

SUPREME COURT OF YUKON

Citation: *HMTQ v. Barry*, 2011 YKSC 39

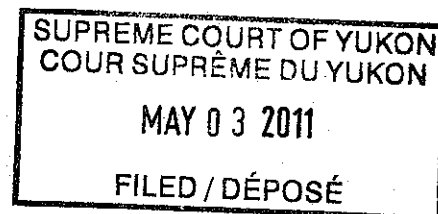
Date: 20110421
Docket S.C. No.: 10-01506
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

DARRYL WADE BARRY



Before: Mr. Justice L.F. Gower

Appearances:
Ludovic Gouaillier
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a somewhat unusual case for reasons which I will come to briefly, but let me start with the circumstances. Mr. Barry pled guilty in January of this year to a charge of common assault on Shannon D'Orsay in Whitehorse on October 11, 2009, about a year and a half ago.

[2] The facts of the offence are that Mr. Barry and Ms. D'Orsay had travelled to the Yukon for the purpose of Mr. Barry visiting his children here. On October 10th, they went to a local tavern, spent some time there, alcohol was consumed, and there was some dancing. Mr. Barry was observed to be dancing with some other ladies in the tavern. This apparently upset Ms. D'Orsay, and there was a brief argument in the

tavern. Ms. D'Orsay said she was leaving; Mr. Barry walked her back to their hotel room in downtown Whitehorse. Along the way they argued quite vociferously. Defence counsel referred to them as "screaming at each other." They arrived at the hotel room. The screaming and arguing continued. They began to push and shove each other, but there were no blows inflicted.

[3] Mr. Barry left the hotel room and went outside of the hotel for an unspecified period of time, presumably to defuse the situation, and with the hope that matters and tempers would cool. However, when he returned the screaming continued on both sides. At some point, Mr. Barry noticed that a pierced earring on one of his ears was almost torn out, and there was some blood. He claims that Ms. D'Orsay threw some cold water on him. He responded by getting up and the pushing continued. Mr. Barry threw Ms. D'Orsay onto a bed, struck her a number of times on various parts of her body and laid his arm across her throat. The blows caused some injuries to Ms. D'Orsay, in particular, a noticeably deep purple bruise to one of her arms. Mr. Barry then left the hotel room.

[4] The RCMP attended about 1:20 a.m. on October 11, 2009. They noticed that Ms. D'Orsay also had a bloody nose, and that there was a small cut associated with that on her nose. Neither Crown nor defence can be sure what caused that cut. Because the police could not locate Mr. Barry at that time, a warrant for his arrest was issued. However, the next morning, he returned, as I understand it, to the hotel room. He and Ms. D'Orsay were able to deal with each other on civil terms, and arranged to travel back to Fort McMurray together. It was not until sometime in December 2009 that Mr.

Barry was arrested in Fort McMurray on the outstanding Canada-wide warrant. He tells me that he was held in custody overnight and released the following morning.

[5] Although this guilty plea comes after the preliminary inquiry, there are a couple of points relating to the plea which are significant: Firstly, the second count on the indictment is a charge of attempting to render Ms. D'Orsay unconscious, contrary to s. 246(a) of the *Criminal Code*. That is a straight indictable offence by law, and explains why the common assault also proceeded indictably. The charge under s. 246(a) will be stayed by the Crown at the conclusion of these proceedings. But for that offence, the Crown tells me that the matter of the assault would likely have simply proceeded summarily.

[6] The second point of significance here is that current Crown counsel was not assigned the file until fairly recent days or weeks. Had that happened earlier, and an opportunity been given for defence and Crown to discuss the matter at some length, it seems very likely that this matter would have been resolved much sooner by way of a guilty plea, as opposed to having to proceed to a preliminary inquiry. So, there is significance to the guilty plea and the acceptance of responsibility by Mr. Barry, and, based on the submissions from counsel, the delay in that guilty plea being entered is not the fault of Mr. Barry.

[7] It is also important to note here that Mr. Barry has a positive pre-sentence report. He is 33 years old, without any criminal record. Since he was arrested and released on this matter in December of 2009, there have been no issues at all regarding any breach of his release conditions, even though I understand that Ms. D'Orsay continues to reside in Fort McMurray, where Mr. Barry lives.

[8] Mr. Barry was born and raised in Cape Breton, Nova Scotia. He comes from a family of seven other siblings and has an excellent relationship with his mother and an improving relationship with his father. He left home when he was 18 years old, after graduating from high school, and moved out to Alberta in search of employment. Prior to that, as I understand it, he had completed a ten-month machinist program at the Nova Scotia Community College, and then later in life, between 1999 and 2004, he completed his journeyman electrical certification in Alberta.

