Unofficial English Translation of the Judgment of the Court

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| Yombo c. R. | | | | | 2023 QCCA 12 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY | | OF MONTREAL | | | |
| No.: | 500-10-007423-203 | | | | |
| (500-01-204049-206) | | | | | |
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| DATE: | January 10, 2023 | | | | |
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| CORAM: | | | THE HONOURABLE | MARTIN VAUCLAIR, J.A.  STEPHEN W. HAMILTON, J.A.  GUY COURNOYER, J.A. | |
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| ÉMILE YOMBO | | | | | |
| APPELLANT – Accused | | | | | |
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| v. | | | | | |
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| HIS MAJESTY THE KING | | | | | |
| RESPONDENT – Prosecutor | | | | | |
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| JUDGMENT | | | | | |
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1. On September 30, 2020, Judge Lori Renée Weitzman, of the Court of Quebec, Criminal and Penal Division, District of Montreal, acquitted the appellant of two counts – one count of uttering threats and another of harassment – and convicted him of one count of assault. He appealed. The application for leave to appeal was referred to the panel: *R. v. Yombo*, 2020 QCCA 1464.
2. For the reasons of Vauclair, J.A., with which Hamilton and Cournoyer, JJ.A. agree, **THE COURT:**
3. **GRANTS** the application for leave to appeal;
4. **DISMISSES** the appeal.

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|  | | MARTIN VAUCLAIR, J.A. |
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|  | | STEPHEN W. HAMILTON, J.A. |
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|  | | GUY COURNOYER, J.A. |
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| Mtre Rita Magloé Francis | | |
| SURPRENANT MAGLOÉ AVOCATS | | |
| For the appellant | | |
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| Mtre Richard Audet | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | |
| For the respondent | | |
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| Date of hearing: | December 15, 2022 | |

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| REASONS OF VAUCLAIR, J.A. |
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1. The appellant was found guilty of assault committed during a chance encounter. The events in question are particular because the appellant is someone who has been in custody several times and the victim is a corrections officer. It is established that they had already crossed paths in prison and another time outside.
2. The complainant testified. On the day in question, she was returning from work, still dressed in her uniform. She was walking on the platform of a metro station when the appellant shouted something at her and pushed her shoulder with his fist. This caused her no pain. She recognized him and heard threatening words. According to her, the appellant smiled as if he were mocking her. The victim smiled back at him, but she explained that it was to defuse the situation. She continued on her way, upset, and let the appellant take the metro while she remained on the platform.
3. The appellant testified. He admitted to having given the victim a “*bine*”, the Quebec vernacular for a light punch on the shoulder, but without applying force. His intention was neither to hurt her nor to annoy her, but to greet her. He was surprised and happy to see her; the gesture was meant to be friendly.
4. Soundless images of the scene were captured by surveillance cameras and adduced at trial. The video clearly shows the victim walking on the platform. Something suddenly catches her attention and the appellant approaches. She continues walking and the appellant gives her four “*bines*”, or little punches, on the shoulder. The appellant seems to follow the victim with his eyes, all smiles, and steps into the metro car which has stopped. The victim remains on the platform.

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1. The trial judge accepted that the appellant did shout something at the victim, but she was not convinced beyond a reasonable doubt that it was a threat. She then analyzed the offence of harassment and concluded that the Crown had not proved all the elements of the offence beyond a reasonable doubt. The victim’s mere discomfort did not meet [translation] "the threshold required to establish harassment” in the circumstances. She also acquitted him of this offence.
2. That was not the case with respect to the offence of assault. In this regard, the judge found that there had been intentional use of force, a finding which, moreover, cannot be doubted. She then ruled out the victim’s implied consent, as well as the appellant's belief that there had been consent. These findings are equally unassailable. These are questions of fact to be assessed by the judge. The appellant demonstrated no error that would justify the Court's intervention.
3. More specifically, and this will also be important with respect to the last part of her decision, the judge rejected the appellant's explanation that he had simply been surprised to find the victim on the metro platform and that his gesture was a friendly one, without any hostility.
4. The judge noted that:

[TRANSLATION]

[38] The video evidence allows us to conclude, beyond a reasonable doubt, that this was an intentional and aggressive act, even if the force applied was not very great. The reaction of [the victim] is consistent with this unexpected and hostile attack.

