

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Cite as: R. v. Boudreau, 2008 NSPC 69

Date: October 8th, 2008
Docket: Digby, Nova Scotia
Registry: 1873299, 1873300
1873302, 1873304
1873301, 1873303
1873296, 1873297

Between:

Her Majesty The Queen

Plaintiff

v.

Herbert Boudreau
David Comeau
Jeannette Doucet

Defendant

DECISION

Judge: The Honourable Jean-Louis Batiot, J.P.C.

Heard: July 22nd and July 23rd, 2008

Oral Decision: October 8th, 2008

Counsel: Murray Judge, for the Crown

William M. Leahey, for Jeannette Doucet
and David Comeau

Michael Taylor, for Herbert Boudreau

[1] **THE COURT:** (Inaudible ...) David Comeau, Herbert Joseph Boudreau and Jeannette Doucet all charges contrary to Sections 267(a) and 267(b) of the **Criminal Code**.

[2] We attempt with words to recreate an event on the 17th of December 2007 at 219 S. F. Comeau Road, Digby County, Nova Scotia, in late afternoon. We have spent two days of examination and cross-examination of the two main witnesses particularly, for the Crown, July 22 and July 24, 2008. The initial event was the confrontation by the 2007 Ford Ranger truck parked in front of that house and that event took seconds. Witnesses are bound in using so many words to describe their impressions and recollections and actions and it takes slices of time in a witnesses particular time frame which may not correspond exactly to another witnesses time frame. That is normal.

[3] The compelling evidence is that of the 911 call from Shannon Huntley. She called because she was seeing her boyfriend, Michael Ryan, involved in the confrontation with Herbert Boudreau and David Comeau. In the replaying of the 911 call, of good quality, we can sense quickly the panic, the stress, the fear that Ms.

Huntley exhibited. The difficulty of imparting information to the responder, particularly to dispatch. Yes eventually the ability to describe what she saw, albeit imperfectly, amid sobs, in spite of breathing difficulties and the apparent waives of fear and hysterics. This was being used in cross-examination, in cross-examining her, on her testimony at trial to show the discrepancies between her testimony, her statements on that call and the statement given to the police.

[4] Upon questioning she is able to give the address, the name of the parties involved, including David Comeau, upon prompting by Michael Ryan. The lack of distinction between a rod, a pipe and a baseball bat. The assumptions versus what she had seen running in front of the truck. The inability to have seen Michael Ryan hit Mr. Boudreau with a pipe or a bat. Her being punched in the face versus being hit with a pipe by Mr. Boudreau. The injuries to the two of them versus no injuries to herself. The ten minute beating, actually much less than ten minutes. The different locations of the parties once they came back from behind the house or from behind the truck. The location of the driver's door of the truck vis a vis the front door of the house and the limitation of her vantage point inside the truck.

[5] Her testimony is that Herbert Boudreau and David Comeau came, driven by Jeannette Doucet, in a Blazer motor vehicle. That motor vehicle stopped, nose to nose, with their 2007 Ford Ranger parked in front of the house. Herbert Boudreau came out with a pipe, yelling and attacked Michael Ryan who was standing next to the back of his truck, outside, as he was raising his hands to fend off the blow. That attack continued as they went, she assumes, around the truck and saw them again to the right side of the truck as they, David Comeau and Herbert Boudreau, forced Michael Ryan to back up to a snow covered pond where he fell and where he continued to be assaulted by both men, Herbert Boudreau using the galvanized steel pipe to do so.

[6] She dropped the phone, running to help Mr. Ryan by jumping on Mr. Boudreau's back and then wrestling for that galvanized pipe as they were both down or halfway down. It is during this wrestling match that Mr. Ryan told her to get back in the truck. She pushed the rod or the pipe down and let go of it. When, she says, Mr. Boudreau swung it in her face, left side, hitting her, not hard, and she went back to the truck where she locked herself in with the phone.

[7] The next full view was when they came, the three of them, to the right side of the truck as she was in the passengers seat, locked inside the cab, for the continuation of the assault. It appears at that time that Mr. Ryan had a bat with him. Obviously the taped conversation to 911 is a hearsay statement but it is introduced as a defence motion as an inconsistent prior statement. (Inaudible ...) purposes of cross-examination. It shows the witness, in a stressful and immediate situation, responding to the emergency and describing what she can see or imagines as a confrontation is evolving.

