

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Kagan, 2007 NSSC 215

Date: 20070705

Docket: CR 225051

Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul David Kagan

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: May 9, 10, 14, 15, 16, 17, 18, 22, 23, 24, 25, 28, 29, June 11, 12, 13, 15, 18, 19 and July 5, 2007 in Halifax, Nova Scotia

Written Decision: July 10, 2007

Counsel: Glen Scheuer, Esq., on behalf of the Crown
Jean Morris, Esq., on behalf of the Accused

By the Court:

[1] Paul David Kagan (“Mr. Kagan” or “the accused”) stands charged that he on or about the 8th day of December A.D. 2000, at or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did wound Jason Kinney thereby committing an aggravated assault contrary to Section 268 of the **Criminal Code of Canada**.

[2] This is Mr. Kagan’s second trial on this charge. In the first trial before a judge and jury, Mr. Kagan was convicted and sentenced to ten months incarceration followed by one year probation. The Nova Scotia Court of Appeal over-turned this conviction and ordered a new trial.

[3] Mr. Kagan re-elected trial by Supreme Court judge alone. Over the course of 19 days beginning on May 9, 2007 and ending on June 19, 2007 the court heard evidence from a total of 15 witnesses — ten called by the Crown (including one witness called in rebuttal) and five witnesses called by the defence. Mr. Kagan was called to testify on his own behalf.

[4] After hearing the final summations of counsel the court reserved its decision until today’s date — July 5, 2007.

[5] The offence of aggravated assault is contained in Section 268 of the **Criminal Code**. It states:

268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[6] In order to make out this offence the burden is on the Crown to prove, beyond a reasonable doubt:

- (i) that the accused intentionally applied force to Jason Kinney;
- (ii) that the force applied wounded Jason Kinney.

[7] To be an assault, the accused must apply the force intentionally and against the complainant’s will.

[8] The word “intentionally” refers to the accused’s state of mind when he applied the force. “Intentionally” means “on purpose”, in other words, not by accident. To decide whether the accused applied force intentionally, all the circumstances surrounding the application of force have to be considered. The court must take into account the nature of the contact and any words or gestures that may have accompanied it (including any alleged threats), along with anything else that indicates the accused’s attitude or state of mind at the time he applied force to the complainant.

[9] To “wound” means to injure someone in a way that breaks or cuts or pierces or tears the skin or some part of the person’s body. It must be more than something trifling, fleeting or minor, such as a scratch.

[10] Crown counsel must prove beyond a reasonable doubt that the wounding of the complainant resulted from the force that the accused intentionally applied.

[11] Crown counsel does not have to prove beyond a reasonable doubt that the accused meant to wound the complainant when he applied force to the complainant. What Crown counsel does have to prove, however, is that a reasonable person, in the circumstances, would inevitably realize that the force the accused applied would put the complainant at risk of suffering some kind of bodily harm, although not necessarily serious bodily harm or the precise kind of harm that the complainant suffered here. “Bodily harm” is any kind of hurt or injury that interferes with another person’s health or comfort. It has to be something that is more than just brief or fleeting, or minor in nature.

[12] The accused has not denied that he used bear spray — a form of repellant containing certain active ingredients called capsaicin and dihydrocapsaicin. Bear spray is often referred to as pepper spray. Mr. Kagan has also admitted using a pocket knife to stab the complainant (“Mr. Kinney”) in an area of his back which caused him to suffer rather significant and potentially life-threatening injuries including a punctured lung. Mr. Kagan relies on the defence of self-defence for his actions.

[13] Usually, it is unlawful for anyone to intentionally apply force to anybody else, by any means, without the other person’s consent. Our law, however, allows us to use force in defending ourselves, our property or other persons under our protection from attack. Anyone who applies force to another person to defend himself, his property, or other persons under his or her protection commits no crime when his conduct comes within the limits the law imposes.