[9] It would appear that he has been employed more or less consistently since he was 19 years old, in positions including a welder-pipefitter, and later as an electrician. He is currently employed with a company in Fort McMurray called Nexen Inc. He has had that employment since November of 2010. His supervisor was interviewed and described Mr. Barry as an excellent worker.

[10] Mr. Barry has two children from a previous relationship residing in Whitehorse, aged 11 and nine, and his former common-law from that relationship continues to get along well with him, and they appear to be continuing as friends.

[11] Since this incident, the relationship with Ms. D'Orsay terminated, and, for the past year or so, Mr. Barry has been in a relationship with another woman by the name of Lara Campbell. They have been living together in the same residence for the last seven months, but they have known each other for the last four years. She was also interviewed by the Probation Officer and said that Mr. Barry has never been aggressive with her, and she feels that he does not have any issues that need addressing, and I take that to be in relation to domestic violence.

[12] Although alcohol was involved in the offence, Mr. Barry denies having an alcohol problem. He says that he started changing his ways about two years ago, and I take that to be largely as a result of this offence. He has separated himself from some of his drinking acquaintances and he says that his days of going to the bar are over. He has had some intermittent drug use since he was a teenager, but apparently discontinued that for the last two years at least. A number of risk assessment instruments were administered by the Probation Officer and they all indicate that Mr. Barry has no problems with respect to alcohol abuse or drug abuse, and that his risk of reoffending is at the very low range.

[13] Mr. Barry indicated to the Probation Officer that this type of behaviour is not something within his value system. It is not something that he condones and he fully recognizes that it should not have happened, that he lost control that evening, and that he constantly thinks about that night and wishes that he made the decision to stay away from the hotel room. I accept that as a genuine statement of his feelings in the matter.

[14] Now, the injuries to Ms. D'Orsay certainly cannot be ignored. A Victim Impact Statement has been filed, and she talks in that statement of the profound effect that this incident has had upon her. The injuries, and I am principally talking about the bruising here, took some significant time to heal. She says that she was diagnosed with Post-Traumatic Stress Syndrome as a result and had to undertake some counselling. She says it took her months to get through the emotional trauma inflicted by Mr. Barry. She says:

"It's quite difficult to articulate just how profoundly Darryl has affected my life. I've never been able to understand how he

could lose control to such an extent that he could damage the one he'd claimed to love. And truly, I suppose I never will. I just hope that out all of all of this, he finds calmness and contentment. Because despite everything he has done, I know I have."

I am pleased to hear that despite the trauma and the difficulty that Ms. D'Orsay has experienced as a result of this offence, she seems to have found her way through it to a point of peace.

[15] There are a number of mitigating circumstances in this case which are of significance, even though the offence is a serious one and the courts do routinely look upon this type of domestic violence with great concern. The mitigating circumstances include the guilty plea and acceptance of responsibility; the absence of any criminal record; the fact that in addition to the absence of any criminal record, this seems to be genuinely out of character for Mr. Barry; the fact that he has a solid employment history and a stable family situation; the fact that he has a very low risk of reoffending; the fact that although alcohol was involved, he does not appear to have any ongoing substance abuse problem; and the fact that he is willing to undertake whatever counselling may be recommended by his Probation Officer, if probation is ordered.

[16] Counsel have explained to me that ordinarily this would have been an appropriate case for referral to the Domestic Violence Treatment Option court in the Territorial Court, but for the fact that Mr. Barry resides and is steadily employed in a good position in Fort McMurray. However, as I say, he has indicated a willingness to pursue and undertake any counselling that may be available to him in Fort McMurray, if directed. The Probation Officer who prepared the pre-sentence report tells me that there

is a 16-week program that he is aware of in Fort McMurray. He is not aware of whether there is a low intensity program, such as there is in Whitehorse, for domestic violence options. If there is not, it may be that, if recommended, Mr. Barry will have to complete the entire 16-week program, which is a significant undertaking.

[17] Now, what is somewhat unusual about this case is that Crown initially indicated to me that the submissions he was making were in the nature of a joint submission, and that is for suspending the passing of sentence and placing the offender on probation for a period of one year under the conditions recommended in the pre-sentence report. However, after some discussion about what the likely disposition would have been had Mr. Barry been able to complete the DVTO program here in Whitehorse, which he was not able to do, through no fault of his own, Crown conceded that a conditional discharge with probation would have been a likely disposition in that court.

