NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Kagan, 2004 NSCA 77

Date: 20040610
Docket: CAC 203573
Registry: Halifax

Between:

Paul David Kagan

Appellant

v.

Her Majesty The Queen — Respondent

Judges:	Roscoe, Chipman, Hamilton, JJ.A.
Appeal Heard:	May 25, 2004, in Halifax, Nova Scotia
Held:	Appeal allowed, conviction quashed and a new trial ordered as per reasons for judgment of Roscoe, J.A.; Chipman and Hamilton, JJ.A. concurring.
Counsel:	Joel E. Pink, Q.C., for the appellant James A. Gumpert Q.C., for the respondent

Reasons for judgment:

[1] The appellant, Paul David Kagan, was convicted, after trial by Justice Richard Coughlan sitting with a jury, of aggravated assault of Jason Kinney who was his roommate in a university residence. He was sentenced to ten months incarceration to be followed by one year probation. He appeals from his conviction on the basis of alleged inadequate and improper jury instructions and also appeals from sentence. He has been released on bail pending determination of his appeal.

[2] For the reasons that follow, I would allow the appeal against the conviction on the basis of misdirection to the jury on the issue of self defence.

[3] At the trial, the appellant did not dispute that he sprayed Mr. Kinney in the face with pepper spray and then stabbed him in the back with a pocket knife, but he claimed that he acted in self defence.

FACTUAL BACKGROUND

[4] The altercation that led to the charges against Mr. Kagan occurred on Friday, December 8, 2000. Paul Kagan was a 19 year old first year student studying computer engineering at Dalhousie University. When Paul first arrived in Halifax in late August, 2000, he was assigned to a three bedroom apartment in the Fenwick Towers student residence. He lived in apartment 1808 by himself until the end of September when Jason Kinney, a 25 year old music student joined him. The young men did not get along with each other very well. By November, Jason had asked to be assigned to another room for the next term. Although the apartment was a designated non-smoking unit, Jason and his visitors periodically smoked tobacco and marijuana in his room and on the balcony. Paul Kagan testified that it was often, while Jason Kinney said it was infrequent. Mr. Kagan indicated that the smoking bothered him and he often complained to Mr. Kinney about it. Mr. Kinney stated that the first time they argued about his smoking was during the week before the stabbing.

[5] By early December, matters had become quite unpleasant between the roommates and they had each asked the residence supervisor to be moved to another apartment. The fact that each of them was faced with Christmas exams seemed to contribute to additional tension. Paul made several telephone calls to his parents in Toronto to advise of the difficulties with Jason. Both the appellant and his father complained to the university residence facilities coordinator about drug use by Mr. Kinney. On December 7th, in separate meetings with the coordinator, both students were offered

placement in another room in the residence. Paul Kagan indicated he would think about the offer. Jason Kinney accepted the offer and planned to move to the other room on Saturday, December 9th. Paul knew that Jason would be moving out.

[6] Sometime on Thursday, December 7th, Paul Kagan purchased pepper spray and a knife at an army surplus store.

[7] On Friday morning Jason met with the facilities coordinator to conclude the arrangements to move to another room the next day. Around noon he left the apartment to go to the university for a recital. He was wearing his guitar in a soft shell case over his shoulder. He went out into the hall and pressed the elevator button. He decided to go back to the apartment to make sure he had closed his bedroom door. He left again. While he was in the hall, he heard Paul on the phone inside the apartment say " Okay, he's gone now". Jason went down on the elevator, but then wondered why Paul was telling someone he had gone. Jason went back up on the elevator and into the apartment and looked around and left. Mr. Kinney described what happened next, in his direct evidence, as follows: (AB 1, page 22)

Q. Okay, and what happened then?

A. I might have passed Paul in the hall of the apartment, and just left, went back out -- out in the hall to -- for the elevator.

Q. Okay. What happened then?

A. Paul poked his head out of the door of the apartment and said, As long as I was moving out -- because I was supposed to be moving out -- he said, As long as I was moving out could I buy my own cutlery -- could I buy my own cutlery.

Q. Okay. And what happened then?

A. I gave him the finger, and told him to f--- off.

Q. What happened next?

A. He asked me again, and I told him to f--- off again and got in the elevator. Then I decided to go back into the apartment to say something else to Paul, so I went back in, and he was in his room, so I stood in the doorway to his room, and asked him if he had something he wanted to say to me. He said, No. So -- so I turned around to leave and he asked me again if I was going to buy my own

cutlery. So I told him to f--- off again and I know we argued a little bit, but I wasn't paying much attention to what he was saying, I was basically just walking out the door. ... We were arguing a bit as I was leaving, but I wasn't paying very much attention to what Paul was saying, I just went out the door.

Q. Okay.

A. I mentioned something about I wanted him to clean the kitchen.

Q. Okay. And what happened at that time?

A. Then I went back out and pressed the button for the elevator, and heard the door lock behind me when I was leaving, so that I kind of pissed me off. So I went back.

Q. You indicated you went back, where did you go back to?

A. Went back to the apartment to continue my argument, and -- I don't know what else I was going to say, but –

Q. What happened then?

A. Well as soon as I opened the door I got sprayed in the face with what I thought was the fire extinguisher at the time. I believe I was sprayed twice with it. My eyes were open and my mouth was open, so I got a good amount of it in both my eyes and my mouth. ...

Q. Okay. So you're -- you're sprayed with this substance, you -- you described it as -- as being a good amount, how -- like what sort of volume are we talking about here?

