

IN THE PROVINCIAL COURT OF NOVA SCOTIA  
**Citation:** *R. v. Sung Lee*, 2003 NSPC 026

**Date:** 20030620  
**Case No.(s):** 1045635  
1045636  
**Registry:** Halifax

**Between:**

**R.**

v.

**Sung Lee**

**Judge:** The Honourable Judge C. H. F. Williams, JPC

**Heard:** Decision rendered orally June 20, 2003  
in Halifax Nova Scotia

**Counsel:** Daniel A. MacRury, for the Crown  
Anthony M. Brunt, for the Defence

## BY THE COURT

### INTRODUCTION

- [1] It was dusk on November 26, 2000 in the Halifax Regional Municipality. The accused, Sung Lee, a Korean student with limited English language skills and a Kendo devotee, was in his quiet suburban neighbourhood, enjoying the privacy of his apartment and, with his family was about to enjoy his evening meal. Kendo is a Japanese style self-defence martial art routine that uses bamboo swords in competition. Without warning and in an imprudent manner, a laser beam, operated by the complainant, David Fillis, and his friends, and which directly targeted the accused and his wife, entered the apartment and disrespectfully encroached upon and disturbed the accused quiet and peaceable enjoyment of his property. Leaving his apartment with his ceremonial Katana sword for protection, and after calling the police, the accused went to investigate the intrusion. He encountered the complainant and a friend hiding behind a nearby house and he detained and subsequently released them to police custody. The complainant however alleged that prior to his detention the accused assaulted him by kicking him and holding the sword to his throat. Additionally, he averred that the accused threatened to cut off his hands and to slit his throat. After an investigation, the police charged the accused with assault with a weapon and uttering death threats against the complainant.

### Relevant Evidence

- [2] (a) on behalf of the Crown

Four youths including the complainant, for fun and distraction, were deliberately and randomly targeting private homes with a laser beam. They would point the laser beam into open windows. When they came to the accused home, they focussed the beam through its open window for five minutes. Seeing a man come to the window and drawing the blinds to obstruct the beam's entry the youths left the area. However, half hour later they returned to the accused house. They saw the window open and they aimed the laser beam through it.

- [3] Upon seeing a man, who was the accused, exiting the house running and holding something in his hand by his side, the youths dispersed. The complainant and his friend, Deangelo Symonds, together ran and hid crouching behind a nearby house. When the accused detected their presence he approached them and demanded that they give him the laser. However, when they replied that it was not in their possession he pulled what they detected to be a sword a little from its scabbard and stated: "Anyone who fuck with me I will cut their head off". Nonetheless, he told them, on their enquiry that he was not going to kill them. Further, he ordered them to get up and when they did not promptly

do so he kicked the complainant, who was closer to him, in the leg. Then, grasping them each by the collars of their coats, he told them to come with him as the police were already waiting for them at his apartment. Taking them to his apartment the accused and the youths all waited for the police to arrive.

**[4]** (b) on behalf of the accused

The accused, his wife and mother-in-law were settling down to have their supper before he went to his Kendo class. A laser beam entered the apartment on two occasions. The first time it was aimless but on the second incident it focussed on his wife's forehead, eyes and throat for several minutes. It also settled on the accused. They went to the window to investigate. When the accused looked out the laser beam shone in his face but he could discern the shapes of persons in the outside darkness.

**[5]** Telling his mother-in-law to call the police, the accused decided to go outside to ascertain and to stop the source of the annoyance. As it was just before he went to his Kendo classes and the equipment was by the door, for his protection if he were attacked, he picked up the Katana sword and went outside. When outside, he saw the persons who were shining the laser into his home running away. Holding the sword in his left hand and by his side he pursued two of the individuals who were running across a nearby field. They, however, eluded him. Giving up the pursuit and returning to his apartment he, by chance and to his surprise, saw two persons, the complainant and his friend crouching and hiding behind a house.

**[6]** He approached them and without saying anything to them the complainant told him that they had nothing. He told them to get up as the police were called and that he was taking them to the police. As the complainant did not move promptly, the accused nudged him on the buttocks with his foot. The accused denied that he swore at the youths, as they asserted, because of his poor English skills and the grammatical constructions. Additionally, he denied that he partially withdrew the sword from its scabbard or that he placed it to the complainant's throat, or at all. He, however, acknowledged that one youth enquired if he were going to kill them and that he told them he was not going to kill them but that he was taking them to the police. Holding them each by their coats' collars he walked them across the field to his apartment and awaited the arrival of the police.

### **Findings of Facts and Analysis**

**[7]** Here, credibility is the paramount issue. Accordingly, because of the conflicts in the witnesses' testimonies it seems to me that a substantive test of the truth of the versions of the event would be whether I can reconcile their stories with the preponderance of the

probabilities which a practical and informed person would willingly accept as reasonable from the scenario as they described it. See: *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357. Additionally, my observations of the witnesses as they testified and my assessment of their testimonies, considering the total evidence, was critical in arriving at my acceptance of their general integrity, sincerity, frankness and honesty. See: *White v. The King* (1947), 89 C.C.C. 148 (S.C.C.), at p.151, *R. v. O.J.M.*, [1998] N.S.J. No. 362 at para.35, *R. v. W.(D)*, [1991] 1 S.C.R. 742.

