

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. King, 2014 NSPC 81

Date: April 4 2014

Docket: 2464292

Registry: Halifax

Between:

Her Majesty the Queen

v.

Mary Jacquelin King

Judge: The Honourable Judge Marc Chisholm

Heard: January 6 and April 4 2014 in Halifax, Nova Scotia

Decision: June 10 2014

Charge Section 267 (a) Criminal Code

Counsel: Chris Nicholson, for the Crown
Jean Morris, for the Defence

By the Court: Orally

[1] Ms. King is charged in an information sworn on the 8th of June 2012, alleging that she, on or about the 21st of May 2012, at or near Halifax, Nova Scotia, did, in committing an assault on Lisa Marie Marshall, use or threaten to use a weapon, or imitation thereof, specifically a metal pipe, thereby committing an offence contrary to section 267 (A) of the Criminal Code of Canada.

[2] This is an allegation of a criminal violation. Under our law Ms. King is presumed innocent. The burden of proof rests upon the Crown who has brought the allegation. The burden is proof beyond any reasonable doubt. In this case, the Court has heard from a number of witnesses. There were four witnesses presented by the Crown and five witnesses presented by the Defence.

[3] The evidence of witnesses who were present at the time of the alleged offence differs in various aspects, one from the other. There are a number of factual aspects for the Court to determine. That determination is made without any pre-conceived notions as to who is likely to be telling the truth. There are no such pre-conceived notions.

[4] The Court must listen to the evidence and not make any firm conclusion with respect to any part of the evidence until the Court has heard all of the evidence. And then the evidence of each individual is considered in light of the totality of the evidence. Then the Court will consider the reasonableness of the evidence, the consistency of the telling of the story (if someone is consistently changing their story it may suggest that they are fabricating and having difficulty recalling the fabrication as they attempt to retell it). The Court must consider whether or not there is evidence of bias or reason for someone to mislead the Court or not tell the entire truth. All of those are the types of factors that the Court must consider when assessing the evidence of each witness. And in the end the Court may accept all or some or none of the evidence of any particular witness.

[5] In making the assessment, the Court is always conscious of the fact that the burden rests upon the Crown to prove the matter beyond a reasonable doubt. If, on any aspect of the evidence, a reasonable doubt arises, the accused is entitled to the benefit of that doubt. It is only when the matter has been proven beyond all reasonable doubt that a conviction may be entered.

[6] In this case, as in many cases, various aspects of what took place are not in dispute. The Court will begin with what is not in dispute.

[7] Ms. Mary Jaqueline King in May of 2012 was living with her Aunt Kasey King and her aunt's daughter in a townhouse at 3484 Micmac Street in Halifax, Nova Scotia. The complainant, Ms. Lisa Marshall, lived in the unit next to that in which Ms. King resided. The complainant Ms. Marshall's address was 3486 Micmac Street. Ms. Marshall resided there with her 3 children. Her boyfriend, Ryan Gannon, father of her children, was there often. There was some dispute on the evidence as to whether or not he was residing there or just visited often.

[8] As of May the 21st of 2012, the date of the alleged offence, Ms. King and her aunt were not on good terms with Ms. Marshall and Ryan Gannon. Ms. King described Ms. Marshall as a rat, explaining that Ms. Marshall had previously called the police on her with what she said were unwarranted complaints. Ms. Marshall believed they were warranted. Ms. King also stated that Ms. Marshall sought to have her placed on a Peace Bond. She stated that she called the Department of Community Services to tell them that Ms. Marshall's boyfriend, Mr. Gannon, was living with her, something she believed was not permitted since Ms. Marshall was receiving financial assistance. Those are but examples from the evidence of things that were done by the different parties demonstrating the animosity between the two as of May 2012.

[9] On May the 21st of 2012 at around supper hour, Ms. King and her aunt were outside the back door of her townhouse. They'd been going in and out. Ms. Marshall and Mr. Gannon were in their townhouse in the process of beginning to get the children ready for bed. They, in their evidence, claim that the back door of Ms. King's unit was slammed loudly numerous times. This had been a bone of contention in the past. Neither Ms. King nor her aunt, in giving their evidence, denied the loud door slamming. Ms. King explained that the back door is a screen door on a hinge which pulls the door closed and it slams. Anyone familiar with a screen door on a hinge knows that that's true if you allow the door to go. If you choose to hang onto the door until it closes you can avoid the slamming noise.

