R v. Jobidon

This scenario is based on a real case. Students will play the roles of counsel at the Supreme Court of Canada appeal hearing. The judgments of the three levels of court (Superior Court, Ontario Court of Appeal and Supreme Court of Canada) can be accessed at: www.canlii.ca (search Federal – SCC database using keyword 'Jobidon').

Case History

The appellant Jobidon was acquitted on June 15, 1987 at Sudbury, on an indictment charging that he:

> "…On or about the 19th to the 20th of September, 1986 at the Regional Municipality of Sudbury in the District of Sudbury, did unlawfully kill Rodney Haggart and thereby did commit manslaughter contrary to the Criminal Code of Canada."

The Ontario Attorney General appealed against the acquittal to the Ontario Court of Appeal. The appeal was allowed; the acquittal was set aside and a verdict of guilty of manslaughter entered. The matter was remitted to the trial judge for sentence. The appellant appealed to the Supreme Court of Canada.

Facts

On September 18, 1986, the appellant and deceased arrived separately at the Woodland Hotel approximately ten miles north of Sudbury, Ontario. The deceased (25) arrived at approximately 10:00 PM to celebrate his upcoming wedding. He and his group met other friends in the downstairs lounge. They drank beer and watched the strippers in the downstairs bar for approximately two hours.

Shortly after midnight most of the group moved to the upstairs lounge where a band was playing. Prior to moving upstairs, there had been some conversation involving the deceased, the deceased's brother, and another friend regarding an incident that had occurred between the friend (Krolick), and the Jobidons during the previous week. The deceased told Krolick that he had heard that he had been 'sucker punched' in the face and Krolick confirmed this. A 'sucker punch' was defined as a punch that came from behind, unexpectedly with no warning and for no apparent reason. Although the 'Jobidon' name was not expressly mentioned, Krolick understood that the deceased knew who had punched him. It was also mentioned that the Jobidons were in the upstairs lounge at that time.

The appellant (21) had never met the deceased nor had he any predisposition toward him. He and his older brother Raymond were in the upstairs bar watching the band.

The First Fight

There were slight variations in the evidence of the witnesses as to their accounts of this incident in the upstairs lounge. The trial judge found that sometime between 12:15am and 12:30am, the deceased approached the appellant, stood in front of him and asked whether his name was Jobidon. The appellant responded 'yes' and the deceased then asked if he knew Glen Krolick to which the appellant also answered 'yes'. The deceased then asked the appellant to go outside. The trial judge accepted the evidence of the appellant that it was obvious from the deceased's tone and manner that he was inviting the appellant outside to fight. The deceased was standing so close to the appellant, who was seated, that he was unable to stand up. The deceased refused to step back. The appellant gave the deceased a light push on the chest and stood up.

As the appellant stood up, the deceased pinched him on the nose causing the appellant's nose to bleed and his eyes to water. The deceased and appellant grabbed each other, scuffled and fell to the ground where they wrestled, rolled over, knocked over tables and chairs and tried to punch each other. Each managed a few punches but the deceased administered more and got the best of the fight.

As a result of the altercation, the appellant received a bloody nose, a cut on his back, a bloodshot or bruised eye and a sore jaw. The deceased may have received a small cut on his lip. During the fight, the appellant's hat and shoes came off. He testified that the deceased could hit powerfully and had won the fight. The deceased was approximately 6' 1" and weighed roughly 175 pounds. He was a trained boxer and a member of a boxing club, although the appellant did not then know that fact . The appellant was 5' 10" and weighed between 165 and 170 pounds. He was, nonetheless, a fit and powerful man.

The owner of the hotel separated the two men and told the appellant and his brother to leave the tavern. The deceased and members of his group proceeded to the lobby outside the upstairs lounge. The appellant, who felt it unfair that he should be asked to leave as he had not initiated the altercation, at one point moved toward the outside and then returned to demand and receive his unfinished beer. The deceased and appellant exchanged words to the effect that the fight was not over and they would finish later.

The appellant and his brother went outside with the hotel owner. The appellant testified that he was waiting for his brother's wife, to drive them home. The appellant stated that he was frightened as the deceased outweighed him and particularly as he and his brother were out numbered by the deceased's group. The deceased's group consisted of six men, at least three of whom were over 6 feet in height and over 200 pounds in weight while the appellant, as previously noted, was 165 to 170 pounds and his brother was only 140 pounds.

The trial judge accepted the evidence that the appellant was somewhat scared of the deceased and his group and was also of the view that at least one of the reasons the appellant waited outside was to '…renew the fight if the opportunity presented'. Although the appellant was somewhat apprehensive about the size and number of the deceased's group, this did not prevent him from wanting to encounter the deceased and renew the fight to settle the score. The trial judge found that the appellant expected a further fight but that he honestly and reasonably

believed that the deceased by his previous conduct and by his words in the lobby had consented to a further, fair fistfight.

