

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Cox, 2008 NSPC 50

Date: 20080505

Docket: 1875070-74

Registry: Kentville

Between:

Her Majesty the Queen

v.

Kaz Henry Cox
Joel Matthew Gibson

Judge: The Honourable Judge Claudine MacDonald

Heard: May 5, in Kentville, Nova Scotia

Written decision: September 3, 2008

Charge: 268(2) CC (both)
266(a) CC x 2 (Cox)
733.1(1)(a) CC (Cox)

Counsel: M. Ingrid Brodie, for the Crown
Kaz Cox for self
Donald Urquhart, for the defence (Gibson)

By the Court: (orally)

[1] I'm going to go through the counts in the order in which they appear on the Information. Starting then with the first count. This is the aggravated assault charge. Both Kaz Henry Cox and Joel Matthew Gibson are charged that they did wound Glen Russell, thereby committing an aggravated assault. So let's look at the evidence insofar as it relates to Kaz Cox and Joel Gibson on the aggravated assault charge. I'm not going to go through the evidence in a whole lot of detail. What I will say is that the evidence as it relates to this count came primarily from Elaine Taylor, from Mr. Russell and from Mr. Gibson. And I say that because although there were many witnesses who testified in the matter, for example Tanya Harris and James Harris didn't see or they had gone presumably by the time whatever happened at the bottom of the stairs happened. They had left. They testified about events that would have taken place before that event happened, but they were gone clearly when this incident that gave rise this charge took place. Insofar as Randolph Toney goes, although he was still at the residence, his evidence was to the effect that he didn't see this altercation or the incident that happened on the steps or at the foot of the steps. He came out shortly after it would have happened. With respect to Heather Walsh, again, she wasn't in a position, she didn't see what happened. Ms. Olmstead, again, didn't see it. So in terms of the evidence insofar as it relates to the first count, I'm going to really concentrate on the evidence of Elaine Taylor, Glen Russell and Joel Gibson.

[2] It is important that I keep in mind for this count as well as for the other counts on the information that the burden of proof is on the Crown. It's a heavy burden of proof that the Crown must meet. The Crown must prove the essential elements of an offence beyond a reasonable doubt before a person can be convicted of a criminal offence. Not only that, but I must be mindful of the law insofar as it relates to the issue of credibility and where credibility is an issue as it is in this case, it is important to keep in mind that the rule of reasonable doubt applies to that issue. In other words, that if a witness is believed or if the accused is believed, then he is to be acquitted in this case. Second, even if I don't believe for example the evidence of Joel Gibson, but if I'm left with a reasonable doubt as to his guilt after considering his evidence in the context of the other evidence, then again, he is to be acquitted. It is important to keep in mind that even if I'm not left in a doubt by the evidence of Joel Gibson I have to ask myself, based on the evidence which I do accept, whether I am convinced beyond a reasonable doubt by the evidence of the

guilt of Mr. Gibson. So I have to be mindful of these very important principals. Dealing as I said first with the aggravated assault charge.

[3] To summarize the evidence, Elaine Taylor testified that there had been an argument that took place between Mr. Cox and Mr. Russell; that at one point Mr. Russell came out of the bedroom saying “what’s going on” and that Mr. Cox pushed Mr. Russell down the steps and that Mr. Cox kicked Mr. Russell in the head and in the ribs. Ms. Taylor also testified that Mr. Gibson participated in the assault on Mr. Russell and in fact, and then after doing that, that indeed he went and got a sheet and wrapped it around Mr. Russell’s head, saying “I’ll help you out”. That’s her evidence in a very brief summary.

[4] What Glen Russell testified to was that insofar as Mr. Cox goes, that he had had an earlier discussion with Mr. Cox pertaining to a knife and that Ms. Taylor took the knife away and that what happened was that he wasn’t sure who pushed him down the stairs, but that both Mr. Gibson and Mr. Cox kicked him. That’s his evidence.

