

Citation: *R. v. Yanisiw*, 2012 YKTC 59

Date: 20120615
Docket: 11-11036
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

JOSEPH ERNEST YANISIW

Appearances:
Jennifer Grandy
Joseph Yanisiw

Counsel for the Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): Mr. Yanisiw has been charged as follows:

Count 1: On or about the 6th day of December, 2011, at Dawson City, Yukon Territory, did commit an offence in that: he did commit an assault on Trina KIBBLEWHITE, contrary to Section 266 of the Criminal Code.

Count 2: On or about the 6th day of December, 2011, at Dawson City, Yukon Territory, did commit an offence in that: he did without lawful authority confine Trina KIBBLEWHITE, contrary to Section 279(2) of the Criminal Code.

[2] There is a third charge relating to s. 246 of the *Criminal Code*. At the completion of the trial the Crown acknowledged that there was no evidence with regards to Count 3 and that she was proceeding only on the first two counts.

[3] This trial was complicated by the fact that Mr. Yanisiw was self-represented, while the Crown was represented by an experienced and capable counsel. This resulting imbalance of knowledge and experience in law and procedure invariably creates challenges for the trier of fact and, in the case of a trial with judge alone, on the trial judge who must assist the accused procedurally.

[4] A further difficulty for the trial judge arises from the fact that the only two persons present during the December 6th incident were the complainant and the accused. The result will turn on findings of credibility and the multi-step analysis set out by the Supreme Court of Canada in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397, (S.C.C.) and *R. v. J.H.S.* 2008 SCC 30.

[5] The complainant, Ms. Kibblewhite, is a 41-year-old woman, born in Alberta, who has resided in the Yukon for six years. The following facts are taken from her evidence. Ms. Kibblewhite lived with Mr. Yanisiw in a common-law relationship since September 2010, until December 6, 2011. During the first winter they lived in Ms. Kibblewhite's apartment in Whitehorse which she said she shared with a girlfriend. In the spring they moved to Dawson City to Mr. Yanisiw's mining camp off Hunker Creek Road, a rough mining road some 45 minutes drive from Dawson City. The residence on this site was a trailer with an addition on it.

[6] Ms. Kibblewhite testified that December 6th was an average day and that they were preparing to leave camp in the next few days. At this time of the year most, if not all, of the other mining camps in the area would have been shut down for the winter.

[7] That morning Mr. Yanisiw had been working on the generator. She could not

remember whether they had had lunch that day. Around noon an argument started with Mr. Yanisiw. She identified a grab bag of issues, most of which were her issues: financial issues, departure dates; she wanted to leave earlier. She had to give up her dog; she was still upset about that. She wanted to see her children. They were almost out of fuel and food. She was a smoker and she was out of cigarettes. She stated that she was getting frustrated with the whole situation and raised her voice. Similarly, Mr. Yanisiw also became agitated, frustrated, and berated her. They were sitting at the table in the kitchen where she was melting snow for washing in a large stock pot. She volunteered that when it was full of water it was difficult to lift. Towards the end of the verbal argument she knocked the stock pot off the stove. The water spilled on the floor and some water spilled on both of them. She said she banged the pot, but did not mean to knock it off. She offered that the water was not hot and that the pot was full of water and heavy, so she could not throw the pot.

[8] At that point, Mr. Yanisiw jumped out of his chair and put his hands around her throat. He was yelling and she was yelling too. She wrestled with him to get his hands off her throat. She said she was scared and had difficulty getting her breath. During the struggle they ended up on the floor with him on top. He tried unsuccessfully to force her head into a five-gallon bucket of water on the floor beside the stove. At some point, his hand was across her nose and mouth, then around her throat again. Finally, she was able to break free and get away from Mr. Yanisiw. She volunteered that during the struggle she did not use a weapon or threaten to use one on him.

