SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Ruddick*, 2019 NSSC 308

Date: 20190927
Docket: CRAM No. 483041
Registry: Amherst

Between:

Her Majesty The Queen

v.

Revere Ruddick

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	August 26, 27, 28, 29 and 30, 2019 in Amherst, Nova Scotia
Oral Decision:	September 27, 2019
Written Release:	October 11, 2019
Subject:	Criminal law – defences – Self-defence
Summary:	Violent incident between accused and complainant resulted in serious injuries to both. Court analyzed the self-defence provisions found in s.34 of the ***Criminal Code***.
Issue:	Did Crown carry its burden of proof beyond a reasonable doubt?
Result:	The Crown did not prove beyond a reasonable doubt that Defendant was not acting in self-defence. Finding of not guilty.

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DECISION

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Oral Decision:	September 27, 2019
Charge:	That Revere Ruddick did, on or about the 1st day of September 2018 at or near Springhill, in the County of Cumberland, Province of Nova Scotia, did wound, maim, disfigure or endanger the life of Winston Dawson, contrary to section 268(1) of the ***Criminal Code of Canada***
Counsel:	Vicky Doucette, Crown Counsel Mathieu Boutet, Solicitor for the Defendant

By the Court:

Background

[1] Revere Ruddick and Winston Dawson are former friends who, for reasons to be explored in this decision, became involved in a very violent encounter which resulted in serious injuries to both men. Ruddick, who is charged with aggravated assault, was himself stabbed more than once. Winston Dawson suffered severe facial injuries that required surgery, as well as other injuries. All these events unfolded at Dawson's home in Springhill, Nova Scotia on September 1, 2018.

[2] Introduced in evidence were after the fact pictures of Ruddick and Dawson taken at the hospital. Ruddick's pictures show someone with significant stab wounds. Dawson's depict the aftermath of gruesome facial injuries from blunt force trauma. Viewed in isolation, either set of pictures could depict a victim.

[3] The Crown says that the Defendant was the aggressor and is guilty of an aggravated assault. The Defence says Mr. Ruddick acted in self defence and accordingly is not guilty of the offence charged.

Structure of These Reasons

[4] I intend to set out a summary of the evidence followed by a discussion and application of the relevant law.

[5] In setting out my summary of evidence I am not attempting to produce a transcript or recite back everything covered by each witness. I will touch on each witness, but my intent will be to focus on central issues of relevance and elements necessary to put the courts factual conclusions in context. I have however considered and weighed all the testimony, and each of the exhibits, in reaching my determinations.

[6] Before embarking on this summary of evidence I intend to give a statement of the core legal principles - including the presumption of innocence and proof beyond a reasonable doubt - which underpin this entire proceeding. I do so at this stage of the decision because it helps me keep these principles at the core of the entire decision-making process.

Legal Principles

[7] The fundamental protection in every criminal trial is the presumption of innocence. This is the primary and irreducible foundation of our criminal

justice system. It has to be appreciated that this principle is not a slogan to be quoted and then forgotten. It must remain central to the entire analysis to be conducted.

[8] To be presumed innocent until proven guilty by the evidence presented in court is the fundamental right of every person accused of criminal conduct. Running together with this presumption of innocence is the standard of proof against which the Crown evidence must be measured. To secure a conviction in a criminal case the Crown must establish each essential element of the offence to the point of proof beyond a reasonable doubt.

[9] This standard has rightly been called an exacting one. It is a standard far higher than the civil threshold of proof, being a balance of probabilities. The law recognizes various standards of proof depending on the nature of the proceeding. The criminal standard towers above those other lessor standards.

[10] The Nova Scotia Court of Appeal and Supreme Court of Canada have provided clear direction on the issue of what is meant by proof beyond a reasonable doubt. They have instructed as follows:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and

common sense. It is logically derived from the evidence or absence of evidence.

- Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

- On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

- In short, if based on the evidence before the Court, you are sure that the accused committed the offence you should convict because this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence not.

- In this case the Defendant did testify. This raises particular issues of analysis which the court will address. But whether the defendant testifies or not, at no time does the burden of proof shift to the defendant and the resolution of the case does not turn on the court picking which version of the evidence it prefers or finds more believable.

- This case requires a consideration of the self defence provisions of the ***Criminal Code***. I intend to address later in this decision the law as it pertains to the legal burden on the Crown relative to this defence. Luckily, we have the benefit of recent Court of Appeal direction on this issue.