The Second Fight

Approximately fifteen minutes after the end of the first fight, the deceased and his group left the hotel. The deceased did not appear to be in pain or discomfort, nor was there evidence to suggest that he had received any significant injury during the first fight. There was a car parked at the hotel entrance close to the Jobidons. A concrete sidewalk divided the hotel from the parking lot and it was raised a few inches from the lot with a sharp 90-degree corner angle. The deceased and his group, en route to the parking lot, walked between the parked car and the Jobidons.

The deceased and the appellant both referred to each other as 'low lifes' and several witnesses heard words to the effect 'let's go for it right now'. During the exchange, the deceased asked '…do you want the same thing again' and the appellant responded that the deceased would not be able to get in a 'sucker punch' again. The brother of the deceased and the brother of the appellant started to fight and moved further into the parking lot.

The deceased stood in front of a parked car with his back to the vehicle, facing the appellant. All witnesses, except the appellant, indicated that the deceased was standing with his hands at his side when the appellant lunged at him and struck him in the face. The deceased fell back, face upwards onto the hood of the car. He appeared to some witnesses to be out cold. He was not moving nor did he offer resistance to the appellant's further blows. The appellant hit the deceased two or three time on each side of the head in the space of a few seconds while the deceased was lying on the hood, his head lopping back and forth as a result of the blows. There was no interval between the deceased's fall onto the hood of the car and the continued punching. Some onlookers intervened and the appellant retreated. The deceased slid from the hood of the car into a sitting position on the ground and then fell over sideways. His head landed near the sharp corner of the raised sidewalk.

Two members of the deceased's group testified that during the fight, they had attempted to intervene but were restrained by members of the crowd. One of the deceased's friends stated that he stepped in and punched the appellant on the nose in an effort to remove him from the deceased. He stated that he was then grabbed 'by a couple guys' who threw him to the ground and told him that it was a 'fair fight'. He stated that he was told that if he didn't leave them alone, he was next. Another friend of the deceased testified that he ran toward the deceased while the appellant was punching him as the deceased 'wasn't fighting back'. Before he could intervene, someone grabbed him from behind and indicated that 'It's a fair fight, just leave it alone'.

The observer, who the trial judge found to be the most reliable, testified that the blows came very quickly. He stated that it happened so fast that he expected that the deceased would bounce off the hood and resume the fight, but that he never did.

Medical Evidence

The deceased was admitted to the hospital emergency department in a deep coma at 1:50am on Friday, September 19, 1986. The attending physician determined that the deceased's blood alcohol content was somewhat in excess of 160 mgs. of alcohol in 100 mls. of blood.

At approximately 4:00am, as a result of a catscan, widespread bleeding in the film surrounding the brain was detected. Surgery was performed to place an intracranial catheter in the brain to reduce swelling, but this procedure and other efforts were unsuccessful. A pronouncement of cerebral death was made at 9:55am on September 20, 1986. The trial Judge, based upon the opinions of the attending neurosurgeon and pathologist, concluded that death was caused by one or more blows administered by the appellant during the course of the second altercation.

Trial Judge's Findings

The trial judge concluded that the appellant had not meant to kill the deceased nor to cause him serious bodily harm. He further concluded that the appellant believed the purpose of the fight was to hit the other man as hard as physically possible until he gave up or retreated. The trial judge stated that physical injury was intended and contemplated and that minor injuries such as bruises, cut or split lips, black eyes, and bloody noses were intended or the possibility of a more serious injury such as a broken nose was contemplated. The trial judge found that the appellant believed he was fighting fairly and that he did not intentionally depart from the kind of fight to which they had consented. He noted that the events all occurred in the 'heat of combat' and that everything took place in seconds during which there was no time for reflection or judgment. He further found that the appellant struck the later blows under the reasonable but mistaken apprehension that the fight was still continuing and the deceased was still capable of fighting back.

The trial judge in entering the acquittal made the following final observation:

> 'Because Rodney Haggart agreed to a fair fist fight, and because I have found that the accused did not intentionally exceed that consent, and that he struck the last blows under a reasonable but mistaken apprehension that Mr. Haggard was still capable of returning the fight and was trying to, I therefore find there was no assault, because the Crown has not established lack of consent.'

POINTS IN ISSUE IN THIS APPEAL

1. Did the Ontario Court of Appeal err in law in holding that 'consent' as expressed in Section 265 of the Criminal Code is limited to the application of force where bodily harm is neither caused nor intended?

2. Did the Ontario Court of Appeal err in law in holding that the codified requirements of an assault as expressed in Section 265 of the Criminal Code were to receive a common law interpretation which expanded the scope of liability?