Citation: *R.* v. *Germaine*, 2006 YKTC 42 Date: 20060412
Docket: T.C. 05-00674A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.
WILLIAM NORMAN GERMAINE

Appearances:
Melissa Atkinson Counsel for Crown
Fia Jampolsky Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER C.J.T.C. (Oral): The defendant, William Norman Germaine, is charged with assault with a weapon. The assault is said to have been perpetrated on his brother, Fabian Germaine. William Germaine is also charged with wounding Fabian Germaine and thereby committing an aggravated assault. It is clear that Fabian Germaine was struck in the face by an assailant wielding a block of wood. I say this is clear because it is beyond question that Fabian Germaine suffered an injury to his face, as depicted in the photographs marked as Exhibit 1. No other alternative explanation for the injury appears anywhere in the evidence.

[2] The questions that arise for decision are these: First, has the Crown proved that the accused was the assailant? Second, if so, has the Crown proved wounding or even bodily harm?

[3] Fabian Germaine testified and said that, as he walked down a street in Mayo, he was attacked by his brother, William, who was wielding a piece of wood, which he described as being like a normal-sized piece of firewood. Fabian said that William struck him in the face with the piece of wood, breaking his nose and chipping a tooth. There was also extensive bleeding. Fabian retreated to the nearby home of a relative where he spent the night.

[4] In the morning he went to the nursing station. Later, he was medevac'd to Whitehorse and treated at the Whitehorse General Hospital for his injuries.

[5] He has substantially recovered from those injuries; however, his nose is not straight and he has difficulty breathing through one nostril. It should be said that Fabian's nose has been broken on a prior occasion, but he indicated that after that incident, it was straighter than it is now.

[6] Fabian Germaine's evidence was attacked on a number of fronts. First, it is clear that Fabian Germaine was substantially intoxicated. Indeed, it can be inferred from what he said and how he presented as a witness that he drinks almost continually and to great excess. Consequently, it was argued that his recall of the events is so suspect that it could not found a conviction.

[7] It was also argued that, as the assailant came up from behind, Fabian Germaine did not really see who attacked him. Rather, it was argued he had reconstructed events based on what another person told him together with Fabian's observation that William always picks on him when he is drinking.

[8] Lastly, it was said that his willingness to confabulate was demonstrated by his evidence that William was consuming alcohol, despite his admission that he never actually saw the defendant drinking.

[9] It must be said at once that the evidence of Fabian Germaine cannot be assessed in a similar fashion to the evidence of what might be called a "normal witness" because it is clear to me that Fabian Germaine's present level of cognitive functioning is somewhat limited. He is quite inarticulate and he was certainly open to suggestions put to him by examiners.

[10] All of that being noted, I am in fact satisfied that he is telling the truth and that he is in fact able to identify his attacker. It was obvious to me that Fabian Germaine was very uncomfortable being in court and testifying against his brother. No motive appeared for Fabian Germaine to falsely accuse his brother, and if he had so done, it is to me virtually inconceivable that he could have stuck to a concocted story throughout the length of the proceedings. Although, he was no doubt very intoxicated, I am satisfied that he was able to comprehend what occurred. It was repeatedly put to him that he did not see his attacker or the block of wood, but he just as repeatedly insisted that he was able to see his brother and he was able to see the block of wood and, indeed, he provided a description of the block of wood.

[11] With respect to the business of Fabian offering the observation that his brother had been drinking, it is true that he later had to admit that that was a supposition on his part, that he had not actually seen his brother drinking. But he did also say, quite early on in his evidence, that one of the reasons he assumed that was because of what his brother did at the time, which to me was a reasonable observation to make. So the fact that he has made some assumptions about his brother's condition, to my mind, is not fatal to the reception of his evidence.

[12] The next and more difficult issue is whether or not the Crown has proved Count 2 as it is particularized. Count 2 alleges a wounding. Ms. Jampolsky, on behalf of the accused, argued that the Crown had not proved wounding, or even bodily harm beyond the trifling and transitory, so as to permit a finding of guilt to an assault causing bodily harm. In Ms. Jampolsky's submission, Fabian Germaine's description of his injuries, coupled with the photos, are insufficient proof in the absence of medical evidence.

[13] In my view, the proof is sufficient at least to justify a finding of assault causing bodily harm.

[14] If Fabian Germaine's evidence is believed, and it is, he suffered a broken nose, substantial bleeding, a chipped tooth, facial bruising and continued difficulty in breathing. His evidence as to his injuries is quite graphically corroborated by the photos, which show, in addition to a considerable quantity of dried blood, that his nose is swollen and misshapen when compared to how it appeared when he gave his evidence. As well, it is material to note as to whether this was bodily harm beyond the

trifling and transitory, that Fabian Germaine's injuries were sufficient to warrant his being medevac'd to Whitehorse and hospitalized there.