[14] There are limits on when and how much force may be used to defend ourselves, our property, or others under our protection. Self-defence arises from the need for self-preservation. It must not be used to get revenge on, or get even with someone else.

[15] In a case where there is some evidence of self-defence, it is important to remember that it is not the accused's responsibility to prove that he was justified in using force; it is Crown counsel's responsibility to prove beyond a reasonable doubt that the accused was not justified in using force.

[16] The relevant provisions of the **Criminal Code** that arise in this case are contained in section 34 of the **Criminal Code**. In particular it is sub-section (2) of this section which Mr. Kagan relies upon for his defence. Sub-section (2) of section 34 states:

(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.

[17] As stated earlier it is not necessary for the accused to prove that he was acting in lawful self-defence. It is for the Crown to prove beyond a reasonable doubt that the accused was not acting in lawful self-defence.

[18] To decide whether Mr. Kagan was acting in lawful self-defence the following three issues have to be considered:

(1) Was Mr. Kagan unlawfully assaulted by Mr. Kinney?

(2) Did Mr. Kagan use force against Mr. Kinney because he reasonably feared that Mr. Kinney would kill or seriously injure him?

- (3) Did Mr. Kagan use force against Mr. Kinney because he reasonably believed that he could not otherwise save himself from being killed or seriously injured by Mr. Kinney?

[19] In determining the first issue of whether Mr. Kagan was assaulted by Mr. Kinney, it is not necessary that he actually be assaulted. It is sufficient that Mr. Kagan reasonably believed, in the circumstances as he knew them to be, that he was being unlawfully assaulted. It does not matter whether Mr. Kagan provoked what was an actual assault or what he reasonably believed was an assault by Mr. Kinney. Neither does the assault or apprehended assault have to be imminent. Imminence is simply a factor to be considered in determining whether it was reasonable for Mr. Kagan to fear that Mr. Kinney would kill or seriously injure him and also whether it was reasonable for Mr. Kagan to have used the force he did to preserve himself from perceived death or grievous bodily injury.

[20] In the Nova Scotia Court of Appeal decision (reported as **R. v. Kagan** (2004), 185 C.C.C. (3d) 417 (N.S.C.A.)) which overturned the conviction of Mr. Kagan, Roscoe, J.A., writing for the unanimous panel quoted from two decisions of the Supreme Court of Canada in **R. v. Pétel** and **R. v. LaVallee** at paragraphs 38 and 39 as follows:

[38] In **R. v. Pétel**, [1994] 1 S.C.R. 3, [1994] S.C.J. No. 1 (QL), 87 C.C.C. (3d) 97, Lamer C.J.C. explained the issues involved in s. 34(2) in the following passage [p. 12]:

[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, so long as there exists an objectively verifiable basis for his perception. [Emphasis added.] [page437]

[39] In *Lavallee*, (**R. v. Lavallee**, [1990] 1 S.C.R. 852; 55 C.C.C. (3d) 97 (S.C.C.)) while discussing the impact of the battered woman syndrome on the requirements for a s. 34(2) defence, Justice Wilson explained the importance of the expert evidence to the reasonableness issues in the following passages [pp. 882-89]:

[50] Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal. Using the case at bar as an example the "reasonable man" might have thought, as the majority of the Court of Appeal seemed to, that it was unlikely that Rust would make good on his threat to kill the appellant that night because they had guests staying overnight.

[51] The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.

.....

[59] If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the "reasonable person" would do in such a situation. The situation of the battered woman as described by Dr. Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary. [Emphasis added.]

REVIEW OF THE EVIDENCE

[21] With this as background I will review the evidence as it pertains to the elements of the offence of aggravated assault and the issues pertaining to self-defence.

