

Citation: *R. v. John Abraham Eriksen and
Tanana Mae Profeit*, 2012, YKTC 87

Date: 20121005
Docket: 11-00299
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

John Abraham Eriksen and Tanana Mae Profeit

Appearances:
Ludovic Gouaillier
Melissa Atkinson
Bob Dick

Counsel for the Crown
Counsel for John Abraham Eriksen
Counsel for Tanana Mae Profeit

REASONS FOR JUDGMENT

[1] John Eriksen and Tanana Profeit were charged jointly and individually with a number of offences arising out of an altercation that took place in Carcross on July 23, 2011. Their trial proceeded on January 31, 2012, and I heard the submissions of counsel on February 17, 2012. I acquitted both of them of all charges on February 17th, with reasons to follow. These are my reasons.

EVIDENCE AT TRIAL

[2] The Crown and Mr. Eriksen called evidence at trial. The Crown's witnesses were Wayne Roberts, the victim of the alleged assault, Richard Christianson, Mary-Ann

Whelan, and Cst. Andrew Green. Mr. Eriksen called Krystal Profeit and Frances Neumann. With the exception of Cst. Green, all the witnesses were eyewitnesses, and, although vantage points and some details varied, they told essentially the same story.

[3] The Carcross footbridge is a popular summer fishing destination, and on July 23, 2011, a number of people were gathered there, both on and under the bridge. Their vehicles were parked along various roads near the bridge, including Riverfront Road.

[4] Wayne Roberts arrived at his Riverfront Road home that day to find that access to his property's driveway was blocked by the parked vehicles. He testified that this was a common occurrence, happening two or three times a week, and that he found it extremely frustrating.

[5] On this occasion, one of the vehicles blocking his driveway was a white pickup truck. Mr. Roberts parked his own truck in front of this vehicle and exited, yelling "whose fucking truck is this" and demanding that it be moved. Within minutes, a couple, who he identified in court as John Eriksen and Tanana Profeit, came up from under the bridge. According to all the eyewitnesses, a heated and profanity-laced argument ensued.

[6] Mr. Roberts acknowledged that at this point he was becoming quite angry. He threatened to get his Bobcat to move the truck; the implication being that he would dump it in the lake. The couple indicated that they would move their vehicle, and Mr. Roberts began getting back into his truck. When he was partially in the vehicle, Mr. Eriksen either rushed at or kicked the driver's side door, such that Mr. Roberts had to scramble to keep his left leg from being slammed in it.

[7] There was more gesturing between the two men, and this escalated into a shoving match when Mr. Roberts exited his vehicle. It was not clear who shoved who first; indeed Mr. Roberts candidly acknowledged he couldn't remember, as things were moving pretty fast.

[8] At some point, and despite his smaller stature (5'7" for Mr. Roberts vs approximately 6'3" for Mr. Eriksen), Mr. Roberts gained the clear upper hand in the altercation by putting Mr. Eriksen in an arm lock and pinning him to his truck. Mr. Eriksen's left arm was twisted behind his back, and Mr. Roberts had a firm grip on his wrist and his shoulder. Mr. Eriksen could not move. In cross-examination, Mr. Roberts agreed that if he had applied increased pressure, he could have broken Mr. Eriksen's wrist.

[9] At this point, someone, possibly Mr. Eriksen, shouted something about bear spray, and Mr. Roberts subsequently noticed Ms. Profeit approaching with a can of bear spray pointed at him. Mr. Roberts released his hold on Mr. Eriksen, pushed him away and confronted Ms. Profeit, by grabbing her, spinning her around so her back was towards him, bending her over and pinning her in a folded position with her arms trapped between her legs. During the course of this maneuver, Ms. Profeit threw the bear spray under the truck.

[10] Seeing his girlfriend trapped in this position, Mr. Eriksen came up behind Mr. Roberts with a second can of bear spray and reached around to discharge it in his face. Despite burning skin and eyes, Mr. Roberts was able to seize the bear spray that Ms. Profeit had thrown under the truck and went after Mr. Eriksen, bear spraying him.

