

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Colley, 2007 NSPC 30

Date: June 12, 2007

Docket: 1706704-06

Registry: Halifax

Between:

Her Majesty the Queen

v.

Carlo Lenn Colley

Judge: The Honourable Associate Chief Judge R. Brian Gibson,
J.P.C.

Heard: May 14, 2007

Date of Decision: June 12, 2007

Charges: On or about the 8th day of October, 2006 at or near East Preston, Nova Scotia, did unlawfully wound Roger Simmons thereby committing an aggravated assault, contrary to Section 268(1) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, in committing an assault on Roger Simmons, use or threaten to use a weapon, or imitation thereof, contrary to Section 267(a) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, unlawfully have in his possession a weapon, for a purpose dangerous to the public peace, contrary to Section 88 of the **Criminal Code**.

Counsel:

G. Arthur Theuerkauf, Senior Crown Attorney
David Green, Defence Attorney

By the Court:

[1] On Sunday, October 8, 2006 between the approximate time of 11 a.m. and 12 noon, at or near East Preston, Nova Scotia, the Accused, Carlo Lenn Colley, struck the right arm of Roger Simmons with a shovel causing a fracture of his ulna bone. Mr. Colley also struck Mr. Simmons in the rib cage area with his fist, causing a fracture of one of his ribs. At the time that Mr. Simmons was struck and injured by Mr. Colley, both individuals were on the residential property occupied by Mr. Simmons.

[2] Mr. Colley claims that he struck Mr. Simmons in self-defence. Absent a consideration of defence evidence, the Crown evidence clearly establishes a *prima facie* case inasmuch as that evidence establishes that Mr. Colley intentionally struck and thereby intentionally applied force to Mr. Simmons causing him to suffer wounds. The issue to be determined is whether, despite the claim of self-defence and evidence adduced in support thereof, the Crown has proven beyond a reasonable doubt any or all of the **Criminal Code** charges against him, being that of aggravated assault, by wounding Roger Simmons, contrary to S.268; that of assault of Roger Simmons by using or threatening to use a weapon, contrary to S.267(a); and that of

possessing a weapon for a purpose dangerous to the public peace, contrary to S.88.

- [3] The defence evidence includes testimony given by the Accused. Therefore, I have instructed myself regarding the issue of credibility relative to proof beyond a reasonable doubt in accordance with the direction found in the case of R. v. W.(D), (1991) 63 C.C.C. (3d) 397 (S.C.C.), where at page 409, the following was stated on behalf of the Court by Cory, J.:

“In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they *must* acquit the accused in two situations. First, if they believe the accused. Secondly, if they do not believe the accused’s evidence but still have a reasonable doubt as to his guilt after considering the accused’s evidence in the context of the evidence as whole: see *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.); approved in *R. v. Morin*, *supra*, at p.207.

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.”

[4] According to Mr. Colley, Roger Simmons got out of his truck and walked toward him with the knife in his hand. In response, Mr. Colley testified that he retreated, picked up a shovel, and swung it with both hands thereby striking the right arm of Roger Simmons. This, according to Mr. Colley’s testimony, caused the knife to fly from Mr. Simmons’ hand to an undetermined location. Apparently no one saw where the knife landed.

[5] A physical struggle between Mr. Colley and Mr. Simmons then ensued. Mr. Colley, aged 36 years, a man significantly larger, heavier and younger than Roger Simmons, who is approximately 30 years older than Mr. Colley, quickly gained the upper hand in that struggle. Roger Simmons went down on the ground and as he did, he grabbed the bottom of the pants worn by Mr. Colley. While he laid on the ground, holding onto Mr. Colley’s pants, Mr. Colley struck Mr. Simmons in the area of his ribs with his fist with at least two and likely more blows. Mr. Colley justified those blows as measures to keep Mr. Simmons from causing him to fall. According to Mr. Colley, Mr.

Simmons was pulling on the bottom of the pant legs in what he believed was an attempt to cause him to fall.

[6] The struggle ended when one of the individuals who had gone to Mr. Simmons' property with Mr. Colley in his truck, intervened. About the same time, Vonita Simmons, wife of Roger Simmons, heard the commotion and came outside.

[7] Whether or not the evidence establishes that Mr. Colley acted in self-defence or is sufficient to raise a reasonable doubt relative to proof of the charges can only be determined by considering all the relevant evidence, including the circumstances that led to the altercation.

[8] Mr. Colley stated to Vonita Simmons that Roger Simmons had had a knife. I conclude that these words were uttered to justify his actions but nevertheless is evidence consistent with his evidence that Mr. Simmons had a knife. Mr. Colley would have had reason to make some attempt to justify his actions by virtue of the fact that Vonita Simmons is his aunt, being his mother's sister. She has a son who is Mr. Colley's cousin. Mr. Colley

enjoys a positive relationship with both Vonita Simmons and her son and was, prior to this event, a frequent visitor at the Simmons' property. Roger Simmons, who has been married to Vonita Simmons for 20 years, is Mr. Colley's uncle by marriage.

