
CANADA / JUDGMENT

R. v. Gerow

2020 BCSC 2258

COURT

Supreme Court of British Columbia

DECIDED

4 December 2020

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2020 BCSC 2258 R. v. Gerow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gerow,

2020 BCSC 2258

Date: 20201204

Docket: 68059

Registry: Chilliwack

Regina

v.

Mitchell Alan Gerow

Before: The Honourable Madam Justice W.A. Baker

Oral Reasons for Judgment

Counsel for the Crown:

H.B. Waldock

Counsel for the Accused:

D.R. Pedersen

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 16-18 & 20, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 4, 2020

I. INTRODUCTION

- [1] THE COURT: The accused, Mr. Gerow, is charged with assault causing bodily harm contrary to 267(b) of the Criminal Code in relation to an event which took place in the early morning on March 18, 2018.
- [2] Shortly after 5:00 a.m. on March 18, 2018, Mr. Geoffrey Nelmes left the deck of Mr. Gerow's home located at 46563 Gilbert Avenue, Chilliwack, B.C., and dropped approximately 11 feet to the ground, seriously injuring his back and pelvis. How Mr. Nelmes left the deck is the primary issue in this case.
- [3] The Crown says that Mr. Gerow threw Mr. Nelmes off the deck, causing bodily injury. Mr. Gerow says that he did not throw him off the deck. Mr. Gerow also claims self-defence pursuant to s. 34 of the Criminal Code in relation to events immediately preceding Mr. Nelmes leaving the deck. Mr. Gerow concedes that if he threw Mr. Nelmes off the deck in response to what Mr. Nelmes had done, this would constitute an assault which caused bodily harm.
- [4] This case is complicated by the fact that almost all the people involved in the actions which resulted in Mr. Nelmes's injury were severely intoxicated at the relevant time.
- [5] At trial, I heard evidence from Sergeant Wolbeck in relation to photographs of Mr. Gerow's property taken two years after the fact. I also heard evidence from Mr. Nelmes, his wife Donna Nelmes, and his son Aaron Nelmes. Other than Sergeant Wolbeck, all witnesses testified via Microsoft Teams due to the COVID-19 pandemic. This technology was satisfactory to receive the witnesses' evidence.

II. BACKGROUND

- [6] Mr. Gerow has lived in Chilliwack for many years. About 20 years ago, Mr. Gerow met Mr. Nelmes and his wife, Donna Nelmes, in Chilliwack. They became good friends. When Mr. Gerow began living with his partner, Robyn, the couple socialized together often. Mr. and Mrs. Nelmes often looked after Mr. Gerow's children, including his daughter Chelsea and his son Colton. There are three adult children in the Nelmes family, including their son Aaron Nelmes who testified at the trial. I will refer to Mr. Aaron Nelmes as Aaron in my decision to avoid confusion with the other witnesses and not out of disrespect.

- [7] In the early 2000s, the Nelmes family moved away from Chilliwack and, as a result, stopped seeing Mr. Gerow as often as before. In 2004, they moved to Kamloops. Mr. Gerow was a truck driver and his route often passed through Kamloops. Once the family moved to Kamloops, the friendship picked up again and Mr. Gerow often stayed with the Nelmes as he passed through Kamloops on his routes.
- [8] The evidence of all witnesses was that when Mr. Gerow and the Nelmes got together, it was their habit to drink to excess. Aaron testified that in his adult years he did not think he had seen Mr. Gerow sober. Aaron testified that when Mr. Gerow and his parents were together they would get drunk, and sometimes Mr. Gerow would make moves on his mother. Several times Aaron was asked by his father to intervene between Mr. Gerow and Mrs. Nelmes. I mention this evidence not in consideration of the character of the accused, but simply to provide context to the facts as they unfolded on the night in question.
- [9] The evidence of Aaron and his parents was often in conflict, particularly with respect to how often and how much his parents drank and what they did when they drank. Aaron is not a drinker. He testified that he does not like to drink alcohol. He rarely, if ever, does drink alcohol. His testimony was not challenged on this point. While I believe that Mr. and Mrs. Nelmes were honest witnesses, in the sense that they were not trying to mislead the court, I find that their evidence is unreliable due to the effects of alcohol on their memories. Where there is a conflict between the evidence of Aaron and his parents, I generally prefer the evidence of Aaron.
- [10] Mr. Gerow did not testify, although a recording of a statement taken from Mr. Gerow by Constable Hawes on August 12, 2018, was tendered in evidence by the Crown. The August statement refers to and incorporates statements made by Mr. Gerow to Constable Hawes on March 18, 2018. Mr. Gerow conceded that the August 2018 statement was given voluntarily and I find that the August 12, 2018, statement was given by Mr. Gerow voluntarily.

