

Citation: *R. v. Brace and Stewart*, 2008 YKTC 14

Date: 20080213  
Docket: T.C. 07-10143A  
Registry: Watson Lake

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Chief Judge Faulkner

**REGINA**

v.

**ROGER BRACE  
AND TYLER STEWART**

Appearances:  
Kevin Komosky  
Jennifer Cunningham  
Elaine Cairns

Counsel for Crown  
Counsel for Mr. Brace  
Counsel for Mr. Stewart

**REASONS FOR JUDGMENT**

[1] FAULKNER C.J.T.C.(Oral): In this case, Roger Brace and Tyler Stewart stand jointly charged that they, on or about the 22nd day of November 2007, at or near Watson Lake, Yukon Territory, did unlawfully commit an offence in that: they did in committing an assault upon James Frank cause bodily harm to him, contrary to s. 267(b) of the *Criminal Code*.

[2] They are further charged on Count 2 that they, on or about the 22nd day of November 2007, at or near Watson Lake, Yukon Territory, did unlawfully commit an offence in that: they did break and enter a certain place, to wit: a dwelling house situated at 820 Ravenhill Drive, Watson Lake, Yukon Territory, and did commit therein

the indictable offences of uttering threats to persons therein and/or assault causing bodily harm, to James Frank contrary to s. 348(1)(b) of the *Criminal Code*.

[3] Mr. Stewart was further charged with theft of a case of beer and with a breach of recognizance. These offences were both alleged to have been committed at the same time and place. No evidence was offered to support the breach charge and it was dismissed at the close of the Crown's case.

[4] The incident in question indisputably occurred in or near the residence of Maurice M.J. Cardinal and John Frank on Ravenhill Drive here in Watson Lake, Yukon. Beyond that, the versions of events advanced by the Crown and the two defendants are as different as night and day. According to Mr. Cardinal, who was supported by Mr. Frank and Matthew Hanchar, Mr. Cardinal was at home asleep on his living room couch. John Frank, Matthew Hanchar and Robin LaFlamme (phonetic) were also present in the residence.

[5] Before retiring, Mr. Cardinal had locked the front door from the inside using a hasp and padlock. He was awakened by a noise outside and heard his nickname, M.J., being called. At that point, the door was kicked in, breaking the lock, and Mr. Brace and Mr. Stewart entered. Mr. Brace attacked Mr. Frank, punching him in the head and knocking him down. Mr. Frank was also kicked in the face. Mr. Hanchar was also assaulted by one of the invaders. The two assailants then turned their attention to Mr. Cardinal, but he managed to evade them and ran out of the house. He went to the hospital, which is located just across the street, from where he telephoned the police.

[6] When Constable Hunter of the RCMP arrived at the residence soon afterwards, she observed and photographed the damaged hasp and broken lock. She also noticed and photographed what appeared to be fresh blood on the kitchen floor. Interestingly, she also noticed a substantial amount of other damage to the house. However, Mr. Cardinal said then and now that this other damage had been caused in a separate incident that had occurred the previous day, wherein persons unknown had entered the residence and damaged the residence and some of its contents, apparently with the aid of a fireplace poker.

[7] Mr. Frank received stitches to close a cut on his mouth, which Constable Hunter also photographed. As well, Mr. Hanchar testified that the intruders, before they left, threatened that they would be back tomorrow night. If true, in my view, these words are sufficient to constitute a threat within the meaning of the threat section of the *Code* because in the context of what had just occurred, the clear implication would be that the assailants would return to cause serious bodily harm.

[8] It further appears that after Mr. Cardinal ran out, the accused persons also left. According to Mr. Hanchar, Mr. Stewart took with him a case of beer, which belonged to the residents of the house. The fourth occupant of the house, Robin LaFlamme, was described as passed out during the proceedings. Mr. LaFlamme did not testify.

[9] Both accuseds were arrested the following day. The story of the defendants, as I say, is markedly different. Their story is that they were walking past Mr. Cardinal's house, when Mr. Cardinal and his cohorts, Frank, Hanchar and perhaps others, ran out of Mr. Cardinal's driveway. Mr. Cardinal was armed with a baseball bat and the others

with sticks. Mr. Cardinal assaulted Mr. Brace with the bat, landing three blows on his head. Mr. Brace says he fell down but ultimately managed to get control of the bat, and struck Mr. Cardinal with it. The attackers then fled.

[10] Mr. Brace says he threw the bat away and then went to a friend's house. In addition, Twila Merrick, who is Mr. Brace's common-law wife, says she observed lumps on her husband's head when she next saw him, although this was some hours after the incident in question. As well, Cheyenne Wolf, who is a friend of both accused, (and both accused indicated had been their host at his home immediately prior to these events), he claims to have observed an altercation on the road from some distance away. While his observations were somewhat sketchy, they are generally consistent with the version of the events advanced by the two accused persons.

[11] It goes without saying that when accused persons testify, the rule in *R. v. W.D.* [1991] S.C.R. 742 applies. The Court can only convict if, firstly, the evidence of the defendants is rejected *in toto*, and secondly, if the evidence that is accepted, proves the case beyond a reasonable doubt.

[12] In coming to my conclusions in this case on credibility, I have had particular regard to the following factors. One, while I recognize that Mr. Frank's injuries could have occurred outside of the home and that he went into the house afterward, nevertheless, in my view, the bloodstains found on the kitchen of the home are much more consistent with the idea that the affray occurred in the house, as the Crown witnesses allege, particularly, as there was no evidence presented of blood being found elsewhere.

