

Case Name:
R. v. McPhee

Between
Her Majesty the Queen, Respondent, and
Jordan McPhee, Appellant

[2018] O.J. No. 6535

2018 ONCA 1016

Docket: C61680

Ontario Court of Appeal

A. Hoy A.C.J.O., P.S. Rouleau and M.L. Benotto JJ.A.

Heard: June 15, 2018.
Judgment: December 12, 2018.

(44 paras.)

Appeal From:

On appeal from the conviction entered by Justice Douglas K. Gray of the Superior Court of Justice on May 11, 2015, with reasons reported at 2015 ONSC 3001.

Counsel:

Michael Lacy, for the appellant.

Nancy Dennison, for the respondent.

The judgment of the Court was delivered by

1 A. HOY A.C.J.O.:-- On September 12, 2013, the appellant, Jordan McPhee, threw a single

punch at Kevin Dhillon, his cellmate at the Maplehurst Correctional Facility. The punch landed on Dhillon's face, beside his left eye, and broke his orbital bone. Dhillon required surgery as a result.

2 The appellant was convicted of aggravated assault, contrary to s. 268 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, by maiming Dhillon. He has served the sentence that was imposed.

3 The appellant argues that his conviction should be vacated and a new trial ordered in accordance with s. 686(5) of the *Criminal Code*, or, in the alternative, that a conviction for the included offence of assault causing bodily harm under s. 267(b) of the *Criminal Code* should be substituted.

4 For the following reasons, I would dismiss the appeal.

I. THE BACKGROUND

5 The appellant made home-made alcohol in potato chip bags or garbage bags that he kept in his bunk in the cell. The fermenting process attracted fruit flies and produced an odour. Dhillon found this disturbing.

6 On the day of the incident, around lunchtime, the appellant and Dhillon returned to their cell. The appellant and Dhillon recounted different versions of what happened after that.

7 Dhillon testified that:

- * there were many fruit flies in the cell at that time;

- * he asked the appellant to clean his bunk;

- * Dhillon was sitting on the lower bunk; and

- * without warning, the appellant climbed down the ladder from the upper bunk and punched Dhillon in the face.

8 The appellant testified that:

- * upon their return to the cell, Dhillon invited him to fight;

- * the appellant came down the ladder from the upper bunk, facing inward towards the bunks;

- * he was angry at Dhillon and not afraid of him;

- * Dhillon, who was standing about a foot to a foot and a half away, threw the first punch with his right arm and a second with his left;

- * Dhillon's punches either did not land or grazed the appellant's shoulder; and

- * the appellant then came out of a crouch and hit Dhillon, with all of his strength, "with a right", like a roundhouse punch, where Dhillon's left eye met his cheekbone, knowing that the bones in that area were very fragile and vulnerable.

9 It was common ground at trial that the appellant punched Dhillon in the face, thereby breaking his orbital bone. The issues at trial were whether the defence of self-defence or consent precluded a conviction, and whether what occurred constituted "maiming" as referred to in s. 268 of the *Criminal Code*.

10 The trial judge concluded that the defence of consent was not available. This conclusion is not challenged on this appeal.

11 The trial judge also concluded that he was satisfied beyond a reasonable doubt that none of the three elements of self-defence were present. Thus, the defence of self-defence was not available. The appellant challenges this conclusion in several respects, which I will discuss further below.

12 Finally, the trial judge concluded that what had occurred constituted "maiming" on each of what he described as the two possible definitions of that word established by the jurisprudence. First, the extent of the damage to Dhillon rendered him unable to fight back; and, second, Dhillon lost, to some extent, the ability to focus his eyes as a result of his injury.

II. THE ISSUES ON APPEAL

13 The appellant argues that:

1. The trial judge erred in his assessment of whether the single punch the appellant threw at Dhillon was "reasonable in the circumstances" (the third element of self-defence) pursuant to s. 34(1)(c) of the *Criminal Code*.

2. The trial judge erred in his credibility assessment by:

- (a) approaching his task as a credibility contest;
- (b) failing to consider and weigh the specific and inherent frailties in Dhillon's evidence, contrary to *R. v. McGown*, 2016 ONCA 575, 341 C.C.C. (3d) 53; and
- (c) relying on factors that were not capable of corroborating the material aspects of Dhillon's evidence.

