

Citation: *R. v. Alphonse*, 2018 YKTC 33

Date: 20180813
Docket: 17-00649
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

JORDIE CURTIS ALPHONSE

Appearances:
Amy Porteous
Mark Chandler

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY J. (Oral): Jordie Alphonse is charged with assault on Aiyana Gatensby, as well as, with mischief in relation to damage to Ms. Gatensby's glasses and cell phone.

[2] Mr. Alphonse and Ms. Gatensby have been in a relationship, off and on, since 2016 and share a one-year-old son. From information provided and, indeed, behaviour in the courtroom, it is clear that the relationship is a volatile one. However, the question for me is whether the evidence is sufficient to satisfy me beyond a reasonable doubt that Mr. Alphonse committed the offences, as charged, on or about January 10, 2018. This turns on an assessment of credibility.

[3] The evidence at trial consisted of testimony from Ms. Gatensby and Cst. Lavallee, as well as a number of photographs, including the damaged cell phone and glasses, the hotel room where Mr. Alphonse and Ms. Gatensby were staying, and three photographs of Ms. Gatensby taken on January 10.

[4] While the evidence suggests that a relative of Ms. Gatensby, who was staying in the room across the hall, and a member of the Yukon Inn staff, who called the police, likely saw or heard something of relevance, for various reasons neither was produced at trial. Mr. Alphonse testified in his own defence.

[5] The versions of events provided to the Court differ dramatically.

[6] In summary, Ms. Gatensby says that Mr. Alphonse became upset in relation to a subpoena she had received regarding a previous assault charge, and her unwillingness to retract her statement. According to her, he grabbed her and started pulling her hair, pushed her down, stepped on her head, kneeled on her head, and pushed a pillow on top of her head over her face. She says at some point Mr. Alphonse broke her cell phone and glasses. She also says there was a subsequent struggle in the hallway, where Mr. Alphonse was on top of her trying to drag her back to the hotel room.

[7] Mr. Alphonse says that Ms. Gatensby was upset with the quality of the breakfast he brought her and became rude. He told her he did not want to fight and was going to leave. He says Ms. Gatensby threatened to tell the police that he broke her cell phone and glasses, items that were, according to Mr. Alphonse, broken several days before by Ms. Gatensby. He says that Ms. Gatensby tried to prevent him from leaving and they

struggled at the door with Ms. Gatensby falling onto her back in the hallway when he opened the door.

[8] Both agree that their young son was locked alone in the hotel room for a brief period. Once resolved, Mr. Alphonse says there was another struggle at the door with Ms. Gatensby trying to prevent him from leaving. He says she tore the bags carrying his clothing, causing him to leave his belongings in the hotel hallway.

[9] As in any case where credibility is at issue, I am bound by the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which states that, if I believe an accused, I must acquit. Even if I do not believe the evidence of an accused, I must ask myself whether the evidence nonetheless raises a reasonable doubt, and, if so, I must acquit. Finally, even if I do not believe an accused and the evidence does not raise a reasonable doubt, I must ask myself whether, on the basis of the evidence I do accept, if I am satisfied beyond a reasonable doubt of the guilt of an accused. The Crown bears the burden of establishing proof to the requisite standard.

[10] Turning first to Mr. Alphonse's evidence, I have no hesitation in concluding that I do not believe his evidence. The entirety of his testimony was clearly an attempt to paint himself in the best possible light and to place Ms. Gatensby in the worst possible light.

[11] For example, he said he was the one who took care of their son, changed every diaper, and took care of every single thing. He says he bought Ms. Gatensby every single cell phone and numerous pairs of glasses, all at exorbitant prices. He says he brought Ms. Gatensby Eggs Benedict every single morning, and would even buy a

second breakfast if she was upset with how long it took him or the quality of the first breakfast. He says he would always leave when they began to fight as he does not like to fight and does not believe in violence.

[12] Conversely, Mr. Alphonse took great pains to disparage Ms. Gatensby's character, suggesting her behaviour is erratic and frequently violent, and described an incident where he says she stabbed him. He claims not to have reported her, as he says he did not want to get her in trouble. He called her spoiled and selfish, and says she frequently destroys his property if unhappy with him.

[13] It is notable that Mr. Alphonse's testimony was often contradictory and illogical. After numerous gratuitous comments disparaging Ms. Gatensby, including saying that she is "crazy, literally" and suggesting that she has manipulated the system and lied to both the police and the Court about him in relation to the charges before the Court, Mr. Alphonse maintains that he loves her unconditionally and hopes for a future together.

[14] Mr. Alphonse stated hotel staff referred to him and Ms. Gatensby as their "favourite couple", but then says that the maid he found to unlock the hotel room door dawdled, notwithstanding the urgency of a young child being locked alone in the room, solely because she does not like them, particularly not Ms. Gatensby, who he says was frequently rude to hotel staff.

