

SUPREME COURT OF YUKON

Citation: *R. v. Allen & Allen*, 2010 YKSC 29

Date: 20100625
S.C. No. 09-01504
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

DOUGLAS ALLEN

AND

HEATHER ALLEN

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair
E.J. Horembala, Q.C.
André Roothman

Counsel for the Crown
Counsel for Heather Allen
Counsel for Douglas Allen

REASONS FOR JUDGMENT

INTRODUCTION

[1] These are my reasons for judgment on the trial of Heather Allen and Douglas Allen on charges of assault against Allan Bullers. Specifically, Douglas Allen is charged with aggravated assault by wounding and assault with a weapon, namely a knife. Heather Allen is charged with a common assault and also with aiding or abetting Douglas Allen in committing a common assault on Mr. Bullers. All these matters arose from events that took place in Whitehorse on October 18, 2008.

ISSUES

[2] Douglas Allen claims that he acted in self-defence under either ss. 34(2) or 37 of the *Criminal Code*. With respect to the latter section, he also claims that he was acting in the defence of his mother by preventing the repetition of an assault on her by Mr. Bullers. Heather Allen denies both committing a common assault on Mr. Bullers and that she did anything to assist or encourage Douglas Allen to assault Mr. Bullers.

[3] Both accused ask me to consider Mr. Bullers' propensity for violence in assessing his credibility.

[4] Sections 34(2) and 37 state as follows:

34(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causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and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.

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.

BACKGROUND

[5] Many of the facts in this case are not contentious.

[6] Heather Allen and Allan Bullers had a rocky on-again off-again relationship for about 4 ½ years, ending with the incidents on October 18, 2008. The relationship was punctuated by frequent arguments, occasional violence, and several periods of separation. Mr. Bullers has a history of alleged and admitted violence against women, including Heather Allen. Douglas Allen was aware of the difficulties in the relationship and had asked his mother to obtain a restraining order against Mr. Bullers.

[7] Ms. Allen was badly injured in a motor vehicle accident in April 2008, when Mr. Bullers was driving with undue care and attention. She temporarily discontinued the relationship after the accident. Ms. Allen was still recovering from her injuries on October 18, 2008.

[8] Unbeknownst to Douglas Allen, by October 18, 2008, his mother had once again resumed contact with Mr. Bullers. On that date, Douglas returned home and saw a car outside his residence that looked like that of Mr. Bullers. At 1:32 a.m. Douglas made a phone call to his mother and asked if she was with Mr. Bullers in the residence. Although she denied this, when Douglas entered the residence he at once suspected Mr. Bullers was present. Within moments of entering, Douglas heard his mother's loud voice from upstairs and immediately thought she was in danger and that Mr. Bullers was involved. He grabbed a large chef's knife from the kitchen and went upstairs.

[9] His mother opened the bedroom door and Douglas quickly went past her and kicked Mr. Bullers in the chest. Almost immediately after that, Mr. Bullers and Douglas Allen engaged in a physical fight on the bed in the bedroom and Douglas stabbed Mr. Bullers in the back with the knife.

[10] At Mr. Bullers' request, Heather Allen pulled the knife out of his back and he walked out of the residence seeking assistance. At 1:37 hours, Ms. Allen called 911 to get an ambulance for Mr. Bullers. The police arrived at the scene minutes later and Heather and Douglas Allen were arrested. The entire incident inside the residence lasted only about 5 minutes from the point Douglas entered until Mr. Bullers left.

[11] Mr. Bullers was successfully treated at Whitehorse General Hospital for a collapsed lung and was discharged 12 hours later.

[12] Ms. Allen is currently 39 years old. At the age of 30, with three children, Ms. Allen obtained a bachelor of science in nursing with a specialist certificate in peri-operative nursing. Douglas is her oldest child, born July 20, 1990. He was therefore 18 years old at the time of the alleged offences. Ms. Allen's two other sons were born in 1993 and 1996.

[13] Mr. Bullers is currently 38 years old. He has a grade 10 education and is generally employed as a truck driver. In 2008, he resided at his parents' home in the Porter Creek subdivision of Whitehorse. He has a 15-year old son from a previous marriage. The son currently resides with his mother in Edmonton.

[14] Heather Allen first met Mr. Bullers in March 2004. After purchasing a house in the Granger subdivision of Whitehorse in September 2004, Mr. Bullers moved in and the couple lived together for less than a month. Ms. Allen and her children later moved to a townhouse on Lewes Blvd.

