

CANADA / JUDGMENT

R. v. Dermody

2025 NSPC 36

COURT

Nova Scotia Provincial Court

DECIDED

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PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Dermody, 2025 NSPC 36

Date: 20251024

Docket: 8849130

Registry: Dartmouth

Between:

His Majesty the King

v.

Carolyn Dermody

Judge:

The Honourable Judge Timothy Daley

Heard:

May 9 and July 15, 2025, in Dartmouth, Nova Scotia

Decision:

October 24, 2025

Charge:

Section 267(b) of the Criminal Code

Counsel:

Michael Blanchard, for the Crown

Donald Murray KC, for the Accused

By the Court:

Introduction

- [1] This is the trial decision respecting Carolyn Dermody who is charged that, on or about the 27th day of April 2024, at or near Dartmouth Nova Scotia, she committed the offence of Assault Causing Bodily Harm against Pamela Hubley contrary to Section 267(b) of the Criminal Code.

The Evidence

- [2] Summarizing the evidence before me, Carolyn Dermody (whom I shall refer to as Dermody) and Pamela Hubley (whom I shall refer to as Hubley) were inmates at the Central Nova Scotia Correctional Facility ("the Facility") at 90 Gloria McCluskey Avenue in Dartmouth, Nova Scotia on April 27, 2024. While inmates, Dermody and Hubley, along with Mary Keeping (whom I shall refer to as Keeping) and Nancy Hiller (whom I shall refer to as Hillier), were admitted to the airing court at that Facility on that date.
- [3] The airing court is an enclosed area with no roof, and which contains some equipment and supplies for activities including basketballs and weight training equipment. It is used to provide an opportunity to exercise, smoke, interact with other inmates, and experience some amount of fresh air and sunshine.

Video of Airing Court

- [4] The airing court is monitored by video cameras from several angles that record colour video but no audio. The cameras are mounted high in the corners and, when combined for viewing, show virtually all the activity in the airing court. A recording of those videos images was entered into evidence by agreement.
- [5] After the four entered the airing court it is apparent from the video that there began discussion between Hubley and the others. During this portion of the discussion, Dermody stood with her hands on her head, and Hubley was gesturing towards each of the others in that conversation. There was no indication of physical hostility or aggression by anyone at that time.
- [6] After a time, both Keeping and Hillier left the discussion and sat on basketballs across a sandy area from and facing Hubley and Dermody who continued to speak. Each was gesturing as they spoke but there is no indication that these gestures were threatening.
- [7] After another brief time, Hubley leads Dermody away from Keeping and Hillier to the corner furthest from the entry and exit door of the airing court. Hubley stops and Dermody passes her, turning around and thereby positioning herself facing into the airing court with her back to the concrete wall a few feet away from same. They continue their conversation, gesturing and moving their bodies slightly forward and back and left and right. At no time does Hubley attempt to strike Dermody during that portion of the conversation.
- [8] Hubley then extends her right hand in a manner suggesting she wanted to shake hands with Dermody who waives off the offer with a gesture. A moment later, Hubley again extends her right hand as if to shake hands and, after brief pause, Dermody begins to strike her.
- [9] I first find that at no time throughout the altercation does Hubley attempt to strike at Dermody in any manner. I also find that Hubley is being held head down by Dermody holding either Hubley's sweatshirt or her hair. I also find that throughout the altercation, Hubley is face down while standing and face down when she falls to her knees.
- [10] I further find that the altercation takes part in two parts. In the first, which lasts a few seconds, Dermody strikes or attempts to strike Hubley a total of 22 times. This included multiple strikes to the face with uppercuts using her right hand while holding Hubley's sweatshirt with her left. She also hit Hubley repeatedly on the back of her head, using a closed fist in what is often referred to as a "hammer fist" punch.
- [11] The two move along the wall area with Dermody controlling and striking Hubley regularly and violently throughout that portion of the altercation. Hubley then falls to her knees, bends over and covers her head with her hands.
- [12] This is the point when I find the second portion of the altercation takes place. Dermody again holds Hubley by her sweatshirt and, at times, her hair, and appears to strike her a total of 11 times with uppercut punches to her face and hammer fist punches to her head. In this

portion of the altercation, Dermody also appears to kick Hubley three times in the face with her foot and appears to strike Hubley three times with knees to her face, all while Hubley is bent over. At one point Dermody herself falls but maintains a hold on Hubley. She rises and, as part of the total strikes summarized earlier, appears to strike Hubley in the face with her knee and appears to hit her with a final few hammer fist punches before stopping.