[22] I will not spend a lot of time on the elements of the offence itself since the accused is not really denying it happened. The focus will be mainly on the reasonableness of the accused's apprehension of death or grievous bodily harm and whether, the accused, on reasonable grounds, believed he could not otherwise preserve himself from such a fate. In making these determinations the Court must consider the reasonableness of the accused's apprehension and belief in light of "...the history, circumstances and perceptions" of the accused. (See **Lavallee**, *supra*). While so doing, the Court cannot lose sight of where the burden of proof lies. It is not for the accused to prove self-defence although there has to be an objectively verifiable basis for his perception. Rather, the onus is on the Crown to prove beyond a reasonable doubt that Mr. Kagan was not acting in lawful self-defence.

[23] I will begin my review of the evidence by first considering the testimony of Dr. Graham D. Glancy ("Dr. Glancy" henceforth), a psychiatrist called by the Defence. Dr. Glancy was qualified to offer opinion evidence as an expert in the field of forensic psychiatry and in the diagnosis of mental health disorders.

[24] In Dr. Glancy's opinion, Mr. Kagan suffers from a mild form of Asperger's Syndrome. Asperger's Syndrome (henceforth "Asperger's") is a form of autism.

[25] Dr. Glancy reached this diagnosis after reviewing background information obtained by an assistant who conducted interviews with Mr. Kagan and his parents. Additional background information including Mr. Kagan's school and medical records, a report of Dr. Finestone who was called upon to carry out an assessment of Mr. Kagan in April, 2002, a personality profile of Mr. Kagan done by Dr. Cash in 2001, an MRI of Mr. Kagan's brain, information provided by Mr. Kagan's first Defence counsel and the results of an interview of Mr. Kagan done by Constable Mason of the Halifax Regional Police Service were also considered as well. Dr. Glancy conducted his own interview of Mr. Kagan which consisted of one three-hour session.

[26] Dr. Glancy did not do any psychological testing but subsequent to arriving at his diagnosis he had the benefit of reviewing a report of a Montreal psychologist, Dr. Pierre Roberge, who has been seeing Mr. Kagan for the past several years. Neither Dr. Roberge's testimony nor his report were received in evidence. Dr. Roberge is providing counselling and other services to Mr. Kagan for Asperger's.

[27] Dr. Glancy testified that people with Asperger's can function at quite a high level. Mr. Kagan is in this category.

[28] Persons suffering from Asperger's quite often have difficulty developing peer relationships. This is noticeable at any early age. They are usually slow in reaching developmental milestones. They seldom develop long-lasting peer relationships. They appear strange or odd to others. They fail to maintain eye-to-eye contact in conversation with others. They have difficulty feeling and expressing emotions and understanding the emotions of others. They can be quite blunt which can be perceived as rude by those they interact with. They tend to suffer from mild paranoia and have a lower tolerance of change which can lead to frustration. They develop anxiety when things are not the way they fervently wish them to be.

[29] Asperger's patients are typically loners. They can be awkward or clumsy when they are young but they can develop quite good motor skills as they get older.

[30] Since they do not normally develop long-lasting or warm relationships with others, they are usually distrustful of others. Asperger's sufferers like structure and routine in their lives. In stressful situations they can develop a heightened level of anxiety.

[31] In direct testimony, Dr. Glancy, was asked to consider a hypothetical situation put to him by Defence counsel. The hypothetical scenario mirrored the Defence's version of events that they say took place over the course of approximately two months after Mr. Kagan and the complainant (Mr. Kinney) became room-mates at Fenwick Place (a Dalhousie University Student Residence). It included the events that took place on the day that Mr. Kagan sprayed Mr. Kinney with bear spray and then stabbed him in the back with a knife. In Dr. Glancy's opinion the hypothetical "Mr. P" would have felt a rising level of paranoia and anxiety. He would have felt increasingly persecuted as tensions escalated between him and the other hypothetical figure — "Mr. J". Mr. P would have felt trapped. As the perceived intimidation continued he would have become fearful for his life. The escalation of the tension

would have made him feel that an attack was becoming more imminent. The hypothetical Mr. P. would have felt that the bear spray would only provide temporary protection from attack and thus he would feel it necessary to use the knife to protect his own life.

