

Citation: *R. v. Rutley*, 2013 YKTC 7

Date: 20130125
Docket: 11-11015
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

DARREN TROY RUTLEY

Appearances:
Jennifer Grandy
Darren Rutley

Counsel for the Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] Darren Rutley is before me for trial with respect to charges alleging a break and enter, an aggravated assault and a breach of the terms of his release conditions for failing to abstain. What is not in dispute is that Patrick McCormick suffered serious injuries on August 2, 2011; what is in dispute is how the injuries were caused and by whom.

[2] Trial of this matter has had a lengthy and convoluted history. An exorbitant number of applications filed by Mr. Rutley, along with his fixated belief that there is a conspiracy afoot to ensure his conviction, often distracted from the central issue in this case; whether the evidence is sufficient to establish, beyond a reasonable doubt, that

Mr. Rutley committed the offences as charged. This decision is focused on the central issue.

Summary of the Evidence:

[3] Angela Rear lives in a home on Front Street in Dawson City, Yukon along with her teenaged sons, Tyler and Nick Rear. Patrick McCormick, a longtime friend of Ms. Rear's, is a frequent visitor to the home, often sleeping on the couch.

[4] Prior to August 2011, Angela Rear and Darren Rutley were involved in a brief relationship. Ms. Rear indicates that she terminated the relationship due to concerns she had with respect to Mr. Rutley's behavior. Approximately one week before the incident, she says she advised him not to come around anymore and says he did not have permission to be in her home in August of 2011.

[5] On the night of the incident, Ms. Rear and Mr. McCormick shared several drinks with a friend in a trailer outside of Diamond Tooth Gerties. Over the course of the evening, Ms. Rear consumed a case of beer, while Mr. McCormick consumed around four to five beer. Ms. Rear then returned to her home and went to bed in her room on the upper floor, after locking her bedroom door.

[6] Mr. McCormick left the trailer and began to make his way to Ms. Rear's residence. On the way, he stopped in or went through a couple of local bars. In one, the Midnight Sun, he saw Mr. Rutley and another individual seated at a table. He says both had mugs of beer. Mr. Rutley told Mr. McCormick to go away, which surprised Mr. McCormick as there had been no previous issues in the six to eight months they had

known each other, although Mr. McCormick was aware that Ms. Rear did not want to see Mr. Rutley.

[7] Mr. McCormick returned to Ms. Rear's residence and went to sleep on the couch in the downstairs living room. He says he woke up when he heard someone banging on a door upstairs. He heard Mr. Rutley say, "Angie, I'm going to knock one more time and then I'm leaving". Mr. McCormick heard another bang and then Mr. Rutley came downstairs. Mr. McCormick asked Mr. Rutley what he was doing there as Mr. McCormick knew he was not welcome.

[8] Mr. McCormick says that Mr. Rutley then grabbed him by the neck with both hands, lifted him off the couch, then began to punch him wildly. At some point, Mr. McCormick blacked out. When he came to, he made his way to the kitchen to get a cloth. He blacked out again, falling to the kitchen floor. When he came to a second time, he crawled back to the couch where he remained until help was summoned the following morning.

[9] Dr. Storey, a Whitehorse surgeon who treated Mr. McCormick, testified that Mr. McCormick suffered a fracture of the proximal of the left humerus, meaning his arm was broken just down from the ball and socket. As the two ends of the humerus bone were completely displaced, surgical intervention was required to repair the break, including the insertion of two wires to align the bone. Mr. McCormick indicated he had not regained full range of motion by the time of the trial.

[10] In addition to the broken arm, Mr. McCormick lost 3 teeth, two during the assault, which were located by Cst. McIntyre on the living room floor, and one which Mr.

McCormick asked Dr. Storey to remove during surgery as it was loose with no teeth around it to provide support.

[11] There is mention, as well, of broken ribs in some of the medical evidence filed at Mr. Rutley's request; however, other than one reference by Mr. McCormick to having had sore ribs the evidence is insufficient to support a conclusion that Mr. McCormick's ribs were broken during the assault.

