SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Cromwell, 2014 NSSC 144

Date: 20140320
Docket: CRH 413196
Registry: Halifax

Between:

Her Majesty the Queen

v.

Aidan David Cromwell

Judge: The Honourable Justice Glen G. McDougall

Heard: Wednesday, March 19, 2014, in Halifax, Nova Scotia

Written Decision: May 12, 2014

Counsel: Christine Driscoll and Rick Woodburn, for the Provincial Prosecution Service
Patrick MacEwen, for Aidan David Cromwell

By the Court:

[1] The Court has been asked to decide if the defence of self-defence and that of provocation should be put to the Jury.

[2] The Crown argues that both defences lack an air of reality based on the lack of evidence in the record on which a reasonable trier of fact, properly instructed in law and acting judicially, could conclude that the defence succeeds.

[3] Defence counsel argues the contrary while pointing to evidence that, if believed by the Jury, could support a favourable finding for the accused.

[4] Defence counsel also asked the Court to include in its charge instructions related to whether the Crown has proved beyond a reasonable doubt that the accused had the state of mind required for murder.

[5] The crime of murder requires proof of a particular state of mind. For an unlawful killing to be murder Crown counsel must prove that the accused either meant to kill Mr. Tremblay or meant to cause him bodily harm that he knew was likely to kill him and was reckless whether Mr. Tremblay died or not. In other words, Mr. Cromwell saw the likelihood that Mr. Tremblay could die from the injury but went ahead anyway and took the chance.

[6] This is an essential element of the offence of murder and must be proved by the Crown on the criminal standard of proof beyond a reasonable doubt.

[7] It will form part of my charge to the Jury.

[8] I will now turn my attention to the two potential defences raised by counsel for Mr. Cromwell.

[9] I will begin with a general discussion of the law that pertains to both self-defence and provocation.

[10] The former provides a complete defence to the alleged offence while the latter, if not disproved by the Crown, serves to reduce what would otherwise be murder to manslaughter.

[11] I should first of all distinguish between the legal burden of proof and an evidential burden.

[12] The legal burden is the obligation put on a party to prove or disprove the existence or non-existence of a fact or issue to the criminal standard

[13] An evidential burden, which in this particular instance is on the Defence, rests on a test to determine whether there is evidence which gives an air of reality to the defence. If the evidential burden is met, the defence will be left for the Jury to decide with instructions that the Crown bears the burden of negating it.

[14] Generally speaking the legal burden of proof in relation to the essential elements of an offence rests upon the prosecution whereas the evidential burden in respect of a defence rests upon the Defendant. The Defence does not, generally speaking, bear the legal burden to prove a defence.

[15] In **R.** v. **Fontaine**, [2004] 1 S.C.R. 702, it was made clear that an evidential burden is a matter of law.

[16] To decide whether an evidential burden has been discharged on any defence raised by the Defendant, a trial judge should ask him or herself:

> Is there any evidence in the record on which a reasonable trier of fact, properly instructed in law and acting judicially, could conclude that the defence succeeds?

[17] According to Watts' Manual of Criminal Evidence, 2010, Carswell at section 16.03 on p. 166:

> The trial judge must assume the truth of the evidence that tends to support the defence and leave the reliability, credibility and weight of the evidence to be determined by the trier of fact.

[18] Despite the recent changes to the self-defence provisions of the **Criminal Code** the "go-to" case in applying the air-of-reality test is **R.** v. **Cinous**, [2002] 2 S.C.R. 3. The majority decision co-authored by Chief Justice McLachlin and Justice Bastarache (as he then was) states at para 50 and 51:

> 50 The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. This venerable rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict. Following *Pappajohn, supra*, the inquiry into whether there is an evidential foundation for a defence is referred to as the air of reality test. See *Park, supra*, at para. 11.
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> 51 The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu, supra; Squire, supra; Pappajohn, supra; Osolin, supra; Davis, supra.* This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1.
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> (My Emphasis)

[19] At paras. 53 and 54, the majority of the Supreme Court said this:

> 53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin, supra; Park, supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin, supra; Park, supra; Davis, supra*.
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> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra; R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park, supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[20] "It is an error of law to put to the Jury a defence lacking an air of reality just as it is an error of law to keep from the Jury a defence that has an air of reality." [Reference para. 55 of **Cinous**, *supra*]

[21] **Cinous**, *supra*, has been applied and continues to be applied in cases that deal not only with self-defence but also with other defences including provocation.

[22] As Justice Saunders said in **R.** v. **Chan**, 2005 NSCA 61 at para. 15:

> 15 The "air of reality" test applies to all defences, including self-defence, so that any defence which meets the test must be placed before the jury; those that don't should not.

[23] Justice Saunders also stated this at para. 21:

> 21 ...The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue. Thus, the air of reality test is not intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed. *Cinous* at para. 54.

[24] At para. 22, Justice Saunders went on to state:

> 22 The term "air of reality" means that the trial judge must decide whether the inferences required to be established for the defence to succeed can reasonably be supported by the evidence. The question is whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true. **Cinous ¶** 86; **R. v. Osolin**, [1993] 4 S.C.R. 595 at 682.
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> 23 Finally, the determination of whether there is an evidential foundation warranting that a defence be put to a jury mandates a two-pronged question:
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> > ... whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused.
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> ...

> ... Before putting a defence to a jury, it is the trial judge's duty to ask not just whether there is evidence in some general sense, but whether there is evidence that is reasonably capable of supporting an acquittal. This requires an assessment of whether the evidence relied upon is reasonably capable of supporting the inferences required for the defence to succeed.