- [13] Once the altercation ends, Hubley moves to the exit door and hits it several times. Eventually the door opens, and an officer lets her out of the airing court.
- [14] That leaves Dermody, Keeping and Hillier in the airing court together. They move around, seemingly discussing something among them, and begin exchanging clothes. By the time the two female officers enter the airing court to deal with the matter, Hubley had exchanged with the others her sweatpants, T-shirt and sweatshirt.

Agreed Statement of Facts

- [15] By way of an Agreed Statement of Facts filed pursuant to section 655 of the Criminal Code, the Crown and Defence agree that on April 27, 2024, at around 2:30 PM, following an incident at the Central Nova Scotia Correctional Facility, 90 Gloria McCluskey Avenue in Dartmouth, Nova Scotia, Hubley was treated by medical staff at the Facility.
- [16] The incident was captured on closed-circuit video surveillance within the Facility. Dermody admits the authenticity of this video and admits that it is a true and accurate representation of the incident in question, and that the video has not been altered.
- [17] After the incident, staff and the Facility call for EHS paramedics to take Hubley to the Queen Elizabeth II Hospital for further assessment. At the hospital, Hubley was assessed and treated by Dr. James Gould in the Emergency Department.

Dr. Gould's examination revealed the following:

- a. Significant bruising and swelling to soft tissues in the face and blurry vision.
- b. Pain and swelling in her left shoulder.
- c. She had no fractured or broken bones, no airway obstruction, her breathing was only impacted by pain to the left chest, not from any injury to the lungs or airway.
- d. She did not have a brain bleed, nor internal injuries to any of her vital organs, and her cervical spine was intact.
- e. When medical staff at the Facility observed signs of what they perceived to be seizure -like symptoms for about 30 seconds, Dr. Gould's examination found signs that contraindicated their initial impressions.

- f. Hubley's mental acuity during his examination indicated signs of close to normal neurological function, which left him in doubt whether there was seizure, or that her symptoms were "seizure-like" activity.
- [18] Introduced into evidence as Exhibit 4 are three photographs taken at the Facility. after the altercation. The first shows Hubley lying on the floor, with blood on, and extensive swelling to, her face. The next photograph shows Hubley, apparently lying on a pillow with, again, extensive swelling to her face, her left eye swollen closed, bruising and blood. The third photograph shows Hubley standing and showing the same injuries as described before.

Corrections Officer Ashley Hanson

- [19] Corrections Officer Ashley Hanson gave evidence in the matter. She testified that she has been an officer with the Central Nova Correctional Facility for five years and is familiar with both Dermody and Hubley.
- [20] Her evidence was that on April 27, 2024, she heard banging on the door to the airing court, an outside activity area, and she opened the door. The woman who came through the door was Hubley and told her that Dermody had "done this" to her.
- [21] Officer Hanson says that she observed that Hubley's face was swollen, bloody and was starting to bruise. Her left eye was swollen shut and she slid to the floor. She observed what she believed to be convulsing by Hubley and that she urinated during that convulsion. She said medical personnel were called and arrived along with staff to look after Hubley.
- [22] She then escorted Dermody out of the airing court and observed that she had blood and marks on her hands, with more on her right hand than her left. She was taken to another area of the Facility, removed her clothing and was held until the video of the incident was reviewed.
- [23] Officer Hanson then returned to be with Ms. Hubley and at that time EHS took her to hospital. She was unsure when she returned to the Facility.
- [24] In cross-examination, she confirmed that she was not aware of any issues between Dermody and Hubley in the past. She said that she has a good rapport with Dermody and that she expected she would tell her of any issues as she has done so in the past. She testified she spoke to Dermody 5 to 6 times per week.
- [25] She confirmed that on the women's side of the Facility there are four "ranges", each with 12 cells and one bed per cell. There is one lock on the range itself and one lock for each cell. Inmates can be moved around by staff. She confirmed that inmates were screened on entering the Facility, including a JEIN check and asking the inmate if they have any issues with anyone else inside. They also address any concerns brought forward. If there are any issues of incompatibility, the inmate is moved.

