

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R v. Upchurch*, 2019 NSSC 26

**Date:** 20190117

**Docket:** CRS 472813

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Emily Upchurch

Defendant

**Judge:** The Honourable Justice Patrick J. Murray

**Heard:** January 7 and 8, 2019, in Sydney, Nova Scotia

**Oral Decision:** January 17, 2019

**Counsel:** Mark Gouthro for the Crown  
Tony Mozvik, QC, for Emily Upchurch

By the Court (Orally):

**Introduction**

[1] Emily Christine Marie Upchurch is charged with several offences that occurred as alleged on January 9, 2017, in New Waterford.

[2] The three charges in the indictment are that she 1) committed an assault on Mr. Murphy using a weapon to wit, a knife contrary to s. 267(a) of the *Criminal Code*; 2) in committing the assault on Mr. Murphy did cause bodily harm to him, contrary to s. 267(b) and 3) did possess a weapon, a knife for the purpose of committing an offence contrary to s. 88 of the *Criminal Code*.

[3] The Crown alleges that the Complainant, Mr. Jason Murphy, has his throat slit by the Accused, with a knife that has been entered into evidence. (Exhibit 2)

[4] The basic allegation by the Crown is that there was an altercation involving a machete between Mr. Murphy and Ms. Upchurch's boyfriend, Gervaise Angione. During this fight Ms. Upchurch says she feared for her safety and that of her boyfriend in their apartment. Ms. Upchurch testified she grabbed a knife and used it on the Complainant, cutting his throat.

[5] In her evidence Ms. Upchurch has admitted to having possession of the knife and using it on Mr. Murphy, causing him injury to his throat.

[6] Ms. Upchurch pleads self-defence. She thought what she was doing was right.

[7] The burden is on the Crown to prove these offences and their essential elements. The Defence has no burden.

[8] The main issue then, is whether the Defence of self-defence is available to the Accused. The Crown acknowledges it is part of their onus, to establish that the Defence, as contained in s. 34 of the *Criminal Code* cannot succeed.

[9] Ms. Upchurch testified and therefore the Court is to be guided by the principles in **R v. W.(D)**, [1991] 1 S.C.R. 742. If I believe Ms. Upchurch, or if the Defence evidence leaves me with reasonable doubt, I must acquit her. Only if I am satisfied the Crown has proven the offences beyond a reasonable doubt should I convict Ms. Upchurch.

[10] It bears repeating that the burden remains on the Crown throughout. In terms of the elements of the offence, they are listed in Appendix "A" and will be attached to my decision. I am not going to review them at this time.

[11] Crown and Defence agree that certain basic facts are established by the evidence.

**Agreed Facts**

1. All four witnesses (including the Accused) were present in the apartment at 322 Ling Street, New Waterford on January 9, 2017. They were Kallie Young, Jason Murphy, Emily Upchurch and Gervaise Angione.

2. Shortly after arriving at the apartment, Ms. Young, Mr. Murphy and Ms. Upchurch made a trip to Walmart on Spar Road, Sydney.
3. Upon returning from Walmart there was an argument, resulting in a scuffle or fight.
4. During this altercation in the apartment, Mr. Murphy had his throat slashed or cut by the Accused and received cuts to his back.
5. Drugs were being used by all four persons on the date in question.

[12] Each witness provided their own version of events. All differ in certain respects. There are four different scenarios of how the events unfolded.

[13] It is important to mention that it is not a matter of the Court selecting which version it prefers because that is not a proper discharge of the burden of proof.

[14] I am not going to recount in detail each witness' testimony, but will provide a summary of their evidence.

## **Evidence at Trial**

### **Kallie Young**

[15] Ms. Young is 19 years of age and has known Jason Murphy for 4 years. He is her boyfriend and she resides with him. She testified that an assault took place in the apartment at Ling Street, New Waterford in the evening. It was dark out, around 6 p.m. She was a friend of Gervaise Angione who owned the apartment. Mr. Murphy did not know Gervaise previously. She stated her, Jason and Emily went to Sydney earlier that day around 3:00 p.m. to run errands at Walmart and Sobeys.

