Date: 20020726
Docket: S. Y. No. 6534

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *R. v. Kenney*, 2002 NSSC 192]

BETWEEN:

CHRISTOPHER RONALD KENNEY

APPELLANT

- versus -

HER MAJESTY THE QUEEN

RESPONDENT

D E C I S I O N

HEARD: **At Shelburne, Nova Scotia before the Honourable Justice David W. Gruchy, on July 9th, 2002**

DECISION: **July 26, 2002**

COUNSEL: **Raymond B. Jacquard, for the Appellant**
James H. Burrill, for the Respondent

GRUCHY, J.:

[1] On November 8, 2001, the appellant was convicted by the Honourable Anne E. Crawford, a Judge of the Provincial Court, of the following offence:

> that between the 30th day of June, 2001 and the 1st day of July, 2001, at or near Stoney Island, in the County of Shelburne, Province of Nova Scotia, did in committing an assault upon Reginald Alpheus MacKay, cause bodily harm to him contrary to Section 267(b) of the Criminal Code.

[2] The grounds of this appeal are as follows:

> (1) The Learned Trial Judge erred in law in determining that the Appellant used excessive force in defending himself;
>
> (2) The Learned Trial Judge erred in law in using the size of the Complainant and the Accused as a factor in determining whether the Accused used reasonable force;
>
> (3) Such other grounds as may be disclosed by the transcript of evidence and allowed by this Honourable Court.

[3] The appellant also appealed the sentence imposed upon him on the following grounds:

> (1) The Learned Trial Judge erred in law in determining that this offence was too serious offence to grant a conditional discharge;
>
> (2) The Learned Trial Judge erred in law in determining that a factor in deciding whether or not to grant a conditional discharge was the fact that it would be of no use to the Accused in attempting to work in the United States.
>
> (3) Such other grounds as may be disclosed by the transcript of evidence and allowed by this Honourable Court.

[4] In a recent decision of the Appeal Court of Nova Scotia - **R.** v. **D.C.S.** , [2000] N.S.J. No. 144 - Roscoe, J.A. reviewed recent cases of the Supreme Court of Canada and at para. 19 of that decision addressed the matter of the standard of review to be applied on appeals. She said:

> The standard of review on appeal from conviction on the grounds that a verdict is unreasonable under s. 686(1)(a)(i) is as set out by the Supreme Court of Canada in *R. v.Yebes*, [1987] 2 S.C.R. 168; 35 C.C.C. (3d) 417 where Justice McIntyre stated at p. 430 (C.C.C.):
>
> . . . The function of the Court of Appeal, under s. 613(1)(a)(i) [now 686(1)(a)(i)] of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.

[5] Justice Roscoe continued:

> Most recently, the Supreme Court of Canada, in a trilogy of cases, released April 13, 2000, *R. v. Biniaris*, [2000] S.C.J. No. 16; *R. v. Molodowic*, [2000] S.C.J. No. 17; and *R. v. A.G.*, [2000] S.C.J. No. 18, reaffirmed the applicability of the Yebes test. Justice Arbour, for the unanimous Court in *Biniaris*, after setting out the test for determining the reasonableness of a verdict, stated at paras. 36 and 37:
>
> [para. 36] That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.

> [para. 37] The Yebes test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal ...
>
> Justice Arbour referred to *R. v. Burke*, [1996] 1 S.C.R. 474, *R. v. Reitsma*, [1998] 1 S.C.R. 769; and, *R. v. O'Connor* (1998), 123 C.C.C. (3d) 487 (B.C.C.A.) as examples of cases where the trial judge's reasons or analysis demonstrated an oversight, a deficiency or a logical inconsistency. ...
>
> . . .
>
> [para 42] It follows from the above that the test in Yebes continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention ...
>
> In the context of this cases then, this court should first engage in a thorough re-examination of the weight of evidence, and then with deference to the trial judge's findings of credibility, scrutinize the reasons provided for defects in analysis, errors of legal principle, or logical inconsistencies.

[6] I have reviewed carefully the transcript of the evidence presented before the learned trial judge. It is clear that there had been bad blood between the complainant and the appellant prior to the incident in question. The origin of that antipathy is not material to the ultimate decision in this case.

