
CANADA / JUDGMENT

R. v. Zsombor

2020 BCSC 2240

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zsombor,

2020 BCSC 2240

Date: 20200813

Docket: 91081-2

Registry: Kelowna

Regina

v.

Kyle Steven Zsombor

Before: The Honourable Mr. Justice Hori

Oral Reasons for Judgment

Counsel for the Crown:

D. Blumenkrans

Counsel for the Accused:

G. Gray

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 28-30, 2020

Place and Date of Judgment:

Kelowna, B.C.

August 13, 2020

Introduction

- [1] The circumstances resulting in this criminal charge against Mr. Zsombor are tragic. In the span of only 20 seconds on April 5, 2018, a close friendship was destroyed, the quality of the life of a physically active businessperson was seriously diminished, and the accused stands charged with aggravated assault.
- [2] Mr. Zsombor is charged with one count of aggravated assault against his friend from childhood, Joseph Gates.
- [3] Mr. Zsombor, who testified at trial, admits that his hand came into contact with Mr. Gates, but that it did so for a defensive purpose while being assaulted by Mr. Gates. Therefore, in addition to requiring the Crown to prove the essential elements of the offence of aggravated assault, Mr. Zsombor relies on s. 34(1) of the Criminal Code [Code] and claims that his actions were in self-defence.

Background

- [4] Mr. Zsombor is 40 years old and Mr. Gates is 39 years of age. They were close friends until April 5, 2018. They both grew up in Kelowna, B.C., and met each other in elementary school when Mr. Gates was in grade six and Mr. Zsombor was in grade seven. They remained close friends through their college years at the Okanagan campus of the University of British Columbia in Kelowna. While attending college, Mr. Gates lived in the basement suite in Mr. Zsombor's house. Mr. Gates describes Mr. Zsombor as his best friend before the events of April 5, 2018.
- [5] Mr. Zsombor and Mr. Gates were part of a group of six friends who had a close friendship from their years in high school. In addition to Mr. Zsombor and Mr. Gates, this group of friends included Trent Kitsch, Doug Hartel, Brett Philips, and Quinn Best.
- [6] It is my impression that all of these individuals are responsible adults. Mr. Gates has a Fine Arts degree and was pursuing a consulting career. Mr. Zsombor has an Arts degree and is employed as a real estate appraiser with the B.C. Assessment Authority. Mr. Kitsch attended the University of Nevada, Las Vegas, and runs his own wine business in Kelowna. Brett Philips is a naturopathic doctor.

- [7] On April 4, 2018, this group of friends gathered together at the home of Mr. Zsombor. They got together because Doug Hartel was in town from Calgary. They arrived at Mr. Zsombor's house at approximately 7:00 p.m. and stayed there until about 10:30 p.m. During their time at Mr. Zsombor's house, the group was drinking beer. Some of the group may have consumed some Korean rice wine and smoked some marijuana.
- [8] The party then moved from Mr. Zsombor's residence to the Dosa Cafe on Bernard Avenue in Kelowna. The Dosa Cafe was a cafe owned by Trent Kitsch. The group of friends stayed at the Dosa Cafe drinking more beer until approximately 11:45 p.m.
- [9] Mr. Zsombor testified that near the end of the evening at about 11:45 p.m., he went to the washroom. When he came out, everyone was gone. They had not told Mr. Zsombor that they were leaving or where they were going. They left the lights of the café on, beer cans on the table, and the door unlocked. Mr. Zsombor testified that he waited about 15 to 20 minutes for the group to return, but they did not. He testified that he was annoyed at his friends because they had left him behind. He was particularly annoyed at the irresponsibility of Mr. Kitsch in leaving the cafe unsecured.
- [10] The other members of the group had left the Dosa Cafe while Mr. Zsombor was in the washroom. They left to find a place to get something to eat. Mr. Gates' evidence about who left with who and where they went from the Dosa Cafe is inconsistent with the evidence of Mr. Kitsch. However, I need not reconcile those inconsistencies because this aspect of the evidence is not necessary for my ultimate decision.
- [11] There was also disagreement in the evidence about how much alcohol the parties consumed during the evening and their state of sobriety. Mr. Gates testified that he drank three beer at Mr. Zsombor's house and was not drunk. He claims that he was not drinking much that evening because he planned to go skiing the next day and did not want to have alcohol in his system while skiing. By the time they left the Dosa Cafe to find something to eat, Mr. Gates said he did not feel particularly drunk. However, Mr. Kitsch describes Mr. Gates as appearing drunk while at the Dosa Cafe.
- [12] Both Mr. Kitsch and Mr. Zsombor admitted that they had consumed a significant amount of alcohol and that they were drunk by the end of the evening.
- [13] The evidence of Mr. Kitsch and Mr. Zsombor leads me to the conclusion that there was a considerable amount of alcohol consumed by everyone in the group on the evening of April 4, 2018. I am also of the view that Mr. Zsombor and Mr. Gates were inebriated by the end of the evening.
- [14] When the rest of the group did not return to the Dosa Cafe, Mr. Zsombor went looking for them. He testified that he went out to Bernard Avenue and saw the group on the street. He was happy to see them, but he wanted the group to know that they had left him behind.

