
CANADA / JUDGMENT

R v. Roudiani

2018 BCSC 1941

COURT

Supreme Court of British Columbia

DECIDED

5 October 2018

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2018 BCSC 1941 R. v. Roudiani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Roudiani,

2018 BCSC 1941

Date: 20181005

Docket: 27326

Registry: Vancouver

Regina

v.

Omid Roudiani

Corrected Judgment: The front page of the Judgment was
corrected on November 21, 2018

Before: The Honourable Mr. Justice N. Smith

Oral Reasons for Judgment

Counsel for the Crown:

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A. Boldt, Articled Student

Place and Date of Trial:

Vancouver, B.C.

May 28-30,

June 15, 25-27 and 29,

September 17-21, 24-25

and 28, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2018

- [1] THE COURT: On October 25, 2015, near the southeast corner of Smithe and Granville Streets in downtown Vancouver, Joshua Albertson was punched or struck in the head, causing him to fall and hit his head on the pavement. That rendered him unconscious and he was found to have suffered skull fractures and a traumatic brain injury. Omid Roudiani is charged with aggravated assault. It is admitted that Mr. Albertson's injuries meet the definition of aggravated assault in s. 268 of the Criminal Code.
- [2] Although the identification of Mr. Roudiani appeared, at the outset of the trial, to be in issue, that is no longer in dispute. Some witnesses described a man in a red checkered shirt, who was also shown on security videos from various locations, and Mr. Roudiani admitted to being that person. Therefore, I will sometimes, in these reasons, refer to Mr. Roudiani by name while summarizing evidence of witnesses who, in fact, only described his clothing. I will, similarly, refer to Mr. Albertson in summarizing evidence of witnesses who did not know him by name at the time.
- [3] The issue is self-defence or, more precisely, whether the Crown has proved beyond a reasonable doubt that Mr. Roudiani did not act in self-defence. The events at issue occurred in an area that is home to many bars and nightclubs and at a time, just after 2:30 a.m., when many of them were closing or had just closed. As is to be expected when any event occurs quickly and suddenly, there are discrepancies among witnesses in their detailed description of what happened. However, certain basic facts are clear.

- [4] An argument or confrontation developed between two groups of young men on the south sidewalk of Smithe Street just east of Granville. This dispute may have been about access to the first of two limousines that were parked one behind the other on that side of Smithe Street. Mr. Albertson was not part of either group. He was walking with his wife Nancy Albertson and was trying to make his way through or around them in order to continue east on Smithe Street.
- [5] A bar called The Roadhouse was located at 670 Smithe Street. That was east of Granville and west of a lane that runs between and parallel to Granville and Seymour Streets. The distance from The Roadhouse to Granville Street was, therefore, less than half a city block and, based on evidence I will refer to later, I find that Mr. Albertson was struck when he was at a point closer to The Roadhouse than to Granville Street. A black limousine was parked at the curb directly in front of The Roadhouse, facing west toward Granville Street, and a white limousine was briefly parked in front of it.
- [6] Ms. Albertson said she and her husband were walking east on Smithe Street when she saw two groups of men shoving each other. She said Mr. Albertson walked ahead of her and gestured to someone in one of the groups that he wanted them to move out of the way. She said she saw Mr. Albertson's body move toward the second group, although she did not see anyone make contact with him at that point. She then saw him being pushed back into the first group and, finally, back into the second group. She said after the last push he took "three quick steps to catch up with his momentum". At that point, she said she saw in her peripheral vision an arm come from behind someone in the second group and hit Mr. Albertson in the side of his head. He had been moving in the direction of the contact, then fell backward. She said there appeared to be force behind the punch, that she did not see any other punches, and she did not hear or see Mr. Albertson act in an aggressive manner.
- [7] Jeffrey Kilvert was apparently among the people that Ms. Albertson witnessed. He testified that he was punched as he was trying to pull his friend out of a developing confrontation. He said Mr. Albertson then arrived, asked what was going on, and was punched, in a blow that Mr. Kilvert described as a haymaker. He said he had kept his eyes on the person who had punched him and saw that it was the same person who punched Mr. Albertson, although he could not recall any description. He said Mr. Albertson did not seem aggressive, did not raise his hands, and had his head turned such that he would not have seen the punch coming.
- [8] Cody Johnson was part of Mr. Kilvert's group. He saw Mr. Kilvert being punched. He described a fist coming over a row of people and seeing Mr. Albertson on the ground, although he did not actually see the contact.
- [9] Chris Musselle and James Brar were working as doormen outside the front entrance to The Roadhouse. Mr. Musselle testified that he saw a group of people engaged in some sort of disagreement or altercation regarding the black limousine that was parked directly in front of The Roadhouse. He identified Mr. Roudiani as part of the group and said he appeared more agitated than the others. He said the group eventually moved away from the black