[12] In addition to testimony, I have also reviewed and considered a number of exhibits which were filed. These included numerous photographs depicting the scene, injuries to Mr. McCormick's face, and injuries to Mr. Rutley's hands; Mr. McCormick's missing teeth and his criminal record, Mr. Rutley's Undertaking, and various medical records and reports.

Issues:

[13] Mr. Rutley declined to make final submissions; however, given the number and variety of applications and representations he has made over the course of the trial, his views have been expressed on numerous occasions. As Mr. Rutley is self-represented, it is prudent, in my view, to address the arguments I anticipate Mr. Rutley would have made in his final submissions even though he declined to do so.

[14] I would summarize the issues raised by Mr. Rutley as follows:

1. Collusion and fabrication of evidence;
2. Credibility of witnesses, particularly Mr. McCormick; and
3. Causation of the injuries, particularly the broken arm.

Collusion and fabrication of evidence:

[15] The predominate theme of Mr. Rutley's numerous applications, affidavits and representations is his deeply rooted belief that he has been the victim of an elaborate conspiracy. He asserts that evidence has been fabricated and that the RCMP, the Crown, the witnesses, his former defence counsel, Legal Aid, Total Reporting and even myself, have colluded for the sole purpose of ensuring his conviction.

[16] Mr. Rutley points to numerous circumstances in support of his belief. For the purposes of this decision, it is neither necessary nor helpful to detail every circumstance, but a few such examples suffice to give a flavor of Mr. Rutley's concerns:

- Mr. Rutley points to the fact Cst. McIntyre's Show Cause Report indicates Mr. McCormick complained of a sharp pain in his arm while the patient care record indicates he complained of pain upon movement as an example of evidence fabricated by Cst. McIntyre. In my previous decision, with respect to Mr. Rutley's application for a judicial stay, I concluded that these statements were not even contradictory let alone evidence of fabrication.
- Mr. Rutley insists that it is clear that Mr. McCormick was reading a statement prepared for him by the RCMP when one listens to the recording of his second statement. To the contrary, when the recording was listened to in open court, it was obvious to me, with the numerous pauses and incomplete sentences, that Mr. McCormick was not reading a prepared statement.
- Mr. Rutley is adamant that Justice of the Peace Proctor, whose presiding authority is limited to fixing dates, presided at his bail hearing and ordered his detention. Again, listening to the tape, it is clear that Justice of the Peace Morrison-Harvey presided at Mr. Rutley's bail hearing.
- Mr. Rutley has more recently filed numerous affidavits asserting that Total Reporting has doctored transcripts; however, I would note the transcripts I have reviewed are, beyond the occasional typographical error, entirely consistent with both my recollection and my notes.

[17] While it is evident that Mr. Rutley's belief is sincere and unassailable, even in the face of basic common sense, the evidence simply does not, in any way, support his contention.

Credibility:

[18] The credibility of the majority of the witnesses, with the exception of Mr. McCormick, is of somewhat limited relevance in determining whether the offences have been made out, as it is only Mr. McCormick who provided evidence regarding the assault itself. That being said, I did not have particular difficulty with the overall credibility of any of the witnesses, including Mr. McCormick. However, there are three issues with respect to Mr. McCormick's evidence which should be addressed.

[19] Firstly, Mr. McCormick testified to having been woken up as a result of banging on an upstairs door. Ms. Rear and both of her sons were asleep upstairs while this was occurring, but each testified they did not hear anything.

[20] In considering how this affects my overall assessment of Mr. McCormick's credibility, I would note the fact that neither Ms. Rear nor her sons heard what Mr. McCormick heard is not itself enough for me to conclude that it did not happen as he described, particularly when I consider that Ms. Rear had consumed a significant amount of alcohol and had left her television on when she fell asleep, and that both Tyler and Nick testified they were sound sleepers, while Mr. McCormick testified that he was a light sleeper. I take judicial notice of the fact that some people sleep more heavily than others. It is entirely possible for one person to sleep through an event that causes another to wake up immediately.

