

Citation: *R. v. Charlie*, 2018 YKTC 26

Date: 20180528
Docket: 17-00191
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

FRANKLIN JUNIOR CHARLIE
and
TYRELL OLLIE

Appearances:

Jean-Benoît Deschamps
Lynn MacDiarmid
Malcolm E.J. Campbell

Counsel for the Crown
Counsel for Franklin Charlie
Counsel for Tyrell Ollie

REASONS FOR JUDGMENT

[1] COZENS J. (Oral): Tyrell Ollie and Franklin Charlie have been charged with having committed the offences of aggravated assault, contrary to s. 268(2); and unlawful confinement, contrary to s. 279(2) of the *Criminal Code*. The alleged victim of these offences is Stephen Olsen.

[2] In addition, Mr. Charlie has been charged with uttering a threat to cause death or bodily harm, contrary to s. 264.1(1), also with respect to Stephen Olsen; and driving while disqualified from doing so, contrary to s. 259(4).

[3] The trial took place on March 8 and 9, 2018, in the community of Ross River. The matter was adjourned to April 19, 2018, in Whitehorse, for counsel to make submissions and then it was further adjourned for my decision.

[4] It is conceded by counsel for Mr. Charlie — and I concur — that the evidence supports a finding of guilt in respect of Mr. Charlie having committed the s. 259(4) offence and, as such, I do not intend to canvass the facts in that regard.

[5] It is also undisputed that on June 18, 2017, in the community of Ross River, during a physical altercation, Mr. Olsen was injured as follows:

- a 1 cm laceration over his left eye;
- a fracture of the orbital floor and inferior orbital rim in the left eye area, known as a "left orbital blowout fracture", with a long-term prognosis placing him at an increased risk for high blood pressure, glaucoma, and possibly permanent vision damage);
- an abrasion to the right shoulder; and
- facial bruising.

[6] I note that the treatment and community health notes that form part of the medical information that was filed noted a bruise and laceration on the right lower leg and pain in the left rib area, which is mentioned in the Vancouver General Hospital consultation report as being possibly the result of non-displaced fractures. There is no further information from medical sources in this regard. Mr. Olsen was taken to Whitehorse General Hospital and medevaced to Vancouver in order to treat the eye injury.

[7] Mr. Olsen testified that he had vision problems for approximately two weeks after the injury and was required to use eye drops. He stated that he is required to meet with an eye specialist every six months for the rest of his life.

[8] There is no dispute with regard to the injuries that Mr. Olsen suffered or that he meets the threshold required to constitute aggravated assault, in the event that either or both of the accused are convicted of having assaulted Mr. Olsen.

[9] Mr. Olsen claims that he was injured when he was assaulted by both Mr. Ollie and Mr. Charlie.

[10] Mr. Ollie claims that Mr. Olsen was the aggressor and that the extent of his physical involvement with Mr. Olsen was slapping him and throwing him to the ground, where he states that Mr. Charlie then kicked Mr. Olsen in the face twice.

[11] Mr. Charlie denies any involvement in a physical altercation with Mr. Olsen, stating that he was not present at the time.

[12] An Agreed Statement of Facts was filed as follows:

[13] On June 18, 2017, Cst. Daniel Bray was called to assist Cst. Roberts with an investigation involving Stephen Olsen as the victim of an assault.

[14] Around 1:15 p.m., the RCMP members attended 45 Kaska Road, Amos Dick's residence, where the incident was alleged to have taken place. Upon walking up to the front steps, Cst. Bray observed a large amount of blood on a piece of plywood at the bottom of the front door steps. He also observed blood on the railing and steps leading

into the house. Constable Bray obtained photos of the outside of the residence and of the blood found on or around the steps.

[15] At 4 p.m., Cst. Bray prepared an Information to obtain a search warrant to go inside 45 Kaska Road.

[16] At 9:45 p.m., the RCMP received via fax an authorized search warrant from Cozens J.

[17] At 10 p.m., Cst. Bray with Cst. Roberts arrived at 45 Kaska Road to execute the search warrant. Amos Dick was home and Cst. Bray explained why they were there and gave him a copy of the search warrant.

[18] During the search, Cst. Bray observed blood drops on the couch and on the floor near the couch. Using a sterile swab, Cst. Bray took a sample of the blood that was on the floor and on the couch.

[19] At 10:19 p.m., the RCMP members left the residence.

[20] Once at the detachment, Cst. Bray secured the two swabs into the exhibit locker.

[21] The two swabs seized and a third one with a blood sample of Stephen Olsen were sent to the National Forensic Laboratory Services in Vancouver. The two samples found on the couch and on the floor near the couch matched the DNA of Stephen Olsen.

