PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Murdock*, 2019 NSPC 15

Date: 20190610
Docket: 8247600
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Brent Douglas Murdock

Judge:	The Honourable Judge Paul Scovil,
Heard:	May 6, 2019, in Bridgewater, Nova Scotia
Decision	June 10, 2019
Charge:	Section 266 Criminal Code
Counsel:	Leigh-Ann Bryson, for the Crown Michael K. Power, Q.C., for the Defendant

By the Court:

[1] On a deck overlooking a cove in Chester Basin Nova Scotia on a summer's day, a fight broke out. The two pugilists were James McMahon and Brent Murdock. The residence was that of Kevin O'Leary (not of Dragon's den) and Holly Cole (the Holly Cole, the Jazz Singer). The altercation occurred after Mr. Murdock was asked to leave by Mr. McMahon. The Crown chose to charge Mr. Murdock with assault contrary to section 266 of the **Criminal Code of Canada**. Mr. Murdock raised the defence of a consensual fight. A defence, which, for the reasons below will succeed.

FACTS

[2] Bradley Coolen testified that on the day in question, July 17, 2018, he received a call from Kevin O'Leary requesting that he come to the O'Leary residence to ask Brent Murdock to leave the premises. Mr. O'Leary was never called by the Crown nor the defence as a witness.

[3] When Mr. Coolen arrived, Mr. Murdock was sitting outside on the deck. Mr. O'Leary asked Mr. Coolen to wait for the arrival of James McMahon. When Mr. McMahon did arrive both he and Mr. Coolen were asked to go outside and tell Mr.

Murdock to go. Mr. Coolen stated that when they got outside Mr. Murdock was already looking for his truck keys in order to leave. Mr. McMahon told Mr. Murdock that he should find his keys and go. An argument commenced. Mr. Murdock asked Mr. McMahon if he wanted to take it elsewhere, to which, Mr. McMahon replied "no we'll do it right here".

[4] Mr. Coolen also spoke about an interaction where Mr. McMahon accused Mr. Murdock of hiding in the bushes and spying on Mr. O'Leary and Miss. Cole. As a result, he said Mr. Murdock lunged at Mr. McMahon.

[5] The two pulled each other down to the deck, wrestled around causing some minor damage.

[6] Mr. McMahon, on the other hand, said that Mr. Murdock asked him if he wanted to take the matter outside to which he replied, "no". Mr. Murdock then ran at him and the physical altercation began.

[7] Mr. McMahon stated that he was punched and kicked and almost lost consciousness. At some point, however, he was able to grab Mr. Murdock's genitals and squeeze them for a period of time. Mr. McMahon stated after this altercation he was injured to the extent that he was off work for 90 days and could

not get out of bed for two months. He said he had cracked ribs and that he had not yet fully recovered. He also complained that his glasses were broken.

[8] An ambulance was called for, but Mr. McMahon determined that that he did not need it and waved it off. Mr. McMahon left without any assistance and drove home. No medical evidence was tendered by the Crown relating to Mr. McMahon's injuries.

[9] Part of the Crown's case included police evidence which outlined that they were called to the scene. Police also took photos of the scene and photos of both Mr. McMahon and Mr. Murdock. These photos were introduced by the Crown as exhibit number one.

[10] The defence called two witnesses, the accused and Nicole Nicholson.

[11] Ms. Nicholson was assisted by the sheriff to the witness stand. She walked there utilizing a white cane. When she was sworn in, she had to make several attempts to find the Bible to place her hand on it explaining that she was legally blind. Ms. Nicholson also indicated that she had very limited peripheral vision.

[12] Ms. Nicholson was in attendance at the O'Leary residence when the scuffle between Mr. McMahon and Mr. Murdock occurred. Not surprisingly when asked by defence counsel as to what she saw the day of the occurrence she could only

indicate that she observed out of the corner of her eye people in a pile on the deck. She could not add any significant details. The crown in its cross-examination also felt compelled to asked Ms. Nicholson what she saw. The Crown was able to get no further than defence counsel in that line of questioning. Through no fault of her own Ms. Nicholson, a blind woman, could not assist at all in describing to the court what had occurred.

[13] Brent Murdock testified that he had been invited over to the O'Leary residence and arrived there at approximately 1 pm. Mr. Murdock said he was out on the deck for most of the day. He reported that during the course of the time that he was at the residence he drank about four beer. Mr. Murdock testified that later in the day Mr. McMahon and Mr. Coolen arrived and the two had gone inside the residence. Mr. Murdock saw everyone, "huddled around" and asked if he could come in and sit. Mr. O'Leary told him "no" and that he should sit outside. Shortly thereafter Mr. McMahon came out yelling and spitting telling Mr. Murdock that he had to leave. Mr. McMahon then drove his fingers into Mr. Murdock's chin. Mr. Murdock testified that he said to Mr. McMahon did you want to go somewhere else to which Mr. McMahon said we would go right here. Mr. Murdock described the physical altercation from his point of view.

LAW

[14] This matter before the court fundamentally centers around issues of credibility and whether there is the defence of a consensual fight, having said that, like all trials the primary rule that a trial judge must remember, in a case such as this, is that the burden of proving the guilt of the accused lies upon the prosecution. Before an accused can be convicted of any offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence. See *R. v. Vallancourt*, [1987] 2 S.R.C. 636.

[15] It is also important to understand that the principle of reasonable doubt as outlined above applies equally to issues of credibility, as well as those of the facts. See *R. v. Ay*, [1994] B.C.J. No. 2024 (B.C.C.A.).

