IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REX

v.

HAVANNA LYNN ROSE PAPEQUASH

Appearances:
William McDiarmid   Counsel for the Crown
Caroline Drolet   Counsel for the Defence

**This decision was delivered from the Bench in the form of Oral Reasons.
The Reasons have since been edited without changing the substance.**

REASONS FOR JUDGMENT

[1]   COZENS T.C.J. (Oral): Havanna Papequash has been charged with having committed the offence of assault causing bodily harm, contrary to s. 267(b) of the *Criminal Code*.

[2]   Niki Good testified that on August 24, 2023, she was walking behind her cousin, Bradley Good, just before midnight. They were walking across from the Whitehorse Emergency Shelter, at 405 Alexander Street, near the old Jamieson's Building heading towards 3rd Avenue. Ms. Good heard the sound of running footsteps behind her, so she stepped to the side and looked behind her.

[3]   As she did so, she was punched in the forehead by a young lady. She was punched a second time in the face, causing her to lose a tooth. She was punched a third time, which caused her to step off the curb and fall to the ground on her back. As she lay on the ground, the lady stomped on her left wrist, leaving a boot print on it. Mr. Good came to help her and pushed the lady off Ms. Good, preventing her from kicking Ms. Good in the head area.

[4]   By the time Ms. Good was able to stand, the lady was gone. She saw four people running towards the shelter. Mr. Good was bleeding from his forehead and his glasses were off. Besides the lost tooth, Ms. Good suffered a cut to her forehead and an injury to her wrist that became infected and required her to be placed on antibiotics for two weeks, both intravenous and oral.

[5]   Ms. Good said that she clearly saw the face of the lady as she came at her and punched her the first time. It was not completely dark out, and there was light from a nearby streetlight. She said that she did not know who this person was. She described her as being "Native/First Nations", with a slightly darker tanned skin tone. She had curly, short, dyed reddish hair in pigtails. She was in her early to mid-twenties, slender, and approximately the same height as she was, 5' 3¾". She was wearing black leggings and a bright shirt with one shoulder off.

[6]   Ms. Good stated that she had not seen the woman who attacked her before the incident, and she had not seen her since the assault. Ms. Good said that she did not immediately report the incident to the police because she did not know who had attacked her. Ms. Good said that some RCMP members were at the scene right after it

happened. She said that she told them that when she knew who had attacked her, she would come back to the RCMP. She said she did not want to give a statement at that time.

[7]   Ms. Good asked around at the shelter and was told initially that it was Oceana Papequash. She said that she learned this name on August 26, 2023. Despite being pressed on this issue, Ms. Good would not provide a specific name for the person or persons who had told her this, and said that she would not do so because she had concerns that if she provided their names, they might not be safe.

[8]   Ms. Good provided the RCMP with a statement on November 1, 2023. She said that she had contacted the RCMP before that date, guessing it was around September 20th or 21st, before her birthday. She was told that she would be asked to participate in a photo lineup in the future. She subsequently participated in a photo lineup on December 29, 2023. Ms. Good immediately recognized Havanna Papequash in the sixth photo that was shown to her, stating, "Yep, that's her. I'd recognize that face anywhere."

[9]   Ms. Good said that she had consumed approximately a mickey of alcohol that day between approximately 10:00 a.m. and 6:00 p.m. dinner time. Ms. Good stated this was pretty normal drinking for that time. She said that she was walking normally at the time of the incident. Ms. Good said that she was approximately a two out of 10 on a scale of intoxication. She had just finished a sub sandwich that she had received at the shelter.

[10]   Ms. Good said that she did not make a statement to the RCMP until November despite apparently knowing the name of her assailant in August, in part because she was dealing with her injuries and recovery. She said that she had met with Victim Services' workers and that she felt she had up to a year to press charges. She said that she had tried to connect with the RCMP officer, and that it took some time to arrange to make the statement as well as some time to arrange the photo lineup.

[11]   She stated that she did not collaborate with Mr. Good when she made her statement. Ms. Good said that when she was speaking with the RCMP, she was unsure whether the woman who had assaulted her was Havanna or Oceana.

[12]   Cst. McRory was the lead investigator in this file. He said that he was assigned the file on September 1, 2023, as a result of a front counter reporting. He was ultimately able to arrange for Ms. Good to participate in the November 1, 2023 interview with Cst. Edwards. Following this interview, Cst. McRory arranged for the photo lineup to be conducted by a third RCMP officer who had not been involved in the investigation.

[13]   Based on the information Cst. Edwards provided him that, in her statement, Ms. Good had said that it was Oceana who had assaulted her and that the assailant was slender, Cst. McRory believed that the description did not match Oceana but was more likely associated with Havanna, with whom he had had some previous interactions. Therefore, he included both Havanna and Oceana's photographs in the photo lineup, as well as 10 other young Indigenous females' photographs from the limited amount of photographs available for his use from the Police Reporting and Occurrence System ("PROS"). Cst. McRory said that he had tried to find photographs

that were similar to the description he had been provided and that were similar to Havanna. He had participated in 15 to 20 photo lineups previously.