A. I'm not sure, I mean, it was enough to cover my face, I couldn't see anything afterwards.

Q. So you're sprayed, what's the next thing that happened?

A. Well it burned quite a bit, so I turned around and dropped down on my knees. Paul said something about -- to leave him alone. I was having a hard time breathing, and I couldn't -- couldn't see, so I tried knocking on the -- both doors on the other side of me -- to the neighbouring apartments, to see if I could get somebody to come out and help me.

Q. Did you receive any help?

A. No.

Q. What happened while you were banging on those doors?

A. I think I said to Paul, What the fuck is wrong with you and you're going to be in trouble, you're probably going to be in trouble now.

Q. When you said that, what did you mean, he was going to be in trouble.

A. Well I'd been having problems with him, like the administration got brought in, and that's who I was expecting him to have problems with, with the administration of the residence.

Q. Okay. So you say that to Paul, what happens then?

A. I think he sprayed me again in the back somewhere, I don't know, so I tried to get up, and I stumbled along the hall to the elevator. And -- and I felt something hit me in the back, and I fell against the elevator, and the door opened, and I fell inside. And there was a couple of guys in there that took me downstairs to the -- the office. ...

[8] Mr. Kinney had been stabbed in the back. The wound was approximately 3 centimeters long. He was taken to hospital by ambulance where his eyes were washed out with saline and he was treated for a collapsed lung caused by the stabbing.

[9] Paul Kagan's version of the incident, in his direct evidence, was: [AB 2, p.575]

Q. Now when he left on this occasion -- okay, let me ask you this question. When he came back to the room and you were on the telephone –

A. Yeah.

Q. -- did he say anything to you?

A. No.

Q. Did he do anything to you at that time?

A. No. Like, he was just really, like, angry, like, I don't know –

Q. And how did you know he was angry?

A. Just the way he looked at me, like, he had a vicious look on him. He was slamming the doors, like, he was not his usual behaviour.

Q. So he then leaves. You get off the telephone?

A. Yeah.

Q. And what did you do at that time?

A. At that time –

Q. Did you say anything to him as he was leaving?

A. Yeah, like, I opened the door at one point, and I made a request that he purchase his own cutlery and stuff like that.

Q. And why did you make that mention to him about cutlery?

A. Why? Because, I don't know, I spoke to my parents about it. It bothered me the fact that he'd always -- like, that he'd always expect them to be clean, my cutlery, and he'd use it and, like, was really demanding on it and, like, using it anyways, and enough. I just -- too much.

Q. Now when you asked him about the cutlery, what did he do?

A. He, like, stuck his finger at me.

Q. And what do you mean he stuck his finger at you?

A. Like, he took his middle finger and he, like, he showed it to me or whatever.

Q. Show me what he did.

...

Q. Now after he told you to fuck you several times –

A. Yeah.

Q. -- what did you do then?

A. Well, he was starting to come towards me and I sensed it. And I also -- I didn't see the point of, like, argument and everything. Like, I wasn't getting anywhere, like there was no use to it, it wasn't that important. He started walking towards my room and –

Q. Did you make it to your room?

A. Yes, I did.

Q. And what did you do when you went into your room?

A. I shut the door.

Q. Now you're in room number 2.

A. Yes.

Q. Where is Jason when you shut the door?

A. Like, he's just coming behind me, like two seconds later he opened my door.

Q. Does he come into the apartment?

A. Yeah, he comes into the apartment; he comes into my room.

Q. You say he comes into your room?

A. Yes.

Q. Was your door shut?

A. Yes, it was.

Q. Does he knock on the door?

A. No.

Q. Now what happens when he comes into the room, Paul?

A. He comes up to me, like face-to-face and he's, like, trembling, he's shaking like. And he asks me if I have anything to say, like anything -- like, what was I saying and things like that.

...

Q. And what was Jason telling you to do?

A. To clean the fucking kitchen.

Q. Now how many times did he tell you to clean the fucking kitchen?

A. Like, more than once.

Q. Was he saying anything else to you?

A. Yes, he was.

Q. What else was he saying?

A. He was just saying, like, aggressive type and –

Q. Now what do you do then?

A. What do I do then? I think I go into my room. Like, he leaves. Or I'm still in my room. He leaves. I –

Q. And what do you do?

A. I got the spray.

Q. Now where was the spray at this time?

A. It would have been in my coat, like, my raincoat where the dresser is.

Q. Yes. And did you pick up anything else?

A. I think -- yeah, I might have picked up the knife or I might have had it on me at that time.

Q. Now how were you feeling at this time, Paul?

A. I was -- like, I was terrified.

Q. And why were you terrified?

A. Why? Because I felt really threatened and vulnerable.

Q. So you picked up the bear -- the spray. What did you do with it?

A. I brought it into the -- I walked out of my room and I brought it into the kitchen, I think.

Q. Now what did you do then?

A. What did I do then?

Q. Uh-huh.

A. Well, I think first I locked the door.

Q. And why did you lock the door?

A. Because I just wanted some peace and quiet. I might have wanted to cook something or -- and study basically, essentially. I had an exam later that day.

Q. What happened then?

A. What happened then? Jason went to unlock the door and he said, That's it.

Q. Now when he said, That's it, what did you say?

A. I said, Leave me alone.

Q. Then what did he do?

A. He still came towards me.

Q. What did you do?

A. Like, he walked in. As soon as he set foot in the apartment I sprayed him.

Q. Now the spray that you sprayed him, where did you get that?

A. At the Army Navy Surplus store.

Q. Now once he said -- once you sprayed him, what happened then?

A. He started -- like, I think he took a step around and he said, Fuck, you're dead, you're dead, and stuff like that.

Q. And who said that? And who said that?

A. Jason Kinney.

Q. And what happened then?

A. Then like I stepped onto the -- and like, when you open the -- when there's the door to the apartment, there's something -- I don't know what it's called -- there's a little raised part. I stepped over that.

