

Citation: *R. v. Quash*, 2018 YKTC 5

Date: 20180208
Docket: 16-00493
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

WESLEY DAVID QUASH

Appearances:
Paul Battin
Vincent Laroche

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Wesley Quash has been charged with having committed the offence of aggravated assault contrary to s. 268 of the *Criminal Code*.

[2] On January 18, 2018, I found Mr. Quash guilty of this offence and stated that written reasons for my decision would follow. These are my Reasons for Judgment.

[3] On October 14, 2016, Steven Smith got out of a cab in the McIntyre Subdivision of Whitehorse. This was at approximately 8:00 p.m., or shortly thereafter. He was somewhat intoxicated. He was walking down the middle of the road towards the residence of his partner, Bobbie Bishop, in order to play radio bingo with her. While walking, Mr. Smith was saying things loudly to no-one in particular and for no particular reason, other than the intoxicated and boisterous mood that he was in.

[4] Mr. Quash was sitting inside his father's vehicle outside a house in the subdivision, where he and his father had been playing radio bingo. Mr. Smith's walk to Ms. Bishop's residence took him past where Mr. Quash was sitting in the vehicle. Mr. Quash was not intoxicated. As Mr. Smith was walking by, Mr. Quash stepped out of the vehicle where he was listening to music and yelled out words to Mr. Smith to the effect of "Why are you being so loud"?

[5] Mr. Smith, after this was said to him, turned towards Mr. Quash, said words to the effect of: "I am not being loud", and "I can be loud if I want", and went up to him quickly, in an aggressive manner, getting quite close to Mr. Quash.

[6] Mr. Quash, using a pocket knife that he had just purchased that day, and with the blade in the open position, swung it once at Mr. Smith, cutting his face open from just below the ear to his chin.

[7] Mr. Smith required surgery to repair the injury. He was hospitalized for three days. There was considerable nerve damage that will require Mr. Smith to take medication for life. I have seen the photographs of the wound that resulted. It was a significant injury that has left Mr. Smith with a large scar, besides the pain, discomfort and other effects of the nerve damage that he has incurred.

Position of the Defence

[8] Mr. Quash submits that he was acting in self-defence when he struck Mr. Smith. He testified that:

- he has been assaulted in the past by various people that he did not know. He attributes this to his resemblance to his older brother, Christopher Quash, whom he believes he was being mistaken for. He described two incidents within the approximately one and one-half-year period prior to the trial where this occurred;
- he has had a knife pulled on him before and another time a sock containing a rock was swung at him;
- as he was trying to back away from Mr. Smith when Mr. Smith was close to him, Mr. Smith dropped his backpack and swung at him, “kind of grazing him in the cheek”, and knocking him back a step. He stated that he was also punched by Mr. Smith;
- he thought Mr. Smith was going to “whip out a bar” and “like try to hit me or something”;
- the actions of Mr. Smith made him fearful and that he was afraid Mr. Smith was “going to kill me or something”;
- he believed Mr. Smith was wearing steel-toed boots and that Mr. Smith might kick him. He stated that he was looking Mr. Smith up and down when he noticed the boots;
- he had no time to think of any other option to avoid being assaulted by Mr. Smith than swinging at him with the knife. He had his hands in his pocket and after he was punched he took out the knife, opening it in the process, and swung it at Mr. Smith;
- on one occasion Mr. Smith passed him in the downtown area of Whitehorse and said “Keep walking you fucking rapist”, mistaking him for his brother.

[9] To the extent that Mr. Quash’s evidence differs from Mr. Smith’s, defence counsel states that Mr. Smith is not a credible and reliable witness because, in addition to inconsistencies “...too numerous to be exhaustively listed”,:

- he denied he was intoxicated, although Cst. Jury placed him at a level of eight out of ten on a scale of intoxication;
- he denied that it was possible he told Cst. Barr that “he deserved it” [being slashed];

- he said he called Ms. Bishop and asked to come home and was “happy” when she said he could, while Ms. Bishop testified that she called him and he said he would be home later, to which she replied “fine”; and, of particular importance,
- Mr. Smith stated that he was unaware that he had even been knifed.

[10] Counsel also points to the evidence of Mr. Smith’s long and extensive history of criminal charges and police encounters that resulted from “...his unwarranted and random aggressive behavior while intoxicated”. He noted that Mr. Smith consistently portrayed himself as the victim in these encounters and he emphasized Mr. Smith’s admitted tendency to be aggressive in order to defend himself.