[11] At some point, the three were in a stand-off on opposite sides of the white pickup truck, with Mr. Roberts at the driver's side and Mr. Eriksen and Ms. Profeit on the passenger side, but eventually Mr. Roberts moved his vehicle so that Mr. Eriksen and Ms. Profeit could move theirs. Mr. Roberts then ran down to the lake to flush his eyes and skin with water.

[12] When he returned from the lake, Mr. Eriksen and Ms. Profeit had driven away. Mr. Roberts described the symptoms of the bear spray as intensifying, and within a little while he experienced significant difficulty breathing and seeing and called one of the emergency numbers he knew; in this case it turned out to be the RCMP. He was treated by nursing staff and the police investigation proceeded.

[13] As indicated, Mr. Roberts' version of events was effectively corroborated by the other eyewitnesses.

[14] Richard Christianson, who testified for the Crown, said concern for his thirteen-year-old grandson prevented him from paying attention the whole time, but indicated that he could hear the car door being hit or slammed at the outset of the confrontation, saw both Mr. Eriksen and Ms. Profeit pinned and saw the bear spray being deployed. He also indicated that Mr. Roberts was taking care of himself quite well and did not appear to need any help.

[15] Mary-Ann Whelan, also a Crown witness, saw a similar scene unfold and noted that Mr. Roberts appeared to be taking care of himself.

[16] The two witnesses called on behalf of Mr. Eriksen had arrived at the bridge with Mr. Eriksen and Ms. Profeit. They missed earlier parts of the confrontation because of where they were situated but essentially testified to the same sequence of events, although they did paint Mr. Roberts as more aggressive, especially with respect to his grappling with Ms. Profeit. Indeed, Ms. Neumann testified that she observed Mr. Roberts strike Ms. Profeit, a fact which is unsupported by the other witnesses.

[17] I am satisfied, based on the evidence, that both Mr. Roberts and Mr. Eriksen were agitated and yelling, and that things escalated from verbal taunts to Mr. Eriksen slamming Mr. Roberts' car door while Mr. Roberts was getting into the vehicle, mutual shoving, and, ultimately, bear spraying. I am also satisfied that Mr. Roberts, despite being outnumbered, had the upper hand in the confrontation up until the point he was bear sprayed, and even then he was able to respond in kind before having to run to the lake in an attempt to flush out his eyes and skin.

[18] Following the altercation, Mr. Eriksen and Ms. Profeit were jointly charged with assault with a weapon, particularized as bear spray, contrary to s. 267(a), and possession of a weapon, again particularized as bear spray, for a dangerous purpose, contrary to s. 88. They were each individually charged with possessing a prohibited weapon (again, bear spray), while subject to a weapons prohibition order, contrary to s. 117.01, and Mr. Eriksen was charged with a breach of recognizance under s. 145(3) for failing to keep the peace and be of good behaviour.

ISSUES

[19] I should state at the outset that I am satisfied that there was an assault with a weapon by both Ms. Profeit and Mr. Eriksen on Mr. Roberts. A conviction of assault requires the unintended application of force to another person, directly or indirectly, and without their consent (s. 265(a)) or an attempt or threat to apply force to another person (s. 265(b)). For a conviction on a s. 267(a) charge, the Crown must prove that the accused committed the assault while carrying, using, or threatening to use a weapon. Bear spray meets the definition of 'weapon' under s. 2 of the *Criminal Code*. I am satisfied, beyond a reasonable doubt, on the evidence that Mr. Eriksen deployed bear spray at Mr. Roberts and that Ms. Profeit threatened Mr. Roberts with bear spray.

[20] This does not resolve the charges, however, as there are a few issues that arise on the facts:

- 1) Were Mr. Eriksen and/or Ms. Profeit acting in self-defence?
- 2) Has the Crown proven that Ms. Profeit and Mr. Eriksen possessed the bear spray for a dangerous purpose?
- 3) Is bear spray properly characterized as a prohibited weapon?

[21] As I indicated in my oral ruling, I find that Mr. Eriksen and Ms. Profeit were acting in self-defence when they used bear spray against Mr. Roberts. I am not satisfied that they had the bear spray in their possession for a dangerous purpose. Finally, I find that bear spray does not meet the *Criminal Code* definition of a prohibited weapon. Accordingly, Mr. Eriksen and Ms. Profeit are acquitted of all charges.

