

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**  
**Citation: R. v Ziai, 2004 NSPC 37**

**Date:** April 30, 2004  
**Case No.(s):** 1160073, 1160074,  
1160077, 1160078  
**Registry:** Halifax

**Between:**

**R.**

**v.**

**Mohammad Ziai**

**Judge:** The Honourable Judge C. H. F. Williams, JPC

**Heard:** Decision rendered orally on April 30, 2004  
in Halifax, Nova Scotia

**Counsel:** Eric R. Woodburn, for the Crown  
Roger A. Burrill, for the Defence

## **By the Court**

### **Introduction**

- [1] The accused, Mohammad Ziai and his family resided, as tenants, in an apartment building owned by the alleged victim and landlord, Mohammad Sami Alhamwi. Also, residing in the building was another tenant named Beverly Penny. Unhappy differences developed between the accused and Penny and between the accused and his landlord to the extent that the Residential Tenancy Board had to adjudicate upon a complaint concerning the accused's occupancy of his rental unit.
- [2] Additionally, the accused, for the purpose of terminating Penny's tenancy, wanted to buy the building but made an unacceptable offer of purchase. Relationship between the parties worsened and culminated in a physical altercation between the accused and his landlord on March 15, 2002. As a result of the affray the landlord suffered cuts and abrasions and after an investigation the police charged the accused with assault with a weapon, assault causing bodily harm, possession of a weapon for a purpose dangerous to the public peace and uttering threats.

### **Summary of Relevant Evidence**

- [3] The accused Mohammad Ziai and his family rented an apartment from Mohammad Sami Alhamwi. Beverly Penny was also a tenant in the same apartment building. Over time the accused developed a strained relationship with his landlord over the late payment of rents. Additionally, the accused and Penny did not get along. The accused in an attempt to evict Penny offered to buy the building but the landlord considered his offer to purchase as ridiculously low and did not accept the offer to purchase. During their discussions Alhamwi claimed that the accused told him that he, the accused, would kill Penny and blame Alhamwi for the act.
- [4] The business affairs between the accused and Alhamwi deteriorated to the point that Alhamwi sought to evict him by proceedings in the Tenancies Board. This attempt, however, was unsuccessful and the accused was still a slow payer.
- [5] Receiving a report that there was a situation with the heating system in the building Alhamwi along with a colleague attended to repair the problem. Alhamwi also entertained a suspicion that the accused could have damaged a broken oil line that he found and repaired. After he had repaired the damage and was leaving the premises Alhamwi saw the accused fixing his vehicle but did not wish to have any contact with him. However, the accused was persistent that Alhamwi stop and address the subject of rental arrears as he, the accused, had proof of payment.

- [6] As a result of the accused accosting Alhamwi, a scuffle erupted in which they both sustained some injuries. Specifically, Alhamwi suffered injuries to his body that appeared to be puncture wounds which he claimed the accused inflicted with a screwdriver.
- [7] This case therefore involves the determination of whether, in the circumstances, the accused did cause bodily harm to Alhamwi, was in possession of a weapon for a dangerous purpose and that he used it in assaulting Alhamwi. Additionally, whether, in the circumstances, the accused did utter a threat to Alhamwi to cause death to Penny.

