IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Kevin Andrew Smith, 2003 NSPC 015

Date: 20030611
Case No.(s): 1119746
Registry: Halifax

Between:

R.

v.

Kevin Andrew Smith

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally April 16, 2003 in Halifax Nova Scotia
Counsel:	Eric R. Woodburn for the Crown D. Peter Mancini for the Defence

By the Court

Introduction

[1] It was 0240 hours on September 8, 2001 in the Halifax Regional Municipality. The drinking establishments were now closed and the patrons were on their way to their other chosen destinations. Members of the Halifax Regional Police Force, including Constable David Boon, were also on routine patrol of the city's streets. Travelling south on Barrington Street, the Constable saw a group of young men engaged in a scuffle near the corner of Duke and Barrington Streets. He intervened and, after an investigation, determined that the accused, Kevin Smith, during the altercation had bitten the complainant, Sean Fahie, and caused him bodily harm. As a result, the police charged the accused with the offence of assault causing bodily harm.

Evidence

(a) for the Crown

[2] The complainant, Sean Fahie, now an unemployed student weighed two hundred and thirty pounds and was six feet seven inches tall. At the time in issue he was employed as a doorman by a local drinking establishment. He also played varsity football. Earlier in the evening, accompanied by a friend, he went to his workplace to collect his pay check. They lingered around for about twenty minutes and left after consuming some alcoholic beverages.

[3] They walked west on the south side of Duke Street and when they arrived at Barrington Street, turned left at the corner of Barrington and Duke Streets and proceeded south on the east side of Barrington Street. Near the corner by the CIBC Building and as the complainant was talking to his friend, the accused, a total stranger, without any warning or provocation, punched him in the face on the left jaw. The complainant responded by striking the accused in the forehead and the accused fell toward him holding onto his shirt and tearing it. Additionally, as he fell toward him, the accused somehow bit the complainant's right middle finger and they both fell onto the pavement with the accused on top. When on the pavement the accused bit the complainant's right inner thigh and tore a piece out of it.

[4] Despite his kicking at the accused to get him to release his bite hold, the complainant was unable to do so. It was only after the forceful intervention of the police who pulled the accused off the complainant the fighting stopped. However, both parties required medical attention as the accused was bleeding from a head wound and the complainant's finger and leg were bleeding profusely. At the hospital, the medical diagnosis was that the complainant sustained abrasions, a laceration on his finger and a bite mark on his right medial thigh. The finger was irrigated and sutured and the medical opinion was that the complainant's injuries

were consistent with bite injuries that required a significant amount of force to break the skin. The bite to his leg left a huge scar and, as a result of these injuries, the complainant was incapacitated for six to seven months and was unable to play football for one season.

(b) for the accused

[5] The accused, a bouncer but now a bartender, was five feet ten inches tall and weighed two hundred and thirty pounds. He was twenty-four years old and was studying aviation technology at the community college. Accompanied by a friend, he was walking south on the east side of Barrington Street when they observed, about a block's distance, a group of men, who were strangers, approaching them. This group was screaming and yelling and also shouting obscenities at them. When they were face to face with this group the complainant, without any underlying cause pushed the accused and struck him in the head.

[6] The complainant repeatedly struck the accused in the head and the effect of these blows caused the accused to loose memory of the ensuing events. The accused, however, recalled biting the complainant because that was the only way he could get the complainant to stop hitting him in the head. Additionally, he recollected that he went to the hospital but received no medical attention as he left because he did not want to be there.

Issue

[7] The theory of the defence was that the complainant, without any reason, attacked the accused who was compelled to defend himself from an unprovoked physical attack. The accused was therefore relying on the defence of self-defence as outlined in the ***Criminal Code***, ss. 34 and 37.

[8] On the other hand the Crown's theory was that the accused was the aggressor who had, without reason, sucker-punched the complainant. Additionally, the disinterested police's testimony and observations contradicted not only the locus of the event but also the conduct of the accused as described by the accused. Further, the accused admitted to biting the complainant in a context that did not establish any minim of self-defence.