[15] In April 2008, Mr. Bullers was employed as a long distance truck driver between Fort Nelson, British Columbia, and Whitehorse. Ms. Allen accompanied Mr. Bullers on one of these trips. Mr. Bullers was driving too fast for conditions and the semi-truck

rolled on a corner near Toad River, British Columbia. Mr. Bullers was uninjured, however Ms. Allen was badly injured in the accident and had to be medivaced to Fort Nelson and then to Edmonton. She suffered fractures to her neck, five ribs, her left arm and her right femur. She had to have surgery to install “hardware” in her left wrist and her femur. On her return to Whitehorse, she remained in hospital for about 3 ½ weeks. Ms. Allen was required to wear a hard neck collar for about six weeks and was on long-term disability until the beginning of January 2009. She says she still has restricted movements and cannot stand for long periods of time. She also cannot lift anything heavy and her left wrist is painful and does not have a full range of motion. She returned to Edmonton for surgery on her femur and left wrist in October 2009 and is scheduled for further surgery on her wrist at the end of this month.

[16] Ms. Allen did not see Mr. Bullers for some time after the accident, but gradually began to re-establish contact with him. She wanted to keep the relationship secret from her children until she and Mr. Bullers sorted out the remaining issues that were causing them conflict. By October 2008, Ms. Allen and Mr. Bullers were in frequent contact with each other by telephone calls, text messages and weekly visits. Mr. Bullers would come over to Ms. Allen’s townhouse on Lewes Blvd, but usually later at night when Ms. Allen’s children were in their rooms or asleep.

ANALYSIS

[17] In this trial, each of the accused has testified. Therefore, I must consider the principles of credibility applicable to the evidence of an accused in *R. v. W(D)*, [1991] 1 S.C.R. 742:

1. If I believe the evidence of an accused, then I must acquit that accused;

2. If I do not believe the evidence of an accused, but I am left in a reasonable doubt by it, then I must acquit that accused;
3. If I do not believe the evidence of an accused and I am not left in a reasonable doubt by that evidence, I must still consider whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt of the guilt of that accused; and
4. If I do not know whom to believe, as between an accused and the complainant, then I must acquit the accused.

[18] Cases subsequent to *W.(D.)* have made it clear that there is no particular magic in the ordering of the principles and that it is not mandatory to commence the credibility analysis with a discussion of the accused's evidence.

[19] Further, *W.(D.)* and other authorities prohibit me from treating the standard of proof as a "credibility contest". However, I am still bound to assess the evidence of an accused in the light of all of the evidence in the trial, including the testimony of the complainant, and in so doing, I must engage in some comparison of the evidence of the witnesses: See *R. v. Hull*, [2006] O.J. No. 3177 (C.A.), at para. 5; *R. v. Dinardo*, 2008 SCC 24, at para. 23; and *R. v. R.E.M.*, 2008 SCC 51, at para. 50.

[20] For reasons which will soon become obvious, I prefer to begin with my assessment of the evidence of Douglas Allen. I found Mr. Allen to be an impressive witness. While there were admittedly some inconsistencies between the warned statement he gave to the police and his testimony in the trial, those inconsistencies did not significantly detract from his credibility. On the contrary, the consistencies between the statement, taken less than two hours after the incident, and his testimony in the trial

were quite striking. Mr. Allen also testified in a careful and considered manner, without any hint of evasiveness or equivocation. I found his direct testimony to be thoughtful and articulate. On cross examination, he seemed to consider each question carefully, often pausing for several seconds before answering, and seeking clarification of the questions when necessary.

[21] Mr. Allen has some cognitive difficulties which have affected his ability to succeed in his formal education. In the fall of 2008, he was attempting to complete his grade 12 for the second year in a row. While on bail, he was required to reside with a relative in Prince George, British Columbia. There, he was assessed as working at a grade 10-level, and he hopes that next year he will be at a level of grade 11. In other words, I understand that, in the school year commencing this fall, he will be attempting for the fourth consecutive year to complete his grade 12. Mr. Allen states that he has always had difficulties at school, particularly in the areas of reading and writing, but that he is good at mathematics. Whatever the nature of his issues in that regard, they in no way detracted from his ability to clearly and credibly relate his evidence.

[22] In short, I believe Mr. Allen's evidence, both with respect to the context surrounding the events in question, and the particular incident which gives rise to the charges against him.

[23] However, in this particular case, that does not automatically lead to an acquittal. Because Mr. Allen has raised two alternative forms of self-defence, I must be satisfied that the evidence demonstrates that there is an "air of reality" to the presence of the essential elements of either of those defences. If so, then I must look to the Crown

prosecutor to see if he has disproven the possible application of both defences beyond a reasonable doubt.

