

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Barron*, 2021 NSSC 14

Date: 20210118

Docket: CRAT 491506

Registry: Antigonish

Between:

HER MAJESTY THE QUEEN

v.

JAMES TIMOTHY CECIL BARRON

DECISION

Restriction on Publication: s. 539(1) CC

Judge: The Honourable Justice N.M. Scaravelli

Heard: November 16, 17, 18, 2020, in Antigonish, Nova Scotia

Decision: January 18, 2021

Counsel: Jonathan Gavel, for the Crown
Godfred Chongatera, for the Defence

By the Court:

[1] James Timothy Barron is charged on a three count Indictment. Overcoming resistance for the purpose of committing the indictable offence of theft pursuant to Section 246(a) of the *Criminal Code*; aggravated assault contrary to Section 268(1) of the *Criminal Code*; and robbery contrary to Section 344(b) of the *Criminal Code*.

[2] Prior to trial, Mr. Barron filed and served a Notice of Constitutional Issue asserting Section 33.1 of the *Criminal Code* to be unconstitutional, in particular that self-induced intoxication is not a full defence that an accused lacked the general intent or voluntariness required to commit the offence which threatens or interferes with bodily integrity of another person.

[3] The issue before the Court in this trial is whether the accused was in a state of automatism at the time the events occurred that would negate the element of intent required to commit the offences.

Automatism

[4] The Ontario Court of Appeal in **R. v. Sullivan**, 2020 ONCA 333, reviewed the definition of automatism.

[2] Automatism is defined as “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action”: *R. v. Stone*, 1999 CanLII 688 (SCC), [1999] 2 S.C.R. 290, at para. 156, *per* Bastarache J. Involuntariness is therefore the essence of automatism. The “mind does not go with what is being done”: *Rabey v. The Queen*, 1980 CanLII 44 (SCC), [1980] 2 S.C.R. 513, at p. 518, citing *R. v. K.*, 1970 CanLII 431 (ON SC), [1971] 2 O.R. 401 (S.C.), at p. 401.

[3] Persons in a state of automatism may have the benefit of a “defence” when they engage in otherwise criminal conduct, even though automatism is not a justification or excuse: *R. v. Luedecke*, 2008 ONCA 716, 93 O.R. (3d) 89, at para. 56. Instead, automatism is treated as negating the crime. It is referred to as a defence because the accused bears the burden of establishing automatism. In *Luedecke*, at para. 56, Doherty J.A. explained the underlying principles:

A person who is unable to decide whether to perform an act and unable to control the performance of the act cannot be said, in any meaningful sense, to have committed the act. Nor can it be appropriate in a criminal justice system in which liability is predicated on personal responsibility to convict persons based on conduct which those persons have no ability to control.

[4] There are two branches to the defence of automatism. The mental disorder defence, codified in s. 16 of the *Criminal Code*, R.S.C., 1985, c. C-46, applies where involuntariness is caused by a disease of the mind, since those who are in a state of automatism are incapable of appreciating the nature and quality of their acts or of knowing at the time of their conduct that it is morally wrong [“mental disorder automatism”]. If successful, a mental disorder automatism defence will result in a not criminally responsible verdict, with the likelihood of detention or extensive community supervision.

[5] The alternative branch, the common law automatism defence, applies where the involuntariness is not caused by a disease of the mind [“non-mental disorder automatism”]. Where a non-mental disorder automatism defence succeeds, the accused is acquitted.

[5] Mr. Barron relies on non-mental disorder, automatism, as his defence. He contends that the combination of alcohol and seizures impaired his consciousness to the extent that he had no voluntary control over his actions.

Evidence

[6] On May 6, 2018, Dr. Faisal Rahman was at his residence with his family on Mount Cameron Circle, in the Town of Antigonish. Dr. Rahman and his spouse were getting ready to go out for the evening to visit friends. At approximately 9:30 p.m., Dr. Rahman left the house to move the family's SUV vehicle from the driveway into the garage with the intention of using the family sedan located in the garage for their visit.