- [15] Mr. Gates testified that Mr. Zsombor approached him on Bernard Avenue in a rage. He says that Mr. Zsombor was jumping up and down and screaming at the group on the street. Mr. Gates says that Mr. Zsombor was causing a scene so they started walking back to the Dosa Cafe.
- [16] Once at the Dosa Cafe, Mr. Zsombor, Mr. Gates, Mr. Hartel, and Mr. Kitsch were in the alley behind the cafe preparing to go home. Mr. Philips and Mr. Best had already left.
- [17] The witnesses differ in their descriptions of the state of Mr. Zsombor's agitation when they arrived in the alley area behind the Dosa Cafe. Mr. Gates describes Mr. Zsombor as being enraged, Mr. Zsombor describes himself as being annoyed, and Mr. Kitsch describes Mr. Zsombor as being "very mad."
- [18] It is at this point in the evening that the incident giving rise to the charges against Mr. Zsombor occurred. Mr. Gates says that he tried to settle Mr. Zsombor down by telling him that they were his friends and telling him to put down the case of beer he had in his hand.
- [19] Mr. Zsombor says that he was starting to leave for home when Mr. Gates "attacked" him. He describes Mr. Gates as "charging" towards him and saying loud things to him that he did not understand. He says that Mr. Gates punched him in the shoulder and shoved him. Mr. Zsombor claims that in response he struck Mr. Gates when he swatted at him to make him stop pushing. As a result of being struck, Mr. Gates fell backwards to the ground striking his head on the asphalt.
- [20] Mr. Kitsch testified that Mr. Gates was trying to calm Mr. Zsombor down. He says that Mr. Gates made contact with Mr. Zsombor with his hand a number of times before Mr. Zsombor struck Mr. Gates causing him to fall backwards onto the asphalt.
- [21] A video surveillance camera at the Dosa Cafe recorded the incident between Mr. Zsombor and Mr. Gates. The Crown entered the video as evidence without objection from the defence. The video surveillance shows the following:
- Mr. Kitsch, Mr. Hartel, Mr. Gates and Mr. Zsombor are standing in the area behind the Dosa Cafe with Mr. Kitsch and Mr. Hartel positioned between Mr. Zsombor in the alley;
 - Mr. Zsombor is holding a case of beer in his left hand and his right arm is inside his coat sleeve;
 - Mr. Gates is gesturing with his right hand and holding a beer in his left hand;
 - Mr. Gates initially puts his right hand on Mr. Zsombor's left shoulder, but soon thereafter, he pushes Mr. Zsombor in the chest area with his right hand and both parties move apart from each other;
 - Mr. Gates then makes a downward gesture with his right hand and Mr. Zsombor moves towards Mr. Gates;

- Mr. Gates then pushes Mr. Zsombor in the chest area for a second time and Mr. Zsombor is pushed backwards;
- When Mr. Zsombor moves forward again, Mr. Gates pushes Mr. Zsombor for a third time, but this time in the area of his left arm and Mr. Zsombor is pushed backwards again;
- Mr. Gates then makes a downward motion with his right hand;
- Mr. Gates then pushes Mr. Zsombor for a fourth time in the chest area and then drops his right hand to waist level again gesturing downward;
- Mr. Zsombor draws his right hand backwards and then steps forward with a striking motion using his right hand and striking Mr. Gates in the head area;
- Mr. Gates' head snaps backward and Mr. Gates falls backward to the ground;
- Mr. Zsombor takes two or three steps forward and goes down on top of Mr. Gates.

