

Citation: *R. v. Lowey*, 2005 YKTC 78

Date: 20051109
Docket: T.C. 05-00175
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

GRANT WILLIAM LOWEY

Appearances:
Noel Sinclair
Edward Horembala

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Grant Lowey is charged with assault with a weapon against Jonathan Wurtack and a common assault against Mr. Wurtack's spouse, Debbie Beck.

[2] The Beck and Lowey families have been neighbours for several years, living two doors apart in the Echo Valley subdivision. Mr. Wurtack became a member of the Beck household some 18 months before the night in question. It was readily apparent in the testimony and demeanour of all witnesses that there is a substantial amount of bad blood between the parties. The charges before the Court are the culmination of this

negative history between the Beck-Wurtack family and the Lowey family, which extends back several years.

[3] In addition to calling one RCMP member, the Crown called three members of the Beck-Wurtack family. Mr. Lowey gave evidence on his own behalf. Not surprisingly, the two versions provided of the events of May 21st to 22nd are widely divergent on several key factors.

[4] The Beck-Wurtack version can be briefly summarized as follows: 13-year-old Bryn Beck was returning on her bicycle from a nearby friend's house late on the 21st when she observed Mr. Lowey in the vicinity of the Beck-Wurtack residence. She advised her mother who in turn advised Mr. Wurtack. Mr. Wurtack grabbed a camera and exited the home in pursuit of Mr. Lowey. Debbie and Bryn Beck similarly left to warn a neighbour about Mr. Lowey's presence in the area.

[5] As Mr. Lowey was no longer in the immediate area, Mr. Wurtack went in search of him. He located Mr. Lowey with his two dogs 20 to 30 feet into the bush on the opposite side of the cul-de-sac from the Beck-Wurtack home.

[6] Mr. Wurtack came to a stop some five feet from Mr. Lowey, with a fallen tree between them. He accused Mr. Lowey of trespassing. Mr. Lowey asserted that he was on Crown land. Mr. Wurtack raised his camera to take photographs. Mr. Lowey then raised a ski pole he was carrying and, as described by Mr. Wurtack, took a poke at Mr. Wurtack by pointing the sharpened end of the modified ski pole in Mr. Wurtack's direction.

[7] Mr. Lowey proceeded to plant the ski pole upright in the ground and turned to deal with his dogs. Mr. Wurtack took the opportunity to take four photographs of Mr. Lowey, then ducked under the fallen tree, grabbed Mr. Lowey's ski pole, which he felt could be used as evidence, and turned to head home.

[8] He was pursued by Mr. Lowey across the cul-de-sac and up the back driveway to the top of the Beck's stairs. At this point, Mr. Wurtack was holding the pole in both hands. Mr. Lowey reached around with both arms and grabbed the pole. He tried to pull the pole back through Mr. Wurtack and then released the pole from one of his hands. Mr. Lowey told Mr. Wurtack to let go, struck Mr. Wurtack on the back of the head with a fist or elbow and pulled down hard on the pole with his other hand. The pole punctured Mr. Wurtack's thigh, causing him to let go of it. As Mr. Lowey turned to leave with the pole, he encountered Debbie and Bryn Beck, who had returned to the property having heard sounds of a scuffle. Debbie and Bryn Beck were standing on opposite sides of the driveway with Debbie Beck standing near the shed. Mr. Lowey used his hand to push Debbie Beck on the shoulder, causing her to stumble back three steps, whereupon Mr. Lowey left the property.

[9] Mr. Lowey tells a much different version of events. Mr. Lowey testified that late on the 21st he took his two small dogs for a walk down Echo Lane, carrying a ski pole as a walking stick, as was his habit, and using a belt with two retractable leashes attached. He took a camera belonging to his employer with him. When he reached the Beck property his dogs stopped in and around the Beck-Wurtack RV, which he maintains was parked on the frontage owned by the Crown. He heard a bicycle and turned to see Bryn Beck go into her driveway. He further heard her yell to her mother about his presence.

Mr. Lowey continued down to the end of the cul-de-sac. When he heard footsteps on the gravel, he followed a path into the woods, indicating he was concerned for his safety due to previous incidents. He stopped when one of his dogs became tangled around a tree.

[10] At that point, Mr. Wurtack appeared five feet in front of him. Mr. Wurtack accused him of trespassing, which he denied. When Mr. Wurtack began taking pictures, Mr. Lowey planted his pole into the ground and turned to retrieve his own camera. Mr. Wurtack came forward, kicked one of Mr. Lowey's dogs and pushed Mr. Lowey, causing him to drop his camera. Mr. Wurtack picked up Mr. Lowey's camera, grabbed the pole and began running away. Mr. Lowey pursued him to see what Mr. Wurtack did with the camera.

[11] Mr. Wurtack fell approximately one-third of the way up the Beck's stairs, which allowed Mr. Lowey to catch up to him. Mr. Lowey could not see the camera at this point, but grabbed the pole and pulled. Mr. Wurtack pulled back hard. Mr. Lowey pulled back harder and the pole came lose. He then heard Debbie Beck yell, "Call 9-1-1," and turned to see her standing near the shed. Mr. Lowey went down the steps with the pole in his hand and left the Beck property. There was no physical contact with Debbie Beck. He retrieved his dogs and returned home by a circuitous route to avoid further conflict. Upon returning home he asked his wife to call 9-1-1.

