

Citation: *R. v. Gagnon*, 2006 YKTC 28

Date: 20060404
Docket: 04-10027
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

R e g i n a

v.

Michael Gagnon

Appearances:
Edith Campbell
Lynn MacDiarmid

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] In early 2004, John DesRosiers, who operates a saw mill in Watson Lake, Yukon, bought a Cat diesel power unit from Ed Jacobs of Whitehorse, for the sum of \$4,000. By May, Mr. DesRosiers had paid \$3,000 and, thus, still owed Mr. Jacobs \$1,000.

[2] On May 2, 2004, Mr. DesRosiers received a telephone call from a person who identified himself as Ed Jacobs. Mr. DesRosiers commented that Mr. Jacobs did not sound like himself. "Mr. Jacobs" said he had been ill and it had affected his voice. He went on to tell Mr. DesRosiers that he, Mr. Jacobs, had a driver in Upper Liard who had suffered a breakdown and needed some cash. He wondered if Mr. DesRosiers could give the \$1,000 to the driver. The driver would telephone and arrange to pick up the money. Mr. DesRosiers said he only had \$800 in cash and Mr. Jacobs said that would be fine.

[3] Later, Mr. DesRosiers received a call from a man identifying himself as Terrence Burne, Mr. Jacob's truck driver. He said he was going fishing and asked Mr. DesRosiers to leave the money in the glove box of his truck which, he said, was parked by the Liard River bridge in Upper Liard.

[4] Mr. DesRosiers said he was very reluctant to leave cash in an unattended vehicle. Mr. Burne then said that he would send a taxi cab to collect the money.

[5] A while later, a taxi cab arrived at Mr. DesRosiers' residence in Upper Liard. The driver was Calvin Dickson, who was well known to Mr. DesRosiers. Mr. Dickson produce a handwritten receipt which stated as follows:

May 02 04

Recieved (sic) From:
John DesRoser (sic) 800.00 on behalf of
Ed Jacobs in cash.

"Terrance Burne" (signature)
TERRANCE BURNE

[6] Reassured by the receipt and the fact he knew Mr. Dickson, Mr. DesRosiers gave Mr. Dickson an envelope containing \$800 in cash.

[7] Mr. Jacobs never received the \$800 and the evidence satisfies me that neither Mr. Jacobs, nor anyone acting on his behalf, made the initial call or authorized anyone to collect the debt on Mr. Jacob's behalf. The whole episode was clearly a scheme to defraud Mr. DesRosiers of \$800. The question is, who perpetrated that fraud?

[8] Mr. Dickson, the cab driver, testified that he was engaged by the accused, Michael Gagnon to drive to Mr. DesRosiers' house and get the money. He then delivered the money to Mr. Gagnon, who took \$50 out of the envelope and paid Mr. Dickson for his trouble.

[9] Mr. Gagnon testified and disclaimed all knowledge of the fraud. He contended that Mr. Dickson was either lying or mistaken in identifying him as the culprit.

[10] In assessing the evidence, it will be convenient to start with the evidence of the accused, Mr. Gagnon.

[11] In short, Mr. Gagnon's evidence is utterly devoid of credit. One example will suffice to illustrate the frailties of his testimony. In his evidence in chief, Mr. Gagnon asserted that he was financially well-off and, thus, had no need to defraud anyone. He had, he said, a \$250,000 contract with CMHC to renovate houses and his wife worked. It turned out in cross examination that, while Mr. Gagnon had the contract, he never got paid and, far from being flush, was heavily in debt and living on a line of credit. Moreover, his wife had actually worked very little due to illness. It must also be pointed out that Mr. Gagnon has a horrendous criminal record, mostly for crimes of dishonesty and deceit and this record clearly tells against his believability as a witness.

[12] In fact, I do accept two things Mr. Gagnon says. I accept that he knew Mr. Dickson well and that he was in Upper Liard in early May of 2004.

[13] It goes without saying that disbelief of the accused does not equate with proof of the charge. That proof must come from elsewhere. In this case, the evidence which must be carefully examined and accepted beyond reasonable doubt is that of Mr. Dickson, since he is the only person who links Mr. Gagnon to the fraud.

