PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Tag-El-Din*, 2015 NSPC 74

Date: October 14, 2015
Docket: 2885548
Registry: Halifax

Between:

Her Majesty the Queen

V .

Latef Reakwon Tag-El-Din

DECISION

Judge: The Honourable Judge Marc C. Chisholm

Heard: September 24, 2015 and October 13, 2015

Decision: October 14, 2015

Charge Sections 267(b) *Criminal Code*

Counsel: Chris Nicholson, for the Crown
Eugene Tan, for the Defendant

By the Court: Orally

Introduction

[1] This is the decision of the Court in the matter of The Queen and Latef Tag-El-Din who is charged on an Information sworn the 13th of July of this year, that he on or about the 30th of May of this year, at or near Halifax, Nova Scotia, did in committing an assault on Luay Thamer Mahdi, cause bodily harm to Luay Thamer Mahdi, contrary to Section 267(b) of the *Criminal Code of Canada*.

[2] This is a criminal charge. The burden of proof rests upon the Crown. The burden is proof beyond a reasonable doubt. If on the evidence, the Court is left with any reasonable doubt, the accused is entitled to the benefit of that doubt and to be found not guilty.

[3] The key evidence in this case is without question the evidence of the complainant, Mr. Mahdi. He testified and was fully cross-examined by Defence counsel. I found the evidence of Mr. Mahdi to be entirely credible and I accept his evidence. It is the finding of the Court that on the date in question, the 30th of May, 2015, Mr. Mahdi was working as taxi driver. That he picked up two young women who requested to be taken to a place where they were to meet a man whom

they owed money, in the amount they indicated as $320. That man turned out to be the accused. When the cab driven by Mr. Mahdi arrived at the appointment place, he stopped the cab and the accused entered the cab with Mr. Mahdi and the two women. There was an argument between the accused and the two women. The accused demanding payment of $600; the two women insisting they only owed $320 and protested that they ought to only have to pay that amount.

[4] Mr. Mahdi chose to intervene in the dispute and there was conversation between he and the accused to the effect of Mr. Mahdi asking why the accused was demanding $600 when they only owed $320. He said that the accused replied, "it was interest", which Mr. Mahdi replied, somewhat sarcastically, "what are you Western Union". The accused told Mr. Mahdi to "F off" "not to get involved" "to shut the F up", (I'm not saying the full word that was used). Mr. Mahdi responded by telling the accused to, himself "shut the F up". According to Mr. Mahdi, the accused then asked him if he wanted to fight him, to which Mr. Mahdi replied, "yeah".

[5] Both men then got out of the taxi. They proceeded a short distance from the taxi where the incident occurred. The two men were not described in terms of height and weight in the evidence, but by the Court's observation, they were of

similar height and weight. Both are of average height and rather slight in terms of weight.

[6] The accused walked first, away from the cab, with Mr. Mahdi following, to an area that the witness Mr. Mahdi described as a parking area, somewhat darker. The accused stopped and turned. Mr. Mahdi walked toward him. Mr. Mahdi testified that he had his hands in fists and his fists in front of his chest. He was ready to fight. Mr. Mahdi testified that as he walked towards the accused, he said something to the effect, "what do you expect when you tell someone to shut the F up" and that the accused said words to the effect, "I'll drop you cold".

[7] According to Mr. Mahdi the accused struck first with a blow from his right hand which was in a fist, to the left side of Mr. Mahdi's face. It was, according to Mr. Mahdi, a quick blow. Mr. Mahdi testified that although he did not go down as a result of the blow, nor lose consciousness, that he couldn't think straight after that blow to the head and that blow caused a cut that began to bleed profusely. It was the evidence of Mr. Mahdi that, he believed, that blow also caused a small crack to the bone near his left eye. The Crown introduced Exhibit 1, the medical records with respect to Mr. Mahdi, which were entered by consent. There was no reference to a cracked bone in those medical records to the left side of Mr. Mahdi's

face. Mr. Mahdi did not throw any punches in response. The evidence of Mr. Mahdi did not indicate whether or not he continued to hold his fists up, that is, whether they were still in front of his chest. The accused then, according to Mr. Mahdi struck a second blow. The second blow was by the accused's left fist to the right side of Mr. Mahdi's face and then, seconds later, a third blow with the accused in position so that he was somewhat to the side of Mr. Mahdi and used his right fist to strike Mr. Mahdi again on the right side of his face.

[8] Mr. Mahdi said the accused then stepped back and left. Mr. Mahdi went to a nearby store. He testified that his face was bleeding profusely. He was given towels to assist in cleaning the blood from his face. He agreed the matter between he and the accused involved a matter of seconds. The police were called. Mr. Mahdi was taken to the hospital for treatment. Mr. Mahdi's testimony and the medical records confirm that Mr. Mahdi suffered a broken right eye bone and a cracked right cheek bone. These injuries required surgery, which took place shortly thereafter, for essentially a reconstruction of the right cheek of Mr. Mahdi and repair to the eye bone.

[9] Mr. Mahdi testified that, at the time of trial, he still had a lack of feeling in the teeth on his right side and some numbness in his right temple. Mr. Mahdi

testified that he had been in physical confrontations before. It was his belief that the accused had worn brass knuckles on his right hand when delivering the two blows struck by his right hand. That was his belief based upon the feel of the impact. He testified that he did not see brass knuckles on the right hand of the accused. He gave a statement to the police on the date in question. In his statement, and while testifying, he acknowledged that he said he believed the accused was wearing brass knuckles or must have had a large ring on his right hand.

