

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**  
**Citation: *R. v. Robin Leslie Marsman*, 2004 NSPC 17**

**Date:** 20040227  
**Case No.(s):** 1198177  
1198178  
**Registry:** Halifax

**Between:**

**R.**

v.

**Robin Leslie Marsman**

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

**Heard:** Decision rendered orally on February 27, 2004  
in Halifax Nova Scotia

**Counsel:** Eric R. Woodburn, for the Crown  
Robin Leslie Marsman, for the Defence

## **BY THE COURT**

### **Introduction**

- [1] The immediate neighbourhood of 2223 Brunswick Street in the Halifax Regional Municipality on May 25, 2002 was the scene of a noisy dispute between two factions of residents. The genesis of the disagreement was that about a week earlier, someone broke the car window of Michelle Morash who was the girlfriend of the alleged victim, Frederick Fowler. Morash was apparently dissatisfied with the arrangements offered to repair the damage and, on May 25, 2002, repeatedly confronted the youth who broke the window and engaged in heated verbal and physical altercations with him and his friends.
- [2] The neighbours who took sides in the dispute, cursed, and swore at each other. However, when the accused, Robin Leslie Marsman, who had received a call about the row, arrived on the scene, an intense argument commenced between him and Fowler concerning Fowler's disposition and attitude toward an elderly resident. This exchange of words resulted in both parties fighting with each other.
- [3] As a result, this case raises the issues of whether, in the circumstances, the accused acted in self-defence, or did he intentionally use force against Fowler? In addition, did he unlawfully create a disturbance by fighting with Fowler?

### **Relevant Evidence and Findings of Fact**

- [4] On my observations of the witnesses as they testified and on my assessment of their testimonies with the total evidence, I accept and find that Morash was unhappy with the youth who had broken her car window. Additionally, I accept and find that she, along with Fowler and others, went to 2223 Brunswick Street where she confronted the youth, argued with him and struck him. Gerald Bowden, a senior resident at the address and who is the father of the accused girlfriend, informed Morash that the youth involved would pay for the damage. However, Morash continued her abuse toward the youth and a crowd gathered and everyone was shouting and swearing at each other. Someone called the police and the parties dispersed.
- [5] Further, I accept and find that Morash and her party returned to the area and again conducted themselves contumeliously. Fowler approached Bowden who was trying to calm things down but desisted when told by Morash to leave Bowden alone. Meanwhile, the accused had arrived because someone called him and told him about the disturbance that involved his girlfriend's father. I accept and find that the accused enquired of Bowden if all was well and that Fowler, uttering profanities, admonished him to mind his own business. As a result,

the accused and Fowler started to argue intensely with each other with the accused telling Fowler that Bowden was an old man and that he, Fowler should pick on someone his own age and size.

- [6] In addition, I accept and find that Fowler who was standing on a step swung at and struck the accused with his hand. Thereupon, the accused grabbed him and they both fell to the ground where they commenced exchanging blows. I accept and find that there was a general scrimmage and the crowd, that had gathered in support, continued to shout and utter invectives at each other. Finally, I accept and find that during the fight that both Fowler and the accused sustained injuries that required medical intervention.

### Analysis

- [7] Credibility is the paramount issue. Therefore, I think that it appropriate to refer to and include the observations that I made in *R. v. Sung Lee*, [2003] N.S.J. No. 227, 2003 NSPC 26 at para. 7:

...because of the conflicts in the witnesses' testimonies it seems to me that a substantive test of the truth of the versions of the event would be whether I can reconcile their stories with the preponderance of the probabilities which a practical and informed person would willingly accept as reasonable from the scenario as they described it. See: *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357. Additionally, my observations of the witnesses as they testified and my assessment of their testimonies, considering the total evidence, was critical in arriving at my acceptance of their general integrity, sincerity, frankness and honesty. See: *White v. The King* (1947), 89 C.C.C. 148 (S.C.C.), at p.151, *R. v. O.J.M.*, [1998] N.S.J. No. 362 at para.35, *R. v. W.(D)*, [1991] 1 S.C.R. 742.

- [8] On a careful analysis, I think that Morash's conduct and her persistence in confronting the youth and his friends acted as the catalyst for the events that developed and defined the evening. The police were called on at least one occasion and everyone had refrained from further fulminations until Morash along with Fowler and another returned and again became abusive and obstreperous. They argued with Bowden who was attempting to placate the parties. When the accused arrived on the scene, the strong inference was that he arrived looking for a fight. However, I am of the view, based upon his first reaction, his relationship with Bowden and the reported and observed activities of Morash and her companions, that his presence was to ensure that no harm befell the elderly Bowden.
- [9] Consequently, I think that given the confrontational mood and abusive manner of Morash's group, it is reasonable to conclude as it is in harmony with the preponderance of the

probabilities that a practical and informed person would readily accept as reasonable as disclosed by the evidence, that Fowler, a member of that group, would not be friendly disposed to greet the arrival and presence of the accused. As a result, I accept and find that he told the accused, clearly and with profanities, to mind his own business. Additionally, as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily accept as reasonable, I conclude and find that Fowler, after a heated exchange in anger, swung out with his arm at the accused. Further, I find that when the accused reacted and grabbed Fowler he was justified in using force to repel or to prevent a further unprovoked attack upon himself. Afterwards, when they both fell to the ground and exchanged blows it is reasonable to conclude that they both wanted to give the best they could to the other.