[9] She immediately went to the walk-in closet at the back of the trailer to get some clothes and belongings together in order to leave. During this time he continued with

verbal threats and swearing. On several occasions he tried to drag her out and throw her into the snow. On one occasion he did this by grabbing her arms behind her back and pushing her. She recalls him shouting things like, "Take all your stuff. Anything you leave, I will destroy." Or "You would have looked better with two black eyes." Or "I wish I could have gotten your head in a bucket of water." She went into the area of the addition to the trailer, still under construction, where she was looking for clothes. She said he latched the door from the kitchen side and would not let her out. Another door out of the kitchen was closed with plywood, so she could not get out. Another door was covered with plastic. She tore the plastic off in order to get out. She said she was confined in the addition room for more than a couple of minutes, perhaps as many as ten minutes. She said she was wet and cold and terrified.

[10] In the bedroom she put some clothes together, dressed warmly and packed an overnight bag, a shopping bag and a large purse. Mr. Yanisiw drove her to the outskirts of Dawson City, an area called Callison Subdivision. She said she walked for 15 minutes and a police patrol car offered her a ride and took her into town. As she complained about some injuries and told the officers she had been assaulted, they took her to the nursing station. They then took her to the police department and took a statement and photographs of her injuries.

[11] Ms. Kibblewhite identified the photographs taken at the police station and pointed out her injuries:

1. Her right elbow is bruised and swollen. This was her most serious injury.

2. On her right arm one half way between her elbow and shoulder there are three light reddish marks consistent with someone grabbing her arm with their hands, leaving finger marks. In fairness, they were barely visible.
3. The back of her right arm also appeared swollen.
4. Although difficult to see in the photograph, she said there was some bruising on her left arm.
5. There is a little bit of red discoloration on her chin which she said was a bruise.
6. The photograph of her neck was intended to show marks on her neck consistent with bruises from choking. The nurse who testified said he saw a red line on the side of her neck that could have been caused by tension on her necklace. Constable McIntyre said he observed bruising on her neck, but my close examination of the photographs showed no marks or bruises in her neck area and certainly nothing consistent with choking as described by Ms. Kibblewhite.

[12] I should make a comment about the photographs. It is evident that the police use a film or filter on their camera that is very sensitive to the colour red. Ms. Kibblewhite is very fair-skinned with blondish brown hair. All of her skin appears unnaturally pink in colour in the photographs. The areas around her eyes, her nose, around her mouth, her arms and chest show various shades of pink. The area on her chin previously referred to as bruised is a little darker pink. There are numerous small spots, blotches on her face and chest, that stand out like pimples and/or mosquito bites that I am quite confident are not. Looking at the photographs only, the only clear injury appears to be her right elbow and to her right arm. The other marks may very well have been caused by human contact, but I would have difficulty classifying them as injuries.

[13] As Mr. Yanisiw was self-represented, counsel was appointed for the sole purpose of cross-examining Ms. Kibblewhite. The cross-examination was very brief. She was asked to re-enact how she knocked over the stock pot full of water to the floor.

I was far from convinced that she could have knocked that heavy pot full of water off the stove with the back of her arm as she described in her actions. She confirmed under cross-examination that her plan was to accompany Mr. Yanisiw to the United States when they left camp for the winter. This was contrary to Mr. Yanisiw's evidence who said he believed that, due to her criminal convictions, she could not enter the United States legally.

[14] Constable McIntyre was in the police vehicle that picked up Ms. Kibblewhite and took her to Dawson. He stated that he took her to the hospital because Ms. Kibblewhite told him that she had been assaulted. He took a video statement from her at the detachment and took photographs of her injuries. He identified the same injuries that Ms. Kibblewhite had, referring to the photographs. Constable McIntyre further confirmed that Ms. Kibblewhite had no criminal record.

[15] Nurse Walker Graham examined Ms. Kibblewhite at the hospital. He relied on his own observations as well as self-reporting by Ms. Kibblewhite with respect to areas of tenderness and restrictions of movement. In addition to the injuries described by Ms. Kibblewhite on the witness stand, he reported several other small spots of redness or tenderness. He did, as I mentioned earlier, identify a small red line on the side of her neck that he said may have been caused by tension on her necklace. He said that there was some redness but no bruising in the neck trachea area. He recorded that Ms. Kibblewhite stated that her boyfriend had assaulted her before. It is noteworthy that this important fact, if true, was not mentioned by her in her evidence.

