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COURT OF APPEALS

STATE OF NEW YORK

KILLON,

Respondent,

-against-

No. 163

PARROTTA,

Appellant.

20 Eagle Street
Albany, New York 12207
September 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Final matter on this
2 afternoon's calendar is appeal number 163, Killon v.
3 Parrotta.

4 Counsel.

5 MR. CANALE: Thank you. If it pleases the
6 court, my name is Greg Canale and I represent the
7 appellant, Mr. Robert Parrotta.

8 I would respectfully request two minutes for
9 rebuttal.

10 CHIEF JUDGE DIFIORE: You may have two
11 minutes, sir.

12 MR. CANALE: Thank you.

13 CHIEF JUDGE DIFIORE: You're welcome.

14 MR. CANALE: When the Appellate Division in
15 this case vacated a unanimous jury verdict and
16 resolved a factual issue that the appellant was the
17 initial aggressor, despite the fact that a jury was
18 specifically charged on this issue, and specifically
19 instructed on the law concerning initial aggressor,
20 and when the lower court found as a matter of law
21 that the appellant was not entitled to justification
22 because they found that he was, in fact, the initial
23 aggressor - - -

24 JUDGE ABDUS-SALAAM: Counsel, is the thrust
25 of your argument that the Appellate Division used the

1 wrong standard when they initially reviewed this
2 case?

3 MR. CANALE: Yes. I think - - -

4 JUDGE ABDUS-SALAAM: And so what standard
5 should they have used?

6 MR. CANALE: It is quite clear in Hallmark
7 and in Campbell v. Elmira. At any time a factual
8 determination is being set aside as a matter of law,
9 the standard to be applied is the utterly irrational
10 test.

11 This jury verdict should not have been set
12 aside unless the jury - - - unless the minority - - -
13 unless the majority below determined that the verdict
14 was utterly irrational.

15 Now, I understand that the majority of the lower
16 court made reference to the way of credible effort
17 evidence of standard. But as soon as they set that
18 standard out, they then immediately engaged in a
19 sufficiency of evidence analysis.

20 JUDGE ABDUS-SALAAM: So do - - - is the
21 remedy that we send it - - - if we agreed with you
22 that they used the wrong standard, is the remedy that
23 we send it back to the Appellate Division, or what
24 would you suggest as the remedy?

25 MR. CANALE: The remedy, I would suggest,

1 is the one alluded to in Martin v. City of Albany,
2 whereby the court concluded that had the Appellate
3 Division in that case vacated the jury verdict based
4 solely on a matter of law issue, they would then be
5 entitled to reinstate the jury verdict.

6 That is exactly what happened here. The
7 verdict was set aside as a matter of law issue, which
8 was an incorrect determination. I submit to you that
9 unless this court finds that that verdict was utterly
10 irrational, the verdict should be reinstated, and the
11 appellant should be entitled to the benefit of the
12 jury verdict.

13 I'll move on to my second point, and that is the
14 majority, not only did they find as a matter of law that
15 the appellant was the initial aggressor thereby
16 prohibiting my client from asserting justification in the
17 second trial, but they also applied what I believe to be
18 the wrong standard in determining what constitutes an
19 initial aggressor in this particular circumstance. The -
20 - -

21 JUDGE ABDUS-SALAAM: But did you disagree
22 with the charge that was given to the jury in the
23 original case - - -

24 MR. CANALE: I believe - - -

25 JUDGE ABDUS-SALAAM: - - - the original

1 trial?

2 MR. CANALE: No, I do not, and I believe
3 that that charge was a valid charge, aside from the
4 point that was made by the both majority and minority
5 of the lower court, and that was that verbal threats
6 should not be considered in determining who the
7 initial aggressor was, contrary to this court's
8 holding in People v. - - -

9 JUDGE FAHEY: Well, let's talk about that
10 for one second. The defensive justification in the
11 statute requires deadly physical force. But the
12 charge that was given, and you both probably know
13 better than I do, but I think the charge that was
14 given, the trial court said, "uses or threatens the
15 immediate use of physical force", not deadly physical
16 force, and there was no objection to the charge, was
17 there?

18 MR. CANALE: No, there was no objection to
19 the charge.

20 JUDGE FAHEY: So my point - - - my point
21 there is if there was no objection to the charge,
22 then that charge then becomes the law of the case,
23 since no one objected to it at that time.