[11] On the issue of assessing the evidence of witnesses, the Court is aware of the many cases governing the analysis of witness testimony. What we sometimes refer to as the "credibility" of a witness really is comprised of two distinct components of creditworthiness:

1. Honesty of recollection;

2. Reliability of recollection.

[12] Honesty speaks to the sincerity and candour of a witness's evidence while reliability relates more to such factors as the witness's individual perception, memory and clarity. Both sides of the equation – honesty and reliability – impact the credit that can be afforded to testimony. A judge may accept all, none or some of a witness's evidence depending on the findings. A judge may apply different weight to different portions of the evidence which is accepted.

[13] A foundation for reasonable doubt can be found in any witness's testimony. So too, a finding of guilt may be safely grounded on the evidence of a single witness if, of course, it is found sufficiently credible and persuasive to meet the exacting burden of proof. In assessing the credibility of testimony, I am aware of the factors which have been pointed to by courts as helpful to this process. On this point I have found ***R. v. Farrar***, 2019 NSSC 46, to be instructive. In

any written version of these reasons I would incorporate this very helpful overview.

[14] It is my obligation to ensure that all these core principles underpin the entire legal analysis to follow.

Evidence

[15] The Crown produced ten witnesses. There were two experts, one who gave viva voce evidence and another whose report was admitted by consent without the need for cross-examination. In terms of police officers, there were a number called whose evidence was not particularly controversial in the end. They spoke to observations at the scene as well as their interactions with Dawson or Ruddick. They gave testimony as to the seizure and continuity of certain exhibits. Where these elements turned out to be not particularly controversial, I do not intend to offer individual summaries of these.

The first Crown witness was Winston Dawson.

Winston Dawson

[16] Mr. Dawson is 66 years old, approximately 5’8” and 125 pounds. He believed his weight and height would have been the same in September of

2018. At that time, he lived at 172 McGee Street in Springhill. Mr. Dawson described his home and its layout and identified photographs which assisted with the configuration of rooms and furniture.

[17] He gave evidence of the background of his relationship with Revere Ruddick. The men have been friendly for a number of years. On this particular day Ruddick, who is related to Dawson's landlord, was there to replace an outdoor water tap which was in need of repair. He described the events of the day including trips to the hardware store and the work done on the house. He describes how events moved from working on the house to eventually the men sitting and socializing outside near the garage consuming some beer. When asked in direct how many beers he would have consumed he estimated five or six.

[18] His recollection was that Ruddick began to act inappropriately outside. He hollered at a neighbour about their music and he said something to some women driving by in a car. He believes he told Mr. Ruddick to go home. Ruddick did not leave, and the men eventually went inside the house. Ruddick may have said he was going to finish his beer before leaving.

[19] Mr. Dawson gave his account of the time spent inside. In the time immediately prior to the violent encounter the men were in the living room watching television and continuing to drink. Dawson had put some food in the microwave. Dawson was on the couch and Ruddick seated a few feet away from him on a black swivel chair. There was a coffee table between them. The court had the benefit of photographs depicting this room from a number of angles.

[20] The fact that Ruddick did not leave when asked was causing the tension to rise. The direction to go was repeated and words were exchanged. Dawson's evidence was that he was the first to get up, standing up from the couch. This was followed by Ruddick getting up from the black chair.

[21] Ruddick spoke words to the effect "Who is going to make me? Not you". Dawson stated that his reply was, "No, but I know a couple of people who can". And Ruddick replying that Dawson wasn't going to call the fucking cops on him.

[22] He next describes being pushed by Ruddick and then punched in the face. He says he fell back onto the couch. In direct he offered unsolicited that while

he once may have had this sequence wrong and may have said he was punched first rather than pushed he is now sure this is the way it occurred.

[23] He went on to testify that once he had landed on the couch, he put his hands on the coffee table. On the table was an open knife which he described as a 2.5-inch locking blade "pocket knife". I have seen the photos of the weapon. It was still open from a prior use, he said. He took the knife in his right hand with the blade facing down. He reports Ruddick as saying words to the effect, "What are you going to do with that? Are you going to stab me?" and he replied, "I will if you try to hit me again". When asked by Crown counsel to describe in detail what happened next, he said as follows:

> A: He either grabbed me by the throat, or by the shirt and pulled me to him almost nose to nose. I saw his fist coming up and that's when I came down with the knife like that and then I was on the floor…

[24] He acknowledged driving the blade into Ruddick into the hilt. He said that he could feel the bottom of his hand holding the knife touch Ruddick's shirt.

[25] In continued questioning Mr. Dawson was asked which he believed happened first, the fist coming up to his face or his right hand coming down in the stab, he said that he couldn't say which happened first.

[26] He could simply reiterate that he believes he went down to the floor immediately after the stab was inflicted. Mr. Dawson says that on the floor he felt weight on his chest and heard Ruddick saying, "You fucking stabbed me, throw that knife away". He says he replied, "I will when you get off me and get out of my house." He says this exchange went back and forth a couple of times and then he felt a weight coming off him and then he says he was punched a further time in the face. This was his final memory, he says, until waking up what appeared to be hours later. He was seriously hurt. He had a wounded arm. His face and eyes were caked in blood.