[10] That was the key evidence with respect to the interaction between the two parties. It is the finding of the Court that both men agreed to a fight. They consented to a fight. The scope of the fight I find, based upon the evidence, to have been a consent to a fist fight, given the actions of Mr. Mahdi making fists with his hands and bringing his fists up in front of his chest. As I have indicated, Mr. Mahdi believed that the accused was wearing, what is commonly referred to as brass knuckles, on his right hand. On the evidence, his belief was based upon the feel of the blows as they were struck, and the injuries. The medical evidence which is before the court, describes the injuries as consistent with blunt trauma. There is no medical or other evidence to indicate that the nature of the injuries

could not have been caused by fists rather than blunt trauma by means of a weapon, such as brass knuckles.

[11] Mr. Mahdi also testified that there were some marks on his skin that he believed were consistent with brass knuckles. He was vague in describing what he was testifying to in that regard and there was no supportive evidence in the medical records with respect to such markings. Mr. Mahdi's own concession, both in his statement to the police and in his testimony, was that he was drawing a conclusion that it was brass knuckles, is not entirely supported by the evidence. Further, Mr. Mahdi's said "it could have been a ring". On his evidence, the Court is left in doubt as to whether or not there was a weapon on the hand or in the hand of Mr. Tag-El-Din when those blows were struck with his right hand.

[12] The evidence in its totality was not sufficient to persuade the Court beyond a reasonable doubt that the accused exceeded the scope of the consent by the use of a weapon.

[13] The consent of the complainant may be vitiated where the Crown proves beyond a reasonable doubt that the accused caused bodily harm to the complainant and intended to cause bodily harm to the complainant. Counsel have referred the

Court to the R. v. Jobidon [1991] 2 SCR 714, and the R. v. Paice [2005] 1 SCR 339, which stand for this proposition.

[14] I find as fact, based upon the evidence, that the accused caused significant bodily harm to the complainant, Mr. Mahdi, by the blows struck by the accused to Mr. Mahdi. Bodily harm, as defined in Section 2 of the *Criminal Code of Canada*, means 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.

[15] Having found that the accused caused bodily harm, to determine whether or not consent was vitiated, the Court must assess whether or not the Crown has proven beyond a reasonable doubt that the accused intended to cause bodily harm. This was the key issue argued by counsel.

[16] The facts are that the accused administered three blows, three punches, each of those punches to the head of Mr. Mahdi. The punches occurring one after the other in fairly quick succession. The Crown argued that the accused having caused bodily harm by those blows must be found to have intended the natural consequences of his actions. Three hard punches to the face of another individual, the Crown argued logically should cause the Court to conclude that the accused intended to cause the bodily harm that he did in fact cause.

[17] This argument was put before the summary conviction appeal court judge in the case of R. v. Swim (2010) NSSC 251, (Justice Robertson). The Crown argued that, essentially, in any case where an individual punches another individual in the head and causes bodily harm, the Court must draw an inference that the accused, by punching the other individual in the head, intended those natural consequences of bodily harm. That argument was rejected. In my view, a rejection of that argument on the facts of that case does not preclude a trial judge from drawing the conclusion that bodily harm was intended if so persuaded on the totality of the evidence. A judge need not but may do so on the basis of the nature of the blow(s) in the context of all of the evidence.

[18] In this case, the accused struck the first blow to the left side of the head of Mr. Mahdi, then promptly two blows to the right side of Mr. Mahdi's head. The first of the blows causing a cut which began to bleed, the second and third blows either of those, or those two in combination, causing the injuries of the broken bones to the eye and cheek area. Those blows were administered just moments after Mr. Tag-El-Din uttered the words, "I'll drop you cold".

[19] There is no evidence before the Court as to the tone or volume of voice with which those words were said. Counsel for the accused argued that those words

represented mere bravado before the start of a fight and did not in any way refer to the intention of the accused.

[20] Crown counsel argued that those words reflected an intention to cause bodily harm, to knock out the complainant.

[21] It is my conclusion, having reviewed the evidence and considered that comment in the context of the evidence, that it needn't be all or the other. The statement is relevant for the Court to consider as part of the totality of the evidence in determining whether or not the Crown has proven beyond a reasonable doubt that the accused intended to cause bodily harm.

[22] The Court must also consider the context. In this case, Mr. Mahdi chose to intervene in a situation involving the accused and the two women which resulted in Mr. Mahdi being challenged to fight by the accused. The accused basically told Mr. Mahdi to mind his own business and swore at him. Mr. Mahdi swore back and refusing to stay out of it. When the two squared off, the accused made the statement "I'll drop you cold".

[23] It is the certain view of this Court that the statement goes beyond bravado and is relevant to the Court's consideration of the intention of Mr. Tag-El-Din as he entered into that altercation with Mr. Mahdi. It is the Court's view, based on

the totality of the evidence, that the accused not only foresaw the potential of causing bodily harm by his actions, but that he intended to cause bodily harm as defined in Section 2 when he entered into the fisticuffs with Mr. Mahdi.

[24] I find that the Crown has proven beyond a reasonable doubt, based upon all of the evidence that in administering those three blows to the head of Mr. Mahdi, the accused not only caused bodily harm, but intended to cause bodily harm to Mr. Mahdi.

[25] I find that the blows administered by Mr. Tag-El-Din were an intentional application of force to the person of Mr. Mahdi without the consent of Mr. Mahdi, the Court having found that the Crown has satisfied the Court that consent is vitiated in these circumstances. I find that Mr. Mahdi had the *mens rea* for the offence, he having clear foreseeability of the risk of bodily harm by his actions in striking Mr. Mahdi as he did.

[26] For those reasons, the Court is satisfied the charge before the Court has been proven beyond a reasonable doubt. The Court is entering a conviction on the charge of assault causing bodily harm.