3. In the alternative, a conviction for the included offence of assault causing bodily harm should be substituted. The first definition of "maiming" adopted by the trial judge -- whether the bodily harm to Dhillon was to such an extent that it rendered him less able to fight back or defend himself -- was wrong in law. As to the second definition, there was no evidence that Dhillon lost the use of some part of his body on a permanent basis.

14 The second issue -- whether the trial judge erred in his credibility assessment in any of the ways alleged by the appellant -- only arises if I conclude that the trial judge erred in his assessment of whether the single punch the appellant threw at Dhillon was "reasonable in the circumstances". This is so for two reasons.

15 First, an accused person cannot rely on the defence of self-defence if the Crown disproves any one of the three elements of self-defence beyond a reasonable doubt: *R. v. Cormier*, 2017 NBCA 10, 348 C.C.C. (3d) 97, at para. 40.¹ The three elements of self-defence are set out in s. 34(1) of the *Criminal Code*:

34 (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

If I conclude that the trial judge did not err in his assessment of the third element of self-defence -- *i.e.* whether the act committed was reasonable in the circumstances -- then the defence of self-defence fails. It is not necessary to consider the trial judge's assessment of any other element.

16 Second, in contrast with his analysis of the other elements of self-defence, the trial judge considered the third element (whether the act committed was reasonable in the circumstances), and the factors set out under s. 34(2), assuming the facts as related by the appellant in his testimony were accurate. Therefore, any of the errors that may have occurred in the trial judge's credibility assessment do not affect his analysis of the third element of self-defence.

17 In these reasons, I ultimately conclude that the trial judge did not err in determining, beyond a reasonable doubt, that the punch administered by the appellant was not reasonable in the circumstances and therefore that the third element of self-defence was absent. Accordingly, the defence of self-defence fails. Given this conclusion, it will not be necessary to go on to consider whether the trial judge erred in his credibility assessment in the course of his analysis of the other two elements of self-defence -- *i.e.* (1) that the appellant believed on reasonable grounds that there was a threat of force being made against him, and (2) that the punch delivered by the appellant was for the purpose of defending or protecting himself from the use or threat of force.

18 Below, I first address the trial judge's analysis of the third element of self-defence -- whether the act committed by the appellant was reasonable in the circumstances -- and then turn to the "maiming" issue.

III. THE TRIAL JUDGE'S ANALYSIS OF THE THIRD ELEMENT OF SELF-DEFENCE

19 Subsection 34(2) of the *Criminal Code* sets out a non-exhaustive list of factors the court is to consider in the course of determining whether the act committed was reasonable in the circumstances pursuant to s. 34(1)(c). It provides as follows:

- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
 - (a) the nature of the force or threat;
 - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
 - (c) the person's role in the incident;

- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
 - (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

20 The portion of the trial judge's reasons in which he analyses the question of whether the act committed by the appellant was reasonable in the circumstances is at paras. 170 to 176:

[170] In any event, I am satisfied beyond a reasonable doubt that the act committed was not reasonable in the circumstances. In coming to that conclusion, I have considered the factors set out in section 34(2) of the *Code*. I have considered those factors assuming the facts as related by Mr. McPhee are accurate.

[171] It would not have been reasonable to administer the punch delivered by Mr. McPhee having regard to the nature of the threat by Mr. Dhillon. According to Mr. McPhee, Mr. Dhillon had invited conflict, by saying "do you want to take it to the back?" and "do you want me to come up there?" Mr. McPhee responded, he says, by descending from his bunk. If there was a threat at that stage, he could have simply stayed where he was. Even after he descended, according to him, there was an attempted punch, or two punches, by Mr. Dhillon that missed the mark. It was totally unnecessary in the circumstances to deliver a blow that disabled Mr. Dhillon.

[172] There were ample other means available to respond to the potential use of force. As noted, Mr. McPhee could have simply stayed in his bunk. He could have called for help. He could have just ignored Mr. Dhillon. Even after he descended from his bunk, once Mr. Dhillon missed the mark, he could still have called for help or grabbed Mr. Dhillon without punching him.