[10] There is no dispute on the evidence that Mr. Gannon went out the back door of Ms. Marshall's townhouse and got into an argument about the banging of the door. The argument was initially with Ms. Kasey King. Ms. Mary King joined in the argument and it is agreed on the evidence that Mary King and Mr. Gannon were yelling at each other. Eventually Mr. Gannon went back into Ms. Marshall's townhouse and Ms. King went back into her aunt's townhouse. Mr. Gannon then proceeded out the front of Ms. Marshall's townhouse and walked a short distance away to a grassy area, which has been depicted in exhibits 1 and 2. Some minutes

later, Ms. Mary King went out front of her or her Aunt's townhouse and walked to Mr. Gannon's location.

[11] Ms. King admitted in her evidence that she verbally and physically challenged Mr. Gannon to a fight, asking him what was going on. She claims that Mr. Gannon had challenged her to go out front for a fight. When she went out Mr. Gannon refused her challenge to fight. She indicated that she continued to challenge him to a fight and in doing so she admitted she made physical contact with him, that she assaulted him, more than once.

[12] The Crown witnesses, the Accused and her aunt all testified that Mr. Gannon's mother, Julie Gannon-Gilbert, came on the scene. The evidence differed as to the time of her arrival at the event. The Accused, Ms. King, stated that she and Ryan Gannon were yelling at each other and Mrs. Gannon-Gilbert tried to intervene.

[13] Ms. King, the Accused, admitted that she pushed Mrs. Gannon-Gilbert, thus assaulting her. She said that the trio, if you will, were moving in the street, moving back towards the townhouses of Ms. King's aunt and Ms. Marshall, the direction from which they'd come, and that a group of neighbours had come out because of the yelling, that is, Ms. King and Mr. Gannon yelling at each other. All of that is

not significantly in dispute. The events which followed that point in time are significantly in dispute and the Court must look to the evidence of all of the witnesses who testified and assess their evidence and make determinations of fact. And, again, in doing so, the Court must be conscious of the burden on the Crown to prove matters beyond a reasonable doubt.

[14] The Crown alleged that the Accused picked up an object, specifically a metal pipe about three feet in length. The Crown alleged that Ms. King raised the pipe over her head and moved toward Lisa Marshall who was then in her doorway yelling for Mr. Gannon to come in. That, as she did so, the Accused yelled insults towards Ms. Marshall and threatened Ms. Marshall. The Crown alleged that someone took the object from Ms. King before she reached Ms. Marshall and Ms. Marshall went inside before Ms. King got to her. And then the yelling between Ms. King and Mr. Gannon continued on down the street. Those are the factual allegations of the Crown.

[15] The Accused, Ms. King, denied possession of a weapon and denied threatening Ms. Marshall. As I've indicated, the burden of proof rests upon the Crown. It is proof beyond a reasonable doubt. There is no burden of proof on the Defendant. The Accused is charged with assault with a weapon in relation to Ms.

Marshall. The Court must consider whether or not, on the evidence, there has been proof beyond a reasonable doubt of that charge or any included offence and I will speak at some length to the matter of included offences with respect to this matter in the course of my comments.

[16] Section 267 of the Criminal Code specifies:

“Everyone who, in committing an assault, carries uses or threatens to use a weapon or imitation thereof is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years or an offence punishable on summary conviction and liable to imprisonment for a term not 18 months.”

[17] The allegation of assault with a weapon requires the Crown to prove an assault. An assault is defined in Section 265 of the Criminal Code in this manner:

“A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly, or
- (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has present ability to effect his purpose, or
- (c) while openly wearing or carrying a weapon or imitation thereof, he accosts or impedes another person or begs.”

[18] So an assault may be committed in more than one manner. There was no evidence of any application of force by the Accused to Lisa Marshall or evidence

of possession of a weapon and accosting, impeding or begging per Section 265 (1) (c). The Crown case relies on the provisions of Sections of 265 (1) (b).

[19] In relation to the matter before this Court, two issues must be resolved by the Court. What are the proven facts, facts proven beyond any reasonable doubt and, two, on the proven facts, has the offence alleged, or any included offence, been proven beyond a reasonable doubt.