24 MR. CANALE: I totally agree with that.
25 However, you can use justification regardless of

1 whether the force used was deadly or not. It's the
2 person who first resorts to use of physical force - -
3 - my position was, and my second point on appeal was
4 that when two people are engaged in an encounter, in
5 an argument, and it could be reasonably said that the
6 appellant was the one who initiated the
7 confrontation, it would then be - - - the definition
8 of initial aggressor would then be the one who was -
9 - - who first resorted to deadly physical force,
10 which is exactly what happened here.

11 You had two people arguing, both possessing
12 weapons, both hurling verbal insults at each other, and
13 the first person to resort to deadly physical force was
14 the respondent, which difficult for me to understand how
15 the majority below said, despite that fact. This is a
16 very crucial fact, and in arriving at their decision that
17 it was the appellant who was the initial aggressor, they
18 seemed to treat that fact - - -

19 JUDGE FAHEY: Well, there were some - - -

20 CHIEF JUDGE DIFIORE: Did your client have
21 the duty to retreat?

22 MR. CANALE: No.

23 CHIEF JUDGE DIFIORE: And why is that?

24 MR. CANALE: He did not have the duty to -
25 - - well, he had a duty to retreat, excuse me,

1 however, the jury determined that he was not capable
2 of retreating. Leads me to an interesting point as
3 well, Your Honor, and that is - - -

4 JUDGE FAHEY: Can I just stop you for a
5 second? Aren't we leaving out a lot of facts here,
6 like he drove for twenty miles, he had been drinking,
7 and had been engaged in an arguments (sic) before,
8 they both had - - - one had a maul, I guess, which is
9 an axe handle, and the other one had a baseball bat.

10 There seems to be a lot of circumstances
11 here that make this a uniquely factual determination.

12 MR. CANALE: Well, that is true.

13 JUDGE FAHEY: Um-hum.

14 MR. CANALE: And that's the point of having
15 a jury trial decide the case based on the facts.
16 It's always been my position that he should have
17 never driven there.

18 JUDGE FAHEY: Um-hum.

19 MR. CANALE: He should have never been on
20 his property. And at the time he was on that
21 property, he was a trespasser and should have left.
22 He should've done a thousand things, but that did not
23 give the respondent the right to immediately resort
24 to deadly physical force. And as soon as he did, he
25 was the initial aggressor.

1 And incidentally, as to retreat issue, if the
2 appellant was the initial aggressor, shouldn't the
3 respondent have retreated back into their - - - his house?
4 He certainly was on an open porch, not in his home - - -

5 CHIEF JUDGE DIFIORE: The respondent has a
6 duty to retreat on his own property?

7 MR. CANALE: Yes. If his - - - his duty to
8 retreat is eliminated if he's inside his house or on
9 a porch that's enclosed. This was a porch open and
10 accessible to the outside. So yes, he did legally
11 have a duty to turn around, and go back inside, and
12 call the police, hey, there's someone on my property;
13 he's trespassing. He did not have the right to
14 immediately resort to deadly physical force.

15 In closing, I would just like to state that as a
16 bedrock principle of our judicial system, that any factual
17 issues, and there are a lot of them, but these factual
18 issues should be left to the determination of a jury.
19 Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, sir.
21 Counsel.

22 MR. BRENNAN: May it please the court. My
23 name is Joe Brennan and I represent the respondent in
24 this case, Stacey Killon.

25 In this case, the Appellate Division majority

1 matter of fact, or certainly a mixed question of fact
2 and law as to whether or not he was - - -

3 JUDGE ABDUS-SALAAM: Well, why - - -

4 MR. BRENNAN: - - - the initial aggressor.

5 JUDGE ABDUS-SALAAM: - - - why wouldn't the
6 second jury have the opportunity to review that fact
7 - - -

8 MR. BRENNAN: I think the - - -

9 JUDGE ABDUS-SALAAM: - - - of whether he
10 was the initial aggressor?

11 MR. BRENNAN: I think the second jury did
12 it. The defendant in this case was not precluded in
13 any fashion from offering whatever factual evidence
14 he wanted to present at the second trial. And in
15 fact, the trial court charged the jury that they
16 could consider who the provocateur was here in
17 assessing whether or not - - - what the damages
18 should be - - -

19 JUDGE ABDUS-SALAAM: Is that the same as
20 get - - - having the second jury have the charge of
21 justification given to it?

22 MR. BRENNAN: No, the - - - it - - - what
23 happened with regard to the second trial is in view
24 of the ju - - - the Appellate Division decision on
25 the appeal, the decision of the majority.

