IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***Daniel Douglas Byrne***, 2003 NSPC 032

Date: 20030625
Case No.(s): 1121681
Registry: Halifax

Between:

R.

v.

Daniel Douglas Byrne

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally June 25, 2003 in Halifax Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Catherine Benton, for the Defence

BY THE COURT

Introduction

[1] The complainant, Douglas Lowther, age forty-five years, was a friend of Marjorie McOine, of about the same age, and who was also the friend of the accused, Daniel Byrne, age twenty-one years. They all lived in the same apartment building in the Halifax Regional Municipality. Generally, Ms. McOine would invite the accused to her apartment to roll her cigarettes and she would give him one cigarette for every ten that he rolled. Periodically, she would also invite the complainant to her apartment for drinks. On the evening of November 20, 2001, without the apparent knowledge of the complainant, she invited both him and the accused to her apartment, one to have drinks and the other to roll her cigarettes. The complainant arrived and expected to have a sociable evening alone with Ms. McOine but, to his surprise and annoyance, he discovered that the accused was also present. Both the complainant and the accused resented the presence of the other and in a confrontation that ended in a scuffle the complainant received a cut to his nose that required medical attention. After receiving a complaint, the police charged the accused with assault causing bodily harm to the complainant.

Findings of Relevant Facts

[2] From the total evidence and on my observations of the witnesses as they testified and on my assessment of their testimonies I accept and find that all the parties lived in the same apartment building in the Halifax Regional Municipality. Additionally, I accept and find that Ms. McOine would habitually invite the accused to her apartment to roll her cigarettes as she herself could not properly do it. At the time of the incident the accused had lived in the building and she had known him for only four months, but she knew the complainant for a much longer time. The complainant was a frequent visitor to her apartment where they would generally socialize and consume alcoholic beverages. Further, I accept and find that the accused was a much younger person than the complainant and Ms. McOine.

[3] I accept and find that the accused, on Ms. McOine's invitation, on the evening in question, was in her apartment rolling her some cigarettes. Further, as she also had some beers to consume, she decided to invite the complainant, as usual, to have a drink with her. I so find. Additionally, I accept and find that when the complainant entered the apartment he was surprised to find that the accused was also present. Consequently, I accept and find that the complainant felt uncomfortable by the accused's presence in the apartment. As a result, he expressed the view that the accused was too young to be present and that he, the accused, ought to leave. However, the accused, was not about to leave as he felt that the complainant had no authority to compel him to do so.

[4] On the preponderance of the probabilities that existed, I accept and find that the complainant, resentful, annoyed and perhaps in a jealous pique, because of the accused's refusal to leave, grabbed him by the throat. I also accept and find that after grabbing the accused by the throat, the complainant twice attempted to strike him with his fist. Nonetheless, I accept and find that the accused blocked those blows and with counter- punches struck the complainant in the nose and in his side. Likewise, I accept and find that the accused, in the scuffle, did cut the complainant's nose and that the complainant sought and received medical intervention for that wound.

Analysis

[5] Here, there is a conflict between the testimony of the complainant and those of the other witnesses. Thus, on the crucial issue of reliability, I examined each version of the event for its consistency with the surrounding probabilities that a practical and informed person would readily recognize as reasonable in the scenario as described by the witnesses. See: ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357. See also: ***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.

[6] I think that it is reasonable to conclude and find, and I do, as it is in harmony with the preponderance of the probabilities that existed in that place and conditions, that the complainant was somewhat jealous of the attention that he presumed that the accused was receiving from Ms. McOine, his long time friend and drinking associate. He therefore challenged the accused presence in the apartment and demanded that he ought to leave. Furthermore, as it is again 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, I accept and find that the complainant opened the apartment door to emphasize his viewpoint that the accused should leave as he was too young to be present in the company of two adults at that time and under those circumstances. After all he, the complainant, was invited up for a social drink that was a usual occurrence. He therefore must have thought that he would be alone with Ms. McOine and by his words and actions, as I have found, I conclude that he resented the presence of the accused and considered him to be a youthful interloper.

