

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nguyen, 2011 NSPC 74

Date: 20111014

Docket: 1943095, 1943096, 1943097

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Tan Phuc Nguyen

Defendant

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: October 14, 2011

Charges: Sections 266 x 2, 264.1(1)(a) *Criminal Code*

Counsel: Andre Arseneau, for the Crown
Alan Stanwick, for the Defence

I. Introduction

[1.] On July 31, 2011 several Cape Breton Regional Municipality employees and private contractors arrived at the defendant's home at 30 Green Road, Sydney to carry out a work order for unsightly premises.

[2.] Mr. Nguyen arrived shortly thereafter and began hollering and swinging a piece of rebar. He was restrained and police were called. Constable Sheldon O'Donnell attended at the scene and arrested the defendant.

[3.] The defendant and his children were transported to the police station where he was charged with assault and uttering threats, and then released. The matter was subsequently set for trial.

II. Review of Evidence:

[4.] Mr. Richard J. Wadden testified he is employed by the Cape Breton Regional Municipality since 2007 as a Property Maintenance and By-law Enforcement Officer. He outlined to the court the procedure he follows with respect to unsightly premises:

- (1) Receives a complaint
- (2) Attends the property
- (3) Takes photos

- (4) Prepares a cleanup order
- (5) Posts the order (takes a photo of the posted order)
- (6) 30 day limit – upon expiration for non-compliance
- (7) Work order is sent out to tender
- (8) Successful contractor for the tender attends property and does cleanup
- (9) Costs are put as lien against property.

This procedure was followed with Mr. Nguyen.

[5.] The initial complaint was in September of 2007. The cleanup order was posted on September 24, 2007 (Exhibit #1 – photos 1 and 2). These photos were taken by Mr. Wadden on the dates stamped on the photos.

[6.] Exhibit #2 is a copy of the order posted on the fence.

[7.] Mr. Wadden returned in October of 2007 to see if the order was complied with. It was not, so he prepared a work order and sent it out for tender.

[8.] On November 22, 2007 he saw Mr. Nguyen in his yard and stopped to speak with him. They were standing next to a shed Mr. Nguyen was tearing down. Their conversation lasted fifteen to twenty minutes.

[9.] As a result of their conversation Mr. Wadden granted the defendant an extension for 30 days and had the work order cancelled.

[10.] Mr. Wadden said the normal procedure is if a property owner requests an extension and it appears they are trying to comply, the department normally grants an extension. The defendant requested an extension.

[11.] Mr. Wadden stated the defendant had no problem communicating with him.

[12.] A number of months went by and the defendant still had not complied, so Mr. Wadden issued another work order.

[13.] Mr. Wadden, Mr. Young another inspector, the contractor, Mr. MacDonald, his brother-in-law and one other man went to the property on July 30, 2008 to clean up. The defendant was not home and there was no response when Mr. Wadden went to the door.

[14.] There was a chain across the driveway. A locksmith was called to unlock the chain. A tow truck was used to remove a green truck that was blocking the driveway. Mr. MacDonald and his crew removed debris until approximately 2:00 pm. They stopped because of a thunder storm.

[15.] They returned on July 31, 2008 to complete the job. There was no one home or on the property. The contractor backed his truck into the yard. Mr. Wadden was behind the truck guiding it. He heard screaming from the side of the truck and he went around to the passenger side.

[16.] Mr. Wadden saw the defendant with a piece of rebar in his hand approximately three to three and a half feet long. He testified the defendant was threatening people in the truck.

[17.] Mr. Wadden yelled at the defendant to stop and the defendant came at him. Mr. Nguyen was “thrusting” the rebar at his stomach. Mr. Wadden was telling Mr. Nguyen why they were there, but the defendant did not stop. He began to swing the rebar like a baseball bat.

[18.] Mr. Wadden testified he grabbed the rebar and he and the defendant “tussled.” He called Mr. Young to come and assist him. The defendant would not stop fighting and they ended up against the fence. The defendant continued to struggle and Mr. Wadden called the police

[19.] The police arrived (Constable Sheldon O’Donnell) and took Mr. Nguyen into custody.

[20.] Mr. Wadden reviewed the photos (Exhibit #1) under examination by Crown counsel. Mr. Wadden stated there were five people on the property, three were in the truck with Mr. MacDonald.