[32] In cross-examination by Crown counsel, Dr. Glancy expressed the opinion that Mr. Kagan's mental condition would not prevent him from knowing what he did was wrong. He felt that Mr. Kagan was capable of making rational choices but if he was paranoid then he would be extremely sensitized to the feeling of being trapped. Dr. Glancy likened the situation to that of the battered woman syndrome case of **R. v. Lavallee**, *supra*.

[33] Crown counsel also put a detailed hypothetical scenario to Dr. Glancy which differed in certain material respects to the one put to him by the defence. Dr. Glancy indicated that if all the elements of the hypothetical could be proved in court then he would have to reconsider the opinion he had earlier provided to the Court. One of the things that Dr. Glancy would have expected to hear from Mr. Kagan is that his former room-mate, Mr. Kinney, was a violent man and that living with him was a negative experience. He would also have expected Mr. Kagan to say that he was afraid of Mr. Kinney although what he would say to anyone would depend on the level of trust he had for the person he was talking to.

[34] These insights into the mind of a person suffering from Asperger's and specifically the mind of Mr. Kagan at the time of the incident are helpful in assessing the evidence provided by the accused.

[35] The somewhat different versions of what transpired on December 8, 2000 and in the weeks and months leading up to that fateful day need to be considered and weighed in an effort to determine what actually took place.

[36] It is not simply an exercise in comparing the version of events presented by the complainant — Mr. Kinney — with the one presented by the accused — Mr. Kagan. One would not expect both versions to be exactly alike. What one person perceives and later recollects seldom matches what someone else might have perceived and then years later tried to recollect. Assessment of witness credibility is also an important consideration for the trier of fact.

[37] In the case of Paul Kagan's testimony his demeanor on the witness stand and the answers he provided to questions put to him by both defence and Crown counsel has to be evaluated taking into consideration Dr. Glancy's diagnosis. Dr. Glancy described Mr. Kagan as being pedantic. Indeed, he exhibited this characteristic by repeating most every question that was put to him by counsel before attempting to answer it. On occasion he would ask the question to be repeated over and over again before offering a response. On other occasions he would seek clarification of a question to the point where he appeared to be searching for the reason or purpose for the question. In many instances this left the Court with the impression that Mr. Kagan was attempting to provide an answer that he thought would be better for the Court to hear. This, in my opinion, has affected his credibility. This, and the numerous inconsistencies in his testimony between this trial and the first trial have left me in doubt as to the truthfulness of some of the answers he has given.

[38] As a result, when trying to reconcile the differences in the evidence presented by the accused and the complainant, I am more inclined to accept that of the latter where differences exist. The corroborating evidence of other witnesses is also of great assistance in assessing the truthfulness and reliability of the testimony given by the two main parties to this event.

[39] I do not propose to regurgitate all the evidence of each and every witness called during the course of this trial. I will, however, refer to what I consider to be the most salient aspects of the evidence of each witness and how it factors into my decision. The focus will be on the issues pertaining to self-defence.

[40] The facts of this case as I find them are as follows:

- In September of 2000 Paul David Kagan, entered his first year in the Engineering Program at Dalhousie University, in Halifax, Nova Scotia.
- Mr. Kagan took up residence in Apartment 1808 at Fenwick Place, a student residence operated by Dalhousie University.
- Apartment 1808 is a 3-bedroom apartment located on the 18th floor of Fenwick Place.
- At the time Mr. Kagan took up occupancy no one else occupied the other two bedrooms. He had the place to himself.

