

ONTARIO COURT OF JUSTICE

5

HER MAJESTY THE QUEEN

10

v.

ALNAZ JIWA

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R E A S O N S F O R J U D G M E N T

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BEFORE THE HONOURABLE JUSTICE W.A. GOREWICH

on May 30, 2012, at NEWMARKET, Ontario

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APPEARANCES:

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A. Barkin

Counsel for the Crown

M. Syed

Counsel for Alnaz Jiwa

WEDNESDAY, MAY 30, 2012

R E A S O N S F O R J U D G M E N T

GOREWICH, J. (Orally):

5 Alnaz Jiwa is charged that, on the 30th of
December 2010, he committed an assault with a
weapon on Mansurali Kara.

10 The Crown called Mansurali Kara, Naushad Jina,
Mehboob Kamadia, Baljit Bardai, Salim Bardai,
Constable Yee and Azmeena Kara. The defence
called Mr. Jiwa.

15 The issues in this matter revolve around the
notions of self defence, excessive force and
credibility.

20 An overview of the scenario is as follows. The
setting is a mosque in the Markham area. The
complainant was at the mosque at the same time
as the accused and confronted the accused as to
why he was there. There is evidence the
complainant was angry and had to be distracted.
25 There is also evidence the complainant was told
by a witness, who testified, that the accused
was waiting for him in another room in the
mosque. As the complainant was leaving the
mosque, there is evidence that either he made a
30 motion of some kind towards the accused, or the
accused made a gesture towards him. The
complainant, fearing he would be struck, punched

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the accused in a pre-emptive mode, making contact with him. The accused responded by raising his arm and, in the process, threw a bag containing a plate he was holding, causing it to strike the complainant in the head and resulting in injury that required stitches.

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The evidence at trial was lengthy and dealt with many events that took place that night. The following comments and findings are based on my view of the evidence and relevant facts and I will restrict my comments and findings to those areas I have determined to be of most importance.

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I find Mr. Jiwa attended the mosque on December the 30th, 2010 for the purpose of expressing condolences to a bereaved family. I find that Mr. Jiwa was also a defendant in a civil matter, the plaintiff being either the Iman or agents of the Iman, the spiritual leader of the particular religion of both Mr. Jiwa and Mr. Kara. I find and accept that Mr. Jiwa defended that action. I find on the evidence that Mr. Jiwa's defence of this matter caused a number of people in that particular religious community to be offended, as the defence to the action was seen as an affront or challenge to the authority of the Imam. I find there was hostility directed to Mr. Jiwa by Mr. Kara on December the 30th, 2010 as a result of what was perceived to be a challenge by Mr. Jiwa to the authority of the
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spiritual leader. This is the genesis of the events as they unfolded at the mosque on the evening of December the 30th, 2010.

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I make the following findings as to what occurred in the prayer hall. I find the evidence virtually uncontested that Mr. Kara initiated verbal contact with Mr. Jiwa. I find there were two incidents in the prayer hall, the first when Mr. Jiwa was kneeling down and speaking to his bereaved friend and at least was touched on the shoulder by Mr. Kara and rudely told, in essence, that he should not be at the mosque. The second verbal contact was when they were in the prayer line or in separate prayer lines not far from each other. There was a further exchange in the prayer line or lines. In no uncertain terms Mr. Kara expressed his opposition to Mr. Jiwa about his being there in these verbal contacts. The evidence reflects he, Mr. Kara, was agitated. His views, I find, were expressed in such a vociferous manner that it became necessary for Mr. Kara's nephew by marriage, Mr. Bardai, a Crown witness, to attend the prayer line in which Mr. Kara was standing and distract him. Mr. Kamadia, another Crown witness, I find also intervened for the purpose of distracting Mr. Kara.

I accept the evidence of Mr. Bardai on this point that Mr. Kara spoke rudely to Mr. Jiwa. I do not accept the evidence of Mr. Kara that he,

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Mr. Kara, spoke quietly and calmly, given the evidence of both Mr. Bardai and Mr. Kamadia. Except for Mr. Kara's evidence, there is little to illustrate Mr. Jiwa's aggression in the prayer hall. There is evidence with respect to his verbal response to Mr. Kara's aggression.