- [8] The Crown's theory was succinctly put as that, on the evidence, I should not have any reasonable doubt that the accused intentionally and unlawfully applied force to the body of the complainant by kicking him and putting the open sword to his throat. Additionally, the accused, in anger, told the complainant that he would cut his throat and cut off his hands.
- [9] On the other hand, the accused argued that the creditworthiness and reliability of the witnesses were the critical issues. The complainant and his friends had intentionally and unlawfully interfered with the accused privacy and enjoyment of his property. Accordingly, when they aimed the laser beam into the accused home the complainant and his friends had committed a trespass and the accused had a right to stop them. Accordingly, his subsequent actions were justified under s. 41 *Criminal Code*. Additionally, as the complainant and his friends were prowlers within the meaning of s.177 *Criminal Code* the accused subsequent action in detaining them was justified under s.25 (1) (c) *Criminal Code*.
- [10] First, I should say that on the total evidence I cannot and do not conclude and find that the complainants were prowlers or loiterers within the meaning of s.177 *Criminal Code*. In my opinion, the evidence does not support this proposition. I do not find that the complainant and his friends were ever on private property. True, they were near the accused house but they were not wandering around without any precise destination and with innocuous conduct. They came near the house, openly and not clandestinely, with the purpose to shine the laser inside and they intended to disrupt and annoy the occupants. They did as they planned to do. See: *R. v. Cloutier* (1991), 66 C.C.C. (3d) 149 (Que.C.A.), *R. v. Willis* (1987), 37 C.C.C. (3d) 184 (B.C. Co. Ct.)
- [11] Second, in my view, on the evidence that I accept and find, when the accused discovered and accosted the two youths hiding near the house he was not aiding a peace officer or public officer. On the evidence, the accused was on his own and by himself without any direction from anyone, looking for the youths whom he thought had targeted his home with the laser beam. I accept and find that before he left his home to chase them he asked his mother-in-law to call the police. However, as there were no officers on the scene when he located the youths and no officers had given him prior command to assist them in apprehending the youths, in my view, and without more on the reasons presented, I find that the accused cannot avail himself to the protection of s.25 (1) (c) *Criminal Code*.

- [12] Third, I do not find, on the total evidence, that the youths entered onto private premises much less entered the home of the accused or were on his property to become trespassers. The trespass alluded to by the accused was the shining of the laser beam into his window that interfered with his quiet and peaceable enjoyment, not that they were actually on his private premises and resisting any attempts to leave. It was not submitted that the accused was using force to evict the youths from his property. On the evidence, he ran out of the house and pursued the fleeing youths. He subsequently located two of them some distance from his home. It was at that location that he made physical contact with them. Consequently, in my view, it cannot be said that he was removing them from his premises and that they were resisting him. Concomitantly, it cannot be said that he was using the necessary force, in the circumstances, to remove them from his property. Therefore, in my opinion, and I so find, he cannot avail himself to the protection allowed pursuant to s.41 *Criminal Code*.
- [13] Overall, however, on my observations of the witnesses as they testified and on my assessment of their testimonies, considering the total evidence, I concluded that I should view the complainant's testimony with great caution. I find that his testimony was inconsistent with that of the other witnesses. He was evasive and was attempting to minimize his own involvement. When weighed and assessed with the other testimonies and on my impression of him as he testified, I acquired the misgiving that he was embellishing and exaggerating the facts as disclosed through the testimonies of the other witnesses. I find that his friend, Deangelo Symonds, was more forthright and frank in his testimony. He admitted that their intention in aiming the laser beam into people's home was for fun and to get the occupants' reaction. The accused had the sword but he did not see him put it to the complainant's throat nor did he hear the accused state that he would slit his friend's throat or cut off his hands. All that he could recall the accused saying, when he first saw them, was: "Anyone who fuck with me I will cut their head off". However, they all agree that the accused stated that he was not going to kill them but that he was detaining them for the police.
- [14] The accused testified and denied using the terms and word sentence constructions as alleged because of his poor understanding of and working knowledge of the English language. The evidence disclosed that he was a student attending a local university that teaches his academic program in English. Additionally, his wife's first language is English and he communicates with her both in English and Korean. Given those factors, it was difficult for me to conclude that he did not have, as he professed, at least a working knowledge of conversational English in order to be able to communicate with the youths when he confronted them for the sole purpose of detaining them for the police.
- [15] It is therefore reasonable to conclude, and I do, as it is in harmony with the preponderance of the probabilities which an informed person would willingly accept as reasonable from the

scenario as described by the witnesses, that the accused had some working knowledge of English to undertake the task of detaining the youths and to attempt, with confidence, to communicate with them and to make them understand his intentions without any misunderstandings. On the evidence that I accept, I find and conclude that they did understand his intentions and as a result did cooperate with him. Therefore, although I do not fully accept the accused version of events when he declared that he did not swear at the youths when he initially confronted them, because of my impressions of the youths' testimonies, I have given him the benefit of the doubt.

