

Citation: *R. v. Burns*, 2006 YKTC 44

Date: 20060530
Docket: 05-00560
Registry: Whitehorse
Heard: Beaver Creek

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

R e g i n a

v.

Carol Louise Burns

Appearances:
Ludovic Gouaillier
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] Carol Louise Burns has been charged with assaulting Della Mae Sam, an offence contrary to s. 266 of the *Criminal Code*. The incident giving rise to the charge occurred on November 19, 2005 in Beaver Creek, Yukon Territory.

[2] The incident involved several family members. It would be helpful to identify them in advance.

[3] Della Mae Sam was 15 years old at the time of the incident. She is the alleged victim of the assault. She lived with Roland and Selena Peters in Beaver Creek for several years before moving to Northway, Alaska, her current place of residence. Selena Peters is her aunt, but she views Selena and Roland as parent figures. Della Sam had come to Beaver Creek to visit Roland and Selena and was staying with them on the day of the incident. She was the main Crown witness in this trial.

[4] Victor Peters is an adult son, I understood adopted son, of Roland and Selena Peters. Della Sam considers Victor to be her brother. The accused, Carol Louise Burns, is Victor's common law partner, and they live in a house close to Roland and Selena's residence. Victor Peters was not a witness in this trial. Ms. Burns gave evidence on her own behalf as the only defence witness.

[5] Roland Peters was a key player in the events of November 19, 2005. He was called as a Crown witness. He testified that he had no memory of the critical events of November 19, 2005.

[6] Corporal Mark London was the investigating officer in this case and provided evidence on behalf of the Crown. He was not present during the incident, but made observations shortly thereafter and took statements from the witnesses.

[7] Selena Peters, although present at Victor Peters and Carol Burns' residence earlier in the day, was not present in her home when the alleged assault against Della Sam occurred. She was not called as a witness.

[8] Derek (Sunshine) Peters is a 19-year old adopted son who lived with Roland and Selena Peters. He was in the house when the alleged assault occurred. He has serious cognitive delays and is unable to relate events in narrative form, although according to Corporal Mark London, he can answer "yes" or "no" to questions. He did not respond to questions put to him by Corporal London. He may have been in his room when the alleged assault occurred and would therefore not have been a witness to the alleged assault.

[9] Della Sam referred to a possible witness, a person known as "BJ", who was present towards the latter part of the incident in the Peters' house. He lives in Fairbanks, Alaska, but was visiting Beaver Creek on November 19, 2005. He was not called as a witness.

The Evidence of Della Mae Sam

[10] Della Sam was at Roland and Selena Peters' home on the afternoon of November 19, 2005 when Selena telephoned her from Victor and Carol's house. Della Sam heard a commotion over the telephone and based on what Selena said, Della Sam assumed that Victor Peters was attacking Selena. Della Sam put on her coat and walked over to Victor Peters' residence.

[11] When Della Sam arrived, the following persons were present in the house: Roland and Selena Peters, Victor Peters, Carol Burns and "BJ". They were drinking and under the influence. In contrast with the others, Della Sam was sober. She does not drink. She does not like others around her to drink.

[12] When Della Sam arrived at Victor and Carol's house, she found Roland and Victor fighting. According to Carol Burns' evidence, this was a serious fight, that went on for some time, and involved the combatants punching each other and rolling on the ground. Della Sam told Roland (whom she consistently referred to as "Dad") to go home and sleep it off. She got him outside and was taking him home when Carol came out and invited Roland back. Della Sam told Carol to go back into the house because she had caused enough trouble already.

[13] Shortly after Della Sam and Roland arrived home, Victor and Carol came over and banged on the windows and doors wanting to get in. Roland went to the door with a baseball bat, which Della Sam took away from him as he opened the door. Roland tried to get it back from her and then Victor was in the house and they were fighting again. Roland had Victor in a "headlock" and Della Sam was right beside them yelling at them to stop fighting.

[14] Carol Burns came into the house and confronted Della Sam: "Why did you have to get into this commotion?" Della Sam told her that she did not want Victor fighting Roland. Carol then grabbed Della Sam, pulled her away and pushed her against the window. Della Sam pushed back and Carol fell down. She then got up and attacked

Della Sam and scratched her face. When Della Sam fell to the floor, crying, Carol Burns kicked her three or four times in the stomach and head and pulled her hair.

[15] Roland Peters intervened and told Carol Burns to leave Della Sam alone. Della Sam ran to the bathroom to wash the scratches on her face while Roland went next door to call the RCMP. Carol Burns did not leave, but followed Della Sam to the bathroom and attacked her again, saying "I'm going to kill you" and "I'm going to put you and Roland in the hospital". The person previously identified as "BJ" had arrived at the residence and intervened by telling Carol Burns to leave.

[16] Della Sam went next door to see if the police were coming and met Roland Peters coming back, who told her they were. Corporal Mark London arrived and took Della Sam to the RCMP station. Her injuries included scratches and bruises to her head. She received a tetanus shot at the nursing station.