[27] Mr. Dawson was questioned on the sequence of events a number of times both in direct and cross. It was apparent that he does not have a recollection of how the other three stab or puncture wounds to Ruddick came to be. It is clear that he was struck by the guitar at some point, but he does not appear to remember that either.

[28] In direct and cross-examination, he acknowledged that Ruddick was struck more than once. He could not say how this had happened. He acknowledged that Ruddick's injuries were dispersed, some on the front and some the back. I will return in a few moments to further comments on my findings respecting Dawson's evidence.

Police Witnesses

[29] As noted previously the Crown called a number of police witnesses. I have reviewed the evidence of the responding officers. Immediately after exiting the Dawson home that night Revere Ruddick drove himself to the Springhill hospital. We had evidence from the officers who responded to the 911 call from the hospital. This was made when hospital staff realized they were dealing with someone with stab wounds. The officers who responded to the hospital were called. They gave evidence about the wounds they observed. They acknowledged that originally they would have seen Ruddick as a potential victim. Ruddick, however, would not say who the other involved party was or where these events had occurred.

[30] Officers continued to investigate. They spoke to a fellow officer who had long experience in Springhill who suggested that one person Ruddick associated with from time to time was Winston Dawson. This led them the next day to the house on McGee Street. The officers who made that visit gave evidence as well. The scene they found there obviously shocked them. Dawson was severely beaten. Despite this he had not called 911 or sought medical attention. This was now many hours later. There was very significant

blood evident throughout the main parts of the home. The pictures speak for themselves. This blood was eventually determined to be from both men.

[31] I have assessed the evidence of the scene of crime officers as well as their work product which became the source of the MacNeil Report which was in evidence by consent. This report used DNA analysis to tie together the locational blood evidence to its sourcing as determined by testing. In other words, the MacNeil Report indicates who was the source of blood in each tested site. Not every site was tested which is not surprising. However, this does mean for instance that the Crown does not have a source identified for the blood deposited on the north living room wall and door casing over which they did seek to advance some argument. The absence of this evidence does impact the force of the argument that can be made about how that mark came to be made and who made it. But I hasten to say that it would have been very difficult to source every pattern or marking it, of course, at the beginning of the matter. It would not have been evident which marks may or may not prove most relevant down the road.

[32] Additionally, a blood covered Dawson spent many hours in the residence after Dawson's departure. He describes waking up and fumbling around in that area for some time in his disorientation. Even if the blood on the north wall and

door casing had been tested to him the defence presumably would have advanced an argument respecting doubt as to when such a mark had been left.

[33] The next witness, Sgt. Matthew Mader, was the blood pattern expert. He employed the evidence from the crime scene and the MacNeil Report to offer opinion evidence as to the interpretation of the blood splatter.

Sgt. Matthew Mader

[34] Sgt. Mader was accepted as an expert qualified to give opinion evidence on issues of the blood stain pattern analysis. He provided a written report as well as testimony in court. I have closely assessed his evidence. His report sets out in detail the locations and characteristics of the blood splatter and stain evidence.

[35] He walked the court through a detailed account of where various blood stains were located and their interpretation. The most critical portion of his report relied on by the Crown pertains to the blood from Dawson which is found in the living room area. It was evident that Mr. Dawson was struck by the guitar evident in the scene photos. Ruddick in his evidence, which I will come to, acknowledges that he struck Dawson. The issue argued by the Crown is the number of strikes, their degree of force, timing and intent. The Defendant

argues they were limited to two strikes and were defensive. The Crown challenges this.

[36] The Report sets out Sgt. Mader's conclusions as to where in the room Dawson was when struck, thus causing the critical spray on the west wall of the room. It also says the spray was caused by a minimum of one strike. It fails to be more definitive on this point.

[37] I accept the Report supports the conclusion that the strike generating the splatter on the living room west wall originated when Dawson (as the source) was significantly crouched. He clearly was not standing upright and just as clearly was not lying on the ground.

[38] The Crown argues that the findings are supportive of the version of events given by Dawson and not consistent with the account provided by the Defendant. The defence disagrees with this and also argues that where no blood was found is relevant. There was no blood identified as being found dripping down on to the coffee table where the defence says it ought to have been found if the account of the first stab wound, as given by Dawson, was accurate. Crown argues that the first stab occurred more to the right of the coffee table (towards the washroom door) and thus there is no inconsistency.

[39] I have weighed these points and will return to make further observations on these elements later.

Defence Evidence

[40] Revere Ruddick was called in his own defence. In many regards his evidence tracks with that of Mr. Dawson. It is really only when we reach the critical few minutes in the living room that their accounts diverge.