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I find Mr. Kara had no authority to tell Mr. Jiwa or anyone else to leave the mosque. I find comments made by Mr. Jiwa to Mr. Kara in response to Mr. Kara's comments were not threatening, but firmly expressed to Mr. Kara, and that Mr. Jiwa was not about to leave the premises. I also find the intervention of Mr. Kamadia to be an important catalyst as to how the events that followed unfolded. As noted above, I find Mr. Kara was agitated to such an extent that he had to be distracted and pacified, engaging the words of both Mr. Bardai and Mr. Kamadia respectively.

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The entire episode, including the throwing of the plate by Mr. Jiwa, was initiated by Mr. Kara, although as noted, Mr. Kamadia was a catalyst after the initial sparring. I found Mr. Kamadia to be less than objective in his evidence. I also find on the evidence he harboured at least a dislike for Mr. Jiwa. Mr. Kamadia did tell Mr. Kara, based on nothing but speculation, that Mr. Jiwa was waiting for him outside the prayer hall, after prayers had been completed. On the evidence of Mr. Kamadia

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himself, I find this information was not accurate, but it did cause Mr. Kara to be on guard for what he perceived to be an imminent impending threat of a confrontation of some sort between Mr. Kara and Mr. Jiwa. This was of such concern that Mr. Kara requested Mr. Kamadia to escort himself and his wife from the prayer hall. It is not clear whether Mr. Kamadia did in fact escort them out, but I do accept the evidence that such a request was made. I find Mr. Jiwa, based on his own evidence and indeed the evidence that came from the mouths of Crown witnesses, that no conclusion could be drawn that Mr. Jiwa was waiting for anyone. The evidence is Mr. Jiwa was standing in a room, outside the prayer hall, speaking to Mr. Ebrahim after he left the prayer hall and had purchased food.

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I find the words used by Mr. Kara in his description of Mr. Jiwa while he was standing and speaking to Mr. Ebrahim does not comport with the evidence of other witnesses and indeed, in my view, is exaggerated to a great degree and is inaccurate in any event. I do not accept the evidence of Mr. Kara that Mr. Jiwa was "aggressive", "ready to pounce", and "looked like he was ready to ambush" him. Mr. Kara, in making his observations, also noted his wife speak to Mr. Jiwa outside the prayer hall. The description by Mr. Kara of Mr. Jiwa is not borne out by the evidence of Mr. Kara's wife, or

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others. I find Mr. Kara was bracing himself for something based on what Mr. Kamadia had told him earlier and based on his own sense of the effect his words had on Mr. Jiwa. Mr. Jiwa, on his own evidence and on the evidence of others, was talking to Mr. Ebrahim. Mr. Jiwa testified he was speaking to Mr. Ebrahim about incorporations, et cetera. I accept that evidence as being logical and consistent.

I find that when Mr. Jiwa left the prayer hall he made a decision he was not going to leave and purchased a plate of food that was placed in a plastic bag that he was holding while he was speaking to Mr. Ebrahim.

The actual incident, and parts of the actual incident, were seen and testified to by several people, including the two principals in this matter, that being of course Mr. Kara and Mr. Jiwa. It was Mr. Kara's view that Mr. Jiwa was going to hit him, so he struck Mr. Jiwa first to throw him off balance. I find Mr. Kara did throw the first punch in a series of punches he directed at Mr. Jiwa, but did not land any punches on the face of Mr. Jiwa as he intended, although Mr. Kara testified that he did. Mr. Jiwa testified he was not struck in the face. I find the evidence of Mr. Kara that the plate was thrown like a missile and the congregation was trying to hold back Mr. Jiwa an exaggeration. Mr. Kara did hit the pillar, located behind Mr.

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Jiwa, with his fist and injured it as a result.