[20] As to the evidence, I will turn first to the evidence of the Crown witnesses, beginning with Lisa Marshall. Ms. Marshall testified that Mr. Gannon went out front and that she remained in her townhouse. There had been the yelling incident, screaming at each other in back of the townhouses. She testified that when she heard the screaming out front, she went to her front door and saw Mr. Gannon and Ms. King screaming at each other in the street. She said that Ms. King shoved Mr. Gannon and was clearly challenging him. That Mr. Gannon said more than once “I don’t hit women”. That Mr. Gannon’s mother, Julie Gannon-Gilbert arrived and tried to separate the two. That at that time Mary King picked up what she described as a metal post type thing about three feet long, four or five inches thick with a long spike at the end. That Mary King first turned to Richard Gannon with the metal post in hand. She said she yelled to Mr. Gannon to come in, that the

police were coming, she had called the police. She said that Mary King turned and came towards her. She initially said came to approximately 20 feet from her. In her further evidence she said Mary King ran towards her and that Mary King yelled “come out and get it”, or “come out you’re going to get it”. She acknowledged that that may not have been included in her police statement.

[21] Ms. Marshall testified that Ms. King screamed insults and obscenities towards her. Later in her evidence she said that Ms. King came to the edge of her doorstep, only three to five feet from her and at that point someone grabbed the object from Ms. King and pulled her back. She said that person, although she couldn’t say who, was a woman. She said she closed the door so that she wouldn’t be struck. She said that Mary King had started to swing the object in her direction. She acknowledged that the matter in which she was testifying occurred approximately two years earlier and the details were somewhat foggy in her memory.

[22] While the Court found the evidence of Ms. Marshall generally straight forward and reasonable, it was the view of the Court that, on her retelling of the story, that the closeness of Ms. King to her became less and that the actions of Ms. King became more serious possibly suggesting some exaggeration in her

description of the event. However, the Court must always keep in mind the circumstances. This is an event which, if true, would have caused significant emotional upheaval at the time and that is a factor for the Court to consider as someone's recollection of the event is assessed by the Court.

[23] The Court heard from Julie Gannon-Gilbert. Mrs. Gilbert testified that she received a panicked call from Lisa Marshall to come quickly. That she responded by going to Micmac Street. That Ms. King and her son, Mr. Gannon, were in the street in a loud argument. She described Ms. King as very aggressive, trying to get at her son. That she tried to intervene. She said that Ms. King was verbally abusive to her, referring to her as a "black bitch". She said she tried to get her son to move away, to separate the two of them. She said they were moving, generally, in the direction of Ms. King's and Ms. Marshall's townhouses as they moved down the street. It was her perception that Mr. Gannon was trying to walk away. She testified that a group was gathering and that when the group of them, herself, her son and Ms. King, were getting closer to Lisa Marshall's, Ms. King picked up an object and held it above her head and then made a run towards Lisa Marshall. She said they all ran. She described it as a full out run. She said it looked like Ms. King would have hit Lisa Marshall but someone grabbed the object from Ms. King.

[24] On cross examination she indicated that Ms. King didn't threaten Richard Gannon with the pipe but continued to argue with him while holding it over her head when in argument with Richard Gannon before turning to run towards Lisa Marshall. She also testified that when Ms. Marshall went inside and the object was taken from Ms. King, the matter did not end there. The group continued arguing and yelling down the street. She similarly testified she didn't see who took the item from Ms. King and didn't see where the pipe ended up. She became quite defensive when being questioned by the defence about the living arrangements of her son, Richard Gannon, as to whether or not he was living with Lisa Marshall. She described the object in the possession of Ms. King as a pipe at least two feet in length with a nail at the end. She said it looked like something that had been broken off of something else.

[25] Mrs. Gannon-Gilbert's evidence was generally straight forward, consistent on many aspects with the evidence of Ms. Marshall. Her evidence with respect to the actions of Ms. King, in the Court's view, was not entirely consistent in the retelling of it. Of significance in her evidence was that the pipe was picked up by Ms. King and held over her head while she was yelling with Mr. Gannon, before having her attention drawn to Ms. Marshall and then moving towards Ms. Marshall.