limousine and toward the white one. He saw a dispute occurring there, with some posturing and shoving, and heard raised voices. He saw Mr. and Ms. Albertson apparently trying to get through the group and saw Mr. Albertson struck by a closed fist and fall to the ground. All he saw of the person who threw the blow was an arm, but the sleeve of that arm was consistent with the checkered shirt he had observed on Mr. Roudiani, who he then saw walk directly toward and past him. Mr. Musselle then went to Mr. Albertson's aid and to find the police, who he knew would be nearby. Mr. Musselle did not see Mr. Albertson make any gestures, raise his arms, punch, or touch anyone and did not hear him say anything.

- [10] Mr. Brar said he noticed Mr. Roudiani at some point but began paying attention to him after he had seen him in an altercation outside the Gorg-O-Mish Afterhours Club, which was across the street from The Roadhouse. Mr. Brar recalled that Mr. Roudiani came back towards his group of friends in front of The Roadhouse and told them he got the better of the altercation at Gorg-O-Mish. He heard a conversation between Mr. Roudiani and the driver of the black limousine to the effect that the driver could not take Mr. Roudiani and his friends home. He also said he saw the group that Mr. Roudiani had been part of enter into the confrontation near the white limousine and saw Mr. Roudiani walking up to join them. Mr. Brar said he saw Mr. and Ms. Albertson coming from Granville Street, walking towards Smithe Street. He said he saw Mr. Albertson step off the sidewalk onto the road to get around the group as he approached, then saw Mr. Roudiani lunge or step over and punch Mr. Albertson. He described the punch as full force, with full contact, and said Mr. Albertson would not have seen it coming. In answer to suggestions that his view was in some way obstructed, Mr. Brar repeated that he saw Mr. Roudiani punch Mr. Albertson.
- [11] Neither Mr. Brar nor Mr. Musselle saw the punch that Mr. Kilvert said he received and neither of them, nor Mr. Kilvert, saw Mr. Albertson being pushed from one group to the other in the way that Ms. Albertson described. On that last point, Ms. Albertson's evidence is entitled to considerable weight because she was the only person with reason to focus particularly on what Mr. Albertson was doing and what was happening to him.
- [12] Mr. Roudiani testified that he had been downtown with a group of friends and left a nightclub on Granville Street at approximately 2:00 a.m. While on the southwest corner of Smithe and Granville, that is across Granville Street from where Mr. Albertson was later injured, they had a verbal altercation with another group of men he described as being South Asian. Brief security videos from an establishment at that corner show Mr. Roudiani involved in what appears to be an argument. This confrontation appeared to be over, but Mr. Roudiani said that the three people he had been arguing with returned with a larger group. He said after his group crossed to the north side of Smithe Street, the situation escalated into a physical confrontation when one of his friends was punched. Mr. Roudiani said he was attacked by two others and fought with them.
- [13] The fight with one of those men continued along Smithe Street, across Granville, to the area near the Gorg-O-Mish Club. It ended with an intervention of a doorman there. A security video from Gorg-O-Mish shows Mr. Roudiani in a fight outside its door at approximately 2:17

a.m., according to the time shown in the video. Mr. Roudiani said he then crossed to Smithe Street to where the black limousine was parked and tried to gather his friends to leave. However, Mr. Karimi, the driver, told him the group was too large for his vehicle and he would call a friend who had a larger one. The white limousine arrived shortly after that and parked in front of the black one. Some of his friends walked to the white limousine, but Mr. Roudiani said he remained behind to try to convince Mr. Karimi, who had been paid for a return trip, to change his mind. He then saw the confrontation that developed near the white limousine and walked toward it.