[18] Crown counsel very fairly concedes that, even in these circumstances, this is not a classic joint submission in the sense that defence counsel would be precluded from arguing that a conditional discharge would be appropriate. Therefore, Crown counsel submits that it is open for me to consider such a disposition, notwithstanding the initial "joint" request for a suspended sentence.

[19] The difference between the two dispositions is, of course, significant. With a suspended sentence, there is a conviction entered against the offender, whereas with a conditional discharge, assuming that the period of probation is completed without any difficulty, then the discharge becomes absolute and the accused is deemed not to have been convicted under the relevant provision in the *Criminal Code*. That is important, at

least within Canada, because it means that the accused effectively, if the discharge becomes absolute, does not have a criminal record in the sense that a criminal record usually means a record of criminal conviction. Whether that will assist Mr. Barry in other respects, such as crossing the Canadian border into other countries, I do not know. That is an issue for him because he continues to visit his children in Whitehorse on a regular basis, and, of course, the Yukon is adjacent to Alaska, and there is the likelihood of vacations across the Alaskan border and vacations to other warmer climates, where a criminal record could be an impediment for him. But, it is not just the border crossing that is the issue here. It is the question of what, in all of the circumstances, is the most appropriate disposition, taking into account the principles of sentencing, which include deterrence and denunciation, as well as the prospects of Mr. Barry rehabilitating and continuing to be a productive member of society and a good father.

[20] It strikes me, in all of those circumstances, that a conditional discharge is the appropriate disposition. It is not a slap on the wrist. It will be a period of probation for one year. That probation will include an abstention from drugs or alcohol and a requirement to provide samples for analysis. It will include a condition that Mr. Barry not attend any bar or tavern or off-sales, and to take the counselling that may be recommended, which could well end up including the 16-week program, which would be a very significant commitment of time for him. So, if Mr. Barry is able to complete and comply with those conditions, and the others which I will come to in a moment, then he will indeed have earned his conditional discharge, or his absolute discharge, which will be the case if the period of probation is completed satisfactorily.

[21] Thus, I am going to conditionally discharge Mr. Barry and place him on a probation order for a period of one year. The conditions of the probation will specifically be as follows:

1. Keep the peace and be of good behaviour; and appear before the Court when required to do so by the Court;
2. Report to a Probation Officer within two working days and thereafter when, and in the manner directed by your Probation Officer;
3. Notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;
4. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;
5. Provide a sample of your breath for the purposes of analysis upon demand by a Peace Officer who has reason to believe that you may have failed to comply with this condition;
6. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
7. Take such alcohol and/or drug assessment, counselling or programming as directed by your Probation Officer;
8. Take such other assessment, counselling, and programming as directed by your Supervisor, including domestic violence programming;
9. Have no contact directly or indirectly or communication in any way with

Shannon D'Orsay, except with the prior written permission of your Probation Officer, and in consultation with Victim Services and Family and Children Services;

10. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this order.

[22] That completes the terms of your probation. Crown has not asked for and I will not make a DNA order or a firearms order in this case. However, there is the matter of the victim crime surcharge, and I need some help on what that is in these circumstances.

[23] MR. GOUAILLIER: The victim fine surcharge, I believe Crown I think proceeded by indictment, it's \$100.

[24] THE COURT: What is the section number again? I can never remember.

[25] MR. GOUAILLIER: It's not in the *Criminal Code*, it's in the -- it's territorial legislation.

[26] THE COURT: Mr. Roothman, do you know?

[27] MR. ROTHMAN: It's \$100, but I saw it in the *Criminal Code*.

[28] THE COURT: Yes, I have too and I am just --

[29] MR. GOUAILLIER: Oh, is it?

[30] MR. ROTHMAN: Yes, I saw it last night; I'll just look. Yeah, 737 -- 737(2) if no -- yeah, it's subsection (b): if no fine is imposed on the offender for the offence.

[31] THE COURT: Okay. So that justifies a \$100 victim surcharge, and when will that be payable?

[32] MR. ROTHMAN: Forthwith.

[33] THE COURT: Forthwith. All right. Mr. Barry, you have been given a significant break. I hope you take full advantage of that, sir.

[34] THE ACCUSED: Yes, Your Honour.

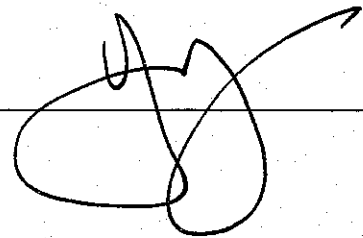
[35] THE COURT: I wish you all the best.

[36] THE ACCUSED: Thank you.

[37] MR. GOUAILLIER: And yes, there will be a stay of proceedings on the remaining count.

[38] THE COURT: Okay. Thank you.

GOWER J.

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