Q. Yes. And what was he doing?

A. He was, like, swinging his arms and saying, like, Fuck, you're dead, like you're so dead, stuff like that.

Q. And how did you feel at that time?

A. How did I feel? I was really scared.

Q. And what happened?

A. Like, I stabbed him and -- I stabbed him in the back.

[10] An expert in forensic psychiatry, Dr. Graham Glancey, who assessed Paul Kagan after these events, testified that he suffers from some features of Asperger's Syndrome, a form of high-functioning autism. Dr. Glancey described the characteristics of Asperger's syndrome as follows:

> The primary characteristic is a difficulty in social interaction. These are people who have difficult, awkward social skills. This occurs from an early age. Although they seem to attach to parent and family figures, they have difficulty socializing with other children, right from an early age. They may be awkward,

they may be clumsy -- both physically, but also in their social skills, so when they approach other children they approach them the wrong way. They are people who have a restriction of interests. So they may be very interested in certain things, but almost too interested, such that other people, depending on their age, get bored with their interests in things and other kids will move on -- but they'll still be concentrating on something.

So an example might be that they concentrate and do Lego blocks for hours and hours on end; whereas, the other kids had moved on to something else very quickly. This is often repeated throughout their lives. So it may be Lego blocks when they're a bit younger, it might be chess when they get a little bit older, it might be mathematical equations when they get older than that. But they have a restriction, they seem to concentrate and talk about these things more than other people do -- and sometimes to the point of boring other people around them.

They have clumsy social skills so they tend not to look at you and avoid eye contact. They tend to not appreciate very well the normal rhythm of conversation, so they don't stop at the right place for somebody else to enter into the conversation; and this means that they tend to upset other people because other people don't like talking to them. It feels too awkward, especially when you're dealing with kids. They tend not to pick up the right meanings for slang when they're kids. So when you're an adolescent, that makes it very difficult if you don't have the right phraseology and the right slangs that adolescents use.

So they tend to become rather isolated and rather loners; although, they do attach to their own family members.

Many of them have difficult sleep patterns. They may sleep too much and the quality of the sleep isn't quite the same so they may be tired and need frequent naps. Approximately 50 percent of them also have anxiety attacks and temper tantrums, and this is particularly when their routines are disrupted because they cling to these routines. They like order and routine in their lives. And this is, again, displayed through the various stages of development so it's sort of temper tantrums when they're very small -- and later on it might be destruction of property or angry emotional outbursts.

They tend later on to be distrustful of other people to the point of almost being paranoid. They talk about moderate to medium paranoia. So they don't trust others very well. And this, again, makes them somewhat of a loner and many of them withdraw unto themselves for this reason and don't seek out or spend time with other people; although, they may respond better to structured

group situations when they have to mix with other people, such as school or work or particular clubs that they are sent to by their parents.

Some people with this disorder have some problems with delay in gross motor skills, things like riding a bike and throwing a ball, but nevertheless, they can sometimes catch up afterwards.

Despite the difficulties in social interaction, they can have the full range of intelligence so they can be any IQ from being borderline mentally challenged all the way to being a genius. So their IQ tends to be preserved.

[11] The position of the defence, based primarily on Dr. Glancy's evidence, was that because of the combined effect of past and present acts of aggression by Mr. Kinney and Mr. Kagan's personality traits precipitated by Asperger's Syndrome, he would have interpreted Mr. Kinney's actions as threats to attack him, and he would have believed, on reasonable grounds, that Mr. Kinney had the ability to affect his purpose. In other words, Paul Kagan acted in self defence.

Grounds of Appeal

[12] In the notice of appeal, the appellant listed the following issues:

Appeal Against Conviction

(i) THAT he erred in law in explaining to the jury the meaning of the legal phrase, "proof beyond a reasonable doubt";

(ii) THAT he erred in law in charging the jury on the special application of the burden and standard of proof in a case where credibility is an issue;

(iii) THAT he erred in law in charging the jury on experts, in particular, as to whether expert witnesses can base their opinion on a third person statement and whether third person statements amount to hearsay;

(iv) THAT he erred in law in charging the jury that if an expert's opinion is based in part on what he learned from a third party that this will diminish the weight that they should give to the expert's opinion;

(v) THAT he erred in law in charging the jury as he failed to outline for the jury the theory or position of the defence and referred the jury to the

essential elements bearing on that defence, namely, section 34(2) in such a way that it will ensure the jury's proper appreciation of the evidence;

(vi) THAT he erred in law by failing to refer to the jury the Appellant's symptoms of the disability "Asperger's Syndrome" and the affect that this would have on the four ingredients needed to establish a defence under section 34(2);

(vii) THAT he erred in law in summing up this technical evidence and to strip it of the non-essentials and to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permitted; and

(viii) THAT he erred in law in the interpretation of section 34(2) as it applies to the facts of the case.

Appeal Against Sentence

(ix) THAT he erred in law in interpreting the provisions of s.742 of the **Criminal Code** and concluding that the Appellant was not a proper candidate for a conditional sentence;

(x) THAT he erred in law in relying on unproven incidents from the Appellant's childhood in concluding that he was not a proper candidate for a conditional sentence;

(xi) THAT he erred in law by imposing a sentence that was harsh and excessive in the circumstances; and

(xii) THAT he erred in law by placing too much emphasis on deterrence.

[13] During his oral submissions, counsel for the appellant advised us that he was abandoning the first ground of appeal, that the trial judge erred in his instruction of the meaning of proof beyond a reasonable doubt by not advising the jury that the standard of proof required was closer to absolute certainty than to probability. The withdrawal of this issue was based on the Crown's reference in its factum to **R. v. Meyn**, [2003] B.C.J. No.1562 (B.C.C.A.); application for leave to appeal dismissed: [2003] S.C.C.A. No. 470.