[41] The Defendant is a large man. Certainly, larger and substantially heavier than Winston Dawson although perhaps only a few inches taller. Like Mr. Dawson, he considered the two men to be friends before this incident. He recounted the events of September 1 including the work on the house, the visit to the hardware store and a drive the two men took to Aulac, New Brunswick to buy gas and to pick up beer which they shared.

[42] He acknowledged there had been some misunderstanding between the two men when they were outdoors. There were some comments about Ruddick speaking to a couple of women who stopped at a nearby stop sign in their vehicle. He shouted out to the women, which Dawson did not like, but Ruddick testified they were both friends of his, with one being a relative. So, he didn't understand why there would be an issue.

[43] He does not recall being asked to leave when the men were outside. He does acknowledge this was asked later in the house. He believed it was around 7 or 7:15 PM when the men went inside. They were in the living room watching TV and the conversation turned strained. Each man appearing to take offence at things said by the other. It was evident the mood was souring. He describes at one point going to the kitchen to get another beer and when he returned Dawson asked him to leave. By Dawson's account of course, this had occurred earlier. Ruddick testified that he would leave, but after he finished his beer. He said that Dawson did not respond to this which he took to be acceptance of this. The men sat in silence, but it is not hard to imagine the tension growing as Dawson wanted him out of the house and with Ruddick being dilatory.

[44] Ruddick's account is that as he finished his beer he was going to go to the bathroom and then leave. He testified that he got up to go to the bathroom. He was walking from the black swivel chair, past the coffee table and towards the adjacent washroom. As he did so he felt a sharp pain in the left upper part of his back near his shoulder. He felt another pain in his lower back as well followed by a burn or warmth at his neck. He reached up with his right hand and grabbed the area at his shoulder and came away with a hand covered in blood. He turned to his left towards Dawson who he said he realized had

stabbed him. He believes Dawson poked him again in the front in the area above his heart.

[45] His evidence was that he said something to the effect "You stabbed me" and grabbed Dawson's wrist which was holding the knife. He held the wrist with his two hands. The men went down to the ground at some point. He believes he was on Dawson's legs. He was more on top. He continued to hold Dawson's wrist. He says he was asking him to throw away the knife and saying that he had to go get himself medical attention. He said he was scared for his life as there was a lot of blood and he was on blood thinners. He claims that Dawson did not respond at first. Eventually he began to feel dizzy. He felt he had to get out of there and to a hospital. The men continued to be on the floor in the area between the end of the couch and the washroom door. He let go of Dawson and began to move away. He believes he may have turned away from Dawson as he began to move towards the kitchen and the back door. As he moved away across the living room, he says that he heard a rustle and then Dawson curse and threaten him and he believed he was beginning to move towards him with the knife.

[46] His account is that he grabbed the first thing that was handy which was a guitar that had been leaning up in the area of the TV stand. He took it by the neck and landed two blows on Dawson, fully shattering the guitar.

[47] His account of the blows indicated that the first was more right to left and the second said to be an over hand strike. He was asked where he struck Dawson and he indicated he could not say. Things happened too fast and he just wanted to put Dawson down and then get out of there. After striking these two blows he says Dawson was going down. He left immediately going out the back door to his truck. He drove himself to the hospital.

[48] His evidence was that he was in fear for his life. He wanted to get out of there and to help. He believed he was losing a lot of blood and he was very scared. He knew he needed help and as soon as possible.

[49] In cross-examination the Defendant was challenged on his account of events. It was put to him that it made no sense that Dawson would stab him out of the blue as he described. He reiterated his evidence that he was stabbed first. He had only made it five to seven steps towards the bathroom when he felt the strike into his left upper back/shoulder area. Crown suggested that he would

have been able to see Dawson on the couch for at least his first three steps. He said that he was near the end of the couch when he was stabbed first.

[50] Crown challenged him on his account of the timeline and his movements. Mr. Ruddick emphasised that things had happened very quickly, but he maintained his account of what had occurred, when the stabbing occurred and how the men ended up on the floor.

[51] It was suggested to the Defendant that it made no sense that at some point he chose to turn his back on Dawson after he let go of his wrist and turned to go to the kitchen and the back door. Ruddick said that he felt himself getting lightheaded and he decided he had to get out of there.

[52] With respect to the grabbing of the guitar and its use by Ruddick the suggestion of the Crown was that Ruddick actually used that once Dawson was no longer a threat to Ruddick. He denied this. He said it was used because he wanted to make sure the knife was not used on him again. The size difference between the men was put to him. He said that size is one thing but if someone wants to kill you, "…sometimes you have to do what you have to do and my motion [with the guitar] was so that he wouldn't stab me again."