[14] There are two possible frailties in Mr. Dickson's evidence. First, he makes an eyewitness identification of Mr. Gagnon. The strength of that identification can be called into question by virtue of the astonishingly sub-standard identification procedure employed by Constable Wright.

[15] Constable Wright received the complaint of the fraud shortly after it occurred. He was told that the money was given to Calvin Dickson. Constable Wright spoke to Mr. Dickson who was somewhat vague as to who had provided him with the instructions and the receipt, and had been given the proceeds. The

name Terrance and Mike were mentioned. Mr. Dickson agreed to come to the RCMP detachment to provide a statement but failed to appear.

[16] Constable Wright went looking for Mr. Dickson. When he found him, he showed him a single photo – an in-custody photo of Mr. Gagnon – and asked Mr. Dickson if he could identify the person in the photo. Mr. Dickson said, “That’s Mike”.

[17] The defence referred to the 1946 decision of the Ontario Court of Appeal in *R. v. Smierciak*, 87 C.C.C. 175, for the unassailable proposition that showing a witness a single photograph has the potential to render worthless any subsequent identification of the accused by that witness.

[18] Had she been from Kansas City, defence counsel might also have referred to the much more recent report; Manitoba, *The Inquiry Regarding Thomas Sophonow* (Winnipeg: Queen's Printer, 2001) (Commissioner: Justice P. Cory).

[19] That being said, one needs to analyze the nature of the evidence in this case. To begin with, Mr. Dickson and Mr. Gagnon were well acquainted, as even Mr. Gagnon admits. They were close neighbours in a very small community. Mr. Dickson knew where Mr. Gagnon lived and knew his wife and mother-in-law. Moreover, his dealings with Mr. Gagnon were far from brief. Mr. Dickson met first with Mr. Gagnon to be provided with instructions and the receipt. After obtaining the money, Mr. Dickson met again with Mr. Gagnon and was paid for the delivery. On both occasions, the meeting place was relatively near Mr. Gagnon’s residence. Finally, despite the fact Constable Wright showed Mr. Dickson a single photo, at least he did not ask if this was the person to whom Mr. Dickson gave the money. Constable Wright asked if Mr. Dickson recognized the person in the photo and Mr. Dickson responded “That’s Mike”. Thus the degree of suggestibility was less than it might have been.

[20] In the result, and despite the shortcomings in the identification procedure used, there is no real possibility that Mr. Dickson has *mistakenly* identified Mr. Gagnon as the person he dealt with on May 2, 2004.

[21] It remains to consider whether Mr. Dickson is otherwise worthy of belief when he points the finger at the accused.

[22] It is true that Mr. Dickson felt he was involved in the incident – he did, after all, get \$50 of the proceeds. It is also true that, initially Mr. Dickson was less than forthcoming as to the identity of the person who provided the receipt and received the money. It is conceivable that Mr. Dickson himself orchestrated this whole affair and there was no “Mike”.

[23] Having considered the matter at length, I am satisfied that Mr. Dickson can be believed. Mr. Dickson was a life-long friend of the DesRosiers and their son and thus would be unlikely to victimize them. Moreover, he did not strike me as sophisticated enough to have concocted such a scheme. If he was, he would not have proceeded with it for the simple reason that Mr. DesRosiers was a person he had known since he was a child and his involvement in the scheme would be obvious.

[24] As for the probability of Mr. Dickson claiming it was Mr. Gagnon who received the money when, in reality, it was someone else, there was nothing in the evidence to suggest that such a theory is more than sheer speculation.

[25] Thus, I accept Mr. Dickson’s evidence that it was Mr. Gagnon who instructed him and who received the proceeds.

[26] It is quite true that there is no evidence as to how Mr. Gagnon (or anyone else) would be privy to information regarding a debt owing from Mr. DesRosiers to Mr. Jacobs. However, I can take judicial notice of the fact that Upper Liard (and Watson Lake) are small places, and in small places, the extent to which one’s affairs may be known to one’s neighbours would appall a city dweller. Some light on what happened here may be shed by Mr. Gagnon’s description in

his testimony of one of his previous offences, wherein he overheard a conversation about a shipment of liquor and intervened to take delivery of it himself.

[27] I find the accused guilty.

Faulkner C.J.T.C.