PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Toulany*, 2021 NSPC 6

Date: 20210122
Docket: 8393357
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Maurice Saleam Toulany

Judge:	The Honourable Judge Theodore Tax,
Heard:	November 6, 2020, in Dartmouth, Nova Scotia
Decision	January 11, 2021
Charge:	Section 267(a); 267(a) and 264.1(1)(a)
Counsel:	Tiffany Thorne, for Nova Scotia Public Prosecution Service. Michelle James, for the Defence Counsel

By the Court:

[1] Mr. Maurice Toulany was charged with three offences – (1) an assault of Christopher Henneberry by using or threatening to use a weapon, to wit "any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person" contrary to section 267(a) of the **Criminal Code**; (2) an assault on Mr. Henneberry by using or threatening to use a weapon, to wit: a dog, contrary to section 267(a) of the **Code** and (3) unlawfully uttering a threat to Mr. Henneberry to cause bodily harm or death to him, contrary to section 264.1(1)(a) of the **Criminal Code**. The offences were alleged to have occurred on or about October 1, 2019, in Dartmouth, Nova Scotia.

[2] The Crown proceeded by way of summary conviction on all three charges. Mr. Toulany entered a plea of not guilty to all three charges and the trial evidence was heard on November 6, 2020. At the conclusion of the Crown's case, the Crown Attorney invited the court to enter acquittals on the second and third counts on the Information. The Court entered acquittals on those two charges.

[3] Following those developments, Defence Counsel indicated that they did not intend to call any witnesses during the trial. Closing submissions were made by the Crown Attorney and Defence Counsel and the Court reserved its decision until today's date.

Positions of the Parties:

[4] It is the position of the Crown that the court must determine whether Mr. Toulany's conduct on the date in question meets the definition of an assault or an attempted assault as defined in section 265(1) of the **Code** and if so, was that assault or attempted assault with a weapon, which the Crown alleges was a can of bear spray.

[5] Finally, if the Court was to conclude that there was an assault or attempted assault with a weapon, the Court must also consider whether there is an "air of reality" to a defence of the person pursuant to section 34 of the **Code** or a defence of property pursuant to section 35 of the **Code**. The Crown Attorney acknowledges that, if either one of those two defences are in issue, the Crown must prove, beyond a reasonable doubt, that Mr. Toulany did not act in self-defence.

[6] The charge before the court arises from a verbal altercation between Mr. Henneberry and his ex-girlfriend, who is the mother of his then five-year-old son, when he came with his mother, Ms. Stella Battiste, to pick up his son at Mr. Toulany's house. Ms. Battiste drove her car with her son to pick up her grandson, who was staying with his mother at Mr. Toulany's house. Upon arrival, the young boy's mother was very upset because Ms. Battiste did not have a car seat in her vehicle for her grandson. Mr. Toulany joined in the heated verbal altercation between Mr. Henneberry and his ex-girlfriend. Then, at a point, he went back into the house and came back out with a can of bear spray in his hand. Ms. Battiste recognized the bear spray, immediately left the house and called the police. The Crown Attorney submits that when Mr. Toulany came out of the house with a can of bear spray in his hand, it was an attempt to assault Mr. Henneberry by an act or gesture or was an assault by accosting Mr. Henneberry to leave the property with a weapon [the bear spray] in his hand and available for use.

[7] For her part, Defence Counsel submits that there was no evidence of any direct or indirect application of force to Mr. Henneberry by Mr. Toulany while he was in possession of a can of bear spray. Moreover, Mr. Toulany made no threats, acts or gestures to use any bear spray. In addition, Defence Counsel points out that there were no tests of the contents of the can to determine if there was any bear spray in it. However, she acknowledges that a person could reasonably think, given the markings on the can that, at the very least, it was an imitation of a can of bear spray.

[8] Moreover, Defence Counsel submits that the evidence established that Mr. Toulany stayed some distance away from Mr. Henneberry on the step, never approached Mr. Henneberry and kept his arm down by his waist. There was no evidence of his arm being raised with a can of bear spray in his hand and pointed in the direction of Mr. Henneberry. In those circumstances, there is no evidence of any actual or attempted assault with a weapon [the bear spray].