[16] When they returned 3 hours later she and her boyfriend Jason were accused of "being rats" by Ms. Upchurch and Mr. Angione. The evidence showed that the police had been to the apartment weeks earlier (around Christmas) and seized "weed plants" and guns. This was the first time they hinted it was them. Ms. Young said she never saw the police there. Seconds later she said, Jason Murphy's throat was slit.

[17] Ms. Young further testified that she, Jason and Gervaise were sitting on the couch with their cellphones. Emily Upchurch came after her with a knife, she said. When Mr. Murphy stood up, she sliced his throat. Mr. Angione then took out a machete. She said she didn't see Emily take out the knife but heard her rustling for it in the kitchen, a clattering sound.

[18] She said when the incident took place none of the four were using alcohol or drugs.

### **Jason Murphy**

[19] Mr. Murphy is 36 years of age. He is 6 feet tall and 280lbs. He testified that upon returning from Walmart, he was just sitting in the living room in a chair and Kallie was on the

couch just shooting the breeze. Mr. Angione was in the bathroom. Emily had been outside for about 15 minutes. She came in, slammed the door and started screaming he was a rat and going after Kallie. He said he stood up and said leave Kallie alone. Ms. Young and Ms. Upchurch were yelling. Gervaise ran to the bedroom grabbed a machete. The machete was still in its case. When he saw the machete he went after Gervaise, landing on top of him. Mr. Murphy took Mr. Angione to the floor.

[20] Mr. Murphy said he was not physical before the machete was taken out. He was kneeling on Mr. Angione who was not able to get free. Ms. Upchurch came from behind, she came out of nowhere, he said. She slit his throat. The machete was dropped during the scuffle. It had been taken from under the mattress in the bedroom. He did not see Emily grab the knife. He said it happened instantly, “right away” after he got on top of Mr. Angione.

[21] Mr. Murphy said he went after Mr. Angione because he was scared he was going to hit him with the machete.

[22] In cross examination Jason said he got nervous and “went at him” (Mr. Angione) before he removed the machete from its case. He agreed that Mr. Angione had said to leave Emily alone. He denied any drug use on that day. He was using the day before, he said.

### **Emily Upchurch**

[23] Emily Upchurch is 30 years of age. She lived with Gervaise Angione at the apartment for about one year at the time of the incident. He was her only family here, she said.

[24] She testified there had been an argument that day that started in the car between herself, Kallie Young and Jason Murphy. They wanted money for the “stuff” from Walmart, which she said, was stolen. After getting out of the locked car, Ms. Upchurch ran up the stairs telling Gervaise not to pay the money to Jason and Kallie. She, Emily Upchurch, took most of the items from Walmart.

[25] Ms. Upchurch said at this point she left the apartment to go for a walk. She was going to the cliff, she said. There were a series of text messages to Mr. Angione. He talked her down and she came back. Jason Murphy confirmed she had been outside for about 15 minutes.

[26] The argument continued with her telling Gervaise Angione not to give them any money. She confirmed in her statement to police she was mad.

[27] Gervaise refused to pay the \$50. He asked Jason and Kallie to leave about 10 times she said, but they wanted the money. In her police statement she stated “all Kallie all cares about is drugs, drugs, drugs”. She was in the bathroom doing her hair. Jason was going back and forth between the living room and kitchen.

[28] Then Jason said, I am sick of this, he had a knife and pushed Emily into the bathroom. She cracked her back off of the sink. Jason threatened to kill her. He had his left hand on her neck. She has a mark there from it, she said. Gervaise retrieved the machete from the bedroom as a scare tactic and said “get out”. Jason went after Gervais and ended up on top of him. She

grabbed the knife and tried to pull Jason off. She admitted to slicing Jason's throat. She didn't fully comprehend what happened. She said she did what she saw on TV, referring to police with a "billy bat" except it was a knife. She grabbed a towel for Mr. Murphy.

[29] She testified she was never one to fight with people. She never put a finger on Kallie. She testified they talked before Jason and Kallie left. She applied or tried to apply first aid.

[30] In cross she said she grabbed the knife from the bed. She tried to get Jason off of her boyfriend with the knife in her hand. She said the marks on Jason's back were from her having the knife in her hand.

