IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Labrador, 2006 NSPC 28

Date: 20060628
Docket: 1559339, 1559340
Registry: Bridgewater

Between:

R.
v.

David Jeffrey Labrador

Judge: The Honourable Judge Anne E. Crawford

Heard: February 13 & April 7, 2006 in Lunenburg, Nova Scotia

Charge: s. 268 of the Criminal Code of Canada
s. 267(a) of the Criminal Code of Canada

Counsel: C. Lloyd Tancock, for the Crown
Johnette Royer, for the defence

By the Court:

[1] David Jeffrey Labrador is charged with aggravated assault and assault with a weapon on William Johnston, contrary to ss. 268 and 267(a) of the *Criminal Code*, respectively.

Facts

[2] From the testimony of the various witnesses, I make the following findings of fact.

[3] On the evening of July 27, 2005 Stephen Francis had a wiener and marshmallow roast with his wife, Wanda, and their children in the front yard of their home at Beech Hill Road, Gold River, Lunenburg County, Nova Scotia. Other people dropped by; some stayed. The defendant, then aged 18, and his cousins Nathan Joudrey, aged 16, and Jonathan Joudrey, then aged 13, dropped in on their way to the river to fish and borrowed a flashlight to catch eels after dark. The defendant had a dozen beer with him and said he drank one or two while fishing.

[4] Later he and the Joudrey boys returned to the campfire. He was surprised to find William Johnston (also known as Billy or Bobby) there. Mr. Johnston had a bad reputation in the community for going up and down the road causing disturbances and starting fights when he was drunk. It was also known that he and Stephen Francis did not get along. Although the defendant knew Johnston by reputation, he had never actually met him before.

[5] Johnston was bloody on his hands and arms; he had been drinking and was aggressive.

[6] The defendant and the two Joudrey boys joined the party around the campfire, and the defendant continued drinking his beer. Johnston was drinking beer offered to him by Stephen Francis.

[7] Cst. Scott Morrison of the Chester detachment RCMP arrived in the early evening looking for Mr. Johnston in regard to an earlier incident at Johnston's home. Mr. Johnston was not in a mood to co-operate, especially with Cst. Morrison, so the officer left after ascertaining that Johnston did not need medical attention and had done nothing that required police intervention.

[8] Two or three hours later, according to the defendant, Mr. Johnston was "talking big" about his own family and began putting down the defendant's family. An altercation ensued between them, which the Crown concedes was a consensual fight. In brief, Johnston punched the defendant, knocking him down; the defendant reciprocated by breaking a beer bottle over Johnston's head. When Johnston continued to come at him, the defendant grabbed a second bottle and hit him with it.

[9] Mr. Johnston then went across the road to his son's home and the defendant went to Stephen Francis's back deck.

[10] Within moments Mr. Johnston reappeared, accompanied by his son, Darcy Johnston, who was carrying a baseball bat. Both were yelling threats at the defendant. Stephen Francis went out his front door to head them off on the road. He grabbed the baseball bat from Darcy and handed it to Jonathan Joudrey who threw it in the woods. William Johnston then choked Jonathan, aged 14, saying, "Looks like you made an enemy."

[11] Despite Mr. Francis's attempts to cool the situation, Darcy and William Johnston continued across the road and once again Stephen Francis attempted to head them off. He stood in front of the steps leading to his deck to prevent William Johnston from getting up the steps to the defendant. Johnston was trying to pull the defendant off the deck over the railing. Darcy took his shirt off, yelling at the defendant, "David Labrador, I'm going to kill you; I'm going to put you six feet under." William was yelling, "Look what you done to me; I'm going to get you."

[12] William Johnston pushed his way up the steps, pushing Francis back up the steps as he went.

[13] According to the defendant, at the top of the steps Johnston pushed past Francis. The defendant told him to "leave me alone," but he could tell Johnston wanted to "come get me". The defendant picked up a child's pogo stick which was leaning against the side of the house and again told Johnston to "leave me alone, don't cross here." He said Johnston kept coming; and he hit Johnston once with the pogo stick. Johnston fell to the deck, apparently unconscious. The defendant said that he hit him because he was scared of him; Johnston was a much bigger man than the defendant and his reputation was that he got drunk and picked fights over nothing.

[14] The defendant was closely questioned on cross-examination as to other options he might have had to hitting Mr. Johnston with the pogo stick. He admitted that there were other items lying on the deck with which he might have defended himself, but said he didn't notice them at the time and just grabbed the pogo stick. He also admitted that at the other end of the house there was another set of steps leading from the deck to the woods. It was dark and it would have been difficult for Johnson to find him if he hid in the woods. He also admitted that he could have gone inside the house, either through the patio door almost directly behind him, or through another door at the other end of the deck; but said he did not consider doing any of those things at the time. He said he could not ask anyone to call the police because there was no phone in the house.