[26] The Court also heard from Crown witness, Cheryl Cromwell. Ms. Cromwell lives in the neighbourhood. Ms. Cromwell was there on the 21st of May of 2012. She testified that she walked by Mr. Gannon, who was sitting in the grassy area a short distance up from the townhouses of the Accused and the Complainant. She walked by and passed a comment with him and then headed down the street. It was a short time later that she heard the screaming in the street. She saw Mr. Gannon and Ms. King yelling at each other. She said Ms. King was screaming and yelling and cursing at him. Mr. Gannon was yelling, saying "I don't hit women, get out of my face". They were yelling at each other. She testified that Julie Gannon arrived and tried to stop the incident but Mary King called her names. She said all of a sudden Ms. King had an item in her hand which she described as a metal object, like a fence post, three and a half to four feet in length. It appeared to have a sharp edge or edges. She said once the group in the street got closer to Lisa Marshall, who was in her doorway, Ms. Marshall called for Mr. Gannon to come in. She heard Ms. King yell at Lisa Marshall, she called her names, called her a bitch and threatened to hit Ms. Marshall. She was still holding the object in her hand and over her head at that time. She testified that Ms. King was not quite to Lisa Marshall's walkway at that time. She said that Ms. King also, at some point during that time, threatened Mr. Gannon. Something about getting her father to

shoot him. She said that someone took the object from Ms. King. She could not say who. She could not say where the object was taken. She testified that that night she did not talk to the police. They didn't ask to speak to her. She acknowledged that in the past she had an issue with Ms. King and had made application for a Peace Bond to be taken out against Ms. King. She said that she was definitely not a friend of Ms. King and she said that she was also not a friend of Ms. Marshall's. That was the evidence as noted, in summary fashion by the Court, with respect to Ms. Cromwell.

[27] In relation to those Crown witnesses who testified with respect to the actions in the street on that date, in the Court's view, there were clear consistent features to the evidence of those witnesses, but there were inconsistencies. A key point of consistency was the possession of an object as described by each of the parties in similar terms. The inconsistencies: (1) what actions did the Accused make with that object in her possession; (2) how close did she get to Lisa Marshall while having that object in her possession; and (3) how did she move towards Lisa Marshall, did she run, did she walk?

[28] Lisa Marshall's evidence, as I've indicated, was initially that Ms. King came towards her. Then that she ran towards her. Ms. Gannon's evidence was a full out

run by Ms. King. Ms. Cromwell's evidence was that the group was moving down the street and the argument was between Ms. King and Mr. Gannon until Ms. Marshall was noted by Ms. King yelling from her doorway for Mr. Gannon to come in as the group, at that point, was approaching the residence of Ms. Marshall.

[29] In assessing the evidence the Court must consider the reasonableness of the evidence. In considering the reasonableness of the evidence, the Court wondered how easy it would be for an individual to disarm another individual if that individual is running full speed towards their intended victim with an object in their hand, holding it over their head. If it was a women, how tall was this woman. If one pictures Ms. King running full speed with a pipe being held in her hand over her head, it seems very difficult to imagine someone approaching her and grabbing the object from her. Were they standing there as Ms. King was running by and grabbed it? Were they running beside Ms. King? While not impossible, it seems an unlikely scenario.

[30] Furthermore, in assessing the evidence, the Court must consider inconsistencies of the different witnesses. The Court was highly impressed with the evidence of Ms. Cromwell. I found that her evidence in no way seemed exaggerated, in no way seemed biased, as against or in favour of one party or the

other. It was the Court's view of Ms. Cromwell that she was an individual who was not testifying with any bias but was testifying because she had seen something of concern to her in her neighbourhood. She did not testify that Ms. King ran towards Ms. Marshall. On the Crown evidence, the Court was not persuaded that Ms. King ran towards Lisa Marshall whether with or without an object in her possession which the Court will speak to further in its decision.

[31] The evidence has not established beyond a reasonable doubt that Ms. King made a run or, indeed, a rapid movement physically towards Ms. Marshall. The evidence, at best, suggested a general movement down the street and then a specific movement once the group had gotten close to the area of Ms. Marshall's residence. Furthermore, Ms. Cromwell did not put Ms. King within striking distance of Ms. Marshall. I accept her evidence. I find that, on the Crown's evidence, before even addressing the Defence evidence, at no time did Ms King get within striking distance of Lisa Marshall.

[32] Other consistent points with respect to the Crown evidence were: That Ms. King was the aggressor. That Ms. King yelled at Ms. Marshall when her attention was brought to Ms. Marshall. That she moved toward Ms. Marshall. That she was in possession of an object described as a pipe while moving towards Ms. Marshall.

That Ms. King uttered insults and a threat and perhaps a challenge to Ms. Marshall. Those are the points of consistency in the Crown evidence.

