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**IN THE YOUTH COURT
AT GISBORNE**

**CRI-2016-216-000076
[2017] NZYC 145**

THE QUEEN
Prosecutor

v

GD
Young Person

Hearing: 20 February 2017

Appearances: Mr Walker for the Prosecutor
Ms Thorpe for the Young Person

Judgment: 2 March 2017

RESERVED JUDGMENT OF JUDGE S MOALA

Introduction

[1] GD faces one charge of wounding with intent to injure. After hearing the evidence I reserved my decision.

[2] It is accepted that GD wounded the complainant KZ with a knife. This occurred at the start of a consensual fist fight. The issue is whether GD was acting in self defence.

Legal principles

[3] In order to prove the charge of wounding with intent to injure, the Crown has to prove two essential ingredients beyond a reasonable doubt: GD wounded KZ; and at the time that GD did this, he intended to injure KZ.

[4] Our law provides that everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use. In considering whether GD was justified in stabbing KZ ie whether he acted in self defence, there are three questions that I need to answer:

- a) What were the circumstances as GD honestly believed them to be?
- b) Did GD use the force for the purpose of defending himself?
- c) Was the force used reasonable in those circumstances?

[5] I remind myself that the onus of proof is on the Crown. So if the Crown has not disproved self-defence beyond reasonable doubt I must acquit. The fact that GD may have been the initial aggressor or initially sought to have a fight with FV or KZ will not of itself rule out self-defence. In such cases the issue is whether the victim has been turned into the aggressor or the roles have been reversed.

Analysis

[6] Before I begin my consideration of the evidence, it is important that I set out my role in this trial. Essentially, I am required to decide whether the essential elements constituting the alleged offence have been proved beyond reasonable doubt. I must also decide whether the Crown has disproved self defence beyond a reasonable doubt.

[7] This is a criminal prosecution. The onus is on the Crown to prove the elements of each charge beyond reasonable doubt. There is no onus on the defendant to prove or disprove anything. All facts need not be proved beyond reasonable doubt, only the elements of the charge.

[8] I have considered all of the evidence that has been placed before me in this case. This includes the evidence given on oath, the exhibits and the agreed facts.

[9] I have considered the reasonableness, coherence, and probability of the evidence of each witness. I have considered their evidence in terms of whether it is consistent with or is supported by other evidence.

[10] I have taken into account the reliability of the witnesses and their powers of observations. I have also taken into account the memory and judgment of the witnesses. I am also aware that a witness although honest and sincere, may be genuinely mistaken about events. A witness needs to be not only honest and sincere, but also reliable and credible.

[11] I want to emphasise that in reaching a decision in this hearing I am not required to articulate findings about every item of evidence. My role is to determine whether the prosecution has proven the elements of the alleged offences beyond a reasonable doubt. In doing that however, it is necessary for me to resolve some primary disputes over the facts.

Crown's case

[12] The Crown called four witnesses. The complainant KZ and FV gave similar accounts of what happened. TU was inside and didn't see the incident. Finally, MB who is GD's partner gave an account of the incident that supported GD's version that he was acting in self defence.

[13] As a matter of law I accept Mr Walker's submission that I can accept some of the evidence called by the Crown while rejecting other parts of the Crown's case.

[14] From the outset I accept KZ's evidence as being credible and reliable. He was at home that evening. He did not know GD and there is no suggestion that he knew there was going to be a fight so that he could arm himself for that purpose. He simply answered the door and the situation unfolded. He was honest about wanting to have a fight with GD and his account of the lead up to the stabbing was straightforward and believable. He conceded fairly under cross examination and was consistent in his account of how the fight happened. He was very calm and quietly spoken that at times it was hard to hear him. He was unsophisticated in his responses and answered the questions simply and without trying to gild the lily.

[15] He says that on the evening of 15 August 2016 there was a knock on the door. He answered the door and a male (GD) asked for FV. He did not know GD. KZ asked him "what for?" GD said he wanted to fight FV. FV told KZ from inside the house that he did not want to fight. KZ came out of the doorway of the house and remained outside until he was stabbed.

[16] GD moved away from the front door towards the large gate near the driveway and stood outside the fence and gate. He still wanted to fight FV. FV then came out of the house and told GD that he did not want to fight. GD continued to tell him to come for a fight and FV continued to say no and "fuck that" before walking away. KZ said that GD was worked up and going "nuts" because FV would not come out for a fight.

[17] KZ then said to him "what's your name bro, what's your problem". When KZ didn't get a response he said to him: "do you wanna sort it out or something, do you want to fight?" GD then said "yeah let's go then". GD said "are you ready for a fight?" KZ said "let's go".

[18] KZ went towards the big gate and stood outside the gate facing GD. The two of them both looked like they were going to go for it then GD said to him "Bro, I'll fricken stab you bro". KZ did not believe him as he did not see a knife on GD. GD then said "Nah bro I don't want you, I wanna getFV". KZ then looked back at FV and that is when GD stabbed him. KZ says that he did not punch GD or touch him in any way.