1. The judge not only had the benefit of hearing the witnesses, but also of analyzing that evidence in light of the video images. The images and the testimony support the judge’s coherent conclusions. She was aware of the inaccuracies in the victim's testimony, particularly with regard to the duration of the events, which the victim believed to be much longer than they actually were. In the judge’s view, this was due to the stress experienced by the victim at the time. Given the situation, she gave the appellant the benefit of the doubt regarding the threatening nature of the words heard by the victim.
2. Once again, the appellant has failed to demonstrate any error in the judge's conclusion on the victim's lack of consent or on the appellant's belief that there had been consent. It was open to the judge to find that there had been no express consent from the victim. Given how quickly the events unfolded and, above all, the absence of a relationship between the parties except for that of a corrections officer’s authority in respect of an inmate, the judge could rule out implied consent.

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1. In the final part of the decision and of the appeal, the appellant criticizes the judge for refusing to apply the maxim of *de minimis non curat lex*, often translated as [translation] "the law does not concern itself with trifles”. This maxim aims to express the idea that a court can accept this “defence” in cases where the offence, although legally committed, is insignificant and should not entail consequences for its perpetrator.
2. Should the judge have applied the maxim or doctrine of *de minimis non curat lex*? I agree with the respondent's position that this doctrine should apply only exceptionally, that is to say, in the clearest and most obvious cases.
3. Whether a case qualifies for application of the doctrine is a question of law. An appellate court may therefore review the decision according to the standard of correctness. However, deference is owed to the underlying findings of fact. I therefore share the approach set out by the Court of Appeal for Ontario in *R. v. Kubassek* (2004), 188 C.C.C. (3d) 307, at paras. 11–16.
4. In the case law, the maxim is discussed by trial courts, for the most part. In Quebec, in *R. c. Freedman*, 2006 QCCS 8022, the Superior Court sitting on appeal from a decision of the Court of Québec, *R. c. Freedman*, 2006 QCCQ 1855, confirmed the possibility of applying the maxim in criminal law.
5. For these reasons, it is pointless to analyze the debates surrounding the maxim and its application. Moreover, in this case, the Court is not being asked to decide on its existence in criminal law or to review *R. c. Freedman*, 2006 QCCS 8022. Nor is it necessary to definitively characterize the maxim as a defence or, as Professor Fehr suggests, as a facet of the inherent power of the courts to cease any abuse of procedure which could undermine public confidence in the administration of justice: Colton Fehr, “Reconceptualizing De Minimis Non Curat Lex”, (2017) 64:1 Criminal Law Quarterly 200.
6. Its existence has at times been questioned, though without being excluded: see *R. c. Dubourg*, 2018 QCCA 1999 at paras. 37–41. Its application seems more questionable in the context of sexual or domestic violence: *R. v. J.A.*, [2011] 2 S.C.R. 440 at para. 63; *R. c. Gosselin*, 2012 QCCA 1874 at para. 40. This should come as no surprise, if only because of the vulnerability of the victims, for example, and the imperatives of public interest in this type of case.
7. The fact remains that the possibility of invoking this maxim has never been totally ruled out by a court of appeal or by the Supreme Court. On the contrary, there are indications that it may play a role in the administration of criminal justice: *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 69; *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 21; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at paras. 200 *et seq.* (Arbour, J., dissenting); *R. v. Murdock* (2003), 176 CCC (3d) 232 (C.A.O.).