[5] What Mr. Gibson says happened, was that insofar as the aggravated assault charge goes was that basically both Mr. Cox and Mr. Allen had sort of grabbed on to each other and that he saw at one point that he did see Mr. Cox punch Mr. Allen at the bottom of the stairs and that what happened was that he, that is Mr. Gibson, put his arm around his brother and that’s how it came to an end after he went, got the sheet and offered assistance to Mr. Russell. So that is a very short version.

[6] So let’s look at this keeping in mind what I mentioned earlier about proof beyond a reasonable doubt and credibility issues. Looking at the evidence of Glen Russell. In court, his evidence was clear that even though he may not have been certain about who pushed him down the stairs, that both Mr. Gibson and Mr. Cox participated in the kicking of him when he was at the bottom of those stairs. That’s his evidence in court. But let’s look at the whole picture here. In his statement to the police, he told the police that Mr. Cox kicked him and that he was pretty sure he got a glimpse of the other brother. So his memory about it or his ability to recall it at the time he gave his statement to the police was not as clear as it was when he was testifying here in court a few days ago. And granted, as was mentioned by the crown, there could be many explanations for that. It could have been just the fact that he was suffering from a concussion at the time, the fact that he was on medications at the time, what have you. What the court is left with; the court is left

with the complainant in the matter soon after the event is alleged to have happened, being definite about the involvement of Mr. Cox, but referring to getting a glimpse of the other brother. And that really is a far cry from his evidence in court where he in a very straightforward way testified that both individuals were involved in the kicking of himself. That inconsistency that is the prior inconsistency with his evidence in court and the prior statement is cause for concern. As I said, it may very well be explainable, but nonetheless there it is.

[7] Looking at the evidence of Elaine Taylor. Her evidence was very clear. Her evidence appeared to be given in a forthright manner and her evidence was that both Mr. Cox and Mr. Gibson participated in the kicking of Mr. Russell. Yet there are issues there as well. Mainly when I listened to her evidence and for example when she talked about Randolph Toney, and what Randolph Toney was doing at the time this assault is allegedly occurring, her evidence, what she testified to in court, was that “My son was yelling at and my son is Randolph Toney, was yelling at Mr. Cox and Mr. Gibson to stop” and this at the time right when the assault is taking place. And she said so she went over and she went down three steps and she could see at that point, she could see Mr. Russell in the corner and she says both individuals kicking him in the head and the ribs and she begged them to stop. So she has her son there at the time - obviously an eyewitness to what’s taking place. Well, Mr. Toney, in his own evidence, well his own evidence clearly is inconsistent with that. Because by his evidence he has himself and there is confusion about where he was located and even whether he was downstairs with Ms. Olmstead or whether he was upstairs in the bedroom. Clearly there is confusion about that. But insofar as his evidence goes, he has himself really, coming out of the bedroom and witnessing the aftermath of what happened. He doesn’t have himself there as an eyewitness to what was happening the way Elaine Taylor in her evidence has him there being an eyewitness to what happened. So that and I realize that’s an inconsistency not an internal inconsistency in Ms. Taylor’s evidence, but an inconsistency insofar as Ms. Taylor’s evidence and the evidence of Mr. Toney; it is significant and it is one that does cause some concern.

[8] The evidence of Mr. Gibson. The court can believe some, all or none of what a witness has to say and I believe some of what Mr. Gibson had to testify, not all, and I’ll get into that later. I believe some of his evidence and I believe some of his evidence and some parts of his evidence are objectively speaking, believable. He testifies that he’s in at the table in what I’ll call the kitchen when this first

