
CANADA / JUDGMENT

R. v. Trainor

2009 BCSC 1871

COURT

Supreme Court of British Columbia

DECIDED

29 June 2009

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2010 BCSC 1871 R. v. Trainor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Trainor,

2009 BCSC 1871

Date: 20090629

Docket: 66311

Registry: Kelowna

Regina

v.

Gary Frederick Trainor

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

Counsel for the Crown:

D. Campbell

R. Li, Articled Student

Counsel for the Accused:

J. Phillips

(Agent for R. Dieno)

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 9 and June 29, 2009

Place and Date of Judgment:

Kelowna, B.C.

June 29, 2009

- [1] THE COURT: The accused was convicted by a jury of aggravated assault on December 16, 2008. The Crown has filed an application under s. 752.1 of the Criminal Code seeking to have the accused assessed for purposes of determining whether it wishes to proceed with an application to have the accused declared a dangerous or long-term offender.
- [2] At the hearing of that application, which began April 9, 2009, the accused took the position that the facts of the offence needed to be established before the court could properly determine whether to make the order sought. That is so because, at the trial, the accused testified that the events giving rise to the charge occurred in a significantly different way than the complainant said they did.
- [3] The complainant, Mr. Dufresne, and the accused, Mr. Trainor, were both employed as fruit pickers on an orchard in Kelowna. They lived in adjacent rooms in a trailer on the orchard. The assault occurred on a hot Sunday afternoon in early July 2007.
- [4] In broad outline, the complainant testified that he heard Mr. Trainor playing his harmonica in his room that morning. He said that sometime later, Mr. Trainor approached him and asked in an accusatory manner where his harmonica was. Mr. Dufresne denied taking it and was upset at being accused of doing so. Mr. Trainor returned to his room and Mr. Dufresne did likewise. Mr. Dufresne could hear Mr. Trainor continuing to mull over the loss of his harmonica and continuing to express his view that Mr. Dufresne had taken it.
- [5] Mr. Dufresne said that he began cooking supper at between 2 and 3 o'clock in the afternoon. He was using a barbeque outside the door to his room. He ate, and before sitting down to watch a video in his room, he went to the communal washroom. On his return, he and Mr. Trainor passed each other and Mr. Trainor again accused him of stealing his harmonica. He said that they exchanged angry words, but nothing more than that. Mr. Dufresne then went to his room and began watching a video. He said that he left his door open.
- [6] He testified that not long after, he felt a pricking sensation in his back and in the back of his triceps. He got up, turned around and saw Mr. Trainor standing there and punching at him in an odd way. He felt more pain and, at that point, realized that Mr. Trainor had a knife and was stabbing him. Mr. Dufresne said that he attempted to grab Mr. Trainor's hand in which he was holding the knife, and that they grappled. In the process, they fell through the open door of the cabin and down the single step at the threshold and onto the grass where they continued to struggle. During the struggle, Mr. Trainor took the knife from his right hand,

which was being controlled by Mr. Dufresne, and put it in his left hand and began stabbing Mr. Dufresne in the head.

- [7] At that point, Mr. Schulte, another fruit picker, came around the corner of the trailer and intervened. By the time Mr. Schulte managed to subdue Mr. Trainor, Mr. Dufresne was bleeding profusely. Mr. Dufresne said that he got up and went into his room to get something to staunch the bleeding. He found a shirt and then left his room, locking the door behind him. He was taken to a nearby residence, where he collapsed. He was in that state when the ambulance arrived.
- [8] Mr. Trainor testified that he did not go into Mr. Dufresne's room that day at all. He, like Mr. Dufresne, had been drinking. He said that by about mid-afternoon, he was reasonably intoxicated. He said that he had lost his harmonica and was upset about that. He thought that Mr. Dufresne might have seen it but denied that he accused Mr. Dufresne of taking it. He acknowledged that they exchanged angry words over the matter. He said that he thought that Mr. Dufresne was a crackhead and told Mr. Dufresne as much. He said that after this exchange, they both returned to their respective rooms and continued to exchange unpleasanties through the common wall.
- [9] Mr. Trainor, who had had about 12 beers by this point, left his room and was going to the washroom. He said that as he went by Mr. Dufresne's door, Mr. Dufresne jumped him. He said that Mr. Dufresne had something in his hand and that he, that is, Mr. Trainor, was unarmed. He testified that they grappled and fell to the ground. Mr. Dufresne dropped what he had in his hand during the struggle, and Mr. Trainor said that he picked it up. He said that in the melee, he thought that he might have cut Mr. Dufresne. Although he said he now realizes that it was a knife that Mr. Dufresne had, at the time he was not aware of what the object was. It was simply something he grabbed in the process of the scuffle. Mr. Trainor then testified that he left the orchard. He was arrested later that evening in the city.
- [10] Mr. Dufresne suffered numerous stab wounds. He had six lacerations, a number of scrapes and abrasions, and two penetrating wounds: one to the abdomen and the other to his left shoulder blade. All of them were, according to the doctor who examined Mr. Dufresne, consistent with having been caused by a thin-bladed knife. The police recovered such a knife at the scene. Mr. Trainor was not significantly injured in the altercation. He was not stabbed at all.
- [11] Mr. Schulte, who intervened and broke up the altercation, lived in the third room of the trailer (Mr. Dufresne and Mr. Trainor occupying the other two). He testified that he heard Mr. Dufresne and Mr. Trainor arguing that day before he, that is, Mr. Schulte, left to have a beer with other workers at the orchard. When he returned sometime later to get another beer from his room, and as he rounded the corner of the trailer, he saw Mr. Dufresne and Mr. Trainor on the ground in front of Mr. Dufresne's room.