[8] David Comeau did not want his common-law wife, Jeannette Doucet, the step daughter of Herbert Boudreau, sister to Nicole, to go alone to 219 S.F. Comeau Road on the 17th of December 2007. Nicole, who had been estranged from Jeannette for four years, had had a long telephone conversation with her the day before. She called a second time on the 17th to advise that Michael Ryan may be on his way to 219 S.F. Comeau Road and so David went with her, in her blazer. They stopped at Herbert Boudreau's to pick him up since she felt she was holding the interest in 219 S.F. Comeau Road in trust for him.

[9] She talked to Aimee, the daughter of Nicole, whom she had not seen for some time then they drove to 219, not fast, but directly. She pulled into the driveway some distance from Michael Ryan's truck, which they could see parked in front of the house. Herbert got out and then David from that two door truck. Herbert told her to go call 911. She did so, immediately backing down. She says she did not see the pipe that had apparently been put between the seat and the passenger door on Mr. Boudreau's side. She went directly to call at a neighbours house.

[10] Herbert Boudreau went forward with the pipe, David Comeau behind him by Michael Ryan's truck. Michael Ryan came towards them with his fists up, in a fighting stance, and Herbert Boudreau struck him on the top of the head with the pipe in a vertical blow. The pipe fell to the ground, Michael Ryan backed off, they all went at it with fists until they ended up in the pond. There was some blood. It is when Michael Ryan was on top of Herbert Boudreau in the pond that David Comeau struck, with his fists, the back of the head of Michael Ryan, to distract him from Herbert Boudreau. There was another strike in the face and then eventually David Comeau ended up on his face in the pond with his arms held back by Michael Ryan. Michael Ryan said that he was leaving but ran to the back of the house, Herbert Boudreau in pursuit with a pipe, David Comeau coming up the rear. They lost sight of Michael

Ryan for two seconds. They said Michael Ryan was back, with a bat and Herbert and David started jostling, pipe against bat. Both David Comeau and Herbert Boudreau backing, slowly, down the driveway until they desisted. No one fell and David Comeau did not strike Michael Ryan.

[11] David Comeau agrees that there was a complete loss of common sense in this confrontation. He was not surprised that Herbert Boudreau had a pipe with him given the events of the day before with the bat and the reputation Michael Ryan had to be a violent man, given the gossip in the community for some years, particularly when Michael Ryan first came to the community in 1997 with rumours of fights and broken leg.

[12] David Comeau was not drinking. He is a lobster fisherman since 2007. He knew the house was trouble. He accompanied Herbert Boudreau even when he, Herbert Boudreau, went out with the pipe towards Michael Ryan. The only reason he struck Michael Ryan was to distract him from Herbert Boudreau. He had no intention, when setting out, to get involved in this confrontation but agrees the wiser thing would have been, upon ascertaining the presence of Michael Ryan to call and wait for the police and go no further.

[13] As for Jeannette Doucet, she had no knowledge of the pipe, she had not seen it. It was likely loaded in the truck before she came out after a visit with Aimee at Herbert Boudreau's home. She was going to 219 at Nicole's request, to check on the property, believing that perhaps Michael Ryan might be there and ought not to be there until 4 p.m. the next day, the 18th of December, as agreed or ordered by Constable Poitras on the 16th of December. But Nicole had made a request. They used to be very close and were working on a rapprochement after four years of estrangement. She would not want to deny Nicole's request at that stage. She had no notion that there was going to be a confrontation and was surprised at the presence of Michael Ryan on the property. She would not argue with the adults, the two adults, when they got out of their truck to go towards Michael Ryan. She just went directly to call 911 and it is that call that we have heard at the beginning of the trial and in which we can hear both Jeannette Doucet speaking with the dispatcher and the dispatcher speaking with Shannon who is describing the event at the 219 S.F. Comeau Road.

[14] The confrontation took place between Herbert Boudreau and Michael Ryan, at the very least, very quickly after Jeannette Doucet left 219 S.F. Comeau Road, within two minutes.