[12] In assessing both versions and weighing all of the evidence before me, I am inclined to the view that Count 1, the assault with a weapon, has not been proven beyond a reasonable doubt. The evidence relating to Count 1 comes primarily from Mr.

Wurtack and Mr. Lowey. Both Debbie and Bryn Beck were unable to say more than the fact that they observed a struggle between Mr. Wurtack and Mr. Lowey on the stairs. Even if I were to accept Mr. Wurtack's evidence in its entirety and reject Mr. Lowey's, the evidence falls short, in my view, of establishing an assault with a weapon.

[13] There are two possible occasions of assault with a weapon on Mr. Wurtack's evidence. The first in the woods when Mr. Lowey took a poke at him, and the second during the struggle on the stairs when Mr. Wurtack received the puncture wound to his thigh.

[14] Regarding the first of these incidents, when Mr. Wurtack was pressed to explain what he meant by taking a poke at him with the pole, he elaborated to say that he thought it was a warning but it might have been an attack; he was not sure. In the circumstances, with the parties some distance apart, at most, it can be said that Mr. Lowey may have pointed the pole in Mr. Wurtack's direction.

[15] Regarding the second of these incidents, Mr. Wurtack clearly took a pole that did not belong to him. It is perfectly understandable that Mr. Lowey would pursue him to retrieve his property. In the struggle on the stairs, even as described by Mr. Wurtack, both individuals were attempting either to keep or to gain control of the pole. Neither, in my view, can be said to have had sufficient control over it during the struggle to deliberately use it as a weapon against the other.

[16] The evidence of both Mr. Wurtack and Mr. Lowey clearly supports a finding that Mr. Lowey was attempting to retrieve the pole, rather than to assault Mr. Wurtack with it. The puncture wound cannot be seen as anything other than an unfortunate accident in

all of the circumstances. Indeed, even Mr. Wurtack conceded that the wound may have occurred accidentally.

[17] Accordingly, I am not satisfied that Mr. Wurtack's evidence on its face establishes an assault with a weapon in law. However, even if I am wrong on this conclusion, I must still consider whether I am in a position to reject Mr. Lowey's evidence and accept that of Mr. Wurtack's. This assessment is essential even if I am correct in my conclusion, as the blow to the back of the head described in Mr. Wurtack's evidence, if believed, could support a conviction on the lesser and included offence of common assault.

[18] The sole issue in making both this determination, as well as a determination of whether Count 2 has been made out, is that of credibility. I have spent some considerable time reviewing all of the evidence before me to make this assessment and I am struck by the fact that the actions, perceptions and evidence of all of the parties is coloured by the extremely negative relationship between them. Constable Manchur referred to that relationship as a longstanding feud, an impression supported by numerous complaints to the RCMP by both sides. Both sides of this feud referred to having been advised by the RCMP to get photographs to be used as evidence against the other and both seemed bound and determined to get that evidence.

[19] Mr. Wurtack testified that even though he had not seen Mr. Lowey do anything inappropriate on that evening and even though Mr. Lowey was not in the vicinity of the Beck-Wurtack property when Mr. Wurtack came out of the house, Mr. Wurtack was "not ready to be done with that", so he went looking for him. He even goes so far as to take

pictures of Mr. Lowey while Mr. Lowey is either on Crown land or someone else's property. Clearly, such pictures would not have proven anything and would not have assisted the Beck-Wurtack cause in any way. Such behaviour must be seen as deliberately provocative in the circumstances.

[20] Similarly, knowing of the bitter history, Mr. Lowey's decision to walk in the direction of the Beck-Wurtack residence and to let his dogs run in and around the Beck-Wurtack's personal property, while skirting the actual property line, can be seen as equally provocative.

[21] The influence and impact of the negative history is similarly evident in Debbie Beck's testimony. On cross she agreed that in her discussions with Constable Manchur she continually interrupted Constable Manchur to complain of unproven incidents in the past, blaming them on Mr. Lowey and to complain of the past performance of other members.

[22] None of these individuals can be described as disinterested or objective. I have no doubt that each feels completely justified in their position and can provide me with any number of examples to support their view that they are the injured party and that they should be believed in relation to the charges before me. However, it is not my task in a criminal trial to decide which of the two sides is more likely telling the truth and to prefer one version of events over the other. Instead, I must determine whether, on all of the evidence before me, the offences have been proven beyond a reasonable doubt. It is an extremely high and exacting standard.

[23] Where the sole issue is credibility, I am bound by the decision of the Supreme Court of Canada in *W.D.*, [1991] 1 S.C.R. 742, which established the test to be applied in assessing credibility as follows: If I believe the accused, I must acquit. Even if I do not believe the accused, I must ask myself whether his evidence raises a reasonable doubt and, if so, I must acquit, and lastly, even if I disbelieve the accused and his evidence does not leave me with a reasonable doubt, I must ask myself whether, on all of the evidence which I do accept, I am satisfied beyond a reasonable doubt that the offence was committed.

