1949

*Mar. 29, 30
*Apr. 12

JOHN NYKOLYN.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Assault occasioning bodily harm—Accused owner of premises on which acts occurred—As hotel keeper he retained two suitcases for rent due by former roomer—Friends tried to obtain them without paying—Whether injured person a trespasser with intent to commit a wrong or an invitee—Right of accused to resist—Degree of force permisisble to repel assault—Hotel Keepers Act, R.S.M. 1940, c. 98—Criminal Code ss. 57, 290.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

The accused, being the proprietor of a rooming house, retained two suitcases belonging to a former woman roomer as security for unpaid rent. Four of her friends decided to obtain them without paying the rent. On arriving at the house one remained outside in a taxi and the three others went into the room occupied by the accused and his wife and when their purpose was known a fight started and the accused hit one of them with a hammer, fracturing his skull. The accused was convicted in police court of assault occasioning bodily harm, the magistrate holding that the men were not trespassers. The Court of Appeal being equally divided, his appeal was dismissed.

Held: The failure of the trial judge to appreciate that the men were wrongdoers and under the circumstances trespassers, as well as his failure to direct himself as to the effect of sec. 57 of the *Criminal Code* under which the accused had the right to resist provided he did not use more force than was necessary, amounted to misdirection and therefore a new trial ordered.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing on an equal division, Richards and Coyne J.A. dissenting, the appeal of the appellant from his conviction, before Macdonell J., on a charge of assault occasioning bodily harm.

The material facts of the case and the questions at issue are stated in the above head note and in the judgment now reported.

W. A. Molloy for the appellant.

C. W. Tupper, K.C. for the respondent.

The judgment of the court was delivered by

ESTEY J.:—The appellant, John Nykolyn, was convicted of assault occasioning actual bodily harm upon the person of Peter Farr at Winnipeg on July 29, 1947. His conviction was affirmed by an equal division in the Court of Appeal for Manitoba (1), Mr. Justice Richards and Mr. Justice Coyne dissenting. Several grounds of dissent are set out in the formal judgment. It seems sufficient to deal with the following only:

(1) The learned magistrate failed to direct himself that Farr, Pyke and Gendre were, as they entered upon the premises, trespassers engaged in the purpose of carrying out a conspiracy to commit a criminal offence.

(1) 55 Man. R. 323.

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(2) That the invitation as found by the learned magistrate was given under duress or misapprehension of the purpose of the men, and therefore not an invitation in law.

(3) That the accused had a right in law to resist the taking of the property from his premises.

The learned magistrate accepted the evidence of Farr, Pyke and Gendre, which may be summarized: The appellant conducted a rooming house. A few days before July 29, 1946, a young woman left appellant's rooming house but being unable to pay her rent the appellant retained her two suitcases, under the provisions of *The Hotel Keepers Act*, R.S.M. 1940, ch. 98. No question is raised as to the right of the appellant to retain these suitcases.

Farr was present and took part in the conversation between the young woman and appellant when the suitcases were retained. In fact he said that one of the suitcases was his, it having been loaned to her. The rent has neither been tendered nor paid. On July 29th Farr, Pyke, Gendre and Seymour were in the beer parlour at the Woodbine Hotel in Winnipeg where they had a few glasses of beer. There Farr told the other three the story of the retention of the suitcases and they decided to go and get them. They all went, as Pyke said "We expected there might be some trouble," and as Farr said that they might "over-awe" the appellant "with superior strength." They proceeded shortly after five o'clock in the afternoon in a taxi. At the rooming house Seymour remained in the taxi with the driver while Farr, Pyke and Gendre went into the rooming house. Appellant lived on the ground floor at the rear of the hall. Farr said that the three of them went to the door and when they knocked it was opened by appellant. Farr asked for the suitcases and the appellant said "Just a minute" and went out, while Mrs. Nykolyn said "Take them." Farr and Pyke walked in, seeing the grips under a table in the room picked them up, when Mrs. Nykolyn began yelling and striking Pyke with a flashlight. Pyke apparently paid no attention to her conduct and carried one of the suitcases out to the taxi.