[53] The Crown put it to the Defendant that Dawson's injuries must have come from more than two strikes from the guitar. He disagreed with this suggestion.

[54] I did note that when Crown appeared to catch Mr. Ruddick in something of an inconsistency over whether Dawson was crouching or going down after the first guitar strike, he appeared willing to shade his evidence to attempt to get out of that potential inconsistency. I noted that and have weighed it as part of my overall analysis.

[55] Before moving on to discuss some of my conclusions and findings about the evidence presented by each side, it will be helpful to discuss the offence charged here and the applicable law of self defence which must be applied.

Aggravated Assault - Applicable Law

[56] The charge before the court is one of aggravated assault. The relevant provision of the ***Criminal Code***, is as follows:

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

[57] The issue here is not whether these wounds suffered by Winston Dawson could rise to the level of an aggravated assault. They could. The injuries meet that standard and this was unchallenged. The issue is self defence.

Self defence Provisions and Application of the W.D. Analysis

[58] The self defence provisions of the ***Criminal Code*** are located in section 34. These provisions have received much recent attention from courts across the country as the section was rewritten by Parliament relatively recently.

[59] In setting out below the relevant principles I have drawn on the recent judgment of the Nova Scotia Court of Appeal in ***R. v. Levy***, 2016 NSCA 457.

[60] If the Court concludes there is an air of reality to self defence, no offence is committed unless the Crown disproves at least one of the following:

> 1) that the accused believed on reasonable grounds that force or a threat of force was being used or made against them or another person;
>
> 2) the accused's acts were done for the purpose of defending or protecting themselves or another;
>
> 3) the act was reasonable in the circumstances.

[61] With respect to the latter element, the trier of fact is directed to take into account the non-exclusive list of nine factors found in **s**. 34(2).

[62] This subsection provides as follows:

> 34. (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;

> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[63] The provisions of what is now section 34 of the ***Code*** came into force in 2013, as part of Parliament's effort to overhaul the self defence statutory regime by enacting a single unified section of the Code dealing with self defence.

[64] One summary of the provisions was expressed by the Ontario Court of Appeal in ***R. v. Bengy***, [2015] O.J. No. 2958. At paragraphs 28-29, the test for self defence was simplified into three basic requirements:

> i. reasonable belief, addressed by s.34(1)(a); i.e., the accused reasonably must believe that force or threat of force is being used against him or someone else;
>
> ii. defensive purpose, addressed by s.34(1)(b); i.e., the subjective purpose for responding to the threat must be to protect oneself or others; and
>
> iii. reasonable response, addressed by s.34(1)(c); i.e., the act committed must be objectively reasonable in the circumstances.

[65] In many cases the first two criteria will not be the major point of contention. The success of the defence will hinge on the third point - the reasonableness of the responsive act, as this inquiry is informed by the application of the listed factors.

[66] It has to be kept on mind that the presence or absence of any single factor is not determinative. The relevance of any factor, enumerated or not, is a matter for the trier of fact to determine.

[67] Other general principles and considerations relating to the application of section 34 include the following:

> • The provisions of section 34 do not have to be considered unless there is an "air of reality" to a claim of self defence; i.e., evidence before the court on the basis of which a properly instructed jury, acting reasonably, could base an acquittal if it were to believe the evidence to be true. See ***R. v. Osolin***, [1993] 4 S.C.R. 595 (S.C.C.) at p. 682; and **R. v. Cinous**, [2002] 2 S.C.R. 3 (S.C.C.), at paragraph 47. In making this initial determination, a trial judge will not weigh evidence, determine credibility, draw inferences, or assess the likelihood of success. See ***R. v. Kong***, [2006] 2 S.C.R. 347 (S.C.C.), adopting the dissenting opinion in ***R. v. Kong***, [2005] A.J. No. 981 (Alta. C.A.).
>
> • Section 34 describes a justification which would render the use of force lawful, based on the principle that it is lawful in defined circumstances to resist force or a threat of force with force; see ***R. v. Ryan***, [2013] 1 S.C.R. 14. As the prosecution must prove an unlawful act, it accordingly is for the prosecution, (where there is an air of reality to a claim of self defence), to negate that defence beyond a reasonable doubt. See ***R. c. Cinous***, *supra*, at paragraph 39.

• In other words, while self defence does require evidential support, the defence bears no legal burden of establishing the defence; i.e., the accused is not required to prove that he or she acted in self defence. The Crown instead bears the burden of establishing, beyond a reasonable doubt, that the defence is not available in the circumstances. In particular, the Crown must prove beyond a reasonable doubt that the accused does not meet all of the three cumulative and necessary conditions outlined in s.34(1) of the Code. If any one of those conditions is absent, the defence is disproven. See, for example: ***R. v. Avril***, [2015] O.J. No. 1675 (Ont. S.C.J.), at paragraph 11; ***R. v. Levy***, [2016] N.S.J. No. 211 (N.S. C.A.), at paragraph 107; and ***R. v. Johnson***, [2016] A.J. No. 1183 (Alta. Q.B.), at paragraph 16.