[33] Let me now turn to the Defence evidence, beginning with Ms. King. She described her personal circumstances, her employment, her work history as a personal care worker and her attending cosmetology school. She acknowledged that on May 21st she was at her aunt's place of residence where she was residing in May of 2012. They were out back having a barbeque, having drinks. She did not specify the nature of the drinks. She stated that Mr. Gannon came out from next door. There was an argument about slamming the door. She said that he slammed the door when he came out of his residence. He leaned over and yelled to them to stop slamming the door. She jumped up and yelled back. She said that Mr. Gannon challenged her to go outside to fight and then went back in his place of residence. She said that she went back into hers.

[34] A few minutes later she went outside and found Mr. Ryan Gannon down the street in a grassy area smoking a marijuana cigarette. She was expecting a fight. She demanded an explanation. She testified that she felt he had been disrespectful to her and/or her family. That he had challenged her to a fight and asked her to go out and now he wasn't doing anything. She stated that she

challenged him to fight and when he refused she punched him in the face. He continued to refuse and she punched him again. His mother, Mrs. Gannon-Gilbert, arrived and tried to intervene and she pushed Mrs. Gannon-Gilbert. She said they were too close to her. That Mr. Gannon was chest bumping her and she was moving backwards. She said they were pushing her up the street and she was going back in the direction of her townhouse. She testified that her aunt yelled to her that the police had been called. She said that when she heard that she said “f--- this” and made a bee-line back to her residence where she grabbed her purse and went out the back door.

[35] She was questioned whether or not she saw Ms. Marshall in her doorway as she went back to her place of residence, as she would have to pass by Ms. Marshall’s place of residence to get to her place of residence. She initially said that she saw Ms. Marshall and said “fucking bitch”. Then she changed her evidence and said she didn’t say it, she mouthed it. She indicated she never had a weapon, there was no weapon, and there was no attempt to assault Ms. Marshall. She said she heard about such a thing in the neighbourhood and people were being asked if they saw a pipe or a weapon, and if they were willing to tell police what they saw. She indicated, basically, that’s the way a lie grows in her view. She denied that there ever was a weapon.

[36] Some points are noteworthy with respect to the evidence of Ms. King. First of all I wondered if, as she stated, Mr. Gannon wanted to get into a physical confrontation with Ms. King why would he ask her to go out front into the street area? They were out back. They were face to face. They were arguing. If he wanted to get into a physical confrontation they were within arm's reach there behind the building. Why would he not engage in a physical action with her at that point? There was no answer on the evidence.

[37] With respect to her evidence that she walked by Ms. Marshall and didn't speak the words "f-ing bitch" but mouthed them. When I consider the evidence of Ms. King, her own evidence of how worked up she was. That she was challenging Mr. Gannon to a fight. That she was pushing Mr. Gannon and Mrs. Gannon Gilbert, that she was yelling in the street, I cannot believe that Ms. King, in those circumstances, would show the restraint to mouth the words "fucking bitch" and not yell them out loud.

[38] As to her suggestion that the metal object never existed, that the story was fabricated, a number of facts are relevant. There was not a lengthy period for that falsehood to be fabricated. On the evidence, the police arrived within minutes and spoke to Ms. Marshall and Mrs. Gannon-Gilbert. They made that accusation about

an object at that time. Each described the object and their description was similar, but different. They would know at that time that any fabrication of such a possession of an object, where there were all kinds of people in the street, would be subject to being shown to be a lie very easily. If it was a fabrication, one might have expected them to actually present the police with an object. Here it is, here's the object that she had, here's the evidence that you need. But in this case, having told the police of the object, none was presented. The police, on the evidence, conducted a search of the neighbourhood and did not find an object described by the Crown witnesses.

[39] Ms. King, in testifying and giving her evidence, was aggressive and combative throughout. Her manner of testifying was consistent with the witnesses' description of her attitude at the time of the alleged offence. Her evidence on several points, I have no doubt, was not truthful. Her evidence, in the Court's view, was not credible.

[40] The Court heard from Ms. King's Aunt, Kasey King. Ms. Kasey King testified of the events starting in the backyard and then going out front into the street and the two yelling at each other. She testified of seeing Mr. Gannon's mother, Julie Gannon-Gilbert, trying to intervene. She testified that she was

yelling for Ms. King to come in and that she did come in and then left. She had no idea where she went, however, she was optimistic she could locate her when the police asked her about that shortly after their arrival.

[41] She testified that she did not see a weapon in Ms. King's hand. She acknowledged animosity towards Lisa Marshall and that animosity was evident during her testimony as was her bias in favour of her niece, Mary King. Her evidence was consistent on most points with the evidence of Mary King. As to her choice of language in not seeing a weapon in Ms. King's possession, it struck the Court as strategically worded, in that she did not see a weapon.