- [12] He testified that Mr. Dufresne was on his back and that Mr. Trainor was on top of him sitting on his hips or thighs. Mr. Schulte saw Mr. Trainor stabbing at Mr. Dufresne and repeatedly saying, "I'll fucking kill ya," as he was doing so. Mr. Schulte said that he put his arm around Mr. Trainor's neck in an effort to pull him off. In the course of doing so, they both fell backwards, such that Mr. Schulte was lying on his back on the ground and Mr. Trainor was lying on his back on top of Mr. Schulte. Mr. Trainor continued to hold on to the knife, and Mr. Schulte had to apply pressure to his neck until Mr. Trainor eventually relinquished the weapon. Mr. Schulte tossed it a short distance away. He testified that Mr. Dufresne then got up, went into his room, and came out with a rag on his head. Mr. Trainor left the area and Mr. Schulte did not see him again that day. Mr. Schulte helped Mr. Dufresne to a nearby cabin where there was a phone, and an ambulance was called.
- [13] Mr. Schulte acknowledged that he had been drinking that day, but said that the amount he had to drink was not affecting him significantly.
- [14] If the jury accepted Mr. Dufresne's account of these unfolding events, no issue of self-defence arose. If they accepted, or were left in a state of reasonable doubt that the events happened as Mr. Trainor testified, then it was necessary for them to determine whether the Crown had proven beyond a reasonable doubt that Mr. Trainor was not acting in self-defence.
- [15] The law with respect to the role of the trial judge following a jury's verdict is straightforward. Section 724(2) provides that the court must accept as proven all facts, express or implied, that are essential to the jury's verdict. As for any other matters, the law remains as set out in *R. v. Gauthier* (1996), 108 C.C.C. (3d) 231 (B.C.C.A.), and is that the court may come to its own independent determination of those other matters and, in doing so, is not to attempt to follow or reconstruct the logical process of the jury. Thus, it is for me to determine whether the Crown has proven beyond a reasonable doubt that the matter occurred in the way Mr. Dufresne described it or whether it happened in some other manner.
- [16] I instructed the jury, at the conclusion of this trial, on the elements of aggravated assault and left for their consideration s. 34(1) and s. 34(2) of the Criminal Code, both of which deal with the issue of self-defence. I told them that they could approach their deliberations by answering particular questions arising from the elements of the offence and the elements of the defence's that I left with them.
- [17] The jury retired to consider their verdict at 2:45 in the afternoon. At 3:45 p.m., they returned with a question. The question is important, and I quote it in full. It reads:

Self-defence:

- Was Gary unlawfully assaulted? Yes.
- Did Gary use force to defend himself? Yes.
- Did Gary use more force than what was necessary? Yes.

- Based on all these answers, is Gary guilty of aggravated assault? This is the scenario that we were having problems with.
- [18] I answered their question and the jury again retired, returning a verdict at 5:45 in the afternoon. The express implications of the verdict are that the jury was satisfied that Mr. Trainor assaulted Mr. Dufresne and that, in doing so, he was not acting in self-defence.
- [19] The verdict is ambiguous, inasmuch as the jury may have accepted Mr. Dufresne's version on which no issue of self-defence arose, or they may have concluded that Mr. Trainor's version was correct (or they may have been left in a state of reasonable doubt on the issue) but concluded that Mr. Trainor exceeded the lawful limits of self-defence in acting as he did.
- [20] As is apparent, the jury's question is more than merely a question. It reveals what they had concluded in their analysis of the law and the evidence.
- [21] The Crown argues that I ought not to consider the jury's question and should reach my findings of fact based only on the evidence and their verdict. To do otherwise is to attempt to reconstruct the logical process they may have followed, and that is not what the law requires. The accused argues that the question should be considered, and from it, if not otherwise, I should find that the jury concluded that Mr. Dufresne initially assaulted Mr. Trainor and that Mr. Trainor responded in self-defence but, in doing so, used more force than was lawful.
- [22] Ordinarily, I would accept the Crown's approach for two reasons. First, it is in accord with the direction given in *Gauthier*. Second, it is not often apparent from a jury's question whether the issue raised is one that they are all troubled by, or merely one that only one or two are having difficulty with. Further, sometimes it is not clear from a mere question if the jury has reached other conclusions about the case at the point when a question is posed. In the unusual circumstances of this case, however, neither of these concerns arises. The question reveals that collectively they had decided that Mr. Trainor was assaulted, that he used force to defend himself, and that he used more force than was necessary in the circumstances.
- [23] The admonition in *Gauthier*, and the cases before it, to the effect that the trial judge ought not to attempt to follow the logical processes of the jury, is based in part on the fact that the individual members of the jury may come to their verdict by different routes, and thus there may be no one "logical process". Further, it is both unnecessary and unwise to engage in what must be, at least in part, a speculative exercise.
- [24] Given the jury's question in this matter, however, neither of these risks is present. Taken at face value, and there is no reason to take it otherwise, they concluded that Mr. Dufresne assaulted Mr. Trainor and Mr. Trainor defended himself, but in doing so, he exceeded the limits of lawful self-defence.