- [9] Whatever the quality of the relationship that may have existed between Mr. Colley and Mr. Simmons prior to October 8, 2006, it was clearly soured by the accusations of theft made by Mr. Simmons to Mr. Colley on the morning of October 8, 2006. Mr. Simmons suspected that Mr. Colley had, without authorization or permission, taken some two by four pieces of lumber from Mr. Simmons' property. Mr. Simmons, upset by his suspicions, had sought out and found Mr. Colley at Mr. Colley's residence that morning. He stated his accusations to Mr. Colley. Later the same morning, Mr. Simmons again encountered Mr. Colley at the residence of a Mr. Slawter and repeated his accusation. In addition to his accusations, Mr. Simmons told Mr. Colley to stay off his property. I conclude from the evidence that both individuals were angry at one another, however during these two occasions, no physical altercation occurred.

[10] In response to the direction by Mr. Simmons to stay off his property, Mr. Colley stated that he would go to the property if he wanted to because it was his aunt's property. After the repeated accusation of theft and direction to stay off the Simmons' property, Mr. Colley proceeded to drive his truck directly to the Simmons property, accompanied by two individuals, Jamal Williams and Cisco Williams. Mr. Colley parked his truck on the right-hand side of the road, across the road from the entrance to the driveway on the Simmons property. Shortly after parking his vehicle in that location, Mr. Simmons arrived in his truck and drove into his driveway a distance of approximately three vehicle lengths from the road and parked near his house. Mr. Colley then got out of his vehicle, walked across the road and down the driveway towards the Simmons vehicle. In so doing, Mr. Colley walked past a shovel which was lying on the ground close to some garbage cans near the edge of the paved portion of the road adjacent to the Simmons driveway. It was apparent from his evidence that he had seen the shovel as he walked down the driveway. This was the shovel that he subsequently picked up and used after retreating in response to seeing what he described as a rusty knife in Mr. Simmons' hand.

[11] Mr. Colley testified that the reason he went to the Simmons property was to talk to his aunt and explain to her that he did not take the missing lumber. While Mr. Colley may have ultimately achieved that outcome if there had not been a physical altercation, I do not believe that this was his primary motivation for going to the Simmons property, if his motivation at all. I accept the evidence of Jamal Williams who testified that the purpose, stated by Mr. Colley, for going to the Simmons property was to show Mr. Simmons that he could go upon the Simmons property despite being directed by Mr. Simmons to stay off that property. Mr. Colley testified that he believed he had a right to go on the Simmons property despite being told by Mr. Simmons to stay off that property. Mr. Colley stated to Mr. Simmons that he would go onto Mr. Simmons yard any time he wanted to in response to Mr. Simmons' direction not to go onto his property. Mr. Colley also testified that he was angered by the allegations of theft and the direction to stay away from the Simmons property. After Mr. Simmons repeated the theft allegations the second time at the Slawter property, Mr. Colley testified that both he and Mr. Simmons went "barrelling out" to Mr. Simmons property.

[12] I find that Mr. Colley drove to a location near the Simmons property and proceeded to enter thereon for the primary purpose, if not the sole purpose, of challenging Mr. Simmons' authority to direct him not to come upon that property. Although Mr. Simmons denied having either a stick or knife in his hand when he got out of his truck, I do not find that denial to be credible. Mr. Simmons, in giving a statement to the police, stated that he had a stick in his hand. Cisco Williams, during his direct testimony, stated that he saw either a stick or butcher knife in Mr. Simmons' hands. Cisco Williams and Jamal Williams, who were both in Mr. Colley's truck, were not in a particularly good position to observe exactly what was in Mr. Simmons' hands. Whether or not the device in Mr. Simmons' hand was a knife or a stick, I conclude that it could have been a knife. Thus, I have assessed Mr. Colley's evidence and his claim of self-defence on the basis that Mr. Simmons could have had a knife in his hand.

[13] I find that Mr. Colley, by driving in anger to Mr. Simmons' residential property and entering thereon, despite being told not to enter upon the property, placed himself in the role of an aggressor. It would have been reasonable for Mr. Simmons to have believed Mr. Colley to be a trespasser

and thereby, in accordance with S.41(1) of the **Criminal Code**, justified in using no more force than was necessary to prevent the perceived trespass. In light of the differences in age and size, the preceding verbal exchanges and the clear challenge that Mr. Colley presented to Mr. Simmons' authority to direct Mr. Colley to stay off his property, it would have been reasonable for Mr. Simmons to arm himself with a knife. Beyond stepping toward the advancing Mr. Colley, with the knife in his hand, Mr. Simmons made no motion to use the knife.

- [14] The evidence establishes that Mr. Colley retreated to the area near where the shovel was located, which was near the edge of the pavement. Cisco Williams and Jamal Williams testified that Mr. Colley ran back to the area where the shovel was located. Mr. Simmons did not chase Mr. Colley. There was no reason why Mr. Colley could not have retreated altogether from the Simmons property, with or without the shovel in hand, to the safety of his truck where two of his friends were sitting. Cisco Williams testified that Mr. Colley would have had no problem outrunning Mr. Simmons if he had been chased.

