COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McDonald, 2012 ONCA 379
DATE: 20120606
DOCKET: C52136

Feldman, Armstrong JJ.A and Himel J. (*ad hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

Mackenzie McDonald

Appellant

John H. Hale and Anne Marie McElroy for the appellant

Lisa Joyal for the respondent

Heard: December 8, 2011

On appeal from the conviction entered on January 15, 2010 by Justice Douglas M. Belch of the Superior Court, sitting with a jury.

Himel J. (*ad hoc*):

I. Overview

[1] The appellant appeals his conviction for aggravated assault and asks that it be set aside and a new trial ordered. He argues that the trial judge did not properly instruct the jury on the defences of consent and self-defence. For the reasons that follow, I find that the trial judge erred in not allowing the defence of

consent to be put to the jury for their consideration. Accordingly, I would allow the appeal and order a new trial.

II. Background

[2] On September 27, 2008, the appellant, who was 19 years old at the time, and two friends drove to Kingston from Ottawa to take part in the annual Homecoming weekend festivities at Queen's University. After spending Saturday evening with friends, the appellant went to the Subway restaurant to get something to eat before going to bed. It was almost 2:00 a.m. and the place was packed. Darren Gibson and Gerard Traverse were in Kingston for the weekend doing renovations at the Canadian Tire store. They also went to the Subway restaurant late that night to get something to eat.

[3] There were approximately 30 to 40 people in line at the restaurant. Mr. Gibson entered the restaurant and went to the front of the line, taking a position in front of some people who were ahead of the appellant. The appellant, who had been waiting for approximately 30 minutes, told Mr. Gibson to go to the back of the line but Mr. Gibson ignored him. The appellant put his right hand on Mr. Gibson's left shoulder and told him to get to the back of the line. Mr. Gibson grabbed the appellant's right arm with both his hands. The appellant tried to get free but could not as Mr. Gibson would not release his arm. The appellant pulled his arm back and forth trying to break Mr. Gibson's hold. The two men were

struggling with each other. The appellant managed to pull his arm and tuck Mr. Gibson's head under his right arm in a chokehold while Mr. Gibson wrapped his arms around the appellant's waist and held on. Another patron began filming the incident with his cell phone just after the physical confrontation began.

[4] The appellant rotated to face the back of the line and attempted to move Mr. Gibson towards the front door. As Mr. Gibson began to let go, the appellant released him by lifting up the arm that had been around his head and neck. Mr. Gibson fell backwards, hitting his head on the hard tile floor. The appellant left the Subway restaurant immediately. He heard later that Mr. Gibson had been seriously injured.

[5] The appellant learned through his friends that the police were trying to identify who had injured Mr. Gibson. The appellant surrendered himself and gave a lengthy videotaped statement to police. He was arrested on a charge of aggravated assault.

[6] Mr. Gibson suffered life-threatening injuries including a fractured skull. He was in a coma for several days and has not regained normal brain functioning. His abilities to speak, read, drive a car, and care for his son are compromised. He cannot work.

[7] The jury found Mr. McDonald guilty of aggravated assault. The trial judge sentenced him to a period of imprisonment of two years less a day, followed by

three years' probation. He also made an order authorizing a DNA analysis and an order under s. 109 of the *Criminal Code* prohibiting the possession of any firearm for a period of 10 years. The appellant appeals the conviction only.

III. The Evidence at Trial

[8] As a result of the brain injury, Mr. Gibson was unable to relate details of the incident. His co-worker Gerard Traverse did not see the incident. He said, "it all happened so quick. I mean we're talking 10 to 15 seconds…". He heard Mr. Gibson's head hit the ground and said the "place cleared out". He described the appellant as "very, very aggressive, very very loud…he was putting on a show." Damian Hedlin, a Subway employee, saw a crowd gather and walked over. He observed that the appellant had Mr. Gibson in a headlock; he saw the appellant release Mr. Gibson and Mr. Gibson fall to the ground. He had not heard any words exchanged between the two men and did not see how the fight started. He said that the appellant did not push Mr. Gibson or apply any other force; he released him from the hold and he fell to the ground. Mr. Hedlin called 911 for assistance.