[173] As noted earlier, Mr. McPhee is taller and heavier than Mr. Dhillon. He would have an advantage in any physical confrontation.

[174] There had been no prior use or threat of force. While there had been some conflict between them, there had been no suggestion of any physical confrontation.

[175] The response by Mr. McPhee, if that is what it was, was totally out of proportion to Mr. Dhillon's ineffectual punches that did not land. As noted earlier, other options were clearly available.

[176] For these reasons, I am satisfied beyond a reasonable doubt that the Crown has shown that the defence of self-defence is not available.

21 The appellant argues that the trial judge erred in his analysis of the third element of self-defence in the following ways:

1. by effectively imposing a requirement that the appellant wait until he was successfully assaulted first before acting, or that he retreat in circumstances where there was no real opportunity to do so;
2. by losing sight of the principle that an accused is not required to weigh to a nicety the force used in response to the perceived use or threat of force;
3. by reasoning backward from the injury to a finding of excessive force; and
4. by giving no consideration to factors that supported a claim of reasonableness, including the following:

- a. the appellant and Dhillon were alone in a locked cell;
- b. the appellant had been told by Dhillon that the reason he had been moved to the appellant's cell was for fighting with another inmate;
- c. no guards were visible from the cell and there was a delay of several minutes after the appellant called for help before any guards arrived;
- d. the appellant took no further action beyond the single punch and rebuffed Dhillon's alleged attempts to continue fighting (once he was able to get up again following the appellant's punch); and
- e. the appellant was the one who immediately called for help once he saw the injury to Dhillon.

22 I reject these arguments.

23 When determining whether the act committed was reasonable in the circumstances, s. 34(2)(b) of the *Criminal Code* required the trial judge to consider "whether there were other means available to respond to the potential use of force". In my view, this is exactly what the trial judge did at para. 172 of his reasons.

24 Similarly, s. 34(2)(g) of the *Criminal Code* required the trial judge to consider "the nature and proportionality of the person's response to the use or threat of force". In doing so, the trial judge did not impose upon the appellant a requirement that he weigh "the exact measure of necessary defensive action" to a nicety or hold him "to a standard of perfection", contrary to this court's decisions in *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.), at p. 111, and *R. v. Cunha*, 2016 ONCA 491, 337 C.C.C. (3d) 7, at para. 24. Nor did the trial judge reason backwards from the injury Dhillon sustained to a finding of excessive force.

25 As the trial judge recounted, on the appellant's version of events, the appellant chose to descend from his bunk and engage with Dhillon and then punched Dhillon in the left eye area in response to two ineffectual punches that did not land. This was not a situation where, in the heat of the moment, an accused fails to "weigh to a nicety" the force he uses in response to the perceived use or threat of force. Here, the appellant, who testified he was not afraid of Dhillon, chose to engage with Dhillon and then weighed the force that he decided to apply in response to Dhillon's ineffectual punches. Specifically, the appellant testified that he used all his strength to administer the blow, and he directed it to where Dhillon's left eye met his cheekbone, knowing that the bones in that area were very fragile and vulnerable. The trial judge assessed proportionality on this basis.

In this context, I read the trial judge's description of the blow at para. 171 as one "that disabled [Dhillon]" as an attempt to reflect the amount of force used, and, therefore, the nature of the blow generally, and not as an indication that the trial judge reasoned backwards from the consequences of the blow in assessing proportionality.

26 In conclusion on this first issue, I am of the view that the trial judge did not err in his assessment of whether the punch thrown by the appellant was reasonable in the circumstances. Thus, the defence of self-defence fails, and it is not necessary to go on to consider whether the trial judge erred in his credibility assessment.

27 I turn next to the maiming issue.

IV. THE MAIMING ISSUE

28 Subsection 268(1) of the *Criminal Code* provides that:

Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

29 The indictment was drafted solely with reference to maiming. The appellant was charged that "he did maim [Dhillon] thereby committing an aggravated assault, contrary to Section 268 of the Criminal Code of Canada."