[22] Also filed were photographs that depict the following:

- an abrasion to Mr. Olsen's right shoulder;

- significant swelling to his left eye area essentially closing the eye;
- a small cut to the left eye area;
- abrasions to the left eye area;
- bloodstains on a St. Louis Blues hockey jersey and blue jeans worn by Mr. Olsen;
- small bloodstains on a blanket on a living room couch in the residence of Amos Dick;
- on the left arm of the couch and on the carpet beside the left arm of the couch, a large blood stain on a plywood sheet at the bottom of the front doorstep;
- small bloodstains on the right side railing and floorboards near the bottom steps of the entrance stairway; and
- small bloodstains on the left-hand railing and floorboard at the top step of the entrance stairway.

[23] Mr. Ollie was arrested in Faro the day after the assault by Cst. Drapeau. At the time of his arrest he was wearing jeans that were stained with blood. He asked the police officer to check his hands for marks, which the police officer did. There were no marks observed.

[24] Mr. Charlie was arrested in Ross River in the early morning hours of June 24th.

[25] In the course of the trial, Mr. Charlie's mother produced photographs of Mr. Charlie's hands and body that she said were taken by her a few days after the incident. These photographs similarly show no injuries or marks.

Stephen Olsen

[26] Mr. Olsen claims that at approximately 4:00 a.m. on June 18, he decided to leave the residence of Josh Ladue, where he had been doing some light drinking with

Mr. Ladue and Corbin Dick and go over to Amos Dick's residence in order to speak to Mr. Ollie and Mr. Charlie. He stated that he wanted to resolve some issues with them.

[27] Mr. Olsen stated in cross-examination that he did not tell either Mr. Ladue or Mr. Dick where he was going and what he intended to do. He also stated that Corbin had left the residence a long time before he did.

[28] When Mr. Olsen arrived on the roadway in front of Amos Dick's residence, he observed Mr. Ollie and Mr. Charlie standing on the porch. He said that they saw him first and Mr. Olsen could see that there was going to be a fight. He stated that he decided to stand his ground and went up to confront them at the porch. He agreed that the physical confrontation occurred on the sheet of plywood at the foot of the stairs.

[29] In direct examination, he stated that Mr. Charlie ran at him first, throwing the first punch, and then he was hit by Mr. Ollie. He said that this caused him to be dazed and dizzy, and he dropped to the ground. He testified that both Mr. Ollie and Mr. Charlie continued to beat him for approximately four minutes using closed fists and kicks. They then grabbed him by his ankles and dragged him up the stairs and into the residence where they continued to beat him brutally for 20 to 30 minutes, striking him in the head; face; ribs; and most of his body, including kicking him and striking him at least one time in the face. He stated that he was unable to protect himself and punches kept getting through. He was unable to leave, partly because of the stomach kicks he was receiving. He stated that Mr. Charlie grabbed him by the throat, choking him, and stated, "I'm going to fucking kill you."

[30] At one point, he was able to throw Mr. Charlie down and kick Mr. Ollie off him.

[31] Chelsea grabbed him by the arms and helped him up. He was able to put on his flip-flops that were by the front door and leave. He stated that Chelsea was Mr. Charlie's friend and that he had not seen her before she helped him up.

[32] Mr. Olsen said that he ran to Auntie Joan Acklack's house and fell asleep there. He stated that when he woke up in the morning, he told her what had happened.

[33] In cross-examination by counsel for Mr. Ollie, Mr. Olsen was less clear and said that he may have told her before he went to bed. However, when cross-examined by counsel for Mr. Charlie, he again reiterated that he told his aunt in the morning.

[34] Significantly, Ms. Acklack testified and denied that Mr. Olsen had asked her permission to stay at her residence that day. She denied seeing him that morning at all. She also said she would have phoned the police if she had seen him as injured as he was.

[35] After leaving Ms. Acklack's residence, Mr. Olsen walked to Mr. Ladue's home. When he arrived, there was no answer so he walked to Corbin Dick's residence before going back to Mr. Ladue's residence, at which point the RCMP were called to report the incident.

[36] In cross-examination, Mr. Olsen agreed he had been drinking a lot that summer and that as result he had caused some problems in the community. He agreed to having been involved in incidents with Mr. Amos Dick, Mr. Ollie, Mr. Charlie, and Mr. Scott DuPont. He agreed it was not until the third statement that he provided to the police that he mentioned the involvement of Chelsea. Mr. Olsen agreed that in his first

two statements he had said he was going to the residence to apologize to Mr. Ollie, but in the third statement he stated he went over to apologize to Mr. Charlie. He explained that he knew that Mr. Ollie stayed at Amos Dick's residence and that Mr. Charlie hung around with Mr. Ollie. When he was asked why he changed his story in the third statement, he said he had not been accurate about what had happened.