[9] Finally, if the Court were to conclude that there was an assault or an attempted assault, there are the defences in section 34 and 35 of the Code that the Court would have to analyze. Defence Counsel also points to the fact that as the verbal altercation became more heated, Ms. Battiste and Mr. Henneberry were asked to leave the property by his ex-girlfriend. Therefore, at that point, they no longer had the consent of the ex-girlfriend to remain on the property and they had become trespassers. Defence Counsel submits that Mr. Toulany took a reasonable action to insist that trespassers leave his property and that the Crown has not

established, beyond a reasonable doubt, that Mr. Toulany did not act in self defence.

Trial Evidence:

[10] Const. Susan Conrad of the Halifax Regional Police responded to a weapons complaint at 64 Albro Lake Rd., in Dartmouth, Nova Scotia around 5:40 PM on October 1, 2019. She met with Mr. Henneberry and his mother, Stella Battiste, who were parked across the street from that address. Based upon their information, Const. Conrad understood that they had gone to the residence to pick up Mr. Henneberry's young son from his mother, when an argument ensued between Mr. Henneberry and his ex-girlfriend, Sonya over the lack of a car seat in the vehicle. Const. Conrad also understood that Mr. Henneberry's ex-girlfriend was now in a relationship with Mr. Toulany.

[11] For the purposes of the narrative, Const. Conrad had also been informed by Ms. Battiste and Mr. Henneberry that before they could leave to get a car seat for the young child, Mr. Toulany came out of the house with a large dog and a can of bear spray in his hand.

[12] Based on that information, Const. Conrad went to the house and spoke to Mr. Toulany, who was very cooperative and willing to speak to the officer. She cautioned Mr. Toulany that anything he said would be noted by the officer. At that point, Defence Counsel acknowledged that Mr. Toulany voluntarily spoke with the police officer and his comments to her could be admitted in the trial without the need to conduct a voluntariness *voir dire*.

[13] Const. Conrad stated that Mr. Toulany had indicated there had been a prior incident with Mr. Henneberry and as the verbal argument became more heated between the three of them, he was fearful that the argument would escalate. For that reason, he had stated that he went into the house and came back out with a can of bear spray. Const. Conrad stated that Mr. Toulany had said that he kept the bear spray in his pocket when he went outside the house.

[14] Const. Conrad also stated that, during her brief conversation with Mr. Toulany, he offered to turn over the can of bear spray to her and did turn it over to her. Const. Conrad maintained custody of that canister and brought it to the court. She identified the canister, and it was marked as Exhibit 1 in the trial. Then, Const. Conrad read the words on the label of the can into the record as being "Sabre Wild Max – Bear Attack Deterrent." She also noted that there was a warning on the label

that the substance was “Explosive” and that the label indicated that the canister contained 1% capsaicin and related capsaicinoids as the key active ingredients.

[15] On cross-examination, Const. Conrad confirmed that after speaking with Mr. Henneberry and his mother, Ms. Battiste, she believed that Ms. Battiste and her son were outside their car when Mr. Toulany came out of the house with the bear spray. However, Const. Conrad acknowledged that she “would not be surprised” if Ms. Battiste stated that she had remained in her car. Based upon her notes, Const. Conrad also believed that Mr. Henneberry had stated that he did not get outside the car when they arrived to pick up his son.

[16] Const. Conrad agreed with the Defence Counsel that she understood that the argument between the parents, which then included Mr. Toulany was over the fact that Ms. Battiste did not have a car seat in her vehicle for her young grandson. Const. Conrad agreed that Mr. Toulany and Sonya were “absolutely” within their rights to not let the child travel in the car without that car seat. Const. Conrad also confirmed that she did not test the bear spray to see if it functioned, nor was it sent to the lab for testing. She also agreed that Mr. Henneberry had confirmed that the bear spray was not sprayed, and that he was not bitten by the dog.

[17] Ms. Stella Battiste, who was the only other witness called during the trial, confirmed that Mr. Henneberry was her son, and that Liam Henneberry was her grandson. On October 1, 2019, she drove her car to 64 Albro Lake Rd. where her five-year-old grandson was staying with his mother to pick him up for visitation with his father. Both her and Mr. Henneberry had just finished work and she drove her car to pick up the grandson.

