

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Gabriel*, 2018 NSCA 60

Date: 20180710

Docket: CAC No. 449076

Registry: Halifax

Between:

Kale Leonard Gabriel

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: May 30, 2018, in Halifax, Nova Scotia

Subject: Criminal law – self-defence – jury charges – *Baxter* instruction – *Vetrovec* warning

Summary: On the evening of July 22, 2010, the Appellant Mr. Kale Gabriel and Mr. Ryan White were in a fight. Mr. Gabriel had a gun which fired, killing White. A jury convicted Mr. Gabriel of second degree murder. Mr. Gabriel appealed his conviction.

Issues: Mr. Gabriel submits that the Crown’s closing address misled the jury on two aspects of self-defence, and the trial judge’s failure to point out those errors constituted mis-directions. Mr. Gabriel also submits that the jury charge wrongly failed to include a *Baxter* instruction respecting Mr. Gabriel’s reactions, and a sharp *Vetrovec* warning respecting the Crown’s key witness, Mr. Randall Sampson.

Result:

The Court of Appeal dismissed the appeal. The draft jury charge had been vetted by counsel before the judge delivered it. The defence had not raised the concerns that appeared in the grounds of appeal.

The jury charge did not transmit to the jury any mistaken impression left by the Crown’s closing address respecting self-defence. To the contrary, the jury charge properly instructed the jury on self-defence, and directed the jury to consider Mr. Gabriel’s testimony on how and why he acted.

The propriety of a *Baxter* instruction – that the accused “cannot be expected to weigh to a nicety, the exact measure of necessary defensive action” – depends on the facts. In the circumstances of this case, the charge did not err by omitting a specific *Baxter* instruction. Mr. Gabriel testified, and the charge directed the jury to consider his explanations of what he did and why.

The jury charge told the jury to be “very cautious about accepting” the evidence of the Crown witness. In the circumstances, and given the trial judge’s discretion on the scope of a *Vetrovec* warning, this was a satisfactory caution.

This information sheet does not form part of the court’s judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 25 pages.