[21.] Mr. Wadden was at the rear of the truck because it was backing into the yard. The Enforcement Officer Mr. Young was at the driver's side and Mr. Young went over to Mr. Wadden after Mr. Wadden called for help.

[22.] Mr. Wadden thinks the defendant got the rebar from in front of the freezer because he saw some there earlier [Exhibit 1 – 10:36]. Mr. Wadden said he was frightened.

[23.] He testified he told the defendant who he was and he had dealt with him on previous occasions.

[24.] The rebar “hit my knuckles”. He is not sure of the number of times he was hit, but it was more than once. His injuries as noted were skinned knuckles. He did not require medical and or hospital treatment.

[25.] The defendant went off balance as a result of swinging the rebar and Mr. Wadden was able to grab his arm. Mr. Young came over and they were able to wrestle him to the fence. Three of them held him against the fence [Exhibit 1 –

12]. He continued to struggle and he kept trying to reach in his pocket for something. It was not a fist fight, they just “had a hold of him.”

[26.] Mr. Nguyen was yelling at people to get out and poking the rebar in the window of the truck at the people. The defendant was speaking English. Mr. Wadden does not recall the defendant yelling any threats at him.

[27.] Mr. Wadden had his uniform on, but he had no badge on his left arm as it was at trial.

[28.] Mr. Wadden had been there before with the same vehicle in November.

[29.] On cross examination defence questioned Mr. Wadden on the procedures he followed. He did not call the owner in advance of going to the property on July 30th. He was not aware that it is required. He did not consider contacting the defendant before he went to the property on July 30.

[30.] His conversation with the defendant in November of 2007 was very cordial.

[31.] The first time the defendant was aware they were at his house was July 31st when he arrived, but he was aware his yard had to be cleaned up because that is what they talked about in November, 2007.

[32.] Mr. Wadden said he identified himself when he came around the truck.

[33.] Robert Livingstone testified he lives in Ontario but he was helping out his brother-in-law, Mr. MacDonald, on July 30th and 31st, 2008. They went to the yard at 30 Green Road on July 30th at 9:30, and began to clean up, but they stopped at 2:00 pm because of bad weather.

[34.] The next day they returned and backed the truck into the driveway. A car drove in the driveway fast and forced them to the back of the yard. The defendant came out of his car, ran to the house and then ran over to them yelling “get out of yard”; “kill you” and thrusting the rebar.

[35.] Mr. Livingstone said he was scared because the bar was near his neck and “Gordie” could not move the truck; they were pinned. Gordie yelled, got out of the truck and ran to the back of the vehicle. Mr. Livingstone identified the defendant in court.

[36.] Mr. Livingstone says the defendant said: “Get off my property. I’m going to kill you.” Despite being within a few inches of Mr. Livingstone’s neck and head, he was not hit with the rebar, but he stated the defendant did hit the truck. [Exhibit 1 – 3], lower portion of the door.

[37.] Mr. Livingstone stated he got out of the truck and saw Richard [Wadden] struggling with the defendant. “We tried to get the bar but he wouldn’t let go.”

Mr. Livingstone had to pry the defendant's fingers off the bar. He said Richard [Wadden] called 911. The police arrived and took the defendant into custody.

[38.] Mr. Livingstone said he never threatened or hit the defendant. He was not sure where Richard was; he was looking out for his own safety. But the first time he was somewhere behind the truck wrestling with the bar with Richard [Wadden].

[39.] On cross examination Mr. Livingstone testified he thought they had permission. Richard had the lock opened on the gate.

[40.] Mr. Gordon MacDonald testified that on July 31, 2008 he and his crew were finishing up a job on Green Road that they had not finished the day before. They arrived a little after 9:00 am.

[41.] As he was backing his truck in the yard (Inspector Wadden was directing him), a car entered and forced him back in the yard. The car was against his bumper.

[42.] Mr. MacDonald stopped the truck because there was a hole behind his truck. The driver of the car was a "guy with glasses." There were two babies in the car. The driver jumped out, ran to the step and got rebar – 36 in long. Mr. MacDonald stated "my truck was tight to another truck, my brother-in-law was on the passenger side with the window down."