III. THE NIGHT OF THE ALLEDGED ASSAULT

- [11] Chelsea Gerow, Mr. Gerow's daughter, was very close to Mrs. Nelmes, referring to Mrs. Nelmes as "Aunty" and "Momma Bear". On March 17, 2018, Ms. Gerow was quite upset. She had just learned that her mother, Robyn, who was dying of cancer, was going into hospice. At about 8:00 p.m., Mrs. Nelmes sent Ms. Gerow a text asking how she was doing. Ms. Gerow replied that she was a wreck and asked Mrs. Nelmes to come to Chilliwack to be with her. Even though it was late, Mrs. Nelmes eventually agreed to go.
- [12] Aaron was living with his parents. His mother asked if he would drive her to Chilliwack because she had had a drink after she got home from work. Aaron described his mother as tipsy, bordering on drunk, and Mr. Nelmes as drunk. Aaron agreed to drive her to Chilliwack. Mr. Nelmes planned to come down to Chilliwack the next morning. However, not long after Mrs. Nelmes and Aaron left, Mr. Nelmes got in his truck and headed to Chilliwack.

- [13] Just as Aaron and Mrs. Nelmes were entering Chilliwack on the highway, Mr. Nelmes called them. Mr. Nelmes told Aaron that his truck had broken down just outside of Hope. Aaron drove his mother to the Gerow home, arriving at about 11:00 p.m. Aaron says that he went in to say hello to everyone before he turned around to pick up his father. Aaron says that everyone in the house was pretty drunk when he arrived. Ms. Gerow and another young woman were in the house and the two of them were carrying Colton to bed as he had passed out in the bathtub. Aaron then left his mother at the house and drove back to Hope to pick up his father.
- [14] Aaron and Mr. Nelmes arrived at the Gerow house around 1:00 a.m. At that point, the party had moved to the backyard with people surrounding a small fire pit. Mr. Gerow, Ms. Gerow, Mrs. Nelmes, and the unidentified young woman were all in the backyard drinking. Aaron says that everyone was in a jovial good mood. Mr. Gerow handed Mr. Nelmes a beer and they sat down in front of the fire. A beer was passed to Aaron, but he drank less than half the can. He surreptitiously poured out the beer over the course of the evening. At around 2:00 a.m., everyone moved to the front of the house to take photographs. A number of these were introduced into evidence and they show a group of happy people mugging for the camera.
- [15] Aaron says that the mood shifted around 3:00 a.m. when the young woman received a message that a friend of hers had committed suicide. Ms. Gerow and the young woman went inside the house while the others went to the backyard.
- [16] Over the course of the evening, there were varying incidents which were the subject of some commentary in the testimony of the witnesses. None of these are material to the charges before me, but they give some flavour of the evening:
- a) At a number of points in the evening, Mr. Gerow wore a hat which Mr. Nelmes teased him about. A number of times during the evening, Mr. Nelmes flipped the hat, which irritated Mr. Gerow.
 - b) Mr. Gerow and Mrs. Nelmes sat next to each other at the fire pit. Mr. Gerow rubbed Mrs. Nelmes' legs and Mrs. Nelmes kissed him on the cheek. These actions bothered Mr. Nelmes.
 - c) Aaron says his father was very upset, left the backyard, got his bag out of Aaron's truck, and began walking unsteadily away from the house, telling Aaron, "It's your mother".
 - d) Aaron was able to get his father back to the house. Mr. Nelmes then banged on the front door, yelling at Mr. Gerow to let him in. When Mr. Gerow opened the door, Mr. Nelmes deflated and began incoherently mumbling. Mr. Gerow put his arm around Mr. Nelmes and offered to pour him some whiskey. The two men went upstairs to the kitchen.
 - e) After his father went in the house, Aaron went to sit in his truck which was parked three to six feet away from the front steps of the house. He heard no shouting or arguing coming from inside the house. After about 10 minutes, the unidentified young woman and Mr. Nelmes came and sat on the front steps. Aaron could hear them talking to each other, although he described their conversation as drunk babbling more than a real conversation.

