems from the fundamental principle that a litigant ought not to be deprived of [their] right to have

[their] case fully heard": *R. v. Jahn* (1982), 135 D.L.R. (3d) 514, [1982] 3 W.W.R. 684 at 691.

[74] Nevertheless, these important principles do not preclude a trial judge from commenting upon the evidence during final submissions and, indeed, he or she may endeavour to focus the argument on particular issues. The comments of the Alberta Court of Appeal in *R. v. Bacarri*, 2011 ABCA 205 are illustrative of this point:

> [24] During argument, trial judges are not precluded from commenting on evidence or attempting to focus the argument on issues of particular concern to the trial judge. Give and take between a trial judge and counsel may be robust but observations made by a trial judge during argument are not pronouncements: *R. v. Hodson*, 2001 ABCA 111, 281 A.R. 76 at paras. 33 and 35. A trial judge is not precluded from voicing concerns about the evidence. Nor is a trial judge precluded from directing counsel's attention to the real issues in the case. Trial judges are not expected to be mute manikins: *R. v. W.F. M.* (1995), 169 A.R. 222 (C.A.) at para. 10.

[75] This passage reflects the wide latitude that judges have to conduct their trials as they see fit. Furthermore, as noted above, a judge may be discourteous at times and debate with counsel over the relevance of an issue. However, the quality and quantity of engagement with counsel during submissions must not serve to constrain counsel from making fulsome submissions to ensure their client's case is heard. The judge's interventions must not prevent counsel from making submissions on relevant issues and the judge's observations must not provide a reasonable observer with an apprehension that the judge has prematurely weighed the evidence, decided the facts, and, ultimately the outcome of the case before it is concluded. The judge's interaction with counsel during closing submissions must not cause a dispassionate observer to have a reasonable apprehension of bias.

[76] The trial judge in the court below conducted himself appropriately and judicially while hearing evidence and during Crown's closing submissions, with the possible exception of his unfortunate comment about credibility always being the "fallback position." Regrettably, however, I find that a reasonable person, reasonably informed would conclude that the trial judge had reached his decision prior to hearing all of the defence counsel's submissions. The number of comments by the trial judge, of which many were interruptions of defence counsel mid-submission,

and the content of many of the comments prevented defence counsel from making proper and fulsome submissions. Despite his determined efforts to argue his client's position, the trial judge became his adversary. This is particularly clear when the trial judge cast himself in the role of the complainant facing an armed intruder. The conduct as described above gives the impression that the trial judge, from the very near beginning of counsel's submissions, had aligned himself with the prosecutorial cause and effectively cross-examined defence counsel without giving him a fair opportunity to plead his client's case. He gave the appearance of 'taking up the role of advocate'. Furthermore, his comments were at times unnecessarily aggressive, sarcastic, and inappropriately argumentative.

[77] Some of the comments, taken on their own, would not give rise to a reasonable apprehension of bias, particularly given the high threshold test discussed above. However, the less serious comments combine with the more serious comments to convey a clear sense that the trial judge prematurely decided the facts in favour of the Crown, thus giving the overall impression that he was predisposed or partial to decide the case in that way. The trial judge appeared to take on a partisan role that was reflected in his ultimate decision.

[78] To be clear, I do not conclude that the trial judge was actually biased. Rather, the way in which the trial was conducted gave rise to a reasonable apprehension that the trial judge was biased.

VI. CONCLUSION

[79] For these reasons the judgment of the Provincial Court is set aside and a new trial is ordered.

"The Honourable Madam Justice Arnold-Bailey"