[14]   The photo lineup was conducted by Cst. Richard in Carcross. He had no previous involvement with this file, and no involvement following the photo lineup other than to inform Cst. McRory that Ms. Good had identified Havanna as the woman who had assaulted her, and to send the photo lineup package back to Cst. McRory.

[15]   Other than defence counsel's submissions on the photographs used in the photo lineup being improperly selected in order to be built around Havanna's description, it is agreed by counsel that the procedure of setting up the photo lineup was proper and that Cst. Richard conducted the photo lineup properly.

[16]   Havanna testified. She stated that she had not assaulted Ms. Good that night. She said that she had seen Ms. Good previously around the shelter and that Ms. Good was usually intoxicated. She said that at the time of the incident, she was in the vicinity of Housing First a few blocks away, although she was not living there. She said that she was hiding.

[17]   Havanna said that she was homeless at the time and that she was regularly using crack cocaine, but not alcohol or fentanyl. She said that using crack made her jittery and paranoid, but not forgetful. She said that at the time of her arrest in January 2024, she thought she was being arrested for breach charges, not a charge of assault causing bodily harm. She said that she would remember if she had beat someone up.

[18]   The issue in this case is not whether Ms. Good was assaulted and that she suffered bodily harm as a result of the assault. This clearly occurred. The issue is whether Havanna has been correctly identified as the woman who assaulted Ms. Good.

[19]   The issue of identification comes down to the photo lineup. The hearsay evidence from individuals or an individual at the shelter as to who assaulted Ms. Good has no probative value on the issue of actual identification. This information, including the apparent misidentification of Oceana as the assailant, only served to facilitate the preparation and arrangement of the photo lineup.

[20]   The evidence of Ms. Good is that she did not know who Havanna was before the assault, and that she had not seen her since the assault. This is not a case where there is any evidence that someone pointed out Havanna to Ms. Good after the assault and Ms. Good carried this information with her into the photo lineup. There is also no evidence that Ms. Good knew Oceana before the assault, or that anyone pointed out Oceana to Ms. Good after the assault.

[21]   Ms. Good immediately and without hesitation picked Havanna out as her assailant from the photo lineup, and immediately discarded the remaining individuals in the photo lineup both, before and after Havanna's photographs were presented to her as possibly being her assailant, and she viewed these photographs one by one.

[22]   It is well established in the jurisprudence that eyewitness evidence is inherently unreliable as stated in *R. v. Miaponoose*, 1996 CanLII 1268 (ON CA):

> The inherent frailties of identification evidence are well
> known to the law and have been the subject of frequent

> judicial consideration and comment. We must, however,
> never regard these principles as trite. They are fundamental.
> They merit repeating. One of the many useful writings on this
> subject can be found in the Law Reform Commission of
> Canada Study Paper on Pretrial Eyewitness Identification
> Procedures (1983). The Commission concludes in its study
> that "the need for comprehensive police guidelines is
> particularly acute in the area of pretrial eyewitness
> identification procedures, because eyewitness testimony is
> inherently unreliable" (at p. 7).

[23]   After repeating this comment from *Miaponoose*, the procedure for conducting photo lineups is set out in the inquiry regarding Thomas Sophonow, the Investigation, Prosecution and Consideration of Entitlement to Compensation known as the "*Sophonow* Inquiry" as was discussed in *R. v. Baker*, 2018 ONSC 3111 in paras. 37 to 42, starting in para. 39:

> 39 In *R. v. Carter*, 2015 ONSC 5273 (Sup. Ct.), at paras. 56
> to 60, B.P. O'Marra J. reviewed the principles applicable to
> determining the reliability of photo lineups:
>
>> 56 In an appropriate case a trier of fact may
>> be justified in convicting on the evidence of a
>> single eye witness. [citing] *R. v. Pelletier*, ...
>>
>> 57 Questionable identification procedures may
>> not be fatal to a finding of guilt. Improprieties or
>> deficiencies in police procedures do not
>> necessarily destroy the identification evidence
>> or render it inadmissible. (citations omitted)

[24]   I find that the manner in which the photo lineup was conducted in this case before me complied with the well-established and appropriate procedure. In particular, the procedure requires that photographs matching as closely as possible the eyewitnesses' description be utilized, stating at para. 39 in the *Baker* case, citing from *Carter* at para. 60, which was citing from *R. v. Gonsalves*, 2008 CanLII 17559 (ON SC):

> ...
>
> The photos should resemble as closely as possible the eyewitnesses' description. If that is not possible, the photos should be as close as possible to the suspect.
>
> ...

[25]   The photographs presented to Ms. Good were chosen from a limited PROS database. Why a broader database is not available for selection is not something I was made aware of. It would seem to me that access to a broader selection of photographs through cooperation with other law enforcement agencies should be possible. This said, while not perfect, as there were somewhat varying hairstyles and colours in particular, the photographs were all of, to use the descriptive words used in identifying the assault, "Native/First Nations" women in the appropriate age range.