[7] On the evening of June 30th, the appellant and the complainant independently attended an outdoor party at which there was apparently considerable consumption of alcoholic beverages. There was an oral confrontation initially between the appellant and the complainant, but the details of which vary from witness to witness. It is clear, however, that the complainant appears to have been spoiling for a fight. The learned trial judge made her findings of fact as follows:

> I find the following facts; there had been previous incidents between the parties arising out of the destruction of a cordless phone for which the defendant held the complainant responsible. The complainant on at least two prior occasions, one earlier the same evening at that same party, had approached the defendant to deny his responsibility and to confront the defendant regarding the rumours he thought the defendant was spreading about him. The defendant is over six feet tall and weighs 195 pounds. Although the complainant was not asked his weight or height he is, in my view, at least somewhat shorter than the defendant and considerable (sic) slighter in build. He also appears to be younger than the defendant.
>
> The defendant gave the most complete description of the incident which brings him before the court and I accept his version of the facts, or at least I'm left in reasonable doubt by it where it differs from others. He says he was hit in the side of the head and I have at least reasonable doubt on this issue and so for those purposes give him the benefit of that doubt, and that he immediately turned and saw the complainant. He concluded that the complainant was responsible and before he had time to see whether or not the complainant was going to continue the assault he punched him in the mouth with his closed fist and immediately followed that with two - with his closed left fist and immediately followed that with two punches to the complainant's face with his closed right fist. The complainant fell like a tree in the description of another witness. And there is at least possibility that he may have been further injured by hitting his head on a rock as he struck the ground. The defendant admits that he then jumped on the defendant (sic) although no other witness describes this and he was then hauled away by two bystanders, one on each arm. The complainant was assisted to his feet and was led away by a friend who took him to the hospital where he was treated overnight and released in the morning.

> He had serious injuries including stitches above and below the eye. Surgery to move the broken bone below his eye back into position. A broken nose. Cuts inside his mouth and a knocked out tooth. He has further restorative surgery to undergo and he missed two weeks of work.
>
> The issue in this case is self-defence. The defendant does not deny his responsibility for these injuries but he says he acted in self-defence under Section 34 and/or Section 37 of the **CRIMINAL CODE**.
>
> The Crown says that the force the defendant used was excessive having regard to the nature of the assault, if any, perpetrated upon the defendant. I agree with the Crown. No matter what may happen in the real world, as Mr. Jacquard put it, no one is justified in responding to one blow with three obviously much harder blows, especially when those blows are inflicted by a larger opponent on a smaller one. This was not a situation where the two were alone and where there were no other options available to the defendant. He could have turned and walked away. He could have asked someone to call the police but he was angry and responded with what in a war situation could be referred to as overwhelming force. That is not sanctioned under either Section 34 or Section 37 where the force must be no more than is reasonably necessary to prevent the repetition or the continuation of the assault. I find the defendant is guilty of the offence as charged. **[emphasis added]**

[8] Given the favourable finding of credibility with respect to the evidence given by the appellant, I have reviewed especially his evidence concerning the assault of the complainant upon him. His evidence on direct examination was as follows:

> A. I proceeded in through the crowd - I couldn't see anything really because it's way back in the - way back in the - by the lights, like the band is really far away from the back part and when I walked through I - I just walked by and just got hit in the side of the head and when I turned Reggie was right there and I smoked him a couple times and he fell straight back like this and I got on top of him and that's when I noticed he was unconscious and had hit his face on a rock.
>
> Q. Okay. Now you're saying that - did you see who - who had, in fact had hit you?

A. I could just see a silhouette of a person that hit me, I didn't know until I turned.

Q. Okay, so you turned and who did you see when you turned?

A. Reggie.

Q. Okay, and was Reggie standing where that punch had come through?

A. Yes.

Q. Okay, where - where were you hit?

A. Just around here.

Q. Just like in the temple area?

A. I'm not sure if it was an opened fist or a closed fist.

Q. Okay. As soon as you were hit what did you do?

A. I immediately turned and - and hit him with my left in the mouth and - and proceeded with two rights to his upper face.

Q. Okay. So how many times did you hit him in total?

A. Three.

Q. Three, okay. How long did this take?

A. Ten seconds, ten - fifteen seconds.

[9] On cross-examination, he described the incident as follows:

Q. Okay, so he's there, you turn to him, does he hit you again?

A. No.

Q. Do you back off and say, “hey man what was that for?”

A. No.

Q. You don’t question him, you don’t demand ...

A. No.

Q. ... some satisfaction as to why he’s done this if, in fact, he did it?

A. No.

Q. You could have done that?

A. Hum.

Q. You could have chosen that route, you could have said, “why did you do that?

A. Well no, I felt threatened.

Q. You felt threatened?

A. Yes.

Q. You’d gotten hit once, you say, you believed it was Reggie MacKay ...

A. I didn’t want to get hit again.

. . . .

A. I never really moved in, I didn’t even hardly have to move, I just turned around and swung with my left.

Q. In the mouth?

A. Right.

Q. Alright. Did he hit you back after that?

A. No. I hit him ...

Q. So after that why didn't you say, "okay, one for one, why did you do that to me or want anymore," why didn't you say anything?

A. Because it only took about three - three - four seconds from the first punch to the last one.

Q. So why didn't you turn around and walk away ...

A. I did.

Q. ... instead of hitting him the second and third time?

A. I did when he hit the ground.

Q. Why didn't you turn around and walk away after you hit him in the mouth the first time?

A. Because it became a fight and ...

Q. Well it's not a fight, he's not hitting you you said?

A. He did just before.

. . . .