[9] Justin Patterson, who had applied first aid, did not see how the fight started. He saw Mr. Gibson leaning forward while bent at the waist in a chokehold, which lasted about 10 to 15 seconds and then fall backwards. He said, "somehow the victim fell backwards" and hit his head on the floor.

[10] Stefan Zalesky was standing near the front of the line when the two men came in and cut into the line. He said that Mr. McDonald objected and there was a shoving match. He testified that the appellant was swearing and started a verbal confrontation and shoved first. Mr. Zalesky pulled out his camera from his pocket when the shoving started and began filming the incident when Mr. Gibson was already in a headlock. He described the headlock as a "wrestling move", "pretty much to choke someone out, to make them pass out". The headlock lasted about 10 seconds. He said that the younger man had "thrown" the older man to the ground; however, he also said, "you can call it dropping too." Mr. Zalesky said that he believed that the older man didn't want to fight.

[11] Jameson Christopher Holman was in the Subway restaurant waiting to order food when he noticed a scuffle break out: "it was kind of like a jostling, pushing and shoving…" He said that he saw the appellant immobilize Mr. Gibson in "a mixed martial arts type headlock before lifting up gently and then dropping the victim." He did not see who started the pushing, but described the appellant as the aggressor as he was "significantly more aggressive compared to the victim". He said that the appellant had picked him up slightly and pushed him away, and that the fall was not violent but unfortunately the floor was very hard.

[12] Scott Paulseth was standing in line at the restaurant with friends when he noticed that Mr. Gibson and Mr. Traverse had come in and were standing to the side of the line up. The next time he turned around, he saw that Mr. Gibson and

Mr. Traverse were standing in front of Mr. McDonald. He did not see how the fight started but saw the appellant had Mr. Gibson in a headlock. He said that the altercation did not appear to be unsafe, that neither party appeared to be a threat to the other, and that the headlock "definitely" did not appear to be dangerous. Then he heard a thud, a loud noise. The confrontation took less than 20 seconds. Although he did not see who initiated contact, he believed Mr. Gibson to be the aggressor.

[13] Detective Steven Koopman testified that police are prohibited from using a hold called a "carotid restraint" or any hold around the neck except when there is a threat of serious bodily harm or death.

[14] The appellant testified that he was not looking for a fight that night. He said he did not do anything deliberately to cause Mr. Gibson to become unconscious and was not trained in martial arts, wrestling or any other technique that could render someone unconscious. When he let Mr. Gibson go, he did not intend for him to hit the ground. He did not realize that Mr. Gibson was unconscious. He left the Subway restaurant not knowing that Mr. Gibson had been injured. He hurried out because he was afraid that Mr. Gibson would get up and come after him. In his statement to Detective Koopman, Mr. McDonald said he thought that the falling backwards was a joke. The appellant's friend William Roantree testified that Mr. Gibson had started the fight by grabbing the

appellant's arm with his two hands and that nothing that the appellant did looked dangerous or "too harmful".

[15] The appellant is now 21 years old and a part-time student at Carleton University. He had been working at Scotiabank at the time of the incident but was unable to continue with that job because of this charge. He has no criminal record. At trial, he called good character evidence concerning his background. On the issue of violence, the character evidence was that he had a reputation of being "very balanced, even handed, and respectful of others…very measured".

[16] During the hearing of the appeal, this court viewed the video which Mr. Zalesky had taken of the incident and which was introduced as an exhibit at trial. The portion of the incident captured lasted between eight to ten seconds. It shows Mr. Gibson bent over at the waist, with his head faced towards the ground and his hands on Mr. McDonald's waist and buttocks.

IV. The Charge to the Jury and the Issue of Consent

[17] At trial, the appellant took the position that the defences of consent and self-defence should be put to the jury. The appellant argued at the pre-charge conference that the defence of consent is available even where serious bodily harm is inflicted as long as the accused did not intentionally cause the bodily harm. Counsel took the position that there was evidence that Mr. Gibson had consented to fight with the appellant. After the appellant placed his hand on Mr.

Gibson's shoulder, Mr. Gibson grabbed the appellant's arm and would not let go. Mr. Gibson also wrapped his arms around the appellant's waist. The appellant contended that Mr. Gibson had engaged consensually in the struggle, that there was nothing inherently dangerous in applying a headlock for five to ten seconds, and that the appellant had not intended to cause harm nor was he reckless. On this evidence, it was submitted, a defence of consent should have been left with the jury.