30 "Maim" is not defined in the *Criminal Code*.

31 Based on his review of *R. v. Schultz* (1962), 133 C.C.C. 174 (Alta. S.C.(A.D.)), leave to appeal refused, [1962] S.C.R. x, and the cases that have come after it, the trial judge concluded that there were two possible definitions of the word "maim". He wrote, at para. 155:

One contemplates that a complainant has lost the use of some part of the body or bodily function, and the other is where the assailant causes bodily harm to the victim to such an extent that it renders the victim less able to fight back or to defend himself or herself. The latter meaning has clearly been established here. The extent of damage to [Dhillon] clearly rendered him unable to fight back. However, it has also been established that [Dhillon] has lost, to some extent, the ability to focus his eyes as result of his injury. That is sufficient to constitute maiming; see *R. v. Stehniy*, [2010 ONCA 269].

32 To recap, the trial judge applied two definitions of "maim" to the facts in this case. The first definition of "maim" applied by the trial judge requires "bodily harm to the victim to such an extent that it renders the victim less able to fight back or to defend himself or herself." The second definition applied by the trial judge requires the loss of "the use of some part of the body or bodily function".

33 The appellant argues that *Schultz* is the source of the first definition of "maim" applied by the trial judge -- *i.e.* "bodily harm to the victim to such an extent that it renders the victim less able to fight back or to defend himself or herself." The appellant submits that *Schultz* was wrongly decided, and therefore the first definition of "maim" applied by the trial judge was wrong in law. He argues that if this were the standard for maiming, most cases of assault causing bodily harm would be artificially elevated to aggravated assault. He submits that the correct standard requires that the person lose the use of some part of his or her body, coupled with proof beyond a reasonable doubt that the person's loss of the body part or function is, or will be, permanent. He argues that the evidence in this case falls well short of that standard.

34 The respondent submits that the trial judge correctly found that there are two possible definitions of the word "maim", and it was open to him to find that the evidence met both definitions in this case. The first definition is satisfied because Dhillon testified that he could not do anything physical after the appellant struck him. With respect to the second definition, the respondent acknowledges that Dhillon regained his eyesight and did not lose the ability to focus his eyes as a result of his injury, and the trial judge therefore erred in finding otherwise. However, the respondent submits that the second definition applied by the trial judge is satisfied by Dhillon's testimony that his eye twitches and cannot adjust to sunlight, and that, as a consequence of the surgery on his eye, he feels numbness, "like some sort of pain", on top of his gums, all the time.

35 As I will explain, I am satisfied that "maiming" within the meaning of s. 268 of the *Criminal Code* is made out in this case.

36 Both definitions relied upon by the trial judge consider the resultant loss of the use or function of some part of the victim's body; however, the first definition particularizes the body function that must be lost -- specifically, the ability to fight back or defend oneself. I agree with the appellant that whether or not a victim has been maimed should not turn on whether the bodily harm inflicted upon the victim rendered the victim less able to fight back or to defend himself or herself.

37 Under old English law, a person who had been deprived of the use of a body part capable of being used to fight was "maimed", and was not subject to trial by ordeal. As one of the texts to which the court in *Schultz* referred at p. 178 of its reasons explains:

The distinction between wound and mayhem was of procedural importance. The man who had been maimed, that is, who had been deprived of the use of a member which would be serviceable in a fight, was not bound to offer or accept battle. In such case one or other of the parties was sent to the ordeal, until the Lateran Council of 1215 abolished that mode of trial; in later days the appellee had to submit to the verdict of a jury. [Footnotes omitted.]²

We are long past the days of trial by ordeal. In today's society, there is no sound policy reason to still require that the loss of the use or function of some part of the victim's body affect the victim's ability to fight back or defend himself or herself in order to constitute "maiming". In my view, the

second definition applied by the trial judge, with its focus on the loss of the use of some body part or some bodily function without further qualification on the type of body part or function lost, recognizes this. In essence, the second definition is the natural evolution or modern adaptation of the first definition.

38 Also, unlike the first, "fighting-focused" definition, the second definition works in harmony with s. 268(3) of the *Criminal Code*, which provides:

- (3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where
 - (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
 - (b) the person is at least eighteen years of age and there is no resulting bodily harm.

