S.C.C. No. 02647

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Hart and Freeman, JJ.A.
Cite as: R. v. Westhaver, 1992 NSCA 49

B E T W E E N:

RONALD LESTER WESTHAVER	)	Alan G. Ferrier
	)	for appellant
appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Dana W. Giovannetti
	)	for respondent
respondent	)	
	)	
	)	Appeal Heard:
	)	December 8, l992
	)	
	)	Judgment Delivered:
	)	December 8, l992
	)	
	)	

THE COURT: Appeal allowed from conviction for assault causing bodily harm, force not unreasonable in

circumstances; per oral reasons for judgment of Freeman, J.A.; Clarke, C.J.N.S., and Hart, J.A., concurring.

FREEMAN, J.A.:

Confronted by an aggressive 300-pound assailant on the crowded deck of a lounge after closing time, the appellant grabbed a heavy wooden doorstop and clubbed him with it three times; the assailant dropped to one knee but continued to threaten the appellant, destroying his jacket in a scuffle and chasing him for several blocks before he was rescued by a friend in a vehicle.

The assailant, Jeffrey Langille, suffered a cut forehead requiring 30 to 40 sutures; later he was diagnosed to have a fractured skull. The appellant appeals from his conviction on the following charge;

> "That he (Ronald Westhaver) did at or near Liverpool in the County of Queens, Nova Scotia on or about the 10th day of December, 1990 did in committing an assault on Jeffrey Langille cause bodily harm to him contrary to Section 267 (1)(b) of the **Criminal Code**."

The trial judge referred to s. 34(1) of the **Code**, which provides:

> "34. (1)d Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself."

He found that Mr. Westhaver was unlawfully assaulted, without having provoked the assault, and had no intention of causing death or grievous bodily harm. However he found that three blows represented more force than necessary, although the first blow was justified.

The difficulty with this reasoning is that there is no finding and little evidence as to which blow caused the bodily harm, the first justified blow or the subsequent unjustified ones. While the judge suggests, without making a finding, that Mr. Westhaver may have been able to escape after the first blow, it is clear the first blow was not sufficient to subdue his assailant.

Other findings by the judge make it clear that Mr. Westhaver found himself in a dangerous situation:

> "I make the following findings of fact:
>
> > I find that Mr. Langille had consumed approximately 20 ounces of alcohol over a 12 to 14 hour period during that day. I find that he bought eight doubles of drinks when he went into the bar of which he consumed six. I find that when he came out of the bar that he urinated over Peter Ozon not accidentally, but intentionally. I find that they got into a fight at which time Mr. Ozon got hit in the face a number of times which caused him to have black eyes and a cut on his face. I find that Mr. Langille moved towards Mr. Murray Westhaver, pushing him out of the way and went forward towards Ronnie Westhaver. I note from the evidence and I think it's important to note that Mr. Langille's weight at that time was approximately 300 pounds and I also find from the facts that he was very upset and very agitated at that time and I think in a mood of going after people. . . . I find that after the episode was over that Mr. Westhaver left and that even though that Mr. Langille was seriously injured that he continued to follow Mr. Ronnie Westhaver and chased after him in, in sort of a rage and was not able to be contained. . . . "

The onus is on the Crown to prove beyond a reasonable doubt that self defence under s. 34 is not available to the appellant. See **Latour v. R,** 11 C.R. 1 (S.C.C.) at p. 11; **Nadeau v. R.,** 42 C.C.C. (3d) 305 (S.C.C.).

The trial judge considered that the appellant could have retreated after the first blow was struck. It appears

from the evidence that Mr. Westhaver would have been happy enough to have done so if he had thought that option had been open to him. Failure to retreat does not necessary preclude a defendant from relying on s. 34; see **R. v. Deegan**, [1979] 49 C.C.C. (2d) 417 (Alta. C.A.), nor must an accused be reduced to a state of frenzy **R. v. Antley**, [1964] 2 C.C.C. 142, 42 C.R. 384, [1964] 1 O.R. 545 (C.A.)

Section 686(1)(a)(i) authorizes a court of appeal to set aside a verdict on the ground that it is unreasonable or cannot be supported by the evidence. The method to be followed in applying that section is set out in **R. v. Yebes** (1987), 59 C.R. (3d) 108. McIntyre, J. stated at p. 120:

> "The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. The process is the same whether the case is based on circumstantial or direct evidence."

We have re-examined and in a limited way re-weighed the evidence. It is confusing and contradictory, but no more so than usual in descriptions of scuffles long after the event by witnesses many of whom were partisan and/or in various stages of intoxication. What is clear is that Mr. Westhaver found himself in peril, threatened by a powerful and aggressive adversary who had consumed a large quantity of alcohol and who was in a rage which could not be contained. The trial judge made no findings as to credibility, but appears to have accepted the evidence of the appellant. We are of the opinion that a properly instructed jury, acting judicially, could not have been satisfied beyond a reasonable doubt that Mr. Westhaver used more force than necessary to enable him to defend himself. The verdict of guilty is set aside and an acquittal is entered.

Freeman, J.A.

Concurred in: Clarke, C.J.N.S.

Hart, J.A.

S.C.C. No. 02647

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

B E T W E E N:

RONALD LESTER WESTHAVER	)	REASONS FOR
	)	
- and -	)	JUDGMENT BY:
	)	
HER MAJESTY THE QUEEN	)	FREEMAN, J.A.
	)	
	)	(ORALLY)