[18] The trial judge would not charge the jury on a defence of consent as it related to the offence of aggravated assault. He charged the jury according to the law outlined by the Supreme Court of Canada in *R. v. Jobidon*, [1991] 2 S.C.R 714. In that case, two men were involved in a consent fist fight which resulted in the victim being taken to hospital in a coma. The trial judge found that the accused did not intend to kill or cause serious bodily harm; however, he hit the victim as hard as he could. The Supreme Court of Canada upheld the conviction on manslaughter imposed by the Court of Appeal. The case discusses the policy reasons for drawing the line on vitiating consent for "consensual fist fights between adults" and discusses the role of consent in the criminal offence of assault. The court was mindful not to overextend the application of the principle by criminalizing activities that were never intended to be captured by the assault provisions of the *Criminal Code*.

[19] Applying *Jobidon*, the trial judge instructed the jury to disregard the defence of consent as he was of the view that it was not available on a charge of aggravated assault. However, he said it was available as a defence on a charge of simple assault. His instructions to the jury were as follows:

> Now in his jury address defence counsel suggested you were required to consider whether Mr. Gibson consented to this bodily harm. He did point out that it is my instruction on the law that you must follow, and my instructions to you on the law is that with respect to aggravated assault you do not consider consent in your determination of this charge.
>
> … Consent does not apply with aggravated assault, consent does apply with assault ...

[20] The trial judge also referenced the issue of consent in the "decision tree" which he handed to the members of the jury. He then reiterated his instructions and said:

> A couple other items that I am going to point out, I have already dealt with the issue of consent, that there cannot be consent to aggravated assault but there could be consent to assault. Remember to keep that different in your consideration.

Counsel for the respondent agreed with the charge to the jury on the issue of consent.

[21] On appeal, counsel for the appellant takes the position that *R. v. Paice*, [2005] 1S.C.R. 339 and *R. v. Quashie,* [2005] O.J. No. 2694 (C.A.) have clarified that consent may be available as a defence on a charge of aggravated assault

even where serious bodily harm is inflicted so long as the accused did not intentionally cause the serious bodily harm.

[22] Counsel for the Crown relies on the case of *R. v. Godin*, [1994] 2 S.C.R. 484, where the court held on a charge of aggravated assault that the Crown is not required to prove that the accused intended to cause bodily harm. The court wrote that the *mens rea* for aggravated assault is "objective foresight of bodily harm" and that: "It is not necessary that there be an intent to wound or maim or disfigure." The Crown argues that the *mens rea* requirement means that, if vitiating consent requires proving that the accused had the intent to inflict serious bodily harm, then the *mens rea* for aggravated assault will be raised from objective to subjective, which cannot be correct. Counsel for the Crown further submits that the cases of *Jobidon* and *Paice* should be interpreted in light of *Godin* and that any "consent" given by a complainant during the course of a fight will be vitiated if the Crown establishes that: (1) the accused intentionally applied force to the complainant; (2) the force the accused intentionally applied caused bodily harm to the complainant; and (3) a reasonable person, in the circumstances, would inevitably realize that the force the accused intentionally applied would put the complainant at risk of suffering some kind of bodily harm.

[23] Crown counsel also takes the position that the defence at trial had admitted certain facts concerning the intentional application of force and causation but contested the issue of objective foresight. As a result, the trial

judge instructed that jury concerning this element of the offence of aggravated assault and said that they needed to decide:

> Would a reasonable person, in the circumstances inevitably realize that the force McDonald intentionally applied put Gibson at risk of suffering some kind of bodily harm although not necessarily serious bodily harm or the precise kind of harm that Mr. Gibson suffered here?

[24] The trial judge then instructed the jury that if they were not satisfied beyond a reasonable doubt that this element had been proven, they must then decide: "...did Gibson consent to the force that McDonald applied?" This is the point at which the issue of consent was considered relevant. Crown counsel supports the order and the manner of the instruction.

