

SUPREME COURT OF YUKON

Citation: *R. v. Frisch*, 2012 YKSC 21

Date: 20120302
Docket S.C. No.: 11-01500
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

KEVIN PETER FRISCH

Before: Mr. Justice R. Foisy

Appearances:
Keith Parkkari
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] FOISY J. (Oral): The accused is charged with committing an aggravating assault by maiming. On the 21st of July in 2010, in the early hours, the accused and his friend, Stephen Gaim, were at a party in a residence at the Yukon College in Whitehorse. They had been drinking alcohol from about 9:00 p.m. the previous evening.

[2] Shortly before 4:00 a.m., the two of them decided to leave the party. Mr. Gaim called a Premium Taxi on his cell phone and requested that the taxi come and pick them up to take them home. Both had had a lot to drink, and both were intoxicated. At about the same time, the complainant, Mr. Bada, a taxi driver with the same Premium Cabs had been dispatched to the Yukon College to pick up two young ladies who, it was

said, were also intoxicated. The accused and his friend saw the taxi arrive and assumed it was the taxi coming to pick them up. They flagged the taxi to a stop and were told by the driver that he could not take them because he had been dispatched to pick up the two ladies.

[3] The two young men, particularly the accused, insisted that the driver take them home, and the driver tried several times to convince the accused that he could not take them. The discussion got more intense. When the accused asked the driver to use his radio to call another cab, the driver refused. The discussion escalated into name calling, and when the driver tried to drive away his road was blocked by the accused and his friend. There was more fruitless argument.

[4] The driver tried to leave again, and eventually the driver got out of his car after having been called a pedophile and a pervert by the accused. He admits he was getting angry. The accused, in addition to being intoxicated and angry, exchanged more harsh words with the driver. The driver retorted with the same type of language. The fight broke out. The driver says the accused poked him in the chest with his fingers and bumped him with his belly. Only then did the driver retaliate by pushing the accused to the ground. The accused says the driver grabbed his shirt and pushed him to the ground first.

[5] At this point, I want to deal with the credibility of the accused. The accused in his testimony went into great detail about the meeting with the cab driver and the ensuing fight. He had then heard the Crown witnesses and was answering questions that, it was evident to me, was an attempt to tailor his evidence to negate any suggestion that he

was wrong at all. In doing so, he went into great detail. Much of this detail was not mentioned to the police when he gave his statement the next day. When challenged initially, he said he was scared, but as his testimony continued to be challenged on the discrepancies between the statement to the police and his evidence in court, he often could not give an explanation.

[6] The photos taken of the accused's face, arms, back and legs, while displaying some minor injuries to his elbows and knees, do not show the injuries one would expect, taking into account his description of the beating he said he received at the hands of the cab driver.

[7] His evidence, compared to the evidence of the driver, on the evolution of the fight is inconsistent. For example, to try and explain the large red bruise on the driver's left side of the face the accused testified that he and the driver, during the struggle, both fell to the ground and that the driver had struck his face on a cement curb. He later, in cross-examination, admitted that the driver might have hit his head and not his face. His evidence is replete with, "I am not sure," "Possibly," "Might have," "I don't know," and so on. I have concluded his testimony, particularly when pitted against the evidence of the driver and other witnesses that I will refer to, is unreliable.

[8] I accept the evidence of the driver and that this episode escalated into a consensual fight. Many blows were struck and much wrestling occurred.

Notwithstanding the position that the accused took, that he did not want to fight and tried to stop it several times, the accused came out of this fight relatively unscathed.

The accused admitted, at the end of the fight, he realized that the driver was just laying

there not moving, and he, the accused, was still on him, punching and kicking him.

[9] There is also the evidence of a second driver who answered Stephen Gaim's radio call for help. When he arrived on the scene, the accused was sitting on the driver's upper chest delivering rapid short punches to the face of the driver; he called them rabbit punches. He yelled at the accused, who got up and walked towards his car. Partway, the accused turned around and went back, straddled the driver's body, sat on him and delivered another round of blows and at least one kick.

[10] This cab driver's name was Steve Cousins, and the defence attempted to show that this man is a storyteller and that his evidence should not be accepted. No doubt Mr. Cousins is a colourful person and that day was agitated, but I am satisfied of the truth of his evidence, notwithstanding the colourful language. Cousins feared the accused would kill the driver, but because of his age and small size he was afraid to leave his car. At one point, he thought of using his car as a weapon but was afraid of also hitting the complainant.

[11] After Cousins arrived, he saw the complainant lying on his back with his arms and hands covering his face in an attempt to protect himself. As the accused continued to punch him, the complainant's arms went limp and his head rolled over to the side. According to Cousins, he was then unconscious. The accused continued to hit the unconscious driver. The accused then got off the driver, Mr. Bada, and walked towards Cousins, yelling and not making any sense. He was yelling obscenities and saying that he was going to kill Bada and sue the company.

[12] A few minutes later, another cab driver, Chris Sutherland, arrived on the scene.