[24] With respect to Heather Allen, I accept the Crown's submission that she lied about a number of things both before and immediately after the stabbing. For instance, she lied to her son about the presence of Mr. Bullers in the residence when he called her on the telephone. She then lied to the 911 operator suggesting that Mr. Bullers was her ex-boyfriend and that he had broken into her residence prior to the stabbing. She similarly lied to Auxiliary Cst. Avoledo, telling him that Mr. Bullers had broken into her house. Finally, she lied with respect to some of the details she gave to the police in her warned statement, such as:

- telling them that Mr. Bullers "just showed up" at her residence without her invitation that night;
- that she did not "actually see what happened" during the struggle between Mr. Bullers and her son; and
- suggesting that she was the one who hid the knife

[25] However, I accept Ms. Allen's explanations for these lies as reasonable, or at the very least, understandable. She admitted that she lied to Douglas Allen about having resumed her relationship with Mr. Bullers by candidly conceding that she effectively put the relationship ahead of her relationship with her own children. In other words, her relationship with Mr. Bullers at that time was more important to her than her children's concerns and fears about Mr. Bullers. In particular, when she received the phone call from Douglas in the early morning of October 18, 2008, she was aware that he and Mr. Bullers did not get along and that Mr. Bullers had threatened Douglas on a previous

occasion shortly before. I infer from her evidence on the point that she lied to Douglas so that he would not become upset about Mr. Bullers' presence and in order to prevent a confrontation between the two. Similarly, I infer that she lied to the 911 operator and Auxiliary Cst. Avoledo because she was attempting to divert police attention away from her son, and also because she was frantic and hysterical at the time. By the time Ms. Allen gave her warned statement at the RCMP detachment, she had calmed down somewhat, but was still attempting to protect Douglas, and to a lesser extent to minimize Mr. Bullers' involvement by saying that she didn't actually see what happened during his struggle with Douglas. She said to the police "I've got this tendency to just like, not want to say anything bad about Allan even in the worst situation." She testified that she similarly downplayed the events which led to her charge of assault against Mr. Bullers in February 2007, which I will come to in more detail shortly.

[26] Accordingly, I do not find that Ms. Allen's lies in this context significantly detract from the credibility of her evidence at trial.

[27] Further, there are many consistencies between Ms. Allen's evidence and that of her son, specifically with respect to what took place in the bedroom after Douglas entered. Since I believe Douglas' evidence in that regard, I find that it corroborates Ms. Allen's on the key points where the evidence of the two witnesses matched.

[28] A large part of the theory of the Crown vis-à-vis Heather Allen is that she was intoxicated by the five beers she had consumed over the course of the evening, and that this has adversely affected the reliability of her evidence and her memory of what happened. Ms. Allen's evidence is that she was feeling the effects of the beer she had consumed, but that she was not impaired. She estimated that she would have been

about a 4 on a scale of 1 to 10, with 1 being sober and 10 being drunk. Further, there was not a single mention from any of the five police officers involved at the scene, or from either of the two auxiliary constables, of Ms. Allen exhibiting any symptoms of intoxication. Therefore, I find as a fact that her level of intoxication has not adversely affected the reliability of the evidence that she gave here.

[29] I agree with the Crown that Mr. Bullers testified in a relatively straightforward and convincing fashion. However, there were a number of points about his evidence, which, when viewed in the context of the evidence as a whole, cause me to question his credibility. Taken individually, one could argue that some points are not significant and should be disregarded, but taken collectively, they ultimately cause me to reject Mr. Bullers' evidence where it conflicts with that of Ms. Allen and her son. The points are as follows:

1. When Mr. Bullers testified about Ms. Allen's purchase of the house in Granger, he said in direct examination that he gave her some money towards the purchase of the house, but on cross examination he contradicted himself and said that he had given her nothing to buy the house.
2. Mr. Bullers was unconvincingly absolute about several points in his evidence:
 - a) he said he "never" went over to Ms. Allen's residence unless he was invited;
 - b) he said that he had no issue with any of Heather's children and "never" yelled at them;

- c) he said that he was “never” verbally abusive to Heather in front of the children; and
 - d) in particular, he said he never called Heather a “bitch” in front of the children, which is contrary to Douglas’ evidence, which I accept, that Mr. Bullers often called his mother a “bitch”, and occasionally a “cunt”.
3. Mr. Bullers’ evidence of Ms. Allen being the aggressor in the bedroom prior to Douglas’ arrival simply defies common sense. I find it to be extremely improbable that someone in Ms. Allen’s frail condition, still recovering from very serious injuries sustained in the motor vehicle accident, would risk the pain and possible further injury that could result from wilfully engaging Mr. Bullers, a broad-shouldered, heavy-set and able-bodied male, in a physical fight.
 4. After he was stabbed, Mr. Bullers said he was “never” on the bed, but that he backed up and was standing, looking over his left shoulder to see the knife handle sticking out of his back. Further, after getting Ms. Allen to take the knife out of his back, he said he left the bedroom. However, that evidence does not account for how the left leg of Douglas’ pants got stained with what Cst. Fredette believed to be blood.
 5. The general tone of Mr. Bullers’ evidence was that he had no particular issue with Douglas. He said that Douglas had never been previously hostile towards him and the two had never argued. However, it was clear from Douglas’ evidence that he absolutely disliked Mr. Bullers. Given the

frequency of their contact over the course of a 4 ½ year relationship, I would expect Mr. Bullers to at least be aware of Douglas' animosity towards him and make some reference to it in his testimony. In particular, Douglas testified about two specific incidents where Mr. Bullers threatened him; once when he was skipping school with some friends and once about a week prior to the stabbing.

