

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

CHEYENNE EDWARD McDONALD

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
David Jardine, Q.C.
Gordon R. Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Cheyenne McDonald is charged with four offences contrary to the *Criminal Code*, namely, that he assaulted J.R. and caused her bodily harm; that he uttered a death threat to her on two separate occasions; and that he breached a term of his Recognizance by having contact with her.

[2] After trial of the matters, the parties are agreed that there is no evidence to support Count #3, which is uttering threats, charged from April 29, 2012. As a result, that charge is dismissed.

[3] There is also no disagreement that the breach charge, Count #4, has been established. I find Mr. McDonald guilty of that charge.

[4] The remaining two counts require an analysis of the evidence in order to determine whether the Crown has proved either of them beyond a reasonable doubt.

[5] The two offences are alleged to have occurred on April 28, 2012. It is common ground that, based on both the testimony of Mr. McDonald and J.R., an incident occurred on that date which led to their relationship ending.

[6] J.R. alleges that she was assaulted by Mr. McDonald after she woke him up regarding dinner. She does not have a specific recollection as to when this actually occurred. She indicated to police it could have been as late as 9:30 p.m., while at trial, she testified that she believed it was late afternoon. She stated Mr. McDonald's young son, whom she had taken to the library that morning, was present.

[7] When the argument started, she asked Mr. McDonald's son to go to his great-grandmother's apartment downstairs. She stated that Mr. McDonald "lost it". He struck her head with the bedroom door, grabbed her arms and shoulder areas, and twice kicked her in the buttocks. He uttered a threat by saying that he would drown her in the Yukon River. He left the apartment, taking her cell phone with him.

[8] She stated that she stayed in the apartment until the next day, at which time she reported the incident to the police. She went with the police to the RCMP detachment in Whitehorse, where she provided a statement. Photographs of bruising on her body were taken by the police. Cst. Crowe of the Whitehorse RCMP testified to meeting with

J.R. on the afternoon of April 29, 2012, and subsequently taking photographs. He noted that she appeared to have difficulty walking.

[9] Mr. McDonald denies having assaulted J.R. He says his young son was present at the time of the argument. He states that he and she got into an argument after she arrived at his apartment with the smell of alcohol on her breath. He does not recall what the argument was about. He states that he told her to get what belongings she had in the apartment and leave. Mr. McDonald told her she was not supposed to be there. He then advised her he was leaving and expected her to be gone when he returned.

[10] At some point during the argument, he describes having gone down to his grandmother's apartment, which is in the same complex, and asking her to come to his apartment to speak to J.R. She did so, after which time he left the apartment. He ended up in the downtown area of Whitehorse to meet up with a couple of friends.

[11] The next day, he returned to the apartment and J.R. was still there. He again told her to leave, after which time he locked her out. That was the last time he saw her. Shortly after she left, the police arrived but Mr. McDonald did not answer the door because he was in the shower. He subsequently spoke to his father and then walked to the police station.

[12] Mr. Ryan Belling and Ms. Isabel Armstrong both testified for the defence. Mr. Belling indicates that he ran into Mr. McDonald in downtown Whitehorse around 4:30 p.m. on the day in question. He says they drank some alcohol in the downtown area before going to his residence, where they spent the night.

[13] Ms. Armstrong, who is Mr. McDonald's grandmother, testified that she was living in the same apartment complex as Mr. McDonald back in April 2012. I understood from her evidence that there was significant interaction between them due to their close proximity. She testified to being asked to attend Mr. McDonald's apartment on April the 28th to speak to J.R. She described J.R. as being extremely intoxicated, so much so that she was unable to get up off the bedroom floor where she was sitting. She denies that J.R. borrowed her car on that day to take Mr. McDonald's son to the library, as had been indicated by J.R. in her testimony.

[14] As submitted by counsel, this is clearly a case where the decision of *R. v. W.(D.)* comes into play. In assessing the evidence, if I believe the evidence of Mr. McDonald, he must be acquitted. Even if I do not believe his evidence, if I am left in reasonable doubt by it, he must be acquitted. If I do not have a reasonable doubt after those two stages, I must determine, on the basis of the evidence I accept, whether I am convinced beyond a reasonable doubt as to the guilt of Mr. McDonald.

[15] In considering the evidence of J.R., she appeared very balanced in her description of what occurred. For example, when asked how many times she was struck, she indicated it was only once. She described the incident as mostly grabbing and pushing. She admitted to having a drinking problem, but indicated she had attended a residential alcohol treatment program and was sober and employed at the time of this incident.

[16] Her evidence was not seriously challenged on cross-examination. Although she did not have a complete recollection of everything that occurred -- for example,

receiving a telephone call where the caller hollered at her when she mentioned the police being present -- her evidence was consistent and unwavering.

[17] She was cross-examined as to why she did not phone the police right away. She responded to this in a twofold manner: firstly, that Mr. McDonald had taken her cell phone and there was no landline in the apartment; secondly, she was traumatized by the incident and spent the rest of the evening and night in the bedroom with the door blocked by a dresser. Although many people might have run for help immediately after such an incident, her actions were, in my view, not unreasonable in the circumstances.

[18] The one area where there was a discrepancy was the timing of the alleged incident. She stated to the police it happened around 9:30 p.m., whereas at trial, she thought it was before dinner time.