- Sometime in the early part of October, 2000 the complainant, Jason Kinney, who was a student in the Music Department at Dalhousie University, moved into apartment 1808 with Mr. Kagan.
- Prior to taking up residence at Fenwick Place, Mr. Kenney shared a flat with another couple on Shirley Street, in the City of Halifax. He moved out of these shared accommodations after a falling-out with his roommates and after being required to pay for the cost of repairs to a door which he had damaged in order to gain entry.
- At the time Mr. Kinney moved into Apartment 1808 he was approximately 6 feet 2 inches in height and weighed between 160 and 170 pounds. He was 25 years of age.
- At that same time, Mr. Kagan was approximately 5 feet 10 inches in height and weighed about 160 pounds. He was 19 years old.
- On his residence application, Mr. Kinney checked off a box indicating that he was a non-smoker and that he preferred to live with a non-smoker.
- Mr. Kinney did, in fact, smoke not only cigarettes but also marijuana on occasion.
- Mr. Kagan often joined Mr. Kinney in smoking marijuana. This occurred mainly on the balcony of apartment 1808 but on occasion it took place within the apartment and on other occasions in a friend's apartment elsewhere within the building.
- Mr. Kinney's occasional cigarette smoking in his room eventually became a source of irritation for Mr. Kagan. On two separate occasions Mr. Kagan complained to Mr. Kinney that he was not supposed to smoke in the apartment. On one of those occasions the cigarette was unlit and in the hand of an individual who was visiting Mr. Kinney although he was more of a friend of Mr. Kagan than Mr. Kinney.
- On the other occasion, Mr. Kinney was in his room entertaining a guest with the window open and the door closed. Mr. Kagan entered the room without knocking and demanded that the smoking cease. Mr. Kinney asked Mr. Kagan

to leave and persuaded him to do so by placing his hand on Mr. Kagan's chest and directing him out of the room. I find that there was little if any force used to persuade Mr. Kagan to exit the room. Later Mr. Kagan apologized to Mr. Kinney for his behaviour.

- Relations between Mr. Kagan and Mr. Kinney started off well but over time they began to deteriorate. Initially they shared marijuana and socialized together even going to downtown bars together on occasion. When Mr. Kagan's younger brother, Ryan, came down to visit he also socialized with both his brother and Mr. Kinney.
- As relations between the two roommates began to deteriorate Mr. Kinney inquired with Dalhousie Residence personnel about the possibility of moving to another apartment within Fenwick Place. This possibility was not pursued at that time.
- In addition to Mr. Kagan's complaints about smoking in the apartment, the use of his dishes and cutlery by Mr. Kinney became an issue for him. He also complained to Mr. Kinney over sharing the cost of the phone which was in Mr. Kagan's name.
- Mr. Kinney complained to Mr. Kagan about his house keeping habits particularly with regard to leaving dirty dishes in the sink and not cleaning up the kitchen.
- On December 6, 2000 Mr. Kagan spoke to Mateo Yorke who was one of the night managers at Fenwick Place. He lodged a complaint about Mr. Kinney's smoking and marijuana use. He did not express any fear he had of Mr. Kinney or any other concern for his physical well-being.
- Mr. Kagan likely spoke to his parents and his brother, Ryan, of his fear of Mr. Kinney.
- The night manager went up to the 18th floor to check out the complaint. After knocking three times and not being able to discern the smell of smoke of any kind he returned downstairs to the main office and called the Facilities Manager - Mr. Pat MacIsaac. Mr. MacIssac told Mr. Yorke that he would follow-up on the complaint the next day in writing.