[42] The Defence also called Stuart Drummond, a neighbour who lives approximately a block and a half away. He testified that he was a friend of Ms. Mary King and Mr. Gannon's, not of Lisa Marshall. He testified that he walked down the street to where Ms. King and Mr. Gannon were yelling at each other in the street, exchanging words. It looked like they were about to fight and that it was escalating. He said he did not see any physical contact and that he did not see a weapon in the possession of Ms. King. He said he stepped in between them and moved them apart. He said that Ms. King was very worked up. He did not see

anyone else intervene, he did not see Julie Gannon intervene. He said she arrived later.

[43] His evidence is inconsistent with the evidence of Ms. King and her aunt. Ms. King acknowledges there was physical contact between the two. Mr. Drummond testifies he did not see any. Furthermore, Mr. Drummond testified that they were in the area of Ms. King's residence when he saw them. On the evidence of Ms. King, the incident started well before that spot on the other side of Ms. Marshall's residence. He said he saw Ms. Marshall in her doorway and he, at no time, saw Ms. King walk past Ms. Marshall's residence. Ms. Mary King said she did walk past Ms. Marshall's residence.

[44] On the evidence considered in its totality and the evidence of Mr. Drummond individually, I have concluded that the only reasonable explanation for the evidence of Mr. Drummond is that he did not see the first phase of the incident. That he came upon the scene after the first portion of the incident, after the period of time where Mr. Gannon and Ms. King and Julie Gannon-Gilbert were present and anything which may have happened between Ms. King and Ms. Marshall had already occurred.

[45] It must also be said, for the record, that Mr. Drummond became extremely defensive when asked about his criminal record and became even more agitated when it was suggested to him that his times were wrong in terms of when Ms. King came to his residence, and how long she stayed. And he became somewhat evasive. In the end the Court is persuaded that he was not there at the significant, relevant time, that is, the time when the allegation related to Ms. Mary King's possession of a weapon.

[46] The Court heard from Sara Gray, a neighbour of Ms. King and Ms. Marshall. She is a friend of Ms. King, as she indicated. She heard the incident begin in the backyard, as yelling between Mr. Gannon and Ms. King, and then in the front. She said what she saw occurred in front of her home. Her home being to the other side of Ms. King's, not in the direction of Ms. Marshall's. She said it had been going on for five or ten minutes before she went out. She testified that she saw Mr. Drummond coming down the street and seeing him intervene. She did not see Mrs. Gannon-Gilbert become involved. She saw her arriving later. She did not see anything in Ms. King's hand. I have come to the same conclusion with respect to the evidence of Ms. Gray. I find that the only reasonable conclusion to draw, on the basis of the totality of the evidence, is that Ms. Gray's evidence relates to a

time later in the event than the relevant time with respect to the allegations before the Court.

[47] The Court heard the evidence of Elizabeth Drummond. Ms. Drummond, also a neighbour, partner of Stuart Drummond, who lives in the broader neighbourhood. She was aware of the animosity between Ms. King and Ms. Marshall. She testified that she looked down the street and saw Ms. Gannon and Ms. Mary King yelling at each other so she sent her husband to intervene. She testified to having seen very little of the event, she saw no physical contact. She saw nothing in the hand of Ms. King. She stated that Ms. King came to her residence afterwards and was there for a period of time before leaving. She believed Ms. King headed back in the direction of her own townhouse. In summary, on her evidence, she had very little opportunity to observe the actual incident in the street and what she did observe, I'm satisfied, was that part of the incident which was after the relevant period of time when the allegation with respect to possession of a weapon and assault with a weapon was alleged to have occurred.

[48] As I've said, the assessment of each witness's evidence is made when considered in context of the totality of the evidence and the Court may accept all,

some or none of a witness's evidence. In this case, the Court heard from a number of people who were present at the time of the alleged incident. There were many others who, on the evidence, were present at that time and in a position to see what happened. They were not called to testify either by the Crown or the Defence. Ryan Gannon, a key participant, was not called as a witness. Ryan Gannon being the alleged victim's common-law partner. And Mr. Gannon, on the evidence of Ms. King, being victimized himself in terms of an assault. He is also the father of the children of Ms. Marshall. And yet, on the evidence, he did not cooperate with the police and did not come forward to give evidence.