6. When Heather Allen came into her darkened bedroom at about 1:30 a.m., it was not disputed that she dropped a glass of juice on the floor. Ms. Allen explained that it was because she missed placing the glass on the small night table, which was beside the bed. In direct examination, Mr. Bullers said that this woke him up and he got up out of bed to clean up the mess. However, on cross examination, he changed his evidence and said that he did not clean up the juice, but simply picked the glass up off the floor. That evidence struck me as quite improbable. Mr. Bullers was already asleep on the far side of the bed closest to the window when Ms. Allen entered the darkened room. While he may well have been woken up by the sound of the falling glass, there was no logical reason for him to get out of bed, and in the dark, walk around to Ms. Allen's side of the bed, and pick up the glass off the floor. Further, his evidence about this was contradicted by that of Ms. Allen.
7. In his direct examination, Mr. Bullers said that after he threw Douglas on the bed he couldn't say who threw the first punch. However, in cross

examination by Mr. Allen's counsel, he contradicted himself by saying that it was Douglas who hit him first.

8. Mr. Bullers said that he grabbed Ms. Allen's cell phone from her while he was lying on the side of the bed closest to the bedroom window. Although he could not account for what happened to the cell phone afterwards, it ultimately ended up on the floor on Ms. Allen's side of the bed, just in front of the small night table. Thus, the location of the phone in that area seems more consistent with Ms. Allen's testimony, which I accept, that she prevented Mr. Bullers from grabbing the phone from her, but that she dropped it when he pushed her off the bed onto the floor.
9. Mr. Bullers was quite emphatic that, after the stabbing, as he was going down the stairs, he turned around to see Heather and Douglas Allen at the top of the stairs, with Heather holding the knife in her hands "smiling". He also said that neither of them said anything at that point. In cross-examination, he repeated that Heather was smiling and that she didn't seem too concerned or shocked about the fact that he was stabbed. It seems to me this was a deliberate attempt by Mr. Bullers' to portray Ms. Allen in a cruel and calculating light. However, his evidence directly conflicts with the record of the 911 call in which Ms. Allen is clearly frantic, hysterical and frequently sobbing, and speaking to both Mr. Bullers and the 911 operator.
10. Mr. Bullers testified that Ms. Allen was "quite intoxicated" that evening. However, as I stated earlier, there was no evidence from any of the seven

police witnesses involved at the scene that Ms. Allen exhibited any symptoms of intoxication whatsoever.

[30] I was also given evidence of Mr. Bullers' propensity for violence. Counsel were agreed that this evidence was admissible because of its relevance to determining who was the initial aggressor in both the exchange between Mr. Bullers and Ms. Allen, prior to Douglas Allen's arrival in the bedroom, and in the exchange between Mr. Bullers and Mr. Allen after the latter's arrival. The evidence consists of the following:

1. In the 1990's, Mr. Bullers' former wife laid charges against him, which were dismissed. Although the charges were unspecified, given what follows, I infer that they involved some form of domestic violence;
2. On April 1st and 15th, 2001, Mr. Bullers was charged with assault by his former wife. She alleged that Mr. Bullers hit her head on a towel rack, hurt her shoulder, and punched a hole in the bathroom door. The charges were resolved by Mr. Bullers agreeing to be placed on a peace bond with conditions not to contact his former wife for a period of nine months;
3. On July 2nd, 2002, an ex-girlfriend, D.S., alleged that Mr. Bullers had uttered a threat to her to cause bodily harm;
4. In August 2002, Mr. Bullers agreed to be placed on a peace bond not to have contact with D.S. for a period of six months;
5. On one occasion while Mr. Bullers was residing with Ms. Allen in the house in Granger, he got into an argument with her and she ran into her youngest son's room. Mr. Bullers followed her and grabbed her by her shirt. He threw her down the hallway and she landed on her tailbone,

suffering an injury to her back and whiplash. She sought medical attention for her injuries and took about three months to heal. Although Mr. Bullers denied this incident, I accept Ms. Allen's evidence on the point;