- [26] She confirmed that individual cells are locked on both the basis of security and safety as well as for discipline. The central control can lock cells if safety requires it, and the locks are always on from 10 PM to 8 AM. There is an intercom in each cell and checks are done every 30 minutes.
- [27] Officer Hanson confirmed that on April 27, 2024, Dermody, Keeping, Hubley and Hillier were in the airing court. There is one such court in the women's side of the Facility and it provides an area for fresh air, smoking, basketball, and some exercise. Inmates are provided one hour per day and possibly extra time if there is no one else occupying the space.
- [28] She confirmed only the central control could open the airing court door and she could not do it individually. If someone outside in the airing court wishes to come back in, they would have use the intercom or knock on the window.
- [29] She explained that the rotations are used to ensure that, if there are verbal altercations or other issues within a particular collection of inmates, they can be in the airing court at separate times and they may be relocated to avoid future difficulties.

Pamela Hubley

- [30] Hubley gave evidence in the matter, and I will begin by saying I do not find her to be a reliable witness with respect to the events which occurred in the airing court.
- [31] She testified that she entered the airing court sometime between 12 noon and 4 PM on the day in question. She said she walked two loops around the area which is not borne out by the video evidence.
- [32] She said Dermody asked if she was talking about her. She denied this and walked away. Her claim that she walked away is also not borne out by the video. She remained engaged in conversation with the three women in the airing court until she and Dermody went to the corner of that area for further conversation.
- [33] She did admit that she doesn't remember some things. She claimed that Dermody hit her in the back of the head and doesn't remember much after that. This is consistent with the video as Dermody did strike her several times in the back of the head as described earlier.
- [34] Hubley said that she banged on the door to exit the airing court and that Dermody continued to hit her at that time. This is also not borne out by the video as the altercation had finished by the time she reached the door to bang on it.
- [35] She described seeing herself in the mirror on the door with her eyes swollen shut, blood everywhere and she was shaking with pain and hurt, describing her pain as 10 out of 10.
- [36] Hubley described injuries to her head, face, back and left leg. She believes she seized for about 21 seconds. She says that it took her a couple of hours to recover, and she couldn't open her eyes during that time.

- [37] When asked about a history with Dermody, she testified that they were on the range together for about two weeks but didn't associate, though they did speak. She didn't know Dermody prior to that, but understood that Dermody thought that she, Hubley, was an undercover police officer. That was said to her about one week prior to the incident. They were both locked in cells at the time, and they were yelling back and forth to one another. She was one story above Dermody's cell. Hubley testified that others on the range accused her of being a cop as well.
- [38] Hubley testified that she had no intention to have a fight or physical altercation with Dermody that day. She described herself as 40 years old, 5'2" in height and weighs 160 pounds. She says she has no combat training.
- [39] When shown the video, she was able to identify each of the women in the airing court. She said that at one point, Dermody asked to talk to her, and they moved to the corner of that area. That further conversation was about the possibility that Hubley was talking about Dermody, to which she said she replied, "why would I say anything," and was told that Dermody didn't want her on the range.
- [40] At one point she asked for a truce with Dermody, saying that she did not say anything about her and put her hand out to shake for the truce. It was at that point that the assault began. She said she made no motion or demonstrated any intent to initiate a altercation.
- [41] In cross-examination she confirmed that she arrived in the range after Dermody was in the range for approximately two weeks. As to rotations to the airing court, she confirmed this was the first time that she and Dermody had been there together.
- [42] She confirmed there had been altercations in the cells where there are no cameras, but it was never between her and Dermody. She said they didn't talk and didn't get along. At one time she heard Dermody's voice saying, "she's a cop". She denied ever hearing herself referred to as "Crime Stopper" in the Facility. She also denied that any guards called her "Paula".
- [43] She did confirm that in an email to the Crown, she said she realized that she was tough and fearless up to April 27, 2024, but now cannot recall some things.
- [44] When reviewing the video in cross-examination, she confirmed she extended her right hand as described, that she is left hand dominant and her left hand was free.
- [45] She also confirmed that she believed she "walked away" and that "Carolyn got me" which is not borne out by the video.
- [46] She confirmed that she had been convicted for fraud, five breaches of undertaking, and three thefts under \$5000.
- [47] She further confirmed that she was in the Facility on an intermittent sentence at the time and that she had never been in prison previously.