[22] Mr. Gates required treatment at the hospital after being struck by Mr. Zsombor. He received seven staples to close a wound. He continues to suffer from the effects of hitting his head on the asphalt. He received diagnoses of post-concussion syndrome and post-traumatic stress disorder. He suffers from headaches, dizziness, and lack of concentration.

Credibility

- [23] I have concerns about the reliability of the evidence given by all of the witnesses, except Maria Kitsch, because of the alcohol consumed by them prior to the assault. The evidence of Mr. Zsombor and Mr. Kitsch is that they had consumed a significant amount of alcohol that evening. They both described their level of intoxication as being "drunk."
- [24] Mr. Gates downplays his level of intoxication by describing himself as "not particularly drunk" or "not overly drunk." However, Mr. Gates testified that he drank only two beer at the Dosa Cafe before leaving to find something to eat and had nothing more to drink that evening, yet when viewing the video of the assault, Mr. Gates confirmed that he has another beer in his left hand.
- [25] Based on the evidence of Mr. Kitsch and the demeanour of Mr. Gates in the video, I have concluded that the alcohol consumed by all the witnesses, except Maria Kitsch, has affected their recall of the events of April 5, 2018. Unfortunately, Maria Kitsch cannot say what occurred between Mr. Zsombor and Mr. Gates because she was not present to observe the incident. Ms. Kitsch arrived at the scene of the incident after it occurred to check on the condition of Mr. Gates and to render assistance.
- [26] I also have concerns about the credibility of both Mr. Zsombor and Mr. Gates. Not only is their recall affected by alcohol, it is my view that their evidence is coloured by self-interest and the desire to place blame.

- [27] My impression from the evidence is that Mr. Gates downplays his level of intoxication and exaggerates the level of Mr. Zsombor's anger at being left behind. It is understandable that Mr. Gates is angry at Mr. Zsombor and that he blames Mr. Zsombor for his injuries. However, it is my view that these factors have coloured Mr. Gates' evidence.
- [28] Similarly, Mr. Zsombor's actions, whether he is found guilty of the offence charged or not, have led to the significant injury of his childhood friend and the end of a close friendship. Whether the Crown has proven the essential elements of the offence or not, it must be difficult for Mr. Zsombor to accept that his actions have had these results. Therefore, Mr. Zsombor's evidence is coloured by these factors.
- [29] Both Mr. Zsombor and Mr. Gates testified as to their recollection and perception of events leading up to and including the incident that gives rise to the charges. Unfortunately, their recollections and perceptions are not reliable or credible for the reasons I have stated.
- [30] The most reliable evidence in this case is the video of the incident taken from a surveillance camera located at the Dosa Cafe.
- [31] In addition, the evidence of Trent Kitsch, while it may be affected by his level of intoxication, is credible evidence. Mr. Kitsch is a friend of both Mr. Zsombor and Mr. Gates. I was impressed that when giving his evidence, Mr. Kitsch tried to be balanced and impartial. He used neutral language when it was appropriate and attempted to avoid fixing blame on either Mr. Zsombor or Mr. Gates.

Analysis

- [32] Mr. Zsombor is charged with aggravated assault against Mr. Gates contrary to s. 268 of the Code. In addition to requiring the Crown to prove the essential elements of the offence, Mr. Zsombor pleads self-defence in accordance with s. 34(1) of the Code.

Aggravated Assault

- [33] Section 268(1) of the Code provides "Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant."
- [34] The essential elements of the offence of aggravated assault are succinctly stated in *R. v. Farrar*, 2019 NSSC 46. In that case, the Court held that in order to establish aggravated assault, the Crown must prove each of the following elements beyond a reasonable doubt:
- (a) the accused intentionally applied force to the complainant;
 - (b) the complainant did not consent to the force the accused intentionally applied;
 - (c) the accused knew that the complainant did not consent to the force being applied;
 - (d) the force applied wounded, maimed, disfigured or endangered the complainant's life; and

- (e) a reasonable person, in the circumstances, would realize that the force applied would put the complainant at risk of suffering some kind of bodily harm, although not necessarily serious bodily harm or the precise kind of harm that the complainant suffered.

