

SUPREME COURT OF YUKON

Citation: *R. v. Gainz*, 2009 YKSC 76

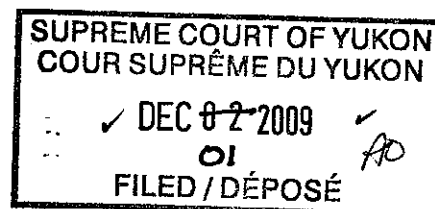
Date: 20091110
Docket S.C. No.: 09-01503
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

TOMMY OTIS GAINZ



Before: Mr. Justice L.F. Gower

Appearances:
Kevin Komosky
Robert Dick

Appearing for the Crown
Appearing for the Accused

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Mr. Gainz has pled guilty to a common assault on Gary Smith on April 14, 2009, in Whitehorse, contrary to s. 266 of the *Criminal Code*. However, he has pled not guilty to a charge of extortion arising out of that assault, contrary to s. 346(1.1)(b) of the *Criminal Code*. That charge alleges that Mr. Gainz, without reasonable justification or excuse, and with intent to obtain money, did attempt to induce Mr. Smith by violence to pay a sum of money to Mr. Gainz. It is not disputed that that is one of the means by which an offence of extortion can be made out.

[2] Mr. Gainz testified in his defence; therefore, I must bear in mind the principles of *R. v. W.(D.)*, [1991] S.C.J. No. 26, on the issue of credibility of the accused. Number

one, if I believe his evidence, I must acquit. Number two, if I do not believe his evidence, but I am left in a reasonable doubt by it, then I must acquit. And three, if I do not believe his evidence and I am not left in a reasonable doubt by it, I must consider whether on the basis of the evidence which I do accept I am convinced beyond a reasonable doubt of his guilt.

[3] Essentially, Mr. Gainz' defence is that he acted solely out of anger when he assaulted Mr. Smith and that he did not have any intention to gain a future advantage by doing so. In particular, he testified that he did not assault Mr. Smith with the intention of encouraging him to repay a sum of money he owed to Mr. Gainz.

[4] Maria Noksana testified for the Crown. She is the 21-year-old daughter of Mr. Smith. She said that on April 14, 2009, she and her father were about to go downtown in Whitehorse with her infant son. She was helping her father put a stroller in the trunk of the car. She felt a shove and turned around to see her father hit the ground. She then saw Mr. Gainz standing over her father, hitting him a number of times with his hands in the head area. She intervened by trying to push Mr. Gainz away from her father, yelling at him to leave him alone.

[5] In direct examination, she said she thought she heard Mr. Gainz say to her father during the assault, "Your dad owes me money" and then "Where is my money"; although she was not sure if those were the exact words. In cross-examination, she indicated that she was sure that she had heard Mr. Gainz say, "Where is my money" during the assault. She also said she was sure that she saw Mr. Gainz hit her father more than once. She said that afterwards Mr. Gainz was still wondering where his

money was. Finally, she said the police arrived a few minutes after the assault, having been alerted by a neighbour.

[6] Gary Smith testified and admitted owing money to Mr. Gainz. He said he had persuaded Mr. Gainz to use his credit card in the fall of 2008 to purchase a WestJet airplane ticket for him in the approximate amount of \$700. He claims to have repaid a portion of that debt, approximately \$400, although that was not acknowledged by Mr. Gainz in his testimony. There is no doubt that Mr. Gainz has a judgment in Small Claims Court against Mr. Smith for a total of \$943.88, plus post-judgment interest.

[7] Mr. Smith said that on April 14th he was putting a stroller into the trunk of his car, facing into the trunk, when he felt like he had been "hit by a truck." He did not see Mr. Gainz strike him. He had no recollection of anything for approximately the next 15 minutes; however, after he regained his focus he had a very sore neck, head and a skinned elbow. He was taken to Whitehorse General Hospital for a medical assessment and complained of having a visible bump on his forehead.

[8] Constable Lightfoot testified that he was called to the scene about 3:40 p.m. When he arrived, he saw Mr. Gainz in the roadway. He appeared to be very angry, but was cooperative in the sense that he put his hands out, offering to be handcuffed. The constable said that Mr. Gainz volunteered some statements after he was arrested, or at about the time he was being placed in the police vehicle. Those statements were "I had to take matters into my own hands" and "If the courts aren't going to do anything, I'll take matters into my own hands."

[9] Constable Lightfoot also took a statement from Mr. Gainz at the detachment.