### **Findings and Analysis**

- [8] I think that two factors are critical before I can conclude beyond a reasonable doubt that the accused had a weapon, the screwdriver, for a purpose dangerous to the public peace, and that he used it during the alleged assault on Alhamwi. First, the Crown must show that the accused did, in fact, have the screwdriver, in his hand, or that it was easily accessible by him when he approached Alhamwi. Second, the Crown must show that the wounds received by Alhamwi and depicted in the photographs, presented as Exhibit 1, were in fact caused by a screwdriver.
- [9] The accused has admitted that when he was working on his car he sent his son to get a screwdriver to assist in removing the hub cap. His son confirmed that he went and got the screwdriver for that purpose as asserted by the accused. I accept and find that when the accused was using the screwdriver it bent and he put it in his pocket. I accept and find that he was still working on his car when Alhamwi and his associate appeared. The accused apparently owed Alhamwi for rent and earlier in the day had gone to the post office to obtain forms to prove that he had remitted monies to Alhamwi. Thinking that he had the forms inside his apartment he sent his son to get a copy. However, realizing that he had a copy on him, in his back pocket, he approached Alhamwi. I accept and find that he was gesticulating to Alhamwi to stop his vehicle as he, the accused had proof of his payment or that he had the means to pay his rent.
- [10] I accept and find that Alhamwi did not want to deal with the accused but that the accused insisted and persisted that Alhamwi should exit his vehicle and address the issues immediate to and of interest to the accused. I recall that there were ongoing problems between the accused and his landlord. The landlord, Alhamwi, has just completed the repairs to the building's furnace that he suspected the accused had damaged. It is therefore reasonable to conclude that, given the existing atmosphere of discontentment, he was unhappy and frustrated with continuously having to address problems that he felt were caused by an uncompromising and uncooperative tenant. With these set of factors in mind, it is reasonable to conclude that there probably existed a festering undercurrent of controlled hostility between the parties. However, because it appeared that the accused was about to satisfy some rental arrears Alhamwi got out of his vehicle, as he was urged to do by the accused.

- [11] What immediately followed requires careful scrutiny. First, I should say that I have no confidence in the testimony of Penny as in my view she tended to skilfully exaggerate and shrewdly distort her narration of the event. Additionally, I conclude that her testimony was inherently unreasonable and was inconsistent with that of other witnesses. In the result, it was difficult to decipher the extent of her embellishment. I conclude and find that she had a bias against the accused and she was, at times, evasive in her testimony. Consequently, I did not consider her account of the event reliable. Nonetheless, both she and Alhamwi testified that the accused was waving his wallet and had money in it and entreating Alhamwi to get out of his car to receive the cash. Alhamwi asserted that the accused threw away his wallet, but did not mention what the accused did with the money, or if he, Alhamwi did receive the money, the reason why he got out of his car.
- [12] Secondly, I also think that Alhamwi's version of the event was a skilful exaggeration with partial suppression of the truth. I say that because I think that it is inconsistent with the probabilities associated with the currently existing circumstances, and it makes no sense, that the accused who wanted to demonstrate that he had paid money, or had money that he owed to Alhamwi and was trying to establish that he had the means to pay would throw away his wallet and presumably the money with it. As no person has mentioned receiving the money and none was found on the accused when he was arrested I think that it is more probable that indeed no money was involved but rather, as he asserted, he had in his hand some document as proof that he had paid the money. I am secured in this view when I consider the fact, which I accept and find, that the accused son had gone to the building, on his father's instructions, to get, as he testified, a chequebook. When he returned with the document, he saw, to his surprise, his father and the complainant wrestling. Thus, I think that Alhamwi's version of the events immediately before they established contact was not in harmony "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), 357 per O'Halloran J.A.
- [13] Third, the accused testified that when he was reaching into his pocket to retrieve the proof of his payment, Alhamwi, without warning and without saying anything, struck him in the mouth. He fell to the ground and, the screwdriver that was in his pocket fell out and the complainant picked it up. Thus, when I carefully examined and weighed all the testimonial evidence and based on my observations of the witnesses as they testified and on my assessment of their testimonies, on the issue of how the fight began, it seems more likely, as it is consistent with the preponderance of the reasonable surrounding probabilities, that out of irritation and frustration and on a perception of the accused conduct in the existing set of circumstances, it was Alhamwi who commenced the fight by striking the accused in the mouth.
- [14] This deduction is reinforced when I consider and add to the mix the accused post event conduct as observed by Dean and Laura Sinclair. They observed that he was wandering around in circles after the fight, crying, bleeding from his face, talking more or less to himself, asking for help and voluntarily surrendered the items in his hand to Dean. This

portrayal of the accused as a dejected and passive person did not, in my opinion, support the depiction of him as a wild and aggressive person as advanced by Alhamwi and Penny. In short, I believe the accused when he says that it was Alhamwi who was the aggressor. In the result, I accept and find accordingly. I also accept and find that the accused's wife and son joined the affray. She attempted to separate them by pulling on Alhamwi's jacket which could explain the tear in the jacket as depicted in Exhibit 1, photograph #7.