[37] In cross-examination by Mr. Charlie's counsel, Mr. Olsen admitted to having been drinking for approximately 11 hours prior to the assault but stated he was only a five on a scale of 10 with respect to his level of intoxication. He admitted to being pretty drunk and tired at the time of the incident. Mr. Olsen denied going over to Amos Dick's residence looking for a fight or that when he saw Mr. Ollie and Mr. Charlie standing there he engaged in an exchange of angry and provocative words, threw rocks, or otherwise provoked a fight.

[38] Mr. Olsen agreed that when he went to the porch, Mr. Ollie came down and slapped him on the head, grabbed him by the shirt collar, and threw him to the ground. He denied swinging at Mr. Ollie first. He also agreed that after he was thrown to the ground, Mr. Charlie kicked him in the face. He stated that the blood stain on the plywood sheet and on the stairs was his blood. Mr. Olsen denied that Mr. Ollie intervened to stop the fight or that he took him into the residence to wash the blood off his face.

Tyrell Ollie

[39] Mr. Ollie testified that in the early morning, he was at Amos Dick's residence. He stated that his girlfriend had passed out on one of the three couches in the living room

and Amos Dick was asleep in his bedroom. Mr. Charlie had been coming and going from the residence throughout the previous evening and the morning.

[40] Mr. Ollie said that he and Mr. Charlie were outside the residence sitting on the steps, where Mr. Charlie was having a smoke. Mr. Ollie was unable to say what time this occurred, as he was not paying attention to the time. He said that Mr. Olsen came down the road, threw some rocks at them — missing — called them names, and said he wanted to fight.

[41] Mr. Olsen came up the gravel driveway, threw a punch at Mr. Charlie, and they started to fight on the plywood sheet at the bottom of the stairs. Mr. Olsen knocked Mr. Charlie to the ground with a punch and then approached Mr. Ollie, who was standing on the second step of the stairs. Mr. Olsen was swearing, calling Mr. Ollie names, throwing punches, and striking him in the chest.

[42] Mr. Ollie said that he responded by grabbing Mr. Olsen by the shirt collar, slapping him, and flipping him to the ground on the plywood sheet. He testified that he stopped at that point because it was not worth it. However, while Mr. Olsen was lying on the ground, Mr. Charlie kicked him twice in the head. Mr. Ollie stated that he heard Mr. Charlie's foot striking Mr. Olsen's head and he told Mr. Charlie that was enough, using words to the effect of "Holy fuck!! That's enough, Slim", at which point Mr. Charlie stopped.

[43] Mr. Ollie said that he picked Mr. Olsen up from behind and helped him into the residence, where he sat Mr. Olsen on the couch near the entrance. He then grabbed some clean rags and a bowl of water and cleaned the blood that was coming from

Mr. Olsen's eye. He said that Mr. Olsen was not bleeding too much while he was on the couch. He said that he helped Mr. Olsen because he felt bad for him and was worried about him.

[44] Mr. Ollie states that Mr. Charlie laughed at Mr. Olsen and said words to the effect of, "That's what you get when you jump on drunk people." Mr. Olsen, who was crying, said he wanted to go home. Mr. Ollie pointed to the door and told him to go. Mr. Olsen then ran out of the house with Mr. Charlie following him. Mr. Ollie was unsure whether Mr. Charlie caught up to Mr. Olsen. Mr. Charlie then left on a four-wheeler.

[45] Mr. Ollie said that he put the cloth he had been using and the bowl of water into the sink. He said that about 10 minutes later, after Mr. Olsen had left, Chelsea Etzel showed up at the residence. She looked around for Mr. Charlie and left. She was there for approximately one minute. He said that Skye Dick was waiting outside on the road.

[46] Mr. Ollie then went to sleep beside his girlfriend on the couch. Mr. Ollie said that he went into Faro with Amos Dick the next day. Mr. Ollie intended to buy more alcohol, while Mr. Dick wanted to buy some nails to stretch a beaver skin. Mr. Ollie wore the same clothes he had been wearing during the altercation. He did not know that the police were looking for him. However, when they pulled up to him in Faro, he thought it might have something to do with Mr. Olsen and he might be blamed and be in trouble.

[47] Mr. Ollie said he had been drinking up until the time of the incident and that he was an estimated six out of 10 on an intoxication scale, with 10 being the most drunk. He stated that while intoxicated he knew what was happening. Mr. Ollie estimated Mr. Charlie as being a six or seven out of 10, but said that he believed Mr. Charlie was

aware of what he was doing. Mr. Ollie estimated Mr. Olsen being intoxicated at about the same level as Mr. Charlie.