There was no issue as to its voluntariness or its admissibility. In that statement Mr. Gainz said, among other things, "Ah, I basically kicked a guy in the head cause he owed me money, for seven months now. An I just got tired of waiting." He also said, later in that statement, "I just hit him the one time. Realized he was not doing anything. I, I got my point across an that was it."

[10] Mr. Gainz testified that after he realized Mr. Smith was not about to voluntarily repay the debt he filed a claim in Small Claims Court for \$2,200. He explained that he was paying interest at a very exorbitant rate on the initial amount of the loan. He obtained a judgment on April 6, 2009, as I said for \$943.88 plus post-judgment interest, but when he received a copy of the judgment, he felt there had been an error in the interest calculation. He arranged an appearance before the Small Claims Court judge on April 14th. He was persuaded that the judgment was correctly drafted, although he was very upset that he was not going to collect all that he thought he was entitled to.

[11] He said he drove back to his home, which was only two doors down from where Mr. Smith was living with his daughter, Maria Noksana, at the time. He said he was very angry about his experience with the Small Claims Court, to the point of being "insanely pissed off", "seeing red" and "at the limits of breaking." He said that he approached Mr. Smith from behind or slightly to the side and kicked him a single time in the ear with his left foot. However, Mr. Gainz said that his only intention in striking Mr. Smith was to relieve his stress, and that as soon as it was over he was fine. He said that he did not expect Mr. Smith to pay the money as a result of the assault. He denied saying "Where is my money" or anything else during the assault. However, after the assault he said that Mr. Smith went towards Ms. Noksana's house, saying, "You're going to get it," to

Mr. Gainz, and Mr. Gainz admitted responding to that by saying, "I hope it's the money."

[12] It was very telling that, when asked about the evidence of Maria Noksana and whether he had any comment about it, Mr. Gainz paused, apparently giving the matter some thought, and responded, "It could have happened." In particular, he acknowledged that it was possible he could have hit Mr. Smith more than once.

[13] In cross-examination, Mr. Gainz repeated that he did not hit Mr. Smith in order to encourage him to repay the money. Indeed, when asked if he wanted to get paid on that day, he responded, "No, I did not." When asked what point he was trying to get across to Mr. Smith, in reference to his statement given to the police, he responded that it was to establish that Mr. Smith was a "dirt-bag and a slime ball."

[14] Defence counsel argued that the evidence establishes, or at least raises a reasonable doubt, that Mr. Gainz merely reacted out of anger in striking Mr. Smith, but that he had no intent to extort repayment of the debt. However, that submission does not fit with Mr. Gainz' own evidence, in his statement to the police, that when he initially pulled up to the scene, nearby where he lived, he was "patiently waiting" for some children in the way to slowly clear off the road in order for him to park his truck.

[15] Further, the evidence of Maria Noksana was clear and believable when she said she heard Mr. Gainz say, "Where is my money?" to Mr. Smith during the assault. Indeed, even Mr. Gainz seemed to acknowledge that it was possible he had said such a thing. In any event, given that Mr. Gainz was admittedly extremely upset at the time, it is understandable that he would not remember everything he said or did in the space of a few moments. The statement, "Where is my money?" is also consistent with telling the

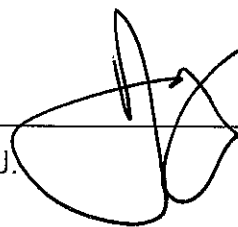
police officer immediately after the assault that if the courts were not going to do anything for him he had to take matters into his own hands. I infer from those statements that he was talking about his intention to collect the debt from Mr. Smith.

[16] Finally, in his statement given to the police officer at the detachment, within an hour of the assault, Mr. Gainz is clearly acknowledging that he kicked Mr. Smith in the head, "cause he owed me money," and that he just got "tired of waiting."

[17] In the result, although I found Mr. Gainz to be a remarkably candid witness in many respects, I do not believe his evidence about his intention at the time of the assault, nor does his evidence about his intention raise a reasonable doubt in my mind as to his guilt on the extortion charge.

[18] Finally, even though I do not believe Mr. Gainz on this point and I am not left in a reasonable doubt by that evidence, based on the evidence which I do accept, namely that of Maria Noksana and Constable Lightfoot, I am satisfied beyond a reasonable doubt of Mr. Gainz' guilt.

GOWER J.

A handwritten signature in black ink, consisting of several overlapping loops and a vertical stroke, positioned to the right of a horizontal line.