6. Ms. Allen testified to other abusive acts by Mr. Bullers where he would slap her, restrain her and even bite her. On one occasion at the Granger residence, after she demanded that he move out of the house, he became angry and tore off a banister railing, punched a couple of holes in a wall and broke a garage window. Although Mr. Bullers denied these incidents, I accept Ms. Allen's evidence on the points;
7. In February 2007, Ms. Allen charged Mr. Bullers with assault. The two got into an argument about Ms. Allen's desire to go to the RCMP detachment to pick up Douglas. She told Mr. Bullers to leave her residence. There was a physical altercation during which Mr. Bullers held her mouth shut, resulting in a cut on the inside of her mouth. He also struck her in the face causing a bruise and a black eye. Her front tooth was also chipped and she suffered from pain in the mouth for about two weeks. Mr. Bullers pled to guilty to that assault; and
8. Mr. Bullers is currently in another romantic relationship. The woman involved has also charged Mr. Bullers with assault and alleges that he grabbed her by the neck. Mr. Bullers has pled not guilty to that assault and it has yet to be disposed of.

[31] Mr. Bullers currently weighs 200 lbs and is 5'10" tall. He testified that he was significantly lighter in October 2008, however the photographs of his exposed torso in the hospital at that time do not support that evidence.

[32] In my view, considering the evidence as a whole, including the evidence of Mr. Bullers' violent disposition, it seems more likely that not that he was the initial aggressor in the incident between him and Ms. Allen on the bed prior to Douglas' arrival. It also seems more likely that once Douglas entered the bedroom and kicked Mr. Bullers. Mr. Bullers reacted by punching Douglas, pinning him to the bed and punching him repeatedly, rather than Mr. Bullers' version of events, in which he portrayed Douglas as a willing participant in a mutual fist fight just prior to the stabbing.

[33] Based on my assessment of the credibility of the two accused and that of Mr. Bullers, I make the following findings of fact:

1. Shortly after Douglas turned 13, Heather Allen began her relationship with Mr. Bullers. Douglas eventually came to realize that Mr. Bullers was verbally abusive towards his mother. More often than not he would be present when they were arguing, and Mr. Bullers would often call her a "bitch" and occasionally a "cunt". Douglas started to realize Mr. Bullers was "no good" for his mother.
2. When Mr. Bullers moved in with the family in the house in Granger, he was both verbally and physically abusive towards Ms. Allen. Douglas came to feel uncomfortable living under the same roof as Mr. Bullers. Although he never saw Mr. Bullers physically assault his mother, he did see the after-effects, such as his mother having to take time off work to

recuperate and having to see a physiotherapist. Ms. Allen described to Douglas in general terms what Mr. Bullers had done on these occasions. When Mr. Bullers was told by Heather to move out of the Granger house, he lost his temper, ripping a railing off a wall, punching a few holes in a wall, and breaking a garage window.

3. There was an incident at the Granger residence in which Douglas and his brothers were playing video games and Mr. Bullers and his mother were arguing. Mr. Bullers became angry and confronted Douglas and his brothers about why they disliked him as much as they did. Douglas was “terrified” of Mr. Bullers on that occasion and his mother told him not to do anything to make him react in any way.
4. After experiencing Mr. Bullers’ behaviour at the Granger residence, Douglas found him to be irrational when angry and believed that he did not give a lot of thought to his actions and did not “look ahead”.
5. After Douglas and his family moved to Lewes Blvd., there was an occasion when he and some friends skipped school and went to his home for something to eat. While in the home, Mr. Bullers arrived and became very angry, shouting at the boys to leave the house. Douglas was “terrified” on that occasion of what Mr. Bullers was going to do. Further, after Douglas and his friends left the home, Mr. Bullers again approached the group on Lewes Blvd. and threatened them. Douglas was scared because he thought that Mr. Bullers was going to beat them all up.

6. There was another incident at Lewes Blvd., during which Douglas learned of Mr. Bullers' violent disposition. This was the assault charge from February 2007, referred to earlier. Douglas had been living out of the house for about one month at a friend's place. He was acting out and being rebellious because of his mother's relationship with Mr. Bullers, whom he absolutely disliked by that time. On this particular occasion, Douglas had been detained at the Whitehorse RCMP detachment because he was intoxicated. Ms. Allen came to pick him up at the detachment and had a black eye. She eventually told him that Mr. Bullers was responsible for the injury. Douglas advised his mother to get a restraining order against Mr. Bullers.
7. About one week later, Douglas and his mother were attempting to re-establish their relationship and were in the Rogers Video outlet renting a movie. Mr. Bullers stormed into the store, came up to them and was "freaking out", asking Ms. Allen why she was charging him with assault. Again, Douglas was terrified of what Mr. Bullers' next action might be.
8. About a week prior to October 18, 2008, Douglas had been at home sleeping for several hours, and when he woke, he noticed Mr. Bullers in the house with his mother. Douglas had arranged for a friend to come over to spend the night. When he went downstairs to greet his friend, his mother and Mr. Bullers came down the stairs. When his mother opened the door to get Mr. Bullers out of the house, Douglas said that Mr. Bullers looked at him with "a facial expression of hatred", snapped his fingers,

pointed at Douglas and said "I cannot wait until the next time I see you Doug". Douglas felt that this was plainly a threat against him.

