SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Muise, 2013 NSSC 351

Date: 20131031
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen

Crown

v.

Cody Alexander Muise

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 6, 2013, in Halifax, Nova Scotia
Counsel:	Christine Driscoll and Darrell Martin, for the Crown Peter Planetta, for the Defendant

By the Court:

[1] This is a decision to address the question: should Sections 34(2) and 35 of the *Criminal Code of Canada*, the self defence provisions be put to the jury in this case?

[2] Mr. Muise is charged with first degree murder on the basis that it was planned and deliberate.

[3] His counsel argues that both of these provisions should be put to the jury.

[4] The Supreme Court of Canada majority in *R. v. Cinous* [2002] 2 SCR 3, stated at paragraph 124:

> Self defence under s. 34(2) provides a justification for killing. A person who intentionally takes another human life is entitled to an acquittal if he can make out the elements of the defence. This defence is intended to cover situations of last resort. In order for the defence of self-defence under s.34(2) to succeed at the end of the day, a jury would have to accept that the accused believed, on reasonable grounds, that his own safety and survival depending on killing the victim at that moment.

. . .

[5] The Court also notes at paragraph 107:

> …that the existence of an actual assault is not a pre-requisite for a defence under s. 34(2). Rather, the starting point is the perspective of the accused. Lamer C.J. stated at p. 13:

> The question that the jury must ask itself is therefore not "was the accused unlawfully assaulted?" but rather "did the accused reasonably believe, in the circumstances, that he was being unlawfully assaulted?"

[6] At paragraph 93, the Court set out the constituent elements of Section 34(2):

. . .

> "(1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary." All three of these elements must be established in order for the defence to succeed. The air of reality test must therefore be applied to each of these three elements. If any of these elements lacks an air of reality, the defence should not be put to the jury.

[7] Stated differently by Justice Doherty in the Ontario Court of Appeal in *R. v. Pilon* 2009 ONCA 248 at para. 64:

> The trial judge properly instructed herself that s.34(2) could only be left with the jury if, on the totality of the evidence, there was an air of reality to that defence. … She identified and applied the air of reality analysis (paras. 33-55) holding that the defence could go to the jury only if there was evidence upon which a properly instructed jury, acting reasonably, could have a reasonable doubt with respect to each of the constituent elements of s.34(2). …

[8] And at para. 66:

> While the trial judge properly considered the entirety of the record, she correctly focused on the evidence concerning the appellant's state of mind when the fatal shots were fired. The defence of self-defence is only available if in the evidence there is a basis to conclude (or at least have a reasonable doubt) that the appellant had the required reasonable apprehension and reasonable belief when he fired the fatal shots. The events leading up to the shooting, the prior history between the parties, McKinnon's habit of carrying a gun and his violent disposition provide important context. However, the justification for killing as defined in s.34(2) must exist when the fatal shot is fired. It is irrelevant to the availability of the defence that

> on the evidence the defence may have been available at some point earlier in the confrontation.

[9] And at para. 68:

> I see no error in this part of the trial judge's analysis. Self-defence is a justification based on the necessity of self-preservation. The rationale underlying that self-preservation is fundamentally at odds with the motivation of one who attacks and kills another.

[10] Justice Doherty went on then to consider another issue. He notes at para. 70:

> Counsel next argues that the trial judge unfairly limited the subjective component of the s.34(2) defence when, at para. 53, she declined to factor into her assessment the attitudes and beliefs of the criminal sub-culture in which the appellant lived.

[11] Justice Doherty adopted the words of Justice Binnie in his concurring reasons in *Cinous* at para. 130:

> …the only way the defence *could* succeed is if the jury climbed into the skin of the respondent and accepted as reasonable a sociopathic view of appropriate dispute resolution. There is otherwise no air of reality, however broadly or narrowly defined, to the assertion…[of self-defence].