[16] The evidence of Mr. Yanisiw, and I underscore the fact that this is now his version of the events, is that he will be 70 years old later this year. He is a widower, having lost his wife four years ago. He has had a very interesting and varied career as a heavy equipment operator, a stint in the army with the Corps of Engineers as a prospector, in the Department of Public Works as a soils technician, as a commercial diver, as a mining equipment manufacturer and, beginning in 1986, as a placer miner. In 2003, he turned to mining as his main work activity. Throughout his life he has not had any criminal convictions.

[17] Since he became a widower Mr. Yanisiw posted his profile on a singles Internet site. In September of 2010 he received several e-mail contacts from a person calling herself Biker Babe 456. Soon she was sending him nude photographs and offering him sex for money. In December of 2010 he flew her into Dawson for a weekend of sex, paying her airfare and \$500. She urged him to stay at her apartment when he came to Whitehorse and to give her the money he saved by not paying the hotel. When he closed camp that year he moved into her two-bedroom apartment in Whitehorse. It was an unusual arrangement, according to him, because her ex-husband was staying in the other bedroom.

[18] In February he had an extended trip to Vancouver, returning at the end of February. In March he became ill and was hospitalized for two weeks. In April Ms. Kibblewhite accompanied him on a three-week trip to Edmonton to pick up some mining equipment that he needed. After returning to Whitehorse she insisted on joining him at his mine site in Dawson. This soon led to some tension as she “sat around on a chair chain-smoking, taking the place of someone who could work.” This led to arguments in

early June and when Ms. Kibblewhite destroyed his laptop computer he told her to get out and leave. Shortly thereafter, Mr. McBirnie (phonetic), her ex-husband, and another person, came to the mine site and they left together, apparently to Whitehorse.

[19] Shortly after Ms. Kibblewhite's departure, Mr. Yanisiw received a letter from Labour Standards claiming compensation for Ms. Kibblewhite for the work she had done at the site, but for which she had not been paid. He said he resolved the claim with the Department as being an invalid claim, as Ms. Kibblewhite had not done any work at the mine site.

[20] In July of 2011, Mr. Yanisiw ran into Ms. Kibblewhite in the parking lot of the Walmart store in Whitehorse. She told him that she had been making money turning tricks in the parking lot with tourists in their camper. She pleaded with him to take her back, that she had no place to live and that the welfare agency made her make the application to Employment Standards. He turned her down. On several subsequent occasions when he was in Whitehorse he ran into her again, and she wanted to return with him to the mine site. I understand that again he refused. On Labour Day weekend in September, she approached him again. She said Jeff had taken all her money and she could not buy cigarettes and that she had pawned everything she owned. On the condition that she clean up her act and not do drugs, he said she could live with him, provided she abided by his rules.

[21] He said everything was fine in the relationship in September and October. He also noted that she was a talented picture artist who did a lot of pictures. In October she convinced him to take her to Fort St. John to see her grandchild. It turned out that

the grandchild and her father merely wanted a ride to Whitehorse. He dropped them off in Whitehorse and returned to his camp. He said he was annoyed because the trip cost him \$1500, and he could have sent several hundred dollars to Fort St. John for bus fare instead. He said that after this incident things started going downhill. She started telling him weird stories about her past and her criminal convictions when she was with the Hells Angels. She said she wanted to go with him to the U.S. at the end of the season. He definitely told her that that would not happen, not in his van.

[22] Another point of tension arose with her dog. The dog defecated around the house and finally in the house, and she was reluctant to clean up. After several shouting matches she left again around November 1. The next day she approached him in Dawson and wanted to return. She had in her possession what appeared to him to be a lot of money in \$100 bills. He also observed her talking to some construction workers in the hotel. Again, he acceded to her wishes to return on the understanding that if there was any violence, she would have to leave. The first ten days were fine, he said, and then in the middle of November her attitude changed. She became mean and vicious. He told her to pack up and he was taking her back to Whitehorse where he was attending a geoscience forum. Because she did not have a place to stay he gave her \$500.