- Later that same evening Mr. MacIsaac returned a telephone call to Mr. Kagan's father, Harvey Kagan, who lived in Toronto. After speaking to Mr. Kagan, Sr., Mr. MacIsaac went up to apartment 1808 but Paul Kagan was not there. Later the night manager called Mr. MacIsaac to let him know that Paul Kagan was in the office and was waiting to speak to him. Mr. MacIsaac spoke to Paul Kagan and asked him if he was afraid of Mr. Kinney. Paul Kagan indicated that he was not.
- Pat MacIsaac met in his office with Paul Kagan sometime during the evening of Thursday, December 7, 2000. A fully furnished bachelor apartment normally used by visiting professors was offered to him. The apartment was already hooked up with cable, telephone, dishes and linen. The only thing Mr. Kagan would have to supply was food. Mr. Kagan declined the offer.
- Later that same evening, Pat MacIsaac knocked on the door to apartment 1808 and spoke to Mr. Kinney about the complaint made by Mr. Kagan. Mr. Kinney was not defensive nor did he deny smoking. In respect to marijuana use he indicated that he was not the only one in the apartment who smoked marijuana.
- On Friday morning, December 8, 2000, Pat MacIsaac met in his office with Mr. Kinney. The same guest suite that had been offered to Mr. Kagan was then offered to Mr. Kinney. Mr. Kinney agreed to move into the apartment and was told that the keys would be at the front desk as soon as he was ready to make the move. Mr. Kinney indicated that he would pick up the keys later that day. Mr. Kagan was aware that Mr. Kinney would be moving to a new apartment in the very near future.
- Jason Kinney returned to apartment 1808 after meeting with Pat MacIsaac. He remained there until just before noon. With his guitar strapped over his shoulder he departed apartment 1808 and went down the elevator to the main floor. He had a guitar recital to attend. When he arrived at the main floor he became concerned that he might not have closed his bedroom door so he took the elevator back up to the 18th floor and re-entered the apartment. Upon leaving the apartment for the second time he overheard Paul Kagan say to someone on the telephone: "Okay. He's gone now."
- Mr. Kinney again went down the elevator to the main floor. Concerned about his belongings he once again returned to the apartment to check on things. He

then left again and pressed the button to summon the elevator. At that point Paul Kagan opened the door to the hallway and asked him if he planned to get his own cutlery. Mr. Kinney's reaction was to give Mr. Kagan the finger and to tell him to fuck off. Mr. Kagan indicated that he took that to mean yes and then closed the door. Mr. Kinney once again returned to the apartment to verbally confront Mr. Kagan. He went as far as the doorway to Mr. Kagan's bedroom and asked him if there was anything else he wished to say. Mr. Kinney was upset with Mr. Kagan but I find that he did not physically make contact with him. In so finding, I accept Mr. Kinney's version of what took place. As he was leaving the apartment Mr. Kinney told Mr. Kagan to clean up the kitchen as it was like a pig sty or something to that effect.

- This time when he left the apartment he heard Mr. Kagan lock the door behind him. This further irritated Mr. Kinney so he proceeded to unlock the door. As soon as he opened the door and prior to crossing the threshold he was sprayed in the face with bear spray by Mr. Kagan. Mr. Kinney was immediately blinded by the blast to the face and felt excruciating pain. He was having considerable difficulty breathing.
- The effects of the blast dropped Mr. Kinney to his knees. He was gasping for air and trying to expel the caustic substance from his mouth and nose. I find that he was then hit a second time and possibly even a third time based on the evidence of Mr. Kinney which I accept and further based on the evidence of Pat MacIsaac who testified to the reaction felt by Dalhousie Maintenance workers who were eventually called upon to remove the carpeting from the floor near the entrance to apartment 1808. The remnants of the bear spray still caused irritation to the workmen when the tainted carpet was disturbed.
- I find that Mr. Kinney was desperately trying to get away from Mr. Kagan and was calling out for help as he stumbled his way in the direction of the elevator. He pounded on the doors of the other apartments in the vicinity of apartment 1808 but to no avail. All the while he still had his guitar case strapped over his shoulder with the guitar hanging down his back. He heard the sound of the elevator's arrival at the floor and as he stumbled towards the elevator doors he felt what he thought was a punch to his back. The force of the blow, which later was found to have been caused by Mr. Kagan stabbing Mr. Kinney with a knife, caused Mr. Kinney to fall into the open elevator. Inside the elevator was James Midgley. Mr. Midgley described the deplorable condition of Mr.

Kinney as he fell into the elevator. At first he thought Mr. Kinney might have been drunk but soon realized that he had been assaulted. Before the doors of the elevator closed Mr. Midgley heard footsteps running away from the elevator towards the end of the hallway where apartment 1808 was located. He also overheard Mr. Kinney say "*You've got to be kidding.*" Mr. Midgley assumed this comment was intended for the person he heard running from the scene as the elevator doors opened. He did not see who that person was.