[14] Since, in my view, the appeal should be allowed and a new trial ordered on the basis of the inadequate charge on self defence, it will not be necessary to deal with any other issue.

Jury charge on self defence

[15] In the circumstances of this case, section 34(2) was the only relevant self defence provision. That section is as follows:

> 34 (1) ....
>
> (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.

[16] The fundamental complaint of the appellant is that the trial judge did not relate the pivotal evidence of Dr. Glancy to the issue of self defence and advise the jury that they should consider that evidence when determining whether the defence applied.

[17] The charge on self defence starts on page 810 and continues to page 823. Prior to this part, the trial judge provided all the standard instructions on the role of the jury, the presumption of innocence, the burden of proof, credibility assessment, and expert evidence. Following the charge on self defence the trial judge recounted the evidence sequentially, witness by witness, without reference to the specific issues.

[18] The trial judge correctly charged the jury on the introductory parts of the self defence issue including the relevant burden of proof on the Crown and the necessary ingredients. It appears that he closely followed the recommended charge for s. 34(2) from **CRIMJI - Canadian Criminal Jury Instructions** by G. A. Ferguson & J. C. Bouck, as charge 8.56, commencing at paragraph 25. After listing the four ingredients of the defence, the judge appropriately explained each part in more detail. The four ingredients were stated to be:

> The four ingredients of Section 34(2) are:

1) Jason Kinney unlawfully assaulted Paul David Kagan

2) Paul David Kagan caused death or grievous bodily harm in repelling the assault

3) David Paul Kagan caused death or grievous bodily harm to Jason Kinney under a reasonable apprehension of death or grievous bodily harm to himself; and

4) Paul David Kagan believed, on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm at the hands of Jason Kinney.

[19] The trial judge explained that the burden was on the Crown to prove beyond a reasonable doubt that one or more of these elements was not present.

[20] Following the explanation of the first ingredient, that Jason Kinney assaulted Paul Kagan, the judge reviewed the evidence the jury should consider in determining whether they had a reasonable doubt about that element. I will quote this passage at length since it is also later referred to by the judge as the applicable evidence for the third element which is more relevant to this ground of appeal. It is also relevant to the manner in which the evidence is summarized. That section is as follows: (page 812)

You should consider the following evidence when deciding whether you believe or are left with at least a reasonable doubt that Jason Kinney unlawfully assaulted Paul Kagan. Paul David Kagan testified Jason told him he had an apartment on Shirley Street. He had a conflict with roommates and had to move out. Jason had been in a fight in Grade 12 over his girlfriend. Paul says Jason was verbally and physically aggressive to him.

Paul told of two occasions when Jason pushed him, once out of Jason's room and another time up against the wall. Paul said Jason's aggression scared him. Paul thought Jason could be violent. He told his parents, brother, and cousin about his fear.

Harvey Kagan testified on December 6th Paul was terrified. Harvey Kagan had never heard of Paul in a state like that before. From December [sic] 19th to December 6th, Paul was afraid, terrified, and very anxious. On December 6th, Paul reported Jason to the Dalhousie authorities. He said it was intolerable and he could not live there. On December 7th, Paul purchased bear spray and a knife, then met with Paul MacIsaac. He told Mr. MacIsaac he wasn't scared and did not accept the offer of another room.

On December 8, Jason gave Paul the finger and said, Fuck you. Came into Paul's room shaking and trembling and said, Do you have anything else to say? Jason left. Paul got the spray, locked the door. Jason comes back and says, That's it. Paul sprays him and Jason says, Fuck, you're dead. You are dead and was swinging his arms.

Jason testified Paul had been complaining of Jason smoking in the room. The first complaint was on December 1st. Jason had a friend over with his room door closed and a window open. Paul said he didn't like smoke and Jason asked him to leave. Jason put his hand on Paul's chest, backed him out of the room and said, We will talk about it. Paul later came back and apologized.

On December 6th, Jason and a friend were in his room. They went out on the balcony to smoke. They came in to warm up. The friend had an unlit cigarette. Paul said, I don't want you fucking smoking in the room. Jason said, We weren't smoking. Paul said, I can smell it. The friend was more Paul's friend than mine. Paul told Jason the smoke bothers him and complained. And Paul complained about smoking in the apartment and asked me not to smoke, I believe twice. Jason didn't recall. Paul didn't ask Jason to stop playing music or not to burn incense.

On December 8th, I saw Paul MacIsaac around 8:45. I returned to the apartment. Paul came out of his room at 10:30 to 11:00 a.m. At 12:00, I left the apartment to go to a recital. I went into the hall, push elevator. I went into the apartment to shut the door. Thought I heard Paul say, Okay, he's gone.

I went down the elevator and came back up to see if my stuff was okay. I passed Paul in the hall of the apartment and went out to wait for the elevator. Paul stuck his head out of the apartment and said, Before you move, do you think you could buy your own cutlery? I had been using Paul's cutlery. I gave him the finger and told him to fuck off.

Paul asked me again, then I told him to fuck off. I went back into the apartment into Paul's room and asked him if he had anything to say. Paul said, So you are going to buy your own cutlery. Right? I called him a little prick, told Paul to clean up the dishes. It's a pig sty. I went out and pressed the elevator. I heard the door lock. It pissed me off. I went back to the apartment to continue the argument. I was sprayed with what I thought was a fire extinguisher. The force of the spray and sound, high pressure pins and needles feeling made me think it was a fire extinguisher. The spray was in my eyes and mouth, enough to cover my face. I couldn't see. It burned.

