SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Swimm*, 2010 NSSC 251

Date: 20100531
Docket: Yar No. 321396
Registry: Yarmouth

Between:

Her Majesty The Queen

Appellant

v.

Nelson Ronald Swimm

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	May 31, 2010, in Yarmouth, Nova Scotia
Decision:	May 31, 2010 **(Orally)**
Written Release:	June 28, 2010
Counsel:	James A. Fyfe, for the Crown Philip J. Star, Q.C., and Lynette Muise, articled clerk, for the respondent

Robertson, J.: (Orally)

[1] The accused, Nelson Ronald Swimm, was charged in an information with the following offence:

> That he, on or about the 10th day of March 2009, at or near North East Point, Nova Scotia, did in committing an assault on Rodney Andrew Ralph Swimm, cause bodily harm to him, contrary to Section 267(b) of the *Criminal Code*.

[2] The trial was held on August 13, 2009 and the decision reserved awaiting submissions by counsel.

[3] On November 18, 2009, the learned trial judge gave his oral decision, transcribed on three pages, and before this court.

[4] He found that Nelson Swimm and his brother Rodney had engaged in a consensual fight, that largely involved wrestling and a few blows to the head exchanged by each of the combatants.

[5] He did not accept that Nelson Swimm struck the first blow in self-defence.

[6] He found that Rodney Swimm had suffered bodily harm by a blow to the left side of his head and left eye. Rodney Swimm had suffered an aneurism in this area of his head some 18 years earlier and there was a slight indentation on the left side of his head as a result. The fact of this medical history and the respondent's knowledge of it in the Crown's submission supports the logical inference that the accused intended an act of bodily harm.

[7] On the evidence, he did not accept that the Crown had made its case beyond a reasonable doubt that the accused had intended bodily harm by his right fisted blow to the left side of his brother's head thereby vitiating Rodney Swimm's consent to the fight.

Questions in issue

1. That the learned trial judge erred in concluding that the fight between the respondent and alleged victim was consensual;

2. That the learned trial judge erred by making an unreasonable finding; namely that the Crown had no proven beyond a reasonable doubt that the respondent had intended to cause bodily harm to the alleged victim.

[8] The appellant appeals this decision relying on s. 813(b)(1) of the *Criminal Code*:

> Except where otherwise provided by law, the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court from an order that stays proceedings on an information or dismisses an information.

and also relying on *R. v. Sall* (1990), 54 C.C.C. (3d) 48 (Nfld.CA); *R. v. Purves and Purves* (1979), 50 C.C.C. (2d) 211 (Man. C.A.); and *R. v. Wilke* (1980), 56 C.C.C. (2d) 61 (Ont. C.A.).

[9] The appellant argues that the trial judge's assessment of the evidence was not adequate to support his findings. In Salhany: Canadian Criminal Procedure, 5th ed., 1989, the author says at pp. 460-461:

> Factual findings which the Crown may seek to challenge generally fall into three categories. The first is where the trial judge has received and accepted certain evidence but has either inadvertently or deliberately refused to make findings of fact based on that evidence. The second will arise where the trial judge has made certain findings of fact but has refused to draw a factual inference from those findings. In either case, the appellate judge is able to assess the evidence heard by the trial judge and draw the necessary inference which logically flows from that finding, which the trial judge failed or refused to do. This logical inference then becomes a factual finding itself.
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> It is the third category, however, which presents difficulties. This arises where the trial judge has heard testimony from two or more groups of witnesses who have given diverging evidence as to what they saw or heard. Where he has chosen to accept the testimony of one group of witnesses over the other, it is generally impossible for the appeal judge to reverse that finding since the trial judge has had the benefit of observing the demeanour of the witnesses and assessing their credibility in the witness box. It may be that the appeal judge finds it difficult to accept that he, sitting as a trial judge, would have accepted that version of the facts; however, it should not be open for him to say that because the trial judge did accept that evidence, he was necessarily in error.

