

Citation: *R. v. Wiebe*, 2006 YKTC 75

Date:20060324
Docket: T.C.05-00403
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Overend

REGINA

v.

DAVID CHARLES WIEBE

Appearances:
Noel Sinclair
Gordon Coffin

Council for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] OVEREND T.C.J. (Oral): The accused is charged that on or about the 13th of September, 2005, at Whitehorse, he had unlawfully committed an offence in that he did wound Darryl Hewitt, thereby committing an aggravated assault contrary to s. 268 of the *Criminal Code*.

[2] Briefly, the facts are that the defendant and one Corinne Silverfox were in a boyfriend-girlfriend relationship and on the day in question they had been at Ms. Silverfox's apartment on 4th Avenue in Whitehorse. There had been an off and on relationship between them, and on that date, that relationship had been renewed for a

month or so, during which time the defendant spent most of his nights sleeping over at her apartment.

[3] On the 13th, near supper time, Corinne Silverfox went with her sister to the bar at the 98 Hotel. Supper was on the stove; the defendant was in the apartment. When Corinne Silverfox did not return when expected, the defendant, having spoken to her on the phone earlier, and having expected her home, went to the bar and wanted Corinne to go home with him. She refused. He left the bar, but returned a short time later and physically tried to remove her.

[4] Mr. Hewitt, who had been at the bar and had had employment there as a bouncer but was not engaged as a bouncer on that particular occasion, responded to the demand of Lisa McKenna that the accused leave the bar. He approached the accused, grabbed him by the shirt or the collar, and pushed him out the door.

[5] Ms. Silverfox remained in the bar. Mr. Hewitt, who, as I say, was not employed as a bouncer on that evening, had bought Ms. Silverfox a beer. That beer had been purchased in the presence of the defendant prior to his removal.

[6] After removal, Mr. Wiebe remained outside the hotel for a short time, and later confronted Mr. Hewitt in his vehicle, that is, in Mr. Hewitt's vehicle. Perhaps, to make myself clear on that, Mr. Hewitt was in his vehicle and Mr. Wiebe approached the vehicle. There was a short interaction at that time. There was no physical contact between the parties.

[7] The defendant indicated in his evidence that he was heading for home at the time, but it is clear that that confrontation at the vehicle took place in a direction opposite to where Mr. Wiebe was staying, that is, opposite to the direction of Ms. Silverfox's apartment.

[8] Back in the bar, Mr. Hewitt offered Ms. Silverfox a ride to her residence, and on the drive to the apartment, they noticed Mr. Wiebe and continued to drive for approximately a half an hour. While they were driving, Mr. Wiebe attended to the apartment. He did not have a key to Ms. Silverfox's apartment. I should, perhaps, as an aside here, say this is a building with six separate apartments, two on each floor, and there are three floors. Ms. Silverfox was on the third floor.

[9] On return to the apartment, Mr. Wiebe obtained a key from Gloria Jackson, who is also a resident of that building. He then entered the apartment, and was in the apartment at the time Ms. Silverfox and Mr. Hewitt arrived. While still outside the building, Ms. Silverfox realized that the accused was in her apartment. She remonstrated with Gloria Jackson, expressing her displeasure. This was in the presence of Mr. Hewitt and in the hearing of the accused, who, at the time, was leaning out the window. He was told by Mr. Hewitt, "You'd better fucking get out or I'll make you," referring to Mr. Wiebe leaving the apartment.

[10] The accused was in the apartment. He put his shoes on and exited the apartment as Ms. Silverfox and Mr. Hewitt were entering the building. The accused met Ms. Silverfox on the stairs between the second and third floors. She showed no interest in his being there, and he said to her, "If you want me to leave, I'll leave."

[11] Almost immediately, a further confrontation took place between the accused and Mr. Hewitt on the stairs, near the area where Ms. Silverfox and Mr. Wiebe had just met. Mr. Hewitt grabbed the defendant and held him against the wall, or pushed and held him against the wall, before the defendant swung him around, causing Mr. Hewitt to fall to the bottom of the stairs. The defendant immediately went to the bottom of the stairs, and proceeded to punch and kick Mr. Hewitt.

[12] Mr. Hewitt suffered significant injuries, including multiple facial fractures and a brain injury, from which, in part, he was unable to recover or return to his employment for over four months. There is no issue here that this was a significant wound and therefore falls into the category of an aggravated assault. Mr. Hewitt had no recollection of any of the events at the apartment, although he did recall the events earlier in the evening.

[13] That is a brief summary of the facts.

[14] There are two issues here, one of which has been raised by the accused and the other by the Crown. The Crown says that s. 34(2), upon which the accused relies, has no application, because this is a situation where s. 41 of the *Criminal Code* applies.

Section 41(1) says:

Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

[15] The Crown suggests that the person who was in peaceable possession of the dwelling-house was Ms. Silverfox; that Mr. Wiebe was not a tenant of the building; that

he had no right to be there, or his right to be there was the right that was extended to him by Ms. Silverfox and she was entitled to withdraw that at any time. I agree with the Crown with respect to that. The Crown says further that because of that, he was a trespasser and that Mr. Hewitt had a right to use physical force to remove him.

[16] I am not satisfied beyond a reasonable doubt that the accused, based on the evidence I have heard, was offered a reasonable opportunity to exit the property before there was an application of force. Nor am I satisfied that in that situation, and on the evidence I have heard, that I am satisfied beyond a reasonable doubt that no more force was used than was necessary.

[17] So that brings us to s. 34(2) of the *Criminal Code*. This is the key to my decision.

Subsection (2) of 34, on which the accused relies, says:

Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[18] Based on the evidence, I accept that the accused was assaulted, that is, that he was grabbed and pushed against the wall by Mr. Wiebe. I am satisfied that he, Mr. Wiebe, caused grievous bodily harm to Mr. Hewitt. I am not satisfied that he did it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made.

[19] The history of the evening certainly would have given Mr. Wiebe no apprehension of his being likely to suffer death or grievous bodily harm from anything

that Mr. Hewitt had previously done. In his evidence Mr. Wiebe said, "Having been ejected from the bar was no big deal," that that did not bother him particularly, one way or the other.

[20] Mr. Wiebe, was clearly not apprehensive after he left the bar, because he went out of his way to approach Mr. Hewitt in his vehicle. It was suggested to him in cross-examination that he had left the apartment and was coming down the stairs to specifically confront the victim, Mr. Hewitt. He denied that. He said, however, that he was going down the stairs to see Corinne. There is no suggestion that in exiting the apartment that he had any concern about his safety.

[21] The violence of the initial assault, that is, the assault on the stairs by Mr. Hewitt, was minimal, that is, he grabbed and pushed Mr. Wiebe against the wall. I am not satisfied on a subjective basis that Mr. Wiebe believed for a moment that there was impending death or grievous bodily harm. He had no such subjective apprehension. I am not satisfied either, on an objective basis, that any person in his circumstances, considering the events of the evening, and particularly the events on the stairwell, would have had any reasonable apprehension of death or grievous bodily harm.

[22] In coming to my conclusions, I found the evidence of Mr. Wiebe to be unreliable in respect of his expressed non-anger at the events of the evening, his evidence of the manner in which Mr. Hewitt fell down the stairs, and when I compare that to his statement to police, his statement to the police more accurately reflects what is likely to have happened on the stairs following the initial assault by Mr. Hewitt. This was an opportunity taken by Mr. Weibe to get his revenge for the events of the evening, and

seeing Mr. Hewitt lying at the bottom of the stairs, he went down and assaulted him as indicated. I find him guilty as charged.

OVEREND T.C.J.