Position of the Crown

[11] Crown counsel submits that Mr. Quash overreacted to the circumstances and his actions were unreasonable. Counsel submits that Mr. Quash’s testimony was contrived and inconsistent, and presented in a manner designed to put himself in the best light.

[12] One example proffered by Crown counsel is Mr. Quash’s testimony that he was concerned about the noise being made by Mr. Smith and that it might disturb the children next door, therefore he simply politely asked Mr. Smith to be quiet. Mr. Quash acknowledged in cross-examination that he did not know how many children were next door or their names. He had just heard there were children there. Counsel points out that this occurred prior to 8:30 on a Friday night, and submits that “...it is doubtful that the well-being of unknown children [who] would be sleeping...was at the forefront of the accused’s mind”.

[13] Counsel also points to the illogic of Mr. Quash stating that he was afraid Mr. Smith would return with some others and harm him, yet he chose not to call the police, and instead left the security of the home where his father and others were in order to go out into the community.

[14] Counsel also notes Cst. Tillman's testimony that, at the time of arrest, Mr. Quash was at ease and relaxed with a "braggadocios tough guy attitude". Counsel submits that this is inconsistent with Mr. Quash's testimony that he was "all fearful" only a short time before.

[15] With respect to Mr. Smith's testimony, counsel submits that he did not attempt to present himself in the best light; to the contrary he admitted his wrongdoings when confronted with them in cross-examination, and he owned up to his mistakes. He did not present himself as perfect. Counsel noted that, other than a differing opinion as to his level of intoxication when compared to Cst. Jury's opinion, and a lack of recollection as to exactly what he told the RCMP, Mr. Smith's evidence was consistent when talking about the incident, unlike Mr. Quash's testimony which was inconsistent.

[16] In addition to the facts as I have found and stated above, there are some aspects of the evidence of both Mr. Quash and Mr. Smith with respect to the events that I will set out in more detail, as this testimony is relevant to Mr. Quash's claim that he was acting in self-defence when he struck Mr. Smith.

[17] Although Ms. Bishop testified, I find that her evidence does not assist me in resolving the issues in this case so I will not review her testimony.

Wesley Quash

[18] In cross-examination, Mr. Quash stated that he slashed Mr. Smith because he had steel-toed boots on and he thought Mr. Smith had something in his pockets. He also testified in chief that Mr. Smith had taken a swing at him and either grazed or punched him in the cheek. The arresting officers were cross-examined about a bruise on Mr. Quash's cheek, and I am satisfied, based on their observations, that this was not a recent injury.

[19] At the conclusion of his cross-examination, Mr. Quash stated that he thought that Mr. Smith was Gary Mullins as he approached him, because he and Mr. Smith look the same: "He looks exactly like Gary. He walks around with the same backpack, same – like the same look....they carry the same backpack like". Mr. Quash testified to a prior encounter with Mr. Mullins that had left him afraid Mr. Mullins was on the lookout for him to cause him harm. He went on to state that if someone was coming down the street with a backpack:

Yeah, and I'm scared of them. Like I don't walk up to them. In don't indicate (sic) them, like I don't even bother them or interact with them because it's a small town. Lot of people know what people do.

[20] Mr. Quash testified that he only recognized Mr. Smith as he was coming up to him.

[21] Mr. Quash testified about a prior incident where Mr. Smith encountered him on the street and called him a rapist. Apart from that, there was no evidence of any prior

history of contact or interaction between Mr. Smith and Mr. Quash. There were no threats made by Mr. Smith during the incident Mr. Quash described.

[22] Mr. Quash testified that when Mr. Smith came up to him, Mr. Smith had his hands in his pockets. Mr. Smith got close to him and was pointing around and saying he could be loud if he wants.

[23] He stated that he thought Mr. Smith was going to hit him; "...because I get hit often and a lot of people just randomly cheap-shot me and lie about it".

[24] Mr. Quash thought that maybe Mr. Smith had something in his pocket, but stated that he did not know whether Mr. Smith in fact had a weapon.

Steven Smith

[25] Mr. Smith testified that Mr. Quash yelled at him aggressively. Based upon his experiences of being beaten up before, including in that same location, he reacted aggressively and ran up to Mr. Quash. He testified that his arms were out to his sides and away from his body. He stated that as he ran up to Mr. Quash, Mr. Quash swung his arm at him. He wasn't sure what Mr. Quash had in his hand, but he thought that his jaw had been broken.

