

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schmidt

REGINA

v.

JESSICA ROBIN LEIGH

Appearances:
Keith Parkkari
Jennifer A. Cunningham

Counsel for the Crown
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] SCHMIDT T.C.J. (Oral): This is an altercation that occurred in a bar in Whitehorse around midnight on September 10, 2011. A patron was having trouble with the bank machine and was agitated and asked one of the bouncers standing nearby if he would assist her. He knew that he could not, so he said he could get the manager and left to go get the manager. He went outside, saw the manager was gone for only a short period of time (seconds).

[2] When he came back, he noticed that the same person was behind the bar and was struggling with the bartender, Ms. Mechan, who is the complainant in this case.

She had demanded to see the manager. She was behind the bar, where she was not permitted by law. Ms. Mechan asked her to leave. Rather than leave, she struck Ms. Mechan and then grabbed her hair. Ms. Mechan struggled back, and one of the bouncers pulled the patron from Ms. Mechan and took her outside and let her go.

[3] The next day, discussions about town — as the bartender said, Whitehorse is a small town — information came to Ms. Mechan that it was a person by a certain name that was in that bar and involved in this altercation. He had heard that somewhere. Ms. Mechan went to Facebook and looked up that name and found a picture of the accused and says that she identified her from looking at that picture and then went to the police and had the police lay an Information against the accused.

[4] The police did a photo lineup a few days later. We did not get into how the photo lineup was done, whether the person was shown one picture at a time and picked that picture out — we just did not get into that in this trial so the Court does not know exactly how the photo lineup was done — but the accused was picked out of that photo lineup by Ms. Mechan. In court, Ms. Mechan also identified the accused.

[5] We have, in addition to that identification evidence, the evidence of two doormen who say they did not know the person who was involved in the altercation. One of them said he may have seen her before but did not know, and neither did Ms. Mechan know who that person was that she had the altercation with, had not seen her before. Those two bartenders, one of them had a better look at her because she approached him about her trouble with the bank machine and they were face-to-face for a short period of time in the bar before he went to get the manager. The other doorman had more of a

fleeting glance, as the struggle occurred behind the bar. Both of those witnesses identified in court the accused as being the person that was involved in that struggle in the bar.

[6] The assumption that we have about eyewitness evidence, that the public has, is that it is the best of evidence and, over the ages, has been relied on as the best evidence. But that assumption has been questioned by various studies done by psychologists who have put on demonstrations that show that eyewitness evidence is frail — very frail — and worse, that people making those identifications are very sure of themselves. That has caused the courts, as defence counsel said, to become a lot more circumspect about eyewitness testimony, and the old practices have been modified and then modified again. There has been some considerable discussion and checklists prepared by the Supreme Court for trial courts to consider in photo lineups to ensure that some of the frailties of that eyewitness testimony are mitigated.

[7] In this case, we have a problem. While the three witnesses have made identification in court, defence counsel has pointed out that the courts have said — again, contrary probably to popular belief — that this evidence does not have a great deal of value. The main problem is that the main witness to the events was tainted in her identification by being told through some hearsay evidence that this is the person who assaulted you, and then when she looked up the name of that person, she believes she recognized that as the person, and that became the basis of her identifications that then occurred — or would have tainted the identification she made at the police station and then later in court.

[8] There is the possibility that her evidence was tainted. It may be that the identification is correct. But given the frailties of identification and given all the safeguards that have been set out by the courts over these last years to take great care in photo identification, this one, if it had been handled this way by the police, would definitely be thrown out. For instance, if the police had said: Well, we heard it was Jessica Leigh, take a look at this picture. Is that her? That is, in essence, what happened here. She was told on hearsay evidence that it was Jessica Leigh. She found a picture of Jessica Leigh, and said: Yeah, that is her.

[9] We cannot pile up vulnerable identification, and if we have enough of those identifications, it can make a good identification — and this is all going to have to be worked out, how social media is going to play in. This is a new phenomenon and we will have learned lots more about it in the Vancouver riots. The Court is going to have to take a careful look at this.

[10] But I am satisfied in this case that the evidence of identification is not sufficient, and I will find the accused not guilty.

SCHMIDT T.C.J.