

SUPREME COURT OF YUKON

Citation: *R. v. Ellis*, 2012 YKSC 46

Date: 20120606
S.C. No. 12-01500
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

JUSTINA KRISTEN MICHELLE ELLIS

Before: Mr. Justice R.S. Veale

Appearances:

Johanna Phillips
Kim Hawkins

Counsel for the Crown
Counsel for the Accused

REASONS FOR JUDGMENT

INTRODUCTION

[1] Justina Ellis has been charged with committing an aggravated assault contrary to s. 268 of the *Criminal Code* by wounding Krista Dawson on January 7, 2012.

[2] The first issue is whether Ms. Ellis should be acquitted on the basis of self-defence. The second issue is whether the bite inflicted by Ms. Ellis resulting in a bruise and a puncture wound constitutes an aggravated assault or the lesser and included offence of an assault causing bodily harm.

THE EVIDENCE

Evidence of the complainant

[3] The only witness called by the Crown to establish what happened in the early morning of January 7, 2012, was the complainant, Krista Dawson. She is a 26-year-old woman, born and raised in Whitehorse. She recalls that on January 6, 2012, she was drinking with her cousin Terrence McIntosh at her uncle's residence. She does not remember if others were drinking other than Terrence, her uncle, and herself. She testified that they drank a 26-ounce bottle of vodka and they were going to make a phone call to a friend before starting the 40-ounce bottle of vodka that they also had in the house. She said that they had begun drinking in the afternoon of January 6.

[4] Because there was no telephone at her uncle's residence, she and Terrence had to go to his mother's house, some four houses away, to make the phone call.

[5] Krista and Terrence went to Terrence's mother's house and went downstairs to Terrence's room to find the telephone. She did not know at the time that Justina Ellis was sitting in the room. She testified that Justina has an intimate or sexual relationship with her cousin Terrence that is on and off.

[6] Krista testified that Terrence and Justina began arguing and Terrence asked Krista to get Justina out of the room and lock the door. Krista said that she went up to Justina and asked her to come upstairs with her. She said that Justina was trying to get at Terrence. She doesn't really know what happened after that, but they were pushing each other and suddenly she felt a bite on her left arm and could not get Justina off her. She was yelling at Justina to get off her and Terrence had to intervene. Once Justina and Krista were separated, Krista ran into the bathroom and put a paper towel on her

arm to stop the bleeding from her arm. She does not know where Justina went after the altercation. Krista said that she called the RCMP, who came to the residence and took her to the hospital.

[7] It is clear from the evidence that Justina Ellis is not an unknown person to Krista, but Krista could not give any details as to how long she has known her other than the fact that she is aware that Justina has an intimate relationship with Terrence. She stated that she did not know what Terrence and Justina were arguing about. She admitted that she consumed a lot of alcohol which can affect her memory, resulting in parts of the evening that she does not recall. She denied that she had taken Valium that night, but indicates that Valium has been prescribed for her to use for withdrawal after drinking.

[8] Krista acknowledged that she is a binge drinker, by which she means that she drinks for days, then quits drinking, and then drinks for days again. She stated that at the time of giving her evidence in court, she had been sober for one week. On the night in question, she testified that she could not recall who made the first physical contact, but she recalls standing in front of Justina.

[9] Once the police arrived at the house, they took Krista to the hospital with Terrence. Krista remembers a nurse cleaning up her arm and that she was crying. She remembers the doctor prescribing antibiotics but she did not know how long she was there and whether other medication was prescribed. She went home with Terrence.

[10] When asked by the Crown what her level of intoxication was in a range of 0 to 10, with 10 representing blackouts, she stated that she was blacking in and out and said her intoxication was an 8.

[11] In cross-examination, Krista confirmed that she had started drinking in the afternoon of January 6. She could not remember who was with her and indicated that it could have been more people than her uncle and Terrence. She said Terrence was drinking as well and was intoxicated.

[12] When asked if she was present when the bullying of Justina took place by Terrence's family, she said she did not remember.

[13] When asked if Justina had come to her uncle's residence that day, she could not remember but admitted that it was possible that she did. When asked if she gave Justina Ellis some mix for drinks, she said that she did not remember. When asked whether Justina had tried to show her drawings that evening, she said that did not happen on that occasion but had occurred on a different date when she was not drunk.

[14] When asked whether Terrence went ahead of her to his mother's house, she said she did not remember. She could not remember if she knocked on Terrence's window to get in, but admitted that it was possible.

[15] When asked whether Justina accused her of flirting with Terrence and told her that it was "sick", she did recall that. She said that it made her angry because Terrence was her cousin.

[16] When it was suggested that she was the one that wanted Justina to leave Terrence's room, she denied that and said that Terrence directed her to get Justina out.

[17] When asked if it was possible that she started the pushing, she admitted that she did not remember who pushed who first.

[18] When asked if she scratched Justina's face or punched her in the face, she said that she could not remember.

[19] When asked if the injury on the inside of her left arm occurred when she wrapped her arm around Justina's head in a headlock, she denied that. She then admitted that she could not remember one way or the other.