(See also *R. v. Fontaine*, 2011 BCCA 140 at para. 25).

[35] On the issue of consent, there is no dispute. I am satisfied beyond a reasonable doubt that Mr. Gates did not consent to being struck by Mr. Zsombor. I am also satisfied that Mr. Zsombor knew that there was no consent from Mr. Gates.

[36] Mr. Zsombor also concedes that the force he applied resulted in injuries sustained by Mr. Gates.

[37] Therefore, the two remaining issues related to the elements of aggravated assault are:

- a) whether Mr. Zsombor intentionally applied force to Mr. Gates; and
- b) whether Mr. Zsombor, as a reasonable person, ought to have realized that the force he applied to Mr. Gates would put Mr. Gates at risk for bodily harm.

[38] With respect to whether he intended to apply force to Mr. Gates, Mr. Zsombor claims that he did not intentionally strike Mr. Gates. Mr. Zsombor claims that his hand came into contact with Mr. Gates as a reflexive or instinctive action when he swatted at Mr. Gates to "stop him from pushing me around." Mr. Zsombor relies on *R. v. Wolfe* (1974), 20 C.C.C. (2d) 382, referred to in *R. v. Anderson*, 2019 ONCJ 630 at para. 15.

[39] In *Wolfe*, the accused was a hotel owner who had barred the complainant from the hotel. The complainant refused to leave so the accused telephoned the police. While the accused was on the telephone, the complainant punched the accused who then turned and hit the complainant on the head with the telephone receiver. The Court of Appeal in Ontario set aside the conviction on the basis that the trial judge had found the accused's action was a reflex, not a voluntary action.

[40] In my view, the actions of Mr. Zsombor in this case were not reflexive or instinctive. The video shows Mr. Gates repeatedly pushing Mr. Zsombor. After the fourth push, Mr. Zsombor draws his right arm back slightly and then steps into a forward motion with his body followed by his right arm and hand.

[41] Mr. Kitsch describes Mr. Zsombor's action as a "punch." He says that Mr. Zsombor went down on top of Mr. Gates after the punch to continue fighting with Mr. Gates.

[42] The actions of Mr. Zsombor, shown on the video footage and described by Mr. Kitsch, are not reflexive or instinctive actions. It is not possible that Mr. Zsombor was taken by surprise by the actions of Mr. Gates. Mr. Gates pushed Mr. Zsombor four times before Mr. Zsombor reacted. Further, after he was pushed for the fourth time, Mr. Zsombor draws his hand back and throws a punch at Mr. Gates. I find that this action by Mr. Zsombor was intentional and voluntary. Therefore, I have no doubt that Mr. Zsombor intentionally applied force to Mr.

Gates.

- [43] On the question of whether Mr. Zsombor would have realized that his actions would put Mr. Gates at risk for bodily harm, the Crown need not prove that Mr. Zsombor intended to wound, maim, disfigure, or endanger the life of Mr. Gates. The onus on the Crown is to prove that a reasonable person in the circumstances would realize that the force applied to Mr. Gates would put him at risk of suffering some kind of bodily harm. However, the risk of harm need not be serious bodily harm or the precise harm that Mr. Gates suffered: Farrar at para. 38.
- [44] I am sure that Mr. Zsombor did not intend to injure Mr. Gates as seriously as he was injured. It is also unlikely that Mr. Zsombor even anticipated that his actions would result in serious injury to Mr. Gates. However, Mr. Zsombor should have realized and should have foreseen that, by striking out at Mr. Gates, he was putting Mr. Gates at risk of injury. It should be reasonably foreseeable to a person who strikes another that by doing so he or she may cause injury to the person struck. As stated in Farrar, "the mental element is objective foresight of bodily harm, not an intent to wound, maim or disfigure".
- [45] Therefore, I find that the Crown has proven the essential elements of the offence of aggravated assault beyond a reasonable doubt.