[10] In the appellant's submission, this is a situation akin to the second category of factual findings referred to by Salhany as quoted in the *Sall* decision, viz, where the trial judge has made certain findings of fact but has refused to draw a factual inference from those findings. Here, the appellant submits, the learned trial judge has found the respondent intentionally punched the alleged victim in the head yet has not drawn the common sense and logical factual inference.

[11] The appellant says it is a common sense inference that a person intends the natural consequences of their actions. *R. v. Farrant,* [1983] 1 S.C.R. 124.

[12] In an excerpt from Ewaschuk, Criminal Pleadings and Practice in Canada, 2d ed., the author writes:

> 17:2250 A trial judge should *not* instruct the jury that a person intends the natural consequences of his act. Instead a trial judge should instruct the jurors that they may infer that a person intends the natural consequences of his act, i.e. that it is a permissible or justifiable inference but not a presumption of fact or law. It is a "common sense and logical inference" which a jury may but is *not* compelled to make.

[13] The Crown first argues that on the facts, the Court should conclude that the fight did not take place by consent but was an acquiescence to the inevitable, since Nelson Swimm had aggressively driven his car in pursuit of Rodney Swimm from the MacDonald's Restaurant to his home.

[14] With respect to draw this conclusion would in my view be to substitute my view of the nature of the altercation with that of the trial judge's findings, who was in a better position to assess the evidence of these two brothers.

[15] Rodney Swimm, berated the accused by calling him "Martha" after the allegedly greedy Aunt Martha, intending to provoke the respondent. This in itself would not vitiate consent. However, the trial judge heard both these men's stories of how they were going to have it out and face one another down.

[16] At Rodney Swimm's home "both men got out of their respective vehicles and faced each other. Each man moved toward the other."

[17] This evidence which the Crown does not refute is in my view reasonably capable of supporting the trial judge's decision that the fight was consensual. The trial judge referenced *R. v. Stanley* (1977), 36 C.C.C. (2d) 216, a case very unlike this case on its facts, where four men entered a man's home at night looking for a fight, an altercation that was acquiescent to the inevitable.

[18] As to the issue of the trial judge's finding that he had a reasonable doubt as the respondent intention to commit bodily harm, I note that the trial judge found this fight was of fairly short duration, one that involved a few punches thrown by each man to the other and involved more wrestling with one another on the ground. Rodney Swimm also managed to get in the last three punches.

[19] Applying *R. v. Paice* (2005), 195 C.C.C. (3d) 97 and *R. v. Quashie* (2005), 198 C.C.C. (3d) 337, in my view the trial judge properly instructed himself as to his duty to determine if he had a reasonable doubt on the issue of the respondent's intent.

[20] He found that the whole situation to be "disturbing and most unfortunate." He could not find that Nelson Swimm intended bodily harm by the punch to the head. Again, in order to find that the learned trial judge erred in his finding, it is my view I would have to substitute my version or preference of the interpretation of these events.

[21] The Crown has suggested that I adopt an approach of a common sense inference that when one man punches another man in the head in the manner described, this can only lead to the conclusion that the respondent intended bodily harm and that there was also an objectively foreseeable risk of bodily harm. I note in *R. v. DeCoste*, [2008] NSSC 279, Justice MacLellan did not accept that a fist fight "punches to the head" led to the inference that bodily harm was by the nature of the fight so intended and therefore, outside the range of consent. This is also in line with *R. v. Doherty*, [2000] N.B.J. No. 299, from the New Brunswick Court of Appeal and *R. v. Crosby*, [2005] P.E.I.J. No. 1, from the Prince Edward Island Court of Appeal.

[22] The Crown bore a heavy burden to prove that the respondent intended bodily harm.

[23] Judge Prince did not accept on the evidence that the Crown had discharged this burden.

[24] I will not interfere with his findings of fact or his application of the law to the facts. His findings can be reasonably upheld when one considers the whole of the evidence.

[25] The appeal is accordingly dismissed.

Justice M. Heather Robertson