[26] Mr. Smith denied ever taking a swing at Mr. Quash. He also denied that he took his backpack off. He stated that he believed that he had shoes on that night, and that he was not wearing steel-toed boots as it was not snowing.

[27] Mr. Smith testified that he had consumed alcohol downtown that day to the point that Ms. Bishop had told him he was getting too buzzed.

[28] Mr. Smith testified that he had no recollection of ever meeting Mr. Quash or speaking to him before the night in question.

[29] On reviewing his evidence, I find that the testimony of Mr. Smith in regard to his actions in past incidents does not either diminish his credibility or make it more likely that he was the initiator of physical aggression in the incident. Similarly, I also find the testimony of Mr. Quash in regard to prior incidents that he was involved in has no impact on his credibility.

The Law on Self Defence

[30] The statutory framework governing self defence changed significantly in 2013 with the coming into force of the *Citizen's Arrest and Self-Defence Act*, S.C. 2012, c. 9. The two sections that replace the former ss. 34-42 of the *Code* are s. 34 which governs the defence of person and s. 35 governing defence of property.

[31] Section 34 is the relevant section in this case, and it establishes three required criteria required for the defence to be available.

[32] As set out in *R. v. Cormier*, 2010 NBCA 10, at para. 40, once the accused raises an air of reality to a defence of self-defence, the Crown must prove, beyond a reasonable doubt, that one of three criteria set out in s. 34(1) is not met.

[33] Paraphrased for these circumstances, the criteria are:

- a) reasonable belief: Mr. Quash must have reasonably believed that force or a threat of force was being used against him by Mr. Smith. Mr. Quash's subjective belief must be objectively reasonable, such that the trier of fact is satisfied that a reasonable person standing in the shoes of the Mr. Quash would reasonably hold this belief.

- b) defensive purpose: the subjective purpose for responding to the threat must have been self-protection.
- c) reasonable response: the response of Mr. Quash must have been reasonable in the circumstances. Whether his response was reasonable requires an assessment of the entire context of the interaction between Mr. Quash and Mr. Smith, with reference to a non-exhaustive list of nine factors set out in s. 34(2). This assessment of reasonableness is objective, however there is necessarily a consideration of the personal circumstances of both the accused and the complainant as part of the overall context.

[34] The nine enumerated factors are:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the accused's role in the incident;
- (d) whether any party used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties;
- (f) the nature, duration and history of any relationship between the parties, including any prior use or threat of force, and the nature of that force or threat;
 - (f.1) the history of interaction or communication between the parties;
- (g) the nature and proportionality of the accused's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the accused knew was lawful, (not applicable in the present case).

[35] In assessing these criteria, a trier of fact cannot expect an accused to "judge the force he uses to a nicety": see e.g. *R. v. A.H.*, 2017 ONCJ 201, citing *R. v. Cunha*, 2016 ONCA 491 and *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont.CA).

[36] As well, an accused does not deprive himself of the defence if he responds having made a reasonable mistake of fact in assessing the risk he is at, including mistakenly believing that his assailant is armed (*Cunha*, at para. 8).

Analysis

[37] I agree with the submission of counsel for Mr. Quash that I must look at and assess his testimony keeping in mind his particular circumstances as: "...being a young first nation man, on the streets of Whitehorse, a reality nowhere near that of his comparatively privileged lawyer".

[38] Of course, I also apply the same principle to Mr. Smith, a First Nation man with a troubled history who is often found living a life on the streets.

Credibility

[39] Mr. Quash's testimony was delivered in a fairly calm and matter-of-fact manner.

[40] Mr. Smith, on the other hand, was very emotional, often wandering away from the question asked, and was defensive and argumentative with counsel during cross-examination.

[41] I find, however, Mr. Quash's version of events to be somewhat incredible.

[42] He testified that Mr. Smith ran up to him aggressively. However he said that Mr. Smith did so with his hands in his pockets. This, in my opinion, was an attempt to provide a foundation for Mr. Quash's stated belief that Mr. Smith may have had a

weapon of some sorts in his pockets, in order to underpin Mr. Quash's stated fear of being harmed, and thus, in turn, justifying his use of force to defend himself.

