Citation: *R.* v. *Surette*, 2009 YKTC 92

Date: 20090723
Docket: 08-00652
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

PIERRE DONAT SURETTE

Appearances:
Kevin Komosky — Counsel for Crown
Gordon Coffin — Counsel for Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): Pierre Donat Surette has been charged with having committed two offences contrary to s. 264.1(1)(a) of the *Criminal Code*, two offences contrary to s. 267(a), one offence contrary to s. 88 and one offence contrary to s. 90.

[2] The charges arise from an incident that occurred on December 25, 2008. In the entranceway of an apartment complex on Lewes Boulevard in Whitehorse, the allegations are that Mr. Surette pointed an approximately 30 inch or so long sword, with perhaps a 20 to 24 inch blade, at or in the general direction of Jeffrey Gill and Ralph Boehnlein and that he further threatened to get a gun and shoot them.

[3] At the outset of the case Crown counsel advised me that Mr. Boehnlein was not

present to testify and the counts of s. 267(a) and s. 264.1(1)(a) in which he is named as a complainant would likely not be proven. At the close of the Crown case, Crown counsel invited me to dismiss those counts and I did.

[4] The Crown called two RCMP witnesses and Mr. Gill. Mr. Surette testified in his own defence. Overall, I find that the evidence of all the witnesses was credible, with some reservations concerning the evidence of Mr. Gill and Mr. Surette.

[5] With respect to Mr. Gill, there were certain aspects of the incidents which he was not clear about, and on at least one point his recollection at trial differed from what he had said occurred in his earlier statement to the RCMP. When confronted with this inconsistency, however, he provided a reasonable explanation.

[6] With respect to Mr. Surette, while I have no difficulty accepting much of what he stated occurred, I find that he underestimates his own level of agitation during the incident and afterwards when he was arrested by the RCMP. By his own admission, he had consumed three drinks of cider in order to put him into the Christmas spirit. He was noted by the RCMP officers to be somewhat intoxicated, although not overly so. He provided a voluntary breath sample at the RCMP detachment which indicated that his blood alcohol level was 0.11 milligram percentile. The RCMP officers also testified that, while Mr. Surette was not uncooperative, he was difficult. While Mr. Surette disputes this, I prefer the evidence of the RCMP officers.

[7] I note that the evidence from the RCMP officers about Mr. Gill's demeanour is that he appeared to be sober. Mr. Gill testified he had consumed two or three beers overall, but there is nothing to lead me to find that Mr. Gill was intoxicated to any

degree.

[8] I am cognizant of the principles enunciated in *R.* v. *W.D.*, [1991] S.C.J. No. 26, and subsequent case law about how I am to assess the evidence given by Mr. Surette. The bottom line is that I must give his evidence a fair assessment and allow for the possibility of being left in doubt, notwithstanding the evidence of Mr. Gill. I have a positive duty to assess Mr. Surette's evidence in light of the whole of the evidence, and that includes the testimony of Mr. Gill. (*R.* v. *Hull*, [2006] O.J. No. 3177, *R.* v. *Jaura*, [2006] O.J. No. 4157, and *R.* v. *J.J.R.D.*, [2006] O.J. No. 4749). I find, however, that, although I accept much of Mr. Surette's evidence, where it is in contradiction to Mr. Gill's evidence on a point on which Mr. Gill is certain what occurred, I accept the evidence of Mr. Gill.

[9] I find that the following occurred. Mr. Surette was in the vestibule of the apartment, where all of the individuals lived, between the outside locked doors and the inside doors. He was putting on his gloves and preparing to go outside to visit a friend. He was carrying a ceremonial-style sword in the sheath, which he intended to give to that friend as a Christmas present. While he likely put the sword against the outside wall in order to put on his gloves, he also likely had, at some point, put it inside his parka, intending to carry it to his friend's place that way.

[10] While Mr. Surette was in the vestibule, Mr. Boehnlein came to the outside doors and asked Mr. Surette to let him in. Mr. Surette could not see through the frosted doors and, thus, not knowing who was outside, refused to do so and told him to use his key if he had one. Mr. Boehnlein then began to knock on the doors and yell or speak loudly at

Mr. Surette. Mr. Gill, who was inside the apartment building, heard the knocking and recognized Mr. Boehnlein's voice. He went to the doorway area and observed Mr. Surette yelling at Mr. Boehnlein, although he cannot say what was being said other than words to the effect of "I'm tired of being a doorman." Mr. Boehnlein finally located his own key and opened the door. He came into the vestibule and confronted Mr. Surette in a verbal altercation. Mr. Surette continued to yell or speak loudly to Mr. Boehnlein and was the louder of the two individuals. Mr. Gill, knowing Mr. Boehnlein's aggressive personality, said, "I'll take care of this," meaning that he was going to intervene to diffuse the situation before it escalated. It appears that Mr. Gill may have stepped in between Mr. Surette and Mr. Boehnlein, who then moved away from Mr. Surette to stand beside or near Mr. Gill.