The Evidence of Corporal Mark London

[17] According to Corporal London, who had attended at Victor Peters' residence several hours earlier in response to a complaint, Roland, Selena, Carol and Victor all appeared to be drinking and Victor and Carol were intoxicated. In fact, Carol Burns testified that she had started drinking the afternoon before and continued drinking on the day of the incident. When Corporal London investigated the alleged assault two hours later, he evaluated both Roland and Victor as extremely intoxicated, as an eight or nine on a scale of 10, where 10 was close to passing out. He rated Carol Burns as a high six to a low seven on that same scale. I conclude that while Carol Burns was not as intoxicated as Roland or Victor, she was strongly under the influence of alcohol.

[18] Corporal London observed Della Sam to be quite upset and crying. He observed a swollen lip and scratches on her nose. He took a statement from her and took Della Sam to the nursing station.

[19] He arrested Carol Burns for assault, and reported that she was very argumentative. He testified that Ms. Burns did not report any injuries nor did he observe any.

The Evidence of Roland Peters

[20] Although Roland Peters had given a detailed three-page statement to the police and had read that statement prior to court, he testified that he had no memory of the incidents of November 19, 2005. This is quite remarkable, considering he gave the statement three days after the incident on November 22, 2005. It is quite likely that Mr. Peters' memory lapse was a convenient way of avoiding getting involved in a court case resulting from his family's dysfunctional behaviour, including his own.

The Evidence of Carol Burns

[21] Carol Burns is a 35-year-old woman who had returned from Fairbanks, Alaska early in 2005 to live in Beaver Creek. As indicated previously, she acknowledged starting to drink the day before the incident and continuing to drink until the time of the altercations. As she was able to walk and talk, she did not consider herself completely drunk.

[22] The altercation at her residence earlier in the afternoon started as an argument between Selena and Roland Peters and when Victor intervened, Roland and Victor started to fight. She does not remember how or why the fight stopped or how Roland left. She said that they went to Roland's house immediately after the fight to check on his welfare as they were concerned that he might hurt himself.

[23] When they arrived they could see Della Sam and Roland through the window and observed that they were walking around quite fast. They knocked on the door and were met by Roland, who threatened Victor with a bat that he held in a swinging position. Della took the bat away when Roland charged Victor and that is when they started fighting.

[24] In her evidence-in-chief, Carol said that Della Sam was screaming at Victor to stay away from her Dad, and not to hurt him. She also said Della Sam attacked Victor and punched him twice, while still holding the bat. Carol pushed Della down, trying to get the bat away from Della Sam. She ended on top of Della, with both knees on her back. Carol also told Della to call the police, because she did not want anything to

happen to her. Carol was unable to explain how the fight between Victor and Roland stopped. Moreover, she denied staying in the residence and confronting Della again, as testified by Della Sam. She denied seeing “BJ” in the house. She was unable to explain the injuries observed on Della Sam by Corporal London.

Findings

[25] The two witnesses, Della Sam and Carol Burns, gave evidence that differed only as it related to the allegations of assault before the court. Their evidence was consistent on most other matters. Their credibility and the reliability of their evidence will be determinative in deciding the outcome of this prosecution.

Credibility of Della Mae Sam

[26] During the trial, it became apparent that Della Sam may have some cognitive limitations. Although sixteen years old, she is currently in grade eight, having repeated grade six. On the other hand, Corporal London who had known her when she lived in Beaver Creek, testified that Della Sam appeared to him to be “fine, cognitively”. He described her “like any 15-year-old, shy”. At the same time, he was aware of the significant cognitive deficiencies of Derek Peters, the young man who lived with Roland and Selena.

[27] I note that no evidence was called as to the existence, nature and severity of Ms. Sam’s cognitive limitations, if any existed at all. In the absence of evidence as to the nature of her cognitive delays, if any, her evidence should be evaluated primarily in the same way as that of an adult. There should be no presumption that her evidence was inherently unreliable or that it should be treated with special caution. At the same time, the court should be sensitive to the special characteristics of teenagers and children as well as individuals who may have physical, emotional or cognitive limitations. Their evidence should not be approached “from the perspective of rigid stereotypes, but on ... a common sense basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case”: see *R. v. B(G)*, [1990] 2 S.C.R. 30 at paragraph 25.

[28] When subject to cross-examination by defence counsel, Della Sam had difficulty responding to several compound questions. When defence counsel was instructed by the court to recompose the question as two separate questions, she was able to answer defence counsel's questions adequately. This occurred several times.

[29] It was not clear whether Della Sam had reviewed the statement she had given to the police prior to court. Although it had been given to her to read, I understood that she does not read very well. It is possible that she testified as to the events of November 19, 2005 without reading her statement prior to court. Her credibility, however, is not to be determined by whether she had reviewed her statement prior to court.

[30] Defence counsel cross-examined Della Sam quite aggressively in relation to what she did with the baseball bat prior to Victor and Carol gaining entry into Roland's house. She said that she hid the bat in Derek's bedroom so Roland would not find it. Earlier she said she hid it under the couch. Then she admitted that she had only thought about putting the bat in Derek's room, but never did, in part because she was afraid Roland would find it there. She was then asked whether she had trouble remembering what happened that day, and she responded that she did. In response to defence counsel's suggestion, she acknowledged that she had difficulty "distinguishing between what she thought about doing and actually did". She acknowledged that she was confused.