[18] Ms. Battiste drove into the long driveway beside the house and turned around in front of the garage and pulled up beside the side door of the house. As the driver, she was closest to the house, with her son, Chris Henneberry seated in the passenger seat. She said that Liam and Sonya were standing by the back door of the house and her son had got out of the car and was standing on the passenger side of the car, while he spoke with his ex-girlfriend. Ms. Battiste remained in the driver’s seat of the car while she was speaking with the others through the open driver’s side window.

[19] After a few moments, the argument between the parents became fairly heated and she offered to drive back to her place, get a car seat and come back in about five minutes. As she offered to do that, Mr. Toulany joined in the verbal argument and, at a certain point, he went into the house and came back out with a

can of bear spray. When that occurred, her son got in the car and she drove across the street and called the police.

[20] Ms. Battiste also said that, sometime during the verbal argument, Mr. Toulany opened the door and let a big dog out onto the step. She was not sure how the dog would react as the verbal argument became more heated. However, on cross-examination, she confirmed that she had babysat her grandson at that house and was familiar with the dog and had never seen any signs of aggression from that dog on any prior occasion or that afternoon. Moreover, she also acknowledged on cross examination that Mr. Toulany had not said anything to get the dog to attack Mr. Henneberry.

[21] She agreed with Defence Counsel that when Mr. Toulany joined in the verbal argument over the lack of a car seat, everyone's voices were raised and the argument "spiralled" into other issues between her son, his ex-girlfriend and Mr. Toulany. She also agreed that Mr. Toulany and the ex-girlfriend had remained on the step at the side door of the house and that when she saw the can of bear spray in his right hand, it remained down by the side of his leg. She estimated that Mr. Toulany was about 3 feet away from her and that her son was standing outside the passenger side of the vehicle, talking over the roof of the car during the verbal altercation.

ANALYSIS:

[22] In a criminal trial, the most fundamental rule is that the burden of proving the guilt of the accused beyond a reasonable doubt, rests upon the prosecution and does not shift to the accused at any stage in the proceedings. The accused person is presumed innocent until proven guilty beyond a reasonable doubt. The trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence in order to convict an accused person.

[23] Reasonable doubt has been defined by the Supreme Court of Canada in **R. v. Lifchus,** [1997] 3 SCR 320 and in **R. v. Starr,** [2000] 2 SCR 144. Those cases have determined that a "reasonable doubt" does not involve proof to an absolute certainty, but more is required than proof that the accused is probably guilty.

[24] The Supreme Court of Canada also pointed out that reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the

evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the Court determines that the evidence was vague, inconsistent, improbable or lacking in cogency. Of course, reasonable doubt may also arise from testimony of an accused or any other evidence tendered by the defence from any other sources.

[25] At the outset of the analysis, it is important to remember that Mr. Toulany has been acquitted of the other charges of assaulting Mr. Henneberry by using or threatening to use a weapon, to wit, his dog, contrary to section 267(a) of the **Code** and of uttering a threat to cause bodily harm to Mr. Henneberry contrary to section 264.1(1)(a) of the **Code**. Therefore, the only issue before the Court is whether the Crown has established that Mr. Toulany either assaulted or attempted to assault Mr. Henneberry by using or threatening to use a weapon (bear spray), contrary to section 267(a) **Criminal Code**.

[26] The essential elements of the remaining offence involve the definition of assault as found in subsection 265(1) **Code,** and with respect to this case, paragraphs 265(1)(b) and (c) of the **Code**. In this case, there is no evidence before the court to support the most common definition of an assault pursuant to section 265(1)(a) **Code** which involves the intentional application of force, directly or indirectly to another person without that person's consent.

[27] In order to establish an assault pursuant to para. 265(1)(b) of the **Code**, the Crown must establish, beyond a reasonable doubt, that the accused attempted or threatened, by an act or gesture to apply force to another person if he has or caused that other person to believe on reasonable grounds that he has the present ability to effect his purpose.

[28] In order to establish an assault pursuant to para. 265(1)(c) of the **Code**, the Crown must establish, beyond a reasonable doubt, that the accused "while openly wearing or carrying a weapon or an imitation thereof, accosts or impedes another person or begs." This third manner of committing an assault is not often before the Court and requires the Court to consider what is meant by "accosting" another person.

