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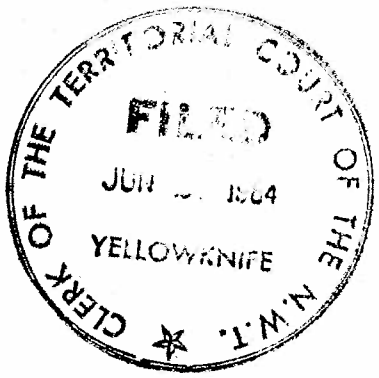
TC CR 84 029

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:



HER MAJESTY THE QUEEN

- and -

CHRISTOPHER NOEL O'SULLIVAN

Transcript of a Judgment delivered by His Honour Judge T. B. Davis, sitting at Yellowknife, in the Northwest Territories, on Friday, June 15, A.D. 1984.

APPEARANCES:

MR. M. D. GATES	On behalf of the Crown
MR. J. Z. VERTES	On behalf of the Defence

THE COURT: Mr. O'Sullivan has been charged with an offence that on the thirty-first of December, 1983, he committed an assault which caused bodily harm to William Luke, contrary to Section 245 of the Criminal Code. For the purposes of convenience at the present time, I am just going to quickly review the evidence that has been adduced at the trial.

The charge arose as a result of an incident that had taken place outside or near a party that had been arranged for a dinner/dance in Yellowknife as a New Year's Eve party, and at which Mr. Luke was one of the persons in attendance, and at which Mr. O'Sullivan was one of the persons in charge of and working at the function during the evening. Generally speaking, there is no dispute as to what injuries had occurred to Mr. Luke, who was struck; and medical reports indicate that he had received a cut lip, broken tooth, required stitches. Mr. Luke himself indicates that he had a cracked tooth as well. There was substantial bleeding of the nose of the victim, which was dealt with a number of days after the event when he went to the Yellowknife hospital, and subsequently spent four days in the hospital in Edmonton where the nosebleed had been stopped after two days. Mr. Luke claims that he was hit in the face and kicked in the chest by the accused.

Mr. Boivin, who was the person that had taken Mr. Luke to the party, had given evidence that throughout the evening Mr. Luke had been pushing and shoving sometimes in scuffles with people, and with Mr. Boivin, and that he,

as well as others, had asked Luke to leave the party on a number of occasions. He had observed Luke, and his state and condition, and observed that he had been pushing at other tables and causing a nuisance. He indicates as well that he had observed the accused heave Luke out the door and into a van, and had observed the accused hit Luke and had observed kicking him the legs and ribs. He indicated Mr. Santos was also outside the door while this was taking place.

There is then some discrepancy in the evidence between Mr. Boivin and Luke, and other persons who had given evidence. Mr. Santos, who appears to have been very concerned about Luke and had gone out the doors of the hall to the street did not see any kicking or hitting; and he did stay to help Luke by offering him handkerchiefs to stop the bleeding of his face. He also indicates that he saw the accused put Luke out the door by his arm and that when outside, he observed the accused hold Luke by the vehicle and saw Luke fall when the accused no longer was holding him up. So, he saw Luke drop down when the accused let him go. He did not see any blows and gave the Court the opinion that the accused was helping Luke when he was outside by the vehicle. This is almost in direct conflict with the evidence of Mr. Boivin.

Mr. O'Sullivan himself, the accused, went on the stand, and I felt that his evidence was straightforward and quite complete. He said that he did put Luke out of the dance on more than one occasion, and he told Luke to go home.

He admits that he had touched Luke before he exited the door. He doesn't feel that his touching Luke was such that he pushed or heaved Luke out; so, it's also in conflict with the evidence of Mr. Luke and Mr. Boivin. He says that Luke himself had pushed the doors open, and Luke went out the doors on his own power in a rushed and harsh way. He then says that before Luke went down the stairs of the veranda of the hall that Luke turned in a fighting gesture, and in a split second the accused struck, punched Mr. Luke in the face. The accused acknowledges that there was blood and injury to Luke as a result of that one punch and that at the time it happened he did not believe there was anybody else present. He does admit to striking Luke. I felt that his evidence seemed to be very straightforward. He acknowledges that he had trouble with Luke at the dance earlier and asked him to leave on a number of occasions and that when he observed that Luke had been struck and injured, he asked others to take care of him, since they appeared to know him by speaking to him in the use of his first name. He then also said that when he was talking subsequently to any witnesses who were involved with the hearing that he told them when called to court to tell it as they saw it.

A number of other witnesses gave evidence and confirmed that Mr. Luke was a nuisance at the dance. They also seemed to confirm that O'Sullivan assisted Luke to some extent outside after he had had his face struck, and after he had fallen down.

