

CANADA / JUDGMENT

R. v. Alphonse

2018 BCSC 502

COURT

Supreme Court of British Columbia

DECIDED

28 March 2018

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2018 BCSC 502 R. v. Alphonse IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alphonse, 2018 BCSC 502 Date: 20180328 Docket: 84116-3 Registry: Kelowna Regina v. Chad Colton Alphonse Ban on Publication: Pursuant to s. 648(1) of the Criminal Code, R.S.C. 1985,

- c. C-46. This ban restricted the publication, broadcasting or transmission, in any way, of any portion of the trial at which the jury was not present. The publication ban applied until the jury retired to consider its verdict. Before: The Honourable Madam Justice Murray Reasons for Judgment Air of Reality re: Defences of Provocation and Self-Defence Counsel for The Crown: D. Grabavac K. Dodds Counsel for the Accused: T. La Liberte, Q.C. K. Cronin Place and Date of Trial/Hearing: Kelowna, B.C. March 16, 2018 Place and Date of Judgment: Kelowna, B.C. March 28, 2018

Introduction

- [1] The accused is charged with the second degree murder of Waylon Jackson. He is being tried by a jury. The evidence is in and both sides have closed their cases.
- [2] Mr. Alphonse seeks to have the defences of provocation and self-defence left to the jury. Before a defence is left it must meet the "air of reality" test.
- [3] I gave counsel my ruling on March 19, 2018 with reasons to follow. These are those reasons.
- [4] I will start by defining "air of reality". I will then set out the facts that are being relied upon for both defences. Finally I will consider the potential defences. Air of Reality
- [5] The air of reality test was succinctly set out by the Supreme Court of Canada in R. v. Cairney, 2013 SCC 55:
- [21] "[T]he air of reality test [is not] intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day": R. v. Cinous, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 54, quoted by Fish J. in R. v. Buzizi, 2013 SCC 27, at para. 16. The question is whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether the elements of the defence of provocation are made out: R. v. Tran, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 41; R. v. Mayuran, 2012 SCC 31, [2012] 2 S.C.R. 162,

at para. 21. The trial judge may engage in a limited weighing of the totality of the evidence to determine if a jury acting reasonably on that evidence could draw the inferences necessary to have a reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation: see the companion case, *R. v. Pappas*, 2013 SCC 56. This Court, per Abella J., described the appropriate approach to the air of reality test in *Mayuran*: In determining whether a defence has an air of reality, there must be an examination into the sufficiency of the evidence. It is not enough for there to be "some evidence" supporting the defence (*Cinous*, at para. 83). The test is "whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (*Cinous*, at para. 65). For defences that rely on indirect evidence or defences like provocation that include an objective reasonableness component, the trial judge must examine the "field of factual inferences" that can reasonably be drawn from the evidence (*Cinous*, at para. 91). [Para. 21]

- [22] If this air of reality test is met, the judge should leave the defence to the jury. While judges must ensure that there is an evidential foundation for the defence, they should resolve any doubts as to whether the air of reality threshold is met in favour of leaving the defence to the jury.
- [6] In this case the only evidence from the accused comes from his statement to the police that was led by the Crown. In that statement the accused claims that he has no memory of the event. It will therefore be left to the jury to draw inferences from the evidence.
- [7] What I must determine is whether there is evidence upon which a jury properly instructed, and acting reasonably, could find that the defence is made out. This requires a consideration of whether the evidence put forth is reasonably capable of supporting the inferences required to find the defence: *R. v. Kong*, 2005 ABCA 255 at para. 74.
- [8] In making this determination the trial judge must consider the totality of the evidence, and assume that the evidence relied upon by the accused to be true. The evidential foundation can be found or inferred from the evidence. The trial judge is not to make findings of fact, weigh evidence, determine credibility, draw determinative inferences or even assess the likelihood of success: *Kong* at para. 175.
- [9] In the absence of direct evidence, like in this case, the trial judge must engage in a "limited weighing" of the evidence to determine whether the evidence, if believed, could reasonably support the inferences the accused will be asking the jury to draw: *Cinous* at paras. 90-91. The Evidence
- [10] The evidence the accused relies on for this defence is as follows:
- i. The accused, his girlfriend Phillside Foureyes (Phillisede), her sister, Naomi Foureyes (Naomi) and Naomi's boyfriend, the deceased, were socializing the night of March 11, 2016;
 - ii. All of them were drinking and smoking marihuana;
 - iii. All of them except Naomi became intoxicated with the accused being the most intoxicated of the group;
 - iv. Throughout the

evening the accused had been bugging the deceased saying what a tough guy he was and challenging him to a fight. Although it was done in a teasing manner, the deceased was irritated by it;

- v. The deceased and Naomi went upstairs to go to sleep. The accused and Phillisede remained downstairs and continued to drink; vi. The accused and Phillisede started arguing; vii. Naomi asked the deceased to go downstairs to check on them; viii. When the deceased went down, he and the accused got into a verbal fight that escalated into a physical fight; ix. Both men picked up kitchen chairs and tried to hit each other with them;
 - x. The fight moved from the kitchen to the living room where the deceased got the accused on the ground and started beating him with his fists; xi. The deceased then chased the accused back into the kitchen where the accused ended up on the floor. The deceased was beating him and then started hitting him with a chair again; xii. Naomi was yelling at the deceased "Waylon stop you're going to hurt him" and "Waylon stop you're going to kill him"; xiii. The deceased threw the chair at the accused then turned to walk toward the kitchen counter where both Naomi and his machete knife were located; xiv. The accused immediately rose from the floor and stabbed the deceased twice in the left side of his chest, killing him; and xv. According to Naomi, the accused's actions were immediate; a reaction to the beating.
- Provocation The Law

- [11] The defence of provocation is set out in s. 232 of the Criminal Code, R.S.C. 1985, c. C-46 which reads in part as follows: 232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. What is provocation
- (2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool. Questions of fact
- (3) For the purposes of this section, the questions
- (a) whether the conduct of the victim amounted to provocation under subsection (2), and
 - (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being. .
- [12] The defence of provocation consists of objective and subjective elements which both must be satisfied.