[29] The **Oxford Advanced Learners Dictionary**, online edition, defines the transitive verb "accost" in this manner - "to go up to someone and speak to them, especially in a way that is rude or threatening." The **Cambridge University** [United Kingdom] online English dictionary defines the verb "accost" in this manner - "to go up to or stop and speak to someone in a threatening way." The

Merriam Webster online American dictionary describes the verb "accost" in this manner – "to approach and speak to (someone) in an often challenging or aggressive way."

[30] Keeping those definitions in mind, in addition to establishing that Mr. Toulany had intentionally committed an assault or attempted to assault Mr. Henneberry, the Crown must also establish, beyond reasonable doubt that in doing so, the accused openly carried, used or threatened to use a "weapon" or an imitation weapon, in this case, the bear spray.

[31] A "weapon" is defined in section 2 of the **Criminal Code** as being "any thing used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating another person." With respect to this narrow issue, I find that Exhibit 1, which was a bear spray and the information on the label of that can which was read into the record by the police officer, outlined the nature of the contents of that can and I am satisfied that those contents could certainly cause injury if sprayed at a person. In those circumstances, I find that Exhibit 1, which has been identified as a can of bear spray, meets the Criminal Code definition of a "weapon."

[32] Although the police officer confirmed that the can with a label identifying it as "bear spray" was not tested or sent to a lab to see whether bear spray would be released, I find that given the markings on the can itself, there can be no doubt that, at the very least, Mr. Toulany had possession of an imitation can of bear spray. As a result, I find that Exhibit 1, which was obtained from Mr. Toulany, would establish the essential element of a carrying or use of a "weapon" for a charge of assault with a weapon contrary to section 267(a) of the **Criminal Code** as that offence may be established if, in committing an assault, the accused "carries, uses or threatens to use a **weapon or an imitation thereof**." [Emphasis is mine].

[33] However, having found that a can of bear spray or what purports to be an imitation of a can of bear spray may be considered to be a "weapon," the charge before the Court requires the Crown to establish, beyond a reasonable doubt, that Mr. Toulany assaulted or attempted to assault Mr. Henneberry with that "weapon." In those circumstances, I also conclude that the carrying or possession of the can of bear spray or an imitation thereof, does not establish the assault with a weapon charge without evidence to substantiate some other act, gesture or words which would constitute an assault or attempted assault of Mr. Henneberry.

Did Mr. Toulany Assault or Attempt to Assault Mr. Henneberry?

[34] Since there was no evidence of any direct or indirect application of force by Mr. Toulany to Mr. Henneberry, the Crown submits that an assault was established by the other manners mentioned in subsection 265(1) of the **Code**, namely, that the accused attempted or threatened by an act or gesture to use the bear spray to apply force to Mr. Henneberry, with the present ability to do so or in the alternative, by virtue of fact that while Mr. Toulany was carrying the bear spray, he accosted Mr. Henneberry or impeded him in some manner.

[35] The first issue to address is whether the Crown established that Mr.Toulany assaulted or attempted to assault Mr. Henneberry as defined in para. 265(1)(b) of the **Code** based upon the submission that he attempted or threatened by an act or gesture to apply force with a weapon and did so while he had the present ability to effect his purpose. With respect to this submission, I find that Ms. Battiste's evidence was that, although she was familiar with and she said that she saw a can of bear spray in Mr. Toulany's right hand, he never raised that hand and kept the can down beside his leg. Based upon the information provided to the Court by Const. Conrad, which was certainly consistent with Ms. Battiste's observations, Mr. Toulany had told her that he kept the can of bear spray in his pocket when he came back out of the house.

[36] In those circumstances, even though Mr. Toulany acknowledged having carried the can of bear spray out onto the step after going into the house for a few moments, I find that there is no evidence before the Court of any act or gesture that would indicate he planned to spray Mr. Henneberry. While I have no doubt that the verbal argument between Mr. Henneberry, his ex-girlfriend and Mr. Toulany became very heated, I find that there was also no evidence that Mr. Toulany expressed any threatening words, nor made any act or gesture which showed any intention to deploy the bear spray against Mr. Henneberry.