Carolyn Dermody

- [48] Carolyn Dermody, the accused in this matter, gave evidence at trial. She said she had been in the Facility for about four months. She confirmed there were four ranges for women, and she had been moved twice. She said various people were giving her a hard time regarding her charges and herself.
- [49] She confirmed that in April 2024, she was 5 foot 5 inches and weighed around 130 pounds. At the time she gave her evidence she was around 155 pounds.
- [50] Respecting her relationship with Hubley, she claimed that she had daily interaction with her, and their interactions were "hit or miss", claiming that Hubley was anywhere from nice to intimidating. Hubley was trying to get information about her charges. She said Hubley's name was "Crime Stoppers" within the Facility because she was asking everyone about their and others' offences. She confirmed this was not supposed to be done as you were not to ask anyone why they were in the Facility.
- [51] Dermody said the inmates had no choice as to which rotation they were on for the airing court and if they chose not to go out on a particular day due to potential conflict, they would not get access to the court. Therefore, they had a choice of telling the guards of the conflict, thereby being a snitch, or ignoring the issue and deal with it.
- [52] On the day of the incident, she confirmed that she, Keeping, Hillier and Hubley were in the airing court together and that Hubley and Hillier were arguing in an aggressive tone. Hillier told Hubley that Hubley was talking about her to others and talking about others to Hillier. Throughout this and subsequent conversation, Dermody said Hubley denied all allegations that she was discussing inmates, their offences or anything else about them.
- [53] Dermody said she and Hubley went to another part of the airing court to discuss things. The conversation started well with normal tone, and she suggested to Hubley that they admit wrongs on both sides. She wanted to talk things out, but it wasn't working.
- [54] Dermody said Hubley's tone became angrier, that Hubley blocked her into the corner of the airing court, and she was feeling intimidated. She said she was much smaller than Hubley.
- [55] When Hubley put her right hand out offering to shake hands, Dermody took that as a cue that she had to defend herself, knowing that Hubley was left-handed. She was aware of this from others in the Facility and observing her when eating.
- [56] Dermody said she would not shake hands with Hubley as it would leave her vulnerable. She is right-hand dominant and that hand would be engaged in the handshake, while Hubley would have her dominant left hand free to assault her.

- [57] When viewing the video, Dermody described that her back was to the wall and that Hubley was "sizing me up", extending her right hand. She believed she had to defend herself. Dermody was worried that she could be pushed and injured or knocked out against the concrete wall behind her.
- [58] Dermody then said that she hit Hubley and hoped the matter had ended. She said that Hubley grabbed her and the altercation continued. She said they had hands on each other for the same amount of time. Dermody said the altercation ended when she was pushed to the floor and the other women intervened to stop the altercation.
- [59] Dermody said that she used her knees as described earlier to protect herself but did not know if she contacted Hubley.
- [60] When asked about the change of clothing, Dermody testified that Keeping suggested the exchange knowing that Dermody would be placed in segregation with her bloodstained clothes. She said that there was blood on the knees of her pants, and her hands were cut and guessed that this was a result of striking Hubley's teeth.
- [61] In cross examination Dermody admits that Hubley never swung a fist or kicked her at any time. After Hubley fell and covered her head, she claimed she was still going on adrenaline. She denied it was vengeance.
- [62] Dermody confirmed that the questions being asked by Hubley were disrupting Dermody's relationships, including her girlfriend, on the range. Hubley was bullying her. She claimed she was upset and fearful of Hubley, not angry with her. She only wanted to talk it out with her.
- [63] Dermody confirmed that she believed Hubley was lying to her face in the airing range and was frustrated with her. She said that despite her fear of and frustration with Hubley, she followed her to the corner of the airing court. She claims Hubley lined her up with her back to a concrete wall. She says this is consistent with behaviour she observed of others about to fight in jail. She also confirmed that she had not spent much time in jail prior.
- [64] Dermody claimed that Hubley caused a physical altercation in her cell previously and was involved in verbal and physical altercations as well. There was no evidence corroborating this from the officer called.
- [65] She said she hoped one shot or punch would end things, but it continued because Hubley grabbed onto her and was throwing Dermody around.
- [66] Dermody said that at the end of the altercation, when Hubley was at and banging on the door, Dermody wanted to quash things and make peace, but Hubley was still threatening to get her and have her charged.
- [67] When asked about the change of clothes, she denied it was a misguided attempt to not be identified as the assailant.