- [15] Nonetheless, when I carefully analysed the total evidence, it is not clear what caused the marks depicted on Alhamwi's body. Moreover, in my opinion, the evidence is not clear on whether it was Exhibit 3 or Exhibit 4 that caused those marks. Furthermore, no witness testified to the fact that they even saw the accused with a screwdriver during the currency of the fight. True, they saw him with a screwdriver in his hand after the fight but he explained that he took it from Alhamwi during the fight and he denied that he used it to stab or to cut Alhamwi.
- [16] However, the accused asserted, and I accept and find that he had the screwdriver in his pocket during the time they were scuffling and that when it fell out of his pocket Alhamwi picked it up. I also accept and find that, as it is consistent with the existing and surrounding probabilities which a practical person would find reasonable, during the scuffle, he was attempting to take the screwdriver from the complainant. His son testified that during the scuffle he saw that his father was attempting to retrieve a screwdriver from Alhamwi.
- [17] Nonetheless, Alhamwi testified that the accused struck him several times with his hand in which he had something. However, he did not know what the accused had in his hand. He imputed that he suffered bodily harm as a result because after the fight he had some injuries that were not there before his contact with the accused. Albeit, he described no bodily sensations as one who had experienced the event would readily exclaim, as to whether he felt, for example, sharp pains or the impact of any foreign object penetrating his body at the same time and corresponding with those blows by the accused. Independent witnesses who saw part of the tussle did not see the accused make any striking motions with his hands. In addition, I have no contemporaneous independent medical opinion as to the probable cause of Alhamwi's injuries or their consistency with, for example, a stab wound, probably caused by a screwdriver or, specifically, probably caused by Exhibits 3 or 4.
- [18] I say that because here, the police retrieved a screwdriver, Exhibit 4, from the inside coat pocket of the accused at the scene and at the time of his arrest. On the evidence, no one testified that they saw him, after the scuffle, put anything into his coat pocket. He was seen only with a screwdriver, Exhibit.3, in his hand. He gave that screwdriver to the witness Shane Dean who then placed it in the trunk of the accused car. Constable Daniel Roache retrieved it and the wheel wrench, Exhibit 2, from the accused vehicle. Thus, it is reasonable to conclude that any screwdriver that was used, if at all and as alleged, must be the one that he had in his hand immediately after the fight.
- [19] Therefore, I think that it was critical for the resolution of these contested issues for the

Crown to make the necessary connectors as proof of the allegations. Merely presenting the screwdrivers without any nexus to the proof of facts was not helpful. Exhibits do not by themselves prove anything. A casual link must be established between the screwdrivers, the accused conduct and the harm alleged. *R. v. Smithers*, [1978] 1 S.C.R. 506. In short, a nexus is a must which, directly or circumstantially, proves a fact in issue.

[20] Although Alhamwi received medical intervention, the Crown offered no medical evidence in support. Instead it tendered photographs that depicted marks and what appeared to be injuries to Alhamwi's body to prove a fact in issue. Nevertheless, in my opinion, the photographs by themselves are not proof positive of bodily harm or of the critical question of causation. This court had the occasion to comment on the issue of the mere presentation of photographs to prove bodily harm in *R. v. McIsaac*, [1999] N.S.J. No.137, at paras. 9-12:

9 Generally speaking, it seems to me, that one basis for the admissibility of a photograph, as here, is that it can only be used by way of illustration to support, corroborate and to explain the evidence of a witness. Properly used, a photograph can provide potent evidence to support or to debunk a particular theory. Therefore, I think to be of any probative value or to have effective evidentiary impact, it is crucial to the trial process that what is depicted in the photograph is properly interpreted by a qualified or capable witness. In tendering the photograph, without more, the theory of the Crown would be that it illustrates only its theory, through its witnesses, that the accused must have inflicted the injuries that the complainant sustained, not that the photograph speaks for itself and therefore is probative evidence of what it depicts.