After a few minutes, Mr. Nelmes put his arm around the girl's shoulder to give her a little hug, and the two of them went back into the house. Aaron was checking his phone while he sat in the car and noted this incident happened just before 5:00 a.m.

- f) There were some discussions about money that Mr. Gerow owed the Nelmes, some talk of a Volkswagen Bug that may be transferred to Mrs. Nelmes, and some talk of Mr. Nelmes setting his truck on fire. The parties' evidence on these points was entirely unclear as it came from Mr. and Mrs. Nelmes and the statement given by Mr. Gerow. None of these witnesses were generally reliable with regard to the events which occurred on March 17 and 18, prior to the incident on the deck.
- [17] Around 5:00 a.m., Aaron got out of his truck and went around to the back of the house. Nobody was sitting around the fire pit anymore. There was a set of stairs that led up to the back deck. Aaron walked over to the stairs. He came up the stairs and saw his mother, father, and Mr. Gerow standing on the deck. None of them were speaking. Aaron testified that they were all just standing quietly on the deck. Aaron walked past them and went into the house through the sliding glass doors adjacent to where his mother was standing.
- [18] Mr. Nelmes was leaning against the railing. When Sergeant Wolbeck went to the scene, he measured the height of the railing. It was three feet, five inches high. Mr. Nelmes is approximately five feet eight inches tall. Before me, Mrs. Nelmes measured three feet five inches against Mr. Nelmes's body. The top of the railing would have been at his beltline.
- [19] Aaron went into the house and spoke with Ms. Gerow and the young woman for a few moments. He then heard his mother scream. Aaron turned and ran to the screen door at the balcony and saw Mr. Gerow flip his father up onto the railing. Aaron saw his father lying horizontal on the railing. Most of Mr. Nelmes' body was over the railing, suspended over the ground below, but his legs were still over the balcony. Aaron saw Mr. Gerow holding his arms straight out from his body, holding onto Mr. Nelmes, and then saw Mr. Gerow push away from his body. Aaron then saw his father fall to the ground below.
- [20] Aaron was asked under cross-examination whether he was sure if Mr. Gerow was trying to push or pull Mr. Nelmes. Aaron replied it did not look like Mr. Gerow was trying to pull him, but he did agree it happened very quickly so he could not know.
- [21] Mrs. Nelmes was questioned about what happened on the deck. While her memory of many details of the evening are not clear, she did have a distinct memory of the events between Mr. Gerow and Mr. Nelmes right before Mr. Nelmes went over the railing.
- [22] Mrs. Nelmes recalls that Mr. Gerow was wearing a hat. Mr. Nelmes stepped towards Mr. Gerow and reached forward to touch the hat, saying something to the effect of, "What's with the hat?" She says Mr. Gerow said to Mr. Nelmes, "I'm sick and tired of your attitude." Mr. Gerow got angry and tried to kick Mr. Nelmes. Mrs. Nelmes was standing behind Mr. Gerow, so she could not see whether the kick connected with anything. She says she then saw Mr. Gerow go towards Mr. Nelmes and grab Mr. Nelmes. She saw the two men grappling with

each other for a few moments. When the men were grappling and as Mr. Gerow held Mr. Nelmes at the railing, Mrs. Nelmes was behind Mr. Gerow, grabbing his shirt and trying to pull Mr. Gerow off Mr. Nelmes. She said Mr. Gerow then threw Mr. Nelmes over the railing.

