
CANADA / JUDGMENT

R. v. Randhawa

2019 BCCA 15

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 15 R. v. Randhawa

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Randhawa,

2019 BCCA 15

Date: 20190116

Docket: CA45077

Between:

Regina

Respondent

And

Gursher Singh Randhawa

Appellant

Before:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Harris

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia,
dated October 13, 2017 (R. v. Randhawa, Vancouver Docket No. 27071).

Counsel for the Appellant:

P.J. Wilson, Q.C.

Counsel for the Respondent:

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

December 14, 2018

Place and Date of Judgment:

Vancouver, British Columbia

January 16, 2019

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Harris

Summary:

The appellant challenges his conviction for aggravated assault and possession of a weapon for a dangerous purpose. He argues the trial judge erred in instructing the jury on self-defence, and says that the charge properly should have required juror unanimity on each element of the defence of self-defence. Held: Appeal dismissed. The Crown's burden of proof in disproving the defence of self-defence only requires it to prove that one of the three elements of the defence does not apply. The trial judge properly instructed the jury that unanimity was required only on the ultimate conclusion that the defence did not apply. In any event, a functional approach demonstrates that the instruction was clear that on the facts of this case, jury unanimity was required to determine that the defence failed on its third element, whether his actions were reasonable in the circumstances.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] The appellant, Mr. Randhawa, was involved in a bar brawl on May 25, 2014, that led to him brandishing a knife and stabbing six people.
- [2] On October 13, 2017, a jury found Mr. Randhawa guilty of five counts of aggravated assault contrary to s. 268(2) of the Criminal Code, R.S.C. 1985, c. C-46, and one count of possession of a weapon for a dangerous purpose contrary to s. 88(1) of the Code.

- [3] The sixth person stabbed by Mr. Randhawa did not testify and Mr. Randhawa was acquitted in relation to that charge.
- [4] At trial, Mr. Randhawa did not contest the underlying conduct establishing the elements of the offences. Instead, he relied on the defence of self-defence.
- [5] Mr. Randhawa challenges his conviction on the basis that the trial judge erred in instructing the jury on self-defence.
- [6] The portion of the trial judge's charge at issue was based on model jury instructions produced by the Canadian Judicial Council. Those instructions treat the three constituent elements of the defence of self-defence as not requiring juror unanimity, so long as the jury is unanimous in agreeing that the Crown has proven at least one of the three required elements of the defence does not apply and that the defence has therefore failed. The Crown submits that this is a proper charge.
- [7] Mr. Randhawa argues that the charge properly should have required juror unanimity on which element of the defence of self-defence the Crown had proven did not apply.

Background

- [8] The bar brawl began after Mr. Randhawa attempted to take a photograph of two women on the dance floor and a man was in his way. They argued and a fight ensued, with a number of men joining in.
- [9] The room was dark with flashing strobe lights and loud music. There were inconsistencies in the witnesses' evidence at trial as to what exactly happened. There was evidence that Mr. Randhawa was in the fight, ended up at the bottom of a pile of men, fought his way up and pulled out a knife waving it around him, slashing or stabbing people. Mr. Randhawa was seen the next day with black eyes, a bruised, puffy and scratched face, and walking with a limp.
- [10] Mr. Randhawa testified that he felt that there were bodies swarming around him, he was punched in the face and upper body, and bodies were hurled on top of him. His knee was bent awkwardly. He felt there were ten to twelve hands punching him during parts of the fight, five or six men beating him. He testified in direct as follows:

Q Various people said that you used a knife; is that true?

A Yes, sir. I pulled a knife out of my pocket and started swinging at people.

Q When did you do that?

A After I'd already been on the ground once. The beating wasn't stopping. People were still trying to get at me, while I was on the ground there, and I figured I had to -- I had to use one, just to get out of there.

Q Why did you pull the knife out?

A To be honest, I was scared. I was getting beaten up really badly. I was outnumbered by, like I said, a huge, huge amount of people. And I just really wanted to get out of there. Like, I didn't know what was going to happen to me.

