

**IN THE DISTRICT COURT
AT MANUKAU**

**CRI-2014-092-008822
[2016] NZDC 4779**

NEW ZEALAND POLICE
Prosecutor

v

THOLFIKAR ALKHAFAGI
Defendant

Hearing: 8 March 2016
Appearances: Sergeant A Heffernan for the Prosecutor
M Edgar and D Ratima for the Defendant
Judgment: 10 March 2016

JUDGMENT OF JUDGE G T WINTER

Introduction

[1] The defendant Mr Alkhafagi and his alleged victim Mr Partap were complete strangers to each other that is until the morning they met at Mr Partap's garage. The police allege at the instant when they met the defendant beat up the victim, put him to the ground and then kicked him about the body viciously with his steel capped boots.

[2] The identity of each party, time, place of meeting and the fact that there was a fight between these two strangers is not disputed. The defence allege that when confronted by a knife wielding assailant Mr Alkhafagi acted in self defence by only punching and not kicking Mr Partap.

[3] So it is that the defendant is charged with injuring Mr Partap with intent to injure him. This judgement will first provide some necessary background to the confrontation between these two gentlemen, then discuss findings about what happened in the fight and consider whether the police have excluded the reasonable possibility of self defence.

The Law

[4] As findings of fact will determine the outcome of this Judge alone trial, I remind myself of the burden and standard of proof in a criminal trial, particularly here where the defendant has made statements to the police. While offering the defendants version of events, I find it is nonetheless not a self serving statement. Indeed pages 8-23 describe the text messaging and the defendant's obvious aggravation over the messages. The defence of self defence is raised by the Constable once the knife is discussed pages 9-11 and there is a denial of kicks but an acceptance of punching the alleged victim. It cannot be said that the statement is purely exculpatory. I find it is available for my consideration. I keep in mind this is an untested statement. However, as I am satisfied as to its relevance and availability it is evidence for the court's consideration.

[5] As the defendant explained his version of events in a police statement, if I accept what he says, then obviously the proper decision upon that charge is not guilty because he will not have done what the prosecution says he did. If what he says leaves me unsure, then again the proper decision is not guilty, because I will have been left with a reasonable doubt. If what the defendant says seems a reasonable possibility, the prosecution will not have discharged its task, and I must find him not guilty. If I disbelieve the defendant's explanation, then I may not leap from that assessment to guilt, because to do that would be to forget who has to prove the case. Rather, I must assess all the evidence that I accept as reliable, and then ask does that evidence satisfy me of the defendant's guilt beyond reasonable doubt?

[6] A person acting in self-defence may be justified in using "force" in defence of another person or themselves. It is the prosecution who must prove beyond reasonable doubt that the defendant was not acting in self-defence. Deciding

whether the defendant was acting in self-defence and therefore “justified” in using force involves three questions:

- (a) What were the circumstances as the defendant believed them to be?
- (b) Did the defendant use force for the purpose of defending himself or another?
 - (i) If I am sure he did not use force for that purpose then the prosecution will have satisfied me that he was not acting in self-defence and I must find him guilty.
 - (ii) If I find he did use force to defend himself, I must then consider:
- (c) Was the force used reasonable in those circumstances?

[7] I remind myself that if the prosecution has not disproved self-defence beyond reasonable doubt, I must find the defendant not guilty. This means that in evaluating the circumstances as the defendant believed them to be and deciding whether the defendant was acting in defence of himself, I must proceed on a view of the facts that is as favourable to that defendant as I consider to be reasonably possible.

Evidence and findings

[8] This otherwise inexplicable fight finds some explanation in the text message confrontation that built up between the two men in the hours before they met.

[9] Exhibit 1 contains pictures of the aggressive texts sent by both men where they abused, then challenged then called each other out for a fight. Quite what caused such a nasty communication between them was not explored in evidence and so remains shrouded in secrecy.

[10] The alleged victim under cross-examination at first attempted unsuccessfully to disown the authorship of all of the texts by foisting them onto another identified

only as Muazz. He was however skilfully brought to a point where he admitted he was the texting protagonist against the defendant [NoE p17/L15-20]. For the avoidance of doubt I find he did send and receive text messages from the defendant in the hours leading up the fight.