[20] When asked if she had scratched Justina's face on her forehead from her hairline to her eyebrow, causing a red mark on her face, she said that Justina's whole face looked red but admitted that there was a small red mark above her lip. She said that she did not agree that she gave these injuries to Justina Ellis, but she also said that she was not sure.

[21] When asked if the fight ended when Justina Ellis bit her, she answered that she did not call it a fight.

Evidence of the attending police officer

[22] Constable Hoogland, who was the first officer on the scene, described Krista Dawson as emotionally upset, crying, angry and excited following the incident. He indicated that she was teary-eyed, her speech was slurred, and she was holding her left arm. He made a brief attempt to locate Justina Ellis but returned to attend to Krista Dawson and took her and Terrence to the hospital rather than waiting for the ambulance.

[23] In examination in chief, he indicated that Krista was able to walk unaided into the hospital but on cross-examination, he indicated that he assisted her while she was walking. He further explained in cross-examination that Krista walked from the scene to the police car unassisted and then again to the door of the hospital when he took her arm and led her to the emergency desk.

[24] In his report, he described her as “highly intoxicated”. He did not take a statement that evening but waited until the next morning when he described her as being hung over.

Medical evidence

[25] Doctor Tadepalli has practiced medicine in Whitehorse for 10 years. He has a family practice and also an emergency room practice at the Whitehorse General hospital. He recalled seeing Krista Dawson on January 7, 2012, after reviewing an Ambulatory Care Form with notations from the nurse and himself. The nurse’s notes indicated a human bite mark and he observed the wound on the inside portion of the left arm of Krista. Dr. Tadepalli indicated that Krista was crying and said that there had been a male person coming in and out of her room intermittently. He examined the wound and it appeared to him to be a human bite with a single puncture mark and a bruise. The skin was broken and it was bleeding. He saw her at 2:00 a.m. and reviewed her previous medical record as she was not unknown to him. The nurse’s notes indicated that she had consumed 15 ounces of vodka. He was aware of possible drug abuse with Valium and alcohol. He confirmed that Valium was often prescribed to alcoholics to be taken to assist in the withdrawal after the binge drinking. He had no idea whether Valium had been taken by Ms. Dawson. He described her as “intoxicated but coherent”. He described 15 ounces of alcohol as being sufficient to render him unconscious had he consumed that much. However, he advised that 15 ounces of alcohol for a person with a higher alcohol tolerance could result in the person being in a reasonably safe condition to discharge with a responsible person. In the case of Krista Dawson, he indicated that her Glasgow Coma scale was 15, indicating that she had appropriate eye

contact, verbal response and movement. As a result, he was prepared to release her into the custody of the male person that attended with her.

[26] Dr. Tadepalli prescribed an antibiotic for the puncture marks and an Atavan, as Ms. Dawson was emotionally distressed.

[27] Ms. Dawson was discharged at 2:30 a.m. with her “bro” as indicated in the notes of the Ambulatory Care Form. Dr. Tadepalli assumed “bro” meant brother.

[28] In cross-examination, he described the bruise and puncture mark as “superficial”. It was washed and covered with antibiotic cream, a greasy substance, and a gauze bandage. It did not require stitches as it was preferable to keep the wound open to avoid infection.

SELF DEFENCE

[29] Defence counsel has raised self-defence and relies on s. 34(1) as the applicable section. Crown submits that s. 34(2) is the applicable section and says there is no air of reality to this defence.

[30] Section 34 of the *Criminal Code* reads as follows:

Self-defence against unprovoked assault/Extent of justification

34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than necessary to enable him to defend himself.

(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.

[31] The elements of the defence under s. 34(1) are: (1) the accused was unlawfully assaulted by the victim; (2) the accused did not provoke the assault; (3) the force used by the accused was not intended to cause death or grievous bodily harm; and (4) the force used by the accused was no more than necessary to enable her to defend herself. See *R. v. Grandin*, 2001 BCCA 340, at para. 35. Under s. 34(2), the elements are: (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm; and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing or causing grievous bodily harm] to the adversary. See *R. v. Cinous*, 2002 SCC 29, at para. 93.

[32] If I am satisfied that there is an air of reality about each of elements in a self-defence defence, the Crown is put in the position of having to disprove each beyond a reasonable doubt.

[33] *R. v. Cinous*, cited above, sets out that there is an air of reality when there is “evidence on the record upon which a properly instructed jury acting reasonably could acquit” (para. 49). The Supreme Court of Canada goes on to explain the evidential burden on the accused:

[53] In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin, supra*; *Park, supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual

circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin, supra*; *Park, supra*; *Davis, supra*.

[34] Whether or not there is an air of reality to self-defence is usually considered in the context of a jury trial, where the judge applies this threshold test to reach a decision about whether the defence should be left with the jury. In this judge-alone context, I am also called upon to determine the substantial issue of whether the evidence that grounds the air of reality also has sufficient credibility and weight and leads to the factual inferences necessary to a successful defence.