This subsection's inclusion of "maims" would not make sense if the meaning of "maims" was restricted only to those injuries affecting the ability to fight back or defend oneself.

39 Similarly, the second definition can be easily applied to any complainant, including infants. In contrast, the first, "fighting-focused" definition can only be used with those complainants who possessed the ability to fight back in the first place.

40 Accordingly, I depart from *Schultz* insofar as it supports a definition of "maiming" tied exclusively to the ability to fight back or defend oneself.

41 That said, I agree with *Schultz* to the extent that it recognizes that the loss of the use or function of some part of the victim's body need not necessarily prove to be permanent in order for "maiming" to be made out. This is because *Schultz*, and the cases that followed it,³ focused on the victim's ability to fight back or defend himself or herself in the fight in which the injury was sustained, rather than the victim's ability to do so in future fights. This acknowledgement that permanence is not always required also makes sense, given modern medicine's increasing ability to correct or repair what were once thought to be permanent injuries.

42 In this case, it is helpful to consider the nature of the injury suffered by Dhillon. The appellant's punch to the left side of Dhillon's face broke Dhillon's orbital bone. The nurse at the correctional facility who saw Dhillon before he was taken to hospital by ambulance described his

face as "caved in". The doctor who examined Dhillon before surgery described the fracture as significantly displaced and comminuted. The injury was not transitory. Corrective surgery was required. Following surgery to repair the damage, it took about one week before Dhillon could eat properly again and about two weeks before he could open his left eye and speak normally again. Moreover, even now, Dhillon's eye twitches and he cannot adjust his eye to the sun. The latter issue affects Dhillon when he is driving, because he has to keep his eye down and cannot focus on the road. Even when driving at night, when lights are coming right at Dhillon, he has to look somewhere else because he cannot visually focus on the light. Dhillon also continues to experience pain in his gum area.

43 In sum, Dhillon suffered a significant loss of the use or function of certain parts of his body -- specifically, his left eye and mouth. He was maimed and the appellant was properly convicted of aggravated assault.

V. DISPOSITION

44 For the reasons above, I would dismiss the appeal.

A. HOY A.C.J.O.

P.S. ROULEAU J.A.:-- I agree.

M.L. BENOTTO J.A.:-- I agree.

1 I note here that the trial judge erred when he set out the elements of self-defence, because it appears that he required the Crown to disprove all three elements beyond a reasonable doubt in order to render the defence unavailable to the appellant. This error does not affect my analysis of the issues on this appeal. The error inured to the appellant's benefit at trial because it held the Crown to an even higher standard than necessary. Nevertheless, the law is clear that the Crown need only disprove beyond a reasonable doubt one of the elements of self-defence for this defence to fail.

2 See Sir Frederick Pollock and Frederic William Maitland's *The History of English Law*, 2d ed. (Cambridge, UK: The University Press, 1952) vol. 2 at p. 490.

3 For example, in *R. v. Litthemane*, 2015 ONCJ 565, at para. 74, the preliminary inquiry judge cited *Schultz* to support the idea that "[m]aim' means to injure a person to the extent that they are less able to fight". Although the preliminary inquiry judge commented that assault causing bodily harm might be the more appropriate charge on the evidence given that the complainant's injuries "involved some degree of bodily harm and not much more", he

ultimately concluded that there was some evidence that would meet the definition of aggravated assault by maiming because, after the complainant was hit on the head with a baseball bat during a fight, "he was out of commission in terms of further involvement". Similarly, in *R. v. Armstrong*, 2002 BCSC 1824, at para. 22, the trial judge was satisfied that the accused had maimed the first complainant because her injuries (a broken arm, two broken ribs and seriously bruised legs and arm) "resulted in [the complainant] being less able to resist the continued assault upon her and less able to defend herself." The trial judge was also satisfied that the accused had maimed the second complainant because, although his injuries were less severe and did not affect him for as long as those suffered by the first complainant, the broken wrist suffered by the second complainant "rendered [him] less capable of defending himself": at para. 26.

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