Issues

[68] In this matter, the issues are as follows:

1. Has the Crown proven beyond a reasonable doubt each element of the offence of assault causing bodily harm: and
2. Has the Crown proven beyond a reasonable doubt that the defence of self defense is not made out?

Summary of the Law

[69] The charge of assault causing bodily harm is contained in Section 267(b) of the Criminal Code as follows:

267. Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

...

(b) causes bodily harm to the complainant,

[70] In this criminal trial the Crown bears the burden of establishing proof of every element of the offence beyond a reasonable doubt. The Supreme Court of Canada decision of *R. v. Lifchis* [1997] 3 SCR 320 provides direction on this issue as follows:

[36] Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[71] In *R. v. Starr* (2000) 2 SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities. Mere probability of guilt is never enough in a criminal matter.

Credibility

[72] As credibility of the accused is at issue in this trial, I note that in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742 the Supreme Court of Canada indicated the way a trial court should assess the evidence of an accused who testifies as follows:

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

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

Third, 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.

[73] I further adopt the restatement of these principles by the Nova Scotia Court of Appeal in *R. v. N.M.*, 2019 NSCA 4 where the Court adopted a reframed statement of the WD factors as expanded by the Supreme Court of Canada in the case of *R. v. JHS*, 2008 SCC 30. The restatement was as follows:

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

Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.

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

Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.

[74] A criminal trial is not a credibility contest.

[75] On the issue of credibility, I am guided by the case of *Faryna v. Chorny* 1951 CanLII 252 (BCCA) where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[76] Or as stated by our Court of Appeal in *R. v. D.D.S.* [2006] NSJ No 103 (NSCA),

Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a ...criminal trial?

[77] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in *D.D.S.*, demeanour can be considered by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[78] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[79] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[80] As the Supreme Court of Canada stated in *R. v. Kruk*, 2024 SCC 7 at paragraph 81:

Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621). With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.

[81] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence.

[82] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in *R. v. Brown* [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

...There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[83] In the case of *R. v. Mah* 2002 NSCA 99, the Court stated:

The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt...the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[84] The Mah decision makes it clear that my function as a judge at a criminal trial is not to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offences beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

Self-Defence

[85] In this trial the Accused has raised the defense of self defence. Section 34 of the Criminal Code sets out the elements of this defense and the factors the court must consider as follows:

34. A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

34(2). In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;

- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

34(3). Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[86] The defence was well summarized by DiLuca J. in *R. v. Theriault* 2020 ONSC 3317:

228 The self-defence provisions have a blend of objective and subjective components that were recently reviewed by Doherty J.A. in *R. v. Khill*; and see also *R. v. Phillips*, 2017 ONCA 752 at para. 80, and *R. v. Mohamad*, 2018 ONCA 966 at paras. 213-214. The provisions are comprised of three components that can be succinctly summarized as follows:

- a. The Trigger - The defendant must reasonably perceive an application or threat of force against himself or another person. On this issue, the evidence has both a subjective and objective component; the defendant must subjectively perceive the application or threat of force, but that perception must be based on reasonable grounds, in other words it must be objectively justified. The objective justification is not purely objective, rather it incorporates relevant subjective features of the accused's personal characteristics and experiences, including training as a police officer; *Khill*, at paras. 48-51.
- b. The Motive - The defendant must respond with a defensive purpose. In other words, what the defendant does must be in response to the perceived threat or application of force. It must not be to seek vengeance, impose punishment or vindicate honour. This component is assessed subjectively. This is an important inquiry because absent a defensive purpose, the rationale for the defence disappears; *Khill* at para. 54 and *R. v. Atkinson*, 2013 MBQB 264.
- c. The Response - The defendant's actions must be reasonable in the circumstances, determined in accordance with the factors set out in s. 34(2) of the Criminal Code. This portion of the assessment is objective, but it too requires consideration of the relevant

personal circumstances and experiences of the person and, as such, it maintains a subjective component. Proportionality of a defendant's response is a factor to consider. However, the defendant's response is not held to a standard of perfection viewed with the benefit of hindsight; *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont.C.A.), and *R. v. Cunha*, 2016 ONCA 491 at paras. 28 and 47. In assessing the reasonableness of the response, the court must be careful to not simply reason backwards from the nature of an injury and conclude that a response was unreasonable solely because it resulted in significant injuries; see *R. v. Omand*, [2005] O.J. No. 5006 (Ont. S.C.J.) at paras. 25-27.