[23] After a week in Whitehorse, Ms. Kibblewhite asked him for a ride to Dawson. He acceded to her request, but it turned out that Mr. McBirnie, with whom she was planning to stay, was living in a crew house and she could not stay with him. She persuaded Mr. Yanisiw to let her stay at his camp until she could find a job using his Internet. So she moved into his camp again and everything was fine for about two

weeks, up to and including December 5. He said there was no misunderstanding, as far as he could see, about her going to the U.S. with him after the season was over.

[24] That then brings us to December 6. In the morning, as indicated by Ms. Kibblewhite's testimony, Mr. Yanisiw had troubles with the generator. He attributed it to bad fuel in the system. He said he worked on it for one and a half hours and got it working. As he entered the house he looked at the clock and asked what was for lunch. She said "nothing," that there was no food and they needed to go into town. He could see canned food on the shelf and knew there was leftover roast beef from the day before. As he was bending over, unzipping the pant legs on his insulated coveralls, he said, "What are you out of, cigarettes or drugs?" As he was straightening up he saw a pot of water from the stove coming at him. At the same time she was reaching for a knife in the knife block as she said, "I'll fucking kill you this time." As he was in a crouched position he lunged up and forwards and grabbed her left shoulder and then neck with one hand, and the arm holding the knife with the other. He whacked her arm on the counter or stove a number of times until the knife fell into the sink.

[25] Mr. Yanisiw said that he was hyperventilating and out of breath as he pushed her towards and out of the door into the covered porch. She was resisting and in the porch she was screaming. He held onto the door to keep her from getting back into the kitchen. He yelled at her to get her things and get out. She used another door that led into the bedroom, and he heard her rummaging around, collecting some of her things.

[26] Mr. Yanisiw denied pushing Ms. Kibblewhite into the addition area of the house. He said she went in to get her clothing. He did close the door after she entered

because he was wet and there was a cold draft. He said that the door had a latch arrangement that could be opened from the inside. It was not the outside hook-eye arrangement that Ms. Kibblewhite described. He also said that he had no idea why she exited through the plastic-covered door as there was another door available to her.

[27] Mr. Yanisiw agreed to drop Ms. Kibblewhite off at the Callison Subdivision because he needed to pick up a fuel filter for the generator. On the way out she got excited and again started flailing her fists at him while driving. He stopped the vehicle to eject her but she settled down. He said he then dropped her off on the Klondike Highway by the Callison Subdivision where, as previously recounted, the police subsequently picked her up and gave her a ride to Dawson City.

[28] I should make several comments with respect to the evidence. I have set out the evidence given by both parties in almost full detail because the nature of the relationship is critical to understanding what happened on December 6, 2011. Moreover, Ms. Kibblewhite described it as a common-law relationship with no caveats, one that lasted for almost a year. That could leave a misleading impression without setting out Mr. Yanisiw's description of the relationship. His description of their relationship was not challenged on cross-examination.

[29] Mr. Yanisiw was self-represented, although counsel was appointed to cross-examine Ms. Kibblewhite. As I mentioned, the cross-examination was very brief and after hearing all of the evidence, I have also concluded that it was very inadequate. The description of Ms. Kibblewhite's lifestyle could have been relevant to Ms. Kibblewhite's credibility. She was not cross-examined on these issues. Accepting Mr. Yanisiw's

descriptions of her lifestyle could violate the confrontation rule set out in the case of *Browne v. Dunn* (1894), 6 R. 67 (H.L.). I note, however, that this is not a fixed rule, but rather subject to the trial judge's discretion, taking into account all the circumstances of the case.

[30] In all of the circumstances, taking into account Crown counsel's submissions regarding *Browne v. Dunn* (*supra*) at the conclusion of the case, I am not relying on the numerous incidents described by Mr. Yanisiw relating to Ms. Kibblewhite's personal behaviour, indicating that she was selling sex to others for money, going to her credibility.