9. In the late afternoon on October 17, 2008, Douglas was at home with his mother, his uncle Paul and his brothers. He and his mother and uncle each consumed one or two beers. They then had supper, and afterwards played some video games and watched some television. At about 11 o'clock, Douglas decided to go for a walk downtown.
10. At about 11:30 p.m. on October 17, 2008, Ms. Allen telephoned Mr. Bullers to ask him whether he would be willing to pick up some beer for her from the off sales outlet. Mr. Bullers agreed, but as he had no cash, he arranged to meet Ms. Allen outside of her residence to get her bank card. Mr. Bullers then purchased a six-pack of beer and returned to Ms. Allen's residence.
11. At that time, Ms. Allen was preparing a meal for the following day, which she planned to share with her family to celebrate her birthday the following week. After delivering the beer to Ms. Allen, Mr. Bullers went upstairs, got undressed and got into bed. Although there was no spoken invitation by Ms. Allen for Mr. Bullers to sleep over that night, I find that the invitation was implicit. Ms. Allen continued with her meal preparation until about 1 o'clock in the morning, during which time she finished the last of the five beers she consumed between 5:30 p.m. the previous afternoon and about 1 a.m. on October 18.

12. Ms. Allen went upstairs into her bedroom carrying her cell phone and a glass of juice. The lamp on the small night table could only be turned on by plugging it into the wall socket. When Ms. Allen entered the room, she initially relied on the light from the hallway. However, she turned off the hallway light switch just outside her bedroom and closed the door, which completely darkened the room. She missed placing the glass of juice on the small night table and it dropped to the floor. This woke Mr. Bullers, who complained that she was intoxicated again. That angered Ms. Allen who replied "Well, if you have such a problem with me drinking, why did you bring me alcohol and why are you here?"
13. Douglas returned home at about 1:30. He noticed a green Mustang automobile on Ketz Road, in the vicinity of his residence, which was similar to Mr. Bullers' vehicle. He texted his mother with the following message "Is that faggot in our household?", but the message failed. He therefore decided to telephone his mother on her cell phone, as he was approaching the front door to the residence, and unlocking the door with his key. As he entered the residence, he made contact with his mother on the cell phone and asked her if Mr. Bullers was in the home. She denied that he was there. Douglas asked if that was his car outside, and again Ms. Allen denied that Mr. Bullers was present. Douglas said "If he is here, you shouldn't lie to me", or words to that effect, however Ms. Allen again denied that Mr. Bullers was present.

14. Ms. Allen received the call from Douglas shortly after she and Mr. Bullers began their argument about Ms. Allen's drinking. Immediately after the call ended, Mr. Bullers asked who was on the phone and Ms. Allen replied "None of your business". Mr. Bullers then grabbed Ms. Allen's left arm and wrist causing her significant pain. She tried to push him away with her right arm and the two struggled. Ms. Allen attempted to use both her legs and her knees to get Mr. Bullers to release his grip. He responded by grabbing her around her right calf and then ultimately pushed her off the bed, causing her to fall on the floor and drop the cell phone, which she was still holding in her right hand.
15. Ms. Allen screamed at Mr. Bullers "Get the fuck out of my house". She stood up and screamed the same command again and began walking towards the bedroom door, with the intention of opening the door and turning on the hallway light to illuminate the room. At that point, Ms. Allen was in extreme pain.
16. Douglas heard his mother's scream, followed by some loud shouting from the upstairs area of the home. He instantly assumed that Mr. Bullers was present and was assaulting his mother. He felt his skin crawl and his hair standing up on end, as his "animal brain" reacted in a "fight or flight" manner. He grabbed the largest knife he could find in the kitchen, thinking to himself "You do not want to stab him, you want to intimidate him and get him to leave". He then stomped up the stairs with his boots on in order to make his presence known. When he reached the top of the stairs, the

door to his mother's bedroom started to open and he took two large strides and was instantly in front of the door facing his mother.