[15] Mr. Boudreau wished to provide some security for his daughter Nicole Ryan, the complainant, wife of Michael Ryan. He had purchased, at her request, a home for her in 1997, with her promise to repay him. It was placed in their joint names with an understanding that it would be hers once it was repaid. In fact there were no payments made. And indeed the evidence shows that the transfer of properties happened several times and the last one, apparently, was her to Michael Ryan. Indeed that home had become a main source of their troubles Mr. Boudreau says. In 2006 he conveyed his interest to his two daughters, Mrs. Ryan and Mrs. Doucet. Ms. Ryan conveyed hers to Michael Ryan apparently for the purpose of making an application under the Petition Act.

[16] It is clear that that home is an important fixture in their relationship or lack thereof and it has been a source of many frustrations.

[17] On the 16th and 17th of December 2007, to Mr. Boudreau's knowledge, Mr. Ryan ought not to be there. From his evidence there had been a first confrontation on the 16th of December when he had checked the house once Nicole had given him the key. He went there with Gary LeBlanc. Unknowingly Michael Ryan was already there. He has not had any civil relations with Mr. Ryan for some years. Indeed it appears that Mr. Ryan was estranged from his wife's family since at least Christmas 2001. We also know that Mr. Ryan and Ms. Ryan were going through a separation in 2007 and on the first of January 2007 Mr. Ryan had left the house and was not to be there pursuant to an undertaking given before the 17th of December at least as long as it was her residence. She had moved out some two weeks before the 16th of December. Mr. Boudreau, given his interest, knew it. It is not clear how Mr. Ryan was aware of that move as he was not to have contact with Ms. Ryan.

[18] So when Jeannette Doucet came to see her father on the 17th of December, as a result of a call from her sister Nicole advising that Michael Ryan may be on his way to the property, there was already a vast history of tensions between the two and, to Mr. Boudreau's knowledge, an apprehension of danger as well as a major issue as to the possession and control or dominion over the house. He was aware, as well, of the

confrontation with Mr. Ryan the previous day. He thus armed himself with a galvanized steel pipe and placed it in the truck.

[19] When they arrived at the driveway at 219 S.F. Comeau Road it was obvious Michael Ryan's truck was there. Mr. Boudreau decided to confront him, getting out of the truck, taking the pipe with him, along with David Comeau, his son in law. He had already given instructions to Jeannette to go and call 911, so obviously an apprehension of a confrontation, and knowledge of the use of a bat the day before, where there had been some bad blood between Michael Ryan and himself and Michael Ryan had threatened to hold his grand child from him unless he gave the house to him were issues that could lead to an explosion. He walked towards Michael Ryan who says he was standing by his truck. Michael Ryan, he says, was walking towards him with his fist in a fighting stance and he, Herbert Boudreau, struck him with a pipe on the top of the head. They were on the grassy portion to the left of the driveway as one was walking towards the driveway to the end of the house by this satellite dish, a location quite different from that given by the Crown's witnesses. The pipe dropped from his hand. Both he and Michael Ryan went at it with their fists and ending up in the pond where David Comeau intervened to draw Michael Ryan's attention away from Herbert Boudreau. Michael Ryan and Herbert Boudreau desisted, both got up,

and Michael Ryan went towards the back of the house. Mr. Boudreau pursued having regained possession of the pipe. Michael Ryan disappeared and then came back with the bat. The conflagration occurred again. Mr. Ryan forced them to back down the driveway and during that continuous confrontation flailing at each other, pipe and bat, Michael Ryan hit Herbert Boudreau on the right side of the jaw with the bat. Herbert Boudreau and David Comeau eventually desisted as we have already seen in the earlier testimony. They walked back to the neighbours, Mark Blinn's, until the police arrived, then they came back and parked on the road where they were arrested.

[20] Michael Ryan's testimony is somewhat in line with that of Ms. Huntley. He was not seeking a confrontation but was prepared to hold his grounds yet not expecting to be hit as he was putting the vanity in the back of his truck. But hit he was, by Herbert Boudreau, with a pipe.