[48] He stated that he had no intention to get into a fight with Mr. Olsen when he saw him and that the force he used was in response to Mr. Olsen striking him first.

[49] In cross-examination by counsel for Mr. Charlie, Mr. Ollie agreed that he and Mr. Charlie were good friends. When confronted about apparent inconsistencies in the statement he gave to the police when he was arrested and his testimony in court, Mr. Ollie stated that he was suffering from the DTs when he gave his statement, but that he was telling the truth in court.

Chelsea Etzel

[50] Chelsea Etzel testified she had been in a three-year on-off relationship with Mr. Charlie. They were involved in a relationship at the time of the incident. She said she had been drinking that evening and morning with others. Mr. Charlie would come and go from where she was. She stated that at approximately 3:30 a.m. or 4 a.m., she and Mr. Charlie walked over to Amos Dick's residence, as Mr. Charlie wanted to see Mr. Ollie and Mr. Dick. When they arrived, Mr. Olsen was sitting inside on the couch crying. Mr. Ollie was sitting on a chair across from him wiping blood from his face with a cloth and a bowl. She stated that Mr. Ollie said to Mr. Olsen, "That's what you get for beating up drunk people." She said that Mr. Ollie's girlfriend was cleaning up in the kitchen and Amos Dick was sleeping.

[51] Ms. Etzel stated that Mr. Olsen stayed at the residence drinking with them and talking to Mr. Ollie for approximately an hour or so. He then got up and was panicky so she tried to calm him down by talking to him. However, he walked out the door and left. She stated that she continued to drink at the residence and slept on the couch by the door that Mr. Olsen had been sitting on. She stated that when she woke up around 10 a.m., everyone was gone.

[52] In cross-examination, Ms. Etzel agreed that she knew the police were looking for Mr. Charlie as a result of the incident and that he was being blamed, but stated she never went to the police to tell them what she knew because she never thought about it.

Franklin Charlie

[53] Franklin Charlie testified after Ms. Etzel had given her evidence. He denied being there at the time Mr. Olsen was injured, stating he came afterwards with Ms. Etzel. His testimony was essentially the same as Ms. Etzel's, with the exception that he said Mr. Olsen left after approximately 30 minutes, not after an hour.

[54] Mr. Charlie stated that he estimated Mr. Olsen to be at a nine out of 10, on a scale of intoxication, with Mr. Ollie just a bit less, and himself at a five. He stated that he knew what he was doing that night. Mr. Charlie denied ever striking Mr. Olsen. He also stated that he did not see any blood on the plywood as he entered the residence, saying, he did not look down.

Analysis

[55] I do not intend to set out in detail the reasons for my decision. I have considered the testimony of the witnesses and photographic and documentary evidence. I have examined the evidence with respect to any consistencies and inconsistencies which exist, not only internally, but when considered against the evidence of the other witnesses and documentary evidence. I have considered the demeanour of the witnesses. I am aware, as both accused testified in this case, that the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 apply.

[56] I find the evidence of Mr. Ollie, generally on all critical points, to be reliable and credible. His version of events best aligns with the physical evidence and the testimony of the others.

[57] I find that much of Mr. Olsen's evidence is not capable of belief. I find that his testimony as to the severity and length of the beating he received, to be inconsistent with the evidence of the injuries he suffered as well as the evidence in regard to the blood on the steps, railings, and the interior of the residence.

[58] I also find the evidence of Mr. Charlie to be unreliable and not credible. I do not accept his version of events that had him not present at the time of the altercation.

[59] In this regard, I find that the evidence of Ms. Etzel to have been contrived in order to provide Mr. Charlie with a defence. With respect to Ms. Etzel's evidence, it is most likely that she went over to Amos Dick's residence to look for Mr. Charlie and when she did not see him there she left shortly thereafter, as testified to by Mr. Ollie.

[60] Mr. Charlie, who testified after hearing Ms. Etzel's testimony, clearly appeared to be matching up most of his testimony with that of Ms. Etzel. It certainly, in my opinion, had the appearance of collusion. The fact that Mr. Charlie did not have any marks on his hands is not particularly a factor for me, although it would perhaps be relevant had I found there to be a lengthy and prolonged beating using fists, which I did not find.

[61] The evidence, which I accept, did not involve Mr. Charlie striking Mr. Olsen in a manner that would likely have resulted in him having marks on his hands.