8. Scholarly commentary on this subject is extensive and contradictory. Many authors have examined it, including, non-exhaustively: Marc-Étienne O’Brien, “Unveiling the Mechanisms Behind Judicial Responses to De minimis Claims in Trial-Level Assault Cases” (2020) 68 Criminal Law Quarterly 249; Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff – Criminal Law*, 5th ed. (Toronto: LexisNexis Canada, 2015) at 652, para. 13.167; Steve Coughlan, “Why De Minimis Should Not Be a Defence” (2018) 44:2 Queen's Law Journal 262; Colton Fehr, “Why De Minimis Is a Defense: a Reply to Professor Coughlan” 67 McGill Law Journal 1; Kent Roach, *Criminal Law*, 7th ed. (Toronto: Irwin Law, 2018) at 105–106; Simon Roy & Julie Vincent, “La place du concept de minimis non curat lex en droit pénal canadien” (2006) 66 R. du B. 213 at paras. 49–50.
9. While the Superior Court confirmed the existence of the maxim in *Freedman*, it is important to emphasize its exceptional nature. In *Dubourg*, the Court reiterated that [translation] “the courts must be careful not to contradict the discretionary choice of the Crown to lay charges for a given act, except in the most obvious cases”: *R. c. Dubourg*, 2018 QCCA 1999 at para. 41.
10. Moreover, on September 1, 2017, the implementation in Quebec of a diversion program for adult offenders offers a concrete possibility of diversion. It ensures, *inter alia*, that [translation] "only offences serious enough to jeopardize public safety will be brought before the courts", thus directing less serious offences outside the traditional adversarial system: see C. Rossi, J. Desrosiers, V. Brassard, L. Marceau, M. Cloutier, A. Beland Ouellette, (2020) *Le Programme de mesures de rechange général pour adultes, portrait, analyse et enjeux du projet pilote* *2017-2019*, research report submitted to the Ministère de la Justice du Québec, Université Laval, Québec, February 2020, 54 p. at 11.
11. There is no doubt that, in this context, cases that have the characteristics necessary for the application of the maxim will be rare. The rarity of its application does not mean that it is no longer useful, however, even in difficult contexts: see, for example, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *supra*.
12. More recent cases illustrate the propriety of its application: *R. v. Juneja*, 2009 ONCJ 572 (one person grabbed another's wrist during a discussion about a latent conflict); *R. v. Haynes*, 2022 ONCJ 30 (a neighbor sprayed water on her neighbor with a hose during yet another verbal argument); *R. v. Arsenault*, 2018 ONCJ 224 (a one-line text message violated a prohibition from communicating; *contra* in *R. v. Feliciano*, 2019 ONCJ 263).
13. The maxim helps maintain confidence in the administration of justice (*R. c. Freedman*, 2006 QCCQ 1855 at para. 56; *R. c. Jean*, 2020 QCCQ 8902 at para. 161; Morris Manning & Peter Sankoff, *supra* at paras. 13.167–168), but it can have the opposite effect if applied without a serious assessment of all the circumstances (*R. c. Jean*, 2020 QCCQ 8902 at para. 171). It should also be noted that in *Freedman*, *supra*, the Crown had conceded that the mere contact revealed by the evidence between the accused and the victim would not have given rise to any charges: *R. c. Freedman*, 2006 QCCQ 1855, at para. 37.
14. In short, it is all a matter of context. I will therefore stop here since, once again, there is no need to take an exhaustive look at the cases or to review the application of the maxim, which still has an active presence in the case law.
15. In the case at bar, the judge applied the criteria and concluded that this was not a case where the maxim could apply. On the basis of the video evidence and the victim’s reaction, to the point of waiting for the next metro train, she found that the blows were delivered during an unexpected attack, in a hostile and aggressive context. She emphasized the [translation] “character of the accused”, of course, but mostly to compare it to the case law invoked by the appellant. She also found that it was difficult to discern a motive for the appellant's actions and that the victim did not seem to be driven by an [translation] "ulterior motive". Ultimately, a contextual analysis led her to reject the maxim.
16. I do not see any error in this conclusion. I would therefore grant the application for leave to appeal and dismiss the appeal.

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| MARTIN VAUCLAIR, J.A. |