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The question arises as to whether Mr. Jiwa did anything to cause Mr. Kara to think he was going to be struck or whether, as Mr. Jiwa testified, Mr. Kara, who had gone past him, came back and punched at Mr. Jiwa. I find the evidence of Mr. and Mrs. Bardai is not of assistance as neither principal in the matter speaks of the grabbing of Mr. Kara's collar as the Bardais do, more will be said about this later. Given Mr. Kara's anger, given he did not want Mr. Jiwa in the mosque, given as I have found on the evidence that Mr. Kamadia, in my view, caused Mr. Kara to fear Mr. Jiwa by telling him that Mr. Jiwa was waiting for him, I find it was Mr. Kara who moved towards Mr. Jiwa to strike him as he testified, in a pre-emptive mode, notwithstanding the fact that Mr. Jiwa was not making threatening gestures to Mr. Kara, although it was perceived as such by Mr. Kara. Given Mr. Kara's forehead and face were injured, I find Mr. Kara's hand or fist was injured, not by being struck by the plate, but when he hit the pillar while striking at Mr. Jiwa and I do accept Mrs. Bardai's evidence on this point.

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On his own evidence, Mr. Kara agreed that Mr. Jiwa at no time made physical contact with him prior to Mr. Kara striking him. Even though Mr. Kara spoke of Mr. Jiwa's challenging him to fight, I find if those words were uttered they

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were not accompanied by actions. I find the evidence of Mr. Jina, another Crown witness, speaks of the plate being thrown by Mr. Jiwa. Mr. Jina testified to hearing comments by both, he could not comment on the content of those comments, he did not see Mr. Kara hit Mr. Jiwa. Mr. Jina, in my view, saw and heard only a very brief portion of what transpired. His evidence adds very little to the scenario under review.

I find the evidence of Mr. Kamadia shows Mr. Kara was upset, agitated and needed calming in reference to Mr. Jiwa in the prayer hall. Mr. Kamadia confirms that Mr. Jiwa was speaking to Mr. Ebrahim, as Mr. Jiwa testified. He reports that Mr. Jiwa looked angry. He confirmed he told Mr. Kara not to leave the prayer room alone, and he did walk behind Mr. Kara and his wife from the prayer hall to where Mr. Jiwa was standing. I find Mr. Kamadia was not paying particular attention as he was speaking to people as he was leaving the prayer hall. He did confirm, and I accept, that Mrs. Kara stopped and spoke to Mr. Jiwa outside the prayer hall. Mr. Kamadia did not see Mr. Kara initiate contact with Mr. Jiwa. At the time of the physical altercation, Mr. Kamadia's evidence is not of assistance as he did not observe a key activity, that being Mr. Kara hitting Mr. Jiwa. I do not find that Mr. Kamadia heard Mr. Jiwa challenge Mr. Kara to a fight as he told the court. I make this finding, as this was not

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contained in his statement to the police. I find crucial in his evidence, setting a tone which is continuous in his evidence, and is perhaps based on the history of bad feelings between them, that Mr. Kamadia chose to believe that Mr. Jiwa was waiting for Mr. Kara for a confrontation and he communicated that to Mr. Kara. He did this notwithstanding the fact he testified he saw Mr. Jiwa and Mr. Ebrahim standing and talking at the archway. He told this court that when he said Mr. Jiwa was waiting, he was just guessing. He did not tell Mr. Kara he was just guessing.

Also important to note in this analysis is that Mr. Kamadia did not know why or did not know Mr. Jiwa was at the mosque to pay his respects to a bereaved friend. He did not know why he was there. The evidence is Mr. Jiwa went to the mosque for prayer and humanitarian reasons. I find Mr. Kamadia's intervention placed both Mr. Kara and Mr. Jiwa in precarious positions. Mr. Kara was caused to think he was going to be attacked and Mr. Jiwa was placed in a position of having later to respond to the actions of Mr. Kara. Mr. Kamadia's evidence, I find, is inconsistent and problematic in several important aspects as to when he left the prayer hall; and was it with the Karas or was it a few minutes later as he told the police? Did he see Mrs. Kara stop and speak to Mr. Jiwa, as he testified on one occasion, or was he unable to