[21] The confrontation was quick. Both Herbert Boudreau and David Comeau had run towards him, continued on toward the pond where Shannon Huntley intervened by jumping on Herbert Boudreau's back. He was assaulted by both Herbert Boudreau and David Comeau in that pond then he ran to the back of the house, got into the back door, locked it as they both, David Comeau and Herbert Boudreau, arrived to it,

latched it, saw them threw the basement window go around the house, was concerned for Shannon Huntley, grabbed the bat, walked upstairs, came out through the front door where a further confrontation occurred on the other side of the truck in front of the door, somewhat to the left, facing the road. Bat against pipe. Bat to the ground, bat picked up again. He hit Herbert Boudreau to the right of his face and the fight continued until Herbert Boudreau and David Comeau desisted, close to the road.

[22] This is a succinct resume of the evidence that was adduced before this trial. It is obviously a W.D. situation, as matters of credibility are important.

[23] All the witnesses were caught up in the moment. Particularly Michael Ryan, Shannon Huntley and Herbert Boudreau.

[24] Neither Herbert Boudreau nor Michael Ryan care for each other and have not for some time.

[25] Michael Ryan had not hesitated the day before to threaten Herbert Boudreau and Mr. LeBlanc, his companion at that time, with the use of a bat, on the same property, when caught red handed in removing some fixtures.

[26] Michael Ryan and Shannon Huntley, together in an intimate relationship, have discussed their respective testimony before the trial and there are indications Mr. Ryan will tailor his testimony to the context or deny facts proven by an independent witness. For instance, denying taking a vanity on December 16th, so witnessed by Constable Poitras, denying a threat clearly made the same day against both Mr. Leblanc and Herbert Boudreau to take them out, using a bat. Denying the smashing of the light fixture. Denying, then admitting, going into the house to get a piece of rope just before the confrontation. Going down on one knee as both Herbert Boudreau and David Comeau were retreating down the driveway, not mentioned in the statement to the police but described by Ms. Huntley.

[27] It may be that he has forgotten the details among so many. But more likely he is attempting to put his role in the matter in a better light. After all, as a co-tenant, helping himself to the fixtures of the house, means he keeps for himself entirely what he would otherwise have to share with the others, including his wife whose interest, on the evidence, has not been extinguished and, that is assuming the property is still worth the money owed to Herbert Boudreau in its present, somewhat dilapidated state. In essence there is more in it for him peace meal, than whole.

[28] On the evidence, Michael Ryan comes through as a person who intends to get his way and will not hesitate to use the threat of force, at the very least. He is also younger and, apparently, stronger than Herbert Boudreau, his father in law. Herbert Boudreau is 69. He appears in good condition and with a certain temper but a calm demeanour. The tensions between his son in law and himself do occupy his mind. In going to the property I accept he wanted to protect his daughter's interest and his own as an unpaid creditor.

[29] I accept there was no urgency to attend at 219 S.F. Comeau Road and that Michael Ryan's presence was only a possibility. I also accept that Herbert Boudreau had reasonable grounds to believe Michael Ryan could be violent and had interfered with the property and himself the preceding day, being the latest event in this frustrating ownership.

[30] Herbert Boudreau certainly had a concern about the property and a dislike of Michael Ryan, his estranged son in law. Michael Ryan may not have been seeking a confrontation, but disregarded the interest of his co-tenant, Jeanette Doucet, and that of Herbert Boudreau, whatever it might be, as an unpaid original investor. Indeed to

all appearances he was committing a waste upon the property by removing fixtures without the consent of the other co-tenants, surreptitiously and in breach of an earlier agreement not to be on the property without the other co-tenant, a date having been set up for the following day by Constable Poitras.

[31] When Herbert Boudreau and Michael Ryan confronted each other on the day in question it appears both were ready and willing to fight each other, in spite of their differences in ages and physical conditions.

[32] Given the confrontation the day before, Herbert Boudreau had armed himself, but it is unlikely that in fact he formed the intention to fight Michael Ryan until he saw him, in a fighting stance, defending his position and his taking of the vanity from the house.

[33] In attacking with a galvanized steel pipe, Herbert Boudreau used excessive force, well beyond the implied consent Michael Ryan had given. Having given instructions to his daughter to call 911, Mr. Boudreau was not justified to escalate the confrontation as he did. There could have been a stand off or a consensual fight, without a weapon, if that was their wish. To use a galvanized steel pipe against an

unarmed man and inflict one blow with a vertical strike was not an act of self defence but an unjustified assault. There was no emergency to fend off. Thereafter, a fist fight ensued between Michael Ryan and Herbert Boudreau. Michael Ryan appeared to get the better of Herbert Boudreau, as one would expect, given their age and physical differences.