- [23] During the struggle between the two men, Aaron saw his mother holding onto Mr. Gerow's shirt, trying to pull him towards her.
- [24] Under cross-examination, Mrs. Nelmes agreed that she did not see everything clearly because it was happening very fast and she was grabbing onto Mr. Gerow, trying to pull him off Mr. Nelmes. She was unshaken in her evidence that Mr. Gerow kicked his legs towards Mr. Nelmes and that the two men grappled for a few moments after the kick. She agreed that she was behind Mr. Gerow and was focused on pulling him off Mr. Nelmes.
- [25] After agreeing with counsel for Mr. Gerow that Mr. Gerow's body was blocking her view of what was happening with Mr. Nelmes, she then agreed with counsel when he put it to her that she assumed Mr. Gerow threw him over the railing.
- [26] The Crown argued that Mrs. Nelmes had overwhelming evidence from which to infer that Mr. Gerow threw Mr. Nelmes over the railing. While she might have agreed with the word "assume" in the question put to her by the defence, she could only have understood the question to mean that she inferred, from what she saw and felt herself in the struggle, that Mr. Gerow threw Mr. Nelmes over the deck. This is substantively different from an assumption which is based on no evidence. I agree with the Crown. Even though Mrs. Nelmes, from her position behind Mr. Gerow's back, could not see Mr. Nelmes at the point he went over the railing, Mrs. Nelmes was trying to pull Mr. Gerow towards her in an attempt to prevent Mr. Gerow from completing what she saw him start, namely lifting Mr. Nelmes up to the railing to push him over. I agree that Mrs. Nelmes, in those circumstances, was capable of correctly concluding that Mr. Gerow threw Mr. Nelmes over the railing.
- [27] I found that Mrs. Nelmes' general evidence of what occurred on March 17 and 18, 2020, and at other times when she was drinking with Mr. Gerow, to be not reliable due to her drinking. However, I am satisfied that her memory of the moments leading up to her husband going over the railing is generally reliable. On the crucial elements of what occurred on the deck, her memory is consistent with the evidence of Aaron.
- [28] On one point, the evidence of Mrs. Nelmes and Aaron is not consistent. Mrs. Nelmes remembers Aaron being on the deck with her just before the altercation. However, on that particular point, I prefer the evidence of Aaron and find that he was inside the house when he heard his mother scream. I find this small discrepancy is not sufficient to undermine the reliability of Mrs. Nelmes' evidence of what happened between the two men just before Mr. Nelmes went over the railing.
- [29] Further, the Crown tendered in evidence a recording of a 9-1-1 call which occurred right after Mr. Nelmes landed on the ground. Both parties agree that this evidence may be admitted for the purpose of rebutting an allegation that Mrs. Nelmes's evidence is a recent

fabrication and to assess how inebriated Mrs. Nelmes was at the time the call was made. The 9-1-1 recording is consistent with the evidence of both Aaron and Mrs. Nelmes, and rebuts any allegation of recent fabrication. Further and more importantly, Mrs. Nelmes was the main speaker on the call and her presentation was not that of a drunken person. She was able to clearly answer all questions asked of her, describe accurately where they were, including the address of the house, spell the names of the people involved, and relay information, questions, and answers between others at the scene and the 9-1-1 operator.

- [30] While I have no doubt she was drinking over the course of the evening, by the time the incident occurred Mrs. Nelmes was sober enough to conduct an informed conversation with the 9-1-1 operator.
- [31] Mr. Nelmes has no recollection of how he went over the railing. He remembers leaning on the railing and asking Mr. Gerow why he was wearing a hat, and that is the last thing he remembers.
- [32] After Mr. Nelmes went over the railing, Mr. Gerow yelled to his daughter to call 9-1-1. Ms. Gerow called 9-1-1 and the recording of that call was entered into evidence. On that recording, a male voice, which Mrs. Nelmes identified as Mr. Gerow, stated, "Why would I do what I done".
- [33] Mrs. Nelmes was cross-examined on her statement to the 9-1-1 operator when she said, "I don't know what happened." Mrs. Nelmes explained that when she said that, she meant she did not know why it happened. I accept this explanation given by Mrs. Nelmes. These were long-time friends and it is entirely understandable that she would mean she did not know what happened, in the sense of she did not know what happened that would cause Mr. Gerow to throw Mr. Nelmes over the railing. Mrs. Nelmes remained confident under cross-examination that Mr. Gerow threw Mr. Nelmes over the railing.
- [34] When Mr. Nelmes landed on the ground, he injured his back and pelvis. Mrs. Nelmes believed he landed on his front. Aaron immediately ran down the stairs to where his father was lying. His father was attempting to crawl and was pulling himself along the ground. Aaron convinced him to lie still until the ambulance got there.
- [35] The ambulance and police arrived on the scene. Mr. Nelmes was taken to Chilliwack hospital. He was then transferred to Abbotsford hospital because the injuries were too serious to be dealt with in Chilliwack. Ultimately he was transferred to New Westminster where he remained for a number of weeks.
- [36] Constable Hawes attended at the scene on March 18, 2018. Mr. Gerow admitted that he said to Constable Hawes, "Arrest me. I was just defending my family."

