

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Chipman and Freeman, JJ.A.

BETWEEN:

EMILY MADONNA TIGHE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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)
) D. Peter Mancini
) for the Appellant
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) Robert C. Hagell
) for the Respondent
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) Appeal Heard:
) February 14, 1992
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) Judgment Delivered:
) February 14, 1992
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THE COURT: The appeal is dismissed as per oral reasons for judgment of Chipman, J.A.; Hallett and Freeman, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

The appellant was convicted in Provincial Court on a charge that she committed an assault causing bodily harm contrary to s. 267(1)(b) of the Criminal Code.

On November 11, 1990, the appellant arrived at Reflections Lounge in New Waterford at around 2:00 a.m. The victim, Kimberly Ann Schaump was at the lounge in the company of Ann Marie Lalo. There was evidence of previous ill will between Lalo and the appellant. An altercation developed between the appellant and Schaump and as a result, Schaump received a deep gash to the face from a drinking glass, requiring hospital treatment and stitches. A permanent scar will remain. After Schaump's face was cut, the appellant and Schaump ended up on the street outside the lounge and as a result of a further melee there, the appellant received a torn scalp, a black eye and other miscellaneous injuries.

There was a conflict in the evidence as to just how the appellant cut Ms. Schaump's face with the drinking glass. Ms. Schaump and Lalo said that it was an unprovoked attack on the part of the appellant with a glass which she had smashed on the table and then thrust into Schaump's face. This account was supported by another witness on behalf of the Crown. The appellant called a witness who reluctantly testified to the effect that she saw the appellant push a glass into Schaump's face. The appellant said that she felt threatened by Lalo and

Schaump, the former having apparently nodded towards the latter in such a manner as to make her think that she might be attacked. She then threw the glass of beer. She said:

"I guess I was too close to her and I struck her with the glass."

The police took a statement from the appellant two days after the incident. At that time, she stated that she was drunk and had no recollection of assaulting Schaump with the glass. In summation at the trial, appellant's counsel spoke of his client's reason to fear Lalo and Schaump and indicated that the matter was for the court to decide.

In giving his decision, the trial judge said:

"Well you know I'm not here to referee the bouts that go on over there. I agree with you in this respect, it may be that assault charges should have been laid against other parties but I am here to determine whether Miss Tighe assaulted Miss Schaump and did bodily harm to her and no matter what witness I pick they all say the same thing including Miss Tighe. I already alluded Mr. Mancini to briefly to the effect of Section 34 and you know even accepting Miss Tighe's version of the events it was only a head gesture from one of the persons at the table coupled with, if you accept her evidence, because no other witness heard the remark made, but if it was made it was a provocative remark to be called a whore but provocation is not a defence and if you are suggesting that the force used was reasonable to defend herself against a present threat then in my opinion it far exceeded action that would be adequate to offset the danger that did exist. I enter a verdict of guilty."

It is contended on this appeal that the trial judge erred in failing to direct himself properly on the defence of self-defence created by s. 34 of the Criminal Code.

Section 34 of the Code provides:

"34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

The trial judge found that the victim made a provocative remark to the appellant. It was no more than that. He did not find that it amounted to an assault. Even if he had, such a finding would not help the appellant. The trial judge made it very clear that he regarded the response of the appellant to be more than necessary to enable her to defend herself in the situation in which she was. This key finding disposes of the argument based on s. 34(1) and it entirely negates any possible application of s. 34(2).

We were also referred to sections 35 and 37 of the Code. These sections were not raised in argument before the trial judge. In our opinion there is no air of reality to any issue which could be raised on the basis of them.

In the alternative, the appellant raises for the first time the defence of accident. This should have been raised at the trial if it was being pursued seriously. In view of the trial judge's findings, this point has no merit.

The appeal is dismissed.

Quint R. Cyria
J.A.

Concurred in:

Hallett, J.A.



Freeman J.A.



1991

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SCC
No. 02503

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-and-

EMILY MADONNA TIGHE

Appellant

NOTICE OF APPEAL

1. Place of Conviction: New Waterford, Cape Breton County, N.S.
2. Name of Judge: Judge D. Lewis Matheson
3. Name of Court: Provincial Court
4. Name of Crown Attorney at trial: Claudine MacDonald and
A. Keith Shears
5. Name of Defence Counsel at trial: D. Peter Mancini
6. Offence of which Appellant convicted: That she, at or near New Waterford, in the County of Cape Breton, Nova Scotia, on or about the 11th day of November, 1990, did, in committing an assault on Kimberly Schaump, cause bodily harm to her, contrary to Section 267(1)(b) of the Criminal Code of Canada.
7. Sections of the Criminal Code or other statutes under which Appellant convicted: 267(1)(b)
8. Plea at Trial: Not Guilty
9. Sentence Imposed:
10. Date of conviction: February 21, 1991
11. Date of sentence: April 4, 1991