[35] My ability to make any findings in this case is obviously complicated by the lack of reliable evidence led. The only witness to testify about what happened was Krista Dawson, who admitted that she was unable to remember much of what actually happened before or during the fight. Terrence McIntosh did not give evidence, and neither did the accused. I have evidence from Dr. Tadepalli about the nature of the injuries sustained by Ms. Dawson and photographs of the injuries to Ms. Dawson. Defence counsel asks me to look to this evidence to draw inferences about how the fight unfolded. It is in this evidentiary context that the Crown submits that there is no air of reality to the accused's defence.

[36] Returning to s. 34, the details about the start of the fight between Ms. Dawson and Ms. Ellis are, to say the least, murky. The complainant "doesn't really know what happened" and doesn't remember large parts of the evening. She doesn't remember if she went to Terrence's house with Terrence or after Terrence. She remembers being asked by Terrence to get Justina to leave his room and asking Justina to come upstairs with her, but she doesn't remember who made the first physical contact, who pushed

who first, whether she scratched and punched Justina in the face, or whether she had her in a headlock at one point. To complicate matters more, the Crown points out that Ms. Dawson may have been justified in using reasonable force to remove Ms. Ellis from Terrence McIntosh's room if she was, in fact, trespassing.

[37] Is this evidence sufficient to get past the air of reality threshold for the unprovoked assault requirement in s. 34(1) or the unlawful assault element common to both ss. 34(1) and 34(2)?

[38] The difficulty is that, rather than having a basis to support the defence, there is an absence of evidence about what actually happened and a proposed scenario by defence that, although plausible, lacks a factual foundation. To reach the air of reality threshold, there must be some evidence on each of the elements required by ss. 34(1) or 34(2), as the case may be. I am unable to find from the evidence of Krista Dawson that there is any evidentiary basis that would show Justina Ellis was unlawfully assaulted, or that Justina Ellis did not provoke the assault.

[39] I now turn to the wider s. 37 self-defence provision, which, as noted by the British Columbia Court of Appeal in *Grandin*, at para. 37:

... extends the ambit of the self-defence protection found in s. 34(1) and provides a wider defence to an accused. Unlike s. 34(1), s. 37 applies to an accused even if he provoked the assault upon him, applies to an accused who acts in the defence of others and does not consider intent in relation to the amount of force used.

[40] Section 37 of the *Code* reads:

Preventing assault / Extent of justification

37(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no

more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

[41] According to *Grandin* (para. 36), the elements of the s. 37 defence are:

- (i) that the accused used force to defend either himself or others from an assault; and
- (ii) that the force used was no more than was necessary.

[42] I find that there is at least an air of reality to these two elements. The evidence readily discloses a pushing match between the accused and Ms. Dawson, notwithstanding that Ms. Dawson does “not call it a fight”. Based on the evidence, it is at least arguable that the force used by Ms. Ellis in biting Ms. Dawson was no more than necessary. It is this second element on which the defence, in my view, depends, and the crucial question becomes whether the Crown has proven beyond a reasonable doubt that the force used by the accused was excessive or disproportionate in the circumstances.

[43] The Crown has submitted that *R. v. Hebert*, [1996] 2 S.C.R. 272, should be considered. In that case, the accused was charged with the aggravated assault of his father, the accused being a fit 30-year-old weighing 136 pounds and his father being a frail 75-year-old asthmatic. The accused said he was attempting to protect himself from punches and his father’s attempt to hit him with a fish club. The father received bruises and abrasions to the left and right sides of his face, the bridge of his nose and severe bruising of his sternum. Cory J. at para. 14 stated:

In dealing with s. 37 of the Code, the trial judge failed to instruct the jury that this provision, like s. 34, was equally applicable to the appellant's defence. The jury should have been told that if they believed, or had a reasonable doubt, that the appellant was preventing an assault by his father, s. 37(1) could provide an alternative basis for the appellant's defence.

[44] He added at para. 18 the following comment on "excessive force" in s. 37:

It would also have been appropriate for the trial judge to review for the jury what is encompassed in the term "excessive force" when viewed in the context of self-defence. Specifically, he should have referred the jury to the principle that an accused facing an upraised knife, or in this case an upraised fish club, cannot be expected to weigh with nicety the exact measure of responsive force. See *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.).

[45] Krista Dawson received a bite on the inside of her left arm. It is described by Dr. Tadepalli as a bruise and puncture mark but "superficial". I am not satisfied that the Crown has proven beyond a reasonable doubt that the force used by Justina Ellis was more than necessary. The Crown has not established that the circumstances facing Justina Ellis rendered her response excessive. The evidence of Krista Dawson is quite unreliable, given her state of intoxication and memory of the incident, except to establish that she was bitten. As a result, I have a reasonable doubt that the bite was excessive when considering the possibility, borne out by the photographic evidence, that Ms. Dawson had her arm around Justina Ellis' head. There is simply no reliable evidence for the Crown to establish excessive force other than the "superficial" puncture mark and bruise.

[46] I therefore acquit Justina Ellis of the charge of aggravated assault. The Crown has not disproven the defence of self-defence under s. 37, as it has failed to prove

Ms. Ellis used more force than necessary in defending herself from an assault by
Ms. Dawson.

VEALE J.