[9] Consequently, apart from the issue of credibility, the inquiry is whether the accused has established, on the evidence adduced, the defence of self-defence pursuant to the ***Criminal Code*** ss. 34 and 37.

Relevant Legislation

[10] The applicable sections of the ***Criminal Code***, are:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> (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.
>
> 37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

Finding of Facts

[11] Except for the police, the credibility of the other witnesses was a preponderant concern. However, I bore in mind the sage advise of O'Halloran J.A. in ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour 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. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[12] At the outset I should say it was difficult to determine objectively why the fight started or

who was the aggressor. The witnesses' testimonies were ambivalent with both parties cloaking their evidence in mantles of innocence and each side emphatically claiming that the other was the aggressor**.** However, as I observed them as they testified I formed the impression that concerning the commencement of the fight each side's story had elements of probabilities which a practical and informed person, in the circumstances presented, would readily recognize as reasonable.

[13] Thus, what I collected bit by bit from the conflicting evidence and from my observations and impressions of that evidence, was that I had before me two athletically well built young men who at the time in question were feeling the effect of having consumed alcohol. From the evidence, it was reasonable to conclude and I do conclude, that the effect of the consumption of alcohol made them both felt ebullient, foolhardy and presumptuous.

[14] I accept and find that each group approached the other on Barrington Street and met near the corner of Barrington and Duke Streets on the east side of Barrington Street near the CIBC Building. Further, because, in my view, it is consistent with the probabilities that surrounded the existing conditions, giving the effects of the consumption of alcohol as I have found, I accept the evidence that the complainant was loud and contentious and that he uttered words that were tantamount to a challenge to the accused to participate in a physical contest.

[15] It is also significant that it was only the accused and the complainant who engaged in a fight. Accordingly, on the evidence that I accept, it is reasonable to infer and find that the accused accepted the challenge of the complainant, however foolhardy it might have been. It is also rational to conclude from the evidence, as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable, that given the background of the accused and the complainant, each was a protagonist in his own right and each was not going to retreat from a test of strength and will. After all the accused had experience as a bouncer, weighed two hundred and thirty pounds and was five feet ten inches tall. The complainant was six feet seven inches tall, weighed two hundred and thirty pounds, played varsity football and also had some experience as a bouncer.

[16] Additionally, I find that it was eventful that the accused testified that he was going to cross the street to the other side in the face of the challenge and to avoid the complainant but, for unexpressed reasons, changed his mind. Thus, again it is rational to conclude, as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions that the accused was prepared to accept the complainant's challenge to engage in a physical contest. My impressions of the accused as he testified was that he was evasive, hesitant and unresponsive to questions. The complainant also did not impress me as being forthright in his responses. Accordingly, I do not find and do not accept that what occurred was a sneak attack by the accused on the complainant or vice versa. In short, I conclude and find, on the evidence that I accept and my impressions of the witnesses as they testified, that both men were prepared

to and did implicitly agree to engage in a physical contest which however did not go as anticipated or expected.

[17] I think that the fight got out of control. I accept and find that during the altercation, the accused bit the complainant's right middle finger tearing it and causing it to bleed profusely. Additionally, when they fell to the pavement, still fighting, I accept and find that the accused bit the complainant's right inner thigh and tore it.

Analysis

[18] By virtue of the ***Criminal Code,*** s.34(1) the accused would be justified in using force to repel an unprovoked and unlawful assault. Further, the accused must not have intended to cause grievous bodily harm to the complainant and he must have used no more force than, in the circumstances, was necessary to protect himself. Consequently, the first question is: Was the application of force to the person of the accused by the complainant unprovoked and unlawful? Thus, it seems to me that in order to establish the factual underpinning of the accused defence under s.34(1), I must also consider his conduct, as I have found.

[19] First, however, the word "provocation" pursuant to the ***Criminal Code***, s.36**,** "includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures". Second, the term "bodily harm" in accordance with ***Criminal Code,*** s.2, "means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". However, the term "grievous bodily harm" is not defined. Nonetheless, in ***R. v. Bottrell*** (1981), 60 C.C.C.(2d) 211 (B.C.C.A.), at p. 217, Anderson J.A., for the purposes of s. 25(3), defined the term "grievous bodily harm" as "causing a hurt or pain".