[21] Secondly, I must consider the impact, if any, of Mr. McCormick's criminal record, filed as exhibit 6. The record is limited but does include convictions for theft under \$200, forgery and uttering a forged document; offences of dishonesty which could potentially raise concerns with respect to credibility. However, I would note that two of the three convictions were in 1982 with the remainder in 1998. Mr. McCormick has had no convictions since 1998. Mr. McCormick testified in a straightforward manner and was not shaken on cross examination. A dated criminal record does not cause me concern with respect to his credibility.

[22] The only other area which raises a question with respect to Mr. McCormick's overall credibility relates to the one inconsistency of note in his evidence, which was highlighted through cross-examination. At trial, Mr. McCormick testified that he passed out on the couch during the assault and was not conscious when Mr. Rutley left. His statement to police suggests the opposite, that he was still conscious when Mr. Rutley left.

[23] This discrepancy does not cause me undue concern. Other than the minor variations, no doubt attributable to the passage of time and the frailties of memory, which one commonly sees in criminal trials, Mr. McCormick was essentially consistent throughout his evidence with respect to the events of August 2, 2011. Furthermore, I would note that the assault on Mr. McCormick was significant enough to have resulted in his losing consciousness several times. It would not be unexpected in such circumstances for there to be some impact on his recollection of the sequence of events. In any event, one variation significant enough to be termed an inconsistency does not undermine the credibility of the whole of his evidence. Indeed, it does little

more than raise a question about the timing of when Mr. McCormick first became unconscious, which is neither critical nor fatal to my determination with respect to the central issue.

Causation:

[24] Over the course of the proceedings, Mr. Rutley raised concerns about the cause of Mr. McCormick's injuries. These can be grouped into two general categories: (1) whether Mr. Rutley was physically capable of having committed the assault as described, and; (2) whether the injury to Mr. McCormick's arm could have occurred as a result of the assault.

[25] Dealing with the first category, Mr. Rutley made representations on several occasions to a chronic back injury which he says would have prevented him from assaulting Mr. McCormick as described. More specifically, he says he physically could not have lifted Mr. McCormick off the couch by the neck.

[26] After much discussion, it was evident that the most recent assessment of Mr. Rutley's physical capabilities was completed in 2006, five years before the assault on Mr. McCormick. Mr. Rutley was not in a position to offer any evidence with respect to his condition contemporaneous with the incident nor was he in a position to retain an expert to provide an opinion with respect to what his physical capabilities would have been at the time of the incident, and Mr. Rutley declined, as is his right, to give evidence on his own behalf. In the circumstances, I must conclude that there is simply no evidentiary basis upon which to find a reasonable doubt based on any physical limitations.

[27] In addition, it is worth noting that when Mr. McCormick was called as a witness by Mr. Rutley, he clarified that when he was picked up off the couch, it was only his upper body that was off the couch. His legs remained on. I would note that Mr. McCormick is of slight build. The force required to lift only his upper body off the couch would not likely be significant in any event.

[28] Dealing with the second category, it was clearly Mr. Rutley's theory that Mr. McCormick's arm was broken as a result of the fall in the kitchen and not as a result of the assault. However, Mr. McCormick testified that the pain in his arm was evident before he got off the couch to go into the kitchen and thus before his fall in the kitchen. In addition, Dr. Storey testified that while it was possible the break could have occurred as a result of a fall, it was more likely the result of a violent blow or fall on a sidewalk.

[29] Having already noted that I found Mr. McCormick to be a credible witness, I accept his evidence as to the events of August 2nd, which leads me to conclude that the break occurred during the assault and not as a result of the later fall in the kitchen.

