

Citation: *R. v. Dickson*, 2015 YKTC 12

Date: 20150121
Docket: 14-00248
14-00012
13-00518
Registry: Whitehorse
Heard: Burwash Landing

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

GERALD PATRICK DICKSON

Appearances:
Keith D. Parkkari
Lynn McDiarmid

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Gerald Dickson has been charged with having committed offences contrary to ss. 266, 267(a), and 267(b) of the *Criminal Code*. The trial of these matters occurred on January 20, 2015, and judgment was reserved to today's date.

[2] These alleged offences occurred in the residence of Dwayne Johnson in Burwash Landing. There were two alleged complainants, Jonathon Carlick and Owen Miller.

[3] Mr. Carlick testified that on the evening of May 23, 2014, he entered the residence of Mr. Johnson to see Austin Dickson standing over an unresponsive Owen Miller, who was sitting in a chair. He testified that he saw Austin Dickson striking Owen Miller. He stated that the Accused, Gerald Dickson, was standing behind Austin Dickson.

[4] As Mr. Carlick went to grab Austin Dickson, he slipped in the blood on the floor and fell onto the coffee table, breaking it. At that point, both Austin Dickson and Gerald Dickson began to strike him in the head. Mr. Carlick believes Gerald Dickson and Austin Dickson were using the leg from the coffee table, which had broken off when he fell onto it. He had difficulty getting back onto his feet, because he was slipping in the blood on the floor.

[5] Mr. Carlick states that he was able to get into the bedroom off the living room. Gerald Dickson or Austin Dickson took Mr. Johnson's rifle and struck him over the head with it, breaking the stock. He says that both Austin Dickson and Gerald Dickson were striking him with clubs, although he could not say with certainty exactly what each of them was using. He testified he was trying to defend himself throughout, blocking many of the blows with his forearms.

[6] He stated that the assault ended when he fell to the floor in the fetal position and said repeatedly that that was enough. Austin Dickson and Gerald Dickson struck him in the side several times and left the residence.

[7] Mr. Carlick stated that he then went to his residence and got a T-shirt to cover the wounds on his head before going back to Mr. Johnson's residence. He testified that

other than the pool of blood near the chair that Owen Miller had been sitting in, the rest of the blood was his.

[8] Mr. Carlick testified that he had several drinks before going over to Mr. Johnson's residence, but that he was not intoxicated.

[9] After the incident, he and Mr. Johnson finished off a bottle of whiskey that was sitting in the residence while they waited for the ambulance and the police to attend. He and Mr. Johnson were keeping Mr. Miller awake because they did not want him to sleep.

[10] Gerald Dickson testified in his defence. He stated that an argument had broken out between Austin Dickson and Owen Miller over a hockey game. Mr. Carlick had left the residence to go get some beer at the time. He stated that Owen Miller backhanded Austin Dickson, who then stood up and punched Mr. Miller in the face a couple of times while standing over him. Austin had stopped and had sat back down when Mr. Carlick entered into the room. Mr. Carlick put his beer under the table and stated, "Who the fuck did this?" Mr. Carlick then sucker punched Austin Dickson and jerseyed him by pulling his clothing over his head, and began hitting him with uppercuts and feeding him punches the whole time.

[11] Gerald Dickson intervened to help Austin and there was a big scramble that ended up in the bedroom. Gerald Dickson states that Mr. Carlick pointed the rifle at him that he got from the room inches from his face and stated, "What are you going to do now, you little bitch?" Gerald Dickson stated that he was afraid for his life. He then backhanded the rifle away, grabbed it from Mr. Carlick, struck him with the butt of the rifle, breaking the stock, and then struck him in the head again with the barrel several

times as Mr. Carlick put his head down and came at him. He was able to knock Mr. Carlick down and he and Austin were able to escape.

[12] Gerald Dickson did not know where Austin was during the struggle with Mr. Carlick, but admitted in cross-examination that Austin could have been striking Mr. Carlick as well. He denies striking Mr. Carlick with anything else or striking Mr. Miller. He testified that he and Mr. Carlick were probably equally under the influence of alcohol at the time, in the area of four or five out of 10.

[13] Mr. Miller testified but was unable to provide much evidence of probative value. He does not recall being struck or anything else regarding the alleged assault.

[14] Mr. Johnson testified. He stated he was fairly intoxicated, having consumed three bottles of whiskey with others that day prior to Austin and Gerald Dickson showing up at his residence. He stated that an argument started between Austin and Mr. Miller and then Austin got up and began to hit Mr. Miller. He said that he then left to get help. He ran into Mr. Carlick, who came over and said, "What are you doing, beating up my cousin?" At the time, Austin Dickson and Gerald Dickson were standing up and not doing anything. Mr. Carlick went to grab one of them and fell down, slipping in the blood. Austin and Gerald began to beat on Mr. Carlick. Mr. Johnson states they were using the table leg to do so. Mr. Johnson left to get help. After the incident was over, he and Mr. Carlick tried to keep Mr. Miller awake. Mr. Carlick had a towel wrapped around his head.

