

Citation: *R. v. Bruce*, 2019 YKTC 37

Date: 20190618
Docket: 18-00412
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Digby

REGINA

v.

SHAWN LORNE BRUCE

Appearances:
Lauren Whyte
Amy Steele

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] DIGBY T.C.J. (Oral): Shawn Lorne Bruce is charged that:

On or about the 24th day of June in the year 2018 at the City of Whitehorse in the Yukon Territory, did in committing an assault upon Fred Wally EMAGHOK cause bodily harm to him, contrary to Section 267(b) of the *Criminal Code*.

[2] The Crown has proceeded summarily in this matter.

[3] An assault is defined in s. 265(1)(a) and (b):

A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

[4] Clause (c) is not relevant to the facts of this case.

[5] Bodily harm is defined in s. 2 of the *Criminal Code* as:

...any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature

[6] Section 34(1) of the *Criminal Code* states:

A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

[7] Section 34(2) states:

In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;

- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[8] The first and most important principle of law applicable to every criminal case is the presumption of innocence. See, for example, *R. v. Starr*, 2000 SCC 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320.

[9] Mr. Bruce enters these proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the Crown, on the evidence, satisfies the Court beyond a reasonable doubt of Mr. Bruce's guilt. The burden of proof rests with the Crown and never shifts. There is no burden on Mr. Bruce to prove that he is innocent.

[10] A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in these proceedings. Rather, it is

based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[11] It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. It is not enough to conclude that Mr. Bruce is probably guilty or likely guilty. That is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Mr. Bruce. The Court must decide, looking on the evidence as a whole, whether the Crown has proved Mr. Bruce's guilt beyond a reasonable doubt.

[12] The Court has evidence of three Crown witnesses and the evidence of Mr. Bruce himself.

[13] The evidence of Mr. Emaghok is that he was walking in a southerly direction ahead of his wife by 200 or 300 feet. They were headed, as he said, "home", which I take it, at that point, was a facility or shelter run by the Salvation Army, apparently now run by another body. He became aware that there was shouting between his wife, who trailed behind him, and Mr. Bruce, whom he knew, being on the other side of 4th Avenue in the City of Whitehorse. These events took place on June 24, 2018. He said that the two of them were cursing and hurling insults at each other across the street. He really could not make out much of what they said.

[14] Mr. Emaghok said that Mr. Bruce ran across the street and, at that point, he went back to where his wife was. He says that Mr. Bruce said, "I'm not going to fight your wife, I'm going to fight" — or have physical interaction, I cannot remember the exact

words — "you". Mr. Emaghok says, at that point, Mr. Bruce made a gesture, imitating or giving an example of that gesture, Mr. Emaghok used his right hand to reach over as if putting a pair of sunglasses in his left-hand breast pocket and then flung his right arm out, such that the hand was extended. Mr. Emaghok said that he was imitating Mr. Bruce's action and that, as a result of that, he was backhanded in the face, in the jaw and cheek area. At that point, he pointed to his left side.

[15] He says that he then attempted — and thinks he may have been successful or was successful — in striking Mr. Bruce. He says Mr. Bruce subsequently picked him up by the shoulders and threw him to the ground. He landed on his right shoulder and his head, injuring his head and breaking his collarbone.

[16] I think it is fair to say the Crown has proven, through the x-rays — and it is not disputed by the defence — that Mr. Emaghok suffered an injury which would constitute bodily harm under the definition in the *Code*, which I just read.

[17] Mr. Emaghok then said he tried to pick up his hat but realized he had pain in his arm and had to use his other hand, or arm, to pick up his hat and then he began walking away.

[18] Mr. Emaghok's wife testified that she was walking down the street and that Mr. Bruce started shouting at her, insulting her and calling her names, cursing at her. She says that she did not respond with insults or curses, which is in direct contradiction to her husband's evidence. She confirms her husband's evidence with respect to Mr. Bruce picking up her husband and throwing him to the ground.

[19] Both of these witnesses deny any loan of a heater or any discussion about a heater during the course of this discussion.

[20] Mr. Schmidt testified that he saw a couple walking down the street past the theatre. He was there waiting for other persons to show up to go into the theatre. What caught his attention was that persons were shouting at each other across the street. He said that both the man and the woman, which would be Mr. Emaghok and his wife, were shouting at Mr. Bruce across the street. I use the name "Mr. Bruce" for the purpose of identifying who that individual is for the narrative, although I note that Mr. Schmidt was not able to identify Mr. Bruce in court.