- [10] Although they both suffered injuries, the evidence is unclear as to the actual causative agent. However, as the thrust of the charge is merely common assault I need not make any comments or findings on the nature or causes of those injuries.
- [11] Here, the accused has raised the defence of self-defence in the face of an unprovoked aggression. At first blush, it seems to be a valid defence as it was Fowler, who swung at him. But, on closer scrutiny it seems to me that the accused could have walked away from any confrontation. However, given the emotional attachment he might have had for Bowden as the father of his girlfriend, in addition to the charged atmosphere, I think that the accused was not prepared to retreat in the face of Fowler's aggressive and rude deportment.
- [12] Therefore, on the evidence, it is reasonable to conclude, and I do conclude and find, that both the accused and Fowler were prepared physically to contest the issues and accordingly confronted each other. Moreover, it is reasonable to conclude and find, given the atmosphere of hostility that then existed, the insults and subtle challenges, that when Fowler swung and the accused countered by grabbing him and they fell to the ground and exchanged blows, they were engaged in a consensual fight. As I have stated, they both sustained injuries but neither is complaining about these injuries. Additionally, the evidence is unclear about the nature and causes of them. Further, there is no evidence on which I could conclude beyond a reasonable doubt that consent was vitiated as a result of those injuries. *R. v. Jobidon*, [1991] 2 S.C.R. 714.
- [13] As a result, on the evidence that I accept and on the analysis that I have made, I conclude and find that the Crown has not proved beyond a reasonable doubt that the accused, Robin Leslie Marsman, unlawfully assaulted Frederick Fowler. I find him not guilty as charged and will enter an acquittal on the record.
- [14] I now turn to the issue of causing a disturbance by fighting in a public place. Section 175 of the *Criminal Code*, states:

(1) Every one who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

.....

is guilty of an offence punishable on summary conviction.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraphs (1)(a) or (d) ... was caused or occurred.

[15] However, before the accused conduct can be an offence under this section, as was put by McLachlin J., (as she then was) in **R. v. Lohnes**, [1992] 1 S.C.R. 167, [1992] S.C.J. No.6 at para. 30:

There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public. There may be direct evidence of such an effect or interference, or it may be inferred from the evidence of a police officer as to the conduct of a person or persons under s. 175(2). The disturbance may consist of the impugned act itself, as in the case of a fight interfering with the peaceful use of a barroom, or it may flow as a consequence of the impugned act, as where shouting and swearing produce a scuffle. As the cases illustrate, the interference with the ordinary and customary conduct in or near the public place may consist in something as small as being distracted from one's work. But it must be present and it must be externally manifested. In accordance with the principle of legality, the disturbance must be one which may reasonably have been foreseen in the particular circumstances of time and place.

[16] I accept and find that before the accused arrived on the scene, opposing groups of neighbours were already present and were shouting expletives and obscenities at each other. The whole atmosphere was charged with hostility and invectives. Apparently, nobody was complaining about this shouting and swearing as everyone was involved. In my view, on the evidence that I accept, it is reasonable to conclude that the accused immersed himself into this swirling imbroglio of disputants and was caught up in the moving events.

[17] Further, I think that, given the overall scenario, it is possible that it was the conduct of Fowler that caused a reaction on the part of the accused that culminated in the fight. In other words, when I considered the countervailing interests that must be weighed, I conclude that the context of the fight between the accused and Fowler was a logical extension of the hostility that was manifesting in a rush of palpable waves through the opposing groups of neighbours. In short, I do not think that the scrimmage caused anyone present to conduct themselves any differently than they were before the accused arrived on the scene.

[18] There is no evidence that the fighting itself affected people's conduct in any material way. True, it may have been noisy but the issue is whether it was a disorder that did interfere with the normal public activities in that place and at that time. The evidence is that all the neighbours who could have been affected were all involved in some conduct that was contributing to the commotion. The accused conduct was part and parcel of this disorderly conduct and, therefore, in my view, it cannot be singled out or be designated as the causative factor. The disorder, such as it was, existed before his arrival and continued unabated upon and after his arrival. Therefore, in my opinion, it cannot be said that he caused it.

## **Conclusion**

[19] Consequently, I think that it would be unsafe to conclude beyond a reasonable doubt that the accused caused a disturbance in a public place by fighting. Put another way, on the analysis that I have made I find that the Crown has not proved beyond a reasonable doubt that the accused Robin Leslie Marsman did unlawfully create a disturbance in a public place by fighting. I find him not guilty as charged and will enter an acquittal on the record.

\*\*\*\*\*