[26]   It is clear to me that Havanna's photograph did not stand out from the rest of the photographs in a way that would have perhaps directed Ms. Good towards identifying her as the assailant.

[27]   In the *Baker* case, the photo lineup was not audio and videotaped, contrary to the expected procedure. The one additional factor that was present in the *Baker* case was confirmatory evidence in that the accused's father lived in the building where the undercover officer said that she met with the accused. This additional circumstantial evidence assisted the Court in determining that the eyewitnesses' identification evidence of the accused was reliable evidence notwithstanding the failure to audio and videotape the photo lineup.

[28]   I appreciate that Havanna testified and that, therefore, the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742 applies. Havanna's testimony was little more than a

blanket denial of having been present or of having assaulted Ms. Good. This was coupled with an admission of contemporaneous homelessness and the use of crack cocaine, which made her jittery and paranoid. Given this blanket denial, there was little to ask by way of cross-examination, as the particulars of the assault would, in all likelihood, have been answered by a further blanket denial.

[29]   In the case before me, the closest thing to possible confirmatory evidence is Havanna's presence in the general area of the assault at a time proximate to when the assault occurred. Opportunity, therefore, exists. Ms. Papequash's homelessness and admitted shelter attendance also place her in proximity to the area in the broadly general timeframe. Her crack cocaine use does not serve to enhance her credibility and the reliability of her evidence, in the absence of other indicators of reliability.

[30]   Ms. Good's recollection of the circumstances of the assault against her was clear and convincing and not at all weakened by the strong cross-examination she was subject to. She had a clear grasp of the details of the assault. I am satisfied that she was not suffering from any impairment by alcohol at the time of the assault to the extent that it would undermine the reliability of her evidence. There is no evidence of her having a motive to fabricate the accusation against Havanna as her assailant, just as there is no evidence that Havanna had any reason to assault Ms. Good.

[31]   There is some evidence that would point to Mr. Good as having also been assaulted and, if so, likely by the other individuals who Ms. Good saw running away after the assault. However, as Mr. Good did not testify, this remains somewhat speculative and not relevant to my decision.

[32] Referencing my comments in *R. v. M.J.H.*, 2018 YKTC 45:

> 76 As stated by Molloy, J. in para. 14 of *R. v. Nyznik*, 2017 ONSC 4392, within her exhaustive and informative analysis regarding the legal principles to be applied in sexual assault cases and in particular in assessing issues of credibility:
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>> [14] This instruction, commonly referred to as "the *W.(D.)* instruction," has become another standard instruction given to all criminal juries, and criminal trial judges will generally instruct themselves in the same manner. However, as was said in the *W.(D.)* case itself, and in subsequent decisions of the Supreme Court of Canada, there is no particular magic in the incantation of these three steps. It is not essential that the trial judge rigidly follow the three steps in the *W.(D.)* instruction. What is critical is for the judge to avoid turning the fact-finding exercise into a choice as to which is the more credible version of the events. This cannot be a credibility contest, with a conviction if the complainant wins the contest and an acquittal if the defendant does. To treat it as such would be to improperly shift the burden of proof. Rather, if the defence evidence, seen in the context of all the evidence, raises a reasonable doubt, then the trial judge cannot convict. Even in a situation where the trial judge completely rejects the defence evidence and has no reasonable doubt as a result of that evidence, he or she must then assess the evidence as a whole and determine whether the Crown has discharged its burden of proving guilt beyond a reasonable doubt. In some cases, even without any evidence from the defence, it is not possible to be satisfied beyond a reasonable doubt based on the evidence of the complainant.
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> 77 In *R. v. Abdullahi*, 2010 YKTC 44, after considering the cases of *R. v. Hull*, 2006 CanLII 26572 (ON CA), [2006] O.J. No. 3177 (O.N.C.A.); *R. v. Jaura*, 2006 ONCJ 385; *R. v. J.J.R.D.*, 2006 CanLII 40088 (ON CA), 218 O.A.C. 37 *and R. v. Dinardo*, 2008 SCC 24, I stated:
>
>> [16] A summary of the principles that have developed in these cases is that there is now, right up to the Supreme Court of Canada, authority for the proposition that accepting the

> complainant's evidence on its own can lead to
> a rejection of an accused's testimony as long
> as the trier of fact does not fall into the error of
> moving from disbelieving the accused directly
> to a finding of guilt. Those are the principles
> that apply to this case.

[33]　　I find that Ms. Good's identification evidence of Havanna as the lady who

assaulted her is reliable evidence that Ms. Good is a credible witness. I find that

Havanna's evidence is not reliable evidence on the issue before the Court and does not

raise a reasonable doubt. I find that the evidence of Ms. Good, in consideration of all

the evidence, satisfies me beyond a reasonable doubt that Havanna has been properly

identified as the lady who assaulted Ms. Good, causing her to suffer bodily harm as a

result. Therefore, I find the defendant guilty as charged.

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COZENS T.C.J.