

Citation: *R. v. Loewen*, 2007 YKTC 20

Date: 20070327
Docket: T.C. 06-11075
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

MICHAEL WAYNE LOEWEN

Appearances:
David McWhinnie
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Michael Loewen stands charged with committing an assault on Darwin Van Bibber and, in doing so, causing bodily harm to Mr. Van Bibber. Mr. Loewen further stands charged with breaching his probation order with failing to keep the peace.

[2] With respect to this second count, I have before me an admission that Mr. Loewen was on probation at the relevant time. Given the nature of the alleged breach, I am of the view that it will stand or fall with my findings in relation to the substantive offence.

[3] With respect to the substantive offence, there are some facts which are not particularly in dispute and have been clearly established in evidence. Firstly, Mr. Van Bibber clearly suffered bodily harm on the evening of October 27, 2006, including a black eye, a split lip requiring stitches and two lacerations to the back of his head, one requiring stitches. These injuries are clearly documented in the photographs and in the evidence of the ambulance attendants and the nurse who treated Mr. Van Bibber.

[4] In addition, Mr. Van Bibber refers to his nose having been broken. The photographs show a red mark on his nose, though none of the medical personnel refer to a broken nose. However, with or without a finding of a broken nose, there is more than sufficient evidence of injuries to establish bodily harm.

[5] Secondly, the photographs and ambulance personnel clearly establish that there was a pool of blood located in the bedroom of the Semple home, where the incident is alleged to have taken place, as well as blood on the mattress and a trail of blood down the hallway and into the living room, where Mr. Van Bibber was located on the couch by the ambulance attendants.

[6] Lastly, blood was located on Mr. Loewen's clothing. Transfer stains were located on Mr. Loewen's jeans and jacket, consistent with them coming into contact with a wet blood source, and projected stains were found on both sleeves of the jacket, indicative of the jacket being in close proximity to an exposed blood source when force was applied to that blood source. DNA testing clearly establishes the blood found on Mr. Loewen's clothing as being that of Mr. Van Bibber.

[7] The incontrovertible evidence establishes, in my view, that Mr. Loewen was in close proximity to Mr. Van Bibber when Mr. Van Bibber suffered the aforementioned injuries. Determining the factual circumstances which resulted in those injuries, and whether those circumstances are sufficient to establish Mr. Loewen's guilt beyond a reasonable doubt, is a significantly more difficult question. Answering this question, in turn, comes down to an assessment of the credibility of Darwin Van Bibber and Esther Christiansen.

[8] Mr. Van Bibber's version of events demonstrates that he had been drinking heavily throughout the day, first at the Downtown and later at Jackie Semple's home. Also present in the home were Mr. Semple, Jimmy Close, Walter Bergman and Esther Christiansen. All were consuming alcohol. At some point, Mr. Semple, and later Mr. Close, left the residence. This left Mr. Van Bibber and Mr. Bergman continuing to drink at the kitchen table while Ms. Christiansen apparently slept in a chair in the living room, and then, at least according to other witnesses, later moved to the bedroom.

[9] Mr. Van Bibber says that he eventually went to the couch or chair in the living room and passed out. The next thing he recalls is rolling around on the floor being kicked and beaten around the head. He believes his attacker was Michael Loewen. He does not really know how many blows he suffered, but estimates five to 10. He cannot say how the attack ended. The next thing he knows is he is sitting on the couch with a towel over his face.

[10] If accepted, Mr. Van Bibber's evidence would support a conviction for assault causing bodily harm. Unfortunately, I had serious concerns about the reliability of Mr.

Van Bibber's evidence. Firstly, there were a number of inconsistencies between Mr. Van Bibber's evidence at trial and his statements to the police and to others. For instance, at trial Mr. Van Bibber indicated that he had consumed three to four beer at the Downtown, 15 beer at Mr. Semple's, plus whiskey that he shared with Mr. Bergman. He told the police he had not even had 10 beer. He told Mr. Guyck, the nurse, that he had 10 beer and smoked a joint. No mention of drugs was made at trial.

[11] He was similarly inconsistent with respect to where he had purchased the beer, the Downtown or the liquor store; whether he had left the Downtown with Jimmy Close or had followed him later; whether Mr. Loewen had said anything during the attack; whether he, Mr. Van Bibber, had told Mr. Loewen to stop or not; and the number of blows that he received, five to 10 punches and kicks or three to four punches.

[12] While it is not unusual to see some inconsistencies, particularly when a witness has been consuming alcohol, I was struck by Mr. Van Bibber's explanations for these inconsistencies. For example, with respect to the inconsistency regarding his rate of consumption, Mr. Van Bibber was reminded of his statement to the police regarding his consumption, "Maybe not even 10 beers over at Jackie's house. I was going to go to the Halloween party at the Pit, but things got changed." When asked to explain the inconsistency between his statement and his evidence at trial as to his rate of consumption at Mr. Semple's, he indicated that his statement, "Things got changed," refers to his having consumed more alcohol rather than his not going to the Halloween party at the Pit. Such a suggestion, in my view, is patently unbelievable.