[43.] The man was hollering “you get off”; “kill you” and putting the rebar through the window on Mr. Livingstone’s side. Mr. Livingstone was “losing it”, he was scared and was telling me to go ahead.

[44.] Mr. MacDonald yelled at the defendant “your fight is not with us.” The defendant saw two inspectors and he was “pissed off.” The defendant gave “my truck a bang with the bar and then went to the inspectors.”

[45.] Mr. MacDonald only had a foot to get out of his truck. When he got out of the truck he ran around to the passenger side of the truck and saw the defendant swinging the rebar at Mr. Wadden. Inspector Wadden was hollering “stop Joe” (the defendant’s name).

[46.] Mr. MacDonald came up behind the defendant and “got hold of the bar.” They had the defendant jammed against the fence (photo #12). Mr. wadden got out of the bunch to call police. They arrived and he and his crew finished the cleanup.

[47.] Mr. MacDonald got the tender for the cleanup and went to the property on July 29th. The defendant said he had an extension. Mr. MacDonald told him he was coming back on the 30th. He told him to call Rick Fraser. “He was talking English like I’m talking now.”

[48.] The defendant showed Mr. MacDonald his footings and they discussed his problem about getting permits. Mr. MacDonald thought the defendant did a fantastic job and told him so. Mr. MacDonald did not get a call from Mr. Fraser, so he went to do the job.

[49.] Mr. MacDonald says when he was talking to the defendant on the 29th the defendant was well aware they were coming on the 30th. Mr. MacDonald never saw the defendant that day as he was not there.

[50.] James P. Young testified he was a fire inspector but was a Property Maintenance Inspector on July 31, 2008. He attended 30 Green Road on both July 30th and 31st to assist Inspector Wadden and oversee the work order [Exhibit #2]. The work order is not served on anyone. There is an internal process to get a contractor who will do the work.

[51.] The Inspectors were in marked vehicles and were the first on site. No one was there. The contractor arrived, Mr. MacDonald, and was backing a one ton truck into the driveway. "I was walking toward driver's side, Inspector Wadden on the other side." Inspector Young testified he heard Inspector Wadden yell for assistance.

[52.] Mr. Young went around the front of the truck and saw the defendant swinging a three to four foot piece of rebar towards Inspector Wadden in an “aggressive manner.”

[53.] Inspector Young said he restrained the defendant from behind and they were able to get him over by the fence. Inspector Wadden called the police from his cell phone.

[54.] The defendant continued to fight back. Inspector Young tried to reassure him by telling him “calm down.” He did not see the defendant have any interaction with anyone in the truck.

[55.] Mr. Nguyen (with the assistance of a translator) testified he owns the home at 30 Green Road where he resides with his two children. His main occupation is that of lobster fisherman.

[56.] He has had some experience with notices to clean up his yard in the past, two to three years before the notice in 2007. His contact included inspections and phone calls to Cape Breton Regional Municipality.

[57.] When the defendant got the last notice he got scared and he did clean up the property. He agrees it was unsightly but it was “legally unsightly” as he had a

permit to renovate. He took a back portion of the house off. He says he purposely built a fence around the property to block the view from other people.

[58.] When officers came on July 31 they did not have his permission to be on his property. Mr. MacDonald had been there one week before “cleaning up my whole yard.” He contacted the city but no one got back to him. When he heard nothing he assumed everything was okay.

[59.] On the 31st of July he got a call that people were in his yard so he rushed back from Halifax. He was very upset, he asked them to leave, and he grabbed a bar trying to scare them away. He says he was trying to make sure his property was not stolen.

[60.] He says he was extremely disturbed and angry, and if he wanted to hurt people he could have because he is a trained martial arts instructor and Navy Seal. He made a conscious effort to restrain himself. He was trying to get them out of his yard so he could contact the police or someone to help.

[61.] The defendant felt the men had no right to be on his property. They were acting in a manner that they were “robbing me”, not cleaning up the property.

[62.] On cross examination he acknowledged that he knew Mr. MacDonald from previous occasions (lobster equipment) and he knew that on this occasion (2007) if he did not comply they would come and clean up.

[63.] He remembers Mr.. MacDonald telling him to call Mr. Fraser if he had any questions (he realized he was connected to the municipality).