- [14] To this point, Mr. Roudiani's evidence is, in many ways, consistent with that of Mr. Musselle and Mr. Brar and with the video evidence. The Roadhouse had two security cameras near its front door. One appears to have been just east of and higher than the door, looking west on Smithe Street. Rather than showing a continuous video image, the recording from that camera consists of a series of still photographs, with a time noted on each. The interval between the photographs varies from about three seconds to about seven seconds.
- [15] A recording from that camera begins just before 2:16 a.m. and shows the black limousine parked directly in front of The Roadhouse door. Mr. Roudiani is first clearly seen walking east on Smithe Street toward the back of the limousine and getting in, along with others, at around 2:23 a.m. A minute and a half later, he is seen to be again outside the limousine. At 2:27:31 a.m., he is apparently standing near the limo, in conversation with Mr. Karimi. He then walks west on Smithe Street and returns with a group of others, who begin getting into the limousine at around 2:30 a.m. They begin getting out again approximately two minutes later, after Mr. Karimi has apparently looked inside the back door. By 2:36 a.m., a group appears to have gathered by the rear of the white limousine and Mr. Roudiani appears to have joined it just before 2:37:50 a.m.. By that time, the white limousine has begun to pull away from the curb.
- [16] It is not possible to see what is happening within the group, in part because it is just beyond a bank of bright lights above the door to The Roadhouse. An image taken at 2:38:18 a.m. shows a figure on the ground at the curb, who witnesses identify as Mr. Albertson. He is a short distance in front of the black limousine, in the approximate area where the rear of the white limousine had been. About 30 seconds after that, Mr. Roudiani is at the rear door of the black limousine, and he is last seen at 2:39:29 a.m., apparently beginning to cross Smithe Street.
- [17] Mr. Roudiani testified that as he walked up to the group by the white limousine he saw one of his friends get punched and an all-out brawl erupted. He said another friend, who was standing in front of him, was pushed back by someone Mr. Roudiani described as "a big tall guy barging through the group". He said his immediate reaction was to believe that the person he had been fighting with earlier across the street had returned and that he had to defend himself and his smaller friend. Mr. Roudiani described a motion of swinging his arm while he was falling backward, but said the other person then disappeared from his view and he did not see him on the ground.

- [18] I note here that these events occurred some 20 minutes after the fight involving Mr. Roudiani outside Gorg-O-Mish had ended. That assumes the timestamps on the surveillance videos from Gorg-O-Mish and The Roadhouse roughly correspond to one another. But, even considering only The Roadhouse video, at least 15 minutes had elapsed.
- [19] I also note that Mr. Roudiani described his assailant from across the street as South Asian, while other witnesses had no difficulty seeing that Mr. Albertson was Caucasian. Mr. Roudiani said he did not actually see Mr. Albertson's face but saw that he was wearing dark clothing, as was the person he had been fighting with.
- [20] As I said, there will always be frailties in eyewitness evidence and differences between witnesses who are asked to describe events that occurred very quickly, but I consider Mr. Musselle and Mr. Brar to be generally the most reliable witnesses. Of the witnesses who testified to seeing what happened to Mr. Albertson, they were the only ones who had not been consuming alcohol. Ms. Albertson, Mr. Kilvert, and Mr. Johnson all admitted to some level of intoxication.
- [21] Mr. Roudiani says he had consumed eight to ten shots of vodka over the course of the evening. This is inconsistent with a subsequent statement to police that he had been too drunk to remember what had happened. He says he lied to the police officer on that point in the hope that the officer would stop asking him questions that he had already said he was not going to answer. In any event, I find that Mr. Roudiani was likely under the influence of alcohol to some degree.
- [22] A second video camera from The Roadhouse looked eastward. It shows Mr. Musselle and Mr. Brar both looking directly in the direction of the altercation at the critical time. They were both asked to estimate the distance from where they were standing to where the altercation occurred, and gave differing estimates. It is often difficult for witnesses to estimate distances accurately and I place no weight on the precise numbers they gave. What is important is that Mr. Albertson fell a very short distance in front of the black limousine, which was parked directly in front of where Mr. Brar and Mr. Musselle were standing. They were, therefore, very close to the events they were watching, probably a distance equivalent to not much more than the width of the sidewalk.
- [23] I therefore do not accept Mr. Roudiani's evidence that he simply swung his arm while falling backwards. I find there was a deliberate forceful punch as described by Mr. Brar and Mr. Musselle. That is also consistent with the result of the blow. I also do not accept Mr. Roudiani's evidence that he did not know what happened to Mr. Albertson. In text messages he sent the next day and which were recovered from his cellphone, he refers to having "lost it" and putting someone "to sleep". However, earlier in the same series of texts, he refers to a fight with "some Hindus". It is not clear if that refers to the same point where he described putting someone to sleep. If it does, it would be consistent with his belief that the same individual he had fought across the street was involved. Mr. Roudiani testified that his text messages were an imprecise compilation of events, with some exaggeration, intended to