V. Analysis on the Issue of Consent

[25] In *R. v. Paice*, there was a scuffle in a bar and the accused was challenged by the deceased to go outside and fight, which he did. They exchanged threats and the deceased pushed the accused once or twice. The accused hit the deceased in the jaw, and the deceased fell backward and hit his head twice. The accused then straddled the deceased and struck him twice more. The deceased died as a result of his injuries. The accused was charged with manslaughter. He argued that the deceased's consent to the fight vitiated criminal responsibility and that the trial judge used an incorrect test for determining whether consent is negated. The trial judge held that the defence of

consent did not apply if there was either intent to cause serious bodily harm or serious bodily harm was caused.

[26] The Court of Appeal ordered a new trial. The Supreme Court of Canada dismissed the appeal. The court held that the trial judge erred in formulating the test in the alternative. Rather, the court held at para. 18 that, in accordance with the *Jobidon* decision, consent cannot be nullified unless there is both intent to cause serious bodily harm and serious bodily harm is caused. The Supreme Court re-affirmed and refined the *Jobidon* decision and held that serious harm must be both intended and caused for consent to be vitiated.

[27] In *R. v. Quashie*, the Court of Appeal considered an appeal from conviction of the offences of sexual assault and sexual assault causing bodily harm where the complainant alleged that she had been sexually assaulted and that she was injured during the second assault. The appellant argued that the trial judge erred in failing to charge the jury on the issue of consent in respect of the offence of aggravated or sexual assault causing bodily harm and submitted that there was no suggestion that the accused deliberately inflicted injury or pain to the complainant. It was argued that whatever injuries the complainant suffered were incidental to sexual intercourse and that consent was an available defence. Justice Gillese reviewed the decision in *R. v. Paice* and wrote at para. 57:

> Based on the authorities, in my view, it was an error for the trial judge to fail to instruct the jury that in order for

> bodily harm to vitiate consent, they had to find both that the appellant had intended to inflict bodily harm on the complainant and that the appellant had caused her bodily harm.

[28] Accordingly, following *Paice and Quashie*, consent is vitiated only when the accused intended to cause serious bodily harm and the accused caused serious bodily harm. The defence of consent may, if the facts support it, be available in the context of a charge of aggravated assault. In the case at bar, in my view, the trial judge erred by removing the defence of consent from the jury for its consideration on the charge of aggravated assault.

VI. The Charge to the Jury and the Issue of Self-Defence

[29] The trial judge instructed the jury on the issue of self-defence with reference to s. 37 of the *Criminal Code*.

[30] Section 37 of the *Criminal Code* provides:

> 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.

[31] The trial judge instructed the jury that the first question to be answered is, "was McDonald unlawfully assaulted?" He explained this instruction as follows:

> ... first, it is essential, however, that McDonald was actually assaulted. It is not enough that McDonald believed that he might or would be assaulted by Gibson or some other person. If you are satisfied beyond a reasonable doubt that McDonald was not unlawfully assaulted, McDonald was not actually in lawful self-defence, your consideration of self-defence would be at an end....

[32] Defence counsel objected to the charge, arguing that s. 37 is "focused on the accused's perceptions in that moment regardless of who started or regardless of whether he was or was not being unlawfully assaulted." The trial judge refused to re-charge the jury that s. 37 does not require that the accused defend himself against an actual assault.

VII. Analysis on the Issue of Self-Defence

[33] Section 37 provides that a person may use force to defend himself if he uses no more force than is necessary to prevent the assault or the repetition of it. "Section 37 does not require a finding as to who the aggressor was": see *R. v. Grandin* (2001), 154 C.C.C. (3d) 408 (B.C.C.A.) at para. 54.

[34] The trial judge was correct in charging the jury only on s. 37 and not on s. 34 as well, as s. 37 provides a broader scope of justification for the use of force and was more appropriate in the circumstances of this case: see *R. v. Pintar* (1996), 110 C.C.C. (3d) 402 Ont. (C.A.) at 416.

[35] The defence of self-defence under s. 37, while it does not stipulate that the person must first have been unlawfully assaulted, does require that the person

be defending himself or anyone under his protection from assault. An assault is the intentional application of force or the attempt or threat to apply force to another person without that person's consent. The person must reasonably believe that he is being unlawfully assaulted. In those circumstances, he will be justified in using force to defend himself from an assault if he uses no more force than is necessary to prevent the assault.