[11] At that point, Mr. Surette pulled out his sword from its sheath inside his coat and pointed it towards Mr. Gill. Although the evidence of Mr. Gill is not clear at this point, I find that it is most likely that Mr. Boehnlein was still standing beside or near Mr. Gill at this time. Mr. Surette did not attempt to strike at either Mr. Gill or Mr. Boehnlein, or otherwise gesture with the sword; he simply pointed it at them briefly at a distance of six to eight inches away from Mr. Gill's chest. I find that the inside vestibule doors were open at this point in time. Mr. Gill had no concern that Mr. Surette intended to come at him with the sword. He did not have to back away to avoid it and he did not feel threatened by it.

[12] Contemporaneous to this, Mr. Surette stated words to the effect of "I will get my gun and shoot you." Again, this was clearly directed at Mr. Gill, and quite likely at Mr. Boehnlein as well. At this time, due to the words that were said, Mr. Gill felt that he

should call the police, and went to his apartment to do so. Mr. Surette left the apartment building and was arrested within five minutes walking towards downtown, carrying the sword in its sheath outside his parka.

[13] This incident occurred in a very brief period of time and was the result of an unexpected confrontation resulting from otherwise innocent circumstances involving individuals that Mr. Surette was generally unfamiliar with.

[14] The position advanced by defence counsel is that Mr. Surette honestly, albeit to a large extent mistakenly, believed that he was at risk of being physically harmed by Mr. Boehnlein and Mr. Gill. This belief is an important consideration and constitutes a defence, to some extent, to all the remaining counts.

[15] Crown counsel argues that there is no reasonable basis for the defence of self-defence and, even if there was, the words that were stated cannot constitute use of force within the wording of s. 34 and s. 37.

[16] Firstly, I find Mr. Surette's actions to be within in the definition of assault in s. 265. I also find that Mr. Surette subjectively believed that he was at risk of being harmed in a potential physical confrontation between himself and Mr. Gill and Mr. Boehnlein. Mr. Boehnlein was clearly upset at Mr. Surette. He is larger than Mr. Surette and Mr. Gill's evidence confirms, although not in these exact words, that Mr. Boehnlein was the kind of person that would not back away from a confrontation. Mr. Gill involved himself in the confrontation due to this knowledge. While the words uttered by Mr. Gill that he would "take care of this" only meant that he would intervene to the extent necessary to defuse the situation before it escalated, to Mr. Surette they may

well have been viewed as meaning that Mr. Gill was going to side with Mr. Boehnlein against Mr. Surette. I say this recognizing that there is no evidence that Mr. Gill otherwise acted in any way that was consistent with Mr. Surette's belief. In fact, Mr. Gill's actions throughout the incident were entirely appropriate. Mr. Gill testified that it would have been apparent to Mr. Surette at the time that Mr. Gill and Mr. Boehnlein knew each other.

[17] I find that Mr. Surette's subjective belief to be objectively reasonable in the circumstances. I am not saying that it is objectively reasonable that he was at risk of being assaulted, only that he could have believed that. As such, I find that Mr. Surette was entitled to use some force to repel what he honestly, but mistakenly, believed was a potential physical attack on him involving Mr. Gill as a participant with Mr. Boehnlein.

[18] Was the force that he used in holding the sword up toward Mr. Gill as he did reasonable in the circumstances? A sword is an extremely dangerous device when used as a weapon and is capable of inflicting considerable harm. Had Mr. Surette swung the sword and/or attempted to strike either Mr. Gill or Mr. Boehnlein, I would have found that the use of force on the basis of a belief of a potential threat of force being used against him, when all that had happened so far was a verbal dispute with Mr. Boehnlein, was an unreasonable use of force and outside of what is contemplated in the defence of self-defence. However, I find that Mr. Surette's use of the sword was intended by him to mean nothing more than a warning that if he was to be attacked he would defend himself with the sword. While I have concerns about the relatively close distance the sword got to Mr. Gill, in all the circumstances, including the lack of concern expressed by Mr. Gill as to his being at any risk of harm by Mr. Surette with the sword, I

find that this use of force was reasonable. I consider the context of the incident to be significant in making this finding. Mr. Surette did not bring the sword to the incident intending to arm himself for a potential confrontation. He had the sword with him for an innocent and lawful purpose. His reaction was spontaneous, brief, was in reaction to his subjective fear and was restrained in the actual "use" of the sword. As such, I dismiss the s. 267(a) charge.

[19] With respect to the s. 264.1(1)(a) charge, I find that these words were uttered by Mr. Surette as a result of the same honest but mistaken belief that he was at potential risk of being harmed and with the intent to prevent any such perceived attack from occurring. The fact that Mr. Surette did not possess a gun is not a defence to the charge; is it simply part of the context in which the statement was made.