[13] In explaining other inconsistencies, he continually fell back on head trauma or having his head bashed in and losing half his blood as an explanation. This, in turn, is inconsistent with the evidence of independent and objective witnesses, such as the nurse, Mr. Guyck, who indicated that his examination, while revealing injuries to the face and scalp, did not indicate that Mr. Van Bibber had suffered a concussion or other head injury. Similarly, Constable Latham indicated that Mr. Van Bibber appeared to understand the questions asked and to provide appropriate answers at the time that he provided his statements to the police.

[14] A final inconsistency of note, Mr. Van Bibber apparently told the ambulance attendants and nurse that he had fallen down the stairs, while being treated at the nursing station. His explanation for this apparent lie varied over the course of his testimony. His first explanation was that he lied to avoid further trouble, which he then explained as the police going after Mr. Loewen, a somewhat curious rationale considering what he says that Mr. Loewen did to him. He later said that he did not want to cause any further trouble, again a curious statement given his evidence that he had not done anything to cause trouble or to warrant the beating in the first place. Finally, he says that he lied as he was afraid Mr. Loewen might possibly kill him.

[15] In addition to his unsatisfactory explanations for inconsistencies, Mr. Van Bibber often appeared argumentative and non-responsive when confronted with his inconsistent statements.

[16] Furthermore, Mr. Van Bibber's evidence was full of phrases like, "I believe," "I think," "I assume," "I imagine," and "probably," suggesting a lack of certainty. Notably,

when he was asked who his attacker was, his initial response was, "I believe it was Mr. Loewen." Similarly, when asked to describe the blows he received, he said he was, "punched and kicked probably." Mr. Van Bibber conceded on cross-examination that his memory is in and out. Along with this apparent lack of certainty, there are significant gaps in Mr. Van Bibber's recollection as a result of his excessive alcohol consumption. Of note, he refers to passing out in the living room, saying that he did not go into the bedroom, when he was observed by Mr. Bergman to follow Ms. Christiansen into the bedroom. The blood patterns observed clearly indicate that whatever happened to Mr. Van Bibber happened in the bedroom, not the living room.

[17] He is unable to say if his attacker was wearing footwear, which one would think would be readily apparent if one were being kicked in the head. He cannot say how the attack ended, nor indeed can he say how it started. He has absolutely no recollection of being treated by the ambulance attendants at the Semple home and so on.

[18] When I consider all of these factors, I come to the inescapable conclusion that Mr. Van Bibber's evidence is unreliable as a result of his extreme intoxication. It would be unsafe, in my view, to found a conviction on the basis of such evidence alone. This leaves for me the question of whether the remaining evidence is sufficient to provide corroboration of Mr. Van Bibber's version or to otherwise establish the commission of an offence beyond a reasonable doubt.

[19] The only remaining evidence which relates to what happened to Mr. Van Bibber comes from Esther Christiansen, and from an admission that Mr. Loewen apparently made to Ms. Christiansen's brother. Ms. Christiansen's evidence differs significantly

from Mr. Van Bibber's. She confirms that she was at Mr. Semple's with the others, drinking beer and whiskey. She did pass out in the chair in the living room at one point, though she indicates that this was before Mr. Van Bibber arrived. When she awoke, Mr. Van Bibber was present and she sat at the kitchen table with him, Jimmy Close and Walter Bergman, where they all continued to drink beer and whiskey. She then indicated that she was going to sleep and to sober up a little. She went into the bedroom and went to sleep on the bed.

[20] She was woken up when Mr. Van Bibber came into the room and tried to get her to come out and drink more beer. She told him to leave her alone. He did not leave, but instead started to "get cute," as she put it, telling her that he was horny and trying to hold onto her and to feel her up. She first rolled to the other side of the bed and then moved to the floor between the bed and wall in an attempt to get him to leave her alone. She lay on her stomach on the floor. Mr. Van Bibber sat on the backs of her legs and tried to pull down her pants and asked her for a quickie. She told him to leave her alone, raising her voice in the hopes that others would come and get him out of the room.

[21] She then heard a knock on the door. Mr. Van Bibber flopped down on top of her and would not get off. The lights came on and Mr. Loewen walked into the room. He asked what Mr. Van Bibber was doing and told him to get off Ms. Christiansen. When he did not, Mr. Loewen grabbed Mr. Van Bibber and pulled him off Ms. Christiansen and kned him in the face. Ms. Christiansen left the room, followed a few seconds later by Mr. Loewen, who asked if she was okay and asked her to come with him. She refused; oddly, as she said she was drunk and stupid. She grabbed a 15 pack of beer and left

the home on her own and encountered the police, who stopped her after having observed her throw her beer aside. She was released with a warning and decided to return to the Semple residence.

[22] She arrived back some five minutes after leaving. Mr. Loewen was no longer present. She observed Mr. Van Bibber sitting on the couch with a tea towel on his face covering his mouth and nose. He asked her how he looked and she said that he needed stitches so she called the nursing station, telling them that Mr. Van Bibber had fallen down the stairs.

