Date: 20010531
Docket: C.A. 00-YU442
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

ORAL REASONS FOR JUDGMENT:

CORAM: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie
The Honourable Madam Justice Proudfoot

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

NORMAN FRANCIS TAYLOR

APPELLANT

DAVID McWHINNIE — Appearing for the Respondent

KIMBERLY ELDRED — Appearing for the Appellant

REASONS FOR JUDGMENT

[1] RYAN J.A. (Oral): On October 31, 2000, the appellant was tried in Territorial Court in Whitehorse on an indictment charging him with one count of assault causing bodily harm, one count of uttering a threat, one count of unlawful

confinement, one count of driving while disqualified, and one count of breaching an order of probation. The appellant was acquitted of the unlawful confinement. He was acquitted of assault causing bodily harm but convicted of the lesser included offence of assault.

[2] The appellant was sentenced to a year imprisonment to be followed by a mandatory ten-year firearms prohibition pursuant to s. 109 of the *Criminal Code*.

[3] The appellant appeals his conviction for assault. He seeks leave to appeal the length of his sentence, and he appeals the imposition of the firearms prohibition.

[4] The events which led to the charges occurred on September 17, 2000. The complainant, Ms. Savage, the girlfriend of the appellant, was staying overnight with the appellant because she was moving out of her home, her belongings were packed up, and she had no other place to stay. She said that at some point in the evening she became annoyed with loud stereo music being played at the appellant's home and decided to leave.

[5] The theory of the Crown was that when the complainant was about to leave the appellant took her car keys from her to prevent her departure. The complainant demanded her keys back, and during the argument knocked a cigarette from the appellant's mouth. The appellant responded by punching the complainant in the

face, which split her lip and caused damage to her nose. Initially, the appellant tried to help the complainant staunch the flow of blood from her injuries, but soon afterward, to prevent her from leaving, continued to hit her about the head with his hand, a paper towel rack and a moose call. He placed a telephone cord around her neck, and twice dragged her down his driveway after she tried to escape on another occasion. At some point during all of this, the appellant told the complainant, "Go ahead and call the cops. You will be dead before they get here."

[6] The theory of the defence was that the appellant punched the complainant in the face as a reflex action when he was taken by surprise after she knocked the cigarette from his mouth. He denied detaining the complainant or preventing her departure. He said that he would not allow the complainant to drive her vehicle because she had been drinking. He said that he offered her the opportunity to call someone to pick her up and told her on many occasions that she could leave, but not in her truck.

[7] The trial judge had a reasonable doubt with respect to the assault causing bodily harm. He accepted, or at least had a reasonable doubt, that the appellants's actions in striking the complainant the first time were part of a reflex action or involuntary action. The trial judge also had a doubt that the appellant intended to confine the complainant. He said:

> I have some major concerns...with...Count 3, that being the charge of confinement. The evidence is completely conflicting in this case. Ms. Savage does agree, on one hand, that she was offered the phone on a number of occasions; she did not use it. She said that was because she was in fear. She indicated that she did not try to go out and use the truck because she did not think she would get to it. There were occasions when, in my view, particularly when the accused was sleeping, she may have gone. The accused has testified in his evidence that he did not intend to confine her, save and except with regard to the issue of driving. I am finding that that is kind of hard to believe on the part of the accused, but with regard to whether or not his total conduct amounted to confinement in meaning of the law here, I would find that his evidence raises a reasonable doubt. I would therefore find him not guilty on that charge.

[8] In convicting the appellant of assault, the trial judge said this:

> I am, however, finding him guilty of common assault, and that is based on the matters that happened after this event. While I do not accept the fact that he intended to cause the damage to Ms. Savage, in the circumstances, he clearly committed an assault by slapping her on the head, cuffing her about the head, hitting her with a paper roll, hitting her with the moose call. That is an assault that has been established in the evidence, and I am finding him guilty of common assault with respect to Count 1.

[9] Counsel are agreed that Mr. Justice Martin correctly stated the law in *Regina v. Ovcaric* (1973), 11 C.C.C. (2d) 565 (O.C.A.), when he said this a page 568:

> An included offence within the meaning of [the section] is a part of the offence charged in the indictment and in order to permit a jury or Court to convict of an included offence, two conditions must be present. First the offence charged must contain all the essential elements of the included offence and secondly, the offence charged in the indictment and the included offence must

both refer to the same transaction.

[10] Since the indictment charged assault causing bodily harm, the first condition has been met. The difficulty arises with the second condition. The view of the evidence taken by the trial judge does not support the Crown's theory that the appellant's actions towards the complainant involved one continuous assaultive transaction designed to prevent the complainant from leaving the appellant's home. The trial judge doubted that the appellant voluntarily punched the complainant in the face and doubted that he intended to prevent her leaving. The assaults which occurred after the initial blow occurred after the appellant assisted the complainant with her injuries and must be seen as a separate transaction.

[11] In my view, the evidence as found by the trial judge did not support a conviction for an included offence. The appellant was not charged separately with the later assaults. In my view, the appeal must be allowed.

[12] The Crown attempted to support the conviction on another basis by suggesting that the trial judge had amended the unlawful confinement count to conform with the evidence, that is, by particularizing the unlawful confinement to one achieved by assaults and threats, and convicting of the lesser included offence of assault. The reading of the reasons for judgment does not support this conclusion.

[13] Finally, I am not persuaded, in spite of Mr. McWhinnie's able argument, that

this Court, pursuant to s. 683(1)(g) and the decision of *Regina v. Irwin* (1998) 123 C.C.C. (3d) 316 (O.C.A.), should amend the unlawful confinement count to include a count of assault. I am not persuaded that this could be done without some prejudice to the appellant, who did not give evidence in chief, nor was he cross-examined, on the assaults now said to constitute the offence.

[14] I would therefore allow the appeal and set aside the conviction for assault.

[15] As a result, it is unnecessary to deal with the length of the sentence. We must, however, deal with the firearms prohibition made under s. 109 of the *Code*. Mr. McWhinnie has conceded that a mandatory order cannot be made under s. 109 because that requires a conviction for an offence punishable by ten years or more. If such an order is to be made, and, examining the record of the appellant, I have no doubt that serious consideration must be given to one, the order must be made under s. 110 of the *Code*. Since evidence should be called on the issue, in accordance with the submissions of counsel, I would remit the matter to the Territorial Court for consideration.

[16] To sum up, I would allow the appeal and set aside the conviction for assault, and I would grant leave on the sentence appeal and remit the question of the firearms prohibition to the Territorial Court for consideration.

[17] MACKENZIE J.A.: I agree.

[18] PROUDFOOT J.A.: I agree.

[19] RYAN J.A.: The appeal is allowed under the terms that I have just set out.

[20] MR. McWHINNIE: Thank you, My Ladies, My Lord.

[21] MS. ELDRED: Thank you, My Ladies, My Lord.

"RYAN J.A."