SUPREME COURT OF YUKON

Citation: *H.M.T.Q.* v. *Smarch,* 2010 YKSC 3 Date: 20091216
Docket S.C. No.: 09-01502
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

v.

LLOYD BENEDICT SMARCH

Before: Mr. Justice L.F. Gower

Appearances:
David McWhinnie Counsel for Crown
Robert Dick Counsel for Accused

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Lloyd Benedict Smarch stands charged with two counts, both arising on February 12, 2009, in Whitehorse. The first specifies an assault on Elizabeth Smith, using a weapon, specifically a native drumming stick, contrary to s. 267(a) of the *Criminal Code*. Both Crown and defence agree that there is no evidence that such a weapon was used and therefore I find Mr. Smarch not guilty of that count.

[2] On Count 2 it is alleged that Mr. Smarch did wound or endanger the life of Elizabeth Smith and thereby commit an aggravated assault on her, contrary to s. 268 of the *Criminal Code*. Once again, both counsel are agreed that there is no evidence that

Ms. Smith's life was endangered. Therefore, the only other way Mr. Smarch could be convicted of that count would be if there was evidence of wounding.

[3] On that point, Crown counsel referred me to a line of cases going back to 1902, which indicate that wounding requires a breaking of the skin. There being no such evidence in this case, the only other alternative for the Crown, or at least one of the other alternatives, would be to apply under s. 601(2) of the *Criminal Code* to amend the indictment to include "maiming" as an alternative manner of committing the offence of aggravated assault, there being some case authority that breaking a bone, particularly a broken leg, is sufficient to amount to maiming: See *R.* v. *Schultz* (1962), 133 C.C.C. 174 (Alta. C.A.). That would certainly solve the Crown's problem, as there is evidence that Ms. Smith's jaw was fractured in this case. However, in my view, it would be prejudicial to the accused to vary the indictment as requested by the Crown at this stage of the trial, since the evidence is now closed. I have discretion under s. 601(2) of the *Criminal Code* and I would decline to make that amendment in these circumstances.

[4] That is not the end of the matter, as I understand both counsel are in agreement that assault causing bodily harm under s. 267 of the *Criminal Code* would be an included offence in this instance to Count 2. So in that regard, I will review the evidence to see whether the Crown has met its onus in proving the charge of assault causing bodily harm beyond a reasonable doubt.

[5] Megan Johns, 23 years of age, testified that she received a phone call at about 2:00 a.m. from Ms. Smith indicating that Mr. Smarch had beaten her up and that she had a big, puffy eye. That, of course, is hearsay. However, Ms. Johns did see Ms. Smith

about 45 minutes to an hour after that phone call and observed her to have a puffy eye, although she could not see any other marks or injuries on her.

[6] Ms. Johns was also responsible for calling the police and when she saw Ms. Smith, she observed her to be drunk, but not very drunk.

[7] Constable Jade Stewart ultimately received the call through the RCMP Communications Centre and attended at the hospital to speak with Ms. Smith. He observed her to be highly intoxicated. He said she was slurring her speech but, to be fair, he also said she also had significant jaw pain. He smelled alcohol on her breath. He did not observe any motor functions because Ms. Smith was lying down on a hospital bed in the emergency ward. He also said that she seemed clear-headed and she had no problems with his questions and answers.

[8] Constable Stewart took the call of this complaint of an assault at about 12:13 a.m. on February 13, 2009. He also observed blood on the sweater of Ms. Smith at the hospital, but did not see where she bled from and could not say whether it was her blood.

[9] The complainant, Elizabeth Smith, testified that she had known the accused for about one or two years, and a short while prior to mid-February 2009 she moved into his apartment and was a roommate with him. They were not intimate partners, as I understand, and she was supposed to pay rent but ultimately did not. However, she did say that the two of them got along well and, prior to this incident on February 12 or 13, 2009, there was no evidence of any animosity between them.

[10] On February 12, 2009, Ms. Smith went to the accused's apartment. She observed that a friend of the accused was there, although initially she did not recall the friend's name. It was a male friend. She, herself, was very intoxicated and candidly admitted that she had been on a week-long drinking binge before that particular occasion; that she has a problem with drinking; and that she is periodically a user of intravenous morphine.

