

Citation: *R. v. Hager*, 2021 YKTC 37

Date: 20210831
Docket: 20-00803
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Cozens

REGINA

v.

JIMMY DARRYL HAGER

Appearances:
Keith D. Parkkari
Amy Steele

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C. (Oral): Jimmy Hager has been charged with having committed the offence of assault, contrary to s. 266 of the *Criminal Code*, and the offence of uttering threats, contrary to s. 264.1(1) of the *Criminal Code*.

[2] As I understand it, the Crown is not seeking a conviction on the s. 264.1(1) charge as there was no evidence of any threats having been made in this case.

[3] The alleged victim of these offences is Georgina Sam. The trial was started in a *voir dire* where the necessity of utterances made by Ms. Sam to Government of Yukon Department of Health employee Mackenzie Boyden were argued by Crown counsel as being admissible for the truth of their contents. At the conclusion, I ruled with reasons

to follow that these statements were admissible at trial for the truth of their contents.

The evidence heard in the *voir dire* was admitted as evidence in the trial proper in addition to other evidence heard during the trial. Judgment was reserved until today's date. This is my judgment.

[4] I cite the evidence of Mr. Boyden that I have just repeated earlier. I am not going to repeat it for the purposes of this decision as there are no changes. And I refer also to the evidence of Cst. Rependa, and it is exactly the same as what I just read in the *voir dire* decision. And again, I will not include it in my oral reasons, although if a transcript is ordered, they of course will be there. (See attached Appendixes A and B for excerpts from the *voir dire* decision.)

Georgina Sam

[5] Ms. Sam testified she had been in a relationship with Mr. Hager for approximately 30 years and that they have four children, three of whom are adult and the youngest being 14.

[6] Ms. Sam stated that when she went to bed that evening, she and Mr. Hager were both drunk, although he was more drunk than her. She said that after being out, Mr. Hager came home and was lying on the porch. She dragged him inside. They got into an argument, and Mr. Hager became upset. She was not sure what time the argument happened, but it was after she saw some things on Mr. Hager's phone that upset her. She stated that Mr. Hager hit her a little bit in the back of the head with his fist. She was unsure how many times he hit her like this, but she was sure that he did hit her. She was not sure if he hit her more than once. He did not hit her in the face.

He then walked out and she locked the door. Mr. Hager hit the door before he left.

Ms. Sam denied ever attempting to hit Mr. Hager.

[7] Ms. Sam recounted being at other residences earlier the day before and arguing with Mr. Hager at one of these residences. She stated that she had been drinking and that she has high blood pressure and she gets nosebleeds sometimes. She said the blood in her nostrils seen in the photos could be from that. She said that she was sick and she vomited on the floor. She said the blood on the floor might be from the nosebleed or from coughing up blood.

[8] Ms. Sam stated that she knew Mr. Boyden, but that she could not remember speaking to him or going to his house on December 30, 2020. She also did not recall speaking with Cst. Rependa or being at the nursing station. She stated she does not really remember some things due to her level of intoxication.

[9] She stated that she cares for and loves Mr. Hager, and that she forgives him.

Jimmy Hager

[10] Mr. Hager testified that Ms. Sam had been drinking the day and evening before December 30, 2020. He met up with her at approximately 9:00 p.m. He stated that Ms. Sam was pretty intoxicated and he asked her why she was drinking. Mr. Hager said that he was not very upset when he asked her about this, although it bothered him a little bit. He said that Ms. Sam drinks a lot, and he barely drinks, although he does binge drink at times. She took a swing at him in an attempt to hit him at the time that,

as she was heading into her sister's residence. He agreed that he walked behind her to the residence.

[11] Mr. Hager said that he and a couple of friends drank most of a 26-ounce bottle of liquor while they were out. He returned home at approximately 3:30 a.m. There was no one else in the home at that time. Ms. Sam came home at approximately 4:00 a.m. They argued about the past. He said that he went outside to leave, but she did not want him to go. He was outside for approximately 20 minutes. Ms. Sam grabbed him and dragged him into the house by his jacket. He said that he then tried to sleep on the floor.

[12] He said that Ms. Sam saw something on his phone and started to hit him. He sat on her, but on the couch, not on the floor, in an attempt to stop her from hitting him, and to get his phone back. He said that he was kind of upset. He said that Ms. Sam told him that his phone was in the snowbank.

[13] He left and Ms. Sam locked the door behind him. He was outside in his T-shirt and it was 20 degrees below zero. He tapped on the door and then, after not getting in, walked to his mother's residence on the other side of town. He says that he arrived there at approximately 9:00 to 9:30 a.m. Mr. Hager states that although he had been drinking, he remembers most of the night. He denies assaulting Ms. Sam in any manner. He denied seeing any blood on Ms. Sam.