begins and indeed that's what Ms. Taylor indicates herself; that he's there. And basically the impression one gets from Ms. Taylor's evidence is that Mr. Gibson is just basically there and he's seated and he's listening to, I believe she called it MP3 player. In any event, that he's really not involved in this and then Ms. Taylor's evidence is to the effect that really as soon as this starts, Mr. Gibson gets himself involved, participates in the kicking and then makes a gesture as if to offer assistance to Mr. Russell after he's laying at the bottom of the stairs, obviously injured. Mr. Gibson's evidence about this is that yes, he did get involved. He got involved to the extent of putting the arm around his brother, that although he wouldn't really come right out and agree with the suggestion that he was doing it to get his brother off Mr. Russell. And just stopping there for a moment, this was one of the parts of his evidence where I accept some of what Joel Gibson said and I do accept his evidence that he put his arm around his brother, but I'm satisfied based on all of the evidence that he was in fact pulling his brother off Mr. Russell, that he was attempting to prevent a continuation of the assault and that his act of offering assistance to Mr. Russell afterwards was exactly that - he was offering assistance to Mr. Russell. Mr. Gibson's evidence was to the effect that he did not participate in the kicking or the punching of Mr. Russell and I have to say that that is capable of belief when one considers all of the evidence. This altercation was between Mr. Cox and Mr. Russell and this altercation that took place certainly at the outset didn't involve Mr. Gibson. Mr. Gibson involved himself shortly after, but as I said, his evidence about his extent of the involvement in it, that is just taking his brother off the, getting his brother away from the complainant, is capable of belief and indeed it is consistent with the way in which he acted soon after, that is by offering assistance to Mr. Russell.

[9] Again, looking at the evidence, insofar as Kaz Cox goes and the charge being that he did wound Mr. Russell and did thereby commit aggravated assault. Although as I mentioned I'm mindful of the fact that there are some parts of Elaine Taylor's evidence that, for example are inconsistent with what Randall Toney had to say, and I'm mindful that Mr. Russell in his statement to the police wasn't nearly so sure of the involvement of Mr. Gibson. When I consider all of the evidence in relation to Kaz Cox I find that the crown had indeed proven that Mr. Cox did assault Mr. Russell insofar as the charge is laid goes, the charge is "did wound Mr. Russell thereby committing an aggravated assault"; aggravated assault isn't really defined in the **Code**. It is set out really by case law. When looking at "wound", the case law suggests that the definition of "wound" is "to injure someone in a way that breaks, cuts or pierces or tears the skin or some part of the

person's body. It has to be more than fleeting, minor or trifling. Clearly the injuries suffered by Mr. Russell were significant. Here is an individual who had broken ribs, who had the abrasions or injuries depicted in the photograph, soft tissue injuries as referred to by Dr. MacDonald. He also suffered a concussion and he suffered was described as I believe as a slight, nonetheless, a collapsed lung; significant injuries. But when I look at "aggravated assault" and when I consider it, "wound and thereby committing an aggravated assault", these injuries that were suffered by Mr. Russell, although significant, do not reach the stage of being aggravated assault. Rather, I find Mr. Cox guilty of the offence of assault causing bodily harm.

[10] Insofar as Mr. Gibson goes, when I consider all of the evidence as I indicated earlier, I am left with a reasonable doubt. His version of the events insofar as what happened in that stairway or the bottom of the stairway; it is capable of belief. And so I find him not guilty of the first count.

[11] Moving on next to the second count. This is the charge that Mr. Cox did commit an assault upon Heather Walsh. Insofar as this matter goes, there was evidence concerning what happened in the house and evidence concerning what happened outside the house. Inside the house what the allegation is, is that Mr. Cox assaulted Heather Walsh and in fact pushed her over a table that resulted in her - well that was an assault on her and in fact was done with sufficient force and what have you that indeed the table legs got broken during it. So let's look at the evidence insofar as it relates to that count.