The evidence is not entirely clear as to just what happened but Gendre, who did not go into the room but remained in the hall, said that while Mrs. Nykolyn was yelling and striking Pyke with the flashlight, Nykolyn came

out into the hall apparently following Farr who had the other suitcase. Gendre held the appellant, not because he entertained any fear of Nykolyn assaulting him, but because as he said, "there was Peter Farr and Mr. Nykolyn arguing about suitcases, and I was going to quiet them down." He then said that after a couple of minutes "I let Mr. Nykolyn go and he said 'Just a minute' and he went behind the door and he picked up a hammer . . ." Gendre said he saw Nykolyn hit Farr with the hammer and then he (Gendre) struck Nykolyn on the jaw with his fist as a result of which Nykolyn fell into his own room and he, Gendre, helped Farr out of the house.

Seymour said he remained in the taxi and "the taxi driver and I heard the screaming and we thought there was a murder on." The taxi driver said "I could hear the noise, but I could not distinguish what it was."

The magistrate accepted the evidence of the three men but failed to direct his attention to the admitted fact that they had gone to appellant's home, as arranged in the beer parlour, to take from him the two suitcases. Farr knew why the suitcases were held because he was present when the appellant had asserted his right to and did retain them. Appellant, in retaining them, was exercising his right under the law of Manitoba and thereby had a property interest in and a right of possession to these suitcases. If, as they deposed, these men went there under the terms of a conspiracy or with a common intent to commit the offence of theft, they were wrongdoers as they entered upon the premises and were, under the circumstances, trespassers. The learned magistrate made no reference in his judgment to this evidence and misdirected himself in law in stating "When they were on the property they weren't trespassing—they rang the bell."

The magistrate also found that "they were told they could get the grips—there was no trespassing there." His finding that they were told to get the grips is based on the statement of Mrs. Nykolyn, who, immediately the door was opened, made some such remark as "Take them." Some question was raised as to the authority of Mrs. Nykolyn to grant such permission on behalf of her husband, which, under the circumstances, I do not think it is neces-

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sary to consider. Why the invitation was given is not clear. It seems to have been given before any trouble started when she may have been under the impression that the parties had come for the suitcases and would pay the rent and take them lawfully. Certainly the moment she found they were taking them without doing so she began actively to resist. The fact that Mrs. Nykolyn may have been momentarily deceived in thinking the parties were upon a lawful errand and under that misapprehension gave the invitation as found, would not alter the fact that these men were throughout proceeding in the execution of their unlawful purpose and were trespassers. The learned magistrate did not direct his attention to this phase of the case. Perhaps it should be mentioned that apart from all questions as to whether the invitation was given under fear or apprehension of consequences or under the belief that the parties intended to pay the rent for which the suitcases were held, which does not appear to have been considered, there is the important question whether or not by her conduct she had withdrawn any permission or licence she had given that would permit these parties to take the suitcases away. The learned magistrate did not direct his attention to this important issue and his failure to do so would seem, under the circumstances, to constitute a misdirection.

The appellant was in his own home in peaceful possession of the suitcases in question. Sec. 57 of the *Criminal Code* provides:

> 57. Every one who is in peaceable possession of any movable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary.

The appellant was in peaceful possession of the suitcases under a claim of right and therefore had, under the foregoing section, a right to resist these men in their endeavour to take the suitcasess provided or so long as he did not use more force than was necessary. The record here would indicate, particularly if the permission, found by the learned magistrate to have been given by Mrs. Nykolyn, was withdrawn or otherwise ineffective in law, that the issue under sec. 57 would be a very important part of this case

and to which the learned magistrate did not direct his attention. Whether one in exercising his right under the foregoing section uses more force than is necessary is a question of fact which, under the particular circumstances of this case, should be determined at a trial where the evidence is directed to this issue and the question of credibility of the witnesses determined by the presiding magistrate who has an opportunity to observe them.

In my opinion the appeal should be allowed and a new trial directed.

Appeal allowed; new trial directed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay, Molloy and McDonald.*

Solicitor for the respondent: *J. O. McLenaghen.*