[7] On the evidence, I accept and find that Ms. McOine was intoxicated and that the complainant had also consumed some quantity of alcoholic beverage. Thus, when the accused refused to leave, I think that it is reasonable to conclude, in the circumstances, that the complainant became annoyed with him. Moreover, in the then current atmosphere of mutual resentment and frustration I think that, as it is in harmony with the preponderance of the probabilities that surrounded the exiting conditions which a practical and informed person would readily recognize, I find it reasonable to accept, and I do accept and find that, in the circumstances,

the complainant lost his patience and self-control and became more forceful and aggressive toward the accused.

[8] I found that the accused cut the complainant's nose with a retaliatory punch. Admitting that he did cause the injuries, the accused however submitted that he acted in self defence against an aggressive, violent, drunk and jealous complainant. Having heard the accused and observing him as he testified and weighing his testimony with the total evidence, I believed him. See: ***R. v. W.(D)***, [1991] 1 S.C.R. 742. I say that because, in my opinion, his testimony had internal coherency, was consistent with that of other witnesses and also with the probabilities that surrounded the existing situation.

[9] The question therefore is: Can he, in the circumstances as presented, be exempted from liability by virtue of s.34 (1) ***Criminal Code?*** The section states:

> 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.

[10] Thus, on the strength of s.34 (1) ***Criminal Code*** the accused would be justified in using force to repel an unprovoked and unlawful attack upon himself. Further, he 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. Therefore, the first enquiry would be whether the accused provoked the attack upon himself. Consequently his conduct, as I have found, would be material in determining the applicability of s. 34(1) ***Criminal Code***.

[11] I do not find, on the evidence that I accept that the accused provoked, within the meaning of s. 36 ***Criminal Code***, the attack upon himself. In my view and on my findings of facts, he neither did nor said anything that could rationally be considered as provocative. He just refused to leave his friend's apartment as he was a lawful invitee and it was not she who was asking him to leave or was suggesting that he should leave. When the complainant attacked him, he indicated that he was scared as the complainant was "raving like a drunk" and was violent and aggressive. In the heat of the moment, he stated that he did what he did to stop the complainant and to avoid injuries to himself. On the evidence that I accept, I find that he did not hit the complainant more than was necessary for the complainant to desist in the attack.

[12] In my view, the accused testimony lent an air of reality to the constituent elements of the provisions. Likewise, he was not expected to weigh the force of his blows or to reflect upon the risk of injuring the complainant which might result from those blows as a result of his justifiable defensive actions. See: ***R. v. Kandola*** (1983), 80 C.C.C. (3d) 481 (B.C.C.A.). On my findings of facts, it is difficult to conclude, beyond a reasonable doubt, that the accused intended to cause grievous bodily harm to the complainant. I accept that his blows were defensive, intended to protect himself from further attacks and were no more than were required to stop the complainant's aggressive behaviour.

[13] Nonetheless, I do not doubt that the complainant suffered bodily harm. Furthermore, I do not doubt that the accused caused the bodily harm. However, in my opinion, on the analysis that I have made, the accused has made out the defence of self-defence under s.34(1) ***Criminal Code*** and, as a result, and in the circumstances, his use of force was justified.

Conclusion

[14] Here, on the facts as I have found and on the analysis that I have made, I believe the testimony of the accused that he acted in self-defence when the complainant unlawfully and without provocation attacked him. Further, although I find that the complainant suffered bodily harm, I also find that the conduct of the accused, in the circumstances, met all the conditions set out in s.34(1) ***Criminal Code*** and those requirements rendered his use of force justifiable. In short, he has made out the defence of self-defence. Consequently, I am not satisfied that, in the case at bar, the Crown has proved beyond a reasonable doubt that the accused, Daniel Douglas Byrne, on November 20, 2001, did unlawfully in committing an assault on Douglas MacKinnon Lowther caused bodily harm to him. Accordingly, I find him not guilty as charged and will enter an acquittal on the record.