IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Davies,* 2006 YKSC 32

Date: 20060512
Docket No.: S.C. No. 05-AP003
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And:

KENNETH GORDON DAVIES

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Lynn MacDiarmid — Counsel for Appellant
Michael Cozens — Counsel for Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Kenneth Gordon Davies from his conviction for assault causing bodily harm arising September 26, 2004, for which he was sentenced to 60 days in jail and ordered to provide a DNA sample. The learned trial judge found that the appellant had struck a blow to the face of Garth William Taylor with sufficient force to dislodge his two front (upper incisors) teeth. The issue is whether the trial judge misapprehended the evidence by either failing to consider relevant evidence or failing to give proper effect to the evidence. If so, the verdict would be unreasonable and the appeal would be allowed.

FACTS

[2] Many of the background facts were uncontested. The only witnesses who testified were Mr. Taylor and the appellant. Mr. Taylor was driving a car in the City of Whitehorse, when he stopped to talk to a female acquaintance, named Anne. The appellant was Anne's partner. He approached Mr. Taylor's car in a very agitated state because he thought that Mr. Taylor was involved with drugs and was not the sort of person that Anne should be associating with, particularly as she was pregnant at the time. The appellant admitted that he lost his cool and was being both menacing and verbally aggressive as he approached the vehicle. When the appellant got to the vehicle, he confronted Mr. Taylor. It was at that point that the stories diverged.

THE CONFLICTING EVIDENCE

[3] Mr. Taylor testified that he started to open his car door and put one leg out when the appellant approached. He said the appellant then punched him in the face through the open driver's door, testifying as follows:

> "… He came over, I was just getting out of the car, punched me in the face, my teeth go flying, and my leg got stuck in the door on something; it all happened so fast …[1]
>
> … I think just once, maybe twice, but it wasn't like he was pummelling; it was just whack and then when you're hit …[2]
>
> He didn't reach through the window; he hit me through the open door. The door was already open and I had my leg out, and he punched me and then slammed the door on my leg. …"[3]

[1] Trial transcript, p. 5, lines 21-24.
[2] Trial transcript, p. 6, lines 9-11.
[3] Trial transcript, p. 19, lines 23-27.

Mr. Taylor also testified that the two teeth ended up sticking on to the sweater of a passenger in the back seat.[4] Although he said his teeth, neck and leg were sore, there was no evidence from Mr. Taylor of any particular pain directly associated with the dislodging of his teeth; nor was there any evidence of any bleeding or the need for Mr. Taylor to receive immediate medical or dental attention. He was asked about whether he later had the teeth replaced and he replied in the negative. When asked whether he looked into doing so, he answered as follows:

> "A: Yeah, $1,500. My real teeth, I don't know what you call it, you grind them to points and then they stick them on and they put – and these two are like together.
>
> Q: Okay.
> A: and these two were together and the middle part, so I think they're crowns or caps, I'm not sure what they're called. I've been down in Vancouver." (emphasis added) [5]

[4] The appellant testified that when he approached the vehicle to persuade Anne to move away, Mr. Taylor told him to mind his own business. The appellant then told Mr. Taylor that he did not appreciate him trying to coax Anne into doing drugs and that she was pregnant. At that point, the appellant admitted losing his cool and told Mr. Taylor to stay away from Anne. The appellant said that Mr. Taylor replied by threatening to get "some boys or some clan" after him. He testified that he tried to open the driver's door, but Mr. Taylor pulled the door closed. The appellant then said that he reached in, through the open driver's side window, with his left hand and attempted to grab what he

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[4] Trial transcript, p. 4, lines 22-25.
[5] Trial transcript, p. 9, lines 1-8.

thought was a crack pipe in Mr. Taylor's hand. At the time, the appellant was wearing leather gloves. He said it felt as though Mr. Taylor had bit his left hand and he, the appellant, responded by pulling his hand away. He noticed that something fell on the floor of the vehicle, but he could not tell what it was. He said that afterward he noted the imprint of Mr. Taylor's teeth on the skin of his left hand. He did not notice Mr. Taylor's teeth coming out of his mouth. He denied punching Mr. Taylor and testified as follows:

> ". . . I went towards the vehicle, the window was down and I tried to open the door. He pulled the door closed, I reached in with my left hand and I grabbed a hold of whatever was in his hand and it felt as though he had bit my hand. I pulled my hand away . . ." [6]
>
> "I had gotten to the vehicle and was reaching for his hand. His hands were around the steering wheel, between the steering wheel and his face. That's when I grabbed the one hand and the next thing I knew, I wasn't sure what had happened, but afterwards I -- it was a small imprint of the teeth on my skin. I had the glove -- my gloves on, which probably protected me from any punctures or any injuries." [7]
>
> . . .
>
> "I didn't mean to strike him, if I did strike him. As I mentioned, I was reaching in for what I assumed to be, whatever was in his hand, I believed it to be a [crack] pipe. When I reached in, I thought it was his teeth on my hand . . ." [8]

ANALYSIS

[5] The trial judge found that the appellant's evidence might reasonably have been true in every particular, except one. He could not see how Mr. Taylor's teeth could have been knocked out, if the incident occurred as Mr. Davies described. He said at para. 7 of his reasons (2005 YKTC 55):

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[6] Trial transcript, p. 24, lines 13-17.
[7] Trial transcript, p. 25, lines 19-27.
[8] Trial transcript, p. 27, lines 15-19.

> "It seems to me that the normal test of what might reasonably be true is met by Mr. Davies' evidence in every particular except one, and that is that I cannot see how, if the incident occurred as Mr. Davies described, that there would have been a blow of sufficient force to have knocked out two of Mr. Taylor's teeth. So to the extent that we have external and incontrovertible evidence, that being the two missing teeth, it seems to me that that evidence supports the version of Mr. Taylor and tells the lie to the version of Mr. Davies."

[6] In *R.* v. *Bridgeman*, [2005] O.J. No. 5334, G. Roccamo J., of the Ontario Superior Court of Justice, at para. 22, dealt with the standard of review on a summary conviction appeal where the ground for appeal is, as here, that the conviction is unreasonable. Roccamo J. directed that the appellate court may only re-examine and re-weigh the evidence for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion. If it is, the appellate court is not to substitute its view for that of the trial judge, irrespective of any doubts it may harbour. However, the court, at para. 25, also stated that a "misapprehension of the evidence" may result from a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence. Finally, Roccamo J. said, at para. 28, that where errors arise as to the substance of the material parts of the evidence and those errors play an essential part in the reasoning process which resulted in the conviction, this renders a trial unfair and gives rise to a miscarriage of justice. The result, in most cases, is that the conviction is quashed and a new trial is ordered.

[7] In *R.* v. *Kootney* (1998), 127 C.C.C. (3d) 371, Fradsham J., of the Alberta Provincial Court, referred at para. 9, to situations where inferences of fact are relied upon to prove an essential element of the offence charged. He concluded that it is

necessary for the Crown to prove such an inferred fact beyond a reasonable doubt and that “the proposed inference must be the only reasonable inference” to be drawn from the other proven facts.

[8] With great respect to the learned trial judge, and recognizing that hindsight is always 20/20, I am of the view that his conclusion was not the only reasonable inference to be drawn from the proven facts. I have come to that view for the following reasons.

[9] First, the above reference to Mr. Taylor’s evidence about his dental work supports the inference that his two upper middle teeth were already crowned or capped at the time of this incident. In describing the dental work, he said, “These two were together”, presumably being a reference to the two crowns or caps, but in the past tense. He also referred to having “been down in Vancouver”, again in the past tense. Taking that passage of his evidence as a whole, Mr. Taylor seems to be describing the crowns or caps he already had received and installed in his upper plate. This is an important piece of evidence, because I logically infer that the structural integrity of Mr. Taylor’s two front teeth would not have been as sound if they were indeed crowns or caps, as compared with real, unaltered teeth.

[10] Second, there was no evidence of any particular pain resulting from the two teeth being dislodged, or any bleeding or other associated trauma, requiring immediate medical or dental attention. That is consistent with the dislodged teeth having been crowns or caps. Further, it is inconsistent with the teeth having been broken off. Mr. Taylor referred to “my real teeth“ and then said “you grind them to points”. This implies that he had the remnants of his two teeth still in place. However, if they were to be ground down to points in the future, then they would have had to be broken off by the

appellant's actions, as opposed to being knocked out. Thus, I again conclude that the more likely explanation for this evidence is that Mr. Taylor had received his crowns or caps prior to this incident.