[11] Ms. Smith observed that the accused's friend was drinking hard alcohol, although she was not too sure if the accused himself was drinking at around that time. At one point she left the apartment to see her friend Sheila (phonetic), but then returned shortly after that by herself. She then admitted to injecting morphine in the apartment. Ultimately, Ms. Smith became aware that the accused and his friend were arguing with each other, although she did not remember for how long or how it ended. At one point she told them both to stop and they did not. They continued to argue. She told them to stop again, and she got involved herself and started arguing too, although she did not recall what they were arguing about.

[12] In direct examination, Ms. Smith said that she barely remembered what happened next, although she did mention that the accused pushed her out of the way. She said at that point she was trying to get them to stop arguing. She could not remember very much. The other fellow was still there at that point and the next thing she testified to in direct examination was remembering coming to at the hospital. She testified that she was sore on her back, on her leg, her jaw and her head, and that she had a cracked jaw.

[13] She spoke to the police at the hospital, but did not remember much about that. Much later, she remembered giving a statement to the police in June 2009. She said she was hungover when she gave the statement.

[14] Because she was having some difficulty in remembering the events of the early morning of February 13, 2009, she was shown a copy of the second statement from June and had an opportunity to review it both before court and in court. After being shown the statement she said that she remembered being kicked by the accused, with his cast, in the jaw.

[15] There does not seem to be any disagreement between Crown and defence that the accused, at the time, had a broken leg, was wearing a cast, and was using crutches.

[16] Ms. Smith did not remember the accused's friend helping her out of the apartment. There were a number of things that were mentioned in the June 2009 statement which she did not remember in her testimony at this trial. She said that nothing happened in terms of fighting between her and the accused's friend.

[17] I found it noteworthy that one thing that Ms. Smith did remember was that the accused was complaining about someone hurting his eye at about the time that all of the events were occurring, although she did not see anyone hit the accused in the eye.

[18] She said that since this incident she has been blocking a lot of this out of her memory because she does not want to remember it.

[19] Ms. Smith was shown pictures of blood in the apartment, which blood ultimately was proven to be hers, particularly on the cupboards and the fridge in the kitchen, but she had no explanation for how that blood came to be in those locations.

[20] Ms. Smith was cross-examined vigorously about the fact that she really had no memory of this incident whatsoever and was only testifying about things that were in the statement that she gave to the police in June of 2009, but that she actually had no direct memory of the matters referred to in that statement. It was interesting to me that she responded to that suggestion by saying, “I remember bits and pieces; being pushed down; being kicked in the jaw.”

[21] The accused testified on his own behalf. He gave evidence which was consistent with that of Ms. Smith in terms of the comings and goings of Ms. Smith and her friend, Sheila, into the accused’s apartment that evening. He identified the friend who was there with them as a person named Calvin (phonetic). He had been introduced to Calvin by another friend in the apartment building by the name of Joe. He said that they were all drinking, that being, he, Calvin and Ms. Smith. Calvin asked if Ms. Smith was his girlfriend. He said no. Calvin then asked how she was getting into the apartment and the accused explained to Calvin that she had her own key because she was staying there. The accused testified that Calvin did not believe him and started getting mad, and that at one point he grabbed the accused and slammed his head on the table. At or about that point the accused said that Ms. Smith came over and that Calvin had backhanded Ms. Smith and she had ended up on the floor.

[22] In addition to having a broken leg, a cast and using crutches, there did not seem to be any dispute about the fact that the accused is blind in his left eye. The accused said that he might have hit Ms. Smith because he could not really see. He just wanted to get out of there. Later, he said he must have kicked her trying to get out of there while she was on the floor. Still later, in his direct evidence, he said that after he had his head slammed on the table by Calvin, Ms. Smith came running into the kitchen. Calvin had just hit her and she went flying. At that point he tried to get away from Calvin and out of the apartment, and that is when he said he must have kicked her, but he said it was not intentional. He said he remembered getting a cut around his right eye when his head was slammed on the table. He tendered a photograph of this injury, which was entered as Exhibit 9. He said this was taken the next day, which would have been February 14th. In cross-examination he said that the photograph was taken at the doctor's office and that he attended at the doctor's office on the recommendation of a relative by the name of Jolene (phonetic).