[7] The SUV parked in the driveway was facing the street. Dr. Rahman approached the vehicle from behind and opened the back hatch door with the intention of raising the back seats. At that time, he noticed a person, he later identified as Mr. Barron, located on the passenger seat that was in a reclined position. He asked Mr. Barron "Who are you, how can I help you?". Mr. Barron turned his head and looked at him. Dr. Rahman then asked the person where he was from. The person replied that he was from Halifax and named a street.

[8] Dr. Rahman then asked what he could do for him. Mr. Barron responded “Give me the car keys”. Dr. Rahman, while still behind the vehicle, replied that he did not have the keys. He again asked if he could help Mr. Barron. The response was “No, I want the car keys”. Dr. Rahman said that he did not have the keys, that they were inside. (Although not expressed by Dr. Rahman, he meant inside his house.) Following the response, Mr. Barron started looking inside the vehicle for keys. He later got out of the driver side door and again demanded the keys. Dr. Rahman replied that he would not give him the keys. He could smell alcohol from the vehicle and observed Mr. Barron to be unstable on his feet. Dr. Rahman felt that Mr. Barron was not in any shape to drive.

[9] Dr. Rahman then told Mr. Barron that he would go inside the house and get “the keys”. He intended to lock the doors once he got inside. Mr. Barron replied that he would go in the house with him and stepped towards the house. Dr. Rahman stepped towards Mr. Barron. They were close. Mr. Barron became more agitated. He put his leg behind Dr. Rahman’s leg and pushed him to the ground causing him to land on the lawn. Mr. Barron then walked over, got on top of Dr. Rahman and began punching him in the face several times with his fists. During this altercation, Mr. Barron said “I want to teach you a lesson. Why did you lie to me?”. Dr. Rahman replied that he would give him the keys if he would stop hitting him. The punching

did not stop. As Dr. Rahman tried to move his position, Mr. Barron pinned him down with his forearm on his neck and began choking him with his forearm and at times with his hands. Dr. Rahman estimated that the attack lasted at least ten minutes.

[10] When Sobia Jamal, Dr. Rahman's spouse, left the house, she first heard noises and then saw her husband on the ground. Mr. Barron was sitting on top of him with his forearm against her spouse's neck while punching him in the face. Ms. Jamal screamed at him. Mr. Barron looked at her, stood up and stared at her before walking away.

[11] Dr. Rahman was transported to the hospital by ambulance. He did not lose consciousness. He testified that following the altercation, he was bleeding from the nose and mouth. He suffered bruises and lacerations, a fractured nose and the loss of two teeth. As well, dental implants were displaced when he was struck in the face. Dr. Rahman required dental surgery involving bone grafting and implants.

[12] Heidi Barron was called to testify on behalf of the Crown. Ms. Barron, 27 years of age, is the sister of James Timothy Barron. She testified that as a part of her graduation from St. Francis Xavier University, she attended a party at a residence at Mount Cameron Circle, Antigonish. Her parents and brother were there.

Everyone was consuming alcohol while there, including her brother. As everyone was mingling throughout the party, she was unable to comment on her brother's state of sobriety. Unknown to her, her parents took Mr. Barron's vehicle when they left the party. Ms. Barron testified that her brother left the party before she did. Later, the RCMP came to the house looking for him.

[13] The next time she saw her brother was after midnight at the graduation dance. She testified that he appeared confused and did not know how he got there. He did not know where he had been. She described him as being "out of it". There was a cut on his forehead.

[14] Under cross-examination by defence counsel, Ms. Barron testified that when her brother appeared after midnight, he knew she was looking for him. He answered her questions. The next day, Ms. Barron stated that her brother was confused, disoriented with no memory.

[15] She testified that her brother has had seizures since he was young. She had seen them before when she was 15 or 16 years old but nothing since. However, she has seen him the next day after he would have had a seizure. He would not remember what happened and was not himself.

[16] Sometime in early October 2018 while she and her children were cleaning the interior of the SUV, Ms. Jamal discovered a key ring with a set of keys. The RCMP were contacted and the keys turned over to them.

[17] Corporal Dollard arrived at Dr. Rahman's residence around 9:50 p.m. in response to the complaint. He observed Dr. Rahman's injuries and testified that he could detect a strong smell of alcohol inside the SUV. The driver's seat was fully reclined. He testified that the distance between the residence where the party was held and Dr. Rahman's residence would be less than a kilometer or a five minute walk. Corporal Dollard subsequently determined through a registration search, that the keys found in the Rahman SUV matched Mr. Barron's car, a Nissan sedan. Corporal Dollard travelled to Halifax, located the vehicle, unlocked the door and started the vehicle with the keys.

