

Citation: *R. v. Toquero*, 2013 YKTC 84

Date: 20100806
Docket: 10-00241
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Barnable

REGINA

v.

BENJAMIN SARMIENTO TOQUERO

Appearances:
Evangeline Ramirez
Nora Mooney

Appearing on her own behalf
Appearing for Defence

REASONS FOR JUDGMENT

[1] BARNABLE T.C.J. (Oral): This is a hearing pursuant to s. 810(1) of the *Criminal Code*. The witnesses heard were Brenda Reeves, Erwin Chechola, Sherry West, Edmund Ramirez, Timothy Ng, and of course the complainant and the defendant.

[2] The facts are that the complainant and defendant had been married for about 14 years but that their union is now coming to an end. Both the complainant and defendant were originally citizens of the Philippines. Now the wife is a Canadian citizen and the husband is a landed-immigrant. She came to Canada first, sponsored him, and then married him. Both of them seem to have been hard workers and have achieved a good measure of success in their new home.

[3] Ms. Ramirez says she is the driving force in their business. I accept that she is. She started the basic cleaning business, and she recruits and pays the employees. The defendant has had another job since 2001. The complainant was competent enough to be able to present her case in English, while Mr. Toquero felt more comfortable presenting in his native tongue and having the other evidence offered to him in that tongue. For reasons such as these, I think Ms. Ramirez did carry the load in the business of the couple.

[4] That is not to say Mr. Toquero did not do his share. I have already mentioned his work at Walmart, where his money went, his early snow clearing, and his cleaning work.

[5] The marriage has not been going smoothly for some time. From the complainant's perspective, the defendant was the cause. She claimed he sexually assaulted her in 1994, committed adultery in 1997, and never really pulled his weight in the business. Now she thinks he wants to go back to the Philippines and has a girlfriend there.

[6] From the defendant's perspective, he sees himself as a drudge, held in thrall from the very beginning by the threat of deportation. He claims he has been threatened by her with death on occasion, and described one incident where she struck him on the chest repeatedly with her fists.

[7] The question I must ask myself is: Am I satisfied from the evidence educed that Ms. Ramirez has reasonable grounds for her fears? "Satisfied" is one key word, and the phrase "reasonable grounds" is also key. When an Information is put forward and

evidence educed, the Court cannot duck this duty. So the suggestion that it be left to the pending divorce court is not open for consideration.

[8] I have listened to the complainant and the defendant carefully and considered what each said and where their testimony differed. I also heard the other witnesses who saw or heard something of what happened on June 18, 2010. With the police outside of the house in question, with the defendant still inside, and with Ms. Ramirez still at the hospital, Brenda Reeves went inside. She told Mr. Toquero what threat he was alleged to have made and was told by him twice that he did make the threat to burn down the house. I appreciate that this exchange took place in English and that the defendant has fallen back on his native tongue and needed to rely on it in this hearing. However, Ms. Reeves said she has had many prior conversations in English with the defendant, that she found his accent thick but understandable, and found that misunderstandings in language were cleared up by further questioning. I also note that he has been here 14 years, has worked in the community throughout, and has had his job at Walmart. I note that he talked with his friend, Mr. Ng, in English, and even over the phone.

[9] I also appreciate that Ms. Reeves was a friend of the complainant and her family, and that she was a co-worker at the bank. Friends are often not as independent witnesses as strangers to the parties, but certainly Ms. Reeves was not so dependent, as defence counsel suggests, especially when it comes to the nieces and nephews of the complainants. The nephews have also testified, so Ms. Reeves was not at the same level of dependence.

[10] Sherry West was another volunteer who went and talked to Mr. Toquero in the house. She said he denied making the threat to her, showed her the mess, but said the complainant made it herself. He told her he had requested his papers and that Ms. Ramirez scattered things. Of course, his denial was not against his interest. I found it interesting that there was a mess when Ms. West was there, but that it was cleared up before the complainant and her relatives returned.