• It must be borne in mind that a person defending himself or herself against an attack is not expected to weigh to a nicety the exact measure of necessary defensive action or the consequences of such action. It accordingly is impermissible to assess an accused's response in that manner. The objective measure of proportionate force in self defence cases requires a tolerant approach. See ***R. v. Baxter***, [1975] O.J. No. 1053 (Ont. C.A.), at paragraph 45; ***R. v. Kong***, *supra*, (and in particular, paragraphs 208-209 of the dissenting opinion in the Alberta Court of Appeal, adopted by the Supreme Court of Canada); and ***R. v. Kraljevic***, [2016] O.J. No. 5853 (Ont. C.A.), at paragraphs 14-15.

• In considering the responsive force used, it is also important to take into account the entire situation, paying sufficient attention to the factual context and the entirety of evidence, and not artificially separate out or slow down the sequence of events; e.g., by viewing a fast-paced event on a frame-by-frame basis. See ***R. v. Quinn***, [2014] O.J. No. 4417 (Ont. C.A.), at paragraph 10; and ***R. v. Cunha***, [2016] O.J. No. 3321 (Ont. C.A.), at paragraphs 28 and 47.

[68] In ***The New Self defence Law: Progressive Development or Status Quo?***

(2014), Volume 92, Number 2, Canadian Bar Review 301, Professor Vanessa

MacDonnell considered and summarized the law of self defence as presently codified in section 34.

[69] The author concludes that its application requires a "contextual approach":

> The self defence provision is structured in two parts. Subsection (1) sets out the constituent requirements of self defence. The accused must believe on reasonable grounds that force is being used against him or her or against another, or that a threat of force of being made; the accused must have committed the offence for the subjective purpose of defending him or herself or another; and his or her actions must have been reasonable in the circumstances. Subsection (2) lists factors to consider in determining whether the accused's actions were reasonable. The list of factors is not "exhaustive."
>
> The new self defence provision asks whether the accused's actions were reasonable. Many of the factors that the trier of fact must consider in assessing reasonableness are familiar features of the law of self defence, including imminence, proportionality, and whether the accused had other options available to him or her. The difference between the old and the new provisions is that these features are no longer absolute requirements or barriers to making out self defence. They are "merely ... factor[s] that must be considered in determining whether any act of self defence is reasonable in the circumstances." The structure of the new provision thus gives the trier of fact some freedom to weigh these factors differently depending upon the circumstances of the case.
>
> Other factors contained in section 34(2) also signal a commitment to a contextual approach to self defence, such as "the size, age, gender and physical capabilities of the parties to the incident," "the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat," and "the history of interaction or communication between the parties to the incident." Although these factors have been considered in cases involving battered women since the Supreme Court's decision in Lavallee, the fact that they have been incorporated into the "general law of self defence" means that they will now be considered in all self defence cases, though again, the weight they are given will vary.

[70] In ***R. v. Evans***, 2015 BCCA 46 (B.C. C.A.), the British Columbia Court of Appeal suggested, at paragraph 19, that pursuant to the former self defence provision (section 37):

> The ultimate consideration was whether an accused had used 'proportionate force', but that by reason of the wording contained within the new s. 34(2)(g), proportionality is but one factor; the ultimate question now is whether the act was 'reasonable in the circumstances.'

[71] The Defendant in this case testified in his own defence. This means the Court will assess his evidence under what has come to be known as the "W.D." analysis. In ***R. v. N.M***, 2019 NSCA 4, the Nova Scotia Court of Appeal recently endorsed the restatement of this test as follows [para 67]:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.
>
> Thirdly, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
>
> Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

[72] The Court must never lose sight of the fact that the accused is to be regarded as innocent until proven guilty on a criminal standard. It is well established that while the Crown always has the burden of proving the essential elements of the offence(s) to a criminal standard, it is not required to prove

every single piece of the evidence beyond a reasonable doubt. See: Nova Scotia Court of Appeal in ***R. v. J.E.W.***, 2013 NSCA 19.