- Mr. Midgley accompanied Mr. Kinney down to the office on the main floor. In the process of helping him, Mr. Midgley got some of the bear spray on himself. Mr. Kinney's eyes appeared to be burning; he was spitting and coughing. He also expressed concern that he might have been stabbed.
- After accompanying Mr. Kinney to the office, two women who worked in the office - Sarah Gaultois and Linda Wright - came to Mr. Kinney's aid. He was taken to a nearby washroom where they helped him to rinse out his eyes and to wash his face. Mr. Kinney's concern that he had been stabbed was confirmed in the office before he was led to the washroom by Ms. Gaultois and Ms. Wright.
- A resident doctor, Dr. Kawchuk, was summoned to give medical attention to Mr. Kinney. The police and an ambulance were also summoned to take Mr. Kinney to a hospital for further medical treatment.
- While this was going on, Paul Kagan left apartment 1808 and proceeded to take the north stairwell down to the main floor. In so doing he passed by the south stairwell which was located just a short distance down the hall from apartment 1808. The north stairwell was located at the far end of the hallway past the elevators. On the way down the stairs, Mr. Kagan placed the bear spray canister on one of the floors somewhere below the 18th. He went to the office where he handed over the blood stained knife that he had used to stab Mr. Kinney in the back. His eyes were watery giving the appearance that he had been crying. He admitted to using the bear spray on Mr. Kinney and then stabbing him with the knife.
- The bear spray and the knife used by Mr. Kagan had been purchased by him locally only a few days before the events of December 8, 2000.

[41] These facts can now be applied to the issues relating to self-defence. The first question that must be considered is:

- (1) Was Mr. Kagan unlawfully assaulted by Mr. Kinney or as a result of threatening words or actions would a reasonable person think that he was about to be physically harmed unless he does something to prevent it?

[42] There is no doubt that the atmosphere in apartment 1808 had deteriorated over the short period of time that Mr. Kagan and Mr. Kinney were roommates. They were just not getting along. On the morning of December 8, 2000 the tension between the two roommates was high. They both played a part in making a tense situation even worse. Mr. Kagan knew that Mr. Kinney was soon going to vacate the apartment. His inquiries of Mr. Kinney with respect to purchasing cutlery might have been innocent enough but he should have known better than to add fuel to the flames. Yet, he persisted.

[43] The actions and words of Mr. Kinney demonstrated his displeasure towards Mr. Kagan. His return to the apartment on two separate occasions followed by a third attempt after Mr. Kagan had locked the door could cause a reasonable person to apprehend that physical harm might occur.

[44] The two remaining questions that must be considered can be dealt with together. They are:

- (2) Did Mr. Kagan use force against Mr. Kinney because he reasonably feared that Mr. Kinney would kill or seriously injure him?

and

- (3) Did Mr. Kagan use force against Mr. Kinney because he reasonably believed that he could not otherwise save himself from being killed or seriously injured by Mr. Kinney?

[45] Certain portions of Justice Wilson's decision in *R. v. Lavallee*, *supra*, bear repeating. At paragraph 51 she wrote:

The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.

At paragraph 59, she stated:

If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the “reasonable person” would do in such a situation....

and then she goes on to say:

I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can assist the jury in making that determination, I would find such testimony to be both relevant and necessary.

[46] Was it then reasonable for Paul Kagan, given his history, circumstances and perceptions to fear that Mr. Kinney was about to kill him or cause him grievous bodily harm? Furthermore, was it reasonable for Paul Kagan, again, considering his history, circumstances and perceptions, to believe that he could not otherwise save himself from the apprehended harm other than by using the force that he did?