[49] With respect to Ryan Gannon and any and all other persons who were present and did not testify, the Court may not speculate on what they may have said if they did come forward or why they have not come forward, whether out of distrust of the police or fear of reprisal or for any other reason. The Court must determine the matter based upon the evidence which has been presented and always keep in mind that the burden rests upon the Crown to prove the allegation beyond a reasonable doubt.

[50] I have reviewed all of the evidence. I have considered the suggestion of Ms. King during her testimony that her being in possession of a weapon was a

fabrication and have commented on the fact that it would have had to have been concocted within a few minutes. On that suggestion, a lie was created that dozens of people in the neighbourhood would be able to dispute. I have considered the fact that no weapon was presented or found. If this suggestion of a fabrication were true, then it would mean that, Cheryl Cromwell agreed to join in on the lie and to commit perjury. I do not believe for a moment that Cheryl Cromwell did so. On all of the evidence which I've heard, Ms. Cromwell was the most impressive of all of the witnesses and, in my view, the most objective.

[51] I have considered the prior history of involvement of Ms. Cromwell with Ms. King as part of the Court's assessment of her evidence. On the Court's view of Ms. Cromwell's evidence she, at no time, exaggerated or overstated or embellished any of her statements. Her evidence was not entirely consistent with the other Crown witnesses whose evidence was more severe in terms of their description of the actions of Ms. King.

[52] I accept the evidence of Ms. Cromwell and the evidence of other witnesses consistent with her evidence that Ms. King, during the course of this incident in the street, picked up an object; i.e., a metal object approximately three and a half feet in length; that she was in possession of that object when in an argument with Mr.

Gannon; that she held the item over her head while in argument in the street with Mr. Gannon; that when her attention was drawn to Lisa Marshall by her calling out to Mr. Gannon to come in and notifying him that the police had been called, that Ms. Marshall made some movement towards Ms. Marshall. That Ms. King uttered the words “fucking bitch” to Ms. Marshall; that Ms. King uttered the statement, as testified to by Ms. Cromwell, that she was going to hit Ms. Marshall; that she, at that time, was in possession of the object described as a metal pipe; that Ms. King got no closer than being close to the walkway of Lisa Marshall; and that, at that time, Ms. King was disarmed by an unknown individual and that the argument between Mr. Gannon and Ms. King then continued in the street. Those are the facts as found by the Court. In clarification, the Court is not persuaded beyond a reasonable doubt that Ms. King was ever within ten feet of Lisa Marshall or that she made a rapid, or running, movement towards Lisa Marshall.

[53] I turn to the application of the law to the facts. On the facts as found by the Court, has the offence of assault with a weapon been proven? Ms. King admitted to assaulting Mr. Gannon, to threatening Mr. Gannon, and assaulting Julie Gannon. She is not charged with any of those offences and none of those offences are included offences. On the evidence, she may have participated in a disturbance in a public place by yelling. She is not charged with that offence. There is evidence

of her uttering a threat to Lisa Marshall and/or to Mr. Gannon. She is not charged with that offence.

[54] With respect to the offence with which she is charged. The time, the place and the identity of the parties have all been proven and are not really in dispute. The Court has found that it has been proven beyond a reasonable doubt that Ms. King was in possession of a metal pipe.

[55] Has an assault been proven? As previously indicated, the Crown's case relies on Section 265 (1) (b) of the Criminal Code.

[56] Has it been proven that the Accused attempted or threatened to apply force? The Court found that the Accused said that she was going to hit Lisa Marshall. Those words, in the Court's view, constitute a threat, part of the definition of assault in Section 265 (1) (b).

[57] Did Ms. King have the ability to affect that threat? I find on the evidence that that has not been proven beyond a reasonable doubt.

[58] Did she cause Ms. Marshall to believe on reasonable grounds that she had the present ability? I did not accept the evidence of Ms. Marshall as to how close Ms. King got to her nor that Ms. King began to swing this pipe at her. Further, I

am not persuaded that Ms. Marshall believed that the Accused had present ability to carry out such a threat and, even if she did, I am not persuaded it would be reasonable to do so. It may be that Ms. Marshall recalls the matter as she testified and that would be understandable given the emotional nature of the incident. However, on the evidence, I am not satisfied that the Crown has proven the charge of assault with a weapon beyond a reasonable doubt for those reasons.

[59] I turn to the issue of an attempt. The definition of assault in 265 (1)(b) includes an attempt, specifically:

“...a threat or attempt by act or gesture...”