Q. ... At the time you hit him in the mouth why didn't you turn and walk away at that point instead of hitting him twice more?

A. Well just - just a fight, I guess. I guess I could of ...

Q. Just a fight.

A. ... I could of stopped and maybe he'd of smucked me back but ...

Q. Maybe, well maybe ...

A. ... or maybe not.

Q. ... the martians would have landed too.

A. That was a chance I had to take.

Q. A chance you had take.

A. I could of either of got hit again or I could have hit until he hit ...

Q. But he didn't make any motions to hit, I asked you that already.

A. But I didn't - there wasn't really that much time for him to make another motion. He hit me once and I turned ...

Q. Well you hit him in the mouth and you stopped him there.

A. I don't know if he was stopped, really.

Q. You didn't care, you were going to go at him until there was no possibility of him doing anything to you and that's what you did, right?

A. I never really thought about it.

. . . .

Q. Why did you not stop after the first hit, accomplished what you felt you were threatened about, why did you go further when he hadn't done anything more to you?

A. Because I just reacted and I reacted - I didn't consider it one punch I considered like a series of punches, like when I hit him with my left I was already swinging with my right, like.

Q. Right. Do you agree that the actions by you are the result of - are the cause of the result to Mr. MacKay, i.e. the injuries that he's referred to?

A. Well yes I would be the cause of it, yes.

[10] On the findings of fact by the learned trial judge, it is clear that the appellant had first been unlawfully assaulted by the complainant.

[11] In these circumstances, it is necessary to consider the provisions of s. 34(1) of the **Criminal Code**, which reads as follows:

> (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.

[12] Section 37 is also to be considered:

> 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.

[13] The appellant has taken issue with the words of the learned trial judge (emphasized above) when she said:

> No matter what may happen in the real world, as Mr. Jacquard puts it, no one is justified in responding to one blow with three obviously much harder blows, especially when those blows are inflicted by a larger opponent on a smaller one.

[14] Justice Freeman of the Nova Scotia Appeal Court in **R.** v. **Westhaver** (1992), 119 N.S.R. (2d) 171 (CA) addressed the matter of self-defence, *inter alia*, as follows:

> [7] The onus is on the Crown to prove beyond a reasonable doubt that self defence under s. 34 is not available to the appellant. See **Latour** v. **R.**, [1995] S.C.R. 19; 11 C.R. 1; 98 C.C.C. 258; [1951] 1 D.L.R. 835 at p. 11 (C.R.); **R.** v. **Nadeau**, [1984] 2 S.C.R. 570; 56 N.R. 130; 42 C.R. (3d) 305; 14 D.L.R. (4th) 1; 15 C.C.C. (3d) 499.
>
> [8] The trial judge considered that the appellant could have retreated after the first blow was struck. It appears from the evidence that Mr. Westhaver would have been happy enough to have done so if he had thought that option had been open to him. Failure to retreat does not necessarily preclude a defendant from relying on s. 34; see **R.** v. **Deegan** (1979), 17 A.R. 187; 49 C.C.C. (2d) 417 (C.A.), nor must an accused be reduced to a state of frenzy **R.** v. **Antley**, [1964] 2 C.C.C. 142; 42 C.R. 384; [1964] 1 O.R. 545 (C.A.).

[15] I have adopted the approach outlined by Justice Freeman and I have re-examined and, in a limited way, re-weighed the evidence. As I have already indicated, the evidence is somewhat contradictory, but I have relied upon the findings of fact and credibility by the learned trial judge. It is clear that the complainant had been spoiling for a fight with the appellant and the appellant knew that. He was struck in the side of the head by a "sucker punch" from the complainant and he reacted immediately by striking back with his left fist, followed instantly by two other blows.

[16] In the circumstances of this particular incident, "... an accused is not required to measure the force used in the necessitous circumstances to a nicety, because

the frenzy of the occasion may not allow for detached reflection": (**Ewaschuk**, para. 21:5180; **R.** v. **Deegan** (*supra*); **R.** v. **Antley** (*supra*); **R.** v. **Kandola** (1993), 80 C.C.C. (3d) 481. The accused had already been sucker punched once and to turn and attempt to walk away, in my view, might well have invited a second punch. Certainly, in the circumstances, in my view, it would not have been realistic to expect help either from the crowd or from police.

[17] I have therefore concluded that the learned trial judge erred when she concluded on the facts of this case that "... no one is justified in responding to one blow with three obviously much harder blows ..." In the circumstances it is clear that the accused found himself in peril and reacted to defend himself. I have concluded that a properly instructed jury, acting judicially, could not have been satisfied beyond a reasonable doubt that the accused used more force than necessary to enable him to defend himself. The verdict of guilty is therefore set aside and an acquittal will be entered.

J.

Halifax, Nova Scotia