1 At the second trial, counsel for the
2 defendant was requested as to whether or not the
3 evidence would be presented on the issue would be
4 identical to what was presented at the first trial.
5 And the response was, it would be. And on that
6 basis, the trial judge said, therefore based on the
7 Appellate Division determination, then, in fact, the
8 justification defense would not be afforded.

9 I don't - - - I submit that factually here, if
10 we start from where this thing began, and I think as Judge
11 Fahey points out, that in fact the defendant in this case
12 drove twenty to thirty miles.

13 JUDGE PIGOTT: Well, can I interrupt you
14 for a minute?

15 MR. BRENNAN: Certainly.

16 JUDGE PIGOTT: If the Appellate Division
17 said in a wholly different case there was no proof
18 that there was a gun involved in this altercation,
19 and therefore, you know, we're setting aside the
20 verdict and sending it back for a new trial. Could
21 the person who is asserting that there was a gun then
22 introduce the gun in the second trial?

23 MR. BRENNAN: I think in the - - - in the
24 way the determination was here, Judge, I believe that
25 would have been permitted.

1 JUDGE PIGOTT: So if they had made a
2 determination, the justification wasn't established
3 in the first trial, couldn't they establish
4 justification in the second trial?

5 MR. BRENNAN: They could - - - yes, I
6 believe they could offer the evidence, but I think
7 based on the facts that the - - - exactly the same
8 facts would be presented by the defendant.

9 JUDGE PIGOTT: So that's the key, because
10 the judge said he would not permit any self-defense
11 or justification charge based upon the August 12th -
12 - - August 2012 Appellate Division order.

13 MR. BRENNAN: That's cor - - -

14 JUDGE PIGOTT: But that's not true. He - -
15 - what he really meant to say was, I'm not going to
16 allow that because you folks have told me that the
17 testimony is going to be the same.

18 MR. BRENNAN: That is correct. And I think
19 the record substantiates that. We talk about initial
20 aggressor. I think in the context of driving there,
21 taking a bat, pulling into the driveway late at
22 night, being told by the plaintiff in this case that
23 he was not to be there, the plaintiff was intoxicated
24 there's no question about that, told him to leave the
25 property on numerous occasions; he had every

1 opportunity in the world to leave. Instead of
2 leaving, he decided to approach the porch.

3 Now, what the - - - the issue here with
4 regard to the - - - whether or not he could have
5 retreated, at any point there isn't any question, I
6 submit on this record, that the defendant could have
7 retreated completely without any danger to his own
8 personal safety.

9 I think if you look at factually what
10 occurred here, there's an assumption being made by
11 the appellant that, in fact, that the plaintiff in
12 this case used deadly physical force.

13 I don't think the record in this case
14 substantiate that at all. The defendant testified that
15 when he approached the porch, the plaintiff is on a porch,
16 there are two steps, he is approximately two-and-a-half to
17 three feet above the defendant who is standing on the
18 ground on a small porch of a mobile home. The roof over
19 this porch is only - - - and it's in the record, at a
20 height of five feet, eleven inches.

21 The plaintiff in this case is approximately five
22 feet, seven. He is holding this maul handle. The
23 defendant contended that he raised the maul handle, up
24 over his head, which was factually impossible with the
25 roof being at five feet eleven.

1 At that point, there's absolutely nothing that
2 would prevent the defendant from taking a step back,
3 retreating to his own vehicle, and driving away. Instead,
4 and what the testimony of a nonparty witness here was that
5 - - - that there was no physical contact between the maul
6 handle and the person of the defendant in this particular
7 case. There was no injury whatsoever.

8 The only testimony in this case of a claim of
9 any physical contact was the testimony of the defendant
10 who claimed that when the plaintiff raised the handle up
11 above his head, which was impossible, and swung it, that
12 he blocked it with his left arm. There was absolutely no
13 indication whatsoever of any injury, contusion, abrasion,
14 anything to his left arm.

15 Then, supposedly, the handle hit him in the back
16 of the head. There is no medical evidence, there was no
17 testimony, there was no laceration. The only testimony
18 was the defendant and his daughter who claimed that there
19 was a bump on the back of his head.