10 The Criminal Code defines "bodily harm" [as] " . . . any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."

11 In my view, there was no proper expert testimony or any scientific quantifiable evidence or clinical assessment to support the validity of the assertion of bodily harm, as defined. The evidence on that point was suggestive, speculative, subjective, and of personal conceptualization. Such evidence, I think, does not add to the common understanding of the Court. The Crown has established no nexus between the striking and the injuries and whether the injuries did interfere with the health or comfort of the complainant. Neither has it been shown beyond a reasonable doubt that the injuries, as described, fall within the definition of not being transient and trifling. Thus, it seems to me that bodily harm depends on the nature of the injury. By way of example only, an individual can suffer an injury that can heal without any interference with the individual's general enjoyment of life. In that case there is not an injury said to be bodily harm within the meaning of the Criminal Code. Medical data, in my opinion, is needed to establish the prognosis and diagnosis of the injury and, in addition, a nexus between the injury and its duration as advanced by the Crown. Here, the evidence purporting to demonstrate bodily harm has no expert medical support and it is therefore of no probative value.

12 It seems to me that the Crown should not underestimate the significance of

connecting the injury to its probable cause nor should it succumb to the logical fallacy that because an injury is affirmed by a victim, they prove the cause logically. Although such evidence may be relevant to a material issue in the case, it may not necessarily be admissible as proof of the fact in issue, as such an approach would tend logically to eliminate any other probable causes.

- [21] Those comments are apposite in the case at bar. According to *Smithers*, causation is a question of fact to be decided beyond a reasonable doubt. However, it is a question of law whether there is any evidence presented to determine the issue of causation. Here, in my view, the Crown did not undertake to show a casual relationship between any conduct of the accused, as I have found, and the injuries as alleged. Therefore, on the total evidence, I find that the direct factual cause of the alleged injuries was unclear or not proved beyond a reasonable doubt. In short, the Crown has not proved beyond a reasonable doubt that any conduct of the accused was the actual cause or was a contributing factor “outside the de minimis range.”
- [22] I have considered the issue of whether the accused did commit an assault simpliciter. However, on my findings of fact, it would be inconsistent with these findings to conclude that he did.
- [23] Additionally, on my findings of facts, it is rational to conclude and I do conclude, that the accused had a screwdriver to take off his car’s hubcap. When he finished that task, he placed the screwdriver in his pocket. Further, when he approached Alhamwi he did not have any screwdriver in his hand. On the evidence, he neither threatened nor intimidated Alhamwi with any screwdriver. Furthermore, neither Alhamwi nor any other person ever saw the accused in possession of a screwdriver before the scuffle or used a screwdriver offensively during the scuffle. On those uncontroverted facts, it is difficult for me to conclude that in the circumstances surrounding his possession at the time in question, as I have found, that the Crown has proved beyond a reasonable doubt that the accused possessed a weapon, a screwdriver, for a purpose dangerous to the public peace or that he threatened to use or used a screwdriver in an assault on Alhamwi.
- [24] I now turn to the issue of the threat to cause death to Penny. I find that this is a case where some independent supportive evidence was required. Given that a conviction depended solely on Alhamwi’s testimony I think that it was essential that the credibility and reliability of his testimony be tested in the light of all the other evidence presented. *R. v. R.W.B.*, [1993] B.C.J. No.758 (B.C.C.A.) Additionally, in weighing and assessing his testimony, I looked for supportive evidence capable of persuading me to entertain a rational belief that he was telling the truth and which would strengthen my belief that on this point he was truthful. *R. v. Vetrovec* (1982), 67 C.C.C. (2d) 1 (S.C.C.).
- [25] Alhamwi testified that the accused, during the time he, the accused, was purporting to buy the building, he uttered words to the effect that he the accused would kill Penny and blame

it on Alhamwi. Taking this utterance seriously, Alhamwi averred that he notified Penny who reacted with such concern for her safety that they both went to the police station and registered a complaint. The accused has denied this allegation. The difficulty that I have here is that when Penny testified she made no reference to or offered any support for Alhamwi's testimony on this allegation. He had asserted that she knew about it as he told her and that together they went to the police and made a complaint. Additionally, no police report was offered in support. Thus, in the absence of supportive evidence capable of persuading me to entertain a rational belief that Alhamwi was telling the truth and which would strengthen my belief that he was truthful on this point, I am left in doubt that the accused uttered a threat to Alhamwi to cause bodily harm or death to Penny.

### **Conclusions**

- [26] On the total evidence and on the evidence that I accept, and on the analysis that I have made, I am not satisfied that the Crown has proved beyond a reasonable doubt the guilt of the accused on all the offences charged and tried on the Information before me. In the result, I find him not guilty as charged and will enter acquittals on the record.

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