[43] It is illogical, albeit not impossible, that Mr. Smith would run towards someone aggressively while keeping his hands in his pockets. I find it much more logical and credible that Mr. Smith ran up to Mr. Quash as he testified to having done: with his arms out to his sides in what, having viewed it as demonstrated by Mr. Smith in the witness box, was a somewhat posturing and macho way.

[44] I also find it contrary to logic that Mr. Quash, seeing an unidentified individual getting out of a van and walking up the street yelling loudly, would precipitate an encounter with this individual, given the fear for his safety he testified about due to previous encounters with Mr. Mullins and others, and how he stated that because of his concerns, he would not bother or interact with people coming down the street with a backpack.

[45] If Mr. Quash was as fearful of being assaulted as he testified to, it would have been more sensible to have simply let Mr. Smith continue on his way without attracting his attention. The expressed concern for the noise disturbing the children does not, in my opinion, counterbalance this fear as expressed in the testimony of Mr. Quash. Further, I agree with Crown counsel that it seems unlikely Mr. Quash would feel this level of concern for children that he evidently did not know.

[46] I also find it highly questionable that Mr. Quash had time to look Mr. Smith up and down and determine that he had steel-toed boots on, when set against his testimony that Mr. Smith rushed up to him and swung at him, grazing him and knocking

him back a step. Mr. Quash testified that this happened so fast that he had no choice but to draw his knife from his pocket, open it and use it as he did. Perhaps Mr. Quash did look Mr. Smith up and down as he said, however, were that the case, then the speed with which the incident occurred was perhaps not as quick as Mr. Quash testified to.

[47] Mr. Quash stated that after Mr. Smith grazed him, he then pulled his knife out of his coat pocket, flicked it open and swung at Mr. Smith. He said that he did not have the knife in his hands before that. Mr. Quash testified, essentially, that he had no time to move away or otherwise put distance between himself and Mr. Smith, or use any other means to prevent himself from being assaulted by Mr. Smith.

[48] I am skeptical of Mr. Quash's testimony that Mr. Smith swung at him and grazed and/or punched him. Certainly the bruising defence counsel pointed to does not appear to have been related to the incident and, even if it were, does not support the occurrence of any significant contact having occurred. I am more convinced that Mr. Smith ran up aggressively with his arms waving and that this is what Mr. Quash reacted to. On the evidence I heard, including Mr. Smith's history of involvement in altercations, I find this to much more likely be the case.

[49] Therefore, I prefer the evidence of Mr. Smith with respect to what occurred over the evidence of Mr. Quash.

Self-Defence

[50] I find the following with respect to the application of s. 34 to the circumstances of this case:

[51] Firstly, I am satisfied that the action of Mr. Smith in running towards Mr. Quash as quickly and aggressively as he did, would give rise to a subjective belief on the part of Mr. Quash that there was the threat of force being used against him.

[52] Further, I find that this subjective belief was objectively reasonable. Notwithstanding that Mr. Quash precipitated the encounter by calling out to Mr. Smith, I can accept that he did not intend or anticipate that Mr. Smith would react in the aggressive manner that he did.

[53] Secondly, given that it was reasonable for Mr. Quash to have a belief that the threat of force was being used against him, it was also reasonable for him to react in a defensive and self-protective manner in order to counter this threat of force.

[54] Thirdly, however, I find that Mr. Quash's response to the situation in his use of the knife to strike Mr. Smith in the face was excessive, and this use of force was unreasonable in the circumstances. The Crown has met its burden in proving beyond a reasonable doubt that the third element of self-defence was not met.

[55] With regard to the criteria set out in s. 34:

- (a) the nature of the force or threat:

[56] The actions of Mr. Smith raised as a possibility only that Mr. Quash may need to take action to defend himself. This was not, on my findings, a case where there was actually any verbal threat or initial blow made by Mr. Smith.

- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force:

[57] While I accept that it was reasonable for Mr. Quash to fear that the threat of force was present, I find that Mr. Smith's actions did not create an atmosphere of imminence that required an immediate response through the use of reciprocal force. I find that Mr. Smith's actions were in the nature of posturing. As well, in my view, there were other means by which Mr. Quash could have responded. He could have moved away to better assess the situation or he could have responded without the use of a weapon.

- (c) the accused's role in the incident:

[58] I find no fault in Mr. Quash's actions in calling out to Mr. Smith as he was walking by. Beyond yelling at Mr. Smith, Mr. Quash did not take any steps to engage himself in a physical confrontation with Mr. Smith. There is no question that Mr. Smith, through his aggression, precipitated the closeness of the encounter in which the physical confrontation occurred.