[11] Third, there was evidence from the appellant that when he reached into the vehicle for Mr. Taylor's hand, Mr. Taylor's hands were between the steering wheel and his face. Thus, Mr. Taylor's hands must have been relatively close to his mouth. Further, upon reaching for Mr. Taylor's hand, the appellant thought Mr. Taylor had bitten his gloved hand. He immediately reacted by removing his hand quickly. It is noteworthy here that Mr. Taylor described his teeth as going "flying" and ending up on the sweater of his back seat passenger. That seems somewhat inconsistent with the notion of the two teeth having been knocked out by a punch to the mouth. In that circumstance, one would expect the teeth to be knocked into the mouth or, at least, dropping downwards, rather than flying outwards and backwards. On the other hand, the trajectory of the flying teeth would not be inconsistent with the notion of Mr. Taylor having bitten the appellant's hand, the appellant immediately tearing his hand away and, in the course of doing so, pulling the two front teeth out with it, especially, if they were only crowns or caps. Further, assuming that the appellant removed his hand with an upward twist or jerk of sufficient force and quickness, his version also helps explain Mr. Taylor's evidence that the teeth ended up coming outwards and backwards.

[12] Of course, the appellant's version is still problematic in that he has technically admitted to an assault by initially grabbing, or attempting to grab, a perceived object in Mr. Taylor's hand, which was an intentional application of force without Mr. Taylor's consent. At the very least, such an action could be construed as an attempt or threat, by

an act or gesture to apply force to Mr. Taylor, which would also be an assault. Further, given that he was reaching in towards the area of Mr. Taylor's face, as the latter's hands were between his face and the steering wheel, in an agitated state, having "lost his cool", it is not inconceivable that his gloved hand may unintentionally or incidentally have made contact with Mr. Taylor's mouth. However, even here, the doctrine of transferred intent would still deem that to be an assault. Thus, Mr. Taylor was entitled to use reasonable force to defend himself. Finally, even if the appellant was simply and quickly removing his hand in a reactive fashion to the alleged bite, he nevertheless could be culpable for having dislodged the two teeth in the process, unless Mr. Taylor used more force than necessary to defend himself.

[13] In short, the appellant's version could still support a finding of guilt for assault causing bodily harm. However, a finding of guilt based on the appellant's evidence, rather than that of Mr. Taylor, could well have resulted in a more lenient sentence than one of 60 days in jail, plus a DNA order.

[14] At the hearing of this appeal, Crown counsel also argued that there was evidence of assault causing bodily harm by virtue of the appellant having slammed the driver's door on Mr. Taylor's leg, causing Mr. Taylor to limp and suffer "a big bruise" for about a month. However, I reject that argument because of the trial judge's conclusion that he accepted the appellant's evidence "in every particular except one", which specifically related to the amount of force applied by the appellant to Mr. Taylor's mouth. In reading his reasons as a whole, I am unable to conclude that the trial judge found beyond a reasonable doubt that the appellant slammed the car door on Mr. Taylor's leg, as the latter alleged.

CONCLUSION

[15] There was an alternative reasonable inference to be drawn from the evidence. Mr. Taylor's two front teeth could well have been existing crowns or caps, which were dislodged after he bit the appellant's hand, albeit potentially in a defensive reaction, by the appellant's own reaction in quickly removing his gloved hand from Mr. Taylor's mouth. That in turn could account for Mr. Taylor's evidence that his teeth went "flying" and ended up behind him and is consistent with the absence of any particular immediate trauma.

[16] Further, depending upon whether the trial judge was satisfied that the appellant initiated an assault and/or whether Mr. Taylor's biting reaction was reasonable self-defence, the alternative inference may have resulted in an acquittal. In any event, the appellant's version, for the reasons which I have given, might reasonably have been true and could also have resulted in a more lenient sentence.

[17] I am unable to conclude that there has been no miscarriage of justice in these circumstances. Thus, I allow the appeal, quash the conviction and order a new trial.

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GOWER J.