A. August 2018 Statement of Mr. Gerow

- [37] In his statement to Constable Hawes made on August 12, 2018, Mr. Gerow said the following:

- a) Mr. Nelmes kicked in the front door at approximately 3:00 or 4:00 a.m;
- b) Mr. Gerow had been lying down with his grandson and got up to see what all the noise was about and found Mr. Nelmes in an irate state;
- c) Mr. Gerow told Mr. Nelmes to calm down and took him upstairs to the deck to mix him a drink;
- d) The next thing Mr. Gerow knew, Mr. Nelmes was lying on the ground and Mr. Gerow did not know how he got there;
- e) Mr. Gerow knew Mr. Nelmes had been in a rage, attacking one of his daughters. The door was kicked in, the door was cracked, the windows was cracked, and the wall was broken by the bathroom;
- f) Mr. Gerow had no understanding of how Mr. Nelmes got off his balcony;
- g) Mr. Gerow did not know whether they were sitting on the ledge and fell over the ledge;
- h) Mr. Gerow does not believe he had anything to do with Mr. Nelmes going off the balcony;
- i) Mr. Nelmes was angry earlier in the evening and would not calm down;
- j) Somebody was getting mad at one of Mr. Gerow's girls and attacking her and saying, "I'm going to take her out, I'm going to kill her";
- k) Mr. Nelmes was very irate with his daughter and strange with her and did grab her at one point;
- l) Mr. Gerow told Mr. Nelmes to get out on the porch and stay there, and the next thing Mr. Gerow knew, he was yelling at his daughter to call 9-1-1 because Mr. Nelmes was off the balcony;
- m) Mr. Gerow did not know if Mr. Nelmes was sitting on the railing and fell backwards or jumped over. He had no idea what Mr. Nelmes was doing.
- n) Mrs. Nelmes was not there, it was just Mr. Nelmes and Mr. Gerow;
- o) Mr. Gerow mixed Mr. Nelmes a drink to try to calm him down;
- p) Mr. Gerow asked Mr. Nelmes what was going on and Mr. Nelmes said he did not know, he was just mad;
- q) Mr. Nelmes has a temper and just seems to snap when he gets to a certain point in drinking;
- r) They had been drinking for eight hours and they had been drinking moonshine; and
- s) Both Mr. Nelmes and Mr. Gerow were definitely intoxicated.

[38] Constable Hawes then questioned Mr. Gerow about statements Mr. Gerow made when the police arrived on March 18, 2018. In the August statement, Mr. Gerow responded as follows:

- a) Constable Hawes stated that when he arrived on the scene on March 18, 2018, Mr. Gerow was standing, waiting for the police with his hands behind his back as if he was guilty. Constable Hawes asked Mr. Gerow to comment on this recollection. Mr. Gerow did not deny he was standing with his hands behind his back and stated he did not physically go after people or do anything wrong to people like that and he just did not know what was going on. He said he just stayed out of the way.
- b) Constable Hawes said that on March 18, 2018, Mr. Gerow stated that he had done some wrestling or training and that Mr. Nelmes came at him at some point, and because of his training, Mr. Gerow just flipped him. In August 2018, Mr. Gerow stated in response that he would never mean for anyone to go over the balcony, but agreed that he wrestled in high school. Mr. Gerow recalled that Mr. Nelmes had come at him earlier that night. Mr. Gerow was wearing a special hat and Mr. Nelmes kept coming at him and crunching it up and Mr. Gerow kept telling Mr. Nelmes to leave his hat alone. Mr. Nelmes was in an irate state. Mr. Gerow had just come back from a back injury and physically could not get anyone over the railing. Mr. Gerow did know Olympic-style wrestling and there was no tossing or karate-type stuff where he could fire someone off a three-and-a-half-foot railing.
- c) Constable Hawes again challenged Mr. Gerow by stating that Mr. Gerow had told him on March 18 that Mr. Nelmes came at him and Mr. Gerow grabbed Mr. Nelmes and flipped him. On August 12, Mr. Gerow said in response, "yeah", and then said maybe that was what he was thinking could have happened, he did not know. All Mr. Gerow knew was that Mr. Nelmes is irate, he is on the balcony, and the next thing he knows, Mr. Nelmes went off the railing. Mr. Gerow remembers Mr. Nelmes grabbing his hat a few times and telling Mr. Nelmes to leave the hat alone.
- d) Mr. Gerow confirmed he was very well inebriated and then said there was no way he could throw a friend over the railing, that he might punch him in the head, but that would be the extent of it. Mr. Gerow confirmed that he is a very physical person and works hard, and that he was off work for a month because he blew out his back, and he just returned to work the previous October.
- e) Mr. Gerow confirmed that he and Mr. Nelmes tussled and wrestled around, but Mr. Gerow had no defensive wounds and there was no way they would do something like that. Mr. Gerow again stated that Mr. Nelmes was in a state since he left Kamloops and they could not get him to wind down.
- f) Constable Hawes asked Mr. Gerow what he would say if there was a witness who saw Mr. Nelmes come towards Mr. Gerow, saw the two of them tussling, and saw Mr. Gerow pick up Mr. Nelmes, and then saw Mr. Nelmes go over the balcony. Mr. Gerow denied that anyone else was on the deck. Mr. Gerow stated that just he and Mr. Nelmes were on the deck and Mrs. Nelmes was not there. Mr. Gerow stated that all his children were in their rooms until Mr. Nelmes calmed down because they feared what he was going to do. He says there were no witnesses on the deck at all.