impress the woman he was sending them to.

[24] The fact that I do not believe Mr. Roudiani's evidence about the nature of the blow he struck does not automatically dispose of the self-defence question. Section 34(1) of the Criminal Code reads:

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.

[25] That requires consideration of Mr. Roudiani's intention and perceptions at the moment he struck Mr. Albertson. That analysis cannot be influenced by the tragic consequences that flowed from that action.

[26] The most fundamental rule of criminal law is that the Crown must prove the case beyond a reasonable doubt. That includes proving that the accused was not acting in self-defence when that issue is raised. In a jury trial, the judge is required to tell the jury that they cannot find an accused guilty if they think he or she is probably or likely guilty. They must be satisfied beyond a reasonable doubt. They must also be told that while the phrase "beyond a reasonable doubt" does not mean absolute certainty, it falls much closer to that standard than it does to the civil standard of proof on a balance of probabilities. There was no jury in this case, but I am required to apply the same standard. In requiring proof beyond a reasonable doubt, the law accepts the risk that some people who have in fact committed crimes may be found not guilty. The law and society decided long ago that that is a lesser evil than the risk of innocent people being convicted and imprisoned.

[27] This case turns entirely on credibility, which requires me to consider the leading Supreme Court of Canada case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. At paragraph 28 of that decision, the Court said:

28 ...A trial judge might well [page 758] instruct the jury on the question of credibility along these lines:

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

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

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[28] This case turns on the second of those three steps. I have already said I do not believe portions of what the accused has said, and, if his evidence does not at least raise a reasonable doubt, there is no other evidence capable of doing so.

[29] The test for self-defence arising from s. 34(1) was summarized by the Ontario Court of Appeal in *R. v. Bengy*, 2015 ONCA 397 at para. 28. The test is stated as:

28 ...

- (i) Reasonable belief (34(1)(a)): the accused must reasonably believe that force or threat of force is being used against him or someone else;
- (ii) Defensive purpose (34(1)(b)): the subjective purpose for responding to the threat must be to protect oneself or others; and
- (iii) Reasonable response (34(c)): the act committed must be objectively reasonable in the circumstances.

[30] The current wording of s. 34 reflects relatively recent amendments that were intended to simplify the law in this area. How much simplification was actually achieved is still a matter of some controversy and previous cases must be read with some care in determining whether the old or new provisions were at issue. However, certain basic principles remain unchanged. One of those principles is that the defence of self-defence is available to an accused who had an honest, reasonable belief in the existence of an assault, even if that belief was mistaken.

[31] In *R. v. Pétel*, the Supreme Court of Canada referred to its earlier decision in *Reilly v. The Queen*, [1984] 2 S.C.R. 396 where it said:

20 ...

... The subsection requires that the jury consider, and be guided by, what they decide on the evidence was the accused's appreciation of the situation and his belief as to the reaction it required, so long as there exists an objectively verifiable basis for his perception.