[37] In addition, based upon Const. Conrad's evidence that when Mr. Toulany handed over the can of bear spray to her and told her that he was fearful of Mr. Henneberry applying force to himself, I find that it is far more likely that Mr. Toulany's possession of the can bear spray was as a means of self defence. I also find that Mr. Toulany's possession of the can of bear spray being held on reserve to potentially protect himself is certainly consistent with the evidence that the canister was held along the side of his pants, as opposed to being raised and pointed in the direction of Mr. Henneberry.

[38] Although there are relatively few reported cases which have involved a situation like the instant case, in R. v. **Boon**, [2008] A. J. No. 1512, 2008 ABPC

373, the accused was charged with assault with a weapon, namely a can of bear spray, contrary to section 267(a) **Code**.

[39] In **Boon**, the accused was a drug addict, who had used a residence as a "crack house" for himself and others. The registered owner of the house was the accused's son, however, the accused claimed that he had financed the purchase and was the real owner of the house and that the son was a trespasser. On previous occasions, the accused had been ejected from the property as a trespasser by the police after breaking into the house. On this occasion, the accused's son came with three others to assist him if there was a confrontation over the issue of directing the accused to leave the house.

[40] The complainant and his friends entered the house through a garage as all of the windows and doors to the house had been broken and were boarded up by the complainant to prevent further break-ins by his father and other drug addicts. The accused was asleep and was startled by the presence of his son and the others. He was told to leave the house, or the police would be called, which precipitated an "emotional verbal exchange" between the accused and his son.

[41] The accused did exit the house as he did not want to again deal with the police over this issue, but once they were outside the front of the house, they had another "emotional verbal exchange." It was during this second verbal altercation that the accused raised a canister of bear spray that he had in his hand, pointed it at the complainant and expressed words which threatened to spray him with it.

[42] In **Boon**, *supra*, Semenuk J. concluded at para. 150 that "absent justification by the accused in doing what he did, there was an assault with a weapon in the circumstances of this case."

[43] As a result, the Court in **Boon**, supra, went on to examine possible justifications for the actions of the accused. The Court found that the accused felt threatened and intimidated by his son and three other males during the first verbal altercation in the house and that he continued to feel threatened and intimidated by his son and the others during the second verbal altercation outside the house. In those circumstances, the Court found that the accused had reasonable grounds to anticipate a physical confrontation with his son and the others in front of the house.

[44] In **Boon**, *supra*, the Court concluded that the accused did not have any intention of discharging the bear spray although he had pulled out the bear spray and threatened to spray his son to defend himself. Since he did not discharge the

bear spray, the force used was no more than necessary to allow the accused to go back into the house and retrieve a DVD player and then leave the property. In the final analysis, the accused was found not guilty of the assault with a weapon charge, as the Court concluded that the Crown had failed to establish beyond a reasonable doubt that the accused was not acting in self defence.

[45] I find that the **Boon** case highlights the series of the legal issues which may arise in a case of this nature. In that case, the Court was satisfied that there had been an assault with a weapon by virtue of the words spoken by the accused as well as his acts and gestures towards his son, as there was certainly a threat to spray the complainant with bear spray. The Court also found that the accused had pointed the bear spray in the direction of his son and that act or gesture was accompanied by threatening words, while the accused person had the present ability to carry out the threat by having the bear spray or "weapon" in his hands. However, in the final analysis, the accused was found not guilty as the Crown had not established that he was not acting in self defence.

[46] Unlike the **Boon** case, in this case, while I have found that Mr. Toulany was carrying a can of bear spray while Mr. Henneberry, his ex-girlfriend and Mr. Toulany were involved in a heated verbal altercation, I have also found that there was no evidence of any act or gesture of Mr. Toulany raising or pointing the cannister in the direction of the complainant. While I accept Ms. Battiste's evidence that she was familiar with and saw a can of bear spray in Mr. Toulany's hand, down along the side of his leg, I find that there was no act or gesture which would indicate any intention that Mr. Toulany was threatening to deploy the bear spray at Mr. Henneberry.