[36] When instructing the jury, the trial judge stated that the jury had to consider three issues. First, they had to determine whether the appellant was unlawfully assaulted; without an unlawful assault, the defence of self-defence cannot be used. Second, the jury was told to determine whether the appellant used force to defend himself. Third, the jury was asked to determine whether this force was proportionate and necessary in relation to the threat, on a reasonable person standard. When describing what constituted an unlawful assault for the purposes of the first prong of the test, the judge stated that, "An unlawful assault is the intentional application of force by any means to the body of another person, here McDonald, without the other person's consent". Later, in this portion of the charge, the judge reiterated that consent was not to be considered in the aggravated assault context.

[37] The trial judge erred in setting out the issues for the jury to decide when he said that the jury had to consider whether the appellant had been unlawfully assaulted. He said: "first it is essential, however, that McDonald was actually

assaulted..." The trial judge erred in failing to define assault to include the intentional application of force or the attempt or threat to apply force to another person without that person's consent. The jury might well have believed that an actual touching was required, which would have been in error.

[38] During deliberations, the jury asked the third question: "What constitutes a person's consent to an unlawful assault?". In responding, the trial judge re-read s.37 of the *Criminal Code* and outlined "three essential ingredients of self defence" as:

> ... first of all, that the accused used force. I do not believe the jury will have any difficulty with that. Secondly, that the force used was to defend himself from assault, which means not only physical contact but the attempt or threat of physical contact or application of force. Finally, thirdly, that the force used was no more than necessary to prevent the assault or the repetition of it.

[39] In re-charging the jury in this fashion, the trial judge corrected the original error on the self-defence to assault instruction. Furthermore, it was not really in issue that the complainant grabbed the appellant's arm and that is what caused the appellant to put him in a headlock. The original error was corrected and was not of any real significance in the circumstances of this case. The Supreme Court has said on a number of occasions that, while the trial judge's charge to the jury was not perfect, it is adequate if it fulfills the function of instructions to explain the relevant law and so relate it to the evidence so that the jury may

appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty: see *R. v. MacKay,* [2005] 3 S.C.R. 607 at para. 1 citing *Azoulay v. The Queen,* [1952] 2 S.C.R. 495, at p. 503; see also *R. v. Cooper*, [1993] 1 S.C.R. 146 where Cory J. wrote at para. 43:

> It has been said before but it bears repeating that it would be difficult if not impossible to find a perfect charge. Directions to the jury need not, as a general rule, be endlessly dissected and subjected to minute scrutiny and criticism. Rather the charge must be read as a whole. The directions to the jury must, of course, set out the position of the Crown and defence, the legal issues involved and the evidence that may be applied in resolving the legal issues and ultimately in determining the guilt or innocence of the accused. At the end of the day, the questions must be whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues. I am satisfied that in this case the charge meets all these basic requirements. Particularly, the law pertaining to the legal issues was correctly placed before the jury. Any errors were immediately and repeatedly corrected.

[40] The appellate court is to consider the charge as a whole. In *R. v. Layton,* [2009] 2 S.C.R. 540 the court said at para. 40:

> The standard that a trial judge's instructions are to be held is not perfection. The accused is entitled to a properly instructed jury, not a perfectly instructed jury: see Jacquard, at para. 2. It is the overall effect of the charge that matters.

[41] While the overall charge on self-defence was not perfect, it was adequate in this case. The issue of consent being available as a defence to assault as opposed to aggravated assault may have caused some confusion in the context of the judge's charge on the issue of self-defence as the reason for the difference was not explained. This arises from the jury's final question which was, "What constitutes a person's consent to unlawful assault?" The verdict came in immediately after the answer was provided.

[42] While the trial judge did not err in the charge to the jury on self-defence, the error on the defence of consent may have caused confusion in the minds of the jury on the self-defence issue as well.

VIII. Conclusion

[43] The failure to leave the defence of consent with the jury in the circumstances of this case was a fundamental error that went to the heart of the defence. Accordingly, I would allow the appeal from conviction, set aside the verdict and order a new trial.

"S. Himel J."
"I agree K. Feldman J.A."
"I agree R.P. Armstrong J.A."

Released: June 6, 2012