[31] This case illustrates why the current practice of appointing counsel to cross-examine a complainant can be dangerous. It can, in certain circumstances, create the illusion of adequate representation with respect to cross-examining a complainant. But as this case indicates, unless that counsel prepares the entire case, views all the taped interviews and discusses all aspects of the case with the accused, after giving the accused legal advice and procedural advice, he may cross-examine ineffectively and set up legal barriers to the search for truth. That occurred in this case.

[32] **Summary of Findings:**

1. Ms. Kibblewhite's relationship with Mr. Yanisiw was not, as she stated, as a typical common-law relationship for one year. First of all, they were not together for extended periods during the year. I find Mr. Yanisiw's description that the relationship was based largely on one involving sex for money to be a more accurate description of their relationship.

2. In describing the December 6th incident, Ms. Kibblewhite appeared to know what Mr. Yanisiw's defence would be. For example, she anticipated his evidence that she picked up the pot and threw it at him by volunteering that when it was full of water it was difficult to lift and she could not throw it. There are several similar instances in her evidence where she seemed to anticipate his position on the facts. She apparently knew what he was going to say. Did she know it because that is what happened or was she deliberately buttressing her own version of the event?
3. Ms. Kibblewhite gave her evidence well. Counsel led her through her evidence and she was responsive and reasonably concise in her responses. Nothing damaging to her credibility arose in cross-examination except her description of the re-enactment of knocking the stock pot of water off the stove. Mr. Yanisiw later said it was a 12-litre pot. He brought it to court with him. It certainly looked like a large pot capable of taking 12 litres. Filled with water, it would weigh 13 kilograms or over 30 pounds. I do not accept that that pot could be knocked off from the back of the stove to the front of the stove and onto the floor by pushing it or striking it with the back of her arm as she described. I find Mr. Yanisiw's description of the pot being picked up and thrown at him to be more probable and credible.
4. Ms. Kibblewhite's most serious injury was to her right elbow and arm. The bruising to the elbow and the finger marks on her upper arm are totally consistent with Mr. Yanisiw's evidence that he grabbed her right arm

holding the knife and slammed it repeatedly on the countertop or stove until she let it go. That action would reasonably explain her obvious injury and swelling to her elbow area.

5. Mr. Yanisiw said he grabbed her by the shoulder and then neck with his other hand while disarming Ms. Kibblewhite. Her injury to that arm and the red colour on the neck is consistent with that evidence.
6. The faint redness on her neck is inconsistent with Ms. Kibblewhite's description of being aggressively choked until she could not breathe.
7. Mr. Yanisiw gave a detailed and lengthy videotaped statement to the police. He then described everything again on his own without counsel guiding him through his evidence. The two versions were remarkably similar. Crown counsel did explore some minor discrepancies. For example, she said, and I am paraphrasing her now:
 - i. You said she threw the pot at you, but you did not see it until it was in the air coming towards you. You really did not see her throw it, so you couldn't say that she threw the pot at you.
 - ii. You said she was standing right of the stove and now you are saying it was the right portion of the stove.
 - iii. You stated that you never threatened anyone, but in your statement to the police you said you did. You used the word "threat."
 - iv. You said you were hit in the face with boiling water, not hot water or warm water. If it was boiling why were you not burned?

In my view these discrepancies were really not major discrepancies. They could be explained by obvious inferences or figures of speech.

[33] I find that the absence of significant contradictions or differences between the statements given to the police and his oral testimony supports Mr. Yanisiw's credibility. I also find that Mr. Yanisiw's description of his response to Ms. Kibblewhite's actions were reasonable and constitute self defence. First, he had a history with her which included episodes of her erratic behaviour. Second, his inference that the stock pot was thrown and not tipped was reasonable and probably correct. The statement, "I'll fucking kill you," while reaching for an 11-inch filet knife justified the defensive actions taken by Mr. Yanisiw in the first instance, and then pushing her into the porch area, holding the door.