[39] The gist of Mr. Gerow's statement can be summarized as follows:

- a) Mr. Nelmes and Mr. Gerow were extremely intoxicated and had been drinking for at least eight hours before the incident.
- b) Mr. Nelmes was irate all evening, could not calm down, kicked in the front door, broke the door, broke the glass, and made a hole in the wall. Mr. Nelmes threatened one of Mr. Gerow's daughters and the children hid in a bedroom for fear of what Mr. Nelmes might do.
- c) Mr. Gerow tried to get Mr. Nelmes to calm down by making him a drink and taking him out on the deck.
- d) Nobody was on the deck except Mr. Gerow and Mr. Nelmes.
- e) Mr. Nelmes came at Mr. Gerow, grabbing his hat, and Mr. Gerow told Mr. Nelmes to leave the hat alone. Mr. Nelmes and Mr. Gerow tussled a bit.
- f) Mr. Gerow does not know how Mr. Nelmes went over the railing. He has no memory of how that happened.
- g) Mr. Gerow told the police on March 18, 2018, that Mr. Nelmes had come at him and Mr. Gerow flipped him, but by August 2018, Mr. Gerow believed he was only making an assumption that that was what could have happened.
- h) There were no witnesses to what happened.
- i) Mr. Gerow is very physical, injured his back previously, but was back at work by October 2017.
- j) Mr. Gerow was not capable of lifting Mr. Nelmes as alleged.
- k) Mr. Gerow does not believe he would hurt his friend in this way.

[40] I accept that Mr. Gerow was extremely intoxicated in the morning of March 18, 2018, and that he had been drinking for at least eight hours. Mr. Gerow's intoxication renders his evidence as to what happened that night unreliable. I accept that there was a sober witness to the material events that night and that is Aaron. I find beyond a reasonable doubt that the evidence of Aaron is reliable and can be used to determine the facts in issue.

[41] The statements of Mr. Gerow, which are consistent with the evidence of Aaron, and which I accept are the following:

- a) Mr. Nelmes and Mr. Gerow were extremely intoxicated and had been drinking for at least eight hours before the incident.
- b) Mr. Gerow made Mr. Nelmes a drink and took him out on the deck.
- c) Mr. Nelmes and Mr. Gerow tussled a bit.

[42] The statements of Mr. Gerow, which are consistent with the evidence of Mrs. Nelmes, and which I accept, are the following:

- a) Mr. Nelmes came at Mr. Gerow, grabbing his hat, and Mr. Gerow told Mr. Nelmes to leave the hat alone. Mr. Nelmes and Mr. Gerow tussled a bit.

[43] With respect to the statements of Mr. Gerow relating to Mr. Nelmes' behaviour that night, including that he was irate and threatened one or more of Mr. Gerow's children, I do not accept that evidence. It is not coherent and it is contradicted by the evidence of Aaron that his father and the young woman were sitting talking together on the front steps before the incident, that there was no shouting or noises coming from the house before they sat on the steps, that Ms. Gerow and the young woman were sitting together in the living room at the time of the incident and not in a bedroom, and that Mr. Gerow and Mr. and Mrs. Nelmes were standing quietly, not talking, on the deck just prior to the incident.

[44] Photographs were introduced into evidence which did show a crack in one window pane on the front door and a dent in the wall in a hallway. However, these photographs were taken two years after the event, and I am not satisfied that the damage was caused by Mr. Nelmes on the night in question. In any event, the alleged behaviour of Mr. Nelmes towards Mr. Gerow's children was not advanced by Mr. Gerow in submissions as a basis for his claim of self-defence.