[13] Two, the finding of the damaged hasp and lock is consistent with the claim that the accuseds broke into the house, and utterly inconsistent with the theory that everything happened outside. I recognize, of course, that the damage to the lock could have occurred at an earlier date. However, both Mr. Cardinal and Mr. Hanchar said that the lock was damaged in this incident. It seems to me that if Mr. Cardinal was attempting to frame the defendants, he would have attributed to them all of the damage in the house, and not simply the damage to the lock. Accordingly, there is good reason to believe that the damage to the lock is indeed an artefact of the offences complained of.

[14] Three, if Mr. Cardinal's story is indeed a concoction, as alleged, then it was obviously concocted immediately after the incident, since his complaint to the police contains all the essentials of his allegations. Moreover, he would have to have made up the story before he knew that he could enlist the aid of Hanchar and Frank to back him up.

[15] Four, although Mr. Brace claims to have gained control of the bat and disposed of it within a fairly defined area, no bat or other weapon was found.

[16] Five, the physical injuries to Mr. Frank are explained by the Crown theory, but left unexplained by the defence theory. Moreover, Mr. Brace claims to have struck Mr. Cardinal, but there is no evidence of any injury to Mr. Cardinal. Indeed, Mr. Cardinal says that he avoided being hit. Again, it seems unlikely that if Mr. Cardinal had been struck during this event, he would have claimed otherwise in making his story to the police.

[17] Six, although Mr. Brace claimed to have suffered head injuries in the attack on him, there is no independent verification of this. The only witness to testify in this regard, other than Mr. Brace himself, was his common-law wife. The alleged injuries are not detectable in the police photos, and although Mr. Brace apparently went to the hospital the following day, no medical evidence was called in this regard and an adverse inference may be drawn from its absence.

[18] Seven, the actions of Mr. Cardinal immediately after the incident are more consistent with him being the victim of an attack than are the actions of Mr. Brace and Mr. Stewart, who appear to have carried on more or less as if nothing untoward had happened to them.

[19] Eight, it is perfectly true that the interview method adopted by Constable Hunter left much to be desired. She interviewed all the inmates of Mr. Cardinal's house together, and as the portion of the audio tape played for the Court shows, Mr. Cardinal and Mr. Hanchar were quite prepared to answer for Mr. Frank when he appeared uncertain of what had occurred. Indeed, it appeared that what Mr. Frank is now telling us includes things that he was told as opposed to what he himself observed.

[20] However, I am satisfied that the story that emerges from the Crown witnesses is not a confabulation or a concoction, since it is, as I have already observed, consistent with Mr. Cardinal's initial complaint. As well, the three Crown witnesses do not tell a nicely crafted story. For example, Mr. Cardinal says that he does not know which assailant attacked Mr. Hanchar. Mr. Hanchar is the only person who mentions the

threat and the beer theft, and Mr. Frank, for his part, remembers precious little of the events at all.

[21] Nine, Mr. Brace and Mr. Stewart were both more articulate and confident in giving their evidence. However, I prefer to look at what the witness has said, not the manner and demeanour of its telling. Indeed, it might be said that the degree of unsophistication of Messrs Cardinal, Hanchar and Frank is such that it would have been a considerable feat for them to concoct this story out of whole cloth and to successfully stick to the script throughout the trial.

[22] At the end of the day, having adjourned to consider the matter carefully, I find the defence witnesses unworthy of credit. Moreover, I am satisfied that the evidence I do accept satisfies me beyond a reasonable doubt as to the guilt of the accused. I should add that there is some degree of uncertainty as to who struck some of the blows, particularly those directed at Mr. Hanchar. However, in my view, this was a joint enterprise and both accused are clearly full parties, regardless of which assailant actually assaulted Mr. Hanchar, or even Mr. Frank.

[23] Accordingly, I find both accused guilty on Count 2, which is the charge of breaking and entering. In my view, Count 1, the charge of assault causing bodily harm is subsumed by Count 2. Count 1, therefore, is conditionally stayed. I find the charge of theft to have been proved and I find Mr. Stewart guilty on Count 3.

[24] MS. CUNNINGHAM: Yes, Your Honour, I was wondering, I think my colleague is in agreement, and I have mentioned this to my friend last night, if

sentencing could be adjourned to Whitehorse so that I could get some letters on behalf of my client?

[25] THE COURT: Sure, that is not a problem.

[26] MS. CUNNINGHAM: I am just wondering when Your Honour would be sitting next week perhaps?

[27] MR. KOMOSKY: I would suggest it go to Friday fix date.

[28] MS. CUNNINGHAM: That is fine, my colleague advises she does not have her calendar, so Friday at 1:00?

[29] THE COURT: Friday at 1:00.

[30] MS. CUNNINGHAM: Thank you.

[31] THE CLERK: Your Honour, just because this is a Watson Lake matter, if there are members here from Watson Lake who wish to participate, (indiscernible) come here, we can connect them by phone for the sentencing.

[32] THE COURT: Sure. What is the custody status?

[33] MR. KOMOSKY: Consent remand, I believe.

[34] THE CLERK: Mr. Brace is detained and Mr. Stewart is on a consent remand, and he also has another matter coming back here on March 28th.

[35] THE COURT: Both are remanded in custody.



[36] THE CLERK: And also, too, they won't be required on Friday to attend court?

[37] MS. CAIRNS: No, Madam Clerk.

[38] THE CLERK: Thank you.

[39] MS. CUNNINGHAM: Thank you.

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FAULKNER C.J.T.C.