[14] Mr. Hager agreed in cross-examination that earlier in the evening he was a little bit upset that Ms. Sam was drinking, and that he was asking her why she was doing so. He stated that he was feeling good from drinking, but denied drinking much alcohol.

Analysis

[15] As Mr. Hager testified, the analysis in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, as expounded upon in subsequent cases applies. As Cory J. stated in paras. 28 and 29:

28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

29 Nonetheless, the failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply: *R. v. Thatcher, supra*.

[16] Mr. Hager was quite confrontational and argumentative with Crown counsel during cross-examination. He was also somewhat evasive. There is a contradiction in his testimony as to when he and Ms. Sam first argued. At one point, he said it was when she first arrived home, and at another point he said it was after he had been lying on the floor and she looked at messages on the phone.

[17] It is possible there were two arguments, one that resulted in him being outside and wanting to leave, and another after she saw the messages. I do not make much of this. Mr. Hager's testimony and the manner in which he provided it, however, left me questioning his credibility and the reliability of his testimony. In consideration of the entirety of the evidence, the testimony of Mr. Hager does not leave me with a reasonable doubt. That, of course, is not the end of the matter.

[18] Ms. Sam provided her testimony in a fairly straight-forward manner. It is apparent she still loves and supports Mr. Hager. The presentation of her evidence and recollection of events has an aura of attempting to minimize the actions of Mr. Hager and to distance herself from recollecting events that occurred afterwards. It is clear on the evidence that she telephoned Mr. Boyden, that he attended his residence where Ms. Hagar was located, that she was accompanied by Cst. Rependa to her residence, and that she attended at the nursing station.

[19] The evidence of Ms. Sam that she was half-cut at the time of the incident was inconsistent with that of Mr. Boyden and Cst. Rependa, who assessed her as being sober. I appreciate that if the incident had happened several hours earlier, then Ms. Sam would perhaps have appeared sober later in the morning. However, that is inconsistent with Ms. Sam going directly over to Mr. Boyden's residence after the incident occurred. It is possible, even plausible, that Ms. Sam was exaggerating her state of intoxication as a basis for not remembering what happened, in particular the more assaultive behaviour of Mr. Hager that Mr. Boyden described her as telling him, when Mr. Boyden assessed her as being sober.

[20] The *res gestae* statements made to Mr. Boyden were not contradicted by any evidence other than the testimony of Mr. Hager that he did not assault Ms. Sam.

[21] Ms. Sam's testimony differed from what she told Mr. Boyden in that her testimony did not mention any choking or arm twisting. However, her testimony did not contradict what she told Mr. Boyden; it was simply less detailed as to the assault.

[22] Ms. Sam's testimony is also not inconsistent with the photographs that were filed. The choking and strikes to the back of the head would not likely result in any visible injuries. The blood in her nostrils, shirt, and on the floor could be consistent with her face striking the floor while Mr. Hager was striking the back of her head. It could also be consistent with a nosebleed and coughing up blood, although both could also be the result of an assault having been committed. Mr. Boyden described Ms. Sam as having some soft swelling to the back of her head, which is consistent with Ms. Sam being struck on the back of the head by Mr. Hager, as she both testified to and told Mr. Boyden.

[23] Ms. Sam testified that after the assault, Mr. Hager left and she locked the door. She told Mr. Boyden that after Mr. Hager got up off of her, she ran to Mr. Boyden's house. These two versions are not necessarily inconsistent, as Mr. Hager may have left the residence after he got up, came back to the door, and tried to get in, and Ms. Sam may have initially locked the door and then left shortly after Mr. Hager left. This is in fact consistent with Mr. Hager retrieving the cellphone, coming back, and tapping at the locked door.

[24] Mr. Hager's evidence that he was tapping at the door after retrieving his cellphone from the snowbank is, in my opinion, an understatement, as his assessment of his own level of intoxication and anger is. I am more inclined to believe the evidence that he was striking the door.

[25] The time at which Mr. Hager said he left to go to his mother's residence is consistent with the time at which Ms. Sam called Mr. Boyden from his residence. Ms. Sam's demeanour in the presence of both Mr. Boyden and Cst. Rependa is supportive of the version of events that she told Mr. Boyden.