Q Why were you scared?

A To me, at the time, it felt a little bit confusing. Like, I didn't understand why there was such a severe sort of fight happening in that situation. There was -- like, you would think after you hit the ground once people would stop. Like, just some punches were exchanged, but you

would think the fight would end, and it wasn't. And I was a brown guy in a club with five or six other brown guys. I don't know if any of you've been to a nightclub but the script sort of -- you know, I've seen it before where, you know, people get jumped and stuff. You hear stories about brain damage and all sorts of things like that. And for all I knew these guys were gangsters. I didn't know what they were.

Q And why did you strike out with a knife?

A I just didn't see any other way of getting out of the situation. You know, fighting back with punches wasn't getting me anywhere and I just sort of wanted to get people away from me. I really wasn't trying to hurt anyone. Like, I didn't try to hit anyone in the face, or anything like that. I just wanted to get out of there.

[11] Mr. Randhawa was 26 years old at the time of the offence. He was just under six feet tall and weighed approximately 180 pounds.

[12] Mr. Randhawa was cross-examined about his recollection of events and the sequence of the fight, as well as the manner in which he pulled the knife out of his pocket, opened it and swung it around him. He admitted to stabbing one of the victims in the stomach and stabbing a bouncer in the arm. He admitted to inflicting serious wounds on six people that night.

[13] In addition to witness testimony about the fight, the jury was shown videotape of the events towards the end of the fight.

Submissions at trial

[14] Both the defence and Crown counsel agreed that the issue at trial was whether the Crown had proven beyond a reasonable doubt that Mr. Randhawa was not acting in self-defence.

[15] The parties agreed that s. 34 of the Code governed the defence. It 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.
- (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.
- [16] In closing statements to the jury, both the defence and the Crown emphasized the jury should not have much difficulty determining the first two questions required by s. 34 of the Code. Instead, their focus would be on the third question: was Mr. Randhawa's conduct reasonable in the circumstances of the case? The defence described this to the jury as the "critical question"; the Crown described it as the "focus [of their] entire deliberation" and the "nub of the case".

Jury Charge

- [17] The trial judge provided the jury with a written charge, which he then read out to them. He supplemented the written charge with an oral review of the evidence.
- [18] The trial judge reviewed the basic information required for most criminal juries, including the importance of impartiality, the presumption of innocence and the burden of proof on the Crown to prove guilt beyond a reasonable doubt.

- [19] The trial judge outlined the essential elements of the offences and advised the jury that the position of the Crown and defence was that these were not seriously in dispute. He instructed the jury that he expected they would have little difficulty in finding that the Crown had established the essential elements, given Mr. Randhawa's acknowledgement that he stabbed each of the complainants. The trial judge instructed the jury that "the central issue for you to decide is whether Mr. Randhawa acted in self defence" (at para. 69).
- [20] The trial judge explained how the jury should approach the issue of self-defence as follows:
- [73] Mr. Randhawa does not have to prove that he acted in self defence. It is for the Crown to prove beyond a reasonable doubt that he did not.
- [74] To decide whether the Crown has proved beyond a reasonable doubt that Mr. Randhawa did not act in self defence, you will have to consider three questions:
1. Has the Crown proved beyond a reasonable doubt that Mr. Randhawa did not believe on reasonable grounds that force was being used against him?
 2. Has the Crown proved beyond a reasonable doubt that Mr. Randhawa did not commit the act for the purpose of defending or protecting himself from the use of force?
 3. Has the Crown proved beyond a reasonable doubt that Mr. Randhawa's act was not reasonable in the circumstances?
- [75] If you find that the answer to one or more of these questions is "yes", the defence of self defence fails. It does not matter if you do not all agree on which of these questions is answered "yes".
- [76] If you all agree that the answer to all three questions is "no", the conditions for self defence are present and you must acquit Mr. Randhawa.
- [Emphasis added.]
- [21] Mr. Randhawa submits the trial judge erred in the above para. 75 of the charge.
- [22] At paras. 80-93 of the charge, the trial judge reviewed in detail the evidence on each of these three questions relating to self-defence.
- [23] In describing the evidence in relation to the first two questions, the trial judge told the jury that, in the circumstances, they would have little difficulty in concluding that the answer was "no".
- [24] In respect of the third question, the trial judge described the jury's task this way:
- Has the Crown proved beyond a reasonable doubt that Mr. Randhawa's act was not reasonable in the circumstances?
- [90] This question relates to Mr. Randhawa's conduct and requires you to decide whether that conduct was reasonable in the circumstances as Mr. Randhawa knew or believed them to be.

