

Citation: *R. v. Nehass*, 2013 YKTC 87

Date: 20131025
Docket: 12-00991A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Chisholm

REGINA

v.

MICHAEL DAVID ARCHIE NEHASS

Appearances:
Terri Nguyen
David Tarnow

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Michael Nehass is charged with two counts contrary to the *Criminal Code*:

On or about the 10th day of December, 2012 at or near Whitehorse, Yukon Territory, did assault Elden Schmidt, a peace officer engaged in the execution of his duty, contrary to Section 270(1)(a) of the *Criminal Code*.

And Count 2:

On or about the 10th day of December, 2012 at or near Whitehorse, Yukon Territory, did knowingly utter a threat to Elden SCHMIDT to cause bodily harm to Elden Schmidt, contrary to Section 264.1(1)(a) of the *Criminal Code*.

OVERVIEW

[2] The Crown has acknowledged in submissions it would be improper to convict with respect to the s. 270(1)(a) charge; however, it is important to review all of the

evidence, as the assault peace officer allegation and that of uttering threats are intertwined.

EVIDENCE

[3] Mr. Nehass is an inmate at the Whitehorse Correctional Centre. On December 10, 2012, he was located in the segregation unit of this facility where Corrections Officer Elden Schmidt, along with two other Corrections Officers in training were working. Mr. Schmidt has worked as a Corrections Officer for three and a half years and knows Mr. Nehass in that capacity. On the date in question, Mr. Schmidt testified he had been requested by his manager to have cleaned a section of the unit's floor space. He asked Mr. Nehass if he would do so in return for extra duties pay, and Mr. Nehass agreed. Mr. Nehass was released from his cell after receiving instructions and cleaning materials for the job he was to perform.

[4] According to Mr. Schmidt, upon release, Mr. Nehass immediately went to an area of the segregation unit where he gestured in a threatening fashion to another inmate. This, in turn, prompted Mr. Schmidt, who was located in a secure area, to order Mr. Nehass to return to his cell. Instead, Mr. Nehass proceeded to a public phone in the unit, where he sat in a chair and telephoned somebody. Mr. Schmidt continued to command Mr. Nehass to return to his cell, and ultimately entered the area with the two other Corrections Officers.

[5] Mr. Schmidt described the accused as tense and agitated. He indicated that the accused stood up and approached him quickly, during which time the accused lunged towards the officer without physically touching him. Mr. Schmidt noted that the

accused's arms were raised and that the accused made a movement as if to hit the officer. Mr. Schmidt described this as a "feint".

[6] Mr. Schmidt stated the accused threatened him by saying not to mess with him.

According to the Officer, Mr. Nehass then stated:

I am really close to smashing you up right now. You know what I did to Tony? I hit him so hard, his nose was pushed into his face.

According to Mr. Schmidt, this was in reference to an earlier altercation between the accused and another Corrections Officer. Mr. Schmidt indicated that during the verbal exchange, he continued to advise the accused to return to his cell.

[7] The Crown called no other *viva voce* evidence, but did tender as an exhibit the videotape from the segregation area that showed part of the interaction between the Corrections Officer and the accused on December 10, 2012. The Crown only received this videotape yesterday, at which time it was disclosed to defence. The video covers the period of time from Mr. Nehass sitting in a chair while using the public phone with his back to Mr. Schmidt, to the moment where he voluntarily returns to his cell. This includes his getting up from the chair, his approaching Mr. Schmidt, and their face-to-face interaction. What is depicted in the video, however, is inconsistent with the testimony of Mr. Schmidt. Mr. Nehass at no time lunges at the Corrections Officer, and he at no time lifts his hands in a threatening manner.

[8] In cross-examination, Mr. Schmidt was questioned about a statement he made to the police after the incident. He acknowledges stating to the police that Mr. Nehass had made a fake punch during his approach to the Corrections Officer. He testified today he

had misspoken when providing this information to the police. The videotape does not depict Mr. Nehass making any such gesture.

ANALYSIS

[9] There is no audio recording which accompanies the videotape, so the only evidence before me as to the contents of the exchange between the accused and the Corrections Officer comes from Mr. Schmidt.

[10] The Crown, although acknowledging difficulties with the testimony of Mr. Schmidt, asks that a conviction be entered on the uttering threats charge. I am unable to do so.

[11] Mr. Schmidt's testimony about the alleged assault is inconsistent with the videotape evidence. Additionally, the portion of his statement to the police describing a fake punch, which is not borne out by the videotape, negatively impacts his credibility. Although Mr. Schmidt gave quite detailed evidence as to the contents of the verbal exchange between him and Mr. Nehass, his similarly detailed evidence of the alleged assault by Mr. Nehass contains significant inconsistencies. There is no evidence to corroborate his evidence with respect to the alleged threat. As a result, Mr. Nehass is acquitted of both charges.

CHISHOLM T.C.J.