[87] To advance the defence of self defence, the court must find that there is “an air of reality” to that defence. The decision of *R. V. Chan*, 2005 NSCA 61 from our Nova Scotia Court of Appeal is helpful in that regard, drawing from the Supreme Court of Canada decision in *R. v. Cinous* 2002 SCC 29. Beginning at paragraph 19, the court explains the concept of an air of reality as follows:

[19] The question whether self-defence should be left to a jury depends on whether the defence possesses an “air of reality.” A defence possesses an air of reality if a properly instructed jury acting reasonably could acquit the accused on the basis of the defence... Where there is an air of reality to a defence, it should go to the jury. Conversely, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should not be put to the jury.

[20] The air of reality test is concerned only with whether or not a putative defence should be “put in play,” in other words left with the jury for its consideration. In coming to that threshold determination, the trial judge considers the totality of the evidence and assumes the evidence relied upon by the accused is true. The evidential foundation can arise from evidence emanating from an accused, or defence witnesses, or of Crown witnesses, whether on direct or cross-examination. It can also rest upon the factual circumstances of the case or from any other evidential source arising on the record. There is no requirement that the evidence be adduced by the accused.

...

[22] The term “air of reality” means that the trial judge must decide whether the inferences required to be established for the defence to succeed can reasonably be supported by the evidence. The question is whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true. *Cinous* ¶ 86; *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595 at 682.

[23] Finally, the determination of whether there is an evidential foundation warranting that a defence be put to a jury mandates a two-pronged question:

... whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused.

...

... Before putting a defence to a jury, it is the trial judge's duty to ask not just whether there is evidence in some general sense, but whether there is evidence that is reasonably capable of supporting an acquittal. This requires an assessment of whether the evidence relied upon is reasonably capable of supporting the inferences required for the defence to succeed. Cinous, at paragraphs 82-83.

Analysis and Decision

- [88] In this matter, I find that each essential element of the offence of assault causing bodily harm has been proven beyond a reasonable doubt. I make this finding when examining the entire incident, including the entire altercation in the Facility airing court captured on video, the photos of Hubley's face after the altercation and the Agreed Statement of Facts filed in the matter.
- [89] The identity of the accused is proven. The date, time and location of the offence establishing jurisdiction is proven. The intentional application of force causing bodily harm is proven. Yet that is not, and has never been, the real issue before the court.
- [90] The issue before the court is whether the Crown has disproven the defence of self defence beyond a reasonable doubt. I find that this requires an assessment of two portions of the altercation between Dermody and Hubley. The first portion occurs from the moment Dermody first strikes Hubley until Hubley falls to her knees and covers her head approximately halfway through the altercation. The second portion of the altercation begins when Dermody begins to strike Hubley again after Hubley falls and ends when the last strike is made by Dermody.
- [91] I first find that there is an "air of reality" to the defence of self defence. Applying the analysis in Chan, when I consider the totality of the evidence, I must consider the testimony of Dermody in which she says that she feared that she was being set up for a punch by Hubley with her dominant left hand when Hubley extended her right hand to shake. This was informed, to a certain extent, by the prior conversation that Dermody said occurred between her and Hubley, during which Hubley denied any allegation asserted by Dermody or others.
- [92] As well, Dermody testified that she was fearful, given her physical position with a concrete wall behind her. She was isolated from the others in the airing court. She believed that Hubley had put her in that position to make her more vulnerable, and she felt that Hubley's body language was threatening. She was smaller than Hubley.