[34] The major injuries described by Ms. Kibblewhite are consistent with Mr. Yanisiw's description of the event. The minor bruising could have resulted from the scuffling and wrestling and pushing Ms. Kibblewhite out of the door. Her claim to be choked until she lost her breath is not supported by her injuries.

[35] There was a suggestion that Mr. Yanisiw should have removed himself from the home rather than disarming Ms. Kibblewhite in the way that he did. In my view of the facts as described by him that was not a reasonable alternative.

[36] This case will be decided as a matter of law by the principles set out in the Supreme Court of Canada case of *R. v. W.(D)*. (*supra*) Cory J. set out a simple set of procedural instructions which he thought would be helpful in deciding cases involving credibility. He stated:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must [still] acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[37] In Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, looseleaf (Toronto: Canada Law Book, 2011) at 2521, the text states [as read in]:

It is useful to think of W.D. as a teaching on the correct process of reasoning about credibility. It forbids two distinct lines of analyses because they are inconsistent with the accused's right to the presumption of innocence until guilt is proven by the Crown beyond a reasonable doubt. First, it is forbidden to reason that the accused's evidence must be believed to secure an acquittal. The accused generally bears no burden of proof and thus need not be believed on a balance of probabilities and certainly not on the highest standard of proof beyond a reasonable doubt. The second forbidden line of reasoning is for the trier of fact to think that the task of adjudication requires the trier of fact to answer the general question of "What happened?" The problem with such a focus is that it creates a tendency in the trier of fact to search through the evidence looking for the truth and deciding whose evidence to believe, rather than searching for a reasonable doubt and giving the accused the benefit of it.

The ultimate issue, as noted by Justice Binnie in a latter case, is not credibility but reasonable doubt.

[38] In another case, *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146, the British Columbia Court of Appeal suggested another further instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[39] Another case, *R. v. K.E.R.* (2003), 65 O.R. (3d) 723 (C.A.), talks about how to apply the test to cases involving self-defence. The Court states at para. 72:

...I would suggest that in future cases, when the defence of self-defence is raised and the trial judge believes that a W.D. instruction is warranted, the jury should be instructed along these lines with respect to the first two principles:

1. If you accept the accused's evidence and on the basis of it, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.
2. Even if you do not accept the accused's evidence, if, after considering it alone or in conjunction with the other evidence, if you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.

But this, again, is just a variation of the *W.(D.)* test set out by the Supreme Court of Canada.

[40] There is another perspective given by some of the cases. There are several cases that stand for the proposition that the proper response to an assessment that both the accused and the complainant are believable is an acquittal, since by definition

it generates a reasonable doubt about guilt. This kind of reasoning appears to be the opposite of not knowing whom to believe, but analytically it is the same.

[41] On the facts of this case, for the most part I have two different stories. I have indicated that Ms. Kibblewhite, when she gave her evidence, was led through her evidence by Crown counsel. She answered questions fairly, concisely and in a manner which was, to my mind, consistent with telling the truth. There was nothing in her demeanour while she was testifying that suggested that she was lying. As I indicated, the only significant concerns I had about her evidence, by the time the cross-examination of her was completed, was her description of how the pot was knocked down and her anticipation of Mr. Yanisiw's evidence on several occasions and volunteering a contrary version without being asked.

[42] I also heard Mr. Yanisiw's evidence. He was also very clear, precise and remarkably consistent with the evidence that he gave in a videotaped interview with the police. I have already indicated that there are some aspects of his evidence that I preferred, his explanation of the pot, and I noted that many of the injuries described were consistent with his version of events. I find myself in the position where I can believe some of the evidence of each of the accused and the complainant. There are other aspects that are so different that I am unable to decide which one to believe.

[43] In applying the principles of *W.(D.)*, as I have previously referred to, and subsequent cases applying *W.(D.)*, including two cases of self-defence, I am in the position where I am unable to decide whose version of the events of December 6 to believe and therefore I must enter an acquittal.

[44] Sir, you are found not guilty.

LILLES T.C.J.