Cousins had radioed him to get the police. Upon arrival, he saw the accused kicking Bada. It was described as a kind of a kick with the front of the sole and with the toe of the shoe rolled up. Sutherland told the accused to stop. The accused kicked the driver once more, or perhaps twice, and it appeared that he stomped him. He got out of the car and told the accused he was about to kill Bada. The accused's reply was that he did not give a shit and he was going to sue. Bada was having convulsions and was unconscious. Sutherland went and put his jacket under the driver's head. The accused kept pacing in circles and was agitated. He was all wound up, saying he was going to sue.

[13] Noelle Marchewa, a dispatcher and driver for the same Premium [sic] cab, arrived on the scene. She had been radioed about the disturbance and asked to call 9-1-1. Bada was still on the ground then. The accused was agitated, pacing, and ranting. She tried to keep the accused at the scene. At that time, the ambulance and police arrived within a short time of each other. Bada, she said, looked in bad shape, lying on the ground in a fetal position, unconscious.

[14] The ambulance arrived and Devin Bailey, the paramedic, saw the complainant unconscious. He pinched the Trapezius muscle, which is a neck muscle, and was of the opinion that a conscious person would have reacted. Mr. Bada did not react. Vital signs were within limits, except that the blood pressure was elevated. He noted blood around the nose and the mouth and eyes swollen and testified that Bada might have been kicked in the head.

[15] Bada also testified that when he came to in the hospital he had a lot of pain and

soreness in his face, nose, ribs, back, arms and legs. The photos taken just after the beating certainly lend credence to his complaints. He also complained of having six loose teeth that will have to be removed.

[16] An Agreed Statement of Facts was entered as an exhibit, containing a description of injuries to both Bada and the accused. It is relatively short, so I will read it into the record.

- 1: On July 21, 2010, Kevin Frisch ("Frisch") and Robert Bada ("Bada") engaged in a physical confrontation on the grounds of Yukon College, in Whitehorse, Yukon.

Robert Bada Injuries

2. As a result of this altercation Bada suffered injuries including:
 - (a) Swollen cheeks, the left side more so than the right;
 - (b) Bruising below his left eye;
 - (c) Distended and guarded abdomen;
 - (d) Minimal contusions on elbows and knees; and
 - (e) Sore ribs
3. Bada was unconscious for about 5 hours at the Whitehorse General Hospital. Dr. Sunshine Giesbrecht had planned on transferring Bada to a hospital in Vancouver, but he regained consciousness.
4. Upon regaining consciousness Bada complained of a headache and rib pain. He also complained of being sore all over. His cheeks and jaw were tender to palpation.
5. Bada underwent various x-rays and ultrasounds. These tests revealed no

bone fractures or internal injuries resulting from the altercation.

6. Bada's injuries were documented in the Whitehorse General Hospital medical records located at Tab 1 of the Joint Book of Exhibits.

Kevin Frisch's Injuries

7. Frisch attended the Whitehorse General Hospital emergency room on July 23 and 25, 2012.

I am not sure if the 2012 is not a mistake here; it should be 2010.

[17] MR. PARKKARI: Yes, it should be 2011. Sorry, 2010.

[18] THE COURT: Yes, it reads 2012; it should be 2010.

8. On July 23 Frisch was complaining of pain on the right, front side of his chest. An x-ray revealed a "probable fracture of the right lateral 6th rib. The attending doctor prescribed ibuprofen. Frisch was discharged from the hospital about 1/2 hour after admission.
9. At 5:50 am, on July 25 Frisch attended the emergency room again; this time complaining of rib pain and shortness of breath. He was treated with Omeprazole and Toradol. After showing satisfactory improvement he was discharged at 6:40 AM.
10. These hospital visits and injuries are documented on Ambulatory Care Forms and Radiology Report located at tab 6 of the Joint Book of Exhibits.

DATED at Whitehorse, in the Yukon Territory this 27th day of March, 2012.

That is where the 12 comes in, I think.

[19] MR. PARKKARI: Yes.

[20] THE COURT: It is signed by both Mr. Parkkari and Mr. Roothman.

[21] In my view, any defence of consent was vitiated when the accused continued to attack after Bada could no longer defend himself. While I have concluded that self-defence in any form has no application to this initially consensual combat, if I had to consider the defence, the acts of the accused in continuing an assault on an unconscious complainant would preclude its application because of the excessive and unwarranted force. Defence counsel also submitted that in deciding whether the Crown had proven the required general intent I should consider intoxication, provocation and fright together. In addition, the Crown must also prove objective foreseeability that would link the assault to the risk of maiming.

[22] I note that s. 33.1(1) of the *Criminal Code* precludes me from considering intoxication as a factor in dealing with general intent. Assuming, but without deciding that the other two factors are to be considered, they have not been shown here, if they exist at all, to support a lack of general intent. Maiming occurred when the driver, unable to protect himself, slipped into unconsciousness and the accused continued to hit him. Nothing more is needed, although the evidence of Bada's common-law partner, Georgina Clethro, testified that since the beating Mr. Bada had become withdrawn, his appetite and sleep habits had been affected, as well as his memory and social life.

[23] In summary, the general intent, objective foreseeability and maiming have all been proven beyond a reasonable doubt.

[24] Mr. Frisch, stand up. I find you guilty as charged. You may sit down.

FOISY J.