[45] I do not accept the following of Mr. Gerow's statements:

- a) that he and Mr. Nelmes were alone on the deck;
- b) that there were no witnesses;
- c) that he was not capable of lifting Mr. Nelmes as alleged; and
- d) that he was only assuming when he told police on March 18, 2018, that Mr. Nelmes came at him and he then flipped Mr. Nelmes. To be clear, I find that in August 2018, Mr. Gerow was attempting to rationalize what he had said on March 18, 2018, and that his statement on this point in August 2018 is not adequate or reliable.

B. Injuries to Mr. Nelmes

[46] Mr. Nelmes had to undergo surgery for fractures on the right side of three of his lumbar vertebrae and fractures to the bones on his right hip joint and sacrum. Mrs. Nelmes testified that her husband's genital area was bruised. She suggested this must have happened when Mr. Gerow kicked Mr. Nelmes. I am not satisfied that the Crown has proven that the bruising to Mr. Nelmes's genital area was caused by a kick from Mr. Gerow. Mr. Nelmes likely landed face first on the ground and suffered serious injuries to his pelvis. I cannot rule out the possibility that this bruising occurred as a result of the fall or his subsequent medical treatments.

[47] When Mr. Nelmes was let out of the hospital, he had to use a walker. By July and August 2018, he was using a cane to move around. He can now walk unassisted but with some difficulty. He says he cannot walk very far and experiences a painful pinching in his pelvis area which affects the strength in his legs.

[48] There is no real dispute that Mr. Nelmes was seriously injured in his fall from the deck.

IV. DID MR. GEROW ASSAULT MR. NELMES, CAUSING HIM BODILY HARM?

[49] While Mr. Gerow did not testify, I have nevertheless engaged in the analysis set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.), to consider the credibility of the witnesses and also the credibility of Mr. Gerow in relation to the statement he gave to Constable Hawes in August 2018 and the formal admission he made as to a specific statement he made to Constable Hawes on March 18, 2018. Even though the defence led no evidence, the principles articulated in *W.(D.)* apply to Crown evidence that favours the accused on key issues which the Crown must prove beyond a reasonable doubt.

[50] As set out above, I accept the credibility and reliability of Aaron's testimony throughout. I find the testimony of Mr. Nelmes in relation to his injuries to be credible and reliable, but I do not find his evidence as to the events on March 17 and 18 to be reliable. I do not agree with counsel for the defence that Mr. Nelmes was evasive. Rather, I find Mr. Nelmes's memory to be compromised due to his consumption of alcohol.

[51] Similarly, I find that Mrs. Nelmes's evidence was forthright but not generally reliable. I do find that Mrs. Nelmes's evidence as to the altercation on the deck to be reliable for the reasons I have already set out.

[52] With respect to the altercation on the deck which led to Mr. Nelmes's injuries, Mr. Gerow remembers Mr. Nelmes coming towards him and grabbing at his hat, and remembers them tussling, but he has no memory of how Mr. Nelmes went over the railing. There is no evidence from Mr. Gerow which, if believed, would result in his acquittal.

[53] On all of the evidence, I find that in the morning of March 18, 2018, Mr. Gerow lifted Mr. Nelmes onto the railing and pushed him over. This resulted in Mr. Nelmes dropping approximately 11 feet to the ground and seriously injuring his back and pelvis.

[54] Counsel for Mr. Gerow speculated that there may be other explanations for Mr. Nelmes's fall, given that Mr. Nelmes was grossly intoxicated, incoherent, and had impaired coordination. However, I am not satisfied that these conjectures of counsel give rise to a reasonable doubt that Mr. Gerow was the cause of Mr. Nelmes's fall. Mr. Nelmes had stepped away from the railing and moved towards Mr. Gerow when the altercation began. The railing was at the height of Mr. Nelmes's belt such that he could not easily tip over the railing. His centre of gravity was lower than the top of the railing. No plausible explanation was advanced as to how Mr. Nelmes could have gotten himself onto the railing in a horizontal position in the very short time between when the men were grappling and when Mr. Nelmes went over the railing.