It is the duty of this Court to try and assess the circumstances and come to opinions as to the facts, and I must do that taking into account the fact that when Mr. Luke was giving evidence, he was not sure of a number of things. He wasn't sure of the number of persons that were in his own party attending the dance, although Mr. Boivin indicated that there were other persons with whom he had been invited to the party. Luke didn't really notice whether there was much dancing going on at the party. He had beer before he went to it, and four or five drinks while he was there between seven and eleven o'clock; and everybody acknowledges, as well as Luke himself, that Luke was impaired. Luke also acknowledged that he did have some difficulty with some chairs and that he was loud during the evening and that on one occasion at least there was a ruckus and a bit of fighting with his friend, Boivin, but did not seem to remember any fighting or pushing or other persons at the dance. Luke admitted that he did return to the dance a number of times and was a bit of a nuisance, which was confirmed by other persons who gave evidence. He didn't remember asking somebody to give him some help to go back into the dance and get the guy who had hit him. He did not remember falling on a table, and he didn't remember taking a swing at anybody, which items all seem to have been matters that other persons gave evidence of, and I am satisfied did in fact take place. But, he did remember getting hit and kicked.

I find that although there is no dispute as to the injury done that the evidence given by Mr. Luke is such that I am very cautious of what weight I am to put on the evidence, because of the condition of Mr. Luke himself and the conflicts that exist.

Under Section 34(1) of the Criminal Code, a person may repel force of an assault by force if there is no intent to injur and if there is no more force used than is necessary to defend one's self. The cases indicate that the Court should not commence its assessment of a situation involving assaults by considering the result in injuries, but should consider the nature of the force--that is, the actual striking itself--and the circumstances of its administration. Therefore, the circumstances in which any force is applied, which might be in the form of reaction to an assault--that is the case of Green vs. Matton (1970, British Columbia Court of Appeal). With regard to the extent of force, the defending person cannot be expected to weigh to a nicety the exact measure of the necessary defensive action. In The Queen vs. Baxter, a 1975 case of the Ontario Court of Appeal, it indicates that there are circumstances in which a person will apply force that he may not be in a position to determine exactly what minimal force is required for his own protection, because it's very difficult to weigh the amount of force. In order to be a criminal offence, it must be excessive, beyond what would ordinarily be considered reasonable.

Even if a victim dies as a result of a blow, a defence may be available to an accused person if he did not intend death or harm, and if he used no more force than was necessary. It's quite possible that certain persons or certain circumstances could develop that even with a relatively slight blow death could result. The Saskatchewan Court of Appeal found that the defence of self-defence might still be available to an accused, notwithstanding the extent of the injury to the person, as stated in The Queen vs. Setrum, in 1976. Cases also indicate that the Court may consider the evidence of specific acts and the character of both the victim and of the accused to determine the likelihood of aggressiveness of the occasions in question; and The Queen vs. Scopelliti, 1981, Ontario Court of Appeal, indicates that those factors can be taken into account.

Assault itself is the application of force without the consent of another person when the force is applied intentionally to another, directly or indirectly. The possibility that a reflex action can result when a person is assaulted is shown in the case of The Queen vs. Wolfe, in the Ontario Court of Appeal, 1974, which says an accused may be acquitted if the element of intent is lacking in any assault, meaning that a person's reaction to something may not be an intentional assault.

In this instance, Defence Counsel has submitted an argument that self-defence is an element that must be considered because of the circumstances in which the accused

finds himself; and there seem to be a number of qualifications before the Court can consider that defence. First, the accused must have been justified in using some force to defend against an attack, whether it was real or reasonably apprehended. The accused must also have honestly believed that he was justified in using the force that he did. It also seems that the cases have indicated that the degree of force to repel must be reasonably proportionate to the degree of the danger that the person finds himself or believes himself to be in or believes that he faced. Those general principles I have taken from three cases, The Queen vs. Gee, 1980, Alberta Court of Appeal, The Queen vs. Trecrocae, Ontario Court of Appeal, 1980, and The Queen vs. Faid, Alberta Court of Appeal, 1981.

I believe the question therefore before this Court comes down to determining the reasonableness in the proportion of force used. The question of proportion of force necessary is for the jury, ordinarily; and therefore, because this is a trial without a jury, it is a question of fact for the Court to determine based on the evidence before it. The Court must be satisfied, in order to have the defence stand, that the accused believed the force was necessary for his own protection; and that is referred to in the Ontario Court of Appeal case in 1976 in The Queen vs. Bogue.

There was very little evidence available other than the evidence of the accused on the circumstances that

I am accepting, and I refer to The Queen vs. Shannon, 1981, Court of Appeal case in British Columbia, where the Court found that a trial court may consider self-defence as a defence in law where the only evidence is that of the accused himself if his version of the events is accepted, and if accepted, he may be entitled to an acquittal.

Having reviewed generally the facts as I have found them without a great deal of detail on what had taken place, I am satisfied to find that the accused in this instance did use force and that that force might have been slightly more than is necessary when he reacted to the gestures and motions of Mr. Luke. I do not find that it was force that was excessive criminally, because I feel, under those circumstances, it is not unnatural for a person who is escorting somebody in an impaired or drunken state to react and strike the other person if an assault appears to be imminent. I am therefore prepared to accept the submitted defence of self-defence in this instance, because I was satisfied to believe the accused, that under those conditions he reacted in a way he believed was necessary for his own protection when Mr. Luke had turned and appeared to have been--at least in the eyes of the accused--going to assault him.

On that basis, I am prepared to dismiss the charge against the accused.

(AT WHICH TIME THIS MATTER WAS CONCLUDED.)

Certified a correct transcript: Edna Thiessen
Edna Thiessen, Court Reporter