[62] In terms of the evidence that I do accept, the physical injuries Mr. Olsen suffered are more consistent with the evidence of Mr. Ollie than the evidence of Mr. Olsen. Being brutally beaten, to the extent Mr. Olsen testified to, would have, in my view, led to more significant injuries than Mr. Olsen suffered or that are in evidence in the photographs that were filed.

[63] That said, I accept that it is possible Mr. Olsen was struck in the ribs at some point but I am unable to say with certainty when and how. Whether when he fell after being flipped by Mr. Ollie, whether he was kicked not only in the head but in the ribs by Mr. Charlie while he was on the ground afterwards, I certainly find that this did not occur while he was inside the residence.

[64] Likewise, I find that the extent to which there was blood located in the residence, the evidence is more consistent with the evidence of Mr. Ollie than Mr. Olsen. There is little in the way of blood noted and is in such locations and in such amounts that I find it inconsistent with the type of beating Mr. Olsen stated that he received in the residence.

It is more consistent with Mr. Ollie sitting Mr. Olsen on the couch and cleaning up his wounds.

[65] It is unfortunate the RCMP investigation did not include a search of the kitchen or bathroom sinks in order to determine whether blood or a washcloth was in there or not. That would have been probative evidence that could have assisted in the trial of this matter.

[66] There are also other potential witnesses that were not called. As such, I could make little of their evidence. I am not saying this with respect to either Crown or defence in particular, but supposedly there were other people around that I did not hear from.

[67] I also find the other physical evidence is inconsistent with the testimony of Mr. Olsen, that he was dragged up by his heels several steps into the residence. There is no evidence of injuries to the back of his head, other than Mr. Olsen's otherwise unsupported testimony to having a couple of goose bumps or abrasions to the back of his body consistent with being dragged in that manner.

[68] Further, the location of the blood on the stairs and the post does not appear to be consistent with this. The blood on the right stairway post switching to the left is more consistent with Mr. Olsen standing on the left side of the porch while the door was being opened to allow him into the residence.

[69] Also, the evidence of Mr. Olsen that his flip-flops were by the door seems odd. I would have thought they would have fallen off while he was being dragged by his feet

into the residence, but that they would hardly be sitting by the door. This is more consistent with him kicking or taking them off as he entered the residence in the manner described by Mr. Ollie.

[70] In addition, the evidence of Mr. Olsen is contradicted by the evidence of Ms. Acklack, who, in my opinion, was truthful and had no motive to be otherwise.

[71] In my opinion, Mr. Olsen was exaggerating the events that occurred in an attempt to put himself in a positive light and to put Mr. Ollie and Mr. Charlie in a worse light.

[72] This said, Mr. Olsen was clearly the victim of a serious assault. The most logical version of what happened and the version most consistent with all the evidence is Mr. Ollie's. I find that Mr. Olsen either specifically went to Mr. Amos Dick's residence or that he was passing by on his way elsewhere and that he engaged in a verbal confrontation with Mr. Ollie and Mr. Charlie outside of Mr. Dick's residence. This verbal confrontation escalated into a physical confrontation in which I am satisfied that Mr. Olsen was the aggressor. I find that he knocked Mr. Charlie to the ground and then turned to Mr. Ollie to begin fighting with him. Mr. Ollie, with legal justification, struck Mr. Olsen, as he testified to, and threw him to the ground. At this point, Mr. Charlie kicked Mr. Olsen twice, striking him in the head, and causing the injuries suffered by Mr. Olsen, in particular, those to his left eye area.

[73] While Mr. Charlie may have been justified either in engaging in a consensual fight with Mr. Olsen or using force to resist, the initial physical attack by Mr. Olsen does

not justify Mr. Charlie in kicking Mr. Olsen in the head and thus causing the harm to Mr. Olsen. This was not a reasonable use of force.

[74] I find that this was the end of the initial physical confrontation and that Mr. Ollie provided what assistance he could to Mr. Olsen, as he testified to. I find that Mr. Ollie helped Mr. Olsen into the residence to provide this assistance and that Mr. Olsen was not assaulted in the residence or confined therein against his will.

[75] I am not satisfied, on the evidence, that Mr. Charlie made any threat to cause death or bodily harm to Mr. Olsen. This was not something Mr. Ollie testified to having heard Mr. Charlie do. I am not prepared to find on the evidence of Mr. Olsen, which I consider to be suspect that this occurred, having found that there was no physical confrontation inside the residence.

[76] As such, I find Mr. Ollie to be not guilty of the charges against him and he is acquitted.

[77] I find Mr. Charlie to be guilty of the offences of aggravated assault and operating a motor vehicle while being disqualified from doing so. He is acquitted of the unlawful confinement and uttering threats charges.

COZENS T.C.J.