Cinous, at ¶ 82-83.

[25] Although the fact that the accused did not testify in this case was not raised by Crown counsel as a reason for concluding that there is no air of reality and as a result the two defences should not be put to the Jury, Justice Saunders had to deal with this in **Chan**, *supra*, at paras. 47 and 48:

> 47 The thrust of the Crown's complaint, focussed as it is on each of the three constituent elements of self-defence under s. 34(2) but more particularly at this third stage requirement, is that because Chan did not testify, and there was no other evidence (in the Crown's view) concerning his subjective frame of mind, there was therefore no basis for the trial judge to determine how Chan perceived the altercation he faced, or the reasonableness of that perception, leaving no air of reality to his claim of self-defence.
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> 48 I reject the Crown's submission. This was virtually the same assertion dismissed by the Ontario Court of Appeal recently in **R. v. LaKing** (2004), 185 C.C.C. (3d) 524 (Ont. C.A.). I adopt the following statement from the judgment of Simmons, J.A., (Rosenberg and Moldaver, JJ.A. concurring):
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> > ... While it may be difficult if not impossible in some circumstances to assess an accused person's state of mind in the absence of direct evidence from the accused, where circumstantial evidence is available, it is open to a trier of fact to draw inferences concerning an accused person's mental state based on that evidence: see R. *v. Mitchell*, [1965] 1 C.C.C. 155 (S.C.C.), and *R. v. Cinous*, at para. 89.
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> (**LaKing** at ¶ 54)

[26] In the case that is before this Court the audio/visual recording of the police interview of the accused was played for the Jury. I instructed the Jury on how they could consider the accused's comments and how they should only use the comments of those who also appear on the recording for context and not for truth.

[27] In it the accused admitted his involvement in the tragic death of Mr. Tremblay. He stated that he was fearful of what he perceived to be a threat from a much larger man. One who was accompanied by another man who testified that he was only trying to convince his friend to stop pursuing the accused and his female companion.

[28] In his police interview Mr. Cromwell expressed not only concern for his own personal safety but also concern for his girlfriend's safety.

[29] The subjective test of reasonableness incorporated in sub-sections 34(1) and (2) of the **Criminal Code** can be satisfied for purposes of deciding whether there is an air of reality to both self-defence and provocation.

[30] Ultimately it will be left to the trier of fact to decide whether or not to believe what the accused said in giving his statement to the police investigators on the morning following the stabbing incident.

[31] The objective component of the defence of self-defence must also be considered not only at this stage but ultimately by the Jury when it embarks upon its' final deliberations.

[32] If self-defence goes to the Jury, it will have to collectively decide if what Mr. Cromwell claims to have been done in self-defence is reasonable in the circumstances.

[33] They will not only have Mr. Cromwell's interview to consider. They will have to consider the testimony of Robert MacDonald as to what he observed and overheard that night both from his friend, Marc Tremblay and the accused, Aidan Cromwell.

[34] There is also testimony of various police officers who were asked questions in cross-examination by Defence counsel based on their experience involving physical altercations in the Metro area.

[35] There is also the evidence of the Chief Medical Examiner, Dr. Matthew Bowes, that must be considered in determining the objective and perhaps the subjective reasonableness of the defence of self-defence

[36] Also there is actual video of the area where the alleged offence took place as captured on the security camera in the apartment building that Mr. Tremblay and Mr. MacDonald earlier exited from.

[37] This is at least some of the evidence that the Jury can consider in deciding whether Mr. Cromwell was justified in using the force he felt was necessary to protect himself and his girlfriend from this perceived threat by Mr. Tremblay.

[38] The strength of this defence is not for me to determine. It should be left to the Jury.

[39] The evidential burden on the Defence to show there is an air of reality to the defence of self-defence has been met. It will be up to the Jury to decide if the Crown has met its legal burden to negate it.

[40] Similarly, with the defence of provocation, given the evidence of what Mr. Cromwell says Mr. Tremblay said to him just prior to the confrontation that ended with Mr. Tremblay's tragic death along with Robert MacDonald's evidence of what he overheard his friend say and do and what he heard Mr. Cromwell say and do it too should be put to the Jury.

[41] The Jury should decide if there was a wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control and if the accused acted on it on the sudden and before there was time for his passion to cool. In other words, do the conditions necessary to show there was provocation exist? The evidential burden to establish an air of reality rests on the Defence. The legal burden to disprove it rests with the prosecution.

[42] For these reasons I have decided that the defence of self-defence and the defence of provocation will be put to the Jury.

[43] The essential element of the accused's state of mind to commit murder will be part of my charge. It will be discussed after I instruct them on the requirement for the Crown to prove beyond a reasonable doubt that the accused caused Mr. Tremblay's death unlawfully.

[44] Before dealing with this element of the offence, I will instruct the Jury on the defence of self-defence for if they are not convinced by the Crown that what was done was not done in self-defence or if they are left in doubt then they will have to acquit the accused. At that point there would be no need for the Jury to go on to decide if the death of Mr. Tremblay at the hand of Mr. Cromwell was unlawful.

[45] I want to thank counsel for their submissions and the cases that were referred to me. Although I did not specifically refer to **R.** v. **Ward**, 2001 NSCA 78 and **R.** v. **Colley**, 2011 NSSC 135 I did read them overnight and I considered them in making this ruling.

Glen G. McDougall, J.