[11] The defendant in his own testimony seemed to admit to scattering the clothes, but said that the papers were scattered by his wife. He testified in answer to a question from a police officer, the question being: Are you going to burn the house? He answered, "I am not insane that I am going to burn my own house." Now, this exchange between Mr. Toquero and the police officer touches less on whether he earlier threatened to burn the house and more on his sense of entitlement to the house and to be in it at that time.

[12] Erwin Chechola testified he saw Mr. Toquero scattering things about and heard him say, "If I can't find it, it's better to burn the fucking house." Now, this was before his aunt initially arrived. He said they called her. When she arrived, he heard them argue, and he heard Mr. Toquero demand papers. This witness said that Mr. Toquero was responsible for the mess that is the clothes and the papers that were scattered in the aunt's room. To quote him, this witness said he saw Mr. Toquero, "Pulling my aunt." This was just about the time she collapsed. He saw her from the kitchen looking into the room.

[13] Edmund Ramirez also saw and heard this. Erwin and Edmund are dependents on the aunt for continued employment. They have only been in Canada a short time and were sponsored by both the complainant and the defendant. Still, I have given some credit and find somewhat credible the evidence of what they witnessed and heard.

[14] Mr. Ng supported the defendant's testimony that the mobile phone company gave as a reason for terminating the cellphone a report that it had been stolen. However, he and Mr. Toquero are able to say that it was not stolen. I accept their evidence insofar as it goes, but absent some witness from Bell Alliant, I see no reason to reject the complainant's testimony about her reason for having the cellphone disconnected. Certainly, without hearing from people at Bell Alliant, I cannot accept that she told Bell Alliant a lie.

[15] Mr. Toquero claims he lives under threat of deportation and has since the beginning. He is now almost 16 years in Canada and, as I pointed out earlier, has a separate job at Walmart since 2001. He has made friends in this community, he is able to communicate with them, and he has the status of a landed immigrant. I do not find that he would be in the same state 16 years later as he was when he first came to Canada. I do not feel that this claim of being fearful of deportation is realistic, 16 years later.

[16] I ask myself: Why did this defendant come to the house on June 18th? They were already in dispute, and the question of where his missing papers were had already been raised and answered, even as late as the day before, June 17th. To make myself

clear, the defendant had already said, "You have my papers, give them to me", and the answer had been given, "I haven't got your papers." That had already been articulated before the 18th. That suggests to me that there was not a true purpose for him to come to the house on June 18th, and to be again searching for and demanding his papers.

[17] The nephew who testified was allowed to leave the stand without being asked about the cup-throwing incident of June 17th. The complainant was not confronted with the proposition that she had changed the mailbox key in March 2010. She was not given an opportunity to respond to the defendant's assertion that he had asked the police to call her and tell her to stop calling him, although, in fairness, I do not think counsel knew about this assertion until she heard it on the stand.

[18] In conclusion, having heard from the three witnesses who said that they heard the threat to burn down the house, having heard from the witness who said the defendant admitted he had made the threat, and after considering who those witnesses were, their motives, and the frailties of their testimony, I am satisfied the defendant did make this threat and that he was angry and frustrated at the time. The complainant has made out her claim that the defendant should be placed on a recognizance.

[19] Defence counsel's suggestion that both parties be placed on recognizances is not accepted. The defendant is to enter into a recognizance in the amount of \$1,000 with no deposit and no sureties for a period of 12 months. If he fails or refuses to enter into this recognizance, he is to be imprisoned for three months or such lesser time as it takes to gain his compliance.

[20] The conditions of his recognizance are:

1. That he keep the peace and be of good behaviour towards the complainant;
2. That he refrain from all contact and communication with the complainant, except through his lawyer;
3. That the defendant not attend at the complainant's residence or place of work;
4. The defendant is not to possess any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, prohibited ammunition, or explosive substances for the period of the recognizance;
5. If the defendant is in possession of any of the above, he is to surrender the same to the RCMP for safekeeping until the term of the recognizance is completed;
6. If he holds any authorization or licence for any of the above, he is to surrender the same to the RCMP for the period of the recognizance.

[21] That is all in this matter. Thank you for the translation, thank you for your attention.

BARNABLE T.C.J.