[73] In this particular case:

> • It would not be appropriate to decide this case by simply determining whether I accept or reject the testimony of the Defendant, including the assertions relating to necessary elements of the section 34 defence.
>
> • I instead have to consider all the evidence, and decide whether I have been satisfied beyond a reasonable doubt that all the essential elements of the crime charged have been established, and that the Crown has disproven at least one of the elements required for a successful section 34 defence.
>
> • Certainly, if I believe and accept the defendant's testimony, then I obviously must acquit.
>
> • However, even if I do not believe and accept the testimony, I must still acquit him of the crime charged if his testimony raises a reasonable doubt in my mind; e.g., as to whether the essential elements of the offence have been established, and as to whether the Crown has disproven any elements required for a successful section 34 defence.
>
> • Moreover, even if I do not believe his testimony, and the testimony does not leave me with a reasonable doubt, I must still ask myself whether, having regard to the evidence I do accept, and looking at the case in its totality, I am convinced that he is guilty beyond a reasonable doubt; i.e., because the essential elements of the offence have been established beyond a reasonable doubt, and the Crown has disproven, beyond a reasonable doubt, at least one of the elements required for a successful section 34 defence.

[74] Because this is one of those cases where two witnesses have two stories that diverge for a critical period, it could be tempting for the court to ask itself which story makes the most sense or is most likely to be correct and to resolve the case for or against the party whose story is not preferred.

[75] The Nova Scotia Court of Appeal in ***R. v. Brown,*** [1994] NSJ 269 (NSCA), cautioned: [para17]

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[76] Making a similar point, the Court of Appeal in ***R. v. Mah***, 2002 NSCA 99, stated:

> …..the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[77] The ***Mah*** case makes it clear that it is not the function of the Court on a criminal trial to "solve the mystery" and resolve the issues by picking the most likely version of the story. While doing so might be more satisfying at some level, it would be an error. The reason it would be an error is that it would remove the burden on the crown and create an onus on the defence which does not exist in law. The Court's proper function is limited to deciding whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt.

Analysis and Findings

[78] Keeping these principles in mind the court turns back to the facts and evidence as previously outlined.

[79] It is evident that both Revere Ruddick and Winston Dawson sustained serious injuries in their encounter of September 1, 2018.

[80] The men were acquaintances who were socializing and consuming alcohol after Mr. Ruddick carried out some maintenance work on Dawson's home.

[81] It is not possible to determine with precision how much alcohol was consumed by the men. It seems likely that the amounts consumed by each were similar. It is more difficult to extrapolate how the alcohol may have affected each of them.

[82] While neither may have been grossly impaired, both were clearly intoxicated.

[83] There was some tension beginning to exhibit itself between the men when they were outside. Mr. Dawson felt that Ruddick was making inappropriate comments to people either passing the property or nearby. Ruddick didn't think

he was being inappropriate. For instance, he knew the women who had driven by so there was nothing wrong with him inviting them for a drink. In any event, friction began to develop and at some point, Dawson asked Ruddick to leave.

[84] Once inside, Ruddick did appear to be dragging his feet on leaving. This was possibly to make a point about how he felt he was in the right. Dawson, he says, was the one making inappropriate comments about foreign telemarketers. Ruddick said he was going to finish his beer before going. The tension was up, and with both men drinking, the stage was set for the outburst of violence to follow.

[85] I have assessed each man's account of the events that followed in the area of the living room at or near the end of the coffee table and continuing off to the open area at the end of the couch and the area leading to the washroom.

[86] I have certain concerns about the evidence of both men. With respect to Dawson's evidence he obviously acknowledged that he did not remember portions of the encounter. He did appear to struggle with aspects of his evidence. It would be surprising if his functioning had not been impacted by his injuries. Defence counsel was successful in drawing out some instances of Mr.

Dawson not recalling prior accounts given by him including for instance evidence from the preliminary about how he would have shot Ruddick if he had had a gun.

[87] I conclude that while he may have been attempting to give complete evidence, recalled to the best of his ability, I have concerns about the reliability of portions of his evidence. He acknowledged a hazy memory. He could not give definitive evidence about how the other stab wounds to Ruddick were inflicted. He accepted the wounds could not have been from one stab.

[88] It is evident he has lost portions of what happened. Now I want to point out as well that he has no recall of some of the injuries he sustained. Based on this I can conclude that his failure of memory may not be strategic, but it still causes reliability concerns. As well his lack of memory covers the portion of the narrative that includes the portion where Ruddick says he further felt threatened and struck Dawson with the guitar. So, for that period we have the evidence of the Defendant who testifies he does have recall and advances an account that has to be analyzed through the WD lens.

[89] With respect to the Defendant, I do not accept all his evidence. I have previously set out instances where he appeared willing to parry with Crown

Counsel and minimize the degree to which he physically interacted with Dawson. I conclude that it is certainly possible that he pushed or punched Dawson prior to Dawson stabbing him the first time. He may be minimizing the number of swings he took at Dawson with the guitar. That is possible. Maybe even probable. But these concerns are not determinative of the ultimate issue before the Court.