[30] However, I would note that even if I had a doubt as to whether the break occurred during the assault, this would not negate Mr. Rutley's responsibility for the injury. I am satisfied that the loss of consciousness and fall in the kitchen were a direct result of the injuries Mr. McCormick suffered as a result of the assault. Applying the reasoning of the Supreme Court of Canada in *R. v. Nette*, 2001 SCC 78, I would, in any event, have concluded that the assault was a significant contributing cause with respect to the fall in the kitchen and therefore of any additional injuries suffered as a result.

Conclusion:

[31] Having addressed what I believe would have been Mr. Rutley's main arguments had he made final submissions, I turn now to my conclusions. Having considered all of the evidence, I would make the following findings of fact, firstly with respect to the break and enter and aggravated assault:

- I accept Mr. McCormick's evidence and find as a fact that Mr. Rutley entered Ms. Rear's home on August 2, 2011.
- Mr. Rutley did not have permission to be in Ms. Rear's residence in August of 2011. Ms. Rear's evidence on this point was both credible and uncontradicted.
- Mr. Rutley banged on Ms. Rear's bedroom door and, upon receiving no response, went downstairs where he was confronted by Mr. McCormick who was on the couch in the living room.
- Mr. Rutley grabbed Mr. McCormick with both hands around the neck lifting Mr. McCormick's upper body off the couch. Mr. Rutley then released one of his hands with which he began punching Mr. McCormick. I would note the photographs of Mr. Rutley's hands filed as exhibit 4 depict marks consistent with having committed the assault as described. No alternative explanation was provided.
- At some point, Mr. Rutley left the residence and Mr. McCormick lost consciousness, although there is some doubt on the evidence as to which occurred first.
- Mr. McCormick experienced pain in his arm when he attempted to get off the couch and go to the kitchen. Once in the kitchen, he again lost consciousness and fell to the floor. He ultimately returned to the couch where he remained until the next morning.
- As a result of the assault, Mr. McCormick suffered injuries including the loss of three teeth and a broken humerus requiring surgical intervention.

[32] Having made these findings, I am satisfied that the evidence establishes beyond a reasonable doubt that Mr. Rutley committed a break and enter into Ms. Rear's

residence by entering without permission; that Mr. Rutley assaulted Mr. McCormick causing a broken humerus amounting to wounding or maiming combined with the disfigurement of the lost teeth, thereby committing an aggravated assault. As the essential elements of the aggravated assault are subsumed in the s. 348(1)(b) break and enter and commit an aggravated assault, I accept the Crown's submission that *R. v. Kienapple*, [1975], 1 SCR 729 applies and would enter the conviction with respect to count two, the break and enter, and a stay of proceedings with respect to count one, the aggravated assault.

[33] With respect to the remaining count, the breach of undertaking, I am not satisfied that the offence has been made out. The evidence does establish that Mr. Rutley was subject to an Undertaking, filed as exhibit 3, which required him to "abstain from the consumption and possession of alcohol".

[34] The only evidence with respect to a breach of the abstain condition comes from Mr. McCormick who indicated that he observed Mr. Rutley sitting at a table in the Midnight Sun bar with a friend. He says that both of them had what he believed to be beer contained in mugs rather than labeled bottles. The evidence was unclear as to whether the mugs were simply on the table or whether he observed Mr. Rutley to handle one of them. There is no evidence suggesting he observed Mr. Rutley consuming anything. In addition, on cross-examination, Mr. McCormick was clear that he assumed, but did not know, that the substance in the mugs was beer.

[35] In my view, the evidence does demonstrate that it is highly likely that Mr. Rutley was in breach of his abstain condition, but it falls short of establishing the offence

beyond a reasonable doubt. I reach this conclusion for two reasons. Firstly, there is some doubt that the substance in the mugs was alcoholic; and secondly, the condition reads conjunctively, requiring both possession and consumption. While the evidence indicates at least a probability that Mr. Rutley was in possession, there is no evidence of consumption.

[36] Accordingly, I am not satisfied beyond a reasonable doubt that Mr. Rutley was in breach of the abstain condition of his Undertaking. Count three will be dismissed.

RUDDY T.C.J.