[23] Immediately after the incident in his apartment he said that he attended to his niece's residence, Christine (phonetic) Smarch. There was a party going on there. He continued to drink. His injury was not hurting that badly. He became intoxicated and spent the night there. The following day he went to visit his sister Jolene, who arranged for him to attend at the doctor's office where the photograph was taken. The photograph bears a date stamp of February 17, 2009. I will come back to that in a moment.

[24] When asked about what he was doing between February 13th and 16th, the accused said that he was drinking. He was also hiding out from the police. He heard the

police were looking for him in relation to the alleged assault and was hiding out because there was a warrant out for his arrest for a prior failure to appear.

[25] Mr. Smarch did not call either Christine or Jolene as witnesses. He admitted in cross-examination that his friend Joe could have told him more about the other individual named Calvin, whose last name remains unknown, but he conceded that he did not pursue that line of inquiry.

[26] I have to instruct myself in these circumstances, where the accused has testified, on the well-known principles from the case of *R.* v. *W.(D).,* [1991] 1 S.C.R. 742, relating to the issue of the accused's credibility. If I believe the evidence of the accused, then, of course, I must acquit. The accused's evidence in this case is that he did not intentionally push or strike Ms. Smith, as she testified, and that if he did kick her in the head with his cast, that must have been accidental and therefore unintentional. Secondly, even if I do not believe the evidence of the accused, if I am left in a reasonable doubt by it, then I must acquit. And thirdly, if I do not believe and am not left in a reasonable doubt by the accused's evidence, I must go onto consider whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt of his guilt. I am not sure where I end up on that spectrum, but I think it is somewhere between the second and third step in *W.(D).*

[27] I am troubled by the fact that the date of the photograph tendered by the accused is some four days after the incident, when the accused says that the photograph was taken the very next day. The accused's explanation for that is that it could have been stamped on the date that it was developed, as opposed to the date that it was taken. I

have no evidence one way or the other on that. I suppose where that leaves me is with perhaps three alternatives. One is that the accused is simply lying when he says that he had the photograph taken the next day. The second alternative is that he is mistaken and that it could not have been taken the next day, but because he was drinking between the 13th and the 16th, he lost track of time and got the day wrong when he finally ended up going to the doctor's office. The third alternative is that the accused may be right in that the photograph was developed on the 17th, but, as I say, I do not have any evidence one way or the other about that.

[28] On the other hand, the evidence of the injury to the accused's right eye is consistent with Ms. Smith's evidence that the accused was complaining about someone hitting his eye. This was presumably right around the time when they were arguing and right around the time when Ms. Smith was pushed and ultimately kicked in the head.

[29] The other problem I have with this case is that the evidence of the complainant is less than reliable. She gave very minimal evidence implicating the accused in her direct examination initially. She simply indicated that all he did was push her out of the way, while she was trying to get him and the friend to stop arguing, and that she then remembered nothing further until waking up in the hospital. It was only after having her memory refreshed by being shown the second statement, and with some prodding and leading by the Crown, that she remembered being kicked in the jaw by the accused with his cast. At the end of her cross-examination, when it was suggested to her that she really had no memory at all, she said that she remembered bits and pieces, being pushed down and being kicked in the jaw. I suppose it is reasonable to conclude that the one that did the kicking had to be the accused because there is no real dispute

about that in the evidence. But, in terms of being pushed down, it is conceivable that she may have entered into the fray of an argument between the accused and his friend and been pushed down by one or the other, and then, as the accused was trying to make his way out, was accidentally kicked in the head by the accused with his cast.

[30] Whether I am left with a reasonable doubt by the evidence of the accused, even though I do not believe it necessarily, or whether I am left in a reasonable doubt because of the unreliability of the evidence of the complainant, does not make much difference, because, at the end of the day what I am left with is a reasonable doubt. I therefore find the accused not guilty of Count 2.

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GOWER J.