[16] However, I conclude and find on the evidence that I accept, that when the accused held the youths to compel them to accompany him to await the presence of the police, in the circumstances he did apply force to their persons without their consent. I also find that when he nudged the complainant on the buttocks with his foot, to get the complainant to stand up, that was also an intentional application of force without the complainant's consent. I do not however accept nor do I find that he placed his sword to the complainant's throat and threatened to slit it or to cut off his hands. This finding is based upon my impressions of the general integrity of the accused and his testimonial consistency with the probabilities that surrounded the existing conditions. He expressed the philosophical view of Kendo as one of self-defence and that he had the sword only in case of an attack upon him. The sword was not for an offensive purpose. Further, before he left his home he had asked his mother-in-law to call the police. I accept and find that his testimony had internal consistency and I find that he conveyed his intention to the youths that he did not intend to harm them which they understood and accepted. They also understood that he was taking them to the police and they cooperated with him. On their travelling to the accused apartment and awaiting the police arrival, I accept that their demeanour was convivial and did not, in my view, demonstrate a fear of the accused in the circumstances and the context of his conversation with them.

[17] Nonetheless, it seems to me on the evidence that I accept and find, it is reasonable to conclude, and I do, that the youths, by their conduct, as admitted and found, were wilfully interfering with the accused lawful use and enjoyment of his property. This was a mischief and a criminal offence covered by s.430 (1)(c) *Criminal Code* that states:

(1) Every one commits mischief who wilfully

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property.

[18] Notwithstanding my findings of his intentional application of force to the person of the complainant, I think that, as belatedly canvassed and alluded to by the parties in arguments,

the accused, in the circumstances, can avail himself to the exemption from liability by the combined utility of ss.494 and 25 (1)(a) *Criminal Code*. The relevant provisions state as follows:

494. (2) Any one who is

(a) the owner or a person in lawful possession of property,  
may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property. [Emphasis added]

(3) Any one other than a peace officer who arrests a person without a warrant shall forthwith deliver the person to a peace officer.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,  
is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[19] Here, I find that the accused was an owner or a person in lawful possession of property. He was in his apartment about to enjoy a meal with his family when the complainant and his friends wilfully interfered with the lawful use and enjoyment of his property, with intent and for fun, aimed a laser beam into the open window of his apartment. This laser beam disturbed and annoyed the accused and his wife and interrupted their meal. When he looked out of the window, the accused saw the shapes of persons but he could not determine their ages. However, he decided to apprehend and to detain them for the police. His mother-in-law called the police and the accused chased the persons whom he immediately determined were involved in the mischief in relation to his property. He located the complainant and his friend crouching and hiding beside a nearby house. Their first utterances to him informing that they did not have the laser but another friend did, confirmed, in his mind, that the two youths before him indeed were involved in the mischief relating to his apartment.

[20] In my view, the accused acted on reasonable grounds. I find that he honestly believed that he had found the perpetrators of the mischief. The statutory law therefore authorized him, in the circumstances, to effect an arrest, without a warrant, as he did find the youths committing a criminal offence in relation to his property and immediately chased, located and identified them as the perpetrators or parties to the mischief. He told them that the police had been called and that he was detaining them for the police. When the complainant did not stand, as requested, and the accused nudged him on the buttocks with his foot, in the circumstances, I find that he used only the force necessary for that purpose. Further, I find

that when he grabbed them by their coats collars he told them that he was taking them to the police who had been called. Thus, I find that his holding them as he did was to accomplish the stated purpose of delivering them to a peace officer and that he used no more force than was necessary for that purpose. Finally, I find that he did not detain them longer than was necessary and he delivered them to the police when they arrived at his apartment which was as soon as it was reasonably practicable under all the circumstances.

## **Conclusion**

- [21] In his application of force to the person of the complainant, the nudging with his foot and the grabbing of the complainant's coat collar, I find that the accused was effecting a citizen's arrest. Therefore, as I have found that he used no more force than was necessary to effect that purpose I conclude and find that he is exempted from liability by the combined benefit of ss. 494 and 25 (1)(a) *Criminal Code*. I do not accept nor find that he placed the Katana sword to the complainant's throat. Therefore, I am not satisfied, on the evidence that I accept, that the Crown has proved beyond a reasonable doubt that the accused unlawfully assaulted the complainant with a weapon or imitation thereof, or at all. In the result, I will find him not guilty as charged and will enter an acquittal on the record.
- [22] Additionally, I do not conclude nor find, beyond a reasonable doubt, on the evidence that I accept, that the accused uttered a threat to the complainant to cause bodily harm or death to the complainant. On that issue, I am left in doubt by the testimony of the accused. Thus, I am not satisfied that the Crown has proved beyond a reasonable doubt that the accused unlawfully uttered a threat to the complainant to cause the complainant bodily harm or death. Consequently, I will find him not guilty as charged and will enter an acquittal on the record.