[24] In the case at bar there were some credibility concerns in relation to all four civilian witnesses. Bryn Beck testified to passing Mr. Lowey while on her bicycle and speeding up to get past him, only to find Mr. Lowey to have arrived at her residence on foot before her, a fact which is highly improbable, if not impossible.

[25] Mr. Wurtack describes a somewhat bizarre act of Mr. Lowey throwing one of his dogs over his shoulder and then later describes Mr. Lowey attempting to pull the pole through him while the two struggled on the stairs. Mr. Wurtack conceded that neither of these statements formed part of his initial statement to the police.

[26] Debbie Beck's evidence included some minor inconsistencies regarding who was where when, and her description of seeing Mr. Lowey by her residence on at least four occasions earlier that day, including at least one in the afternoon, is contradicted by the receipt filed as Exhibit 11, which places Mr. Lowey at Yukon Gardens making a substantial purchase that afternoon. Furthermore, on cross-examination, Ms. Beck was, at times, non-responsive and somewhat argumentative.

[27] Similarly, Mr. Lowey, on cross-examination, was, at times, evasive and non-responsive.

[28] Still, even with these concerns, I cannot say that any of the parties was clearly lying. The case law is clear that it is not enough for me to decide that something is most likely true or false or that my gut instinct tells me to believe one person over another. I must be able to clearly articulate reasons for disbelieving or rejecting evidence. This is particularly true when dealing with the evidence of an accused, as an accused need not prove their version but must rather raise a reasonable doubt.

[29] In assessing the evidence of Mr. Lowey, the Crown urges me to reject it on the basis that it flies in the face of common sense and is directly contradicted by the evidence of the Beck-Wurtack family, which, Crown asserted, adhered to the natural logic of everyday life.

[30] With respect, I disagree. Firstly, I am not entitled to reject an accused's evidence solely because it is contradicted by other evidence which I might accept or find more likely to be true. I cannot say I believe the Beck-Wurtack family; therefore I disbelieve Mr. Lowey; that is not the test. Secondly, in my view, there were things done by all parties which were not entirely consistent with common sense, including Mr. Lowey walking past the Beck-Wurtack property and allowing his dogs to wander around their personal property, in light of the history; Mr. Wurtack pursuing Mr. Lowey into the woods and taking photos which would establish nothing; Mr. Wurtack taking the pole; Mr. Lowey chasing after him to retrieve it; and Ms. Beck, who expressed sufficient concern about Mr. Lowey's presence to wish to warn a neighbour, heading out to do so

at eight months pregnant and taking her 13-year-old daughter along with her instead of at least trying to reach the neighbour by telephone first. None of these actions are necessarily consistent with common sense, but they are all perhaps understandable when viewed in light of the bitter history between the two families.

[31] The Crown also suggests that Mr. Lowey's version of the struggle on the staircase does not ring true, as, if Mr. Wurtack had indeed fallen, instead of just stumbling on the stairs, as he testified, he would have dropped anything that he was holding to use his hands to brace himself. That may well be true, but Mr. Lowey did not or could not fully describe exactly how Mr. Wurtack fell or even how he was holding the pole, as Mr. Lowey was behind him at the time. He said only that Mr. Wurtack fell and this allowed Mr. Lowey to catch up to him. On this version it is entirely possible that Mr. Wurtack used one hand to brace his fall while holding the pole with the other, or even that he momentarily let go of the pole when he fell and then regained possession of it before Mr. Lowey caught up to him.

[32] What was clear on the evidence was that Mr. Wurtack was bound and determined to keep the pole away from Mr. Lowey and Mr. Lowey was determined to get it back. The remainder of Mr. Lowey's description of the struggle for the pole on the stairs, with Mr. Wurtack braced on his knees and elbows on the stairs, is, in my view, at least a plausible one.

[33] Lastly, the Crown questioned Mr. Lowey's evidence regarding the camera, suggesting that it was fabricated as Mr. Lowey had taken no photographs and therefore Mr. Wurtack would have had no motive to take the camera from him. This ignores the

possible motive of taking it to prevent the taking of photographs. In addition, the Crown suggests that Mr. Lowey's failure to report the theft to his employer until the 27th supports the inference that the stolen camera was a fabrication. However, the Crown concedes that Mr. Lowey did report the theft to the RCMP in a statement given immediately after the incident. As a result, the evidence in my view, does not support the inference.

[34] There were no major inconsistencies in Mr. Lowey's evidence and his version was at least a plausible one. What I am left with is an inability to articulate any meaningful basis upon which to reject Mr. Lowey's version of the events. There may well have been a push and a blow to the back of the head, as described by the Beck-Wurtack family, as I am equally unable to articulate a meaningful basis upon which to reject their evidence.

[35] However, if I find, as I have found, that I am unable to reject the evidence of the accused, I do not get past the first branch of the *W.D.* test and I cannot convict. I have no option in this case but to dismiss both counts. Mr. Lowey, you are free to go.

RUDDY T.C.J.