[90] If this case were to be decided only by which man's evidence was more preferred overall, I would have preferred the evidence of the complainant, Winston Dawson. However, this is not a civil case and not the end of the analysis.

[91] I have not accepted the evidence of the Defendant as determinative and not being able to resolve the matter on an application of the initial elements of the WD analysis I must go on to consider whether the totality of the evidence in this case leaves me in reasonable doubt on the issue of self defence.

[92] I have weighed the findings of the Mader Report and the issue of how they impact my conclusions on the self-defense issue. The core conclusions of Mader include that a minimum of one strike caused the west wall blood stain pattern. As well the Report does not put Dawson on the ground during the

strike or strikes but rather could be consistent with a crouch position albeit closer to the wall than the account of Ruddick might suggest. On balance, however, the Report does not eliminate the concerns I have about whether the defence has been disproven by the Crown.

[93] The obligation on the Crown is a heavy one. Given that there is an air of reality to the self defence issue, the Crown must disprove at least one of the elements of the defence beyond a reasonable doubt.

[94] In submissions the Crown accepted that the critical element of section 34 on these facts is section 34(1) (c) – the issue of reasonable response. Given the evidence in this matter I think the Crown was correct to focus on this element.

[95] The position of the Crown is that Ruddick has lied to minimize the nature and degree of his response and that it was self-evidently disproportionate based on the seriousness and nature of Dawson's injuries.

[96] I have weighed each of the factors listed in section 34(2). Some are more material than others on these facts.

[97] With respect to the nature of the perceived threat, Ruddick had been stabbed with a knife. So, the nature of the force or threat was a serious one. To a large extent the use of the knife takes out of the equation the question of the relative

size and physical characteristics of the men. The introduction of the knife as a weapon was a force multiplier, in other words. But I have weighed the respective physical characteristics of the men and how the injury suffered by Ruddick impacts the consideration of this element.

[98] As directed by the section, I have weighed each of the elements in 34(2) including the men's respective roles in the encounter and have considered the proportionality questions as that element appears in 34(2)(g). In doing so, however, I am cognizant that by the time Ruddick laid hands on the guitar he was seriously wounded and bleeding heavily. I accept that Ruddick did begin to fear for his life. The amount of blood loss makes this reasonable.

[99] I am mindful of the case law we reviewed a few minutes ago on the application of the self defence provisions. I refer to a summary of the principles in cases such as ***R. v. Mohamad,*** 2014 ONCA 442, and the Nova Scotia Supreme Court in ***R. v. Grabosky***, 2019 NSSC 231.

[100] These direct that the reviewing court is not to hold those claiming to have acted in self defence to a standard of perfection when it comes to weighing the exact measure of necessary defensive action or the consequences of such action. The objective measure of proportionate force requires a tolerant approach. One

wonders how much more tolerant this becomes when the party is bleeding in the way Ruddick was.

[101] The Defendant argued that he wanted to put Dawson down so that he could get out and to the hospital. Defence argues his fear was objectively reasonable. He believed that he could be stabbed again, and his intent was defensive. The Defence relies on the caselaw that says exact weighing of the defensive response is not required and notes in particular the reference in ***R. v. Grabosky***, where Justice Rosinski comments that it would be an error to reject an accused's claim of self defence by parsing his reactions down to the split second thereby holding him to a standard of perfection. He also adopted the statement of the Ontario Court of Appeal in ***R. v. Mohamed*** that directs that in considering the reasonableness of a defendant's use of force, the court must be alive to the fact that people in stressful and dangerous situations do not have the time for subtle reflection. As Justice Paciocco noted in his much-quoted paper on the subject of section 34, the law recognizes that people who perceive themselves to be in a position of peril do not have time for full reflection and that errors of judgment will be made.

[102] It continues to be good law (as confirmed in the Mohamad decision, para 29) that in deciding whether the force used was more than necessary under s. 34,

the trier of fact must bear in mind that the person defending himself against an attack, reasonably apprehended, cannot be expected to weigh to a nicety the exact measure of necessary defensive action.

[103] As was said by the Nova Scotia Court of Appeal in ***R. v. Levy***, no offence is committed unless the Crown disproves at least one of the three elements of the defence of self defence, and this must be proved beyond a reasonable doubt. When I assess the totality of the evidence, I have concluded that the Crown has not carried its burden of displacing at least one of the elements in the s. 34 test beyond a reasonable doubt.

[104] The state of the evidence in this matter on the issue of self defence is such that it would be unsafe to convict. In all the circumstances, I have a reasonable doubt on the question of self defence.

Conclusion and Disposition

[105] With respect to the Indictment before the Court it is my determination that the Crown has not carried their burden on all the elements beyond a reasonable doubt.

[106] A finding of not guilty will be entered and the Indictment will accordingly stand dismissed.

J.