[20] As to the argument by Crown counsel that words cannot constitute a use of force within the definition of self-defence, I find that accepting this position could lead to illogical or absurd results. As an extreme example, if an individual is threatened by the use of force against him which could result in grievous bodily harm or death, to the extent that he is justified in repelling that force with deadly force, and he possesses a loaded firearm, it would be a defence to that individual if he shot the aggressor but not if he only threatened to shoot the aggressor. The defence of self-defence allows for the increased use of force to repel an unlawful assault proportional to the threatened harm. A threat to use a gun is a lesser response to an unlawful assault than actually firing the gun; therefore, a more restrained response.

[21] In the case of *R.* v. *Fioramanti*, [1991] O.J. No. 1991, (Ontario Court of Justice)

on a charge of uttering a threat, the Court stated:

> The offence of uttering a threat requires mens rea on the part of the accused. Mens rea may be found in the intention of the accused to make a threat which is to be taken seriously by the receiver. These elements have been established in this case. While motives are not usually relevant in providing a defence to the charge, it is clear that a person in imminent danger or distress in the face of an aggressor may be justified in uttering threats as an act of self-defence.

[22] Therefore, I find that the threat to Mr. Gill was made in the context of Mr. Surette defending himself, or belief that he needed to defend himself, and in the circumstances falls within the defence of self-defence. As such, Mr. Surette is acquitted of this charge.

[23] The charge of carrying a concealed weapon requires that Mr. Surette is carrying a weapon as defined by the *Code* and that he concealed the weapon so that it would not be observed or come to the attention of others. The factual basis for this charge requires that I find that Mr. Surette placed the sword inside his parka. The only evidence comes from Mr. Gill who said that Mr. Surette pulled the sword out from inside his coat and pointed it at him; before that he did not see the sword. Mr. Surette stated that he did not conceal the sword at any time, but had leaned it against the outside wall and he took it out of its sheath from that location in order to point it at Mr. Gill and Mr. Boehnlein.

[24] Crown counsel is correct, and defence counsel concedes, that Mr. Gill was not asked whether it was possible that Mr. Surette obtained the sword from the wall instead of his coat; therefore, the rule in *Browne* v. *Dunn*, (1893) 6 R. 67 (H.L.), applies. I note that Mr. Coffin did ask Mr. Gill whether it was possible that Mr. Surette turned his back

towards Mr. Gill prior to pulling out the sword, which is consistent with Mr. Surette retrieving the sword from the outside wall. Mr. Gill's answer to Mr. Coffin's question, however, is that Mr. Surette was facing him when he pulled out the sword. To some extent, this question by defence counsel addresses the concerns raised by application of *Browne* v. *Dunn*, although not going as far as asking whether the sword could have been against the wall. Regardless, I am satisfied on Mr. Gill's evidence, which I prefer, that the sword was inside Mr. Surette's coat; therefore, it was concealed.

[25] I find, however, that it was concealed for the purpose of transporting it to Mr. Surette's friend's house and not for any other purpose. It was, for example, not carried and concealed just in case Mr. Surette had to defend himself.

[26] The question remains as to whether the sword was a weapon. Quoting from *R.* v. *Constantine*, [1996] N.J. No. 4, paras. 9 and 10:

> [9] Obviously, a handgun or a switch-blade knife or brass knuckles may generally be regarded as being weapons because they are designed to be such. Thus, in the absence of evidence to the contrary, the cases generally state that concealment of any of these may create the offence because unlawful purpose may be assumed or implied.
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> [10] The same, however, cannot be said of a carving knife or a steak knife or a hunting knife, or many other objects which are intended for peaceful purposes. Thus, the key to the entering of a conviction in such matter has to be the establishing by the prosecution that the object is being concealed for an unlawful purpose. This is, however, not an easy method of dealing with the problem in all cases because obviously the lines as to the nature of the object, the extent of the concealment and the determination of purposes can become easily obscured.

[27] After considering a number of authorities, the Court in *Constantine* stated:

> [14] The authorities seem to follow a standard pattern of the prosecution having of necessity to establish that an object which could be used for peaceful purposes was intended to be used as a weapon. Conversely, where the object in issue was one which could obviously be deemed to be a weapon because of its very nature, the evidentiary burden would fall on an accused to establish that no unlawful purpose was intended. One case which appears to have caused some problems within the courts of the country, however, is that of R. v. Felawka, [1993] 4 S.C.R. 199 where, by a four to three majority, the Supreme Court upheld a conviction of a person who was carrying a .22 calibre rifle wrapped in his jacket on his way home from target shooting. He was found guilty of carrying a concealed weapon because he intended to conceal it, he having stated, "it was not proper to carry it out in the open". It is interesting to note in that case the majority felt that a firearm as defined in s. 84 of the Criminal Code will always come within the definition of a weapon because it is expressly designed to kill or wound. While mens rea is required to be proved to establish a s. 89 offence, that mens rea will be established if the Crown proves beyond a reasonable doubt that the accused concealed an object that he knew to be a weapon, without more. Lamer, C.J.C., dissenting, was strongly of the view that it had not been shown that the accused was carrying a "weapon" within the meaning of s. 89. Further, in his view, the majority's interpretation of s. 2, which would include a firearm as a weapon regardless of its use or intended use, could produce unjust results.
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> [15] Felawka does appear to deviate somewhat from the norm. However, in any event, it may be distinguished for our purposes because we are not here dealing with a firearm, but rather a hunting knife. That object was not designed to kill or maim persons and therefore the matter of purpose or intent of the accused becomes most relevant.

Just as a note, when I read the head-note on *Felawka, supra,* it appears to me that it is a six to three majority, rather than four to three; but that is just based on the head-note.

[28] In considering the application of this case and the Supreme Court case of

Felawka to the sword carried by Mr. Surette in this case, it appears to fall somewhere between the switch-blade, firearm, brass knuckles category and the carving knife, steak knife or bread knife category. The sword, which I describe to some extent as a ceremonial sword, is not designed or created for utilitarian purposes unrelated to the concept of it being used as a weapon to kill or maim. At best, it can be said to be created and sold as a decorative ornament of sorts to hang on a wall or place in a display case, basically, a decorative ornament of something that originally seems to have as a main purpose being designed to be in the same sort of category as to kill or maim persons. Similar is a ceremonial knife, which by design is not a hunting knife, carving knife or steak knife, but clearly is designed as being or representative of a weapon made to kill or maim persons, outside of its decorative role. I recognize that any number of other manner of things, from opening letters on, could also be done with such swords and knives.

[29] On the other hand, the sword is not a prohibited weapon, nor is it a “weapon” such as a firearm, which it is illegal to obtain or possess without first being licensed to do so. You can walk into any one of a number of stores in Canada and purchase such a sword simply by paying for it. If I were to place this sword in the same category as a firearm, the result, according to a narrow application of *Felawka*, would be to prevent a sales clerk from placing the sword in a large shopping bag, or in the case of a ceremonial knife in a small shopping bag, unless clearly marking the outside of the bag in a manner which conveys to the general public that there is a sword or knife in the bag.

[30] I believe that there is some merit to the dissenting opinion expressed by Lamer,

C.J.C., in *Felawka* that an overly strict application of the majority reasoning with respect to categorizing items as weapons, irrespective of the circumstances of their concealment could lead to an unjust result. That is not to say that I disagree with the reasoning of the majority.

[31] In this case, however, I find that the sword, not clearly falling into either category, was not presumptively a weapon as defined in the *Code* for the purposes of s. 90; therefore, I dismiss this charge.

[32] On the final count of carrying a weapon for a purpose dangerous to the public, the Crown must prove that the weapon was carried in a manner in which it was intended to be used for a purpose dangerous to the public. It is important to remember, and I am quoting from para. 28 of *R.* v. *Calder*, [1984] A.J. No. 979, that:

> (1) … The fact that it may not be used at all as an offensive weapon or the fact that it may be so used are of themselves quite inconclusive.
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> (2) What may have originally been a possession with an innocent intent may, depending on the circumstances, change.
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> (3) If an accused threatened with a knife which he originally had for an innocent purpose, the question then becomes, did his innocent intent change, or did the circumstances justify the threatening or use of the knife so that it could not be said that his possession became a possession for purposes dangerous to the public.

[33] For all the reasons set out above in respect of the other counts, I find that this charge has not been proved beyond a reasonable doubt and dismiss it. Mr. Surette is, therefore, acquitted on all charges.

[34] I want to add that this is a somewhat unique set of circumstances. The acquittals are in large part based upon a consideration of the actions of Mr. Surette in this somewhat unique context. It will be unusual for such a set of circumstances to exist, where, without any physical violence actually occurring, a sword can be used and threatening words said, that does not end up in a conviction.

[35] I would order the sword to be returned after the expiration of any period of appeal. Is that satisfactory to both parties?

[36] MR. KOMOSKY: Crown would seek that the sword be forfeited.

[37] THE COURT: On what basis? It is not illegal; it is not restricted; it is a legal device that a person can have for an innocent purpose, so what is the basis that it should be forfeit on?

[38] MR. KOMOSKY: That it was used in an inappropriate manner.

[39] THE COURT: Inappropriate but, as I found, not unlawful. I am going to order that it be returned to him, again, after the expiration of an appeal period if an appeal has not been filed.

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COZENS T.C.J.