Citation: *R.* v. *Kodwat*, 2009 YKTC 84

Date: 20080206
Docket: 07-00411
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Luther

REGINA

v.

BYRON DEAN KODWAT

Appearances:
Samantha Oruski — Counsel for Crown
James Van Wart — Counsel for Defence

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): I am going to work backwards on this. We have three counts.

[2] On Count 3, it is obvious that the police have laid the wrong charge. Section 139(1) does not deal with this circumstance whatsoever and the Court is not going to go through any hoops to amend the Information to put it under s. 139(3) or s. 139(2) because that would be unfair to the accused for a number of reasons. One, he has not been able to prepare for a trial based on what the proper count should have been; and secondly, the maximum sentence under s. 139(2) is a lot higher than it is under s. 139(1). So justice clearly calls for a dismissal on Count 3.

[3] With regard to Count 2, the Court feels that there is a lack of evidence to show that there was a threat to the complainant to cause bodily harm to him under s. 264.1. I mean it could perhaps be inferred, but I am not about to do that in this case.

[4] With regard to Count 1, the Court is going to comment on some of the points that were raised during the trial. First of all, with regard to the smell of alcohol, the Crown witness explained satisfactorily, in my view, why he did not notice the smell of alcohol on the breath of the accused. With regard to the issue of the white pants and the black jeans, that, in my view, is a non-issue in this case. The police evidence is clear about the white pants. With regard to the surname Charlie, this does not raise any type of significant defence whatsoever. We know that the accused's mother's name was Charlie, and the police were fairly certain that in the past he had been known occasionally as Byron Charlie. But in any event, it provides absolutely no defence here whatsoever.

[5] With regard to the credibility issue, under *R.* v. *D.W.*, [1991] S.C.J. No. 26, from the Supreme Court of Canada, the Court is prepared to make a finding of credibility in favour of Mr. Whalen because Mr. Whalen's evidence, considering human experience, makes sense. To suggest that Mr. Whalen was concerned about many of the First Nations people in this area and was prepared to go into a bar at 11:30 or 12:00 in the morning, that is 11:30 a.m. or so, and shortly thereafter rip his own chain and then head over to the police and in a very animated fashion explain what happened is really going a bit too far. He did not strike me as that good an actor and I cannot imagine that he would have resorted to that. I mean he came in, he told his story. He did tell his story in an animated fashion. I did sense, as the Crown indicated, he did not really want to be

here. He made a point of speaking to the good nature of Mr. Kodwat when he was sober. Also, both the accused and the Crown witness talked about the brief encounter of a peaceful nature at Tim Hortons afterwards, where they both just nodded.

[6] Mr. Kodwat has explained about the knife with the short blade. It was clearly being held by the accused with the blade facing towards the complainant at the same time that the accused was telling the complainant, “Don’t show up for court,” in a threatening manner.

[7] So based on all of that, the Court has no hesitation in registering a conviction on Count 1; but as to Counts 2 and 3, they are dismissed.

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LUTHER T.C.J.