- [13] First, there is a two-fold objective element: "... (1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control": *R. v. Tran*, 2010 SCC 58 at para. 25.
- [14] Second, there is a two-fold subjective element: "... (1) the accused must have acted in response to the provocation; and (2) on the sudden before there was time for his or her passion to cool": *Tran*, at para. 36.
- [15] The suddenness applies to both the insult and the act of retaliation. The wrongful act or insult "must strike upon a mind unprepared for it" and must "make an unexpected impact that takes the understanding by surprise and sets the passions aflame": *R. v. Tripodi*, [1955] 112 C.C.C. 66 at page 68.
- [16] The accused argues that the physical fight was consensual but the beating with the chair when the accused was on the ground made him lose control, thereby constituting provocation.
- [17] Key to a defence of provocation is the loss of control by the accused.
- [18] This case is similar factually to *R. v. Gibson*, 2001 BCCA 297. In *Gibson*, the accused, after being confronted by the deceased about his offensive conduct toward a woman on the street, engaged in a physical fight with the deceased. After the accused lost the fight, the deceased made what the accused took to be a dismissive gesture. The accused took it to be an insult. The accused got up from the ground, grabbed a knife and stabbed the deceased, who at that point was walking away.
- [19] Our Court of Appeal, in upholding the trial judge's decision that there was no air to reality to a defence of provocation in these circumstances, said the following: In the case at bar the reason offered by the appellant for attacking the deceased with a knife as he walked away from the fight was the appellant's public loss of face and dignity. Having confronted the deceased about the deceased's perceived offensive behaviour toward Ms. Boake, and having lost the fight which resulted, he was finally insulted by a dismissive gesture. The humiliating events would not be trivial to the ordinary person who bore the appellant's relevant characteristics. But those events, the sequelae of a lost match (as in *Squire*, the not unexpected blows exchanged during a consensual fight) are not such as to deprive the ordinary person of his power of self-control. As mentioned earlier, the ordinary person standard is adopted to fix the degree of self-control and restraint expected of all in society. It recognizes human frailty when the threshold test is passed and a person is provoked beyond the level of tolerance of the ordinary person. Based on the evidence in this case no jury could find that under the same circumstances an ordinary young man in the appellant's place would have been provoked by the actions, words and gestures of the deceased so as to cause him to lose his power of self-control. The nature of the alleged provocation in this case is not one recognized as falling within the boundaries of s. 232 of the Criminal Code.

- [20] That is precisely the case here. Being hit with a chair when you are engaged in a chair fight is something that could and should have reasonably been anticipated. Both men at one point were wielding chairs trying to strike each other. It was foreseeable that one or both of them would be hit. That the deceased got the upper hand and was able to get the accused on the ground and hit him several times with a chair, in these circumstances, is not an act that would deprive an ordinary person to lose their self-control.
- [21] I am satisfied that there is no air of reality to the defence of provocation. As a result it will not be left to the jury. Self-defence
- [22] Self-defence is set out in s. 34 of the Criminal Code which reads in part as follows: 34 (1) 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. Factors
- (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. .
- [23] To establish the defence, the accused must prove that:

- i. He believed on reasonable grounds that Mr. Jackson used force or made a threat of force against him; ii. He stabbed Mr. Jackson for the purpose of defending or protecting himself from that use or threat of force; and iii. The stabbing was reasonable in the circumstances.
- [24] The defence of self-defence is predicated on the evidence above with the following additional evidence:
- i. Naomi Foureyes testified that the deceased had shown the accused and Mr. Barry his knife earlier in the evening; ii. According to Mr. Barry the knife had been on the counter in the position shown in the photos when he was there; iii. The knife was in plain view; and iv. When the deceased threw the chair at the accused he did nothing to indicate that in his mind the assault was over.
- [25] The Defence submits that a properly instructed jury could infer from the above that the accused thought the deceased was going for his knife to continue the brutal beating.
- [26] The Crown argues that that inference is not reasonable on the facts. It is the Crown's position that the only evidence this jury has of the accused's mindset is from the accused's statement to the police in which he said:
- i. He cannot remember what happened; ii. He does not know how he sustained his injuries; iii. He was drunk and blacked out; and iv. He has not seen the deceased's knife since Christmas.
- [27] Given those statements the Crown argues that the jury could not possibly conclude that the accused believed the deceased was going for his knife. Without that, the accused would have known that the assault was over. The act of stabbing therefore was not in self-defence.
- [28] The jury must treat the accused's statement as they do any evidence - they may accept all, some or none of it. If they choose to accept that the accused had not seen the deceased's knife that night, they may have difficulty with the defence of self-defence. However it is open to them to reject that given the evidence of Naomi Foureyes and Tyson Barry, and find that the accused was mistaken when he told the police that he had not seen the deceased's knife since Christmas.
- [29] I am satisfied that there is an air of reality to self-defence. I will instruct the jury accordingly.
- "The Honourable Madam Justice Murray"

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