[12] Justice Doherty went on to say at paras. 73 to 75 in *Pilon*:

> [73] … The reasonableness standard ensures that the self-defence justification will not extend to killings committed in circumstances that the community, as represented by the jury, regards as unreasonable and beyond the pale of any acceptable justification.
>
> [74] The reasonableness inquiry is not, however, purely objective. … the jury must consider the relevant circumstances as the accused perceived those circumstances. The jury then tests that perception against the community standard of reasonableness.
>
> [75] I see a world of difference, however, between testing the reasonableness of an accused's apprehension and belief in the circumstances as the accused

> perceived them, and testing the reasonableness of that apprehension and belief in light of the appellant's personal moral code or world view. It may well be, given the criminal sub-culture in which the appellant operated, that he lived by the motto "kill now or be killed later". In assessing the reasonableness of the appellant's conduct, however, the jury cannot accept that motto. To do so would effectively eliminate the "reasonableness" requirement form the defence of self-defence.

[13] Turning then to the case at Bar, all counsel agree that Mr. Muise arguably reasonably believed he was under assault by Mr. Hatcher on December 3rd, 2010 immediately prior to his firing up to 12 rounds from his M1 rifle in the direction of Mr. Hatcher, one of which struck and killed Mr. Hatcher.

[14] Secondly, as to whether Mr. Muise had a reasonable, that's subjectively and objectively, apprehension of risk of death or grievous bodily harm given: the evidence that Mr. Hatcher discharged his pump action shot gun first; the history of violence between Mr. Muise and Mr. Hatcher, including the likelihood that Mr. Hatcher previously attempted to shoot Mr. Muise on October 16, 2010 and wounded thereby, his girlfriend, Sarah Oakley instead, as well as the three shot gun blasts into a hang out frequented by Mr. Muise and his friends and in which he had just been an hour earlier, also likely by Mr. Hatcher on December 3rd ; and given the evidence of the building animosity between the two since Mr. Muise got out of jail in mid-November 2010 as captured by the text messages in evidence and the conduct of the two; I conclude that there is an air of reality to this constituent element of s. 34(2).

[15] Thirdly, as to whether Mr. Muise had a reasonable belief, subjectively and objectively, that it was not possible to preserve himself from harm except by killing Mr. Hatcher, I keep in mind particularly the comments from Justice Doherty in *Pilon* regarding the "kill now or be killed later" criminal subculture mentality. At this stage, the question is whether there is merely an air of reality to Mr. Muise's claim that he had such a subjective and objective belief at the time he fired the two bursts from his M1 rifle in the direction where he believed Mr. Hatcher was.

[16] The Crown makes the point that there is no air of reality to this element of self-defence because there is unequivocal evidence that Mr. Muise believed Mr. Hatcher likely wanted to cause him grievous bodily harm or death, yet Mr. Muise sought out Mr. Hatcher whom he believed would be armed with a firearm, by specifically travelling on foot to Mr. Hatcher's neighbourhood and very close by to his actual residence in the darkness of night; answered Mr. Hatcher's telephone call to Mr. Muise and specifically told Mr. Hatcher that Mr. Muise was in the vicinity "out back"; and that Mr. Muise with Mr. Matt Munroe and Mr. Ryan MacDougall took out

positions behind rocks in an elevated position about 180 feet away from where they expected Mr. Hatcher would likely arrive and laid in wait for him.

[17] The Crown says that there can be no air of reality to the claim that Mr. Muise's subjective belief that once he heard a gunshot from Mr. Hatcher's direction that he had to "protect myself before I get killed; instinct takes over." It says that Mr. Muise intended a violent confrontation with Mr. Hatcher and even when it occurred, his firing of his M1 rifle at Mr. Hatcher's direction could not in the circumstances be the basis for a claim of self-defence because a subjective belief could in no circumstances be considered reasonable.

[18] While Mr. Muise could not claim a reasonable belief by relying on a pre-emptive strike rationale against Mr. Hatcher in these circumstances, the evidence suggests that Mr. Hatcher fired his shot gun first, and he was known to have similarly disposed associates living in that neighbourhood with him. Therefore, on the low threshold of the air of reality test, it is not possible for me to conclude that there is no basis on the evidence for a properly instructed jury acting reasonably to conclude that they could have a reasonable doubt with respect to this constituent element of s. 34(2) of the *Criminal Code* .

[19] Therefore, each of the constituent elements of s. 34(2) have been found to have an air of reality and the defence must be put to the jury.

[20] The defence also argued that it put s. 35 of the *Criminal Code* to the jury. In my view, given the greater complexity of that provision, coupled with the arguably no material advantage to the accused in the circumstances, that I can envision, I am not prepared to put that defence to the jury.

Rosinski, J.