Self-Defence

- [46] Having found that the Crown has proven the essential elements of aggravated assault, I must decide whether Mr. Zsombor can avoid conviction by virtue of s. 34(1) of the Code because his actions against Mr. Gates were in self-defence.
- [47] Section 34(1) of the Code provides as follows:
- 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.
- [48] On an appeal from a conviction for assault causing bodily harm, the court in *R. v. Leroux*, 2018 BCSC 1429, held at para. 20 that in order for the defence of self-defence to succeed all three requirements of s. 34(1) of the Code must be met. The court held further that "So long as there is an air of reality to the defence a requirement will be met if the Crown fails to prove beyond a reasonable doubt that it is not met."
- [49] Mr. Zsombor relies on *R. v. Tremblay*, 2019 BCSC 410, in support of his plea of self-defence. The facts in *Tremblay* are distinguishable from the facts in this case in that:

- a) the complainant and the accused were strangers to each other so they had no prior relationship;
 - b) the complainant was outwardly angry at the accused and made threatening comments to the accused;
 - c) the court held that the complainant was confrontational and intent on physically challenging the accused; and
 - d) the complainant approached the accused quickly and aggressively and with an outstretched arm.
- [50] In these circumstances, the court in Tremblay held that the accused acted in self-defence when he stood his ground and stabbed the complainant when the complainant raised his right arm toward the accused.
- [51] While the facts in Tremblay are distinguishable, Justice DeWitt-Van Oosten, as she then was, considered the legal principles applicable to the defence of self-defence. I will summarize those principles as follows:
- a) The Crown bears the burden of disproving the defence of self-defence. To meet this burden, it need only prove beyond a reasonable doubt that one of the three elements of the defence does not apply. All three of the s. 34(1) criteria must be present for the defence to be available: para. 172.
 - b) In deciding whether the Crown has met its burden, the Crown must consider the whole of the evidence and, throughout the analysis, the court must remain mindful of the fact that the accused is presumed innocent unless and until the Crown meets its burden of proof: para. 173.
 - c) The law does not require that an accused retreat before acting in self-defence, although a failure to do so may be relevant to the s. 34(1) and (2) analysis: para. 174.
 - d) A person who is under attack and defending themselves cannot be expected to weigh to a nicety the exact measure of the defensive action required: para. 174.
 - e) In self-defence cases, evidence showing that the complainant has a predisposition to violence is admissible: para. 175.
- [52] The Crown concedes in this case that there is an air of reality to the defence of self-defence. The Crown also concedes Mr. Gates was using force against Mr. Zsombor. Accordingly, the first element of the self-defence is satisfied.

- [53] The second element of self-defence requires that the act constituting the offence be for defensive or protective purposes. In this case, the question is whether Mr. Zsombor struck Mr. Gates in order to defend or protect himself. In assessing the second element of the offence, I am mindful that Mr. Zsombor is not required to retreat before acting in self-defence and that he is not required to weigh the exact measure of his defensive response. However, the response to the application of force must be defensive or protective in nature.
- [54] The Crown's burden is to disprove beyond a reasonable doubt that the actions of Mr. Zsombor were taken to defend or protect himself from Mr. Gates. Based on the evidence of Mr. Kitsch and the video recording of the incident, I find that the Crown has fulfilled its burden on the second element of the defence.
- [55] According to Mr. Kitsch, Mr. Zsombor was "very mad" because his friends had left him behind at the Dosa Cafe and he continued to be angry at his group of friends leading up to the incident. Mr. Kitsch testified that Mr. Gates was trying to calm Mr. Zsombor down and saw Mr. Gates push Mr. Zsombor a number of times. Mr. Kitsch then saw Mr. Zsombor spin quickly and hit Mr. Gates on the left side of his face. Mr. Kitsch does not recall seeing Mr. Zsombor's hand when he struck Mr. Gates, but describes the contact as a punch and recalls hearing a "pop."
- [56] Mr. Kitsch testified that when struck, Mr. Gates fell backwards hitting his head on the asphalt and that Mr. Zsombor went down to "continue to fight Joe, but did not hit him again." It is Mr. Kitsch's evidence that when Mr. Zsombor realized that Mr. Gates was knocked out, he then began to try and support Mr. Gates' head.
- [57] Mr. Zsombor says he was merely annoyed at his friends for leaving him behind. He testified that he wanted the group to know that they had left him behind, but that was it. He testified that Mr. Gates came rushing at him out of nowhere and that he merely swatted at him to make him stop pushing. For the reasons stated earlier, this evidence is not credible. It is inconsistent with Mr. Kitsch and inconsistent with the video surveillance tape.
- [58] In assessing the effect of credibility on the ultimate decision, I am guided by the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, as modified for self-defence cases by *R. v. Reed* (2003), 65 O.R. (3d) 723. Justice DeWitt-Van Oosten in *Tremblay* adopted the modifications to the credibility assessment in self-defence cases set out in *Reed*. In *Tremblay*, the principles of *W.(D.)* are restated as follows at para. 180:
- If I accept Mr. Tremblay's evidence and on the basis of it, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.
 - Even if I do not accept Mr. Tremblay's evidence, if, after considering it alone or in conjunction with other evidence, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.