[20] Consequently, in assessing the accused conduct in order to determine the applicability of s.34 (1), I considered, along with my other impressions of the witnesses as they testified, the following:

> (a) the accused was in a "good mood" and feeling the effects of the consumption of alcohol;
>
> (b) the complainant challenged him with the words: "Hey, want to go?" and, "Want a piece of me?" He considered walking away and avoiding the complainant but for unexplained reasons changed his mind;
>
> (c) the accused decided to confront the complainant and to accept his challenge.

Thus, on the evidence that I accept, I find that by a reasonable inference the accused by his

considered conduct assented to the complainant's invitation to fight and, as a result, the parties were ad idem.

[21] On the evidence that I accept, I can reasonablely infer, and I do, that he knew that the complainant wanted to fight him on no rational basis. Likewise, on the evidence, ignoring the complainant would not have been difficult. Therefore, I think that a reasonable person in the accused position and in those circumstances reasonably would have perceived that, by his overall conduct, he would be giving some impetus to the foolhardy and presumptuous attitude and desires of the complainant.

[22] Consequently, I think that his considered conduct could be viewed and be interpreted as his intention to invite an assault upon himself by the complainant. I find, that given his observed belligerent state of the complainant, the accused's action in accosting the complainant, in the circumstances, was intentional and foolhardy. He was aware that the complainant wanted to fight and he could have avoided it. Accordingly, on the evidence, I do find, by reasonable inference, that the accused was prepared to accept the complainant's challenge. I therefore conclude that a reasonable person, in his position and in those circumstances, reasonably would have perceived that any gesture, however innocuous, would be construed to be a provocation by the complainant within the meaning of the ***Criminal Code***, s.36 .

[23] Therefore, I think that, on balance, it is reasonable to conclude that the push by the complainant was anticipated by the accused. It was the prelude to a fight. They then commenced to trade blows. The complainant struck him in the forehead and he struck the complainant in the jaw. He also bit the complainant's finger. When the facts and the true situation are examined, it seems to me that the accused subjective belief that the action of the complainant presented to him an imminent danger of grievous bodily harm and that his counter action was necessary to protect himself, objectively, given his own conduct, in my view, was not reasonable. He was struck repeatedly in the head and they fell to the pavement with him on top. While on the ground, he bit the inner thigh of the complainant. Consequently, in my opinion, the incidents of the assault, in these circumstances, would not have occurred without the accused "having provoked" them by his conduct. See, for example, ***R. v. Nelson***, (1992) 71 C.C.C. (3d) 449 (Ont. C.A.). As a result, it is my opinion, on the analysis that I have made, the accused cannot avail himself to the protection of the ***Criminal Code*** s.34(1).

[24] Having found that the accused cannot avail himself to the protection of the ***Criminal Code***, s.34(1) because he "provoked" the assault on himself, he may, however, at first blush, avail himself to the protection of the ***Criminal Code***, s.34(2). But as was put by Lamer C.J., in ***R. v. Petel*** [1994] 1 S.C.R. 3, [1994] S.C.J. No. 1, at paras. 19 and 20:

> 19 It can be seen from the wording of s. 34(2) of the Code that there are three constituent elements of self-defence, when as here the victim has died: (1) the

existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary.

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, as long as there exists an objectively verifiable basis for his perception.

[25] Additionally, as I stated in ***R. v. Nickerson,*** [2002] N.S.J. No. 109, 2002 NSPC 4, at para. 17:

> ... the law requires me to ask myself not whether "the accused was unlawfully assaulted" but rather whether "the accused reasonably believed, in the circumstances, that he was being unlawfully assaulted." It is his state of mind that is relevant. Therefore, here, did he have a reasonable apprehension of any danger posed by the complainant? And, if so, did he have a reasonable belief that he could not extricate himself otherwise than by injuring the complainant?