- [55] I accept the evidence of Aaron and Mrs. Nelmes and find that the only plausible explanation as to how Mr. Nelmes was briefly balanced horizontally on his left side on the edge of the railing is that Mr. Gerow lifted him into that position, and the only plausible explanation for Mr. Gerow extending his arms away from his body while his hands were on Mr. Nelmes as he was balanced on the railing was that Mr. Gerow pushed Mr. Nelmes off the railing, resulting in Mr. Nelmes' 11-foot fall.
- [56] In the result, I find that the Crown has proved beyond a reasonable doubt that Mr. Gerow intentionally applied force to Mr. Nelmes when he threw Mr. Nelmes off the deck by lifting him onto the railing and pushing him over.
- [57] There is no evidence that Mr. Nelmes knew that Mr. Gerow was intending to throw him off the deck or consented to being thrown off the deck. I find that Mr. Gerow and Mr. Nelmes were fighting and grappling, and Mrs. Nelmes was trying to pull Mr. Gerow off of Mr. Nelmes, all of which support a finding that Mr. Gerow knew that Mr. Nelmes did not consent to being thrown off the deck.
- [58] Further, when Constable Hawes arrived on the scene, Mr. Gerow did not say anything which suggested he thought Mr. Nelmes knew he was going to be thrown off the deck or agreed to actions which could result in being thrown off the deck. Rather, Mr. Gerow told Constable Hawes to arrest him.
- [59] I find that the statement of Mr. Gerow also supports a finding that Mr. Gerow knew that Mr. Nelmes had not consented to the actions which resulted in his injuries. I find that the Crown has proven beyond a reasonable doubt that Mr. Nelmes did not consent to being thrown off the deck, and Mr. Gerow knew that Mr. Nelmes had not so consented.
- [60] The injuries suffered by Mr. Nelmes in falling 11 feet to the ground are not contested. I find the Crown has proven beyond a reasonable doubt that Mr. Gerow's application of force to Mr. Nelmes in throwing him off the deck caused bodily harm to Mr. Nelmes.

V. Did Mr. Gerow Act in Self Defence

- [61] The defence argues that Mr. Gerow is not guilty pursuant to s. 34 of the Criminal Code. Section 34 requires an accused to prove that he believes, on reasonable grounds, that force is being used or threatened against him and that he acted for the purpose of defending himself, and that his actions were reasonable in the circumstances.
- [62] Mr. Gerow argues that he was justified in kicking Mr. Nelmes, because Mr. Nelmes unexpectedly came towards him, presumably to grab at Mr. Gerow's hat. The evidence as to whether Mr. Gerow's kick connected to Mr. Nelmes is not clear. However, what is clear on the evidence is that after the kick, the two men began grappling with each other. Mrs. Nelmes screamed at Mr. Gerow to leave her husband alone, and she grabbed at Mr. Gerow's back, trying to pull him off her husband.

- [63] Counsel for the defence agreed that his submissions in relation to s. 34 all related to the kick Mr. Gerow gave Mr. Nelmes. Counsel for the defence also agreed that if I found Mr. Gerow threw Mr. Nelmes over the railing, this would be an assault causing bodily harm. I reiterate here that it is my understanding that the defence does not argue that Mr. Gerow threw Mr. Nelmes over the railing to defend himself. The defence argues that Mr. Gerow kicked Mr. Nelmes to defend himself. It is my understanding that the defence argues that the Crown has not proven that Mr. Gerow threw Mr. Nelmes off the deck and does not raise self-defence in relation to how Mr. Nelmes left the deck and landed on the ground.
- [64] If I am wrong in my understanding, even if Mr. Gerow believed that Mr. Nelmes was going to use force against him as Mr. Nelmes stepped towards him to grab his hat, and thought that kicking Mr. Nelmes was justified to protect himself, the kick did not launch Mr. Nelmes over the railing. Time passed between the kick and Mr. Gerow throwing Mr. Nelmes over the railing. The two men fought and grappled. Mrs. Nelmes got involved, screaming and trying to pull Mr. Gerow off Mr. Nelmes. Mr. Nelmes was launched over the railing by Mr. Gerow picking him up and pushing him over. I am not satisfied that Mr. Gerow's actions in throwing Mr. Nelmes off the deck were taken to defend himself from Mr. Nelmes approaching him and reaching for his hat. There was nothing reasonable about Mr. Gerow's actions.
- [65] I am satisfied beyond a reasonable doubt that Mr. Gerow's actions in throwing Mr. Nelmes off the deck exceeded what was reasonable in the circumstances as Mr. Gerow knew them to be. I find that Mr. Gerow was not acting in lawful self-defence pursuant to s. 34.

VI. Conclusion

- [66] I find Mr. Gerow is guilty of assault causing bodily harm contrary to s. 267(b) of the Criminal Code. Mr. Gerow, could you stand now, please. Mr. Gerow, I find you guilty of Count 1 of the indictment.

"W.A. Baker, J"

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