[34] It is then that Shannon Huntley, in wrestling with Herbert Boudreau and the pipe, got struck, not hard, in the process. She had, in effect, attacked Herbert Boudreau. This was more of an accident than an intentional strike by Herbert Boudreau whose main contender was still Michael Ryan. There is no proof beyond a reasonable doubt that Herbert Boudreau intended that soft strike on Ms. Huntley and I find him not guilty of those two charges.

[35] Indeed there is no evidence the fight was directed towards Shannon Huntley. The only time she was involved, as I have said, was when she attacked Herbert Boudreau to help her boyfriend. There is no reasonable grounds to believe harm would come to her.

[36] I conclude that Michael Ryan ran to the house and armed himself with a bat, which he had used the day before, to continue the fight with Herbert Boudreau. He did so driving Herbert Boudreau and David Comeau, who accompanied Herbert Boudreau, down the driveway in a duel of bat against pipe, and did so for a considerable distance. Both men backing down the driveway. He, Michael Ryan, struck Herbert Boudreau, likely in retaliation for the blow Herbert Boudreau had inflicted on him earlier. He clearly, by that time, had the upper hand, having forced both men down that long driveway. That blow was excessive force.

[37] I accept Ms. Doucet's evidence that she did not know of the presence of the pipe used by Herbert Boudreau until he took it out of her truck and carried it with him on the way to a confrontation with Michael Ryan, at the house. Her role was to check, on behalf of her sister Nicole, the property on which she believed both Herbert Boudreau and Nicole had an interest. She then went directly to a neighbour to call 911 once it was ascertained Michael Ryan was present at the house. She was not a party to any unlawful act but acted promptly to notify the authorities and seek help. I find her not guilty of the charges.

[38] I am unable to conclude, beyond a reasonable doubt, that David Comeau was a party to the offences with which he is charged. He accompanied first his wife, Jeannette Doucet, and then Herbert Boudreau to the house, as Jeannette Doucet wished to help her sister.

[39] Given the losses already experienced, the tense situation at the house, the agreement that no one was to be there before the morrow and Jeannette's desire to be helpful to her newly found sister, Mr. Comeau's position that she should not go there unaccompanied was reasonable. They stopped at Herbert Boudreau's on their way. Mr. Boudreau came with them. When they stopped, nose to nose, their car against Mr. Ryan's car, David Comeau accompanied Herbert Boudreau to talk to Michael Ryan. At that stage, as Herbert Boudreau had the pipe with him, David Comeau must have known there was some apprehension but there is no evidence David Comeau knew of a plan to attack Michael Ryan yet he was there to be with Herbert Boudreau and defend him or help him.

[40] Indeed, my impression of David Comeau would be that he is not a man who seeks confrontation but rather tries to avoid it if possible. He readily admits this situation should have been avoided. It was not. Given the personalities of the two

main protagonists, Michael Ryan and Herbert Boudreau. David Comeau was not a party to Herbert Boudreau's design.

[41] I find that David Comeau did help Herbert Boudreau to his loss when Michael Ryan was on top of Herbert Boudreau pounding him with his fists. David Comeau struck him once, with a fist, at which time Michael Ryan turned against him. At no time was David Comeau armed and his role was more to defend Herbert Boudreau than attack Michael Ryan. And I do find him not guilty of the two charges he faces.

[42] And thus, in the final analysis, I find David Comeau and Jeannette Doucet not guilty as charged and Herbert Boudreau guilty to have used excessive force when he attacked Michael Ryan with a galvanized pipe at the truck.

[43] In light of all the existing circumstances there was no imminent danger but only pent up frustrations and anger and likely a desire to get into a fight. A short wait for the police would have avoided all sorts of consequences.

[44] This is a finding of guilt against Mr. Boudreau on the 267(a) charge, using a pipe, and I will hear you counsel with respect to the *Kineapple* principle and section 267(b).

[45] MR. JUDGE: A stay should be entered with respect to that charge Your Honour.

[46] THE COURT: Yes, and a stay will be entered.

Jean-Louis Batiot, J.P.C.