[26] Here, on the evidence that I accept, I find that there was no "objectively verifiable basis" for the accused's contention, that he had a reasonable apprehension that the complainant would cause him "grievous bodily harm". The testimony of the officer was clear that it was the accused who was the aggressor intent on causing hurt to the complainant who was attempting desperately to disengage. The accused referred to the blows to his head to support his submission that he was afraid of the complainant because of some continuing violent act on the part of the complainant toward him. His explanation, however, was not that he believed on reasonable grounds that he had to fight the complainant as it was not possible

to preserve himself from harm otherwise and except by hurting the complainant, rather, he testified that he bit the complainant in the leg because he was kneeing him in the head. Nonetheless, on the evidence that I accept, it was the accused who continued to be violent toward the complainant even when the police was attempting to separate them. Therefore, on the analysis that I have made, in my opinion, he cannot avail himself to the protection of the ***Criminal Code***, s.34(2).

[27] On the evidence and on my impression of the accused as he testified, I think that because he too was hurt in the affray he considered it a bit unfair that he should now be held criminally responsible for the complainant's injuries for something that was initiated by the complainant. Consequently, I think that it was within this context that he claimed self defence. Even if I were to accept that under the protection of the ***Criminal Code***, s.37(1) he was genuinely defending himself from the complainant's attack, he, however, pursuant to the ***Criminal Code,*** s.37(2), cannot wilfully inflict any hurt that is excessive considering the nature of the assault that he intended to repulse with the force that he used.

[28] Here, however, in my view, on the testimony of the police, the accused was not repulsing any attack on himself but was in fact persistently attacking the complainant and biting his inner thigh. In short, the facts, as I have found, do not support the defence of self defence and the evidence does not lend an air of reality to the submitted factual underpinnings for me to apply the provisions of the ***Criminal Code***, ss.34 and 37, for the benefit of the accused. Further, if as I have found that the fight was consensual, because there was serious hurt or non-trivial bodily harm, consent is vitiated. ***R. v. Jobidon***, [1991] 2 S.C.R.714, 66 C.C.C.(3d) 454.

[29] On the evidence that I accept, I do not doubt that the complainant suffered bodily harm. According to Dr. David Petrie, the attending emergency physician, the complainant's history was bites to his finger and inner thigh. On examination, the complainant's injuries were consistent with bite injuries that required a significant amount of force to break the skin. He had a laceration to his finger that had to be irrigated and sutured. In addition, he had a bite mark on his right medial thigh that left a huge scar when healed. To allay his fears of contracting hepatitis B or AIDS they tested the complainant for these diseases with negative results. The effect of these injuries was the complainant was incapacitated for six to seven months and was unable to play football for one season.

[30] Causation is a question of fact to be decided by the jury beyond a reasonable doubt. ***Smithers v. The Queen*** (1977), 34 C.C.C. (2d) 427 (S.C.C.), affirming 24 C.C.C. (2d) 344. However, it is a question of law as to whether there is any evidence to put the issue to the jury in the first place. Here, in my view, the Crown has established beyond a reasonable

doubt a casual relationship between the bites to the finger and thigh of the complainant, on my findings of fact, and the lacerated finger and injury to the medial thigh sustained by the complainant. In my opinion there was well-grounded medical opinion as to the cause of the complainant's injuries. The doctor's opinion was that they were consistent with biting as a causative factor.

Conclusion

[31] Consequently, on the analysis that I have made, I find and do not doubt that there is sufficient evidence for me to conclude, beyond a reasonable doubt, that the accused caused bodily harm to the complainant. On the evidence that I accept and on the analysis that I have made, the accused cannot avail himself to the self-defence protection of the ***Criminal Code***, ss.34 and 37, as asserted. Further, because the complainant suffered non-trivial bodily harm consent is vitiated. Therefore, in my opinion, on the evidence that I accept and on the analysis that I have made, I conclude that the Crown has proved beyond a reasonable doubt the elements of the offence as charged. I therefore find the accused, Kevin Smith, guilty as charged on the Information tried before me, and I will enter a conviction on the record.