

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Snyder, 1996 NSCA 266

Clarke, C.J.N.S., Hart and Matthews, J.J.A.

BETWEEN:

WENDELL SNYDER)	
R. Andrew Kimball)	
)	for the Appellant
)	
Appellant)	
)	
- and -)	
)	Denise C. Smith
)	for the Respondent
HER MAJESTY THE QUEEN)	
)	
)	Respondent
)	Appeal Heard:
)	November 27, 1996
)	
)	Judgment Delivered:
)	November 29, 1996
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THE COURT: Appeal allowed, the conviction set aside and an acquittal entered per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Hart, J.A. concurring.

MATTHEWS, J.A.:

A judge of the Provincial Court found the appellant guilty of assaulting Charles Zwicker using a weapon, his dog, contrary to s. 267(1)(a) of the **Code**.

In doing so she found that the appellant's dog, with the appellant's "encouragement, attacked and bit" Zwicker, "who, at the time, was engaged in verbally taunting and threatening" the appellant. She also held that:

However, it seems clear that, despite Mr. Zwicker's undoubted provocation, the force used by the defendant here was more than was necessary for either self-defence or defence of property. Mr. Zwicker had no weapon and was doing no more than uttering obscenities and a generalized threat to "get" the defendant. The defendant had a clear opportunity to withdraw from the situation, and did so when he went into his house. But instead of staying there and calling the police, he chose to go back out with his tape recorder and a knife. Under these circumstances, the defence of self-defence is not available to the defendant.

An essential ingredient of the offence is: on the facts of this case, is the dog a weapon.

Unfortunately neither counsel at trial nor the trial judge addressed that issue. On appeal, Crown counsel forthrightly did and added this to the eight issues raised by the appellant.

In the Crown's factum, counsel remarks:

The appellant has not raised as an issue whether there is evidence to support a finding that the appellant had the means of controlling the dog, such that the appellant could form an intent to apply force to the complainant and expect that the dog, his "weapon" would carry it out. However, the respondent submits that whether an animate object, a dog, can be a weapon within the meaning of s. 267(1)(a) of the **Criminal Code**, as the learned trial judge implicitly found, is a live issue in this appeal.

In order to hold the appellant guilty of the offence, it is necessary to find as a fact that the appellant had the intention, and the means to effect that intention, to apply force (an assault) to Zwicker through his dog. That is a function of a trial judge, not this Court.

The respondent also correctly observed:

1. that the trial judge "appears to equate the finding that more force than necessary was used, with the failure of the appellant to retreat".
2. that the trial judge's statement that Zwicker "had no weapon and was doing no more than uttering obscenities and a generalized threat to 'get' the defendant" ... "does not demonstrate that she took into account the Appellant's state of mind based on the prior history between he and the Complainant: **R. v. Petel** (1994), 87 C.C.C. (3d) 97 (S.C.C.)."

We add that the trial judge apparently failed to consider whether the accused, facing the threats on his life as uttered by Zwicker in all of the circumstances here, cannot be expected to weigh with nicety the exact measure of responsive force.

The respondent submits that the cumulative effect of the trial judge's failure to address these issues is such that the appeal should be allowed.

We agree. In consequence, we allow the appeal, set aside the conviction and enter an acquittal.

Matthews, J.A.

Concurred in:

Clarke, C.J.N.S.

Hart, J.A.

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Appellant

- and -

HER MAJESTY THE QUEEN)

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) REASONS FOR
JUDGMENT BY:

)
) MATTHEWS,
J.A.
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