[16] We then must ask, "What is reasonable doubt?" The question of what reasonable doubt is a standard of proof, was discussed by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320. There, the Supreme Court set out that reasonable doubt is not like subjective standards of care that we employ in important everyday situations. It is not proof to an absolute certainty. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense and not on sympathy or prejudice. The Court was clear

about proof beyond a reasonable doubt and that it falls much closer to absolute certainty than to proof on a balance of probabilities. See *R. v. Starr*, [2000] S.C.J. No. 40.

[17] In this matter, given that an accused has testified, I must also apply the principles of *R. v. W. D.*, [1991] 1 S.C.R. 742. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused or disbelieve the accused yet his testimony raises a reasonable doubt, I must acquit. If any of the evidence brought forward by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I have to ensure myself that on each and every element of the offence, there is evidence which provides proof beyond a reasonable doubt. If the Crown has not proven any element beyond a reasonable doubt, then I must acquit.

[18] The concepts embodied in *W.D.* were expanded upon by the Nova Scotia Court of Appeal in *R. v. Brown*, [1994] N.S.J. No. 269. In *Brown*, Justice Matthews stated as follows:

> **17** These observations in our opinion are equally applicable to cases where a judge sits alone. As Chipman, J.A remarked in R. v. Gushue 117 N.S.R. (2d) 152 at 154:

> ...There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt. See R. v. Cooke (1988), 83 N.S.R. (2d) 274; 210 A.P.R. 274 (C.A.); R. v. Nadeau, [1984] 2 S.C.R. 570; 56 N.R. 130 (S.C.C.); R. v. K.(F.) (1990), 73 O.R. (2d) 480 (C.A.); R. v. J.G.N. (1992), 78 Man. R. (2d) 303; 16 W.A.C. 303; 73 C.C.C. (3d) 381 (C.A); R. v. K.(V.) (1991), 68 C.C.C. (3d) 18 (B.C.C.A)

18 The British Columbia Court of Appeal in R. v. K.(V.) considered issues similar to the instant case. Understandably not all of the issues were the same. After a useful analysis of the proper procedure to be followed in such cases, Wood, J.A speaking for the court commented at p. 35:

> I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender-related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes.
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> 57 (Q.L.) at 756. As Binnie, J. put it in Sheppard, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[19] While Justice Wood in *K.V.*, stated the issue at the end of the day is not credibility, credibility can often form a crucial role in a trial judge's determination of whether the Crown has proven a case beyond a reasonable doubt. A trial judge's assessment of credibility can lead to that judge accepting all, none, or part of a witness's testimony.

[20] While there are no set rules for determining credibility courts will often look to a witness's ability to observe the events that they are testifying about. Were they sober, intoxicated, angry, upset or faced with a number of stimuli? Any of these things may, or may not, affect a person's ability to recall events. People's animosity towards others may intentionally or unintentionally affect the way they recall events. People may mislead or falsify testimony intentionally due to prejudice, hate or to minimize their roles in events as they unfolded. Accused likewise may lie or misstate facts to avoid conviction.

THE LAW RELATING TO ASSAULT

[21] Section 265 of the code sets out, regarding assault as follows:

> 265 (1) a person commits assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

[22] Section 265 clearly contemplates that consensual assaults may occur. One only has to think of sports as occasions where intentional applications of force occurs with consent that would not in law be considered assaults. If you're a hockey player stepping onto the ice in a game against the Boston Bruins where

Brad Marchand is on the ice, you can expect an application of force. You may even hope that he keeps such force within the confines of the rules of the game.

[23] In *R. v. Jobidon* [1991] S.C.J. No. 65 the Supreme Court of Canada examined consensual assaults and how, that as a matter of public policy, a victim cannot consult to the infliction of bodily harm.

[24] Courts have further held the bodily harm must have been intended by an accused and inflicted before the law will vitiate consent. See *R.v. Paice* 2005 SCC 22. In *R. v. Zhao* [2013] O.J. No 2010. The Ontario Court of Appeal held that the determination of intent in matters of assaults relative to whether bodily harm was intended was subjective.

Analysis

[25] In relation to the factual background almost all witnesses came forward with a similar narrative. Mr. Murdock was at the O'Leary residence. Mr. Coolen and Mr. McMahon arrived later and asked Mr. Murdock to leave. This was done, apparently, at the request of Mr. O'Leary. A confrontation ensued out on the deck. Mr. Murdock asked Mr. McMahon if he wanted to take the matter off the premises, i.e. go fight off the premises. The physical altercation took place then and there.

[26] In relation to Mr. Murdock's evidence I do not accept all of it, but I do find that the marks on his chin, which were photographed, corroborate and are consistent with Mr. McMahon stabbing him there with his finger. As well the crucial aspect of his comments to Mr. McMahon asking if he wants to take the confrontation elsewhere with Mr. McMahon replying, "they would do it right then and there", was confirmed by Mr. Coolen's evidence.

[27] The facts as I have set out above raise the defence of consent. The defence of consent has not been disproven by the Crown. Consequently, I am left with reasonable doubt in relation to the offense of assault.

[28] Mr. McMahon in his evidence gave the court pause for concern. Mr. McMahon outlined injuries that could be considered within the category of bodily harm, yet he waved off any assistance from an ambulance which had arrived. As well Mr. McMahon spoke of his glasses being broken during the scuffle. Photos in Exhibit 1 numbered DSC01462, DSC01464 and DSC01465 show McMahon holding an intact pair of glasses.

[29] In the final analysis I am not convinced that there was bodily harm occasioned to Mr. McMahon and an even if there was there was no evidence of a subjective nature that such injuries were intended to be caused by Mr. Murdock.

[30] I further find that altercation was a consensual fight.

Conclusion

[31] As a consequence of all the above I hereby acquit Mr. Murdock.

Paul B. Scovil, JPC