[23] If accepted, Ms. Christiansen's evidence at the very least would raise a reasonable doubt, in my view, as to whether Mr. Loewen was acting in defence of Ms. Christiansen, pursuant to s. 37, or to prevent the commission of an offence pursuant to s. 27.

[24] I agree with defence counsel that had Mr. Loewen heard Ms. Christiansen loudly asking Mr. Van Bibber to leave her alone and had entered the room to find Mr. Van Bibber lying on top of Ms. Christiansen, he would certainly have reasonable grounds to believe that Ms. Christiansen was in the process of being assaulted, sexually or otherwise. I disagree with Crown's submission that accepting Ms. Christiansen's version would necessarily lead to a finding of unreasonable force. Force is not measured by the severity of the injuries, nor is one expected to measure the force used to a nicety.

[25] Ms. Christiansen describes Mr. Loewen pulling Mr. Van Bibber off her and kneeling him in the face. If such actions happened quickly, essentially as part of one

action or movement, it would not be unreasonable force, in my view. Furthermore, while Crown is correct in noting that one knee to the face could not have caused all of the injuries noted, there is nothing before me to suggest that the injuries to Mr. Van Bibber's lip, nose and eye could not have been caused by one knee to the face. Given Mr. Van Bibber's extremely intoxicated state, I cannot discount the possibility that the cuts to the back of his head were a result of his having fallen or bumped his head at some point. Indeed, he himself suggested to the police in one of his statements that he might have fallen and hit his head on the coffee table at some point.

[26] With this in mind, however, I must say that I did have some concerns with Ms. Christiansen's testimony. She too exhibited some inconsistencies in her evidence. When calling for an ambulance she advised Mr. Guyck that Mr. Van Bibber had fallen down the stairs. She then told the police that she did not remember anything and then later changed her story to that provided to the Court.

[27] In addition, some of Ms. Christiansen's version presented as somewhat strange in my view. Firstly, and mostly obviously, she suggested that, with Mr. Van Bibber plopped down on top of her while she was on her stomach in the narrow space between the bed and the wall, that she could see Mr. Loewen at the door of the room on the other side of the bed. I find it very hard to believe, having viewed the pictures, that it would have been possible for her to see Mr. Loewen in the doorway.

[28] Similarly, Ms. Christiansen refers to Mr. Van Bibber as someone that she did not know well beyond saying hi to him, and she describes what is, essentially, a sexual assault with Mr. Van Bibber saying such things that as, "I'm horny," and "Let's have a

quickie,” while trying to pull down her pants. Yet instead of presenting as frightened or disturbed by these events, in her evidence she essentially presented as annoyed or irritated, using such phrases as, “He was talking nonsense,” “He was being cute,” and “He was bugging her.” She also conceded that there was no reason that she could not have gotten up and left the room, yet she remains in the room with Mr. Van Bibber, “bugging her,” as she puts it, for close to 30 minutes.

[29] For these reasons, her description of the interaction between her and Mr. Van Bibber strikes me as somewhat bizarre, though not enough that I would have to find that it would be impossible. I should note that there were some similarities between Ms. Christiansen’s description of the altercation between Mr. Van Bibber and Mr. Loewen, and the admissions that were apparently made by Mr. Loewen to Ms. Christiansen’s brother, Arthur James Christiansen. Mr. Christiansen testified that Mr. Loewen told him that he had entered the bedroom to find Ms. Christiansen in a little scuffle with Mr. Van Bibber, which he could tell was not with Ms. Christiansen’s consent. He pulled Mr. Van Bibber off the bed, punched him in the temple, then kneed him, though he did not explain where or how he kneed him.

[30] Unfortunately, I have serious concerns about the reliability of Mr. Christiansen’s recollection about the conversation. He seemed to have no independent recollection of the circumstances and the conversation, and he had to be referred to his statement on more than one occasion to refresh his memory.

[31] At the end of the day, despite the very best efforts of the Crown to provide me with as many of the pieces of the puzzle as were within their power to provide, I am

nonetheless left with far too many unanswered questions. The objective and reliable evidence, at best, places Mr. Loewen in close proximity to Mr. Van Bibber when he received at least some of his injuries, but the only witnesses that can speak to what actually occurred between Mr. Van Bibber and Mr. Loewen are witnesses with whom I have serious concerns regarding their credibility and reliability. I am left with the belief that Mr. Loewen very likely caused at least some of Mr. Van Bibber's injuries, but I am unable to say with any degree of certainty whether this occurred as described by Mr. Van Bibber, as described by Ms. Christiansen, or as some combination of the two versions.

[32] In such circumstances, I simply cannot find that I am satisfied beyond a reasonable doubt of all of the essential elements of the offence causing bodily harm. I have no option but to dismiss that count. As I noted earlier, in my view, the other count stands or falls with the substantive offence. Accordingly, it will be dismissed as well.

RUDDY T.C.J.