Issue 1: Were Mr. Eriksen and Ms. Profeit acting in self-defence?

[22] As indicated, I am satisfied that both Mr. Eriksen and Ms. Profeit assaulted Mr. Roberts with a weapon. That is not the end of the story; however, as each of them argues that they were acting in self-defence.

[23] The applicable provision in these circumstances is s. 37:

37(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

[24] As per the BC Court of Appeal in *R. v. Grandin*, 2001 BCCA 340, there are two elements to this defence: firstly, that the accused used force to defend either himself or others from an assault, and, secondly, that the force used was no more than necessary (para. 36).

[25] With respect to Ms. Profeit, the evidence is that she threatened Mr. Roberts with the bear spray during the time in which he had Mr. Eriksen bent over a truck in an arm-lock. According to Mr. Christianson and Ms. Whelan, Mr. Roberts did not look like he needed any help and he appeared to be taking care of himself. I am satisfied that Mr. Roberts had Mr. Eriksen not only in an uncomfortable position but that, as he said, if he exerted more pressure, he could have broken Mr. Eriksen's arm. By approaching Mr. Roberts with the bear spray in a manner that suggested she would deploy it, I find that Ms. Profeit threatened force to prevent injury to Mr. Eriksen. It had the intended effect.

The “force” used was certainly proportionate to the force being used against Mr. Eriksen, especially given that Mr. Roberts came to no harm.

[26] With respect to Mr. Eriksen, he bear sprayed Mr. Roberts during a point in the altercation when Mr. Roberts had Ms. Profeit bent over double with her arms pinned between her legs. Given what Mr. Eriksen had just experienced, he was under no illusion that Mr. Roberts could easily injure Ms. Profeit. Although I do not find that was Mr. Roberts intent, and I do believe that he just wanted to prevent the deployment of the bear spray that she was holding, Mr. Eriksen was responding in the moment. He intervened to defend Ms. Profeit and I do not find that his use of bear spray was excessive in the circumstances. The evidence is that once he sprayed it and secured Ms. Profeit’s release, he backed off. Although he was subsequently bear sprayed himself, the violence on his part did not escalate any further.

[27] In the circumstances, I find that both Ms. Profeit and Mr. Eriksen were acting in self-defence.

Issue 2: Has the Crown proven that Ms. Profeit and Mr. Eriksen possessed the bear spray for a dangerous purpose?

[28] In order to make out this offence, the Crown must prove (i) that the accused possessed a weapon, and (ii) that the purpose of that possession was one dangerous to the public peace. These two elements must co-exist at the ‘relevant’ time, although a person’s purpose may change during the time in which a weapon is in his possession (*R. v. Kerr*, 2004 SCC 44, *R. v. M.D.*, 2008 BCCA 538).

[29] As noted, it is clear that bear spray meets the definition of weapon in s. 2 of the Code, as it was used by Ms. Profeit to threaten or intimidate Mr. Roberts, and as it was used by Mr. Eriksen in causing injury to Mr. Roberts. I have found that this use was in self-defence.

[30] It seems to me that there are two relevant time periods to be considered: before Mr. Roberts and Mr. Eriksen began exchanging words and shoves, and after their altercation started. Was the possession of the bear spray at either of these times for a purpose dangerous to the public peace? Given that neither of the accused testified, this question must be answered with regard to all of the circumstances. I take judicial notice of the fact that bear spray is widely available and commonly owned in the Yukon. Indeed, Mr. Roberts, the complainant, indicated that he frequently carried it and that it is usually in his vehicle when he is going to or from work. There was no evidence led to suggest that the bear spray in the possession of Mr. Eriksen and Ms. Profeit was present for any reason other than in anticipation of a bear encounter. Possession for this reason does not threaten harm to people or property nor does it threaten to interfere with a normal state of order, and it is not dangerous to the public peace.