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see if she did that as he testified on another?
I find he exaggerated when he told the police
that Mr. Jiwa threw the plate viciously,
targeting the victim's face. I find that
comment was made to the police to put Mr. Jiwa
in the worst possible light. He did not see who
was hit, he did not see what preceded Mr. Jiwa
throwing the plate, and it is clear on the
evidence that Mr. Kamadia harboured a dislike
for Mr. Jiwa, originating many years ago. His
dislike for Mr. Jiwa is important to consider in
this matter as I find it coloured his perception
and objectivity in his evidence. He was not a
victim and yet he injected himself as a quasi
victim in a dispute that was not even his. I
base this on comments to the police that he
would not want Mr. Jiwa as a friend. Further he
told the police, "No one wants to sit down
beside him and look at his face, he is
repulsive." I find he did make those comments.

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Mr. Kamadia also testified Mr. Jiwa threatened
to assault him, evidence I reject. I find those
comments are reflective of his personal views
vis-a-vis Mr. Jiwa and, as such, his evidence
must be viewed with extreme caution. I find his
evidence with regard to the actual subject
matter, that is the assault with a weapon, is
anything but objective and cannot be relied on.
He did not see who was struck, yet he told the
police that Mr. Jiwa deliberately targeted the
face of Mr. Kara. Mr. Kamadia was in no

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position to honestly make that statement and I so find.

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The evidence of Mr. and Mrs. Bardai makes reference to Mr. Jiwa grabbing the collar of Mr. Kara. Neither Mr. Kara nor Mr. Jiwa, the two principals in this matter, make any reference to this in their evidence. In view of this conflict between the Bardais' evidence and the two principals, I cannot conclude this happened. Mr. Bardai testified he had to calm Mr. Kara, his wife's uncle. He reluctantly agreed that Mr. Kara was the aggressor, although he did not see how the argument started. His wife testified she saw Mr. Kara throw a punch at Mr. Jiwa. Mr. Bardai did not, but they both saw Mr. Jiwa throw the plate or the bag containing the plate. Mrs. Bardai did not hear the words exchanged. Even on this evidence from Crown witnesses, I find Mr. Kara was the aggressor and made the first physical contact against Mr. Jiwa prior to being struck by the bag containing the plate. Mrs. Bardai said it was before Mr. Jiwa threw the plate, yet she testified she saw him transfer the bag from his left to his right hand and launch it in an overhand motion. What their collective evidence does reflect in the end is that Mr. Kara was so angry at the onset that he had to be distracted and later, after Mr. Kara punched at Mr. Jiwa, and that of course Mr. Jiwa did throw the bag at Mr. Kara. Mrs. Bardai's evidence which I accept on this point explained,

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why Mr. Kara broke his hand as she saw his fist hit the pillar behind Mr. Jiwa, when he threw a punch at Mr. Jiwa.

I find Mrs. Kara's evidence confirms her husband was hit by a plate, but only after the fact as she was not sure what Mr. Jiwa did. I find she did stop briefly to speak to Mr. Jiwa as she passed him leaving the prayer hall. While the Crown submits her evidence was for the most part consistent, I cannot be certain from where her memory was derived. She did not give a statement to the police until some 15 months after the event, in fact, only a day or two before she testified. She also agreed that she discussed the matter in detail with her husband in the 15 months that passed between the event and her testimony. I find her evidence is of little assistance overall as her memory may well have been reconstructed from detailed discussions with her husband, a principal in this matter. This is not a criticism of her, as it would be natural to discuss the situation, but I find the fact that no statement was taken from her until during the trial and her discussions with her husband in the intervening 15 months is problematic in giving her evidence the weight or importance the Crown asks me to give it. It is of negligible weight.

I now turn my findings to the evidence of Mr. Jiwa. This is a situation where an analysis of

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his credibility is made using the test in R. v. W.D. I find on his evidence that Mr. Jiwa was at the mosque for a proper purpose. Mr. Kara and Mr. Jiwa did not know each other prior to this evening. Mr. Kamadia was known to Mr. Jiwa and I find he had animus directed at Mr. Jiwa, evidenced amongst other things on Mr. Kamadia's comment to the police that Mr. Jiwa was waging a battle against the entire Islamic community. I find on the evidence Mr. Jiwa was a controversial figure and received much notoriety in that particular religious community as a result of his defence of a law suit, referred to above.