[21] Mr. Schmidt says that he was aware of these people because of the shouting. He was not paying particular attention to them, in the sense that he was not watching them the whole time, although he did say at one point he saw Mr. Bruce push Mr. Emaghok. He said he could not say that he was watching the interaction between the three just before that particular moment, so he cannot confirm or deny whether or not Mr. Emaghok struck Mr. Bruce; whether Mr. Bruce struck Mr. Emaghok; or, if both happened, which was first.

[22] Mr. Bruce testified that he was walking down the street. His intention was to go to the Yukon Hotel, which, I understand, is a block and a half from the theatre. He denies any shouting across the street. He says he crossed the street to the same side as Mr. Emaghok and Mr. Emaghok's wife because there was a crosswalk there and it was easier to cross the street there than some other place. He says he was not aware

of the presence of Mr. Emaghok and his wife until he got across the street. That really contradicts the evidence of the other witnesses in the case.

[23] Mr. Bruce says Mr. Emaghok and his wife each had a Budweiser in a bag. Whether the beer was in the same bag or in two different bags, I am not clear, but he said he could see through the bag enough to recognize cans of Budweiser. I note that Mr. Bruce classifies himself as a recovering alcoholic, so he would have some experience in that regard.

[24] Mr. Bruce says he wanted to start a conversation with them as he had loaned a heater to Mr. Emaghok's wife previously because she had complained about a lack of heat in her residence. This took place during the colder months. He said, as a Northern person, he felt an obligation to help a fellow Northerner in that situation. Subsequently, the heater had not been returned to him and he had heard that Mr. Emaghok's wife was trying to sell the heater. He says he broached the subject with them, indicating that he wanted his heater back or the cost of the heater, which was some \$80. Mr. Bruce said that he had purchased the heater at Canadian Tire. He had loaned it because the residence that he lived in — called the "Barracks" — was quite warm and he had no use for the heater at the moment that he loaned it.

[25] Mr. Bruce indicated he did not get anywhere with respect to his requests about the heater and, at one point, referred to Mr. Emaghok's wife, calling her "a lying bitch". He says because of what he perceived as their state of alcohol consumption that he was not going to get very far. He said Mr. Emaghok, at the urging of Mr. Emaghok's wife, took a swing at him. He said that Mr. Emaghok's wife had been verbally urging

Mr. Emaghok to rise to her defence against the blandishments of Mr. Bruce. Mr. Bruce says that is why he believed Mr. Emaghok took a swing at him.

[26] Mr. Bruce said that the swing did not really amount to much, did not faze him too much. He says, at that point, he decided that he was going to go on his way.

Mr. Emaghok had placed himself in such a way that he was impeding Mr. Bruce's progress in what Mr. Bruce's evidence suggests was the most direct route to the Yukon Hotel. As a result, Mr. Bruce gave him a shove. Mr. Bruce denies picking Mr. Emaghok up by the shoulders and throwing him to the ground. Mr. Bruce also denies backhanding Mr. Emaghok either first, during, simultaneously, or after.

[27] With respect to the evidence of Mr. Emaghok and his wife, there are contradictions in their evidence. The most glaring one is that Mr. Emaghok says his wife was cursing and swearing. She, in her testimony, said that she was not doing that at all. She knew the words were an insult but did not know what they meant. She indicated that she had brain surgery some 18 months ago. I am not sure whether that was 18 months before today or before the incident. She indicated she did not think her memory of this event was affected by that surgery.

[28] I found it most interesting that she became quite animated at points in her testimony, in contrast to her husband. Her husband's evidence was that when she gets going or in a frame of mind, she is hard to calm down and get her to be quiet. He says he was urging her to be quiet because he did not want any trouble with Mr. Bruce, who was then on the other side of 4th Avenue.

[29] Certainly if the two of them were colluding in a story, they did not do a very good job. On the other hand, with respect to the physical actions of Mr. Bruce towards Mr. Emaghok, they are similar. On the other hand, I have to bear in mind that they have been together for 18 months and human memory can, as a result of conversations, change over time, so one has to guard against that.