The Court, in *Pétel*, continued, at para. 21:

21 ... The existence of an assault must not be made a kind of prerequisite for the exercise of self-defence to be assessed without regard to the perception of the accused. This would amount in a sense to trying the victim before the accused. In a case involving self-defence, it is the accused's state of mind that must be examined, and it is the accused (and not the victim) who must be given the benefit of a reasonable doubt. The question that the jury must ask itself is therefore not "was the accused unlawfully assaulted?" but rather "did the accused reasonably believe, in the circumstances, that she was being unlawfully assaulted?"

Of course, those references to what a jury must consider also apply to a judge sitting without a jury.

[32] In the Reilly case, the Court also said that:

... the accused may still be found to have acted in self-defence even if he was mistaken in his perception. Reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary man using ordinary care could have made in the same circumstances.

[33] A similar principle was stated by the British Columbia Court of Appeal in *R. v. Berrigan*, [1998] 108 B.C.A.C. 224. There, the Court was referring to the sufficiency of a trial judge's charge to the jury and, after quoting portions of that charge, said, at para. 22:

22 The danger here is that the jury may have rejected self-defence on the basis that no actual assault occurred or was about to occur.

And, at para. 24, said:

24 These instructions do not make the point clearly that even if no assault was in progress, as long as the appellant holds a reasonable but mistaken belief, he can rely on self-defence. ...

[34] Another important principle is that, where such a reasonable belief in a threat exists, the question of what constitutes an objectively reasonable response cannot be judged too finely.

[35] In *R. v. Cunha*, 2016 ONCA 491, the Ontario Court of Appeal said, at para. 7:

7 As for the objective element of the defence, it is accepted that in considering the reasonableness of the defendant's use of defensive force, the court must be alive to the fact that people in stressful and dangerous situations do not have time for subtle reflection ...

[36] The Court also refers to a statement from Professor Paciocco, now Mr. Justice Paciocco of that Court, which said:

7 ...

The law's readiness to justify "mistaken self-defence" recognizes that those in peril, or even in situations of perceived peril, do not have time for full reflection and that errors in interpretation and judgment will be made. ...

[37] At paras. 24 and 25 of the same case, the Court said:

24 I accept the appellant's argument that "the trial judge parsed the appellant's reactions down to the split-second and held him to a standard of perfection, informed by ... hindsight knowledge ...

25 This was plainly a case for the court to keep in mind that in considering the reasonableness of the defendant's use of defensive force, the court must be alive to the fact that people in stressful and dangerous situations do not have time for subtle reflection. ...

- [38] Cunha also restates the principle that a person facing a threat is not required to retreat and cautions that a trial judge's rejection of some portion of an accused's evidence does not necessarily justify a blanket rejection of all his evidence that is not directly corroborated by other witnesses.
- [39] As I have said, the question in this case is not whether I believe Mr. Roudiani in preference to the evidence of other witnesses--as I have said, I do not--but whether the Crown has negated self-defence beyond a reasonable doubt. In that regard, I cannot ignore the fact that these events unfolded very quickly. Only about 30 seconds elapsed from the time Mr. Roudiani had clearly joined the group by the white limousine to the point that Mr. Albertson was on the ground. While I do not accept Mr. Roudiani's characterization of the situation as a full-scale brawl, all of the evidence is consistent with it being a tense confrontational situation with at least a potential for violence.
- [40] Mr. Roudiani had been in a fight a few minutes before and his evidence of that individual having been the aggressor is not contradicted. No one describes Mr. Albertson barging or charging toward Mr. Roudiani as he describes, but Ms. Albertson does describe him taking three quick steps after being pushed. In those circumstances, particularly the very short time in which these events unfolded, that is potentially consistent with Mr. Roudiani perceiving something more aggressive.
- [41] Considering all of the evidence and the standard of proof that must be applied, I am left with a reasonable doubt and must find that the Crown has failed to prove beyond a reasonable doubt that Mr. Roudiani did not act in self-defence. I, therefore, am bound to find him not guilty.

"N. Smith J."

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