Without going through each aspect of Mr. Jiwa's evidence, I accept his reason for being at the mosque, that being to offer condolences to a bereaved friend and to pray. I find on his evidence, and the evidence of others, that he was accosted by Mr. Kara who, without authority, challenged Mr. Jiwa's right to be at the mosque. I find on his evidence and the evidence of Mr. Kamadia and Mr. Bardai, extreme unpleasantries were exchanged with Mr. Kara being the aggressor. Given the tenor of Mr. Kara's aggression, I accept Mr. Jiwa's evidence that Mr. Kara uttered a threat to break his teeth, a threat Mr. Jiwa did not take seriously at the time. It is consistent with Mr. Kara's tirade. Mr. Kara's aggression was to such an extent that Mr. Kamadia and Mr. Bardai had to pacify and

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distract Mr. Kara while he was at or near the prayer line Mr. Jiwa was in. I accept the evidence of Mr. Jiwa that he left the prayer hall, purchased food that was placed in a bag, and went to stand in an ante room outside the prayer hall. I accept his evidence he stood and spoke to Mr. Ibriham in the foyer area for a period of time. I do not find, on anyone's evidence, he was waiting for Mr. Kara to come through the area where he was standing to further the argument with Mr. Kara. As per the evidence of Mr. Kamadia, the fact he thought Mr. Jiwa was waiting for Mr. Kara was pure speculation and I find that information, which was communicated to Mr. Kara, caused Mr. Kara to be concerned. I accept and find that Mr. Jiwa properly exercised his right to be in the mosque and, as well on the evidence, he was behaving in a proper fashion. I find a further difficulty developed while he was standing near the archway outside the prayer hall after Mrs. Kara briefly exchanged a greeting with him and Mr. Kara moved a few steps beyond. I accept Mr. Jiwa's evidence that Mr. Kara went past him a few feet, he came back towards him and said something. It is consistent with Mr. Jiwa's behaviour at this point and I accept his evidence that he conveyed to Mr. Kara the thought that he did not want any problems. I find the evidence that Mr. Kara struck Mr. Jiwa from two to five times an estimate and does not bear negatively on the credibility of Mr. Jiwa. The evidence is it

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happened so fast. I accept the evidence Mr. Jiwa was not injured as a result of Mr. Kara punching him.

To recap, I find that Mr. Kara, thinking Mr. Jiwa was going to strike him, moved towards Mr. Jiwa and struck him first. I find Mr. Kara's hand was injured as he hit his hand on the pillar near where Mr. Jiwa was standing. In response to this action by Mr. Kara, I accept the explanation of Mr. Jiwa that he instinctively raised his hand, which was holding the plate of food and threw it at Mr. Kara who had, in effect, attacked him. Mr. Jiwa said it was self-defence, it was a reflex action, it was instinctive. The descriptions of Mr. Jiwa's actions by the witnesses collectively and accurately in general terms illustrate a motion of throwing, which is not in dispute. I accept Mr. Jiwa's actions were instinctive and designed to ward off the advance by Mr. Kara. In assessing credibility on this point, I ask: who initiated this, how much time was involved in this particular aspect of the matter, how much time should be considered for Mr. Jiwa to consider his own response, was he frightened, and did he realize he had the bag containing the plate in his hand? The quick and simple answers are: I do not find Mr. Jiwa made any approach towards Mr. Kara before Mr. Kara approached him, I find it was Mr. Kara who initiated this last confrontation, as he did the confrontations that

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preceded it, I find on the evidence of several people the passage of time was but for a few seconds for these events to unfold, and I find in the circumstances there is nothing to refute the fact that Mr. Jiwa was frightened.