[60] Attempt is also defined in the Criminal Code in Section 24. It reads, in part:

“An attempt to commit an offence may be by doing or omitting to do something...”

[61] Clearly, the wording of 265 differs from the wording of attempt in Section 24. Clearly the wording in 265 does not encompass an omission. The difference in the wording of these provisions convinces the Court that the word attempt in 265 (1)(b) has a different and more restrictive meaning than attempt in Section 24 of the Criminal Code. Further, this being criminal legislation, the Court must interpret the provision, Section 265(1)(b), to give it the most restrictive meaning

consistent with the wording of the provision. I find that there is a difference in the scope of the meaning of assault and an attempted assault.

[62] Section 662(1)(b) specifies:

“A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or summary conviction, the accused may be convicted (b) of an attempt to commit an offence so included.”

[63] I am persuaded that the offence of assault with a weapon has, as included offences, attempted assault with a weapon, assault and attempted assault.

[64] The offence before this court is assault with a weapon. In my view, assault is undoubtedly an included offence. For the reasons previously stated, the evidence has not proven an assault beyond a reasonable doubt.

[65] Has the evidence established proof beyond a reasonable doubt of an attempted assault with a weapon or attempted assault? There is a need to re-visit the evidence and make further findings of fact.

[66] The evidence established that Ms. King was in possession of a metal pipe. However, the evidence was that she picked it up before her attention was drawn to Ms. Marshall. She held the pipe over her head when yelling at Mr. Gannon. On

the evidence, she did not in any way, make a gesture of threat or a motion to strike Mr. Gannon or Mrs. Gannon-Gilbert with the metal pipe although admittedly, on her own evidence, she physically assaulted both of them.

[67] When her attention turned to Ms. Marshall and she made some movement towards Ms. Marshall, I find, at the time, she was still in possession of the metal pipe. Also, during that time, she uttered a threat to hit Ms. Marshall. The evidence was not that she uttered a threat to hit her with the pipe or that she gestured with the pipe as she made that statement.

[68] While in possession of the metal pipe, and making that statement, one might be inclined to the view that the two are connected i.e., she intended to hit her with the pipe, but the task of the Court is to determine whether or not the allegation has been proven beyond a reasonable doubt. An attempt, as I've indicated, is defined in Section 24. It reads:

“Everyone who, having an intention to commit an offence, does or omits to do anything for the purpose of carrying out the intention, whether or not it was possible under the circumstances to commit the offence.”

[69] Because of the wording of the attempt section, the fact that Ms. Marshall never got to within ten feet is not necessarily conclusive of the matter. Subsection 2 of Section 24 reads:

“The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt, is a question of law.”

[70] The first issue is, therefore, whether or not the Crown has proven an intention beyond a reasonable doubt. As I’ve indicated, in reviewing the evidence, I find that Ms. King uttered those words, that she would hit Ms. Marshall, while in possession of the metal pipe, but I am not persuaded, beyond a reasonable doubt, that it has been proven that she had an intention to strike Ms. Marshall with the pipe given that she did not mention the pipe in her statement, given that she did not gesture with the pipe, given that she did not use the pipe as a weapon in relation to any other person with whom she was in a dispute on that day. I find that it has not been proven beyond a reasonable doubt to the satisfaction of the Court that she had the intention to use the weapon to assault Ms. Marshall. I, therefore, find her not guilty of an attempted assault with a weapon.

[71] I turn now to the final issue for the Court which is whether or not the evidence has proven beyond a reasonable doubt that Ms. King committed an attempt to assault Ms. Marshall. In this regard, again, the Court must consider all of the evidence, including the animosity between the parties. That there was an insult directed to Ms. Marshall by Ms. King. That Ms. King uttered a threat to strike Ms. Marshall and that she moved towards Ms. Marshall and got to an area

near the front walkway of Ms. Marshall. In those circumstances, although the Court was not satisfied beyond a reasonable doubt that she intended to use the object in her possession as a weapon in the commission of an assault, the Court was satisfied beyond a reasonable doubt that when Ms. King approached Ms. Marshall her intention was to apply force to her and that action, in moving towards her in those circumstances, went beyond mere preparation to actions in the course of carrying out her intention. This has been proven to the satisfaction of the Court beyond a reasonable doubt and for that reason, with respect to the included offence of attempted assault, the Court finds that that charge has been proven beyond a reasonable doubt and finds Ms. King guilty on that charge.