COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Wiebe***,
2007 YKCA 007

Date: 20070621
Docket: YU567

Between:

Regina

Respondent

And

David Charles Wiebe

Appellant

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

J. Van Wart	Counsel for the Appellant
N. Sinclair	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 7 June 2007
Place and Date of Judgment:	Vancouver, British Columbia 21 June 2007

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The appellant appeals his conviction on August 22, 2006 by the Honourable Judge Overend of the Territorial Court of the Yukon Territory following his trial on a charge that

> On or about the 13th day September, 2005 at or near Whitehorse, Yukon Territory [he] did unlawfully commit an offence in that: he did wound Darryl HEWITT, thereby committing an aggravated assault, contrary to Section 268 of the *Criminal Code*.

[2] The learned trial judge's reasons are indexed as 2006 YKTC 75. He sentenced the appellant to 3 years in prison and prohibited him from possessing a firearm for 10 years. His reasons on sentence are indexed as 2006 YKTC 80.

[3] The trial judge summarized the facts as follows:

> [2] Briefly, the facts are that the defendant and one Corinne Silverfox were in a boyfriend-girlfriend relationship and on the day in question they had been at Ms. Silverfox's apartment on 4th Avenue in Whitehorse. There had been an off and on relationship between them, and on that date, that relationship had been renewed for a month or so, during which time the defendant spent most of his nights sleeping over at her apartment.
>
> [3] On the 13th, near supper time, Corinne Silverfox went with her sister to the bar at the 98 Hotel. Supper was on the stove; the defendant was in the apartment. When Corinne Silverfox did not return when expected, the defendant, having spoken to her on the phone earlier, and having expected her home, went to the bar and wanted Corinne to go home with him. She refused. He left the bar, but returned a short time later and physically tried to remove her.
>
> [4] Mr. Hewitt, who had been at the bar and had had employment there as a bouncer but was not engaged as a bouncer on that particular occasion, responded to the demand of Lisa McKenna that the accused leave the bar. He approached the accused, grabbed him by the shirt or the collar, and pushed him out the door.

[5] Ms. Silverfox remained in the bar. Mr. Hewitt, who, as I say, was not employed as a bouncer on that evening, had bought Ms. Silverfox a beer. That beer had been purchased in the presence of the defendant prior to his removal.

[6] After removal, Mr. Wiebe remained outside the hotel for a short time, and later confronted Mr. Hewitt in his vehicle, that is, in Mr. Hewitt's vehicle. Perhaps, to make myself clear on that, Mr. Hewitt was in his vehicle and Mr. Wiebe approached the vehicle. There was a short interaction at that time. There was no physical contact between the parties.

[7] The defendant indicated in his evidence that he was heading for home at the time, but it is clear that that confrontation at the vehicle took place in a direction opposite to where Mr. Wiebe was staying, that is, opposite to the direction of Ms. Silverfox's apartment.

[8] Back in the bar, Mr. Hewitt offered Ms. Silverfox a ride to her residence, and on the drive to the apartment, they noticed Mr. Wiebe and continued to drive for approximately a half an hour. While they were driving, Mr. Wiebe attended to the apartment. He did not have a key to Ms. Silverfox's apartment. I should, perhaps, as an aside here, say this is a building with six separate apartments, two on each floor, and there are three floors. Ms. Silverfox was on the third floor.

[9] On return to the apartment, Mr. Wiebe obtained a key from Gloria Jackson, who is also a resident of that building. He then entered the apartment, and was in the apartment at the time Ms. Silverfox and Mr. Hewitt arrived. While still outside the building, Ms. Silverfox realized that the accused was in her apartment. She remonstrated with Gloria Jackson, expressing her displeasure. This was in the presence of Mr. Hewitt and in the hearing of the accused, who, at the time, was leaning out the window. He was told by Mr. Hewitt, "You'd better fucking get out or I'll make you," referring to Mr. Wiebe leaving the apartment.

[10] The accused was in the apartment. He put his shoes on and exited the apartment as Ms. Silverfox and Mr. Hewitt were entering the building. The accused met Ms. Silverfox on the stairs between the second and third floors. She showed no interest in his being there, and he said to her, "If you want me to leave, I'll leave".

[11] Almost immediately, a further confrontation took place between the accused and Mr. Hewitt on the stairs, near the area where Ms. Silverfox and Mr. Wiebe had just met. Mr. Hewitt grabbed the defendant and held him against the wall, or pushed and held him against the wall, before the defendant swung him around, causing

> Mr. Hewitt to fall to the bottom of the stairs. The defendant immediately went to the bottom of the stairs, and proceeded to punch and kick Mr. Hewitt.
>
> [12] Mr. Hewitt suffered significant injuries, including multiple facial fractures and a brain injury, from which, in part, he was unable to recover or return to his employment for over four months. There is no issue here that this was a significant wound and therefore falls into the category of an aggravated assault. Mr. Hewitt had no recollection of any of the events at the apartment, although he did recall the events earlier in the evening.