[91] Anyone who defends or protects himself or another person cannot be expected to know exactly how to respond or to deal with the situation or to know how much force to use to achieve his purpose. What is reasonable may include several alternatives. This issue here is not whether Mr. Randhawa believed on reasonable grounds that he had no other course of action available to him, but rather whether what Mr. Randhawa did was a reasonable thing to do in the circumstances as he knew or reasonably believed them to be.

[92] In determining whether the act committed was reasonable in the circumstances, you must consider all of the circumstances, including but not limited to:

- The nature of the force or threat;
- The extent to which the use of force was imminent and whether there were other means available to respond to the use or potential use of force;
- Mr. Randhawa's role in the incident;
- Whether any of the other people involved used or threatened to use a weapon;
- The size, age, gender and physical capabilities of those involved in the incident;
- The nature, duration and history of any relationship among the people involved in the incident, including any prior use or threat of force, and the nature of that force or threat;
- Any history of interaction or communication among the people involved in the incident;
- The nature and proportionality of Mr. Randhawa's response to the use or threat of force; and
- Whether Mr. Randhawa's act was in response to a use of threat of force that Mr. Randhawa knew was lawful.

[93] Both Mr. Wilson on behalf of Mr. Randhawa and Mr. MacFarlane for the Crown submitted that this is the critical issue that you will have to decide. Was Mr. Randhawa's use of a knife reasonable in the circumstances? You have heard evidence from a number of people about what happened at the bar in the late evening of May 24 and the early morning of May 25, 2014. As both counsel noted, no clear story emerges which may not be surprising given the setting, the conditions in the bar, the fact that most of the people involved had been drinking and the passage of time. It is for you to decide based on all of the evidence that you heard, whether Mr. Randhawa acted reasonably in the circumstances. Use your common sense, life experience and knowledge of human nature in your assessment of the evidence to answer this question.

[25] After he had just explained, as set out above, that the "critical issue" for resolution would be whether "Mr. Randhawa's use of a knife [was] reasonable in the circumstances", the trial judge then reviewed the positions of the parties for the jury. In so doing, he focussed on each party's position regarding this third component of self-defence.

[26] The trial judge also explained the concept of jury unanimity:

- [100] A verdict, whether one of guilty or not guilty, is the unanimous decision of the jury. To return a verdict requires that all of you agree on your verdict. While your verdict on the offences with which Mr. Randhawa has been charged must be unanimous, your route to the verdict need not be. You could all be satisfied of Mr. Randhawa's guilt beyond a reasonable doubt even though individually you have different views of the evidence. Similarly, you could all have a reasonable doubt about Mr. Randhawa's guilt, but not agree why. It matters not, provided that your verdicts on the offences of assault with a weapon and aggravated assault are unanimous.
- [103] If you cannot reach a unanimous verdict, you should notify the sheriff in writing. He or she will bring me your message.
- [107] Any verdict you reach must be unanimous. Unless you are unanimous in finding Mr. Randhawa guilty, you cannot convict him. Nor can you return a verdict of not guilty unless you agree unanimously that he is not guilty.
- [108] Each of you must make your own decision whether Mr. Randhawa is guilty or not guilty of each count. You should reach your decision only after consideration of the evidence with your fellow jurors. Your duty is to try to reach a unanimous verdict. However, you are entitled to disagree if you cannot reach a unanimous verdict after a sincere consideration of the facts and the law and an honest discussion with your fellow jurors.
- [27] After the judge finished delivering the charge, the defence objected to para. 75 of the charge, submitting that unanimity was required with respect to a "yes" answer on the three components of self-defence because these were elements of the offence. The Crown disagreed. The trial judge declined to make a correction to his charge in this regard. After discussion with the parties, the trial judge did make some additional comments to the jury on other matters.
- [28] During deliberations, the jury sent a question to the court regarding the correct approach to determine whether Mr. Randhawa's conduct was reasonable. The question was:

When we the jury are determining whether or not Mr. Randhawa's conduct was reasonable in the circumstances, is that reasonableness based on our thoughts now, looking at the circumstances, or as Mr. Randhawa knew or believed them to be at the time?

- [29] After hearing submissions from counsel, the trial judge provided the jury with a response to the question. The response is not challenged on this appeal, and included the following explanation:

Reasonableness is an objective standard. It requires you as the jury and the judges of fact to consider Mr. Randhawa's actions through the eyes of the reasonable person. Now one definition of a reasonable person is as follows.

The reasonable person is a person of the same age, gender, physical capabilities as well as past interactions and communications with the complainants as Mr. Randhawa. A reasonable person cannot be expected to know exactly what course of conduct or how much force is necessary in self-defence.

While reasonableness is an objective standard, Mr. Randhawa's subjective belief about the circumstances facing him is a relevant consideration, but it is not determinative. That subjective belief must be based on reasonable grounds. In other words, Mr. Randhawa's understanding or belief of the circumstances must be reasonable.

Issue on Appeal

- [30] Mr. Randhawa agrees that the only real issue for the jury to decide in this case was the third question in the defence of self-defence: whether the Crown had proven that the use of force was not reasonable. Mr. Randhawa submits that the trial judge needed to instruct the jury of the need for unanimity in answering that question.
- [31] Mr. Randhawa submits that the instruction that told the jury "[i]t does not matter if you do not all agree on which of these questions is answered 'yes'" (at para. 75), opened up the possibility that the jury could have rejected the defence of self-defence even though they were not unanimous about whether the Crown proved that Mr. Randhawa's conduct was "not reasonable".
- [32] The Crown submits that so long as it proved to each juror that one element of the defence of self-defence did not apply, such that all members of the jury agreed the defence did not apply, the jury did not need to be unanimous on which question they answered "yes".

Analysis

[33] For ease of reference I will repeat the criteria in s. 34(1) of the Code:

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.

[34] Mr. Randhawa accepts that once there is an air of reality to the defence, the Crown need only prove beyond a reasonable doubt one of the three elements of self-defence set out in s. 34(1) of the Code does not apply: *R. v. Borden*, 2017 NSCA 45 at para. 91; *R. v. Cormier*, 2017 NBCA 10 at para. 40. This is because all three criteria in s. 34(1) must be present for the defence to be available.