[11] The photos from the alleged victim's phone can be read from Exhibit 1. They include such messages from Mr Partap as:

Mr A: U guys want war I wil gav it too u (sic)

U still cuming coz I got this angr inside of me and it's a good day to start the the week stay the fuck away u and who every told u too text me cool

Mr P: me alone wea I cum otahu or papatoe wont be long cunt

[12] There then follows an exchange of address information between the two men who are by then I find trying to locate each other as they spoil for a fight to sort out whatever their unknown grievance was about.

[13] I find the challenging tone of the texts with Mr Partap calling Mr Alkhafagi a "pussy" and a "dickhead" and a "cunt" (NOE p 25 L 10-30) were provocative. That provocation was compounded by the alleged victim offering a challenge to the defendant as appears from cross-examination at p 29 L 20. Then a little later saying that if the did not turn up then Mr Partap would go "looking" for him (p31L5).

[14] Regarding Mr Partap's evidence over the fight itself there were three telling inconsistencies in his evidence. First in his evidence-in-chief Mr Partap explained that he had just arrived at work like any other day when suddenly the defendant's car pulled in sharply. The defendant got out and immediately punched him and beat him up. He took care to emphasize he wasn't lying in wait for this unknown man he had been in a text war with.

[15] However, under cross-examination that story unravelled when the witness was caught in the unbelievable logic of claiming the confrontation was not inevitable but pure coincidence. Second his evidence about the defendant pulling up sharply and immediately assaulting him was undermined by the second prosecution witness

Mr Khan a work mate of Mr Partap. He had the scene under a distracted view as he was talking with his boss at the time of the incident. He said and I accept that Mr Partap pulled into work, got out of his vehicle, lit up a smoke and waited by his truck. Then the defendant's vehicle arrived. The defendant got out. However, rather than immediately punching the alleged victim Mr Khan said the two protagonist's first mumbled then shouted at each other. Then, rather than commence by punching Mr Partap, the witness said the defendant grabbed Mr Partap with both hands by his jacket and threw him to the ground. The third and most relevant inconsistency is the exaggerated description by Mr Partap of the force of the punches and then kicks with steel capped boots he says he received from the defendant.

[16] The description of the beating Mr Partap gave in evidence did not correspond with the injuries depicted by the photographs nor the description of the injuries observed by others. In addition, his claim to be kicked about the face by the defendant's boots did not leave any tell-tale blood stains on those boots from the obvious gash to his eye. These boots were seized and photographed that same day.

[17] Alongside these inconsistencies which I find make the alleged victim an unbelievable witness I now compare the defendant's explanation given to the police.

[18] As a result I find the defendant engaged in a text war of words with Mr Partap. He gave as good as he got from that verbal exchange. He and Mr Partap then rose to the challenge of defending their honour by mutually accepting the call to a fight. Why else would the confrontation in front of Mr Partap's work place have happened?

[19] I find there was a fight between the men.

[20] Regarding the knife. I find it most probable that Mr Partap awaited Mr Alkhafagi's arrival at the workshop. That the name calling and abuse continued once Mr Alkhafagi got out of his car. I find they fronted up to each other. While I accept Mr Khan's evidence describing how Mr Alkhafagi first grabbed Mr Partap by the collar, I find it unsurprising that he did not in this intense quick confrontation see the knife. I find Mr Partap brandished that knife as the fight began.

[21] I find Mr Alkhafagi grabbed Mr Partap by the collar scruff and put him to the ground. There were punches exchanged in that struggle. I find the evidence of Mr Partap's physical injuries and the absence of any blood on the defendant's boots leaves me unsure the police have proved he then kicked Mr Partap.

Self Defence

[22] I find this was a fight that does no credit to either protagonist. I find as part of that fight Mr Partap brandished a knife. I find he was grabbed, punched, put to the ground, but not kicked by the defendant.

[23] In the circumstances as the defendant believed them to be, I find he acted in self defence. The prosecution have not satisfied me he used excess force.

[24] The charge is dismissed.

G T Winter
District Court Judge