- [59] In this case, I do not accept the evidence of Mr. Zsombor and, based on the evidence of Mr. Kitsch and the video surveillance recording, I am satisfied beyond a reasonable doubt that Mr. Zsombor punched Mr. Gates and, when he did so, it was not for a defensive or protective purpose, but to engage Mr. Gates in a fight. When Mr. Zsombor punched Mr. Gates, the video shows that Mr. Gates had his arms and hands lowered. The video also shows Mr. Zsombor take two or three steps before he drops to the ground on top of Mr. Gates. According to Mr. Kitsch, Mr. Zsombor appeared to drop on top of Mr. Gates to continue the fight.
- [60] I see nothing in the conduct of Mr. Zsombor that is defensive or protective. On the contrary, Mr. Zsombor's action in punching Mr. Gates is an offensive action. He was intending, as indicated by Mr. Kitsch, to engage Mr. Gates in a fight. While I recognize in some situations a strong offence is the best defence, in the circumstances of this confrontation between childhood friends, it was not necessary to take such an offensive approach. Accordingly, the Crown has proven beyond a reasonable doubt that the second element of self-defence is not satisfied.
- [61] Therefore, the defence of self-defence is not available to Mr. Zsombor.
- [62] Since the Crown need only prove that one of the three elements of self-defence does not apply, it is not necessary to consider the third element of the defence. However, if I were required to do so, I also find that the Crown has fulfilled its burden on the third element of self-defence.
- [63] The third element of self-defence requires that the act constituting the offence is reasonable in the circumstances.
- [64] Section 34(2) of the Code provides:
- (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.
- [65] The nature of the force applied to Mr. Zsombor in this case by Mr. Gates was relatively minor. Mr. Gates pushed him a number of times, but did not strike or threaten to strike Mr. Zsombor, did not use or threaten to use a weapon.
- [66] The parties were close friends from childhood. They knew each other well. They had partied together many times and had seen each other at their best and their worst. However, at no time in the past had there been any physical confrontations between them. According to Mr. Kitsch, on the occasion on April 5, 2018, Mr. Zsombor was very mad and Mr. Gates was only attempting to calm him down.
- [67] Mr. Zsombor was heavier than Mr. Gates at the time of the assault, but both individuals were athletic and active people.
- [68] I must not judge the reasonableness of Mr. Zsombor's action by the serious nature of the injuries suffered by Mr. Gates. I also recognize that Mr. Zsombor is not required to measure to a nicety his response. However, given the nature of the force applied to Mr. Zsombor and the longstanding friendship between Mr. Zsombor and Mr. Gates, the reaction of Mr. Zsombor in throwing the punch to the area of Mr. Gates' head was not reasonable. Longstanding close friends who have not had any physical confrontation would not react in that way.
- [69] Therefore, I find that the third element of self-defence is not satisfied.
- [70] As I said at the beginning of these reasons, this is truly a tragic circumstance. However, based on the conduct of Mr. Zsombor, as depicted on the video recording and as described by Mr. Kitsch, I must conclude that Mr. Zsombor is guilty of the offence of aggravated assault as charged.

"D.K. Hori J."

HORI J.

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