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Further I find nothing to diminish Mr. Jiwa's credibility, when he spoke to the police, about complaining about the actions of Mr. Kara and not giving them a statement *per se* about his own participation. He knew his rights, *vis-a-vis* not having to give a statement, and he also felt he had a legitimate complaint about being attacked by Mr. Kara. No adverse inference about his credibility will be drawn on that issue. It may be that Mr. Jiwa was inaccurate as to how many times Mr. Kara struck him, but I find it is significant that Mr. Kara did strike him first. I find Mr. Jiwa's evidence that he struck back or threw the bag in self defence, or in a reflexive action or instinctively not inconsistent one with the other. I find he did strike back with the hand that held the plate of food and the plate, it did strike Mr. Kara in the head, causing him to be cut. It is clear Mr. Jiwa did not go to the mosque looking for any kind of confrontation.

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I make reference to the seminal cases on the matter. To convict I must be satisfied beyond a reasonable doubt that Mr. Jiwa assaulted Mr. Kara with a weapon and used more force than was

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necessary to defend against the original assault. I am not thusly satisfied. The first area to address is the scenario. Mr. Jiwa was clearly placed in an untenable position by the verbal onslaught, instigated by Mr. Kara, followed by being approached by Mr. Kara who was of the view that Mr. Jiwa was going to hit him. Thinking that was going to happen, Mr. Kara took a pre-emptive action and struck Mr. Jiwa one or more times. Mr. Jiwa responded by swinging the bag he was holding, which contained a plate of food and, in the process, caused the plate of food to be hurled at Mr. Kara, and as I have noted, the plate striking Mr. Kara on the forehead.

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Firstly, in dealing with credibility I accept the evidence of Mr. Jiwa. Engaging a test of R. v. W.D., his evidence is credible in my view for the reasons expressed amply above. This does not end the matter, as the issue of excessive force is also a key issue before the court. The Court of Appeal, in R. v. Antley, [1963] O.J. No. 853, captures the essence of the issue before me. At paragraph 10 of that decision, Roach J.A., after expressing his views that he believed the appellant, said:

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"A person who is set upon by another need not be reduced to a state of frenzy in resisting the attack before self defence is available to him as a defence to a charge of assault. He may have had a real and justifiable fear of the

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impending danger without losing his self control and in that state of mind in using force to resist force so long as it is not in excess of what is necessary in these circumstances."

In the Antley case, as in the case at bar, the evidence around the assault proper occurred fast and suddenly. I specifically find that Mr. Jiwa was placed in that situation by Mr. Kara and, in the words of Roach J.A., "In the agony of the situation in which he," and I insert the words or the name, Mr. Jiwa, "was placed by the attitude and conduct of the complainant."

Roach J.A. in his judgment also refers to the 1928 Alberta Supreme Court decision in R. v. Ogal, 50 C.C.C. 71 at pages 73 and 74, where Hyndman J.A. stated:

"It was of course not possible to measure with nicety just the amount of force necessary to protect himself under all the attendant circumstances."

This exact principle has been cited and since that time since that defence has been raised. The cases also speak to the issue that it is the force itself and not the consequences of the force used which is justified if the limiting conditions of the statute are met. As noted in paragraphs 23 and 24 of R. v. Kandola, a 1993 British Columbia Court of Appeal decision:

"The force which is justified under Section 34(1), if all conditions for such justification

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are met, is force which has been intentionally applied, in the sense that it results from what the law recognizes as a volitional act."

The case also gives clarity to the principle that one cannot weigh the nicety or the amount of the force used to repel an attack, when at paragraph 28 the court notes:

"It would be inconsistent with this principle to expect a person who is under attack of sufficient magnitude to warrant resort to deadly force, even though deadly intent is present, to stop and reflect upon the risk of deadly consequences which might result from taking such defensive action."

I find Mr. Jiwa was in that position. At the risk of being redundant, he did not initiate the verbal confrontations, he did not initiate the physical altercation with Mr. Kara, and he responded instantly to the advance of Mr. Kara in the fashion he described, instinctively and in self defence, and using sufficient force to repel the attack. As noted in Ogal, noted above, it is not the consequences of the force used.

Stand up please, Mr. Jiwa. Yes, for the reasons expressed I find you not guilty of the charge. Thank you.
