
CANADA / JUDGMENT

R. v. Billing

2019 BCCA 237

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 237 R. v. Billing

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Billing,

2019 BCCA 237

Date: 20190702

Docket: CA44569

Between:

Regina

Respondent

And

Jason Curtiss Billing

Appellant

Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated February 10, 2017 (R. v. Billing, Vancouver Docket 27132).

Counsel for the Appellant:

L. Helps

Counsel for the Respondent:

S. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 2, 2019

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

Summary:

Appeal from conviction by jury of aggravated assault. Held: appeal dismissed. The trial judge did not err in her instructions on self-defence by failing to instruct the jury on a mistaken belief of an assault, as the appellant testified that he acted in response to an actual assault, and not one that he believed was about to occur. Nor did the judge err by failing to give a Baxter instruction to the effect that the appellant's response did not have to be weighed to a nicety. There is no reviewable error in the remainder of the charge.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] Jason Billing appeals his conviction for aggravated assault. He contends that errors in the judge's charge to the jury led them to reject his claim that he was acting in self-defence when he stabbed Kevin Markland, and resulted in an unjust verdict. In issue are the amended self-defence provisions of the Criminal Code, R.S.C. 1985, c. C-46, brought into effect in March 2013.

Background

- [2] Mr. Billing and Mr. Markland were known to each other because Mr. Billing's girlfriend, Ms. Woods, was staying with Mr. Markland and his wife. On the day in question, Mr. Billing went to the Markland residence in the early morning hours. The Marklands described him as honking the car horn and doing burnouts on the road. Mr. Billing admitted he was at the Markland residence but denied doing burnouts. He returned in the early afternoon. Ms. Markland and her son were at home but Ms. Woods was not there; nor was Mr. Markland,

who had driven to the gas station to fill jerry cans. Ms. Markland described the appellant pulling into the driveway, getting out of his car and yelling at her while she stood at the window of an upstairs bedroom. He told her that Ms. Woods had something of his, he was there to get it back, and threatened to kick in the door. Mr. Billing disputed this version of their interaction. He said he told Ms. Markland he was there to give Ms. Woods a letter describing his unhappiness about the way their relationship was going.

- [3] At that point, Mr. Markham returned from the gas station and parked his truck in the carport. He testified he got out of his car and grabbed the smaller gas can to fill the lawnmower. He heard Mr. Billing yelling at his wife and told him something along the lines of "why don't you get out of here, you goof". At this point the versions of events described by Mr. Markland and Mr. Billing diverge markedly.
- [4] According to Mr. Markland, Mr. Billing responded, "I got something for you," walked back to his car, rummaged for something, and then advanced towards him with a black silver and shiny object in his hand. Mr. Markland described Mr. Billing as angry and aggressive. He went into defensive mode, shaking the gas can at Mr. Billing in an attempt to avoid getting stabbed with what he had now identified as a knife. During the altercation, Mr. Markland received superficial injuries to his cheek and chin, a small laceration to his left flank/stomach, and four stab wounds in his back, one of which punctured his left lung. He said he was being stabbed as they moved down the fence line in front of the house. Mr. Billing then stopped, got in his car and took off. Ms. Markland came running out of the house, the ambulance arrived and he woke up in hospital.
- [5] Mr. Billing's version of what transpired painted Mr. Markland as the aggressor. He said that he was at his car window retrieving a satchel with the letter for Ms. Wood when Mr. Markland told him to get off his property and called him a goof -- a word he understood was a serious insult and an invitation to fight. As he looked toward Mr. Markland, he says he was hit with a wall of gas which caused his eyes to burn and made it difficult to see. He described going into defensive mode and taking two blind swings at Mr. Markland, before sustaining a serious blow to the left side of his face from either Mr. Markland's fist or the gas can. Mr. Billing said he deployed a knife he kept attached to his belt as a tool, making two or three flailing gestures. Mr. Billing said he was terrified and ran at Mr. Markland with all his force, pushing him towards the fence and stabbing him four times. He stopped after the last swing because he knew he had "hit [his] mark," and drove away because he was concerned that Ms. Markland might come outside "and light [him] up or something".
- [6] Mr. Billing admitted he stabbed Mr. Markland. The issue for the jury was whether he had done so in self-defence.