[18] Mr. Barron did not testify at trial.

[19] Dr. Michel Rathbone, a specialist in neurology, neuroscience and neuropharmacology, testified on behalf of the defence as an expert witness qualified to express opinion on seizures; complex partial seizures; and alcohol reacting with complex partial seizures causing non-mental disorder, automatism.

[20] The Crown waived the requirement for a voir dire and accepted Dr. Rathbone's qualifications to provide opinion evidence. Dr. Rathbone's qualifications and Curriculum Vitae were marked as exhibits. Dr. Rathbone provided a written report.

[21] Dr. Rathbone interviewed Mr. Barron who self-reported the following events on May 6, 2018.

Mr. Barron told me that on May 6, 2018 he was going to sister's university graduation. He said that he got up early, had coffee and left, arriving just in time for the start.

He and parents had a sandwich for lunch at 1-2 PM. Then he attended a party at a residence where he consumed 3-4 glasses of whisky (65% alcohol). He next recalls being at the auditorium for the dance. There someone asked if he was OK because he was bleeding from the right forehead. He found his sister. Then he vomited twice. He tried to eat, but vomited again continued to vomit until 9 or 10 AM the following morning. He said that he was vomiting blood.

Mr. Barron began looking for his car. He said that he had asking his parents to drive his car to his sister's residence after the graduation. By this time, the following morning, his parents were on the way to Mexico on plane.

Mr. Barron said that he Googled a towing company. They wanted him to talk to police, who arrested him, charging him with assault and robbery. He was told that at about 9:35 PM the previous evening he was found in someone's car, trying to steal it, and beat them up. This was before he went to the dance, where he was observed to have an injury to the right forehead.

Mr. Barron said he was taking anticonvulsants twice a day at the time of the incident. But he did not take them when he was drinking. He found valproic acid in his pocket the next morning.

Two days after the incident he still found everything looked too bright. He was told he had a concussion, and certainly this is characteristic of a concussion. One of his anticonvulsant medications (valproic acid) was below therapeutic level when assessed after the event.

[22] Dr. Rathbone received and reviewed “copious” medical records that showed that Mr. Barron had a long standing epilepsy disorder.

[23] Dr. Rathbone described the automatism state, where a seizure occurs, as a state of lower consciousness, not unconscious. The individual does not respond normally and is not aware of the environment. There would be no response to people speaking to them. The person would not be prone to violence unless interrupted where the person usually resists. Further, a person having a seizure would be confused afterwards for various lengths of time. He acknowledged that a large amount of alcohol consumption, itself, could cause confusion.

[24] Dr. Rathbone stated that alcohol consumption lessens the seizure threshold and makes it more probable that a seizure will occur. His report states “In my opinion, this is what occurred when Mr. Barron was at the party residence before the dance at the auditorium”. He goes on to conclude:

As a result of a seizure Mr. Barron would have no recall of the events and would be quite confused. His previous seizures were associated with prolonged loss of memory and confusion. Moreover, if the seizure began as a focal seizure from the right temporal lobe focus, those around him would likely consider his behaviours strange. From the neurological point of view, one or more seizures would certainly account for a memory loss before he arrived at the dance. In contrast although he consumed a considerable amount of alcohol at the party in the afternoon, it would be unlikely to have made him totally amnesic, and certainly not for that amount of time.

[25] Under cross-examination, Dr. Rathbone stated where a person acts under a state of automatism, he would not expect that person to make demands nor would he expect the person to take steps to enforce demands. He agreed that confusion can exist without a seizure and that depending upon the amount consumed, alcohol could cause a person's memory to deteriorate.

[26] Under re-direct examination regarding resistance exhibited by an automaton, Dr. Rathbone agreed that resistance could result in punching "but not an attack".