[15] After hitting Mr. Johnston once with the pogo stick, the defendant left, at the urging of others present, and went home.

[16] The police and ambulance were called for Mr. Johnston, who testified that he could remember nothing after being hit with a beer bottle by the campfire. He was transported to hospital in Halifax, where he was treated for injuries to his head and face. He testified that, as a result of the treatment of those injuries, he later had 40 stitches removed.

Issue

[17] Only one issue is raised by the defence: the availability of the defence of self-defence pursuant to s. 34, 35 and 37 of the *Criminal Code*.

Self-Defence

[18] The Crown concedes that the defence has met the initial burden as mandated in *R. v. Cinous* [2002] 2 S.C.R. 3, and that self defence is an issue to be decided. The burden is on the Crown to establish beyond reasonable doubt that self defence is not available to the defendant.The self-defence provisions of the *Criminal Code* overlap in a confusing manner and can be difficult to apply in any given fact situation. *R. v. MacIntosh*, [1995] 1 S.C.R. 686. However, as I am satisfied that this matter can be resolved under s. 34(1) of the *Criminal Code*, it will suffice to quote that section:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause

> death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

[19] Applying this section to the defendant's situation, I note that it requires:

> (1) an unprovoked
> (2) assault by the victim on the defendant
> (3) with no intention by the defendant to cause death or grievous bodily harm
> (4) and no more force than is necessary to self-defence

(1) unprovoked

[20] It is clear that throughout this scenario, including the first altercation by the campfire and the second altercation which is the subject matter of these charges that Mr. Johnson was the aggressor and that the defendant was trying to avoid trouble. In other words it was Mr. Johnson who was trying to "pick a fight" with the defendant.

(2) assault by victim on defendant

[21] It is equally clear that when Mr. Johnston came back across the road to the Francis residence with his son he intended to continue his earlier assault on the defendant, this time with the assistance of his son. His son was carrying a baseball bat, and, even after being deprived of that weapon, both William and Darcy Johnston continued their verbal assaults on Mr. Labrador. William Johnston also laid hands on Mr. Labrador and attempted to pull him off the deck. When that was unsuccessful, he pushed, shoved and hit at Mr. Francis, backing him up five steps onto the deck in order to get past him to continue his attack on Mr. Labrador. These acts clearly constitute an assault by Mr. Johnston upon the defendant.

(3) no intent to cause death or grievous bodily harm

[22] The defendant stated that he did not intend the injury which he inflicted on Mr. Johnston; he did not realize until later how seriously he had been hurt. At the time he was afraid of Mr. Johnston and just wanted to stop him from continuing his assault. Mr. Johnston was bigger, stronger and more aggressive than him.

(4) no more force than necessary

[23] The Crown argued that the defendant had other courses of action available to him to prevent Mr. Johnson's assault. He could have gone into the Francis home; he could have gone down the other set of steps into the dark woods; he could have gone home; he could have picked up some other less dangerous object with which to defend himself.

[24] But the case law makes it clear that having a means to retreat is only one factor to be considered and does not preclude reliance on s. 34. *R. v. Westhaver* (1992), 119 N.S.R. (2d) 171 at para. 8. I find that in all the circumstances here it was not unreasonable for the defendant to remain on the deck of his cousin's home, rather than take his chances on outrunning his assailant either into the dark woods or to his own home. As to any other options he might have had, it is clear that he did not consider those at the time.

[25] It is also clear that in the heat of the moment the defendant did not consider which item or items available to him would be most suitable to defend himself, but merely grabbed the first item he saw. As Gruchy, J. stated in *R. v. Kenney*, 2002 NSSC 192; [2002] N.S.J. No. 374:

> ¶ 16 In the circumstances of this particular incident, "... an accused is not required to measure the force used in the necessitous circumstances to a nicety, because the frenzy of the occasion may not allow for detached reflection": (Ewaschuk, para. 21:5180; *R. v. Deegan* [(1979), 17 A.R. 187; 49 C.C.C. (2d) 417 (C.A.)]; *R. v. Antley* [[1964] 2 C.C.C. 142; [1964] 1 O.R. 545 (C.A.)]; *R. v. Kandola* (1993), 80 C.C.C. (3d) 481.

[26] In my opinion in this case this applies not only to the force used but also to the choice of weapon.

Conclusion

[27] I find that the Crown has not established beyond reasonable doubt that the defence of self-defence under s. 34(1) of the *Criminal Code* is not available to the defendant. He is therefore entitled to acquittals under that section on both counts before the court; and there is no need to consider ss. 34(2) - 37.