[15] Rather than continue to retreat, I find from the evidence that Mr. Colley picked up the shovel and moved toward Mr. Simmons, swinging the shovel, striking Mr. Simmons on the arm and thereafter continuing as the aggressor in the ensuing struggle. Exactly how far back down the driveway Mr. Colley moved toward Mr. Simmons before striking him with the shovel isn't exactly clear. However, Cisco Williams testified that the "fist fight", which occurred after Mr. Simmons was struck with the shovel, started beside Mr. Simmons' truck which was parked about three truck lengths down the driveway. There is no evidence that Mr. Simmons retreated after being struck by the shovel. Thus, I conclude that Mr. Simmons had not walked more than a few steps past the back of his truck before being struck with the shovel.

[16] Consistent with his role as the aggressor in this altercation, Mr. Colley stated, when he saw the knife held by Mr. Simmons, "so it's going to be like that". In essence, Mr. Colley retreated, armed himself with a shovel in the face of seeing Mr. Simmons armed with the knife, then proceeded toward Mr. Simmons and engaged himself with Mr. Simmons by swinging the shovel. By grabbing the shovel and then proceeding towards Mr. Simmons,

rather than retreating, Mr. Colley placed himself in the role of what can only reasonably be seen as a resisting trespasser. By virtue of S.41(2) of the **Criminal Code**, I conclude that Mr. Colley committed an assault without justification or provocation. Even if S.41(2) is not applicable, Mr. Colley was under no imminent danger and there was no need to move toward Mr. Simmons and strike him to defend himself.

- [17] Mr. Colley, until the direction given to him by Mr. Simmons to stay off his property, would have been justified in holding the opinion that he had an implicit invitation to enter upon the Simmons property. That implicit invitation, having been expressively revoked with the direction from Mr. Simmons to stay off the property, ought to have been seen by Mr. Colley as a termination of any legal justification to enter upon the Simmons property, absent a subsequently expressed invitation from some other individual authorized to extend that invitation, such as his aunt Vonita Simmons. There is no evidence of such an expressed invitation given subsequent to Mr. Simmons' direction to stay off his property.

[18] Mr. Simmons, on the other hand, as a person in possession of real property, was justified in using force to prevent what he perceived as a trespass upon his property provided he used no more force than was necessary. Exhibiting a knife and stepping toward Mr. Colley, in my opinion was within the scope of reasonable force.

[19] The evidence, given by Defence witnesses, about Mr. Simmons subsequently retrieving what was described as a rifle or a shotgun after the altercation and pointing it in the direction of Mr. Colley's truck as he drove away is mostly irrelevant to a determination of these charges. Whether or not Mr. Simmons actually carried out that act I am not certain. He denied doing so and his wife, Vonita Simmons, stated that Mr. Simmons did not possess or own a firearm. However, Mr. Colley's evidence about how he saw Mr. Simmons' intention to use what he described as a rifle or shotgun is relevant to the assessment of how he saw Mr. Simmons' intention relative to the knife that he possessed. Relative to the alleged pointing of the rifle or shotgun, Mr. Colley testified that he was not afraid because he "knew" Mr. Simmons "wouldn't use it". Regarding the knife, Mr. Colley rather weakly stated that he had a concern that Mr. Simmons might throw the knife at him

if he ran, thereby offering that as the reason why he chose instead to disarm Mr. Simmons. In light of how Mr. Colley saw Mr. Simmons' intention to use the rifle or shotgun, I am unable to believe that Mr. Colley could ever have thought that he was facing an imminent attack when Mr. Simmons stepped toward him holding the knife or that Mr. Simmons would throw the knife at him if he retreated fully from Mr. Simmons' property. Rather, the gesture of holding a knife and stepping forward could only reasonably have been seen as a warning to come no further and to leave. Mr. Colley was not prepared to heed the obvious meaning of that gesture. Rather, he was intent in prevailing over Mr. Simmons' direction to stay off his property and assert what he unreasonably believed to be his right to enter thereon.

[20] I do not believe Mr. Colley's evidence that he acted in self-defence. The evidence does not support that claim. Furthermore, his evidence, when considered in the context of all the evidence, does not raise a reasonable doubt. Nevertheless, I do not believe that Mr. Colley intended for Mr. Simmons to suffer such serious injuries. The blow to the arm, although not carefully measured, was intended to disarm Mr. Simmons, not to cause the fracture. Similarly, I do not believe Mr. Colley intended Mr. Simmons to

suffer cracked ribs. Mr. Colley acted from anger and acted in a manner to have his will prevail over that of Mr. Simmons relative to access to the Simmons property. He appears to regret that Mr. Simmons suffered such injuries and is sorry that that was the outcome.

[21] In conclusion, I find Mr. Colley guilty of all three charges. However, based upon the principles expressed in the R. v. Kienapple (1974) 15 C.C.C. (2d) 524 decision, a conviction should enter upon only the S.268 aggravated assault.

R. Brian Gibson, J.P.C.
Associate Chief Judge