Issues on appeal

- [7] Mr. Billing identifies three main errors in the judge's charge on self-defence, contending she failed to instruct the jury that:

1. He could have had a mistaken belief an assault was taking place against him;
2. Mr. Markland's use of the word "goof" could have led Mr. Billing to perceive he was going to be assaulted; and
3. Mr. Billing was not required to precisely weigh the proportionality of his response to the assault.

The appellant also raises a fourth ground of appeal, contending a number of less significant errors, taken together, caused the charge to be deficient. It is convenient to address the first and second main grounds of appeal together, a task to which I now turn.

1. Did the judge fail to instruct on mistaken belief of an assault and the significance of the word "goof"?

[8] The Criminal Code provides:

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.

[9] Under s. 34(1)(a), either actual force, or a reasonable belief of force or a threat of force will suffice to meet the first element required to establish self-defence. This reflects a fundamental tenet of criminal law that a person may take defensive action as a pre-emptive measure to prevent an assault if the person believes on reasonable grounds that he or she is about to be assaulted. In other words, a person in that situation is not required to stand by and wait to be assaulted before taking action: *R. v. Young*, 2008 BCCA 393 at paras. 30-37. An accused will not be prevented from relying on self-defence even if he held a reasonable but mistaken belief of fact that he was being or was about to be assaulted: *R. v. Pétel*, [1994] 1 S.C.R. 3 at 13.

[10] The appellant says it was a fatal flaw for the judge to fail to instruct the jury to consider that Mr. Billing could have mistakenly believed that Mr. Markland was using or about to use force against him. This is particularly so, says the appellant, because Mr. Markland had used the words "you goof" when telling Mr. Billing to leave his property -- a particularly degrading insult understood by those who have served time in jail (as Mr. Markland and Mr. Billing had) to be an invitation to fight.

[11] In my view, a mistaken belief instruction was not warranted on the facts of this case. At trial the defence defined the case as one of credibility. In closing submissions to the jury, defence counsel structured his submissions around the central controversy of who was the initial aggressor, characterizing the case as "a classic he said/he said". That strategy reflected the

appellant's evidence that he had been assaulted first by Mr. Markland throwing gasoline directly into his face and landing a serious blow to the left side of his head, either with a fist or the gas can, before pushing the gas can into his face. That version of events, with Mr. Markland as the initial aggressor, was diametrically opposed to that of the complainant. But the relevant point in analyzing this ground of appeal is that the threat the appellant said he was responding to was an actual assault. If his evidence did not raise a reasonable doubt that he was responding to an assault by Mr. Markland, there was no evidence capable of supporting a mistaken belief that he was being assaulted.