- [93] In applying the air of reality test, I am to assume the evidence relied upon by the accused is true. In that context, I find that there is an air of reality to the defence.
- [94] In doing so, I am mindful that in making such a finding, I must consider whether "the inferences required to be established for the defence to succeed can reasonably be supported by the evidence". As noted earlier, from the perspective of Dermody, and assuming her evidence to be true, I find that test has been met.
- [95] I further find, applying the two-pronged test set out in *Chan*, that there is evidence upon which I could, acting reasonably, acquit the accused if I believed that evidence to be true. I further find that the evidence put forth, if believed, is reasonably capable of supporting the inferences required to acquit the accused.
- [96] This, of course, is not the end of the analysis. It is merely the beginning. Now I must move to the particulars of the defence of self defence.
- [97] When assessing the defence of self defence in the context of the first portion of the altercation when Dermody begins to strike Hubley, I find that the Crown has failed to prove beyond a reasonable doubt that the defence is not made out.
- [98] Specifically, I have considered the evidence of Dermody respecting her perception that she was under threat of force by Hubley in that moment before throwing the first punch. Her evidence, which I find credible, is that she felt threatened by several circumstances in that moment. She was invited to that area of the airing court by Hubley for discussion. Whether intentionally or not, Hubley positioned herself facing the concrete wall and Dermody positioned herself with her back to the concrete wall. According to Dermody, the conversation was not going well and Hubley was refusing to accept any responsibility or accountability for behaviours that the others accused her of.
- [99] Dermody also testified that she was aware that Hubley is left-hand dominant, and Dermody is right-hand dominant. I find it reasonable that Dermody would believe that, if she had engaged in a handshake with Hubley, she would have been vulnerable to a strike by Hubley's dominant left-hand. Therefore, I find there are reasonable grounds for Dermody to believe that she was under threat of force.
- [100] Given that finding, I find that the act of striking Hubley was committed for the purposes of self defence from that threat of force by Hubley.
- [101] I further find that the act committed, striking Hubley at the commencement of the altercation, was reasonable in the circumstances. In doing so, I consider the various factors under s. 34 (2) of the Criminal Code. As noted, the threat was one of physical violence as perceived by Dermody. If force was to be used by Hubley, it was certainly imminent upon shaking hands or, if there were no handshake, it would be reasonable to infer that Hubley would apply force by striking her. I find there were no other means available to her in that moment to respond.

- [102] As for Dermody's role in the matter, it is clear from the video that she engaged in an assault throughout the altercation. There was no weapon used or threatened to be used by either party.
- [103] I have considered that these two women are of different ages, Hubley being 40 and Dermody being 27. They are about the same height. The most important difference in them is their physical size, with Hubley being considerably larger than Dermody.
- [104] I have considered that they had a prior relationship, though not a friendly one, while in the Facility. I accept Dermody's evidence that she believed, as did others, that Hubley was an undercover police officer, or at least a "rat" who gathered information about the offences and inmates and used that to her advantage. This would reasonably lead Dermody to believe that the extended right hand was not a gesture of truce, but rather an extension of this difficult and conflictual relationship.
- [105] Respecting proportionality, I find that at the beginning of the altercation, the act of Dermody was proportional given her perspective and perceived threat of violence by Hubley. This was not a altercation that began on the street corner where either party could have walked away in the opposite direction. Dermody was facing away from and close to a concrete wall inside an airing court within the Facility. While not completely blocked in, her only option to escape would have been to go to her left and Hubley would certainly be able to follow her in that direction with limited to no route of escape.
- [106] Analyzing the evidence within the context of the decision of Theriault, the trigger, both from a subjective and objective viewpoint, was present. Dermody reasonably believed that she was under threat by Hubley, given their history and the circumstances of their conversation, and their physical position within the airing court.
- [107] Respecting motive, at the beginning of the altercation, I find that Dermody responded in a defensive manner. It is important to note that, in such circumstances, particularly within a facility such as this, "it is inappropriate to measure with great precision the question of a defensive purpose." Given what she knew and perceived at the time, I find that Dermody's response was defensive. I do not see any evidence of vengeance as the altercation played out in its early stages. I find that she was looking to defend herself from the imminent risk posed by Hubley.
- [108] Respecting the response, again I find it to be reasonable at the early stages of the altercation given all the circumstances of the parties, the airing court, the physical positions of the parties and the fact that that Dermody should not be "held to a standard of perfection viewed with the benefit of hindsight." I have been careful, in assessing this portion of the evidence, not to reason backwards from the nature of the injuries and conclude that a response was unreasonable solely because it resulted in significant injuries, which it did.