[47] In addition, I find that there was no evidence that Mr. Toulany ever expressed any threatening words towards Mr. Henneberry during the heated verbal altercation which might have left a reasonable belief that he had threatened to deploy the bear spray at Mr. Henneberry. As mentioned at the outset, the lack of any evidence of an expressed threat was dealt with at the conclusion of the Crown's evidence and Mr. Toulany was acquitted of that charge.

[48] Taking all of the evidence into account, I find that the Crown has not established, beyond a reasonable doubt, that Mr. Toulany attempted or threatened to assault Mr. Henneberry by an act or gesture or threat of an act or gesture to apply force to Mr. Henneberry, while he had what was, or purported to be, a can of bear spray in his hand, pursuant to the definition of an assault found in paragraph 265(1)(b) of the **Criminal Code**.

[49] Having come to that conclusion, the Crown Attorney also submitted that the evidence established that Mr. Henneberry was assaulted with a weapon based upon the definition of an assault in para. 265(1)(c) of the **Criminal Code**. Therefore, the key issue to determine is whether the Crown has established, beyond a reasonable doubt, that Mr. Toulany accosted or impeded Mr. Henneberry and did so while he was carrying a weapon or an imitation thereof.

[50] I have already determined that the canister, which was marked as Exhibit 1 in the trial, with a manufacturer's label indicating that it was a "Bear Attack Deterrent" and contained the key active ingredients of bear spray as read into the record by Const. Conrad could be considered to be a "weapon" as defined in section 2 of the **Criminal Code**. However, it is clear from the para. 265(1)(c) **Code** definition of an assault, that the offence is not made out by simply carrying or openly wearing a weapon or an imitation thereof.

[51] I find that the *actus reus* of an assault pursuant to para. 265(1)(c) of the **Code** requires proof that the accused openly wore or carried a weapon or an imitation thereof **and** while doing so, he accosted or impeded the complainant. Based upon the definitions that I have referred to above with respect to accosting someone, I find that the essence of this offence involves some words or actions that are of an inherently threatening nature which were made while the accused person was openly wearing or carrying a weapon.

[52] In my opinion, based upon the definitions of the transitive verb "to accost" someone referred to above, the Crown is required to establish, beyond a reasonable doubt, that the accused "accosted" another person by going up to or approaching someone **and** also expressing words to them in a challenging, aggressive or threatening way.

[53] On the other hand, in my opinion, in order to establish an assault by "impeding" someone, the Crown is required to establish, beyond a reasonable doubt, that the accused "impeded" someone by preventing that other person as a result of the accused's words and/or actions of a threatening nature, to prevent or hinder that other person from proceeding in a certain manner as they wished to do.

[54] It is clear in this case, that Mr. Toulany did not impede Mr. Henneberry from doing anything. The heated verbal altercation between the adults had started over the fact that Ms. Battiste had driven Mr. Henneberry to the house in her vehicle to pick up her grandson without having a car seat appropriate for his age. There was absolutely nothing preventing Mr. Henneberry from leaving the scene and

returning with his mother several minutes later with the proper car seat to transport his young son. Once again, there was no evidence of any words or actions of a threatening nature directed towards Mr. Henneberry.

[55] Moreover, the argument over the car seat, which then spiraled into other issues, appears to have been based upon the fact that the young boy's mother and Mr. Toulany had very valid reasons to object to Ms. Battiste and Mr. Henneberry transporting the young child without a car seat. As Const. Conrad acknowledged during cross examination, they were "absolutely within their rights" to not let the young boy travel without the safety and security of an appropriate car seat being properly secured in the vehicle.

[56] In those circumstances, I cannot conclude that Mr. Henneberry was "impeded" in the context of an assault as defined by para. 265(1)(c) of the **Code**, since there is no evidence of any words or actions of a threatening nature which would have "impeded" him from doing anything that he was legally able to do.

[57] Having come to that conclusion, has the Crown established, beyond reasonable doubt that Mr. Toulany committed an assault of Mr. Henneberry by "accosting" him while openly wearing or carrying a weapon, based upon the definition found in para. 265(1)(c) of the **Criminal Code**. Although there are not many reported cases involving an assault committed in that manner, in **R. v. Whitehorn**, [2004] N.J. No. 304; 2004 CanLII 6855 (NLPC) Gorman J. dealt with the factual and legal issues involved in the trial based upon the definition of an assault in section 265(1)(c) of the **Code**.