17. When Ms. Allen opened the bedroom door, Douglas went rushing by her and she said "Get him out".
18. Ms. Allen was crying and very upset. Douglas did not pay too much attention to her as he immediately walked past her into the room. Douglas is uncertain of what exactly his mother said, but he interpreted it as a direction to get Mr. Bullers out of the room and out of the house. He did hear his mother say "Get him," but thought she meant either get him out or get him away.
19. When Douglas entered the room he saw Mr. Bullers seated on the front corner of the bed closest to the window. He immediately walked up to him and kicked him in the chest.
20. The blow knocked Mr. Bullers off balance momentarily, however he quickly stood up and said "Do you want to go, Doug?"
21. Douglas hesitated and considered placing the knife on the dresser in the bedroom.
22. Before giving Douglas an opportunity to respond, Mr. Bullers punched him on the right side of his face with a left hook, and then immediately threw Douglas onto the bed.
23. Douglas realized that his hesitation had given Mr. Bullers an opportunity to gain control of the situation.

24. Mr. Bullers was positioned with his left leg on the floor and his right leg in between Douglas' legs, such that Douglas could not use his legs to fight back. Mr. Bullers was also using the weight of his body to keep Douglas pinned on the bed. Douglas is 6'1" tall and currently weighs 200 lbs.
25. Mr. Bullers began punching Douglas on both sides of his face. Douglas still had the knife in his left hand and was using his right hand to block some of the blows. Bruises to Douglas' face were later observed by Csts. Fredette and Wright at the RCMP detachment.
26. At one point, Douglas put down the knife briefly and unsuccessfully used both of his hands to try to push Mr. Bullers off him.
27. Douglas again reached for the knife and said to Mr. Bullers "Get the fuck off me. I've got a knife, I will stab you."
28. Mr. Bullers continued punching Douglas on both side of the face.
29. Douglas reached around with his left arm and stabbed Mr. Bullers on the outside of his left shoulder blade close to his left armpit. He did this in order to avoid the critical area of the spine and the heart. The knife, which has an eight-inch blade, penetrated about four inches into Mr. Bullers' torso.
30. Mr. Bullers immediately shifted his weight to his right, but was still positioned over top of Douglas, in particular over top of his left leg. At that time, the blood from Mr. Bullers' wound dripped onto the left leg of Douglas' pants.

31. With his right leg free, Douglas grabbed Mr. Bullers' head and kned him on the left side of his head, causing bruising to Mr. Bullers' left temple area. This allowed Douglas to squirm out from underneath Mr. Bullers.
32. Mr. Bullers asked Douglas why he had stabbed him. He also began screaming to Ms. Allen repeatedly to pull the knife out.
33. Ms. Allen had been standing off to the side of the bedroom during the entire struggle between Mr. Bullers and Douglas. She pulled out the knife from Mr. Bullers' shoulder and briefly ran out of the room with it, placing it on the top of the washing machine, immediately next to the top of the stairs. By this time, Ms. Allen was terrified and hysterical.
34. Mr. Bullers reached into his pocket to grab his cell phone and asked Douglas to dial 911. Douglas replied "I hate you". He also blamed Mr. Bullers for ruining his life and told him to call the police himself. Mr. Bullers responded "You're going to jail Doug. You're going to jail."
35. Ms. Allen returned into the bedroom and came up from behind Mr. Bullers, who was still leaning over the bed. Using her good right arm, Ms. Allen assisted Mr. Bullers to his feet. It was at this point that the blood from Mr. Bullers' wound stained the right centre area of Ms. Allen's white tank top shirt.
36. Douglas walked out of the bedroom, saw the knife, and hid it underneath the washing machine.
37. Mr. Bullers walked out of the bedroom, and stumbled down the hallway, at one point smearing the blood from his wound on a portion of the wall.

38. Ms. Allen also walked out of the bedroom down the hallway about that time. Her middle son opened the door to his bedroom, which was on the left as one faces the stairwell, closest to the top step of the stairs. Ms. Allen told the son to call the police, which he did on Ms. Allen's home phone. The record of that 911 call has Mr. Bullers in the background yelling various things such as "I'm calling 911", "I'm toast", "Doug's going to jail", "He come in and stabbed me", "I want him arrested and in prison". During that same phone call, Ms. Allen said to Mr. Bullers "Fuck you. You fucking assaulted him", and to the 911 operator that Mr. Bullers was "beating me up". As stated earlier, she also lied to the 911 operator by saying that Mr. Bullers had broken into the residence. Ms. Allen was frantic, hysterical and often sobbing during the 911 call.
39. Mr. Bullers left the residence and made his way onto Ketz Road, by which time the first police vehicle arrived on the scene, driven by Cst. Muller, who was paired with Auxiliary Cst. Avoledo.
40. Csts. Wright and Fredette were the next RCMP officers to arrive at the scene. They were followed shortly afterward by Cpl. MacLeod, Cst. Moran, and auxiliary Cst. Milne.
- 41.** Cst. Wright called in to the residence for Heather and Douglas Allen to come outside, as they were being placed under arrest. The arrest proceeded as "high risk takedown" with guns drawn by the RCMP constables involved. After Ms. Allen and Douglas were placed in handcuffs, they stood outside the residence under the guard of the

auxiliary constables for a brief period, while the other police officers made arrangements to deal with Ms. Allen's other two sons and some friends who were sleeping over.

