Citation: *R. v. Sayine,* 2017 YKTC 55

Date: 20171103
Docket: 17-00016
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

JAMIE SAYINE

Appearances:
Christiana Lavidas — Counsel for the Crown
Melissa D. Atkinson — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Jamie Sayine stands charged with three offences, two of common assault and one of failing to comply with the abstain condition on his undertaking to an officer in charge. Crown called no evidence with respect to the breach. Accordingly, count three is dismissed for want of evidence. Crown further concedes that while there is some evidence with respect to an assault on Jolene Papequash, the evidence falls below the requisite standard of proof beyond a reasonable doubt. Accordingly, an acquittal will be entered with respect to count two. Crown seeks a conviction on count one alleging an assault on Raven Papequash on April 7, 2017.

[2] The Crown's case consisted of evidence from two civilian witnesses, one police officer, and an admission with respect to the evidence of a second police officer. The defence called no evidence.

[3] It should be noted that Ms. Papequash was sworn in as Raven Lennie. It was clear in both her evidence, and in the evidence of Cst. Reid, that she is commonly known by both surnames. For the purposes of this decision I will refer to her as Ms. Papequash, as that is how she is named in the Information.

[4] The assault in question is described by Ms. Papequash who testified that she went to a home she understood to be that of Mr. Sayine's brother at her Auntie Jolene's request. She says her Auntie Liz and Mr. Sayine were also present. All appeared to be intoxicated. Mr. Sayine accused Ms. Papequash of theft. He told her to get out, grabbed her by the hair and pushed her toward the door. She eventually left but was followed by Mr. Sayine. As she was halfway down the outside stairs, she says she turned and Mr. Sayine kicked her in the face. She called the police, and sought the assistance of Bodean Wolfe who she met on the street.

Issues

[5] There are two issues to be determined:

1. Whether the Crown has established the essential element of identity; and, if so,

2. Whether the evidence establishes that Mr. Sayine committed an assault. As the evidence of the actual assault is limited to Ms. Papequash's testimony, this issue turns on an assessment of her credibility.

Identification

[6] It is undisputed that one of the essential elements that the Crown must prove beyond a reasonable doubt in any criminal case is that of identification, namely that the person charged is the person who committed the offence. This is normally done through what is commonly referred to as "dock" identification in which one or more of the witnesses identify the accused in the courtroom. There was no dock identification in this case.

[7] The lack of dock identification is not fatal to the issue of identification. The question becomes whether there is other evidence before the Court sufficient to establish identity to the requisite standard.

[8] The Crown relies on the case of *R. v. Iverson,* 2013 ABPC 224, in which the accused was charged with being in care and control of a motor vehicle while impaired. As the investigating officer testified by video, there was no dock identification. The Crown points to paragraph 22 of the decision as support for the proposition that name alone, where sufficiently distinctive, can be sufficient to establish identity. Paragraph 22 reads:

> A third way to prove identification is by similarity of names. An inference can be drawn from the mere similarity of nomenclature to the person who appears in the Information. At the very least, ***Nicholson*** states similarity of names is a matter to be weighed. In ***R. v. Chandra****, supra,* McIntyre J.A. (as he then was) of the British Columbia Court of Appeal stated the relative distinctiveness of a name, if it is coupled with an address or appears on a document of significance, its weight is strengthened and must be considered and is some evidence.

[9] In the *Iverson* case, Fraser J. goes on to decide that the name of Iverson is not sufficiently distinctive to establish identity, noting that he "would not rely on name only without some other evidence".

[10] This hesitation to convict on similarity of name alone is reinforced if one looks to those cases referred to in paragraph 22 of *Iverson*.

[11] In *R. v. Chandra*, [1975] 29 C.C.C. (2d) 570, the accused was charged with criminal negligence in the operation of a motor vehicle causing death. At the scene of the accident, a man with the same name as the accused and a driver's licence in that name, provided a statement to the police containing admissions. The officer could not identify that man at trial. The trial judge excluded the statement on the basis there was no evidence to identify the person who gave the statement as the accused. No further evidence was called and the trial judge directed the jury to enter a verdict of acquittal.