- [25] While I am persuaded, in the unusual circumstances of this case, that it is appropriate to consider the jury's question in coming to my conclusions as to the factual basis for their verdict, I would reach the same conclusion without regard to the question they posed.
- [26] I find the following facts.
- [27] Mr. Trainor was angry about the loss of his harmonica and suspected that Mr. Dufresne had stolen it. He accused Mr. Dufresne of that and Mr. Dufresne responded angrily. Mr. Trainor would not let the matter go and continued to level accusations at Mr. Dufresne during the afternoon. Their verbal dispute erupted into violence outside Mr. Dufresne's door. It was initiated by Mr. Dufresne; however, when he initiated it, I am satisfied beyond a reasonable doubt that he was unarmed. Mr. Trainor, almost immediately after the assault took place, lost all measure of self-control and stabbed Mr. Dufresne in the abdomen and elsewhere. They fell to the ground, and Mr. Trainor continued to stab and was expressing his intention to kill Mr. Dufresne when Mr. Schulte appeared and intervened. Mr. Dufresne suffered the injuries about which Dr. Conchie testified, and all of those injuries, I am satisfied to the requisite degree of certainty, were caused by Mr. Trainor. I am also satisfied beyond any reasonable doubt that Mr. Trainor was not stabbed, nor was he otherwise injured in any significant way during the altercation.
- [28] I am not satisfied beyond a reasonable doubt that any part of the altercation occurred in Mr. Dufresne's room. The door to his cabin has a doorknob, above which is a hasp secured by a padlock. By the time the police arrived, the door was locked with the padlock. Mr. Dufresne said that he locked it following the assault. It is beyond doubt that, in the immediate aftermath of the assault, Mr. Dufresne was bleeding profusely. From the photographs, there does not appear to be any blood on the doorknob, the padlock or the hasp.
- [29] Moreover, there are no photographs of the interior of Mr. Dufresne's room which might shed light on whether anything untoward happened in there. The fact that there are no photographs is no one's fault. The police had no reason to suspect that anything had happened inside the room when they attended. Nevertheless, it remains a gap in the evidence.
- [30] These circumstances leave me in a state of reasonable doubt as to whether Mr. Dufresne went into his room after the assault. In fact, I think it likely that he did not and that the door had been closed and locked prior to these events unfolding. If that is so, it casts into doubt his account of how the assault began.
- [31] I find that the entire altercation occurred outside the door of Mr. Dufresne's room. Both men were angry. Because I am not satisfied beyond a reasonable doubt that Mr. Dufresne did not initiate the assault, I give the benefit of that doubt to Mr. Trainor and conclude that Mr. Dufresne initiated the altercation, but did so when he was not armed. Mr. Trainor responded using a knife that he had in his possession. I accept as proven that the events occurred as described by Mr. Schulte from the point at which he observed the combatants, save as to his observations of Mr. Dufresne immediately after Mr. Trainor was pulled off of him.

- [32] In coming to these conclusions, I have not ignored the fact that Mr. Trainor gave a statement to the police that was ruled admissible at the trial. From it, it is clear that he was significantly agitated. I recognize that he told the police initially that he did not know how the altercation started; however, he did say, on at least two occasions during his statement, that Mr. Dufresne started it.
- [33] His statement reveals two other things. First, Mr. Trainor thought that Mr. Dufresne was a crackhead; and second, he was suspicious, if not, frankly, paranoid, about those who he believed were crackheads. All of this is consistent, or at least not inconsistent, with Mr. Dufresne having started the fight and with Mr. Trainor responding out of all proportion to the severity of the assault perpetrated on him. I note also that in his statement, Mr. Trainor said nothing about going into Mr. Dufresne's cabin.
- [34] It seems to me, counsel, that the next issue to be addressed is the question of whether Mr. Trainor ought to be remanded for purposes of an assessment. I think and I say for your benefit, Ms. Phillips, because you were not here, that the Crown had completed its submissions on that issue, but that Mr. Dieno had not made his because he wanted to know what the factual basis of the conviction was.
- [35] MS. PHILLIPS: Thank you. As Mr. Dieno had told me previously, we take no position with that.
- [36] THE COURT: All right, thank you.
- [37] I have not, or will not at this juncture, explain in detail my reasons for my decision. However, I am satisfied, having regard to the test set out in s. 752.1 of the Criminal Code and having reviewed the materials provided by the Crown in support of their application, that it is appropriate to order that Mr. Trainor be remanded under s. 752.1 for purposes of an assessment as contemplated by that section. I am satisfied that the prerequisites necessary to warrant such an order have been met.

Barrow J.

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