[12] The evidence of Heather Walsh. Here is what Heather Walsh had to say about that. Her evidence was that she and Mr. Cox got into an argument and they were near where the table was as shown in that diagram. She wasn't sure how it started, she thought it was because she may have called Mr. Cox "Todd", which was the name of her former partner and her evidence at one point was that she thought that Mr. Cox slapped her, although she didn't really remember. She did say that it got physical, that it was Mr. Cox who made the first physical contact in this discussion between herself and Mr. Walsh; discussion or dispute, I suppose would be a better word for it. Her evidence, and I must say that her evidence by her own admission she didn't have a real full recollection of what took place. She testified that she remembers bits and pieces of it. But among the bits and pieces that she recalled, was Mr. Cox throwing her into the kitchen and her hitting her head on the counter. And she talked about the table legs getting broken. She said she asked

Mr. Gibson to stop Mr. Cox and that indeed Mr. Gibson hollered at Cox a few times, but that didn't really work. That's what she says happened. And much of what she says really is corroborated by what other witnesses said took place; thinking again in particular of Elaine Taylor's evidence when she testified about what happened involving Mr. Cox and Ms. Walsh.

[13] What Elaine Taylor said took place was that she saw Heather being thrown, yes she saw an argument and then a fight break out between Mr. Cox and Heather with Heather being thrown on the kitchen table by Mr. Cox with enough force to break the legs of the table. And then there were attempts to break that up.

[14] Insofar as this charge goes, of course again, I have to consider all the evidence and there is the evidence of Mr. Gibson. This is one of those parts of Mr. Gibson's evidence where I reject his evidence and find in incapable of belief that he's there chatting on the phone while this is taking place and doesn't even bother to turn around to see what is going on and basically misses this whole incident even though it would have been taking place just several feet from where he was supposedly on the phone. It's really incapable of belief. When I consider all the evidence insofar as it relates to this charge, again, being mindful of the heavy burden of proof that the crown faces, I find that the crown had indeed proven this charge beyond a reasonable doubt. I find Mr. Cox guilty of assaulting Heather Walsh.

[15] Count three is the charge that Mr. Cox did commit an assault upon Elaine Taylor. Insofar as this charge goes, what Ms. Taylor testified was that after and this would be immediately after the assault committed by Mr. Cox on Ms. Walsh that she and others really were trying to break it up. Her evidence was that she was there, that Ms. Olmstead was there, her daughter Susie was there. They were all trying to break this up and to get Mr. Cox off Heather and that what happened was that she ended up on the floor and she said that she ended up on the floor, Mr. Cox had pushed her back with enough force to knock her on the floor and as I mentioned that Keshia had tried to intervene and that they were all trying at one time and that Mr. Cox had his Columbia jacket ripped and that's what made him outraged at that time. And that essentially is what she had to say about that and about her being pushed and knocked to the floor by Mr. Cox.

[16] Again, considering other evidence insofar as it relates to this charge, it's really hard to get a clear picture, let alone a picture that is beyond a reasonable

doubt of what exactly happened between Mr. Cox and Elaine Taylor. Just for example, the evidence of Kesha Olmstead, who would have been in the middle of this fray, according to Ms. Taylor and indeed according to Ms. Olmstead herself. Ms. Olmstead said that she was upstairs, that Randolph Toney was downstairs, that she was talking to Aleshia and then she heard two people talking and it sounded like an argument. It was getting louder and then she talked about what happened between Mr. Cox and Heather Walsh and then she says “I landed on the floor, someone pushed me” that she was headed into the kitchen to see what was going on. She doesn’t know who pushed her. She landed on the floor, got back up and then went back downstairs to talk to Randolph. So there is nothing; she doesn’t add anything in terms of what may or may not have transpired between Mr. Cox and Elaine Taylor. It is one of those situations where what happened may have been exactly as described by Ms. Taylor, but when I look at all of the evidence in its totality, I just can’t be satisfied beyond a reasonable doubt that there was indeed an assault by Mr. Cox on Ms. Taylor. It is not enough for the court to be pretty sure that that happened or to think well probably it did happen. The court has to be satisfied based on the evidence beyond a reasonable doubt. When one considers all of the evidence in its totality insofar as that count goes, I am left with a reasonable doubt. I find Mr. Cox not guilty of that count and as mentioned the fourth count, the breach of probation I find Mr. Cox not guilty of that charge.

Claudine MacDonald, J.P.C.