[58] In **Whitehorn**, the female complainant and the male accused had worked for several years as coworkers in the kitchen area of a hospital. On the day in question, the accused asked her why she was not friendly towards him, when she was friendly towards everyone else. After that and for a few hours, he would stop and stare at her. After lunch, the accused approached the complainant with a 12 inch knife taken from the cutlery drawer in his hand, stood very close to her and held the knife with the blade pointed up at his shoulder level and asked if they could be friends. The accused then lowered the knife to his side and began to swing it back-and-forth in a pendulum motion while he continued to speak to her about them not being friends and that girls cannot be friends. The complainant was frightened by his actions. The complainant had acknowledged that the accused did not touch her or threaten to harm her.

[59] In **Whitehorn**, *supra,* at para. 68, the accused was found guilty by the Court. Judge Gorman concluded that the Crown had established that he had committed an assault as defined by section 265(1)(c) of the **Code**. The evidence established that the accused was openly carrying a weapon and that the earlier events and the conversation while swinging the knife back-and-forth while talking to her established that he had accosted her while doing so. The Court concluded that the accused intended, by his words and actions, to intimidate and scare the complainant because he knew she was not interested in him, did not wish to speak to him and she had not responded to his staring at her.

[60] Taking into account the above mentioned definitions of the transitive verb to "accost" someone, unlike the **Whitehorn** case, I find that there is no evidence that Mr. Toulany ever went up to or actually approached Mr. Henneberry during the heated verbal altercation which started over the lack of the car seat and then, apparently spiraled into other matters.

[61] I find that the evidence established that Mr. Toulany remained on the step of the house and that he never approached Mr. Henneberry who was standing outside the passenger side of his mother's vehicle. In those circumstances, not only did Mr. Toulany not approach or get into the "personal space" of Mr. Henneberry, I find that Mr. Toulany probably remained a minimum of 8 feet away from him [since Ms. Battiste had stated that, as the driver, she was about 3 feet from Mr. Toulany] with a physical barrier of her car being between the two males.

[62] Furthermore, taking into account the definitions of "accosting" someone referred to above, in this case, there was no evidence that Mr. Toulany moved forward to be in the physical proximity or "personal space" of Mr. Henneberry, nor any evidence of any words, acts or gestures of a threatening nature made by Mr. Toulany that were directed towards Mr. Henneberry.

[63] In my opinion, an accused person who approaches and being in close proximity to another person or being in the "personal space" of that other person, does not in and of itself, constitute an assault by "accosting" or "impeding" someone, based upon the definitions of those words, which are contained in para. 265(1)(c) **Code**.

[64] In the case of R. v. **Byrne**, [1968] 3 C.C.C. 179, 3 C.R.N.S. 190 (BCCA), it was held that words alone, unaccompanied by any gesture, do not constitute an act of assault.

[65] As a result, I find that, in order to establish that an accused committed an assault by "accosting" someone based upon the definition of an assault in para.265(1)(c) **Code**, the Crown must establish an approach by the accused to be within the "personal space" of the complainant to "accost" that person and that action must be combined with words, acts or gestures directed at the victim which were made in a challenging, aggressive or threatening way to establish a present ability to effect his or her purpose.

[66] Given the fact that there was no evidence of any threats being made by Mr. Toulany towards Mr. Henneberry and the fact that he never approached him during the heated verbal altercation, I find that the Crown has not established, beyond a reasonable doubt, that Mr. Toulany "accosted" Mr. Henneberry while carrying a weapon. Therefore, I conclude that the Crown has not established that Mr. Toulany "accosted" Mr. Henneberry and I thereby find that he did not commit an assault based upon the definition of an assault as found in para. 265(1)(c) of the **Code**.

[67] For all of the reasons outlined above, I find that the Crown has not established, beyond a reasonable doubt, that Mr. Toulany committed an assault with a weapon contrary to section 267(a) of the **Criminal Code**. Having come to that conclusion, I find Mr. Toulany not guilty of that offence.

Theodore Tax, JPC