[31] In cross she was asked why she did not tell the police where the marks on her neck came from (in photos) and why not tell the police about Jason having the knife. I don't know, she said. She agreed if pleading self-defence it would be a good idea to tell police everything that happened.

[32] She said it didn't register when she had the knife in her hand. She made various tries to grab Jason. She wished she had went a different way. She was trying to defend herself, Gervaise and their home.

### **Gervaise Angione**

[33] Gervaise Angione confirms there was a dispute, but it was about him paying \$50 for razors that were stolen and brought back from Walmart. Gervaise and Emily suggest that Kallie wanted this money for more drugs.

[34] Mr. Angione says he took out the machete as a warning gesture for Jason Murphy and Kallie Young to get out, to leave his house. Mr. Murphy confirms he was asked to leave. Gervaise did not remove the machete from the case. Jason then came at him knocking him back against the door of the bedroom. They struggled with Jason on top, hitting, spitting when Emily came with knife and cut Jason on the throat.

### **Submissions - Crown and Defence**

[35] The Crown acknowledges that each of these accounts is different. Further, it says the Court will need to determine which evidence it accepts and rejects.

[36] The Crown submits that self-defence is still available no matter who starts the fight, pointing out for example that if Mr. Murphy is found to be protecting himself from Mr. Angione who had a weapon, then there is no real force or threat. If Mr. Murphy was holding him down, and not letting him up so he would not be harmed, then Emily Upchurch's actions would be completely unreasonable.

[37] The Crown acknowledges that things were happening at a fast and hectic pace and that is a consideration of the Court. The Crown also acknowledges there are credibility issues with all 4 witnesses.

[38] The Defence submitted it will be very difficult for the Court to make the necessary findings in this matter, as to the guilt or innocence of Ms. Upchurch. The evidence between Walmart and the slice, is all over the place, they submit.

[39] If the Court is unable to conclude what happened beyond a reasonable doubt, Ms. Upchurch is entitled to the benefit of that doubt and should be acquitted.

[40] The Defence further submits that all 4 witnesses were on serious drugs that day. There is the question of what occurred in the span of 30 seconds while the parties are on methadone, Ritalin and perhaps other drugs.

[41] The Defence submits trying to piece together what happened is a difficult challenge. Mr. Murphy had his throat sliced yes, but the Defence is not confident how it happened has been proven by the Crown. As a result, the findings necessary to disprove self-defence cannot be made, says the Defence. Because of this “vacuum” in the evidence, an acquittal is warranted.

[42] The Crown asserts that the Court can accept all, part or none of a witness’ testimony. The Defence asserts that if the Court is unsure of whom to believe, then his client is entitled to be found not guilty.

### **Assessment/Credibility**

[43] We have here an altercation involving a machete, where the Accused says she feared for her safety and that of her boyfriend in their apartment. She grabbed a knife and used it on the 280 lb Complainant’s throat, whom she said at that time, was waling away on top of her much smaller boyfriend.

[44] Mr. Murphy states they were sitting around when an argument erupted. They (he and Kallie) were being blamed by Emily and Gervaise for rattling them out to police. Jason stood up to defend Kallie and Gervaise brandished a machete. It was shown but not removed from its case, with Mr. Angione asking them to leave, stating “get the fuck out of my house”.

[45] Mr. Murphy decided to lunge at Mr. Angione. He “went at him” he said, ending up on top of him. “I had him pinned down with my knees” when Emily Upchurch slit his throat. He said, Ms. Upchurch got him a towel. Shortly thereafter he and Kallie left in his car with him driving but with her steering. They went to his mothers where they called 911. He was taken to the hospital and stitched up. He received five stitches externally according to the medical report. Mr. Murphy testified it was eight, four outside and four inside.

[46] Needless to say this incident is extremely serious and violent. The knife was admitted into evidence and identified by Mr. Murphy and Emily Upchurch. The consequences could have been far worse and as stated it is only by good fortune, that Mr. Murphy was not more seriously injured. As it was, it qualifies as “bodily harm” under the *Criminal Code of Canada*.