[19] When he realised he had been stabbed he was shocked and he went over the back fence. The ambulance arrived and took him to the hospital where he received medical treatment.

[20] Under cross examination KZ denied having the knife inside his pants when confronting GD. He denied punching GD but acknowledged that he was about to punch GD. He then stopped as GD didn't want to fight him. KZ said that he didn't want to fight someone who didn't want to fight.

[21] The following exchange highlights KZ's frame of mind at the time (at page 19 of the Notes of Evidence):

“Q So it was when you moved towards him that second time as if you were going to hit him that you got stabbed, wasn't it?

A I didn't move towards him when I got stabbed, I was still standing there after he said he didn't wanna fight, so I thought it's not my nature to take someone out that didn't wanna fight and he was just a bit quiet and yeah. He said...”

Q You didn't walk away though did you?

A Nah, I was still standing there but I went from guard to my guard was open to...

[22] KZ identified GD from a photo board that was shown to him after the incident.

[23] I accept his evidence that he did not bring the knife to the fight. I accept that there was no planning on his part and he only responded to GD wanting to fight. GD on the other hand acted with foresight and planning. He went round to the address to have a fight. I am satisfied that he is the one that brought the knife to the fight. I am also satisfied that GD said that he was going to stab KZ just before he stabbed him. GD said he was going to do it and then he did it.

[24] KZ was cross examined about the knife and what it looked like. In my assessment the accuracy of his description of the knife does not assist me in my task as it is accepted that a knife was used by GD and that MB took the knife off him and threw it in the drain. This knife was located by the Police and photographed and included in the photo booklet.

[25] FV gave evidence and although his evidence is largely in line with KZ's version of events, I am not placing a lot of weight on his evidence. FV drank a lot of alcohol that evening and his evidence in Court left me doubtful as to his reliability. His attitude in the witness box and the flippant way in which he answered questions left me uncertain about which parts of his evidence were reliable. However, I do accept that he didn't want to fight and that he remained on the property close to the front steps of the house during the incident.

[26] TU gave evidence that she was at home and inside the kitchen when the incident occurred. She could hear three males arguing. She said she heard a male voice say "seikh fucken heil" and then she heard KZ say "ow". When she went outside she saw KZ's arm bleeding. She then grabbed a towel and wrapped it around KZ's arm. She then called the ambulance. She did not recognise the knife in the photo-booklet and confirmed that there was no knife like that at her address.

[27] GD's partner MB gave evidence. As mentioned above, her evidence supports GD's version that he used the knife to defend himself.

[28] She says that as she walked past [address deleted] FV was sitting near the window called out to her "go get GD to come back for a fight". It is accepted by every witness that when GD arrived demanding a fight with FV, he refused to fight and made that clear. I do not accept her evidence that FV asked for a fight. TU and KZ did not give evidence on that issue. There is some suggestion of a previous incident involving FV and GD but no evidence was given about that.

[29] She gave evidence that when they left for [address deleted], GD was angry and wanted to fight FV. There was no evidence that she tried to stop him or talk him out of it. On her evidence GD was at home and it is on her word that he has gone

over to the address to fight with FV. She then goes along with GD for the fight. I have concerns about her judgment and her involvement by going along with GD.

[30] She says that FV answered the door which is different to the evidence of KZ, FV and GD. She accepted that FV walked back into the house after telling GD that he didn't want to fight. She says that GD was keen for a fight with any one of them because he was angry and saying "Come on the cunt".

[31] She then says that FV said that if GD came onto their property they would stab him.

[32] She said that when they came together by the fence KZ punched GD and that his top lifted and she saw a knife which then dropped to the ground. This was the knife that GD picked up and used to stab KZ when KZ went to punch GD for a second time.

[33] I do not accept MB's version of what happened. It is almost exactly the same version that GD gave at the hearing. I take into account that she is GD's partner. It is significant that she was there at the address supporting GD knowing that he was about to have a fight. Her support continues in relation to the knife. It is significant to me that GD took the knife from the scene. In my view, he took the knife from the scene not only because it was evidence but because it was his knife. MB took the lead with the knife and took it off GD and threw it in the drain. This was also designed to help and support GD. It is my view that her version of the incident was designed to help GD and to keep him out of trouble. I do not accept her evidence that KZ asked for his knife back. In addition, I do not accept that FV called out to GD that he would be stabbed if he came onto the property. This conflicts with the evidence that FV did not want to fight and made it clear that he didn't want to fight.

Defence case

[34] From the discussion above it is clear that I do not accept GD's version of events. He was not a credible and reliable witness. He was interviewed by the Police shortly after the incident and he denied being at the address. I accept that there are many reasons why people may lie to the Police. In explanation he said in evidence that: "I dunno what I was thinking that day, I was freaking out. Yeah. Heaps of things going through my head at that time". I take this denial into account when I assess his credibility and reliability.

