(56)

1972 S. H. No. 01041

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION — CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

v.

RICHARD BRUCE STEELE

Respondent

[Oral Opinion]

McKINNON, C.J.N.S.:

The respondent was charged on July 31, 1972, that he:

"at or near Sydney River in the County of Cape Breton, Nova Scotia, on or about the 27th day of July, 1972, did unlawfully commit an assault on James Ross Latham and caused him bodily harm, contrary to section 245 (2) of the Criminal Code of Canada".

The respondent appeared before His Honour Judge Charles O'Connell on September 21, 1972, and elected to be tried by a magistrate without a jury.

The learned Magistrate found the respondent not guilty.

This is an appeal by the Crown against acquittal.

The facts are:

On the evening of July 27, 1972, James Ross Latham and a group of friends were in the Peacock Beverage Room of the Paridot Tavern, which is located at Sydney River, Cape Breton County, Nova Scotia. Latham had been drinking with a friend since midday. By evening he described himself as "feeling good".

Leave to appeal is granted.

We consider it necessary to deal only with the first ground of appeal.

The learned trial Judge in giving his reasons for judgment, stated as follows:

> "Upon review of the evidence I am satisfied that on the night in question that James Ross Latham was the author of his own misfortune. He provoked the assault by saying what he did to Steele about his wife, which resulted in my opinion in a temporary loss of self-control and the retaliation used was not excessive."

At common law, the use of insulting words did not constitute provocation: see Taylor v. R., [1947] S.C.R. 462; and therefore it must be governed by the provisions of the Criminal Code.

Section 36 of the Code states:

> "36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures."

However, sections 34 and 35 state:

> "34. (1) 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.
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and
>
> (b) he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

"35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose."

Neither of these sections would appear to apply to the case before us. Section 215 also provides that a wrongful act or insult may constitute provocation, but that section is limited in its application to cases of culpable homicide.

It appears, therefore, that the use of insulting words directed at the appellant did not provide him with a valid defence to the charge. Mere words could never amount to an assault. There would have to be some act indicating an intention of assaulting or which an ordinary person might reasonably construe as indicating such an intention, or some act amounting to an attempt. There was no such act made against the respondent.

We are all agreed that the appeal should be allowed.

In the circumstances present here, it is the unanimous opinion of the Court that it would be in the best interests of the respondent and not contrary to the public interest to direct the respondent be discharged absolutely under the provisions of section 662.1 (1) of the Criminal Code.

DATED at Halifax, Nova Scotia, this 16th day of February, A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

Martin E. Herschorn, Esq. Appellant