20 JUDGE ABDUS-SALAAM: And so - - -

21 MR. BRENNAN: Now, under those circ - - -

22 JUDGE ABDUS-SALAAM: - - - Counsel, your -
23 - - your view of that is that the Appellate Division
24 took that evidence and weighed it - - -

25 MR. BRENNAN: Yes.

1 JUDGE ABDUS-SALAAM: - - - and decided that
2 - - -

3 MR. BRENNAN: Yes, and I think - - -

4 JUDGE ABDUS-SALAAM: - - - the verdict - -
5 - the jury's verdict was against the weight - - -

6 MR. BRENNAN: Was against the credible
7 evidence.

8 JUDGE ABDUS-SALAAM: - - - of the evidence?

9 MR. BRENNAN: Yes, Judge. Yes.

10 JUDGE ABDUS-SALAAM: But why wouldn't a
11 second jury - - - you are saying it's the - - -
12 getting that evidence before a second jury without
13 the justification charge was equivalent to what the
14 first jury was able to do in the second - - - in the
15 second trial?

16 MR. BRENNAN: I believe that's the case,
17 Judge. I believe that's the case here.

18 JUDGE ABDUS-SALAAM: Well, if you were
19 representing the defendant, wouldn't you want the
20 second jury to get that justification charge so that
21 there could be a determination - - -

22 MR. BRENNAN: Well, I - - -

23 JUDGE ABDUS-SALAAM: - - - about whether
24 this initial - - -

25 MR. BRENNAN: - - - when you concede it's

1 the same factual thing, and you have a determination
2 of the Appellate Division, I do not see why the trial
3 judge would reach any other conclusion.

4 JUDGE PIGOTT: Did you try this case
5 yourself?

6 MR. BRENNAN: Yes.

7 JUDGE PIGOTT: Okay.

8 MR. BRENNAN: But in any event, here, I
9 think this is a situation where it was the function
10 of the Appellate Division to evaluate the evidence.

11 I don't think, as the appellant claims in
12 this case, that the proper standard is that it is
13 utterly irrational. I think the Appellate Division
14 is empowered to make a determination that, in fact,
15 this verdict was contrary to the weight of the
16 evidence. I think once they made that determination,
17 the proper thing is what the majority did, was to
18 remand the case for the second trial.

19 So I think under these circumstances, I think
20 that determination was correct, and I don't think there
21 was ever any evidence here, which is being glossed over by
22 the appellant. There was absolutely no reasonable basis
23 upon which the defendant could have claimed - - - could
24 have believed that, in fact, that the - - - there was
25 deadly physical force being applied here.

1 He could have retreated with complete safety,
2 and therefore the defense of justification was not
3 available to him in this case.

4 Thank you very much.

5 CHIEF JUDGE DIFIORE: Thank you, sir.
6 Counsel.

7 MR. CANALE: The - - - my adversary said
8 that yes, as a matter of fact, the Appellate Division
9 determined that the appellant was the initial
10 aggressor. I respectfully submit that the Appellate
11 Division should not be making findings of fact in a
12 jury trial. In fact, to do so specifically denies my
13 client of his right to a jury trial.

14 JUDGE FAHEY: I thought that was their job,
15 to review findings of fact, and they could make a
16 separate factual review if necessary.

17 MR. CANALE: It is their job to weigh the
18 evidence, which they did not do. Instead, they
19 declared, as a matter of law, that my client was the
20 initial aggressor. Just in case - - -

21 JUDGE FAHEY: Well, they did use the
22 phrase, fair interpretation of the evidence, didn't
23 they, in their order?

24 MR. CANALE: They said that it doesn't
25 support - - - under a fair interpretation doesn't

1 support. And I know we're getting - - -

2 JUDGE FAHEY: The reason I ask that is
3 because it seems one of the initial determinations we
4 have to make, is this a Wade case or is this a matter
5 of law case, so - - -

6 MR. CANALE: In making a determination,
7 perhaps it might be useful to refer to the second
8 opinion of the Appellate Division when I wanted to
9 put justification in to have the jury consider it,
10 and they said, its application - - - the rule of the
11 law case said, "its application is exclusively to
12 questions of law, and makes a legal determination in
13 a given case binding upon all parties."

14 The determination that the appellant was the
15 initial aggressor was a legal determination as - - -

16 JUDGE FAHEY: Well, I thought that
17 determination was whether or not you could put the
18 justification defense in secondly. That's - - - I
19 think your legal determination, but not the facts of
20 the interchange.

21 MR. CANALE: What they did is said the
22 facts don't amount - - - don't rise to entitle the
23 appellant to justification, and therefore they struck
24 it from the case, which is tantamount to a directed
25 verdict on the issue of my affirmative defense.

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JUDGE FAHEY: I see.

JUDGE ABDUS-SALAAM: But what - - -

MR. CANALE: Thank you very much.

CHIEF JUDGE DIFIIORE: You're very welcome,
counsel.

Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Killon v. Parrotta, No. 163 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 20, 2016