> I turned around and dropped to my knees. I couldn't see, had a hard time breathing. Knocked on doors of other apartments. I said to Paul, What is wrong with you? I said, You are in trouble now, or, Fuck, you are in trouble now. Paul said, Leave me alone. I got up and Paul sprayed me again.
>
> I felt a burning sensation, excruciating pain, couldn't get it out. Choking on it, couldn't breathe. It coated my mouth. I couldn't see. I was feeling my way along the line. Paul said, Leave me alone -- Paul might have said, Leave me alone, again. I did not threaten to grab or strike Paul. It is important for you to note that Section 34(2) applies regardless of whether Paul David Kagan did or did not provoke the original assault by Jason Kinney.

[21] Since the second element, that concerning whether there was bodily harm caused by the accused to Mr. Kinney, was not in issue, the charge on that part is brief and no evidence is reviewed.

[22] The third ingredient, that concerning the accused's apprehension of death or grievous bodily harm was properly explained in detail following the **CRIMJI** charge. Next the trial judge stated: (page 818)

> You should consider the following evidence when deciding whether Paul David Kagan was under a reasonable apprehension of death or grievous bodily harm from the assault of Jason Kinney. The evidence is the same as for the first ingredient, the history of the relationship between Paul David Kagan and Jason Kinney and the events of December 8, 2003.

[23] Next, the fourth ingredient to the defence is explained as follows:

> The fourth ingredient for self-defence under Section 34(2) is that at the time Paul David Kagan sprayed and stabbed Jason Kinney, Paul David Kagan believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm. The fourth ingredient like the third ingredient focuses on Paul David Kagan's belief and whether that belief was based on reasonable grounds.
>
> It should be emphasized that the ultimate question for you is not whether Paul David Kagan could have, in reality, otherwise preserved himself but, rather, whether Paul David Kagan at the time honestly believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm even if he was, in reality, mistaken.
>
> In deciding whether Paul David Kagan at the time he sprayed and stabbed Jason Kinney believed on a reasonable ground that he could not otherwise preserve himself from death or grievous bodily harm, you must consider all of the

circumstances including the background and the nature and extent of the assault on Paul David Kagan by Jason Kinney.

In deciding whether Paul David Kagan had such a belief and whether that belief was based on reasonable grounds, you can ask yourself whether a reasonable person in Paul David Kagan's situation and with Paul David Kagan's experiences may also have believed that he could not preserve himself otherwise than by spraying and stabbing Jason Kinney. If, after considering all of the evidence, you believe or are left with a reasonable doubt that Paul David Kagan believed on reasonable grounds that he could not otherwise preserve himself, then the fourth ingredient of self-defence under Section 34(2) has been established.

[emphasis added]

You should consider the following evidence when deciding whether Paul David Kagan at the time he sprayed and stabbed Jason Kinney believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm.

[24] The evidence that the jury is directed to over the next three and one-half pages is similar to that referred to in relation to the first ingredient, for example:

... Jason Kinney testified, I was sprayed with what I thought was a fire extinguisher. The force of the spray and sound, high pressure pins and needles feeling made me think it was a fire extinguisher. Spray was in my eyes and mouth, enough to cover my face. I couldn't see. It burned. I turned around and dropped to my knees. I couldn't see, had a hard time breathing. I knocked on doors of other apartments. I said to Paul, What is wrong with you? I said, You are in trouble now, or, Fuck, you are in trouble now.

Paul said, Leave me alone. I got up and Paul sprayed me again. I'm not sure if I was on my knees or feet when I went to the elevator. I felt something hit me in the back and I fell into the elevator. I was right at the elevator when struck in the back. I felt a burning sensation, excruciatingly painful. Couldn't get it out. Choking on it. Couldn't breathe. It coated my mouth. I couldn't see. I was feeling my way along the wall. Paul might have said, Leave me alone, again. I was sprayed as soon as I opened the door, no warning. I did not threaten, grab, or strike Paul. ...

[25] There was no reference to the evidence of Dr. Glancy in the part of the jury charge dealing with the ingredients of self defence.

[26] At the conclusion of the instruction on self defence, the trial judge reviewed all of the evidence in a fashion similar to that quoted above, that is, partly in a

narrative form partially repeating the actual words of the witness in the first person. Within that summary, commencing at page 833, is the reference to Dr. Glancy's evidence. The complete passage is as follows:

> ... Dr. Graham Glancy testified, a forensic psychiatrist, that he performed a psychiatric assessment as to Paul's mental state at the time of the offence. It is his opinion that Paul suffers from Asperger's Syndrome.
>
> The primary characteristic of Asperger Syndrome is difficulty in socialization, awkward in social skills, loners that do attach to family members, may need frequent naps, have temper tantrum. Like order and routine in life. Tend to be distrustful of others. Some have delayed motor skills and can have a full range of intelligence. Personality traits of Asperger's: loner, isolated, distrustful, showing great stress. People with Asperger's have a particular way of perceiving others.
>
> Mr. "X" in a hypothetical that was put to him has features of Asperger's Syndrome. He can't interpret the new type of person he has to deal with. Mr. "X" demonstrates many of the features of someone who suffers from Asperger's. He would be increasingly afraid for his own safety. As tensions mount, he would become increasingly anxious. He would interpret acts as a sign he was about to be attacked.
>
> Mr. "X" has a predisposition that people are out to get him. When under stress, he would think less clearly, less logically. When under extreme stress, thinking likely to be unclear, probability to act out increased. Whether he would act out is hard to say. Most people with Asperger's Syndrome would not be violent.
>
> Paul does not meet all of the criteria of Asperger's Syndrome. He does not have impaired motor skills. He is somewhat of an athlete. Dr. Glancy testified he was not aware of Paul was the captain of the cross- country team. Usually, people with Asperger's are not able to form friendships. Paul has developed some friendships. Paul is close to his family, which is not unusual in mild and moderate Asperger's. Paul has a mild form of Asperger's Syndrome. Persons with Asperger's are not violent. Dr. Glancy was aware of the various incidents involving Paul. Once, it looked like he was going to strike his mother with a broom. Once when a janitor wouldn't let him in school, he took [inaudible]. One story advanced he asked his father to take him to Buffalo. Father said no. Paul twisted his father's glasses. Paul had no significant delays in language development. Dr. Glancy said psychiatry is an inexact science. Dr. Glancy agreed it was difficult to tell between a shy person and a person with mild Asperger's Syndrome.