[47] In terms of the evidence, I concur with the Crown that Ms. Young’s evidence is of little value to the Court. While she remembered Mr. Murphy’s throat being slit, she could not

remember the details of how it happened. “When I say I can’t remember, I can’t remember”, she said. She said things like, her mind was “scrambled” and her recollection was not 100 percent.

[48] Mr. Murphy presented as generally credible. His evidence is consistent with others as to the machete being taken out and landing on top of Mr. Angione. Understandably he got nervous, he admittedly leaped directly at Gervaise Angione, wrestling him to the floor. He said there were few words, as did Mr. Angione. Emily Upchurch said he was hitting Gervaise. Mr. Angione said Jason was swinging at him but he was hitting the floor instead. He testified Mr. Murphy was mostly spitting on him.

[49] Mr. Murphy said it was immediately after he fell on top of Mr. Angione that Emily Upchurch came from behind and slit his throat. He was adamant it was not him who was the aggressor. In cross-examination, he agreed he reacted in a violent fashion:

Q: So what I’m suggesting to you Mr. Murphy is that if somebody is coming at you with a machete right, you’re going to act pretty violently towards them.

A: Obviously yeah.

Q: Yeah. And you’re going to grab him.

A: I didn’t hit him, I know I didn’t hit him, I know that. I just went at him like that and then we both went down to the ground.

Q: Your going to grab them.

A: Uh huh.

Q: And you’re obviously a pretty hyper guy here...

A: Uh huh.

Q: ...as sitting here today so I’m sure you were pretty aroused at the time right?

A: Oh yeah.

Q: Yeah and things were happening quickly I take it.

A: Uh huh.

Q: Do you remember yelling at him that you were going to kill him and stuff like that?

A: No I don’t know.

Q: No you don’t remember saying anything like that.

A: Not at all nope.

Q: So you grab him do you remember where you grabbed him at?

A: Well what happened, when he came out with the machete I just jumped right up and leaped right at him.

Q: Yeah.

A: And then when I leaped at him he went into the wall and we both hit the floor.

Q: Okay and where did you land and where did he land?

A: I landed on top of him and he landed his back up against the door when he was sliding down the door, the door casing.

Q: Alright so when he’s on the ground, is he, is he face down on the ground or is he on his back on the ground?

A: I don’t know, I don’t remember that, alls I know is just everything happened all at once, just so fast.

[50] I have difficulty with Mr. Murphy’s assertion that no drugs were being used by any of the four persons present. Both he and Ms. Young denied there were drugs being used. Based on his

previous admission that he had used street drugs while on Methadone, the Crown concurs with the Defence that drugs were being used.

[51] While I have some reservation due to the conflict in evidence, I accept the submission made by both counsel that all parties were using drugs that day.

[52] In a similar vein, I have difficulty accepting Mr. Murphy's denial of the reason the girls went to Walmart. He drove them there. He said Emily had to return something. Ms. Young denied stealing but when asked in cross-examination whether anybody else was stealing, she referred to Emily stealing and said she was scared of her (Emily).

[53] Mr. Murphy denied having the knife as alleged by Emily, and denied threatening to kill Mr. Angione as Emily had said. In terms of him going at Mr. Angione, "what else was he to do", he said.

[54] In some respects the machete being taken out is consistent with a confrontation more than merely sitting around shooting the breeze and then having words.

[55] In terms of Ms. Upchurch's credibility, the most glaring thing is her omission of Jason having the knife in her statement to police. In it, she said that Jason "was going to attack me". In her evidence at trial she said, he did attack her.

[56] In addition, Ms. Upchurch admitted to lies in her statement. She agreed that when her neck was being photographed it would have been a good time to tell the officer what happened.

[57] At trial she explained she was questioned only once and later had time to think. She also said she was protecting Gervaise and did not want more charges.

[58] It should be noted in concluding her statement she said that nothing was a lie and everything she said was true (page 22).

[59] On the other hand, there are consistencies in Ms. Upchurch's statement that, in fairness, should be mentioned. When asked about the marks on Jason's back she mentioned grabbing him with the knife (page 10). She initially denied stealing but added they were before the statement concluded (pages 15, 20). She was correct that the slice was not deep as per the medical report, it was superficial (page 16). She maintained it was self-defence (page 16).

