

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Cyr, 2008 NSPC 26

Date: May 27, 2008

Docket: 1880916

1880917

1880918

1880919

Registry: Halifax

Between:

Her Majesty the Queen

v.

Corie AKA Corey Cyr

Judge: The Honourable Judge Castor H.F. Williams

Decision: May 27, 2008

Charge: 266(b); 733.1(1)(a) x 2; 145(3) Criminal Code

Counsel: D. Martin, counsel for the Crown
A. Nimmo, counsel for the Defendant

Introduction

[1] On March 8, 2008, at 0900 hours it was raining quite hard in the Halifax Regional Municipality. From the southbound bus shelter on Barrington Street at the Scotia Square Mall, Kelly Clelland saw, on the opposite side near the north bound bus shelter, on the sidewalk, a young man and young woman, arguing with each other. They were also pushing and shoving each other but the man was more aggressive and the altercation escalated. As well, she saw the man toss clothing into the road that the woman retrieved. This activity happened several times. However, at one point in time, the man forcibly pushed the woman backward and she stumbled into the roadway behind a parked bus. Concerned for the woman's safety, Clelland called the police. The police arrived. Subsequently, they arrested and charged the man, now identified as the accused, Corey Cyr, with assaulting the woman, Roxane Guidrey. They also charged him with breach of a recognizance and of probation orders.

[2] The accused does not deny that the altercation occurred. However, he

has asserted that he was defending his personal property from Guidrey, and, as a result, he was justified to use any force that was reasonably necessary to retain it. Therefore, this case is a consideration of whether, in the set of circumstances, the accused can rely upon the defence of protection of property permitted under the ***Criminal Code***, ss.38 and 39.

Legislation

[3] For ease of reference, the ***Criminal Code***, ss.38 and 39 state:

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.

(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.

39. (1) Every one who is in peaceable possession of personal property under

a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

Finding of Facts and Analysis

[4] In order to avail himself of the defence as submitted the accused, under s.38, must show that he was in possession of the clothes, his possession was peaceable, Guidrey was a trespasser and that he either was preventing her from taking his clothes or was taking his clothes from her. However, in the process of recovering or preventing the taking of his clothes he must neither strike nor cause her bodily harm. Under s.39, the accused would accrue no criminal responsibility if he uses no more force than was necessary to defend his clothes.

[5] Here, the Court finds that the accused and Guidrey knew each other to

the extent that he was bound by a court order to reside at her residence as she was his surety in a matter before the court. Likewise, this Court finds that differences arose between them made his further stay at her residence untenable. Mutually, they wanted to go separate ways but, as it was the weekend and she could not render her surety until the following Monday, she was concerned that she would lose her surety amount, if he did not surrender himself to the police.

[6] In any event, the accused packed all his clothing in a bag and left the home ostensibly to turn himself in to the police. However, the Court finds that Guidrey did not trust him as his observed conduct suggested otherwise. Also, the Court finds, as it is compatible with the preponderance of the possibilities as disclosed by the total evidence and which a practical and informed person would readily recognize as reasonable, that she followed him to see where he was going and to stop him if possible, from going anywhere but to the police station, by taking from him his clothes as a means of persuasion. After all, she continuously expressed the view that as a single mother, she was not prepared to lose her surety money because of any violation by him of his release conditions.

[7] The Court does not accept Guidrey's professed innocence in this sordid affair. Given the manner of her dress for the inclement weather and her singular state of mind, as disclosed by the evidence, it is reasonable to conclude, and the Court concludes and finds that she followed him and harassed him by arguing with him. This prompted a reaction that the Court finds escalated into a mutual verbal and physical exchange.

[8] Concerning his clothes the Court finds that it was unclear from the evidence how his clothes first became exposed to the rain. In all the circumstances, the Court accepts the evidence of the independent witnesses who had no interest in the outcome of the case, that both of them were engaged in throwing his clothes onto the pavement or into the road and that Guidrey retrieved when they were tossed out.

[9] However, the Court does not doubt that the accused had peaceable possession of his clothes. Guidrey lays no legal claim to them and the Court finds that she has none. Nonetheless, the evidence does not support the assertion that she was attempting to take his clothes from him or that he was taking his clothes away from her. By way of example only, the evidence does

not disclose that she was taking his clothes from his bag against his will and that he was doing something to prevent her from doing so. Or, that she did take his clothes and that he was taking them back from her. Rather, on the evidence, the Court finds that it was a throwing of clothes by both of them with her picking them up and him tossing them out.

[10] Put succinctly, there was no evidence that he was taking the clothes from her or that she was attempting to take his clothes from him. Therefore, in the Court's opinion, he cannot avail himself to the defence of personal property under the ***Criminal Code***, s.38. Furthermore, in the Court's opinion, the wording of s.39 makes it inapplicable to this case. That is so as, on the evidence, the Court finds that the accused has neither asserted nor established any "colour of right" claim to the personal property.

[11] Nonetheless, the Court finds, on the evidence that it accepts, that overall, the accused was aggressive. Also, the Court finds that he intentionally and forcefully pushed Guidrey onto the roadway. He described their interaction as a mutual pushing and shoving. However, witnesses described it as aggressive conduct on his part to the extent that they feared

for the safety of Guidrey. But, her testimony was very guarded and evasive on the issues of her physical contacts with him and her testimony was vague or unsatisfactory on the issue of her consent, if at all, to him touching her and, it is confused by her engaging in mutual physical contacts.

[12] Thus, the Court concludes and finds that they were having a mutual fight that began at Guidrey's home in Dartmouth and continued and culminated on Barrington Street in Halifax. Further, it only ended with the intervention of the security personnel and the police. This finding, in the Court's opinion, is evidenced by their observed argumentative and emotional states, the tossing about of his clothes in the rain, their pushing and shoving each other, his damaging of her cellular phone, his heightened emotional responses on the arrival of the security personnel and the police and the bruises and scratches that they both sustained. Consequently, on the total evidence, this Court is not satisfied that the Crown has proved beyond a reasonable doubt that this was not a consensual fight in that the accused struck Guidrey without her consent.

[13] However, the Court does find that the accused was involved in an

altercation that attracted the attention and intervention of members of the public. He was disturbing the public peace by engaging in such conduct. His probation orders commanded him to keep the peace and be of good behavior. It is however debatable that these orders can trigger a conviction for violations when the underlying and substantive offence has been removed.

[14] Put another way, it is the Court's opinion that the breaches for failing to keep the peace and be of good behavior cannot be sustained as the Crown has not proved beyond a reasonable doubt that he has committed an offence that would trigger those conditions of his probation orders and the recognizance.

Conclusions

[15] On the Court's observations of the witnesses as they testified and its impressions of their testimonies and on the above analysis, it concludes and finds that, if it had concluded and found that in law, the accused assaulted Guidrey, the accused, for the above stated reasons, could not avail himself to the defenses set out in the ***Criminal Code***, ss.38 and 39.

[16] However, although it does not fully believe the accused, the Court is left in some doubt by his testimony. Also, the Court was not persuaded beyond a reasonable doubt by Guidrey's testimony concerning her role, participation and lack of consent in the altercation. As a result, the Court is not satisfied that the Crown has proved beyond a reasonable doubt that the accused assaulted Guidrey. Consequently, this Court finds him **not guilty** of assault, as charged, and an acquittal will be entered on the record.

[17] Additionally, for the above stated reasons, this Court finds him **not guilty** of the violations set out in the probation orders and the recognizance of failing "to keep the peace and be of good behavior" as framed on the Information tried before the Court. Accordingly, acquittals will be entered on the record.

J.