[27] Following conclusion of the evidence and prior to submissions, counsel submitted to the Court a signed "Agreed Statement of Facts". The document essentially acknowledges that identity is not an issue and that Mr. Barron recalled drinking 3-4 glasses of whisky, which he believed was 65% proof. Further, that Mr. Barron had no memory of leaving the party, attending the complainant's residence, attacking the complainant or how he arrived at the auditorium for the dance.

Analysis

[28] In preparing his report, Dr. Rathbone was not privy to the events that occurred at Dr. Rahman's residence on May 6, 2018. The weight to be assigned to expert opinion is related to the amount and quality of evidence upon which it is formed.

[29] Based upon the evidence, I am not satisfied on a balance of probabilities that Mr. Barron was in a state of impaired consciousness to the extent that he did not have voluntary control over his actions at the time of his altercation with Dr. Rahman. Based upon Dr. Rahman's evidence, Mr. Barron's impairment by alcohol likely caused his confusional state and lack of memory. There is no evidence that Mr. Barron was suffering a seizure at the time. In contrast to Dr. Rathbone's opinion as to what a person in the state of automatism would not do, Mr. Barron was able to make cogent verbal and physical responses when communicating with Dr. Rahman and throughout the assault, thereby demonstrating elements of decision making and control.

- He responded to the question of where he was from and what he wanted by stating he was from Halifax, naming a street, as well as repeatedly asking where the keys were.
- When Dr. Rahman told him the keys were inside, Mr. Barron began searching the interior of the vehicle.
- When Dr. Rahman said he would go inside the house to get the keys, Mr. Barron replied that he would go in the house with him and stepped toward the house.
- When Dr. Rahman stepped towards him, Mr. Barron responded by tripping him to the ground, getting on top of him and beating him.
- While beating him, Mr. Barron told Dr. Rahman that he would teach him a lesson for lying to him.
- Mr. Barron responded to Ms. Jamal's scream by stopping the assault.
- Mr. Barron was aware his sister was looking for him after he arrived at the dance and responded to her questions.

[30] As I have determined that Mr. Barron was not in a state of automatism at the time of the alleged offence, I need not consider the constitutionality of Section 33.1 of the *Criminal Code*.

Counts #1, #3

[31] The elements of the offences that the Crown is required to prove in Counts one and three are similar. They are set out in the Information as follows:

#1 That, on or about the 6th day of May, A.D., 2018 at, or near Antigonish, Nova Scotia, did with intent to enable himself to commit the indictable offence of theft did choke Faisal Rahman by placing his hands around his neck contrary to Section 246(a) of the Criminal Code;

...

#3 Furthermore at the same time, date and place: did assault Faisal Rahman with intent to steal from him contrary to Section 344(b) of the Criminal Code.

[32] Both counts assert violence against Dr. Rahman with the intent to commit theft/steal. Section 2 of the *Code* defines steal as committing theft. Section 343 provides that everyone who commits robbery, steals. Section 343(c) of the *Code* applies to Count 3 and provides that everyone commits robbery who assaults any person with intent to steal from him.

[33] The Crown, therefore, must prove beyond a reasonable doubt that:

1. Mr. Barron intentionally choked and otherwise assaulted Faisal Rahman;
2. Faisal Rahman did not consent to the force that Mr. Barron applied;
3. Mr. Barron intended to steal something (the SUV) from Faisal Rahman.

[34] Based on the evidence, I am satisfied that the Crown has proven beyond a reasonable doubt the first two elements of the offences in Counts 1 and 3. The issue becomes whether Mr. Barron intended to steal (the SUV) from Dr. Rahman.

[35] The only testimony in this regard is the evidence of Dr. Rahman. The Crown submits that Mr. Barron's demands for the keys while in the SUV, that has no resemblance to his Nissan sedan, establishes that Mr. Barron wanted the keys to the SUV that he was intending to steal. However, considering that Mr. Barron's first response to Dr. Rahman was to disclose the street and city where he lived and was willing to go into the house to retrieve the keys, coupled with the fact that his own car keys were subsequently found in the SUV, also leads to a possible inference that Mr. Barron, likely under the influence of alcohol, wanted and was searching for the "car keys" to his Nissan sedan. This raises doubt.

[36] As a result, I am not satisfied that the Crown has proven beyond a reasonable doubt that Mr. Barron intended to steal Dr. Rahman's SUV. Accordingly, I find Mr. Barron not guilty of both counts 1 and 3 of the Indictment.