[15] When questioned about his criminal record, Mr. Alphonse says that an assault conviction in 2017 never happened, but that he entered a guilty plea solely because he could not afford to go back to British Columbia to fight the charge. However, when

asked about whether he retained counsel, he referred to paying for private counsel or his mother paying for counsel, noting that they had received settlement funds, so they have money available if they need it, which begs the question as to why such funds could not be used to return to British Columbia for trial.

[16] Also, in relation to this prior conviction, Mr. Alphonse said that he and Ms. Gatensby had discussed and agreed that “they” would plead guilty. When asked about their discussions in light of the no-contact order, he then says these discussions took place through Ms. Gatensby's mother. He maintained that the conviction on his record for breaching his no-contact order was the only time he was ever in breach. Yet when asked earlier about the end of their relationship, he said that there was no real end to the relationship and that he and Ms. Gatensby have always been in contact.

[17] In addition to being self-serving and contradictory, Mr. Alphonse's evidence was also implausible on key facts. For instance, the description he provides of Ms. Gatensby falling through the door onto her back in the hallway, struck me as highly improbable given that the door opened inward, and she was standing in front of the door to prevent his exit.

[18] In addition, his suggestion that Ms. Gatensby had held onto broken eyeglass frames and broken pieces of a cell phone only to pull them out at an opportune moment to, as the Crown put it, “stage the hotel room” was equally implausible. His version would also suggest that the scream heard on the 911 call before the call is disconnected would also have to have been staged.

[19] Finally, he would have us believe that Ms. Gatensby dragged his belongings back into the hotel room so that she could later cut them up, and that is the only reason that Cst. Lavallee did not see his bags in the hallway.

[20] For these reasons, I do not believe the evidence of Mr. Alphonse; nor, for essentially the same reasons, does his evidence raise a reasonable doubt.

[21] It does not follow that because I disbelieve Mr. Alphonse, the case has been proven against him. I must still consider the remaining evidence and whether it is sufficient to establish guilt beyond a reasonable doubt.

[22] However, before considering the remaining evidence, it should be noted that the Crown raised a concern that several points in Mr. Alphonse's version of events had not been properly put to Ms. Gatensby as required in the decision of *Browne v. Dunn* (1893), 6 R. 67 (H.L.). These include the suggestion that Ms. Gatensby had broken her own phone and eyeglasses sometime prior to January 10, that Ms. Gatensby had pulled the hotel phone cord out of the wall when Mr. Alphonse was trying to call his cousin, that Ms. Gatensby had destroyed Mr. Alphonse's personal belongings after returning them to the room from the hallway, that Ms. Gatensby had been violent on numerous previous occasions, and that the source of conflict was over breakfast and not a subpoena.

[23] The established remedy for failure to comply with the rule in *Browne v. Dunn* is to reduce the weight placed on such evidence. However, I conclude that it is necessary in the circumstances of this case to make an expressed ruling with respect to this issue. Having concluded that I do not believe Mr. Alphonse's evidence, it necessarily follows

that I am not placing any weight on his testimony. As a result, the impact of the failure to comply with the rule in *Browne v. Dunn* is really immaterial to the outcome of this case.

[24] This leaves an assessment of whether the remaining evidence is sufficient to establish proof of guilt beyond a reasonable doubt, which rests, largely, on an assessment of the credibility and reliability of Ms. Gatensby's evidence.

[25] Defence counsel submits that there are concerns with both Ms. Gatensby's credibility and her reliability. In terms of credibility, he argues that it was clear she was angry at Mr. Alphonse, including telling him during cross-examination, that she was going to report him from breaching his conditions. Counsel suggests her animus led her to tailor her evidence to make Mr. Alphonse look guilty.

[26] Considering Ms. Gatensby's testimony in its entirety, I do not find that her anger or frustration undermines her credibility. The outburst referred to occurred towards the end of cross-examination and followed the Court cautioning Mr. Alphonse, yet again, for inappropriate behaviour during Ms. Gatensby's evidence. While I cautioned Ms. Gatensby about the outburst, it was not sufficient, in my view, to undermine the credibility of her evidence as a whole. Nor did I find her evidence to be tailored to make Mr. Alphonse look bad.

[27] Overall, I found her evidence to be much more balanced than Mr. Alphonse's, including, as it did, acknowledgment of several things that Mr. Alphonse had done to support her and their young child. There were no clear indicators that Ms. Gatensby

was being deliberately untruthful deserving of adverse findings in relation to her credibility.

[28] Rather the concerns with respect to Ms. Gatensby's evidence, and the real crux of this case, in my view, relate to the question of the reliability of her recollection and whether it is sufficient to support a conviction.