[4] The appellant pleaded that he acted in self-defence and invoked s. 34(2) of the ***Criminal Code***, which provides,

> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[5] It is well-settled that this defence requires that the accused have a subjective belief that is objectively reasonable under both subsections 34(2)(a) and (b) and that all the accused need do is raise a reasonable doubt that he acted in self-defence, since the burden of negativing self-defence rests on the Crown.

[6] The trial judge rejected self-defence. He said,

> [18] Based on the evidence, I accept that the accused was assaulted, that is, that he was grabbed and pushed against the wall by Mr. Wiebe [*sic*]. I am satisfied that he, Mr. Wiebe, caused grievous bodily harm to Mr. Hewitt. I am not satisfied that he did it under

reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made.

[19] The history of the evening certainly would have given Mr. Wiebe no apprehension of his being likely to suffer death or grievous bodily harm from anything that Mr. Hewitt had previously done. In his evidence Mr. Wiebe said, "Having been ejected from the bar was no big deal," that that did not bother him particularly, one way or the other.

[20] Mr. Wiebe, was clearly not apprehensive after he left the bar, because he went out of his way to approach Mr. Hewitt in his vehicle. It was suggested to him in cross-examination that he had left the apartment and was coming down the stairs to specifically confront the victim, Mr. Hewitt. He denied that. He said, however, that he was going down the stairs to see Corinne. There is no suggestion that in exiting the apartment that he had any concern about his safety.

[21] The violence of the initial assault, that is, the assault on the stairs by Mr. Hewitt, was minimal, that is, he grabbed and pushed Mr. Wiebe against the wall. I am not satisfied on a subjective basis that Mr. Wiebe believed for a moment that there was impending death or grievous bodily harm. He had no such subjective apprehension. I am not satisfied either, on an objective basis, that any person in his circumstances, considering the events of the evening, and particularly the events on the stairwell, would have had any reasonable apprehension of death or grievous bodily harm.

[22] In coming to my conclusions, I found the evidence of Mr. Wiebe to be unreliable in respect of his expressed non-anger at the events of the evening, his evidence of the manner in which Mr. Hewitt fell down the stairs, and when I compare that to his statement to police, his statement to the police more accurately reflects what is likely to have happened on the stairs following the initial assault by Mr. Hewitt. This was an opportunity taken by Mr. Weibe to get his revenge for the events of the evening, and seeing Mr. Hewitt lying at the bottom of the stairs, he went down and assaulted him as indicated. I find him guilty as charged.

[Emphasis added.]

[7] The appellant raises two grounds of appeal:

A. The learned trial [judge] erred by attributing on the Appellant a burden of proof, beyond the "air of reality" test", to establish he

acted in self-defence pursuant to section 34(2) of the *Criminal Code*.

B. The learned trial judge erred in finding the appellant guilty absent proof beyond a reasonable doubt that the Appellant did not act in self-defence pursuant to section 34(2) of the *Criminal Code*.

[8] The appellant submits first that the trial judge erred in law by improperly placing the burden of proof upon him to satisfy the judge that he was acting in self-defence. In his submission, it was incumbent upon him to show only an air of reality to self-defence, and the burden of proof always lay with the Crown to negative self-defence beyond a reasonable doubt. He refers to the two passages in the reasons for judgment that I have emphasized in paragraph 6 above, which, he says, demonstrate the trial judge's error.

[9] The Crown responds that, in stating that he was not satisfied, the trial judge was merely saying that he was not satisfied that the appellant had met the evidential burden of establishing an air of reality to his allegation that he had a reasonable apprehension of death or grievous bodily harm. In the Crown's submission, the trial judge found no air of reality to this submission and properly rejected the defence.

[10] Self-defence may not be left with a jury unless the trial judge is first satisfied that there is an "air of reality" to the defence, that is, that there is evidence that, if believed, is capable of supporting a finding that the accused acted in self-defence: see ***R. v. Cinous***, [2002] 2 S.C.R. 3, 162 C.C.C. (3d) 129, 2002 SCC 29. However, there is nothing to be gained in this case by a discussion of whether there was an air of reality to self-defence. First, this was not a jury trial and it is patently unrealistic to

suggest that a trial judge, as trier of fact and law, would undertake a separate air-of-reality analysis as the trier of law in order to determine whether, as the trier of fact, he could consider whether self-defence was available. Rather, a trial judge would simultaneously consider the questions whether there was any evidence of self-defence and whether there was sufficient evidence of self-defence. Moreover, there was evidence before the trial judge in this case that would have supported self-defence had he accepted it. There was evidence that Mr. Hewitt was much larger than the appellant, that he was a bouncer by occupation, and that he had ejected the appellant from the bar earlier in the evening. There was also evidence that Mr. Hewitt had threatened the appellant if he did not leave the apartment. The appellant testified that he was trying to leave the apartment when Mr. Hewitt grabbed him, was "winding up" as if to strike him, and threw him against the wall. He said he feared that Mr. Hewitt would lay a beating on him if he did not get to Mr. Hewitt first and that he initially tried to restrain Mr. Hewitt and only struck him when he was unable to hold him down. Thus, the submission that the trial judge concluded there was no air of reality to self-defence must be rejected.