CONCLUSIONS

[34] With respect to Douglas Allen, I find there is an air of reality to his defence of self-defence under s. 34(2) of the *Criminal Code*. Although I find that Mr. Allen was the initial aggressor when he entered the bedroom, by kicking Mr. Bullers once in the chest, that fact alone does not disentitle him to the benefit of the defence: See *R. v. MacIntosh*, [1995] S.C.J. 16, at para. 42. Following that kick, there was a brief break in the action where Mr. Bullers asked "Do you want to go. Doug?", and before Douglas responded, Mr. Bullers struck him in the head with a left hook and immediately threw him onto the bed. Since I have found that Douglas did not strike back while he was repeatedly punched by Mr. Bullers on both sides of his head, I am satisfied that there is an air of reality to the requirement that Douglas reasonably perceived that he was being unlawfully assaulted by Mr. Bullers at that time. Further, given Mr. Bullers' age relative to Douglas, his life experience and his size and weight, as well as Douglas' belief based on his previous experience with Mr. Bullers that he was irrational when angry and did not "look ahead", I am satisfied that there is an air of reality to the requirement that Douglas reasonably apprehended grievous bodily harm to himself if he allowed the assault by Mr. Bullers to continue. Grievous bodily harm need only be injury that is very severe or serious: see *R. v. Paice*, [2005] S.C.J. No. 21, at paras 41 – 43. Finally, the evidence gives an air of reality to the requirement that Douglas Allen believed on

reasonable grounds that he could not preserve himself from grievous bodily harm otherwise than by the force he used.

[35] There is no proportionality requirement in s. 34(2). Therefore, the fact that Mr. Allen wounded Mr. Bullers by stabbing him in the back does not disentitle him to the defence, if there is an air of reality to the other necessary elements.

[36] Since I am satisfied that there is an air of reality to all of the essential elements in s. 34(2) of the *Criminal Code*, I must look to the Crown to see whether it has disproven the defence beyond a reasonable doubt. In that regard, based on my findings of fact, I am left with a reasonable doubt about the application of s. 34(2) to this case.

[37] Since s. 34(2) provides a complete defence to Mr. Allen on both charges against him, I find him not guilty on both counts.

[38] Having arrived at those verdicts, it is unnecessary for me to consider Mr. Allen's reliance upon s. 37 of the *Criminal Code* in the alternative. However, in the event I am error in my conclusion under s. 34(2), I will say that I am not satisfied that it was "necessary" for Mr. Allen, either in his own defence or in the defence of his mother, to immediately kick Mr. Bullers in the chest on entering the bedroom. At that point, Mr. Allen could not have been under any reasonable perception that he was about to be assaulted by Mr. Bullers. Mr. Bullers was sitting on the far corner of the bed, completing the act of getting dressed. He said nothing and did nothing to Mr. Allen to cause Mr. Allen to believe that he was in imminent danger of being assaulted. Further, the same can be said with respect to Ms. Allen. At that point, she was standing near the door of the bedroom, several feet away from where Mr. Bullers was seated. She also had a safe exit out of the bedroom into the hallway. Even if Mr. Allen reasonably perceived

that she had been previously assaulted by Mr. Bullers when he heard her scream, I find that any suggestion that he reasonably perceived a repeat assault by Mr. Bullers upon her was imminent does not have an air of reality.

[39] With respect to Heather Allen, I did not believe Mr. Bullers when he said that she struck him on the side of his head when he took her cell phone away from her. Rather, I prefer her evidence, which was corroborated by the bruising to her left hand and wrist and her right knee area. Since I believe Ms. Allen's evidence on the point, I must acquit her of the charge of common assault upon Mr. Bullers.

[40] Finally, with respect to the charge against Ms. Allen that she aided or abetted Douglas Allen in committing his assault upon Mr. Bullers, the Crown's theory is that she did so either by using the words "Get him" or by striking Mr. Bullers in the back, or attempting to pull him off Douglas, when he and Douglas were struggling on the bed. With respect to the words used by Ms. Allen, I have accepted her evidence she said "Get him out". That finding is consistent with the understanding Douglas had that, even though he did not hear everything his mother said, she was directing him to get Mr. Bullers out of the bedroom and away from her. Such a direction does not constitute an encouragement to have Douglas assault Mr. Bullers. Further, given my finding that Ms. Allen was off to the side of the room the entire time Mr. Bullers and Douglas were struggling on the bed, there is no evidence she did anything physically to assist Douglas in assaulting Mr. Bullers. Accordingly, I find her not guilty of Count #4 as well.