[26] While there are some problems with Ms. Sam's testimony, primarily related to her lack of memory of events that occurred after the alleged assault, I find that I am satisfied beyond a reasonable doubt that Mr. Hager assaulted Ms. Sam. This said, I am limiting my finding to Mr. Hager pushing Ms. Sam to the ground where she lay on her stomach while he struck her on the back of the head in a manner sufficient to cause some soft swelling. To the extent that there was bleeding from Ms. Sam's nose, this was a by-product of the assault, whether a simple nosebleed resulting from the incident, or from her face inadvertently striking the ground. It was not a result of Mr. Hager striking Ms. Sam in the face deliberately. While Mr. Hager may have taken Ms. Sam to the ground by placing his arm around her neck, I am not satisfied beyond a reasonable doubt that he was choking her.

[27] I am satisfied that in taking Ms. Sam to the ground, Mr. Hager placed his arm around her neck and grabbed her arm in doing so. That could be categorized as twisting. But there was no indication it was twisting to the point of pain.

[28] Therefore, on these facts, I find Mr. Hager guilty of the offence of assault.

COZENS C.J.T.C.

Appendix A

Mackenzie Boyden

[29] Mackenzie Boyden testified that on December 30, 2020, he had been working at Pelly Crossing for approximately two and one-half years as a Yukon Government health worker, working at the health centre. He had known Ms. Sam for the period of time he was working at Pelly Crossing, both as a co-employee and as a patient. He lived close to where Ms. Sam lived. He was aware that Ms. Sam and Mr. Hager were in a domestic relationship.

[30] On December 30, 2020, at approximately 9:30 a.m., Mr. Boyden was at the health centre when he received a call from Ms. Sam. She was calling him from inside his home. She told him that she had had an altercation with Mr. Hager and that she was scared. She had run to his house and, once inside, locked the door. Mr. Boyden described her as being tremulous, breathing rapidly, and speaking in short sentences.

[31] Mr. Boyden went to his residence, where the door was locked. Ms. Sam answered the door and let him in. Mr. Boyden noted her to be breathing rapidly to the point of hyperventilating, shaking, scared, quite afraid, and uncomfortable. He observed dried blood in her nostrils and on the front of her pyjama clothes. She had tears in her eyes. She wanted him to check to make sure no one was there outside the residence.

[32] Mr. Boyden stated that this was unusual behaviour for Ms. Sam based upon his experience with her. She had never come that far into his house before, although he

recalled an incident approximately six months earlier where she had come into his house and yelled to wake him up in the middle of the night.

[33] Mr. Boyden stated that he considered Ms. Sam to be sober. There was no smell of liquor that he could ascertain. She was walking normally and she had clear speech. He stated that in his job he has had hundreds of occasions to estimate the state of sobriety of individuals. He said that he was aware that Ms. Sam had a drinking problem and that he had seen her intoxicated before.

[34] Mr. Boyden stated that Ms. Sam told him that she had been sleeping at home with the door locked when Mr. Hager came to the door, knocking and banging on it, asking to be let in. When she let him in, an altercation started between them. In the course of this altercation, Mr. Hager, who was intoxicated, twisted her left arm and choked her. She was lying on the ground on her stomach while Mr. Hager was striking the back of her head. She said that when Mr. Hager got up off of her, she ran out of the house and went to Mr. Boyden's residence, where she called him.

[35] Mr. Boyden stated that Ms. Sam was taken to the health centre by the RCMP for evaluation. Some soft swelling but no bruising was observed on Ms. Sam.

[36] Mr. Boyden testified that he was recalling the incident from memory as he had taken no notes at the time. He agreed he did not remember exactly the words that Ms. Sam said to him, but that he was remembering as best as he could. He believed that Ms. Sam had called him right after arriving at his residence. He stated that he only asked her questions after she told him what had happened.

Appendix B

Cst. Daniel Rependa

[37] Cst. Rependa testified that he received a call from dispatch at approximately 9:30 a.m. on this date, telling him that Ms. Sam was hiding out at Mr. Boyden's residence after being assaulted by Mr. Hager. He attended at the residence and spoke to Ms. Sam. He observed dried blood on her shirt and under her nose. He observed Ms. Sam to be very concerned and fearful, stating that she was dizzy and that her head hurt. He did not observe any indicia that Ms. Sam was overly intoxicated. He stated that her speech was coherent and she seemed fine. She had no issues with her speech or mobility. He considered her to be sober.

[38] He accompanied Ms. Sam to her residence due to her concerns about going back. She was focused on getting her clothes. He observed blood under her couch and also mixed with vomit on the floor, which Ms. Sam stated had happened while she was being assaulted.

[39] Cst. Rependa stated that Ms. Sam would not provide a formal statement. He stated that Mr. Hager turned himself in to the police on January 3, 2021.

[40] I note that the Crown was not seeking the comments of Ms. Sam to Cst. Rependa to be admitted into the trial proper, but only to form part of the narrative.