[37] Mr. Barron is also charged in Count #2 with committing aggravated assault on Faisal Rahman:

#2 AND FURTHERMORE at the same time, date and place did in committing an assault on Faisal Rahman, wound, maim, disfigure or endanger the life of Faisal Rahman, thereby committing an aggravated assault contrary to Section 268(1) of the Criminal Code.

[38] Based on the evidence, I find that Mr. Barron intentionally and knowingly applied force to Dr. Rahman without his consent. He was agitated at not getting the keys and became more agitated when Dr. Rahman stepped towards him when he moved to go to the house to retrieve the keys.

[39] Mr. Barron then attacked and violently assaulted Dr. Rahman by repeatedly punching and choking him. The attack continued for a period of time despite Dr. Rahman's pleas for him to stop.

[40] However, in relation to the unlawful assault, is Mr. Barron guilty of aggravated assault or the included offence of assault causing bodily harm? In order to be found guilty of aggravated assault, Mr. Barron must have wounded, maimed,

disfigured or endangered the life of Dr. Rahman. Any one of these types of harm is sufficient.

[41] The evidence regarding Dr. Rahman's injuries came from his direct testimony which I repeat. He suffered bleeding from the nose and mouth. He suffered bruises and lacerations to his face as well as a broken nose and loss of two teeth and otherwise recovered.

[42] There is no evidence that Dr. Rahman's life had been endangered by Mr. Barron's assault nor am I satisfied that he was maimed or disfigured as a result. Therefore, the issue is whether his injuries constitute wounding.

[43] In the case of **R. v. MacNeil**, 2012 NSPC 106, the victim suffered a concussion, a cut near his eye, a brain injury and broken facial bones. His injuries healed after about two to four months. Before finding the accused not guilty of aggravated assault but guilty of the included offence of assault causing bodily harm, Provincial Court Judge Anne S. Derrick (as she then was) reviewed authorities dealing with the meaning of wounding in the context of an aggravated assault charge.

[10] Many cases, including *Vincent*, refer back to the Alberta Court of Appeal decision in *R. v. Littleton*, [1985] A.J. No. 256 which upheld a conviction for aggravated assault based on "wounding" where the victim, a correctional officer, had been assaulted by a prisoner and suffered a broken rib and fractured jaw, and a perforated ear drum that bled and was surgically repaired. He experienced constant ringing in his ear as a result of the assault. The court referred to him

having sustained “substantial trauma” to the area around his ear. (*Littletent*, paragraphs 2 – 4)

...

[12] In *S.E.L.*, the court held that “An appropriate modern definition of “wounding” is tissue injury that results in permanent damage or dysfunction”, which on the facts in *S.E.L.* would have required “sustained loss of vision or impairment to [S.E.L.’s daughter’s] brain.” The court in *S.E.L.* held that aggravated assault by way of “wounding” required that the injuries have a “lasting effect” on the victim. In noting the requirement for “permanent damage or dysfunction”, the court referenced the *Vincent* decision.

[44] Further, at paragraph 19:

[19] An assault is characterized as an aggravated assault when it involves injuries at the upper end of the injury spectrum, injuries that either endanger life, or disfigure, or maim, or wound. Surely then, wounding has to be bodily harm that sits at that end of the severity scale where disfigurement and maiming also belong.

[20] For the law to be coherent, there must be something that distinguishes wounding from serious bodily harm where the nature of the injuries alone do not make the distinction clear. In such cases, the distinguishing characteristic has to be the permanence or long-lasting effect of the injuries. In this respect I find the *S.E.L.* decision to be the most helpful to my analysis. ...

[45] I adopt the reasoning in **MacNeil** that there should be evidence of some degree of “permanence or long-lasting effect of the injuries” to constitute wounding under Section 268(1) as opposed to serious bodily harm. Although I would not characterize Dr. Rahman’s injuries as minor, I am not satisfied that the Crown has proved beyond a reasonable doubt that Dr. Rahman injuries constitute wounding.

[46] As a result, I find Mr. Barron not guilty of aggravated assault but guilty of assault causing bodily harm.

Scaravelli, J.