[15] Clearly, and beyond any question whatever, bodily harm has been made out. The remaining question is whether wounding has been proved. Briefly, wounding requires a breaking of the skin. In *R.* v. *Littletent*, [1985] A.J. No. 256, this requirement was satisfied by proof that the blows administered by the accused had perforated the complainant's eardrum. In that case, the eardrum canal was swollen and bruised and full of blood and had to be surgically corrected.

[16] In *R.* v. *Boudrow*, [1992] O.J. No. 2430, the Ontario Court of Appeal held that the accused was guilty of aggravated assault by wounding, where the complainant's teeth were broken and there was blood in the mouth area.

[17] However, in reviewing cases dealing specifically with injuries to the nose, the British Columbia Supreme Court took a somewhat more narrow approach to the meaning of wounding in *R.* v. *P.H.B.*, [2000] B.C.J. No. 850, and *R*. v. *Assinaboine,* [2005] B.C.J. No. 1550.

[18] In *P.H.B.*, *supra,* the accused hit his wife in the face with his fist, causing her nose to bleed but there was no lasting damage beyond some bruising. The Court found that wounding required breaking of the skin and that rupturing of the nasal mucosa was not enough to make out the charge.

[19] In *Assinaboine, supra*, the victim had swelling around his eyes and was bleeding from his nose, eyes and ear. He also had abrasions on his face and it was extremely

swollen. The Court held that the blood coming from the nose and the eyes was insufficient to meet the narrow definition of breaking of the skin, and the judge held that the bleeding from the ear had not been proved to have resulted from the blow struck by the accused as opposed to the victim's head striking the pavement. In the result, the accused was convicted of the lesser and included offence of assault causing bodily harm.

[20] Lastly, in the case of *R.* v. *Hilderman*, [2005] A.J. No. 243, two accused threw a bottle at the victim's face, kicked him and hit him with a baton. The complainant was bleeding from a cut on his head. Martin J. expressed concern that a broad definition of wound might include injuries such as abrasions or small cuts and this could lead to illogical results. He concluded that wounding must contemplate and describe an injury which is more serious than mere bodily harm. He described a wound as "a cut or breaking of the skin which bleeds, which is more than transient or trifling and which will leave a scar if not surgically altered," and excluded "bruises which will disappear once the blood is reabsorbed by the body and simple abrasions that bleed and then heal over." In this case, the skin and tissue to the bone were separated and required stitching and as a result, the accused was found guilty as charged.

[21] The evidence here, which, of course, comes solely from Fabian Germaine, and not through any medical evidence, is of bleeding to the nose, which I can only assume was from the rupture of blood vessels inside the nose. Looking at *P.H.B., supra,* and *Assinaboine*, *supra,* I am forced to conclude that those facts do not constitute wounding as that term is contemplated by the *Code*. Since Fabian Germaine's nose was broken

and is now permanently misshapen, there is, of course, evidence that he was maimed or disfigured, however that is not how the charge was particularized.

[22] In the result, Count 1, which is the charge with a weapon, has been proved and I find the accused guilty.

[23] With respect to Count 2, the charge as framed has not been proved but the accused is clearly guilty of the lesser included offence of assault occasioning bodily harm. However, since it arises from the same delict, it should be conditionally stayed and a conviction entered only upon Count 1.

[24] It remains for me to comment on some aspects of the prosecution and defence of this case. The Crown presented a case consisting solely of the evidence of one frail witness and two photographs. It is patently obvious, since the victim was hospitalized, that medical evidence was available and, if offered, could have potentially obviated the need to consider at length the question of what his injuries were and their extent and whether they met the test of wounding as the law requires. Such evidence could have potentially aided the Court in other ways, as, for example, by providing insight into whether the injuries were consistent with the assault described.

[25] Another lapse, in my view, is in the unexplained absence of another person described by the sole Crown witness as Muncho, who was apparently present during this incident. It may well be that Muncho, whoever he is, could not be found or that he had no evidence to give, but simply not producing him without any explanation risks drawing an adverse inference from the trier of fact. It is obvious that there may well have been other persons; for example, the relative who received Fabian Germaine after

the assault, who might have been able to shed some light on matters, particularly, Fabian Germaine's level of intoxication, which was a matter that assumed some prominence during the course of the trial.

[26] The fault was not all on one side either, because the defence, having made the assertion that the evidence was not in law sufficient to found a finding of aggravated assault, or even assault causing bodily harm, failed to produce a single authority in support of this contention but left the Court to do the legwork as best it could whilst on circuit. Together, the investigators, the prosecutor and the defence counsel did not make the task of the Court in deciding this case any easier.

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FAULKNER C.J.T.C.