- [35] Mr. Randhawa argues that it flows from this premise, logically, that the jury must be unanimous in concluding that the Crown has disproved one of the three elements of the defence. More precisely, Mr. Randhawa submits that the jury must be unanimous on which of the three elements of the defence the Crown has disproved.
- [36] Mr. Randhawa submits that if the jury was not unanimous on the third element of self-defence, which was the only real issue for the jury to decide in this case, then he was entitled to an acquittal.
- [37] There is little authority on this issue.
- [38] In *R. v. Dagenais*, 2012 SKCA 103, the Saskatchewan Court of Appeal considered the argument that the jury should have a unanimous view about each element of the defence to run contrary to common sense:
- [32] The final argument advanced by Mr. Dagenais concerns the defence of self-defence. He takes issue with the trial judge's instructions to the jury to the effect that jurors were not required to be unanimous in their individual assessments of the elements of self-defence so long as they were unanimous with respect to the bottom-line, i.e. as long as they were unanimous about whether or not the defence had been made out. Mr. Dagenais says this was wrong in principle. In his view, the trial judge should have instructed the jurors that they were required to have a unanimous view about each element of the defence.
- [33] We are not prepared to accept this argument. Counsel for Mr. Dagenais acknowledges that he has no legal authority for it. We are not inclined to break new ground on this front.
- [34] Simply put, Mr. Dagenais' submission on this point runs counter to common sense in that, if accepted, it could result in an accused person being acquitted even though each of the jurors agreed that he or she had no defence. Further, it also runs counter to the basic principle, reflected in cases such as *R. v. Thatcher*, [1987] 1 S.C.R. 652, to the effect that the members of a jury are required to agree only on the ultimate verdict, not on the precise path to that verdict.
- [39] The Appeals Court of Massachusetts recently reached a similar conclusion, noting that, "it is 'the absence of self-defense,' and not the theory thereof, that is subject to the reasonable doubt standard": *Commonwealth v. Humphries*, 91 Mass. App. Ct. 1101 (2017), citing *Commonwealth v. Rodriguez*, 370 Mass. 684 at 689 (Sup. Ct. 1976). In *Humphries*, the court held there was no requirement that the jury be unanimous as to how the absence of self-defence was proved.
- [40] Case law out of the Court of Appeals of Texas is consistent with this approach. That court described the defence of self-defence as analogous to "the 'manner and means' by which the specific actus reus element [of the offence charged] was committed and on which the jury is not required to unanimously agree": *Harrod v. State*, 203 S.W.3d 622 at 627 (Tex. App. Ct., 5th Dist. 2006).

- [41] Mr. Randhawa submits that this Court should not follow Dagenais as it misconstrues the case it relies on, *R. v. Thatcher*, [1987] 1 S.C.R. 652, and is incorrect.
- [42] Mr. Randhawa submits that Thatcher merely stands for the proposition that jurors need not be unanimous on the factual pathway each relies on to reach a conclusion that the Crown has proven or disproven an element of an offence or defence, respectively. However, they still need to be unanimous that the Crown has proven an essential element of an offence, or negated an essential element of a defence, beyond a reasonable doubt.
- [43] The trouble I have with Mr. Randhawa's argument is that it equates the application of the Crown's burden of proof in disproving the defence of self-defence with the Crown's burden of proof on elements of an offence. The application of these burdens of proof are not analogous. In order to meet its overall burden of proof, the Crown has to satisfy the trier of fact that it has proved each element of an offence beyond a reasonable doubt. In contrast, the Crown only has to satisfy the trier of fact that it has disproved one element of the defence of self-defence beyond a reasonable doubt.
- [44] As such, juror unanimity is required only on the ultimate conclusion: whether the Crown proved beyond a reasonable doubt that the accused did not act in self-defence. This is precisely how the trial judge instructed the jury in this case.
- [45] I agree with the logic identified in Dagenais. If this Court were to accept Mr. Randhawa's argument, it could lead to the strange result that an accused would be acquitted because the Crown failed to disprove the defence of self-defence, even though each juror unanimously agreed, but in their own ways, that they were satisfied beyond a reasonable doubt that the defence did not apply.
- [46] Regardless of the above analysis, I am also satisfied that in the present case there could be no question in the juror's minds that the only issue for them to decide was the third element of self-defence. Taking a functional approach to the whole of the jury instruction, the instruction made it clear that: there was no basis for concluding the Crown had established that the defence failed on either of its first two elements; the Crown had to establish that the defence failed on its third element; and jury unanimity was required to determine that the defence failed on its third element.
- [47] Additionally, the jury's question to the court made it clear that the third element of the defence was the jury's focus. The trial judge's response was that reasonableness required "you as the jury to consider Mr. Randhawa's actions through the eyes of the reasonable person". The jury could not be confused that the one issue they had to decide was, on the facts of this case, something that they had to all agree on: that Mr. Randhawa's conduct was not reasonable in the circumstances.

Conclusion

- [48] I would therefore dismiss the appeal.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Harris"

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