[30] Their description of the events is not supported by the evidence of Mr. Schmidt and, in fact, his description of a push, to my mind, is far different from picking someone up by their shoulders, lifting their feet off the ground, and throwing them back down on the ground. I note that Mr. Schmidt — perhaps it is his profession as a teacher — tried to be very careful in his choice of words in giving his evidence. Mr. Schmidt's evidence supports the admission made by Mr. Bruce that he, in fact, pushed Mr. Emaghok.

[31] With respect to the evidence of Mr. Emaghok and his wife, I am not satisfied beyond a reasonable doubt that it happened the way they said it did, that is, of picking up and throwing him on the ground.

[32] With respect to the evidence of Mr. Bruce that he, Mr. Bruce, deliberately pushed Mr. Emaghok which resulted in Mr. Emaghok falling to the ground and suffering the bodily harm that he did, that is supported by the evidence of Mr. Schmidt. I am satisfied beyond a reasonable doubt that has been proven by the Crown.

[33] The issue then becomes the application of s. 34. Since I found that Mr. Bruce intentionally applied force to Mr. Emaghok, it is a question whether that constitutes an assault unless Mr. Bruce can be found not guilty on an application to s. 34.

[34] Before I get into that, I think I should address the law with respect to discrepancies in evidence.

[35] The Supreme Court of Canada has given guidelines, initially in the case of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which is an attempt to apply the principle of presumption of innocence, as I mentioned at the beginning of my decision, with regard to discrepancies in the evidence between witnesses.

[36] The test originally read: First, if you believe the evidence of the accused, obviously you must acquit.

[37] Of course, based in that is that the evidence that is believed must form a basis for acquittal. If an accused took the stand and admits to committing the offence and you believe him, it does not mean he gets acquitted. Second, if you do not know whether to believe the accused or a competing witness, you must acquit because you have a reasonable doubt.

[38] Thirdly, if you do not believe the testimony of the accused but are left in a reasonable doubt by it, you must acquit

[39] Subsequently to that test, a fourth criterion has been added: Even if you are not left in doubt by the evidence of the accused that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence you accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[40] Given that Mr. Schmidt did not see what happened before what he described as a "push", I am left in the position of having conflicting evidence as to who did what to whom first.

[41] To reiterate, Mr. Emaghok and his wife both indicated that Mr. Bruce began the physical altercation by backhanding/striking Mr. Emaghok with Mr. Bruce's right hand on Mr. Emaghok's left cheek. I note Ms. Steele's comment that if you envision that in your mind, the blow would be more likely land on the right cheek of Mr. Emaghok.

[42] It is not a question of what I find to be the more probable or the more believable. I have to stay under the circumstances. I do have a doubt as to what happened first. I will say that I think with respect to Mr. Bruce, his years of drinking have damaged his ability to accurately recollect events. This is not to say that I think he is deliberately lying about things. I think he simply has a bad memory, which he mentioned a number of times in his evidence. However, given the support for what he says, in the evidence of Mr. Schmidt, I am left in a reasonable doubt as to who may have struck him first.

[43] That still, however, leaves the issue of whether or not the push by Mr. Bruce is excused by the application of s. 34(1).

[44] I am satisfied that the Crown has not satisfied me beyond a reasonable doubt that s. 34(1)(a) does not apply and is not available to Mr. Bruce.

[45] Section 34(1)(b) states:

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves . . .

[46] I do not believe that is available to Mr. Bruce because his evidence left me with the impression he simply wanted to leave and he wanted to leave by the most direct route. He got involved in a long torturous explanation about why he did not simply go another way or walk around. His answer was he did not know Whitehorse that well. You do not have to take that big a walk around someone. You just have to move five or six feet to be out of arm's reach to go on your way.

[47] I think the Crown made a very good point. If he was acting in self-defence, it is because you apprehend an attack or are responding to an attack. His evidence was: I pushed him out of the way. I went on my way to the Yukon Hotel. I didn't even look back. I wasn't aware that he'd even fallen.

[48] Well, I think he simply pushed Mr. Emaghok out of his way because he was fed up and annoyed, not because he was defending himself or was apprehensive of defending himself.

[49] On that basis, I do not need to consider s. (c), whether the act committed is reasonable in the circumstances, because he has to meet all three criteria. Section 34, in my view, is not available to Mr. Bruce for that reason and, thus, I find him guilty of assault causing bodily harm.

DIGBY T.C.J.