[15] An agreed statement of evidence of Cst. Cyr was filed. When he arrived at the scene approximately two hours after events at approximately 4 a.m., the events having occurred closer to 2 a.m., he noted Mr. Carlick and Mr. Johnson showing signs of

intoxication. Mr. Carlick had a towel or bandage of some sort wrapped around his head. There was what he considered to be blood on the floor. When he arrested Mr. Gerald Dickson approximately two hours later, he also showed signs of intoxication.

[16] Photographs and medical reports were filed. Mr. Carlick received five significant lacerations to the back and sides of his head, which required numerous sutures. Some were done in Destruction Bay at the medical centre, and others after medevac to Whitehorse.

[17] Mr. Miller suffered a broken nose that required subsequent surgery as well as significant bruising to his face and a laceration under one eye.

[18] The residence was in a state of disarray. There was a major pool of blood where Mr. Miller had been sitting when he was struck. There was an overturned broken coffee table with one leg missing. There was blood on the floor on the side of the living room furthest away from the bedroom and also nearer to the bedroom. Mr. Miller had been sitting in between the two locations. There was the broken coffee table leg with blood stains on it; this was nearer to the bedroom and some distance away from the coffee table. The broken stock of the rifle was lying on the floor in the kitchen area near the bedroom.

[19] Given that Gerald Dickson has testified, the principles of *R. v. W.(D.)* [1991] 1 S.C.R. 742 are applicable. Briefly put, and having been interpreted in a number of ways that are still consistent with what is stated, they are as follows: If I believe the evidence of the Accused, I must acquit. If I do not believe the evidence of the Accused but I am left in a reasonable doubt by it, I must acquit. And if I do not believe and I am not left in a reasonable doubt by the evidence of the Accused, I must consider whether, on the

basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the guilt of Gerald Dickson.

[20] There are, as to be expected in such circumstances where alcohol is involved, differences in the accounts between the witnesses with respect to what occurred and in what order. I say this in respect in particular of the evidence of Mr. Carlick and Mr. Johnson more so than in respect of the evidence of Mr. Carlick and Mr. Dickson. The differences in their evidence are not as easily attributed to alcohol, given their different roles.

[21] Mr. Johnson states that he went to get Mr. Carlick, whereas Mr. Carlick states he was entering into Mr. Johnson's residence on his own with some beer. Mr. Johnson states that they did not drink any alcohol after the events, whereas Mr. Carlick stated that they did. I am not particularly concerned as to the differences in testimony between Mr. Carlick and Mr. Johnson insofar as they relate to matters less probative of what occurred in respect of the alleged assaults themselves.

[22] In the matters that are probative in respect of the alleged assault, the evidence of Mr. Johnson is more consistent with that of Mr. Carlick. This is not to discount the differences in evidence, but simply to assess their impact upon the overall reliability of the evidence of Mr. Carlick and Gerald Dickson.

[23] When I consider the testimony of Mr. Carlick, Mr. Johnson, and Gerald Dickson in light of the physical evidence of the photographs, I find that I cannot accept the evidence of Mr. Dickson as to what took place. I find his evidence to be inconsistent with this other evidence. I further find that the testimony of Mr. Carlick is consistent with

the physical evidence and with that of Mr. Johnson, insofar as his evidence with respect to the commencement of the altercation with Mr. Carlick and initial continuation of it.

[24] I find that Mr. Gerald Dickson's evidence with respect to his consumption of alcohol is not reliable. He states that five and possibly six individuals drank from a single 26-ounce bottle of alcohol, passing it around. He had not been drinking before. He states there was no alcohol after 10 p.m. He has testified to not having consumed any alcohol after 10 p.m. and prior to being arrested the next morning. His symptoms of intoxication observed by Cst. Cyr are not consistent with the testimony of Gerald Dickson.

[25] I also find Gerald Dickson's version of disarming Mr. Carlick strains credulity beyond the breaking point. He testified that he was five-seven and 165 pounds at the time of the events. Mr. Carlick was five-ten and 250 pounds at the time. Gerald Dickson states that they were both more or less equally under the influence of alcohol. While it may not be impossible for Gerald Dickson to have nonetheless disarmed Mr. Carlick as he testified to having done, I find in light of my consideration of the other evidence that this testimony does not have the ring of truth to it.

[26] I also find Gerald Dickson's testimony that neither he nor Austin Dickson suffered any injuries during this event make his testimony that Mr. Carlick was continuously feeding uppercuts to a defenceless or jerseyed Austin Dickson unbelievable. I would have expected there to be some injuries suffered by Austin Dickson.

[27] I further find Gerald Dickson's testimony as to how he struck Mr. Carlick with a rifle barrel to be inconsistent with the injuries suffered. I would have expected Mr. Carlick to have suffered injuries to the left side of his head different than the ones

that he did. While it is hard to assess with any great degree of accuracy exactly how Mr. Carlick would have had to have been struck to have been injured as he was, and thus I am not overly concerned with this evidence, I find, nonetheless, that his injuries are more consistent with him being struck in the manner in which Mr. Carlick testified that he was.