- [12] This issue was addressed by the Ontario Court of Appeal in *R. v. Sinclair*, 2017 ONCA 38, leave to appeal ref'd [2017] S.C.C.A. No. 212, adopting this Court's reasoning in *R. v. Grandin*, 2001 BCCA 340:
- [61] First, as is often the case, the evidentiary support for self-defence was the testimony of the appellant. The conduct to which he said that he responded was not an attack that he reasonably believed was about to occur. Rather it was one that did occur - Barton grabbed him by the shoulder. On this evidence, there was no realistic basis for a suggestion that although Barton may not in fact have grabbed him by the shoulder, the appellant reasonably believed that he was about to be attacked by an armed assailant. To distinguish between what the appellant reasonably believed and what he said happened was unwarranted on the evidence. It follows, in my respectful view, that there was no air of reality to support the proposed instruction and thus no obligation to give it. [Emphasis added.]
- [13] In the present case, too, there was no air of reality to support the proposed instruction on mistaken belief. The appellant testified he was responding to an actual assault. This was not a case about equivocal conduct. Whether the appellant reasonably but mistakenly believed that an assault was about to occur was not a live issue at trial.
- [14] A mistaken belief instruction would have been inconsistent with the appellant's evidence and his strategy at trial. It would have confused the jury. Further, since the appellant said he was responding to an actual assault, the contribution of the word "goof" to the perception that he was about to be attacked was of little significance and there was no need for the judge to specifically focus on it in her instruction.
- [15] It is significant that the appellant did not raise at trial any of the issues he now takes with the charge, despite the judge engaging in extensive consultation with counsel, and inviting submissions on the charge over several days. Although failure to register a complaint at trial is not decisive, it is a factor to be considered on appellate review -- it is an indication that the defence considered the charge to be satisfactory in the context of the trial as it had unfolded, and an indication that the charge was adequate to prepare the jury for its task: *R. v. Daley*, 2007 SCC 53 at para. 58; *R. v. Calnen*, 2019 SCC 6 at paras. 38-40.
2. Did the judge fail to instruct the jury on the proportionality of the response?

[16] The appellant submits that proportionality was a key issue in this case because, even if the jury thought Mr. Billing was responding to an assault by Mr. Markland, they could have found his actions of stabbing him to be unreasonable in the circumstances when assessing the third element of self-defence. He argues it was therefore important for the judge to tell the jury that an accused does not usually have time for calm deliberation and cannot be expected to "weigh to a nicety" the exact measure of force that is necessary to defend himself. In other words, Mr. Billing says the jury should have been told that people in stressful and dangerous situations do not have room for detached reflection: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.); *R. v. Cunha*, 2016 ONCA 491 at para. 7. This is sometimes referred to as a "Baxter Instruction".

[17] The first point to note is that *Baxter* involved the former iteration of the self-defence provisions. A brief review of those sections may be of assistance. Former s. 34(1) provided:

34 (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

The former s. 34(1) thus codified proportionality as a prerequisite to self-defence -- an act was justified if the force used was "no more than necessary". Former s. 34(2) provided:

34 (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

This section did not contain the proportionality requirement of s. 34(1) and arguably justified the use of excessive force: *R. v. Bengy*, 2015 ONCA 397 at paras. 46-48.

[18] The Supreme Court of Canada endorsed *Baxter* as an appropriate instruction as to what is encompassed by the term "excessive force" when viewed in the context of self-defence: *R. v. Hebert*, [1996] 2 S.C.R. 272 at paras. 16-18. The Ontario Court of Appeal revisited *Baxter* in *Sinclair*, characterizing the *Baxter* Instruction as relating to the reasonableness of an accused's belief in the necessity of killing or very seriously injuring the victim as the only means of self-preservation under the former section 34(2)(b) (at para. 117). In addition, under the former s. 37, the ultimate consideration was whether an accused had used proportionate force: *R. v. Richter*, 2014 BCCA 244 at para. 18; *R. v. Grandin*, 2001 BCCA 340 at para. 39.

[19] The present case, of course, deals with the new self-defence provisions. The first question on this appeal is therefore whether a Baxter Instruction remains relevant in light of the substantial changes effected by the amendments to the Criminal Code. Proportionality is given less emphasis in the new provisions; it is but one factor among many to be considered under s. 34(2):

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.

[Bold emphasis added.]

[20] As the Ontario Court of Appeal noted in *Bengy*, the amendments converted mandatory prerequisites into discretionary considerations and removed a strict limitation on when fatal defensive force can be used. The ultimate question is whether the act was "reasonable in the circumstances".

[21] The Crown submits that it would be contrary to the thrust of the new provisions to single out proportionality by requiring a Baxter Instruction when proportionality is no longer determinative, but rather one of many factors to be looked at in deciding whether the accused's action was reasonable. The Crown emphasizes that the concept of reasonableness itself depicts a range of responses, not a single right answer (citing *Sinclair* at paras. 123-124), and the jury system is predicated on the fact that collectively the jury possesses the ordinary common sense required to assess reasonableness.