- (d) whether any party threatened to use a weapon:

[59] Mr. Smith did not threaten to use a weapon. I also find that Mr. Quash had no reasonable basis to believe that Mr. Smith intended to use a weapon. Firstly, I have found that Mr. Smith's hands were not in his pocket. However, even if they were, there is nothing in the evidence that would elevate Mr. Quash's suspicion, to the extent it may

have existed, that Mr. Smith intended to use a weapon, beyond that of mere speculation. Even without my doubts about Mr. Quash's credibility on this point and whether he truly subjectively but mistakenly believed that Mr. Smith had a weapon, any such belief in my view was not objectively reasonable.

(e) the size, age, gender and physical capabilities of the parties:

[60] Having viewed both parties in court and heard the evidence, I am satisfied that Mr. Quash was not at any physical disadvantage when the incident occurred. Mr. Smith was 44 years of age and estimated his height and weight at approximately 5'8.5 or 9" and 145 lbs. Mr. Quash was 27 years old. There was no evidence as to Mr. Quash's height and weight other than Mr. Smith testifying that Mr. Quash was bigger than him. On what features of the two that were observable to me in court, and on the available evidence, I would certainly not consider Mr. Quash to be at any physical disadvantage. I am aware, of course, that I have no evidence about issues such as martial arts training etc. that could impact upon this.

(f) the nature, duration and history of any relationship between the parties, including any prior use of threat of force, and the nature of that force or threat; and

(f.1) the history of interaction or communication between the parties:

[61] There was nothing in the evidence that demonstrates there being any prior interaction between the parties that supports the use of force by Mr. Quash in the manner that occurred. While I am prepared to accept that Mr. Quash has been aggressively confronted by individuals who mistakenly believe that he was his brother, Christopher Quash, the evidence does not support a finding about such a past

interaction with Mr. Smith, other than the short verbal exchange on Main Street in which no threats or physical aggression occurred. I find that there was no history of violence or significant communication or interaction between them.

- (g) the nature and proportionality of the accused's response to the use or threat of force:

[62] I find that the use of force by Mr. Quash was excessive and unreasonable. There was no attempt by Mr. Quash to take any other action than what in fact constituted the use of the maximum force available to him.

[63] As I have already noted, there were other options available to Mr. Quash other than to take the drastic action that he did. There was little in the way of evidence tendered or adduced on this point, although I am aware that, after slashing Mr. Smith, Mr. Quash went to the other side of the fence in order to separate himself from Mr. Smith. Logic supports that other actions less drastic could have been taken in the circumstances. Unfortunately for both Mr. Smith and Mr. Quash, it does not appear that any other action was contemplated by Mr. Quash, such as simply pushing Mr. Smith away or walking away backwards into the house.

[64] In saying this, I am not basing the unreasonableness of Mr. Quash's action on the extent of the injuries suffered by Mr. Smith. Without considering the injuries, I find that Mr. Quash's use of a knife to slash Mr. Smith's face was disproportionate to any threat he may have perceived. The significance of the injury does not take an otherwise reasonable response and make it unreasonable. To allow for the extent of the injury suffered and resultant impact on Mr. Smith to turn an otherwise lawful action into an

unlawful one would be an error. This is not the case here, however. It is the action itself of swinging the knife at Mr. Smith's face given the very limited nature of the perceived threat or use of force that I find unreasonable.

[65] I have based my conclusion on a finding of fact that Mr. Smith did not swing at or punch Mr. Quash at the initial moment of confrontation. However, even if I had found that Mr. Smith in fact did so, my conclusion would not have been any different. Given the circumstances of the incident and the physical characteristics of the parties, including the intoxication of Mr. Smith and the sobriety of Mr. Quash, I find that there were reasonable alternatives available to Mr. Quash that should at least have been explored or attempted, even in the short time frame available, before he took the drastic action that he did.

[66] Again, Mr. Smith was not looking for or intending in any way to engage in a physical confrontation with Mr. Quash that evening, prior to Mr. Quash calling out to him. Mr. Quash chose to use an unreasonable and excessive means of violence in repelling the perceived threat or, even were I to have found Mr. Smith to have swung and struck Mr. Quash first, the use of force that Mr. Smith confronted him with.