[60] Mr. Angione's statement is some ways the most straight forward. It is not dissimilar from Mr. Murphy's except for Mr. Murphy attacking Ms. Upchurch with the razor and Mr. Angione being punched by him. They disagreed as to the reason for the argument.

[61] Mr. Angione says Jason punched him first in the face. He fell into the punching bag in his room. He had the mark over his right eye. Mr. Murphy says Mr. Angione is obviously going to have some marks from their struggle. Like Mr. Murphy, Mr. Angione says there were not a lot of words spoken. He wanted them to get out of his house.



[62] Like Emily Upchurch, Mr. Angione said there was stealing but he was not paying for the razors which he says, Ms. Young and Mr. Murphy wanted him to.

[63] He agrees with Emily Upchurch to the extent that Mr. Murphy was the aggressor. Ms. Upchurch has not stayed with him since this incident. It appears their relationship has ended. He confirms the parties talked after the incident. He has not seen the others since that night. They had been there often, everyday for a month. He says he did not see the knife. He said Jason didn't touch Emily Upchurch, but was going after her with a razor. He said he did not let him touch her. Jason dropped the razor, he said, before hitting him. He said he asked them to leave repeatedly. He confirmed Emily was heading to the cliff.

[64] He was challenged in cross-examination that he did not tell police about the razor. He said he just wanted to get out of there, meaning giving the statement. In re-direct he said, he told them that Jason did go after Emily.

### **Decision**

[65] There is a lot of conflicting evidence as to how events unfolded in this matter. I have reviewed the evidence again and again, in an effort to assess credibility and make appropriate findings. I concur with the Crown that all four witnesses have issues and points of conflict in their evidence. Further, I accepted both counsel's submission that all parties were under the influence of drugs.

[66] Further, I believe Ms. Upchurch when she says she was acting in defence of herself and her boyfriend in their apartment.

[67] It was suggested by the Crown, she had ample, even a perfect opportunity to inform the police of the accurate information when giving her statement. She agreed when asked why she did not relate the events exactly as they transpired. Eg. that Jason Murphy came at her with a knife. "I don't know", she said. I have had time to think, I was interviewed only once. I have never been charged with anything like this before. I didn't know what to do, she said words to that effect, in explaining her statement at trial during cross-examination.

[68] On the other hand, she was candid about the use of drugs, about the stealing, and the use of the knife itself to cut Mr. Murphy's throat.

[69] By all accounts Jason Murphy was much bigger and was the guy on top. He and Gervaise said few words were exchanged. Emily Upchurch said he was threatening to kill. While I have some doubt about that, Jason himself said he reacted violently and was quite agitated (aroused).

[70] In cross he said as soon as he saw the machete he leaped directly at Gervaise, knocking him into the door of the bedroom and then was on top of him.

[71] At the point in time when the larger man was on top of the smaller man, I believe the Accused, Emily Upchurch, considered there was force or the threat of force. Her reaction was to grab the first thing she could in an effort to defend and protect herself and her boyfriend.

[72] I am satisfied she first attempted to remove Jason Murphy several times from her boyfriend.

[73] In the eyes of Emily Upchurch, and this was all happening in seconds. I accept her evidence that she didn't know where the machete was or what Jason would do.

[74] She said she feared for her boyfriend and herself in their apartment.

[75] On these facts I am satisfied that sections 34(1) (a) and (b) have been met.

[76] The real question is were her actions reasonable as per s. 34(1)(c).

[77] The Crown says slicing the complainant's throat is out of all proportion to the harm that could come to Gervaise Angione. In assessing reasonableness, proportion is one of an unlimited list of factors in section 34(2).

[78] I am cognizant of the factors set out in section 34(2) in determining what is reasonable including the relevant circumstances of the person, the other parties and the act including but not limited to the factors contained therein.

[79] Having considered these, I do not think Ms. Upchurch could be expected in these circumstances, to weigh the niceties of whether for example, Mr. Murphy was merely holding Mr. Angione down or was in fact reacting violently, as Mr. Murphy admitted he was.