Dr. Glancy is moderately confident in his diagnosis of Asperger's Syndrome and testified as to what he meant by "moderately confident." He testified Paul remembers the events of the attack clearly. On cross- examination, Dr. Glancy agreed that Paul had said to him, He is looking at me like to get me, but he's blinded and went the wrong direction and I stabbed him. Paul did what he did to prevent being beaten. At the time of the attack, Paul was thinking a number of things. He was weighing a few options.

In the hypothetical, Mr. "X" would be difficult to get along with. He may be self-absorbed. He would magnify negative things. When Mr. "X" bought the knife and sprayed, Dr. Glancy would expect Mr. "X" to say that he was afraid of Mr. "Y." Mr. "X's" anxiety would be raised by the upcoming exams.

[27] After the review of the evidence the judge read the theories of the Crown and the defence to the jury. The part of the defence theory relevant to the appeal was stated in the following terms:

Did Paul Kagan provoke the assault? No. Was the responsive force used by Paul Kagan with his personality traits, given the history, circumstances, and Paul's perception no more than necessary for Paul Kagan to defend himself? No.

You, the jury, will find supporting evidence from Paul Kagan, Harvey Kagan, Ryan Kagan, Dr. Graham Glancy, Gregory Johnstone to conclude that the Crown has failed in their efforts to disprove that Paul Kagan did not act in self-defence. Dr. Glancy has rendered an opinion that Paul Kagan demonstrates some features of a disorder known as Asperger's Syndrome. He basis his opinion on Paul's history and his inability to cope with pressure and stress for a number of prior years.

Dr. Glancy rendered the following opinion:

1) that Paul Kagan, because of his personality traits, would have felt persecuted when his anxiety was raised;

2) that Paul Kagan, because of his personality traits, would have felt trapped and this would have been reasonable in light of his situation;

3) that Paul Kagan, because of his personality traits, would have interpreted Jason Kinney's acts as threats to apply force and Paul Kagan would have believed, on reasonable grounds, that Jason Kinney had the ability to affect his purpose because of prior acts of aggression and because of Paul's knowledge of his past;

> 4) that any person with Paul Kagan's personality traits would have had the same perception and reaction to events as did Paul;
>
> 5) that Paul Kagan, because of his personality traits, would honestly have felt that Jason Kinney would have caused him serious physical harm;
>
> 6) that in the mind of Paul Kagan, because of his personality traits, he would have interpreted spraying and striking of Jason with a knife in the back as one continuous act, and;
>
> 7) that Paul Kagan's belief would have been sincerely and strongly held at the material time.

[28] The jury charge concluded with the usual closing instructions about the possible verdicts and the duties of the jury.

[29] It is important to note that following the completion of the jury charge, counsel for the appellant objected to the lack of reference to the evidence of Dr. Glancy in relation to the elements of self defence in the following terms:

> MR. PINK: Yeah, I have a couple if Your Lordship pleases. One dealing with the issue of self-defence. Now I fully appreciate this is probably one of the most difficult sections of the **Criminal Code** to explain to a layman jury. But when you're dealing with your items number 3 and 4, and you talk about the beliefs of the accused and you talk about the ordinary reasonable person. I'm asking the Court to instruct the jury in light of the evidence of Dr. Glancy because when you weigh him you don't weigh the belief of Paul Kagan against the ordinary reasonable man, you've got to, in fact, weigh him in light of a person who has the mild symptoms of Asperger Syndrome. That's number 1.

[30] Although the jury was brought back before commencing their deliberations for two other re-charges respecting the elements of the offence of aggravated assault, the trial judge did not make any correction in regard to the objection by Mr. Pink about the self defence charge.

[31] Two hours after the jury commenced its deliberations, they sent a note to the trial judge asking for " a written summary of the judge's interpretation of the definition of self defence under the **Criminal Code**". After consulting with counsel, the judge arranged for the earlier charge on self defence to be replayed from the tape recording. The review of all of the evidence at the end of the self defence charge, which included the only reference in the charge to Dr. Glancy's evidence, was not replayed.

[32] On the second day of their deliberations the jury sent a note to the trial judge indicating that they were at “an impasse” and were unable to “come to an agreement”. A standard exhortation was given. After two more hours, they asked to rehear the evidence of Jason Kinney. That evidence was replayed for them the next morning. Two and one-half hours after the end of the playback, they returned with their verdict of guilty of aggravated assault.

Analysis

[33] The appellant is correct in his assertion that the trial judge did not either refer to Dr. Glancy’s evidence as relevant to the third and fourth ingredients of the defence of self defence or indicate when reviewing Dr. Glancy’s evidence that it might be of assistance to the determination of the issues relating to self defence. The question then for this Court is: do these omissions amount to reversible error?