[22] There is in my view no reason to draw a hard line that says a Baxter Instruction should no longer be given under the new regime. A judge is to be allowed flexibility in instructing the jury: *R. v. Araya*, 2015 SCC 11 at para. 39. There may be cases in which a Baxter Instruction

would be helpful to the jury in carrying out the task before it. I note that the current versions of Watt's Manual of Criminal Jury Instructions, 2d ed (Toronto: Carswell, 2015) at 1253 and Canadian Criminal Jury Instructions, 4th ed, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2018 update) ch. 8.55 at 8.55.9(g) both include the instruction under s. 34(2)(g), although the Model Jury Instructions (online) prepared by the National Committee on Jury Instructions of the Canadian Judicial Council do not.

- [23] Recognizing that it may still be appropriate to give a Baxter instruction does not, however, mean that a charge will be deficient if the instruction is not given. Even under the previous version of the self-defence provisions, a Baxter Instruction was not mandatory. As Watt J.A. noted in Sinclair:
- [119] Yet not every omission of a Baxter instruction is fatal to the validity of a conviction recorded without its inclusion. The authorities fail to reveal a single case in which such an omission, on its own, has been held sufficient to warrant appellate reversal. Each case depends on its own facts: The absence of a request for the instruction or an objection to its omission: The thoroughness of the judge's review of the relevant evidence: The emphasis laid on the subjective component of the excessive force element in former s. 34(2)(b): Scotney, at paras. 34-36.
- [24] In the present case, I see no basis for interfering with the verdict because the instruction was omitted. First, the judge repeatedly told the jury that Mr. Billing did not have to prove self-defence, but rather that the Crown carried the burden of disproving at least one of the elements of self-defence beyond a reasonable doubt. Second, the judge repeatedly recited the material aspects of evidence relevant to the defence, thoroughly reviewing Mr. Billing's version of events as demonstrated by this lengthy extract from the charge:

Kevin Markland was standing in the middle of his driveway. He was looking at [Mr. Billing]. Mr. Billing said he shouted at him, "I have something for Ashley, will you give it to her." Kevin Markland did not say anything. He was coming toward Jason Billing. Mr. Billing thought everything was fine. He went to his passenger door. He put his key in his right pocket, reached in through the open passenger window and grabbed the satchel with the letter. Mr. Markland said nothing to him as he moved toward him.

Mr. Billing said he grabbed the satchel and began to unzip it to pull out the letter. He heard, "Get the fuck off my property, goof." Those are words that you do not throw out unless you are going to fight somebody. He looked toward the voice. It was like a wall of liquid coming to him, a big splash right in the face. The liquid also hit his left side. It was gasoline. As soon as he opened his eyes, it was like an intense burning. He thought about three cups of liquid came at him. He dropped the letter back through the car window and said, "What the fuck, man?"

Because of use of the word "goof", he went right into defence mode. He took a couple of swings, which he described as blind haymakers. He threw a left and a right. He did not hit anything. He did not have anything in his hand at the time. He could not see. He was standing right beside the passenger car window of his vehicle.

Mr. Billing said he did not know what he was hit with, whether a fist or the gas can, but he took a serious blow to his head. After he was regaining his balance, he grabbed his knife. It was a clip -- it was in a clip attached to his belt. He deployed the knife by flicking it with his thumb. He had burning eyes and was trying to wipe them.

Mr. Billing described himself as flail thrusting. He did not know if he hit Kevin Markland or not. While he was thrusting, he was wiping his hands with his right hand. The knife was in his left hand. He saw red in front of him. Kevin Markland pushed the gas can in his face. He was struck in the face. It snapped his head back and made his ears ring. He was absolutely terrified. He ran at Kevin Markland with all his force. He was swinging his knife and he stabbed him four times. He could not see. He only saw a general figure.