[80] She tried to grab Mr. Murphy off of Mr. Angione on several occasions and the marks on Mr. Murphy's back corroborate this to some extent. Her evidence in this regard is as follows:

A: Like I said I picked up the knife from the bed, I grabbed him by the back of his shirt and near the back of his like the top of his butt and I tried pulling him off, I switched hands with the knife and I tried to grab him again, once again, I don't know why I had the knife, and then the third time is when I tried pulling back like the cops do with the billy bats and that's when I, I realized it was a knife.

Q: So you realized it was a knife only when you had it up to his neck like the cops do with the billy bats?

A: I didn't know what... I didn't know what it was, at... it didn't register that I had a knife in my hand.

[81] While it is not the nature of the injury that is determinative, the wound (from good fortune) was described by the physician as superficial. (See Exhibit 5) There is no expert evidence on this point, but it may serve to explain the manner she said she acted.

[82] Regardless, I accept that she wished she would have went a different way. I am satisfied she handed him a towel and attempted to aid him.

[83] In terms of the non exhaustive factors in section 34(2) I have considered the following.

[84] With respect to (a) I have discussed the nature of the threat but would add there was the machete nearby, which also addresses factor (d). With respect to (b) this was happening fast, I

have addressed that in terms of “niceties” and as well found she first made attempts to remove Mr. Murphy. She said there was little time to phone 911. She had her phone but Jason threw it and it smashed into pieces.

[85] With respect to (c) Ms. Upchurch’s role has been discussed in detail. She was very protective of Mr. Angione who is her only family here. Factor (e), size, age and gender have been discussed and considered throughout this decision. With respect to (g) proportionality is one factor and I have also addressed this.

[86] In my respectful view, I have considered all of the relevant circumstances of the person, the parties and the act, in reaching my decision that the Accused’s actions were reasonable in the circumstances.

[87] Even if I did not believe her, Ms. Upchurch’s evidence leaves me with a reasonable doubt about her guilt. As stated it has been difficult to determine with the requisite degree of certainty how the events unfolded on the date in question. As such, I am unable to conclude beyond a reasonable doubt that the defence of self-defence is not available for her. She is entitled to the benefit of the doubt and therefore an acquittal is warranted.

### **Conclusion**

[88] Despite the inconsistencies in her evidence, and her admitted untruths, I believe Emily Upchurch when she says she did not intend to harm Mr. Murphy, but instead was acting in defence of herself, her boyfriend and her property.

[89] On the whole of the evidence, I accept that she was acting in self-defence. Her evidence on this point was in my view credible and genuine. In terms of its reliability she candidly admitted her actions. Her explanation leave me with a reasonable doubt.

[90] I felt the Crown prosecuted this case in a very fair manner.

[91] This concludes my decision.

Murray, J.

## Appendix “A”

### Essential Elements of the Offence

#### S. 267(a) Assault with a Weapon

- i) Accused intentionally applied force;
- ii) Complainant did not consent to that force;
- iii) Accused knew complainant did not consent to force applied;
- iv) That a weapon was involved in the assault of the complainant by the accused.

#### S. 267(b) Assault causing bodily harm

- i) That accused intentionally applied force to complainant;
- ii) That the force intentionally applied caused complainant bodily harm.

#### S. 88(1) Possession of a weapon for a dangerous purpose

- iii) That accused possessed a weapon;
- iv) That accused knew what she possessed was a weapon;
- v) That accused had the weapon for a purpose dangerous to the public peace.

### Definitions

**Weapon** – s. 2 anything used, designed, or intended to use

- (a) in causing death or injury;
- (b) for the purpose of threatening or intimidating includes a firearm and for purpose of s. 88, 267, 272 anything used for binding or tying up a person.

**Bodily Harm** – Any hurt or injury to a person that s. 4(3) interferes with the health or comfort of the person, that is more than merely transient or trifling in nature.

### Possession

- (a) When he/she has it in their personal possession or knowingly
  - vi) has it in the actual possession or custody of another;
  - vii) has it in any lace, for the use or benefit of himself or another person; and
- (b) When two or more person with the knowledge and consent of the rest, has anything in his custody or possession it shall be deemed to be in the custody and possession of each and all of them.