[34] According to **R. v. Jacquard**, [1997] 1 S.C.R. 314, that question should be addressed with the understanding that jury charges are not judged on a standard of perfection.(¶ 2). As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper. (¶ 14) The accused is entitled to a jury that understands how the evidence relates to the legal issues. (¶ 32)

[35] The appellant submits that it was a reversible error of law not to advise the jury that they should consider the evidence of Dr. Glancy when deciding the issues of reasonableness inherent within the third and fourth ingredients of self defence. The point was never made that the appellant, because of a mental illness, may not be the typical reasonable person. The appellant relies on **R. v. Lavallee,** [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C), **R. v. Nelson** (1992), 71 C.C.C. (3d) 449 (Ont. C.A.), **R. v. Charlebois,** [2000] 2 S.C.R. 674, 148 C.C.C. (3d) 449 (SCC) and **R. v. G. (R.M),** [1996] 3 S.C.R. 362, 110 C.C.C. (3d) 26, in support of his argument.

[36] The position of the respondent is that, while the charge is not perfect, and “it would have been preferable” if the instruction sought by the appellant had been given, when the charge as a whole is reviewed, it sufficiently instructs the jury regarding self defence. Since the evidence of whether the appellant actually did have Asperger’s Syndrome was not conclusive, the jury first had to decide whether the syndrome would affect the appellant’s reasonable apprehensions and beliefs. Since the jury was directed to the appellant’s “situation and experiences” in the passage quoted at ¶ 23 above, it would

know to consider the effects of the syndrome, if any, within that assessment of the appellant's beliefs and apprehensions. As well, it is submitted that since the theory of the defence accurately explained the application of the expert evidence to the ingredients of self defence, the charge does not reveal an error of law. The Crown does not attempt to rely on the curative provisions s. 686(1)(b)(iii) of the **Criminal Code**.

[37] The consideration of the third and fourth ingredients of a s. 34 (2) defence requires an examination of the state of mind of the accused at the time of the assault. The questions for the jury were: did Paul Kagan have a reasonable apprehension of death or grievous bodily harm and did he believe on reasonable grounds that there was no other way to prevent the grievous harm to himself except by using the force against Jason Kinney. These two questions must be approached from the perception of Paul Kagan. (See **Lavallee**, ¶ 36 -38 and **R. v. Cinous**, [2002] 2 S.C.R. 3 at ¶ 94.)

[38] In **R. v. Pétel** [1994] 1 S.C.R. 3; [1994] S.C.J. No. 1, Lamer, C.J. explained the issues involved in s. 34(2) in the following passage:

> ¶ 20 In all three cases the jury must seek to determine how the accused perceived the relevant facts and whether that perception was reasonable. Accordingly, this is an objective determination. With respect to the last two elements, this approach results from the language used in the **Code** and was confirmed by this Court in **Reilly v. The Queen**, [1984] 2 S.C.R. 396, at p. 404:
>
> > The subsection can only afford protection to the accused if he apprehended death or grievous bodily harm from the assault he was repelling and if he believed he could not preserve himself from death or grievous bodily harm otherwise than by the force he used. Nonetheless, his apprehension must be a reasonable one and his belief must be based upon reasonable and probable grounds. The subsection requires that the jury consider, and be guided by, what they decide on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, so long as there exists an objectively verifiable basis for his perception.

[Emphasis added.]

[39] In **Lavallee,** while discussing the impact of the battered woman syndrome on the requirements for a s. 34(2) defence, Justice Wilson explained the importance of the expert evidence to the reasonableness issues in the following passages:

> 50 Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal. Using the case at bar as an example the "reasonable man" might have thought, as the majority of the Court of Appeal seemed to, that it was unlikely that Rust would make good on his threat to kill the appellant that night because they had guests staying overnight.
>
> 51 The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.
>
> ...
>
> 59 If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the "reasonable person" would do in such a situation. The situation of the battered woman as described by Dr. Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary.
>
> [emphasis added]

[40] In **Nelson**, the Ontario Court of Appeal was dealing with a person of diminished intellectual capacity charged with second degree murder who claimed he had acted in self defence. The Court determined that in addressing the issue under s. 34(2) of what the accused reasonably apprehended and believed, the evidence relating to the nature of the accused's intellectual impairment was of central importance and the jury should have been instructed to ask itself, given the accused's diminished intelligence, whether his apprehension and belief with respect to the matters covered by s. 34(2)

was reasonable. In discussing the quality of the expert evidence offered in that case, Morden, A.C.J., for the Court, noted at p. 470:

> No doubt the evidence would have been more helpful had it dealt more specifically with the exact nature of the appellant's intellectual deficit and how it could affect his perception of and reaction to threats and intimidation. However, the evidence, including that relating to the appellant's being on long-term disability, appears to show that the appellant was suffering from an objectively verifiable intellectual impairment sufficient to take him out of the broad band of normal adult intellectual capacity.

[41] In that case, although the trial judge referred to the low intelligence of the accused in relation to intent and proportionate force under s.34(1), the failure to refer to his mental status in relation to the reasonableness requirement in s. 34(2) was found to be a reversible error.

[42] It should be noted here that the evidence of Dr. Glancy in this case was much more specific than that in **Nelson**, and was directed to the issues of how Mr. Kagan's mental status could affect his perception and reaction to the actions of Mr. Kinney.

[43] In **Charlebois**, the accused was charged with first degree murder after shooting a man in the back of the head while he was sleeping. He argued that he acted in self-defence, that he had an overwhelming fear of the victim and was suffering from acute anxiety at the time of the shooting. He was convicted of second degree murder. The trial judge did give some instruction to the jury about the use of the expert evidence in relation to the elements of self defence, but on appeal it was argued that the charge was insufficient in that respect. The Supreme Court of Canada confirmed the Quebec Court of Appeal's application of the curative provision because any errors in the charge on the issue of self-defence caused minimal prejudice.

