COURT OF APPEAL OF YUKON

Citation: *R v. Simms*,
2014 YKCA 8

Date: 20140430
Docket: 13-YU722

Between:

Regina

Respondent

And

Roxanne Simms

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Cooper

On appeal from: An order of the Territorial Court of Yukon,
dated January 31, 2013, (*R. v. Simms*, Whitehorse Docket 12-00665)

Oral Reasons for Judgment

Counsel for the Appellant:	G. Coffin
Counsel for the Respondent:	L. Gouaillier
Place and Date of Hearing:	Whitehorse, Yukon April 30, 2014
Place and Date of Judgment:	Whitehorse, Yukon April 30, 2014

Summary:

This case is an appeal from conviction on a charge of aggravated assault arising out of a two-sided domestic dispute that led to a stabbing. The issue on appeal was whether the trial judge erred in law in finding that the accused could not rely on self-defence as a defence to the charge.

Held: The appeal is allowed. The conviction is set aside and a new trial is ordered. The trial judge erred in law when he failed to discuss all the possible factors that may allow for the accused's defence of self-defence. The trial judge erred in determining that failure to retreat rendered the defence unavailable. Failure to retreat does not preclude an accused from relying on self-defence in the context of defending oneself in one's own home or in the context of defending oneself somewhere other than one's home. Therefore, the conviction must be set aside.

The defence request for an acquittal is denied as it is not possible for the appeal Court to properly assess the claim of self-defence based solely on court transcripts.

INTRODUCTION

[1] **COOPER J.A.**: Ms. Simms and the complainant had a three-year relationship which was characterized by dysfunction, substance abuse, and conflict. In the late evening and early morning hours of September 7th and 8th, 2012, they were once again in conflict. Ms. Simms went to the apartment they shared to retrieve her belongings. An altercation occurred. Ms. Simms stabbed the complainant and, as a consequence, was convicted of aggravated assault. She appeals that conviction, arguing that the trial judge erred in finding that the defence of self-defence was not available.

[2] For the reasons that follow, I would allow the appeal, set aside the conviction, and order a new trial.

FACTS

[3] The trial judge largely accepted the evidence of Ms. Simms and a witness who corroborated aspects of Ms. Simms' evidence on matters leading up to the physical confrontation.

[4] Ms. Simms had returned to the apartment at approximately 8:00 a.m. to retrieve her belongings. She entered through the front door while the complainant was asleep in the bedroom. The complainant woke up and, to use the words of the

trial judge, "viciously assaulted Ms. Simms." The complainant returned to the bedroom and closed the bedroom door. Ms. Simms retrieved a knife from the kitchen. She testified that she wanted to get her purse, cash, and cell phone, all of which were in the bedroom. The break between Ms. Simms and the complainant lasted only seconds. The complainant came out from the bedroom a second time and grabbed Ms. Simms by the hair. Ms. Simms slashed at him with the knife, causing a wound to his arm, which required 16 stitches to close.

ISSUE ON APPEAL

[5] The issue in this appeal is whether the trial judge erred in finding that the defence of self-defence was not available.

ANALYSIS

[6] Given certain statements made by the trial judge in his decision, I find it necessary to address the issue of whether Ms. Simms was entitled to be in the apartment or whether she was a trespasser. If she was a trespasser, there is an argument that the complainant had the legal right, pursuant to s. 41 of the *Criminal Code*, R.S.C. 1985, c. C-46, to use force to remove her and that resistance by her was unlawful. Any such conclusion is without merit.

[7] The evidence was contradictory on how Ms. Simms came to be living at the apartment again, after her return from Iqaluit. It is not disputed that she was living at the apartment at the relevant time. It is not disputed that only the complainant's name was on the lease, however the circumstances by which that came about are concerning. In any event, a finding that a person is a trespasser requires a much more nuanced analysis than just determining whose name is on the lease. Such an approach invites all sorts of mischief in the domestic context (see *R. v. Girton*, 2003 BCSC 1494).

[8] With respect to self-defence: at the relevant time, the *Criminal Code* provided, under s. 34(1):

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

[9] The four essential elements of self-defence were:

- an unlawful assault;
- no provocation by the accused;
- no intention to cause death or grievous bodily harm; and
- no more force used than is necessary.

[10] Failure to retreat does not preclude an accused from relying on self-defence. In the context of defending oneself in one's own home, it is an error to consider whether the accused had an opportunity to retreat and did not do so. In the context of defending oneself somewhere other than one's home, the opportunity to retreat is but one factor to be considered in determining whether the accused used no more force than was necessary and was acting in self-defence. It is not dispositive of the issue (*R. v. Deegan*, 1979 ABCA 198 (CanLii), (1979) 49 C.C.C. (2d) 417 (Alta. C.A.); *R. v. Proulx*, 1998 CanLii 6317 (B.C.C.A.);

[11] A judge is presumed to know the law and is not required to articulate in detail the reasoning used to reach his decision. However, the reasons given must be sufficient for a reviewing court to satisfy itself that the judge applied the correct legal tests and principles.

[12] It is apparent from the decision that the failure of Ms. Simms to leave the apartment following the initial assault on her by the complainant was significant to the trial judge. At different parts throughout the relatively short judgment, he states: "The accused easily could have left" "But what is fair to conclude is that she had every opportunity to flee and should have done so" "Several seconds have gone by since Mr. Lethbridge last hit her, and she did not leave" "The accused, having had the opportunity to leave, chose to stay."

[13] The trial judge goes on to find that s. 34 of the *Criminal Code* is not applicable.

[14] The trial judge does refer to Ms. Simms having been assaulted immediately prior to the incident and being assaulted at the time of the incident. He also makes mention that Ms. Simms had been assaulted by the complainant on prior occasions. However, these references are made in the context of relating the facts as he finds them.

[15] The various factors that would play into a determination of whether the accused was acting in self-defence are at no time discussed in relation to the potential defence as the trial judge had determined that failure to retreat renders the defence unavailable for consideration. This is an error in law and for this reason the conviction must be set aside (*R. v. Northwest*, 1980 ABCA 132 (CanLii).

[16] The defence asks that an acquittal be entered. This request cannot be acceded to. It is not possible for this Court, on the basis of the transcript, to determine the proper balancing of the various factors that the Court must consider when assessing a claim of self-defence.

[17] Accordingly, I would allow the appeal, set aside the conviction and order a new trial.

[18] **BAUMAN C.J.B.C.**: I agree.

[19] **DONALD J.A.**: I agree.

The Honourable Madam Justice Cooper