[29] In addressing this issue, it is important to note that the law does not require a standard of perfection with respect to a witness' recollection of events. Indeed, a perfect memory is often more suspect than an imperfect one. It is understood that memory, particularly during traumatic experiences, can be adversely affected; however, there must be sufficient, credible and reliable evidence to support a finding of proof beyond a reasonable doubt.

[30] That being said, the issues with Ms. Gatensby's recollection are not what one would call inconsequential.

[31] I noticed some inconsistencies, questions regarding plausibility, confusion regarding the sequence of events with limited recollection of detail, and an apparent lack of certainty.

[32] I will deal with each of these in turn.

[33] In terms of inconsistencies, the most significant would be the evidence changing from Ms. Gatensby being pushed to the floor with Mr. Alphonse pushing her face into the rug to Ms. Gatensby saying she might have been pushed down to the bed. There was also differing evidence with respect to whether she called 911 from the hotel phone

or her cell phone. Given the nature of the allegations, these inconsistencies do not cause me undue concern.

[34] With respect to plausibility, Ms. Gatensby, while in the room on the second floor of the hotel, tells the 911 operator that she can see Mr. Alphonse in the parking lot near his truck. Shortly thereafter, she is heard to scream and testified that Mr. Alphonse had returned and grabbed the phone from her.

[35] Defence counsel argues that it is implausible to believe that Mr. Alphonse could have made it back to the room within the very short time frame between Ms. Gatensby telling the operator he is in the parking lot to when the scream was heard. Cst. Lavallee indicated it took him 35 seconds from entering the hotel to reach the room. There is no indication of the pace at which he was moving. In addition, I have no evidence before me with respect to the exact length of time between Ms. Gatensby telling the operator Mr. Alphonse was in the parking lot and when the scream was heard. It is difficult to conclude, in the circumstances, whether it was or was not possible for Mr. Alphonse to have made it back to the room.

[36] Confusion regarding sequence of events, limited recollection, and apparent lack of certainty, however, are much more problematic. At various times in her evidence, Ms. Gatensby describes events occurring in the hotel room she and Mr. Alphonse were staying in, in the hallway, and in the room across the hall inhabited by Mr. Patterson-Smith. Much of the cross-examination was aimed at clarifying the sequence of events regarding what happened, when, and where. Ms. Gatensby frequently said that she did not remember, and, by the end of her evidence there was

little to no clarity regarding the majority of the sequence of events. In addition, when asked about some specifics in the sequence of events, she frequently responded using words like "maybe" and "probably", denoting a lack of certainty in her recollection.

[37] Ms. Gatensby provides a plausible explanation for issues with recollection, including the passage of time, that this was one of many incidents, and that she tries not to think about them.

[38] It is important to remember, however, that the issue before me is what happened on this day and not what may or may not have happened between the parties at some other time.

[39] I would note, however, that Ms. Gatensby's struggle regarding some details and the sequence of events was largely in relation to what took place after she says she was initially assaulted in the hotel room. Her account of that initial assault remained largely unchallenged and uncontradicted.

[40] It must also be noted that there was confirmatory evidence in relation to her version of events, as opposed to Mr. Alphonse's.

[41] The photos of injuries are entirely consistent with Ms. Gatensby's description of events, particularly the two which show the scrape, bruising, and swelling to the left cheek and mouth area of her face. Other photos show the broken phone, the broken glasses, and the room in disarray including depicting at least one bag of clothing and the hockey sticks Mr. Alphonse suggests he dropped in the hallway.

[42] Having considered Ms. Gatensby's evidence, I have reached the following conclusions. The concerns with respect to reliability flowing from her difficulties with recollection are significant enough that I cannot accept her evidence in its entirety; however, I am satisfied that I can accept, and do accept her evidence where there is confirmatory evidence.

[43] Accordingly, I find that Mr. Alphonse became angry about the subpoena Ms. Gatensby received and her unwillingness to retract her statement. He grabbed her, pulled her hair, pushed her down, and pushed her face into the carpet, causing the injuries depicted in the photographs. He stepped on and kneeled on her head and pressed a pillow over her head. I also find that he broke her glasses during the initial assault.

[44] The issue of the cell phone is a little more problematic. I find that I cannot say from the photograph whether the cell phone is a complete one or just the exterior casing of an already damaged cell phone. The damage in relation to the phone is also confusing in Ms. Gatensby's evidence, in terms of the sequence of events, including when and why the cell phone was broken. In the circumstances, I conclude that I cannot find that Mr. Alphonse wilfully damaged an otherwise intact cell phone. I am giving him the benefit of the doubt in relation to the cell phone.

[45] In the result, I find Mr. Alphonse guilty of a common assault and mischief in relation to the glasses but not to the cell phone.

RUDDY T.C.J.