

Citation: *R. v. Simms*, 2013 YKTC 110

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Docket: 12-00665  
12-00665A  
12-00665B  
12-00665C  
12-00665D  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Luther

REGINA

v.

ROXANNE SIMMS

Appearances:  
Joanna Phillips  
Gordon Coffin

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] LUTHER T.C.J. (Oral): Roxanne Simms is charged, on September 8, 2012, with breaches of ss. 268(2), 279(2) and 264.1(1)(a) of the *Criminal Code*. During the course of the trial, it was determined that there was insufficient evidence to sustain any type of case with regard to Count 2, and that charge is dismissed. I will review the facts pertaining to Counts 1 and 3 and render my decision.

[2] The culmination of dysfunctionality and troubles between the accused and the victim occurred on September 8, 2012, with the stabbing of the victim's right arm requiring 16 stitches. The relationship was beset with substantial substance abuse and

suspicious, perhaps occurrences of infidelity. As to why the relationship lasted as long as it did one may never know. What is clear is that on the morning in question, the accused took a knife and stabbed Patrick Lethbridge in an apartment in which Mr. Lethbridge was the tenant. The history of tenancy and occupancy was checked. The precise location of the stabbing is shown in Exhibit 3, photograph 8393, where the blood is visible on the carpet.

[3] In *R. v. Gibson*, [2013] N.J. No. 10, a very recent decision of Judge Gorman of the Provincial Court of Newfoundland, at pages 9 through 12, the judge outlines the onus and the standard of proof, and he goes through all the important, recent cases. He also discusses, in terms of credibility, *R. v. W.(D.)*, [1991] 1 S.C.R. 742, from the Supreme Court of Canada; talks about the three steps, and then he tells us at para. 25:

In *R. v. Van* (2009), 65 C.R. (6th) 193, the Supreme Court of Canada pointed out at para. 23 that “the purpose of the **W.(D.)** instruction is to ensure that the jury know how to apply the burden of proof to the issue of credibility. The jury must be cautioned that a trial is not a contest of credibility between witnesses, and that they do not have to accept the defence evidence in full in order to acquit.”...

Then:

...In *R. v. Gray*, 2012 ABCA 51, it was noted, at paragraph 40, that “part of the message intended to be conveyed by the third arm of the **W.(D.)** instruction is that a complete rejection of the appellant’s evidence does not mean that his guilt is established.” In *R. v. D.K.B.*, 2012 MBCA 114, the Manitoba Court of Appeal in considering **W.(D.)** indicated that the “key is whether the correct burden and standard of proof were applied, not what words were used in applying them.” Finally, it was pointed out in *R. v. Nedelcu*, 2012 SCC 59, that “rejection of an accused’s testimony does not create evidence for the Crown” ...

[4] Aware of all these authorities, I am making the following findings. Overall, the evidence of the accused is more believable than that of Mr. Lethbridge on the major points. His own cousin, Kelsie Ford, whom I found to be quite credible, gave evidence that generally supported her friend, the accused, rather than Mr. Lethbridge, her cousin. The credibility test, however, goes much further than that slight analysis.

[5] Mr. Lethbridge and the accused were confused and in distress during that morning encounter. In my opinion, both were still under the influence of alcohol and perhaps more. Both did not want police involvement, and neither wanted to go to jail. I accept that the accused entered through the door and that Mr. Lethbridge was asleep. Foolishly, despite obvious feelings of anger from Mr. Lethbridge the night before, Ms. Simms went there by herself to retrieve her belongings. Her options included going with a friend, perhaps Kelsie Ford, or the police, despite her reservations about engaging the police because of their response to her when she was doused with wine a short time before.

[6] Upon being awakened, Mr. Lethbridge assaulted Ms. Simms, with injuries as shown in Exhibit 2. While it is possible that the accused may have been assaulted between 1:00 a.m. and 8:00 a.m. on September 8, or after she left the apartment and was arrested in the park the next day, there is absolutely no evidence of that and I accept Ms. Simms' version as to how she was assaulted by Mr. Lethbridge and that the injuries were sustained by his assaults.

[7] The closest analysis, however, needs to be directed towards that time, after being viciously assaulted in the apartment of Mr. Lethbridge around 9:00 a.m., the

accused grabbed the knife from the kitchen. This was a sizeable knife. It appears to be approximately 30 centimetres, if you take a look at Exhibit 3, 8404 through 8408. At the time, Mr. Lethbridge was behind the bedroom door. The accused easily could have left. She said she got the knife because she just wanted her stuff and that she did not want to cut him. Perhaps she was that dazed and angry that momentarily she did want to stab him [precisely at that particular time]. I do not know that. I cannot conclude that. But what is fair to conclude is that she had every opportunity to flee and should have done so. She was not defending family or friends, as in *Kandola*, [1993] B.C.J. No. 1035. She was not defending her property. The apartment was no longer hers. She was not defending her personal property as Mr. Lethbridge never threatened to destroy it, other than put it outside.

[8] After a very brief time, Mr. Lethbridge came out of the bedroom and grabbed Ms. Simms' hair. It was then that she stabbed him. Let us think about that for a moment. She now has the knife. Several seconds have gone by since Mr. Lethbridge last hit her, and she did not leave. In her mind, in the state that she was in at the time, did she know that he was coming out to assault her, or was she just going to go in armed, with the knife, and take her stuff regardless? In my opinion, s. 34 of the *Criminal Code* does not apply here. The use of the knife was not for the purpose of defending herself because she did not need to. Ms. Simms had other viable options.

[9] As a trial judge, it is very difficult to determine what is going on in the minds of two such people who have persevered through a fractious relationship and who were both under the influence of a substance or substances at the time. There was some evidence that there were altercations in the past and that Mr. Lethbridge had assaulted

a girlfriend in Sault Ste. Marie, and also that he had assaulted the accused before, causing her injury. There was a suggestion that the accused had injured Mr. Lethbridge before.

[10] What I can safely surmise from the facts is that Mr. Lethbridge was aggressively minded on the night of September 7, 2012, and when he discovered the accused in his apartment, having woken up on the morning of September 8, 2012, Mr. Lethbridge assaulted her. The accused, having had the opportunity to leave, chose to stay. She grabbed a knife and she slashed Mr. Lethbridge, causing a wound requiring 16 stitches. Her clearly stated intent to obtain her belongings at such an unreasonable cost to him, and herself, resulted in this criminal case. As to what occurred after the slash, I am inclined to accept the evidence of the accused.

[11] Based on my analysis of what occurred that morning in the apartment, I am registering a conviction to Count 1.

[12] As to Count 3, the Supreme Court of Canada, earlier this month, came out with a case, *R. v. O'Brien*, [2013] 1 S.C.R. 7. The majority, on a four to three split, upheld the acquittal by the trial judge, which was upheld by a majority of the Manitoba Court of Appeal. The Supreme Court of Canada reiterated the opinions they expressed earlier in *R. v. McCraw*, [1991] 3 S.C.R. 72, and *R. v. Clemente*, [1994] 2 S.C.R. 758.

[13] In this particular case, as it pertains to Count 3, the threats that the Crown is putting forward are words by the accused, "I hate you, I hope you die this time." It is my opinion that she expressed her feelings and her immediate hope.

[14] In my view, this was not a threat to cause bodily harm or death. Her criminal assault on him had already taken place. Count 3 is dismissed.

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LUTHER T.C.J.