[47] Based on my findings of fact and after considering the expert opinion evidence of Dr. Glancy, I have concluded that it was not reasonable for Paul Kagan to fear that Mr. Kinney was about to either kill him or cause him grievous bodily harm. Additionally, I find that it was not reasonable for Paul Kagan to have used the force that he did against Mr. Kinney because he could not otherwise save himself from apprehended death or grievous bodily harm.

[48] Paul Kagan testified that he was afraid of Jason Kinney because of Jason Kinney’s previous history of violence against others and because of the physical acts of aggression directed towards him personally.

[49] Jason Kinney had an amateur record of 0 and 1. The one physical fight he ever had occurred when he was in high school some six or seven years previously. He lost that fight. The only other evidence of anything that could possibly be perceived as aggression in Mr. Kinney’s past was the damage he caused to a locked door when he forced it to open by kicking it. Indeed, when you compare Mr. Kinney to Mr. Kagan, it is Mr. Kagan who has exhibited violent tendencies in the past.

[50] As to any physical contact that Mr. Kinney might have with Mr. Kagan, I accept Mr. Kinney's version over that of Mr. Kagan. At most, Mr. Kinney might have placed his hand on Mr. Kagan's chest to guide him out of his room after Mr. Kagan had barged in uninvited. Mr. Kinney is not and was not a violent man. It is not reasonable for a person, such as Paul Kagan, given his situation, his condition and his circumstance, to fear that Jason Kinney would kill or cause him grievous bodily harm. If someone was about to attack another person would he not first remove a cumbersome guitar that was strapped over his shoulder? I would think that any reasonable person, even one with mild Asperger's, would have to say "yes" to this.

[51] The possibility of self-defence might have been viable if Mr. Kagan had not done anything more than spray Mr. Kinney with the bear repellent. The first discharge of spray was enough to put Mr. Kinney on his knees. He was left virtually defenceless.

[52] I do not accept Mr. Kagan's version of events that Mr. Kinney was flailing his arms and threatening to kill him. Mr. Kinney was desperately searching for help. He was stumbling down the hallway, knocking or banging on doors in an effort to locate someone who could help him. He could not see; he was having difficulty breathing. He was coughing and practically gagging from the caustic substance that had hit him directly in the face from very close range.

[53] He proceeded in the direction of the elevators. He was not trying to attack Mr. Kagan. He was trying to get away. As he stumbled down the hallway he passed by the entrance to the south stairwell. This opened up the possibility for Mr. Kagan to escape if he truly feared for his life. He must have realized that Mr. Kinney could not possibly come after him. After all, Mr. Kinney could not see and was having extreme difficulty in breathing. He was crying out for help, not retribution.

[54] Unlike the battered woman case, Paul Kagan was not subjected to a long history of abuse and violence by Mr. Kinney. Indeed, there was no physical violence whatsoever. At most, there was only the rather gentle use of Mr. Kinney's hand to guide or direct Mr. Kagan out of Mr. Kinney's room. That, when combined with a few verbal exchanges and some tension, certainly does not add up to a history of abuse and violence.

[55] There was no hopelessness of escape. Mr. Kagan knew that Mr. Kinney was going to move out. These arrangements had already been made. His stated fear that Mr. Kinney would get his friends and come back to get him has no foundation or merit whatsoever.

[56] In using a knife to stab a helpless, defenceless man, Mr. Kagan was not acting in self-defence. He was an aggressor intending to inflict further injury to Mr. Kinney. If Mr. Kagan's action were motivated by fear then it was not out of fear of Mr. Kinney.

[57] After considering all the evidence, including the evidence of the accused, I am not left with any doubt as to his guilt.

[58] The Crown has proved all elements of the offence beyond a reasonable doubt. It has also discharged its responsibility to prove beyond a reasonable doubt that the accused was not acting in lawful self-defence.

[The Court asks the accused to stand]

COURT: Mr. Kagan, on the charge that you on or about the 8th day of December A.D. 2000, at or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did wound Jason Kinney thereby committing an aggravated assault contrary to section 268 of the **Criminal Code of Canada**, I find you "Guilty".

J.