[12] The B.C. Court of Appeal determined that the trial judge erred in finding that there was no evidence as to the identity of the person who made the statement noting at paragraph 7:

> In my opinion, mere identity of name affords some evidence of identity of a person. When accompanied by other factors such as the relative distinctiveness of the name, or the fact that it is coupled with an address, or appears upon a licence or other document of significance, its weight is strengthened. The trier of fact when such evidence is before it, whether Judge alone or jury, must consider it, weigh it and reach its determination. …

[13] It is important to note that, in *Chandra*, the Court did not find that the evidence as to name amounted to proof of identity beyond a reasonable doubt, but rather that the

trial judge erred in concluding that there was no evidence of identity. There was some evidence of identity which should have been put to the jury.

[14] In *R. v. Nicholson*, 1984 ABCA 88, the accused was charged with driving with a blood alcohol level in excess of the legal limit. At trial, the police officer mistakenly identified the accused's brother. The accused's conviction, upheld on appeal, was further appealed to the Alberta Court of Appeal. Kerans J.A. noted that there were four different "proofs of identity":

> 1. The appearance notice: the officer was an eye-witness to the commission of the offence, arrested the accused, and released the accused on an appearance notice;
>
> 2. The similarity of names: noted as a matter to be weighted;
>
> 3. The driver's licence: shown by the accused to the officer which included a photographic likeness;
>
> 4. The defence evidence: the brother's testimony that the accused, and not he, was arrested on the night in question.

[15] Considering the impact of these four points, the Court notes at paragraph 36:

> There were, therefore, four points of proof of identity here, in my respectful view, any one of at least the first, third or fourth would alone be adequate to support a conviction in the absence of any contradictory evidence.

[16] It is important to note that the Court did not consider the second point of proof, the similarity of names, as being adequate on its own to establish identity. Rather, "The correct question, then, is whether mere similarity is sufficiently persuasive. …" (paragraph 33).

[17] In the case of *R. v. Bazinet*, [1997] B.C.J. No. 1778, the B.C. Supreme Court overturned a conviction for care and control with a blood alcohol content in excess of the legal limit, finding that the trial judge erred in relying on the appearance notice as proof of identity. Oppal J. concluded at paragraph 17:

> I have difficulty with the practice of a court relying on its own process to conclude that an essential element of the Crown's case has been proved. Merely because the person has appeared in court in response to the court process cannot be probative of the issue of identity. The fact that a person has appeared in court after being charged surely is not evidence of the fact that he has committed a crime. …The Crown is always required to prove either by direct or circumstantial evidence the identity of the person who has committed the crime.

[18] In *R. v. Evaglok*, 2010 NWTSC 35, the accused was charged with assault on his spouse. The main witness for the Crown was the couple's daughter who interrupted the assault and contacted the police. The daughter, the accused father and the mother were the only three people present when the police arrived and the accused was arrested. At trial the daughter was asked, and provided, her father's name as the person who assaulted her mother, but she was not asked to identify him in the courtroom. On appeal from conviction, the NWT Supreme Court held that the similarity of name is an element to be considered, noting that the names were not only similar but identical. However, the Court also noted that there was substantial other circumstantial evidence of identity, including the familial relationship between the parties, the fact that the only three present in the apartment were the witness and her parents, with her father, the only male, being arrested and removed from the residence. Leave to appeal was denied.

[19] The evidence with respect to identity in this case is as follows:

- Ms. Papequash says that she was assaulted by Jamie Sayine;
- It is admitted that Cst. Miller arrested an individual, in the home where Ms. Papequash says she was assaulted, who identified himself as Jamie Sayine;

[20] In assessing whether the 'similarity of names' in this case is sufficiently persuasive, I would note that, though no evidence was called with respect to how rare or common, the name Sayine would appear to be a relatively distinctive one.