[64.] The defendant stated he did not think who was from the municipality that day; he was only thinking of his property. He does not recall hitting the truck or poking at a man in the truck; all of his actions were to scare people and get them off his property.

[65.] Defence counsel argues the defendant does not deny swinging rebar and yelling, however, the defendant complied with the work order posted in 2007 and the condition of the premises on July 31, 2008 was due to renovations that he had a permit for. Since compliance with work order, no work order was in place when Inspector Wadden and others entered his property.

[66.] The defendant was acting in “defence of property” as they were trespassers. Was the force used by the defendant reasonable force to expel trespassers. The defendant stated he only intended to scare them to get them off his property.

[67.] The Crown argues the Inspectors and others were not trespassers (Municipalities Act) gave them authority and s.38 does not apply. But even if it did not, the defendant's actions were excessive, and they were not reasonable in the circumstances.

The Law:

[68.] *Municipalities Act*, Part 15 – Dangerous and Unsightly Premises:

s. 344 - Every property in a municipality shall be maintained so as not to be dangerous or unsightly.

s. 346(4) – The notice may be served by being posted in a conspicuous place upon the property or may be served upon the owner.

s. 348(3) – Where the owner fails to comply with the requirements of an order within the time specified in the order the administrator may enter upon the property without warrant or other legal process and carry out the work specified in the order.

s. 352(1) – The administrator may, for the purpose of ensuring compliance with this part, enter in or upon any land or premises at any reasonable time without warrant

[69.] Section 38 of the *Criminal Code of Canada*:

38. (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser from taking it, or

(b) in taking it from a trespasser who has taken it,

if he does not strike or cause bodily harm to the trespasser.

Assault by trespasser

(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.

[70.] This section justifies defence of personal property.

[71.] The justification of a s. 38(1) is available, not only to the person in peaceable possession of personal property, but, as well, to every one lawfully assisting such a person. What is justified is preventing a trespasser from taking the personal property, as well as retaking the property from the trespasser after he has taken it, provided it does not involve striking or causing bodily harm to the trespasser.

[72.] Subsection (2) applies where a person in peaceable possession of personal property lays hands on the property and a trespasser persists in attempting to take the property from that person and any one lawfully assisting him/her. The trespasser, in such circumstances, is deemed to commit an assault without justification or provocation.

III Credibility Assessment

[73.] Credibility is really a two part process of determining whether the witness has credibility and later, after the competing evidence is assessed, deciding believability.

[74.] In **Faryna v. Chorny** [1952] 2 D.L.R. 354 (B.C.C.A.) O'Halloran, J., stated:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.”

[75.] The court must also consider the test in **R. v. W.(D.)** [1991] 1 S.C.R. 742 at para. 28.

[76.] Based on all of the evidence I find:

[77.] Inspector Wadden and others had lawful authority to be on the defendant's property to ensure compliance with the work order. The defendant had been given an extension but he did not finish the required work.

[78.] The defendant had dealings with the municipality in the past. He knew Mr. MacDonald, Inspector Wadden and Mr. Fraser, and he knew who to contact as well.

[79.] The week before he and Mr. MacDonald had a lengthy chat and Mr. MacDonald had told him to contact Mr. Fraser if he had any questions. The defendant had notices before, he understood and he said he took them seriously and cleaned up.

[80.] There is no evidence before this court that on the date in question Mr. Nguyen's property was being stolen or had been stolen in the past by these gentlemen or anyone else.

[81.] On the date in question the defendant entered the yard and blocked Mr. MacDonald's truck and entrance. He got out of his car and immediately started yelling and screaming – “get out of yard, kill you” – and swinging rebar. Inspector Wadden identified himself but the defendant continued to swing. I find Inspector Wadden suffered a minor injury “scraped knuckles.”

[82.] The Inspector was in uniform in a marked vehicle. And I am satisfied the defendant knew at least Mr. Wadden and Mr. MacDonald.

[83.] If the defendant wanted them off his property, how was that going to happen if he had blocked the exit? Why did he not call the police (even from Halifax)? The defendant says he was angry, restraining himself and then on cross examination says he was not thinking.

[84.] Given all of the circumstances, Mr. Nguyen's reaction and actions were not reasonable in the circumstances. Therefore I find the defendant guilty.

The Honourable Judge Jean M. Whalen, J.P.C.