[35] I take into account that he was the aggressor who went to the address for a fight. I take into account that he remained aggressive throughout the incident until he stabbed KZ. This aggression is something that was noticeable when he gave his evidence and in the way that he answered the questions. I am satisfied that he was the aggressor at the time he arrived at the address until he stabbed KZ before leaving. The roles did not reverse at any point so that KZ became the aggressor.

[36] He agrees that he went over to the address for a fight and that when KZ answered the door he said more than once that he wanted to fight FV. He says he expected to have a fist fight.

[37] When FV didn't come out he went back to the large gate and continued to call out for FV to come out for a fight. He accepts that FV came out of the house and stood on the doorstep by KZ. FV did not want to fight. This did not deter GD.

[38] He then says that KZ agreed to fight him and ran towards him and punched him on the face. It was then that something fell out from KZ and onto the ground. He says that he picked it up without knowing what it was. When KZ tried to leap at him again he lashed his arm forward. He said he was trying to make KZ go back.

[39] He gave evidence that he was in danger because there were two males against him. He said that at the time there were too many things going through his head and he was just "freaking out".

[40] Under cross-examination it was put to him that it did not make sense that FV sent a message that he wanted to fight, yet when he got to the address, FV did not

want to fight. He accepted that he went to FV's address because he wanted to deal to FV as FV had asked for it. He accepted that he wanted to beat him up.

[41] It was put to him that it was not believable that he would bend down to pick up something in the middle of a fight and expose himself to being punched again. He maintained that he did pick up the knife. He accepted it could have been a cellphone or anything.

[42] GD said he used the knife to lash forward and that he did not mean to stab him. GD accepted that the first punch did not really do much to him. He says that he was concerned about the second punch. GD accepts that when faced with a second punch he responded with a knife. He accepted that the only risk posed to him was KZ punching him again.

[43] It was put to him that there was no need to stab him and he responded with "Nah nah, but I was freaking out". GD accepted that he could have simply thrown the knife away and that he could have backed away himself. GD said that he picked up the knife because it looked like KZ was going to pick it up too.

Decision

[44] There is no dispute that GD wounded KZ. I am also satisfied that GD intended to injure him.

[45] I then come to consider whether I am sure that when he did that, he was not acting in self defence.

What were the circumstances as GD honestly believed them to be?

[46] In summary, GD accepts that he went the address to have a fight and he wanted to beat up FV. He then agreed to have a fist fight with KZ. He felt in danger because there were two males against him, namely KZ and FV who was close by. He said that FV had called out that he would be stabbed if he came onto the property. KZ ran at him and punched him once to the face. This punch did not really do much to him. He says that he saw something drop and he picked it up not knowing what it

was. It looked to him like KZ was going to pick it up. He then says that KZ went to punch him again and that is when he used the object, to try to get KZ to back off.

Did GD use the force for the purpose of defending himself?

[47] FV was not close enough to KZ at the time of the stabbing to make GD fear that FV will get involved. FV was still inside the property and probably by the front steps of the house. In addition, FV was emphatic that he did not want to fight and GD accepts that. In terms of his evidence that FV called out that he would stab GD if he came onto the property, there is no suggestion that GD went onto the property. The only person who confronted him was KZ. KZ was the only one that went out to the other side of the fence where GD was.

[48] I also take into account that even on GD's evidence KZ never had the knife in his hand nor did KZ use the knife to attack him. On his and MB's evidence the knife fell to the ground when KZ punched him for the first time. On GD's evidence all KZ did was punch him once. This is the fist fight that GD was expecting to have with KZ. For GD to then say that he was somehow in danger and that he needed to defend himself using a knife is not credible.

[49] Even if I accept that KZ punched GD, GD gave evidence that the punch didn't really do much to him. In light of that, and the fact that GD accepts that he went to the address to have a fight, it is difficult to see how GD felt in such danger because of something he wanted and was expecting. I also take into account that from their appearance in Court GD is of a bigger build than KZ even though KZ is older.

[50] GD's evidence that he picked up an unknown object and just used it to try to get KZ to back off is not credible. He accepted it could have been a mobile phone or anything. He also accepted that picking it up would have left him vulnerable to being punched again by KZ.

[51] Having regard to those factors, I am satisfied beyond a reasonable doubt that GD was not acting in self defence.

[52] Given my findings above, there is no need to look at the reasonableness of the force. However, even if I was wrong on the above issue and GD was acting in self defence, I would find that the force used was not reasonable. There must be a reasonable balance between the threat that the defendant believed he faced and the force used to meet it. The force GD used was not reasonable. For him to use a knife to stab KZ is not reasonable given that all KZ did was punch him after they agreed to have a fist fight. The threat of a second punch from KZ does not warrant the use of a knife to stab him regardless of how the knife got there. Especially when the first punch did not do much to GD.

[53] I am satisfied beyond reasonable doubt that the Crown has proved each of the elements of the charge. The Crown has also proved beyond reasonable doubt that GD was not acting in self defence.

S Moala
Youth Court Judge