[28] In sum, I find Gerald Dickson's testimony to be unreliable and inconsistent with the evidence of the photographs and the evidence of Mr. Carlick, whose evidence I do not have any particular concerns with. I find Mr. Carlick's evidence to be consistent with the physical evidence and more consistent with that of Mr. Johnson, whose evidence I am otherwise less inclined to give great weight to. I also find it to be consistent with Mr. Miller's testimony, at least in regard to the level of Mr. Miller's intoxication and the suggestion of Mr. Carlick that Mr. Miller sleep it off at his residence instead of going over to Mr. Johnson's.

[29] In conclusion, I find that events occurred as follows, briefly put: Mr. Carlick entered the residence to find Austin Dickson striking Mr. Miller while Gerald Dickson stood behind Austin. As Mr. Carlick reached to grab Austin, he fell to the ground, breaking the coffee table while doing so. Austin Dickson and Gerald Dickson then began to assault Mr. Carlick, including assaulting him with a table leg. As Mr. Carlick struggled to defend himself, the three ended up crossing the living room to the bedroom.

[30] I find that Gerald Dickson struck Mr. Carlick over the head with the rifle. While Mr. Carlick had stated he believed that Austin Dickson struck him with the rifle, he also stated he did not really know throughout what each of them was hitting him over the

head with, and Gerald Dickson stated in his self-defence that he did strike Mr. Carlick over the head with the rifle, and I find I am satisfied that that occurred. The stock was broken in the meanwhile. Further on this, to the extent that Austin Dickson was striking Mr. Carlick over the head with the rifle, they were acting together in concert at that point. So I find that Gerald Dickson, either himself or in concert with Mr. Austin Dickson, struck Mr. Carlick on the head with a broken leg from the coffee table as well.

[31] I find that Mr. Miller's injuries were entirely suffered at the hands of Austin Dickson, and that there is no evidence that Gerald Dickson struck Mr. Miller.

[32] I find that Gerald Dickson was not acting in self-defence at any time during this event and that he assaulted Mr. Carlick with the weapon as charged. Therefore, I find him guilty of assault with a weapon.

[33] More difficult is the question of whether it has been proven beyond a reasonable doubt that Gerald Dickson assaulted Owen Miller and in doing so caused him bodily harm. As stated, there is no evidence that Gerald Dickson struck Mr. Miller. Crown counsel submits that Gerald Dickson should be found guilty as being a party to the assault perpetrated by Austin Dickson on Mr. Miller. In particular, in intervening as Mr. Carlick was attempting to pull Austin Dickson off of Mr. Miller, Gerald Dickson was in fact assisting in allowing the assault to continue.

[34] Section 21 of the *Code* states that:

- (1) Every one is a party to an offence who
 - (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[35] I note in the Martin's 2015 *Criminal Code* under the annotations under "Liability of Party Generally," it reads:

Mere presence at the scene of an offence is not sufficient to ground liability under this subsection. There must be more: encouragement of the principal; an act which facilitates the commission of the offence; or an act which tends to prevent or hinder interference with accomplishment of the criminal act. Passive acquiescence is not sufficient. Presence at the scene of an offence can be evidence of aiding and abetting only if accompanied by other factors such as prior knowledge of the principal's intention to commit the offence or attendance for the purpose of encouragement:
(*Dunlop and Sylvester v. The Queen*, [1979] 2 SCR 881) ...

[36] The difficulty here is that Mr. Carlick testified that Gerald Dickson did not intervene until Mr. Carlick slipped and fell on the floor. At that point, Austin Dickson broke off the assault of Mr. Miller, and he and Gerald Dickson began to assault Mr. Carlick. Had Austin Dickson been in the continuous act of striking Mr. Miller and had Gerald Dickson grabbed Mr. Carlick to prevent him from intervening or stopping the assault against Mr. Miller, I would have had no trouble finding him guilty as a party to the assault of Mr. Miller.

[37] I have no evidence as to exactly what Gerald Dickson was in the act of doing when he was standing behind Austin Dickson as Mr. Carlick entered the residence. I cannot speculate as to what his intentions were at that time.

[38] On the evidence that I find sufficiently reliable and I therefore accept, I find that Gerald Dickson's actions were not intended to break up Jonathon Carlick's intervention into the assault of Mr. Miller in order to allow it to continue, nor were in a justifiable defence of Mr. Dickson, but were entirely for the purpose of perpetrating an assault against Mr. Carlick.

[39] I do not find him in these circumstances to be a party to the offence of assault on Mr. Miller, and as such I have a reasonable doubt in respects of Counts 2 and 3 and acquit Gerald Dickson of the charges of assault and assault causing bodily harm in respect of Mr. Miller.

[40] I think that that concludes my findings: Guilty, Count 1; not guilty, Counts 2 and 3.

COZENS T.C.J.