[44] Bastarache, J. for the majority, in dealing with the argument which was similar to that made here, first confirmed the general rule that the jury should be referred to evidence that supports the defence:

> 24 In **R. v. G. (R.M.)**, [1996] 3 S.C.R. 362, at para. 9, our Court recalled the long accepted rule that:
>
> > In the course of giving directions to a jury, it is essential that the trial judge outline for them the theory or position of the defence and refer the jury to the essential elements bearing on that defence in such a way that it will ensure the jury's proper appreciation of the evidence.
>
> [emphasis added]

[45] Justice Bastarache indicated that “the trial judge connected Dr. Lafleur’s evidence to the elements of self-defence on several occasions, although he did not specifically announce each time that this is what he was doing” (¶ 24). Several examples are set out in the decision in paragraphs 25 to 27. For example:

> 25 ..., in explaining the significance of Dr. Lafleur's evidence to the defence, the trial judge correlated his evidence with the first element of self-defence, the apprehension of an immediate attack:
>
> > [TRANSLATION] Dr. Lafleur offered an opinion with respect to the state of mind of the accused at the time the incident occurred with the aim of supporting the claim of the accused, that he apprehended an immediate assault.

[46] In oral argument in this appeal when Crown counsel referred to **Charlebois**, he was asked by the panel where in this charge the expert evidence was related to any of the elements of self defence. He was not able to point to any connection of the expert evidence to the elements of self defence.

[47] The principles emerging from these cases that are most applicable to this case are:

1. Although the charge need not be perfect, it must explain to the jury how the evidence relates to the legal issues;
2. On the legal issues involving the apprehensions and beliefs of the accused, the jury should consider whether the perception of the accused was reasonable, given his specific situation and experience;
3. Expert evidence of the accused’s specific mental disorder is helpful, and necessary to appreciate why the accused’s fear might have been reasonable in his situation; and
4. The jury should be directed to specific evidence bearing on elements of a defence.

[48] In light of these principles, the charge in this case, in failing to specifically refer to the expert evidence of Dr. Glancy as relevant to the third and fourth elements of self defence, was incomplete. This omission constitutes a significant error of law.

[49] The deficiency of the charge was aggravated by being repeated in the replay in response to the jury’s question regarding self defence. The first time the self-defence charge was given it was followed by a review of the evidence including Dr. Glancy’s and later by the theory of the defence which connected the expert evidence to the issues of the reasonableness of the accused’s apprehensions and beliefs at the crucial time. When it was

replayed, neither of these possibly moderating aspects of the total charge were included.

[50] As stated by the Supreme Court of Canada in **R. v. W.D.S.**, [1994] 3 S.C.R. 521, answers to questions from the jury must be correct and comprehensive:

> 18 There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.
>
> . . .
>
> 19 . . . When the jury submits a question it must be assumed that the jurors have forgotten the original instructions or are in a state of confusion on the issue. Their subsequent deliberations will be based on the answer given to their question. That is why the recharge must be correct and why a faultless original charge cannot as a rule rectify a significant mistake made on the recharge.
>
> 20 To this I would add that obviously the greater the passage of time that has elapsed between the main charge and the question from the jury, the more imperative it is that a correct and comprehensive answer be given. . . .

[51] I would add that generally it is not necessary when reviewing the evidence in relation to each element of an offence or defence to read in page after page of detailed evidence. It is sufficient and preferable, in the interests of brevity, to refer to the evidence in a summarized or point form fashion. Nor is it necessary to repeat evidence in detail more than once if it is relevant to more than one issue. (See: **Jacquard**, ¶ 14.) Here, for example, following the explanation of the third element to be determined, that of whether the accused was under a reasonable apprehension of death or grievous bodily harm, the trial judge could have summarized the relevant evidence by charging along these lines:

You should consider the following evidence when deciding whether Paul Kagan was under a reasonable apprehension of death or grievous bodily harm from the assault of Jason Kinney:

- the evidence about their past relationship including the evidence that Jason and Paul had previous confrontations about Jason's smoking, and that Paul said Jason pushed him twice;

- the evidence that Jason had prior conflicts with former roommates and with a past girlfriend;

- the evidence that Jason left and returned to the apartment several times, and was upset with remarks made by Paul;

- the evidence of both Paul and Jason about the profanities that were exchanged when discussing the cutlery and the messy kitchen;

- the evidence of Paul that Jason was angry, vicious looking and slamming doors and coming very close to him;

- Paul's evidence that he was terrified.

- Finally, you should also consider the evidence of Dr. Glancy. Recalling the instruction I gave you earlier about expert testimony, you should consider his opinion that Paul Kagan suffers from features of Asperger's Syndrome, and whether his mental condition affected his ability to perceive the situation.

- Dr. Glancy testified that Paul tended to not react well to pressure. Recall the evidence of Dr. Glancy that people with Asperger's Syndrome are likely to have impaired social functioning, be paranoid and distrustful, and suffer from anxiety attacks. In the hypothetical example used, Dr. Glancy said that a person with Asperger's Syndrome in a tense situation would be anxious and might interpret aggressive acts as a sign that he was about to be attacked. Taking into account all the evidence you accept about Paul Kagan's personality traits and mental condition, was he fearful of being seriously harmed by Jason Kinney and was his apprehension reasonable? Again, the issue is, what did Paul Kagan reasonably perceive, given his situation and experience?

[52] A direction similar to these last two paragraphs, pointing the jury to the expert evidence relevant to the issues of whether the accused's apprehension and belief with respect to the s. 34(2) defence was reasonable, was required in the circumstances of this case.

[53] For these reasons, I would allow the appeal, quash the conviction and direct a new trial.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Hamilton, J.A.