[31] After Mr. Roberts arrived on the scene, I have found that the bear spray was brandished and ultimately deployed in self-defence. It is possible that at this point the purpose of the possession turned into something culpable. Indeed, the Courts seem to indicate that the use of a weapon in self-defence does not preclude a conviction for possession of a weapon for a dangerous purpose; rather it is a factor to consider (*Kerr, M.D., supra*). I am satisfied here that Ms. Profeit's motive in threatening Mr. Roberts with the bear spray was to help Mr. Eriksen out of a situation in which she honestly

anticipated that he could come to significant harm including, possibly, a broken wrist. Similarly, given the escalation of events, I am satisfied that when Mr. Eriksen deployed the bear spray in Mr. Roberts face, he was motivated by a desire to prevent any harm coming to Ms. Profeit. With respect to the bear spray, the purpose of both accused was, in all the circumstances, not dangerous to the public peace.

Issue 3: Is bear spray a prohibited weapon?

[32] The evidence established that both Ms. Profeit and Mr. Eriksen were subject to prohibition orders pursuant to s. 110, and, further, that both were in possession of bear spray at the relevant time.

[33] Weapons deemed to be 'prohibited' under Canadian law are set out in Schedule 3 to SOR/98-462, which is entitled *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*. Section 1 of Part 3 reads:

1. Any device designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of
 - (a) tear gas, Mace or other gas, or
 - (b) any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person.

[34] I accept that bear spray is a 'liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person'. The contentious question is whether it was 'designed to be used' for the injury, immobilization or incapacitation of a person.

[35] In his submissions, Crown counsel submitted that the proper interpretation of s. 1 requires a disjunctive reading between 1(a) and the rest of the section. He suggested that the 'or' following subsection (a) indicates that subsection (b) intends to prohibit any liquid etc. capable of injury, immobilization or incapacitation, regardless of the purpose behind its design. I cannot agree with this interpretation. Rather I find the design purpose is relevant to both subsections (a) and (b), and the 'or' is disjunctive as between the two subsections. I also find that bear spray is designed for use on bears, not people, and, accordingly, is not caught by the *Regulations*. I am supported in this view by the decision of the B.C. Court of Appeal in *R. v. Jordan*, 2004 BCCA 139.

[36] In *Jordan*, the appellant was found with a can of pepper spray labelled "First Defence Aerosol Pepper Protector MK-3". The warning sticker clearly indicated that the product was designed to be used in self-defence. Evidence given by a police officer at the trial was that the same solution (10% oleoresin capisicum) was marketed as 'bear spray' in a larger can capable of projecting the solution further and with a greater spray radius. The summary conviction trial judge acquitted Mr. Jordan, on the basis that bear spray was "a perfectly lawful and legal thing to possess" and that there was "absolutely nothing to differentiate" the pepper spray possessed from bear spray. The acquittal was set aside on appeal to the Supreme Court, which accepted that, while bear spray was not a prohibited weapon, the pepper spray was. The Court of Appeal agreed, finding that the uncontradicted evidence showed that:

... the canister found in the appellant's possession met the definition of a prohibited weapon as set out in the regulations; i.e., that it was "designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of ... any liquid ... capable of ... incapacitating any person" (para. 18).

[37] Ryan J.A. further wrote that “[w]hat is prohibited is an item designed to be used to incapacitate humans; that the substance in both types of canisters may be used to incapacitate humans is immaterial” (para. 20). Accordingly, the pepper spray canister, because of its design, was a prohibited weapon.

[38] While the deployed canisters in this case were not actually before me, all the witnesses, including Mr. Roberts, identified them as ‘bear spray’. I have already taken judicial notice of the fact that bear spray is readily available to, and indeed urged on, people venturing out onto local trails or into the bush. I accept that Mr. Eriksen and Ms. Profeit approached Mr. Roberts with cans of bear spray, and that it was bear spray that was deployed. Unlike the pepper spray in the *Jordan* case, bear spray is designed for use on bears, not people, and is not caught by the *Regulations*. I acquit Mr. Eriksen and Ms. Profeit on the s. 117.01 charge of possessing a prohibited weapon.

[39] On the basis of these findings, I also acquit Mr. Eriksen on the s. 145(3) charge of failing to keep the peace and be of good behaviour.

RUDDY T.C.J.