[11] The trial judge did not accept the evidence of self-defence. At paragraphs 19 and 20 of his reasons, quoted at paragraph 6 above, he examined the events prior to the altercation, including the appellant's ejection from the bar by Mr. Hewitt, his discussion with Mr. Hewitt outside the bar, and the events as the appellant was leaving the apartment, in order to determine if they provided support for a finding that the appellant was under a reasonable apprehension of death or grievous bodily harm from Mr. Hewitt. At paragraph 22, he found that the appellant's evidence was

unreliable and rejected it. He concluded, at paragraph 21, that the unlawful assault by Mr. Hewitt was minimal and that the appellant was not under a reasonable apprehension of death or grievous bodily harm at the material time and, at paragraph 22, that the appellant simply took the opportunity to exact revenge on Mr. Hewitt when Mr. Hewitt was lying at the bottom of the stairs.

[12] Accordingly, the question on this appeal is whether the trial judge reversed the burden of proof in the passages impugned by the appellant.

[13] Defence counsel (who was not counsel on appeal) referred to the elements of self-defence and the burden of proof in his closing submission to the trial judge. He began by referring to ***R. v. Waugh***, 2001 CarswellYukon 34, 2001 YKSC 505 in which Veale J. said, at paragraph 36, that the question to be determined was "whether the Crown has proved beyond a reasonable doubt that self-defence under s. 34(2) does not apply". He concluded by urging the trial judge to find that self-defence had been established and stated, "At the very least … the Court should find that it has not been proven beyond a reasonable doubt that self-defence is not applicable".

[14] Moreover, immediately before discussing the application of s. 34(2) in his reasons, the trial judge rejected the Crown's submission that Mr. Hewitt had not unlawfully assaulted the appellant because the appellant was a trespasser and Mr. Hewitt was entitled to use reasonable force to remove him pursuant to s. 41(1) of the ***Code***. In doing so, he stated that the Crown had not satisfied him beyond a reasonable doubt either that the appellant had been given a reasonable opportunity

to leave before Mr. Hewitt applied force or that the force used by Mr. Hewitt was no more than was necessary.

[15] Given these clear signs that the trial judge had the correct burden of proof in mind, I cannot accept that he reversed the burden of proof on the question of self-defence.

[16] It should be noted that the trial judge gave his reasons extemporaneously at the close of counsel's submissions at the end of the trial. Such circumstances are not conducive to a perfect articulation of principles of law and findings of fact. Moreover, his reasons must be considered in the context of the issues before him. The central focus of the submissions of both counsel was the allegation that the appellant acted in self-defence. Thus, the trial judge was asked to determine as a matter of fact whether self-defence was applicable, and his reasons for judgment were responsive to counsel's submissions on this question. The legal principles engaged in this case are well-settled and he was not required to expound on them simply to demonstrate that he was aware of them and that he applied them.

[17] After reviewing the evidence and counsel's submissions and after reading the impugned passages in the context of the trial judge’s reasons as a whole, I think that, in the passages questioned by the appellant, the trial judge was simply advising the parties that he was not satisfied that the evidence of self-defence raised any reasonable doubt. To give these passages a literal reading, as the appellant urges us to do, would compel the conclusion that the trial judge, who is presumed to know the law, overlooked the elementary principle that the Crown always bears the burden

of proof of guilt beyond a reasonable doubt and that the burden never shifts to the accused. I would not be prepared to reach that conclusion in the circumstances of this case.

[18] Accordingly, I would reject the first ground of appeal.

[19] The appellant's submission on the second ground of appeal is that the trial judge did not subject the evidence to the analysis mandated by ***R. v. W. (D.)***, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397 and that he "completely failed to consider whether the appellant's evidence raised a reasonable doubt", to use the words of the appellant's factum.

[20] The case turned on the factual question whether the appellant was under a reasonable apprehension of death or grievous bodily harm at the material time. The trial judge's reasons were responsive to that question. He set out why he did not accept the appellant's evidence and why he rejected self-defence. He was not required to go further and to set out his entire reasoning process. I see nothing in his reasons for judgment that persuades me that he did not understand or apply the principles relating to the assessment of credibility and proof beyond a reasonable doubt. The presumption that he knew the law is applicable.

[21] Accordingly, I would also reject the second ground of appeal and, for those reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Madam Justice Levine"