[31] Ms. Burns' counsel submitted that this acknowledgement totally undermined the credibility and reliability of Della Sam's evidence. I disagree. It is evident to me that her admission as to confusion related only to the handling of the baseball bat, and how she was going to try and keep it away from Roland, so as to prevent a serious altercation. She did not appear confused in relation to the rest of her evidence. Her answers to questions often contained considerable detail. Much of her evidence was consistent with that of Carol Burns, except where it related to the alleged assault. It was obvious from her consistent evidence on key points during cross-examination that she was not confused or making her evidence up as she went along. Although defence counsel

suggested a variety of alternative scenarios to her, she repeatedly answered in the negative to his suggestions. She stuck to the essential elements of her version of events.

[32] With respect to credibility, it is important to note that Della Sam was the only sober person in her immediate and extended family at the time of the incident. And while she acknowledged that she was unhappy with Roland and Selena for drinking when she came to visit, there was no demonstrated *animus* or motive to make up a story to incriminate Ms. Burns. She was primarily unhappy with Roland and Selena drinking when she came to visit and spend time with them.

[33] The injuries reported to and observed by Corporal London were more consistent with Della Sam's version of events than that of Carol Burns.

[34] In all of the circumstances, I find Ms. Sam's evidence to be credible.

Carol Louise Burns

[35] I did not find Ms. Burns' evidence to be credible. Where it differed from that of Della Sam, I do not believe her.

[36] To begin with, Ms. Burns was intoxicated at the time of the alleged incident. She had been drinking for two days, by her own admission.

[37] Her recollection of important events surrounding the alleged assault was not very good. For example, she did not remember how or why the fight between Victor and Roland at her house stopped. She does not know how Roland left and was not positive whether Della Sam came over to her residence or not. On cross-examination, she contradicted herself and said she was positive that Della Sam did not come over to her residence and denied that Della Sam took Roland home.

[38] She also testified that she and Victor went to Roland's house to check on him almost immediately after Roland left. She said they were concerned about his welfare and wanted to make sure he was alright. Considering that Victor and Roland had been fighting – punching each other and rolling on the floor just minutes earlier, this

explanation is not believable. In fact, when Roland opened the door, Victor and Roland immediately resumed their fight. These facts are more consistent with Victor and Carol going to Roland's house to continue the fight.

[39] Ms. Burns' evidence that she intervened physically to keep Della Sam safe is not believable. Ms. Burns said that she told Della Sam a number of times to call the police because she "didn't want anything to happen to (Della)" is also not believable.

Ms. Burns' suggestion that the fight and Roland Peter's well being were urgent police matters is inconsistent with their failure to call the police when they returned home from Roland's house.

[40] I do not accept Ms. Burns' evidence that she pushed Della Sam to the ground because she was concerned that Della Sam might hit someone with the bat. Nor do I accept her statement, which appeared as an afterthought, that Della was hitting or pushing Victor with her hand or fist (while holding the bat, apparently in the other hand). Della Sam was yelling at the two men to stop fighting. It is more likely that Carol Burns pulled Della Sam away, and onto the floor, because she wanted the fight to continue. I am satisfied that the sole reason Victor and Ms. Burns came to the house was to continue the fight that was started earlier in the afternoon at her home.

[41] During cross-examination, Ms. Burns paused before answering many of the questions posed by Crown counsel, as if she was trying to piece together a coherent story. In my opinion, she was not very successful in doing so.

[42] As I mentioned earlier, the injuries to Della Sam reported to Corporal London were more consistent with Della Sam's version of the events of that day.

Conclusion

[43] For the reasons previously indicated, I prefer the evidence of Della Sam to that of Carol Burns where Ms. Burns' evidence differs from that of Ms. Sam. In fact, I will go further and say that I do not believe or accept Ms. Burns' evidence where it is not corroborated by Ms. Sam.

[44] I find that Ms. Burns intervened to stop Della Sam from stopping the fight between Roland Peters and Victor Peters. And while the use of some force might have been justified had Ms. Burns believed that Della Sam might injure Victor, or that Della Sam herself might be injured, I find that Carol Burns used unnecessary force and kicked Ms. Sam in the stomach and head area, three or four times, while she was on the floor. She also pulled Ms. Sam's hair. I also find that Carol Burns assaulted Ms. Sam again when Ms. Sam retreated to the bathroom to wash her face and the scratches she had received from the earlier assault.

[45] In coming to these conclusions, I have considered and applied the directive in *R. v. W(D)*, [1991] 1 S.C.R. 742. I do not believe the evidence of the accused, Carol Burns, where it contradicts that of Della Sam. Her evidence does not raise a reasonable doubt. Based on all of the evidence that I accept, I am convinced beyond a reasonable doubt as to the guilt of Ms. Burns. I find her guilty of the charge of assault, contrary to s. 266 of the *Criminal Code*.

Lilles, T.C.J.