[21] In deciding whether this alone is sufficient to establish identity, it is important to note that Mr. Sayine was not known to Ms. Papequash. He was someone she had met on one occasion several years earlier at a time when she was drunk, and she was told his name by a third party. There was no relationship of familiarity as in *Evaglok*.

[22] Again, unlike *Evaglok*, while the name Sayine is not one I have encountered before, the evidence does indicate that at least one other Sayine, Mr. Sayine's brother, was also present in the home during the relevant period.

[23] There is no evidence before me that Cst. Miller confirmed Mr. Sayine's identity through photo identification or other means. In addition, though I was not asked to take judicial notice with respect to court documents in relation to the issue of identity, I would note that there is no information before me with respect to address or date of birth on any documents in the court file as being consistent with Mr. Sayine's date of birth or address which would add weight to the similarity of name issue.

[24] Finally, and perhaps most importantly, there is no evidence that Ms. Papequash, who was outside speaking to one officer, confirmed for the other officer who was inside the home arresting Mr. Sayine that the man being arrested was the person who assaulted her.

[25] In my view, there are crucial gaps in the chain of identity and there is insufficient circumstantial evidence to allow me to conclude that the similarity of name in this case is sufficient to establish the essential element of identity beyond a reasonable doubt as is required for a conviction.

Credibility

[26] Having decided that the essential element of identity has not been proven in this case, it is, strictly speaking, unnecessary to address the second issue of whether the evidence, specifically that of Ms. Papequash, when viewed within the context of the evidence as a whole, is sufficient to establish that an assault was committed by Mr. Sayine.

[27] However, in the event I am wrong on the first issue, I would note that Ms. Papequash's evidence, while sufficiently credible to persuade me that something happened, was not, in my view, sufficiently reliable to support a conviction.

[28] This conclusion is based on a number of factors. Firstly, Ms. Papequash was admittedly under the influence when she testified. She was noticeably angry and argumentative during both direct and cross-examination.

[29] Her evidence was inconsistent on some points with that of the other witnesses. For instance, she testified that when the police attended they caught Mr. Sayine trying to run away out the back gate. The admission with respect to Cst. Miller's evidence indicates that he encountered and arrested Mr. Sayine inside the house without incident. Similarly, Ms. Papequash testified that Mr. Sayine was going to throw a shovel at Mr. Wolfe from behind. She yelled to warn Mr. Wolfe, who told Mr. Sayine to "go ahead". Mr. Wolfe, on the other hand, testified that Mr. Sayine did pick up a shovel, but it was held blade toward the ground. He made no mention of an attempt to throw the shovel at him nor of the verbal exchange described by Ms. Papequash.

[30] Ms. Papequash's evidence also included some internal inconsistencies. On cross-examination, she mentioned grabbing a piece of wood to protect herself, which she dropped and ran when Mr. Sayine said he was going to get his weapon. When asked why she had not mentioned this in direct, she said that the Crown had not asked her to tell the whole story.

[31] In addition, there were inconsistencies between Ms. Papequash's evidence at trial and her statement to the police. In particular, it was noted that she had not told the police that she had gone to the residence because her aunt was afraid for her safety as Ms. Papequash indicated at trial. Nor had she told the police that Mr. Sayine had grabbed her by the hair. In response to the first inconsistency, she said it had slipped her mind; in response to the second, she said she was shaken up when she gave the statement.

[32] Finally, Ms. Papequash testified to having been kicked in the face. The evidence, including that of Ms. Papequash, is consistent that there were no visible injuries as one would expect to see in such circumstances.

[33] The combined effect of these concerns leads me to conclude that, even if identity had been proven, the evidence is not sufficiently reliable to establish, beyond a reasonable doubt, that Mr. Sayine committed an assault against Ms. Papequash.

Conclusion

[34] My findings on both issues lead to the inescapable conclusion that an acquittal must be entered with respect to count one.

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RUDDY C.J.T.C.