- [109] Having said that, I find that the behaviour of Dermody after the first few blows were landed quickly changed from the purpose of defending herself to a purpose of aggression, dominance and vengeance. I make this finding for the following reasons.
- [110] First, the video makes clear that at no point does Hubley punch or attempt to punch Dermody throughout the altercation. In fact, Hubley's head is always held down by Dermody while striking her and the strikes are unrelenting throughout the altercation.
- [111] Second, I find that the act, while reasonable in the beginning, became unreasonable as the altercation evolved. While I am cautious not to hold Dermody to a standard of perfection viewed with the benefit of hindsight, I find that the video makes clear that Dermody quickly went past the point of self defence and to the point of deliberate assault. There was simply no risk to her throughout the altercation after she struck the first blow.
- [112] Third, I find that there is a motive in the evidence to support the finding of a change in the nature of the altercation. Dermody made clear that she and Hubley did not get along well. She was very clear that she and others believe that Dermody was an undercover cop, or at least a rat, and that this was unacceptable to anyone in the Facility. It was her evidence that she believed that Hubley was looking to collect information about her and her offences. I find that this was at least part of the motive which became paramount soon after the altercation began. I find that Dermody was soon looking to exact vengeance, not to defend herself.
- [113] If I am incorrect in this assessment of the defence of self defence during the first half of the altercation, I find with respect to the second half of the altercation, the Crown has disproven the defence of self defence beyond a reasonable doubt. I make this finding for the following reasons.
- [114] First, it is clear from the video that when Hubley fell to her knees and covered her head, she was no imminent or ongoing threat to Dermody. Hubley had already received a volley of blows to the back of her head and face without being able to defend herself in any way. There was no reasonable basis for a fear of imminent harm.
- [115] Second, it was at that moment that Dermody had the opportunity to walk away. Dermody was a short distance from the entry door where she could have summoned officers to assist. There was no indication from the body language or behaviour of Hubley that she intended to stand up and engage in a further altercation. Dermody had alternatives which she chose to ignore.
- [116] Third, it was Dermody, not Hubley, who reengaged in the altercation when she kicked Hubley in the face and began striking her again. This continued for several more seconds and involved knees and kicks to the face by Dermody. I find this was disproportionate to the threat posed or that might be reasonably perceived. This is particularly so in the context of the cessation of the altercation temporarily when Hubley fell to the ground and covered her head.

- [117] Fourth, I find that the blows dealt by Dermody on Hubley at that stage of the altercation were disproportionate to the threat posed. The kicks and knees to Hubley's face caused her head to snap, indicating a serious force being applied.
- [118] Fifth, I find the motive for the continuation of the assault to be not one of self defence, but rather one of vengeance based on Dermody's belief that Hubley was either an undercover police officer or rat. I find this portion of the assault by Dermody was intended to send a clear message to Hubley regarding those behaviours being unacceptable in the Facility and particularly with respect to Dermody.
- [119] Finally, in response to the Crown's position that the court could look at this matter as two separate portions of the same altercation, counsel for the Accused raised the question whether the court could be satisfied beyond a reasonable doubt that the bodily harm identified were caused by blows landed by Dermody in the second half of the altercation.
- [120] I have already made a finding that, save during the first few blows of the altercation, the defence of self defence has been disproven by the Crown. I further find that the bodily harm caused to Hubley by Dermody was, at least in part, caused by the blows landed on Hubley's face in the second half of the altercation.
- [121] Specifically, I find the video makes clear that, when Dermody was kicking and kneeing Hubley in the face, her head snapped back on some occasions. This force applied to her face would, I find, have caused injury to her and I conclude that this, combined with the photographic and Agreed Statement Fact evidence, establishes beyond a reasonable doubt that at least some of the bodily harm injuries caused to Hubley by Dermody took place during the second half of the altercation.
- [122] I find it is not necessary for the Crown to prove which injury was caused by which blow. It is sufficient to prove that some of the injuries were caused by some of the blows in the second half of the altercation and I find this has been proven.
- [123] I therefore find Carolyn Dermody guilty of the offence of assault causing bodily harm against Pamela Hubley contrary to section 267(b) of the Criminal Code.

Timothy Daley, JPC

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