He was about three feet from Mr. Markland. He pushed and stabbed him in one motion. They ended up along the fence in front of the home, about two or three posts down. He was trying to make his way back around the car. He was side stepping, trying to avoid blows. It was happening really fast. He thought about 12 seconds passed from when Kevin Markland first threw gas on him to the time Mr. Billing left the property in his car.

At about the third post along the fence, Mr. Billing pushed Kevin Markland and he made contact with the fence. He pushed him right into it. On the last swing, he heard, "Ouch, fuck." He knew that he had made his mark. He saw Kevin Markland holding onto the fence and he was not coming toward Mr. Billing. He could see this through blinking, burning eyes. He got out of there. He was still covered in gas. He was worried that Kim Markland might come outside and light him up. He got into the driver's seat of his vehicle, put the knife in his lap, and drove away at a high rate of speed, his eyes still blurry.

He testified that when Kevin Markland first approached him and threw gas on him, he had not threatened Mr. Markland. He did not say anything threatening toward him, nor did he make any threatening gestures. He knew the two men did not like each other, but he was not expecting an altercation with him.

He said he was fearful when he produced his knife. He brought it out because he thought his life was in complete jeopardy. He thought Kevin Markland was trying to kill him. He said he could not retreat. Kevin Mark -- sorry, Mr. Markland kept assaulting him. He was hitting him and following him.

[25] Third, the judge told the jury that they were to consider Mr. Billing's circumstances and were to use their common sense in assessing whether he was acting in self-defence.

- [26] Fourth, the subject matter of the Baxter Instruction is something a jury is likely to consider even without being specifically told to do so: Sinclair at para. 123.
- [27] Fifth, the issue at the centre of the present case was the jury's assessment of the conflicting testimony as to which of the two men had first assaulted the other. As Watt J.A. said in Sinclair, "on that threshold decision, the omitted Baxter instruction ha[s] nothing to say" (at para. 125).
- [28] Finally, as noted above, defence counsel was consulted extensively on the charge preparation and invited again during and after its delivery for comments. Defence did not ask for a Baxter Instruction.
- [29] I would not accede to this ground of appeal.
3. Was the charge insufficient due to a number of other errors?
- [30] The appellant relies on three other errors which he acknowledges would not be fatal on their own, but which he says cumulatively make the charge deficient:
1. The judge failed to instruct the jury that the factors in s. 34(2) were only factors and not requirements;
 2. The judge did not give sufficient emphasis to the W.(D.) instruction; and
 3. The judge failed to instruct that Mr. Billing did not have an obligation to retreat.
- [31] These final grounds of appeal can be dealt with summarily. In my view, the factors are framed as open-ended considerations that could not be mistaken for requirements. It was for the jury as the trier of fact to determine the weight to assign to any factor. I agree with the Crown that it would be obvious to a jury that some of the factors might not be relevant to the reasonableness of the defensive action on the evidence in the case.
- [32] As for the W.(D.) instruction, the main thrust of the appellant's complaint was that the judge instructed on W.(D.) immediately after the self-defence provision, giving it less emphasis because it was "lost" mid-charge. However, on the third day of deliberations the jury asked to replay the appellant's testimony and the judge immediately thereafter repeated the W.(D.) instruction. The jury returned a guilty verdict the next morning. It follows that the W.(D.) instruction was not minimized or "lost" mid-charge. To the contrary, it was almost the last thing the jury heard before concluding their deliberations.
- [33] Finally, the duty to retreat was not a live issue in this case. The availability of retreat is a relevant factor under s. 34(2)(b) in assessing the reasonableness of the appellant's actions -- "whether there were other means available to respond to the potential use of force". The appellant's position at trial was that he was unable to retreat in the circumstances of the case because he was being attacked. In my view no instruction on an obligation to retreat was warranted in the circumstances.

[34] It follows that, even considered collectively, these complaints do not amount to a deficiency in the charge.

Disposition

[35] For the foregoing reasons, I would dismiss the appeal from conviction.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Butler"

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