[19] In the normal course, the exact time of the allegations may not be significant. However, the defence has led evidence from both Mr. McDonald and his friend, Ryan Belling, that they met up in downtown Whitehorse around 4:30 p.m. on April 28th and spent the evening and night together. However, Mr. Belling did not record his recollections of this event until this past winter, almost two years after the incident. Mr. Belling wrote a short statement in the presence of Mr. McDonald. Mr. Belling stated, "We were remembering things together."

[20] Based on the circumstances of the making of the statement and the fact that Mr. Belling was drinking vodka slushies on the streets of downtown Whitehorse when he happened to run into Mr. McDonald two years earlier, I find the reliability of his

statement questionable. Specifically, I am unable to give any weight to his testimony of the time of day he happened to run into Mr. McDonald.

[21] Ms. Armstrong's testimony is also problematic. She states that she remembers the date in question because of the fact that Mr. McDonald had to go to court soon thereafter and, as a result, of being asked to write a statement sometime thereafter. However, under cross-examination, it became evident that she never reviewed the statement since the time of its making. She admitted to having no recollection as to the details of the statement or its subject matter. She agreed that she did not have a good recollection of the events of April 28th but, rather, recalls what Mr. McDonald had told her about it.

[22] Her evidence with respect to J.R.'s state of sobriety is also externally inconsistent with that of Mr. McDonald. Although he took pains to point out that J.R. was generally inebriated, he stated, on the day in question, he only smelled alcohol on her breath. Considering how he attacked her character at every opportunity, it would be highly unusual for him to have missed a chance to describe her as falling down drunk, if, indeed, that were the case.

[23] Due to what I have just outlined, I find that Ms. Armstrong is mistaken as to when she may have seen J.R. in such a state of intoxication. It was not on April 28, 2012.

[24] Turning to Mr. McDonald's evidence: his memory was very poor with respect to many items; he was evasive and argumentative in cross-examination; there were a number of significant inconsistencies in his evidence, and other actions which, in the circumstances, were not logical.

[25] In direct examination, he suggested that J.R. had only dropped by his apartment on April the 28th and that he told her she was not supposed to be there. I took this to mean that they were not supposed to be having contact because of the no-contact condition on his Recognizance. He stated, "All she was doing was getting me in trouble." Yet, in cross-examination, it became obvious that she was a permanent resident of the apartment. He testified that, "She was living with me the whole time." When asked why he was ignoring the no-contact condition, he stated, "She kept saying she had no other place to go." He later indicated that he got up that day around 9:30 a.m. and, at that time, they started arguing.

[26] Under cross-examination, he was questioned whether he was controlling J.R. by only giving her one of two keys necessary to enter the apartment despite the fact she was paying rent on occasion. He stated the reason he did not give her a key for the deadbolt was to prevent her from bringing others into the apartment. Yet, after their argument on April the 28th, he purports to have left her there to clean out her belongings while he went downtown, met up with friends, and stayed the night at another residence.

[27] Although Mr. McDonald ran into Mr. Belling, who had previously lived with Mr. McDonald and J.R., he never stated to him that the relationship had just ended and he had kicked J.R. out of the apartment.

[28] Despite the fact that this incident was the end of their relationship and led to Mr. McDonald being criminally charged, he had no recollection of what the argument was about. When the police attended at his apartment the following day, he states he

was in the shower and, as a result, did not answer the door. Yet, he admits the police were banging on the door loudly enough, and presumably identifying themselves, for him to know it was the police. Nonetheless, he did not interrupt his shower to respond and only contacted them after having gone to his grandmother's apartment to talk to his father.

[29] I now turn to the bruising on J.R., as described by Cst. Crowe and as depicted in photographs entered as evidence. J.R. stated Mr. McDonald had grabbed her by the arms and shoulder areas. The photographs depict bruising on the arms and in the left chest area. She described Mr. McDonald slamming the door against her head. There was swelling, as described by Cst. Crowe, on her facial area.

[30] Defence argues I should be cautious with respect to the evidence of injuries to J.R. because, in essence, it is circular reasoning. That is to say, she had injuries, so she must have been assaulted.

[31] The bruising and swelling is not determinative of the assault allegation. However, it is corroborative of J.R.'s description as to what occurred.

[32] As stated by the Alberta Court of Appeal in *R. v. Kruper*, 2007 ABCA 17, at para. 12:

... Here, the photographs, which are real, albeit circumstantial, evidence, do not constitute the only evidence relating to the existence and provenance of the complainant's injuries; indeed, the photographs are merely an adjunct to the complainant's direct evidence relating

to her injuries. Therefore, technically, this is not a situation in which the rule in *Hodge's Case* has any application whatever.

[33] And at para. 15:

In considering whether the Crown had proved, beyond a reasonable doubt, that the appellant had caused bodily harm to the complainant, the trial judge was entitled to rely on the real, circumstantial, evidence of the photographs to verify the complainant's direct evidence. The trial judge was in an altogether different position than that of the investigating police officer, whose opinion about the age of the scabs the trial judge rightly rejected; the trial judge was entitled to assess the testimony of the complainant along with the evidence provided by the photographs.

[34] Having considered all of the evidence, I conclude that the Crown has proved beyond a reasonable doubt Count #1 and Count #2 of the Information.

[DISCUSSIONS WITH COUNSEL]

[35] We will adjourn this matter to the fix date court on October the 3rd at 1:00 p.m. I will order the preparation of a pre-sentence report.

[DISCUSSIONS WITH COUNSEL]

[36] Thank you, counsel.

CHISHOLM T.C.J.