Citation: *R.* v. *Hartling,* 2016 YKTC 22

Date: 20160520
Docket: 15-00278
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Chief Judge Ruddy

REGINA

v.

RAYMOND JOHN HARTLING

Appearances:
Paul G. R. Battin — Counsel for the Crown
Norah E. Mooney — Counsel for the Defence

REASONS FOR JUDGMENT

[1] Raymond Hartling stands charged with aggravated assault on Alvin James. The offence is particularized as wounding. There is little doubt that Mr. James suffered injuries on the night in question. He alleges that those injuries were caused by Mr. Hartling assaulting him with a hammer when Mr. James went to Mr. Hartling's residence in response to hearing screaming and hollering. Mr. Hartling denies the assault, indicating that Mr. James was already injured when he came to the residence seeking help. The primary issue to be decided in this case is that of credibility. Should that issue be resolved in the Crown's favour, a secondary issue to be decided is whether the injuries, as described by Mr. James and as seen in the photographs filed as exhibit 2, amount to wounding.

Credibility

[2] Mr. James and Mr. Hartling provide very different versions of events. Accordingly, the question of guilt or innocence turns on an assessment of their respective credibility. In so doing, I am guided by the Supreme Court of Canada decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and cognizant of the fact that this is not a credibility contest in which one version is preferred over the other; rather it is an assessment of whether I am satisfied beyond a reasonable doubt as to the guilt of the accused. If I believe Mr. Hartling, I would have a doubt and must acquit. If I am unable to decide who to believe or to resolve conflicting evidence, I must acquit. Only if I am satisfied beyond a reasonable doubt, on the basis of the evidence I do accept, may I convict. The burden of proof rests on the Crown.

Mr. Hartling' evidence

[3] Turning first to Mr. Hartling's evidence, he testified that he did not assault Mr. James. Rather, he says, Mr. James was assaulted elsewhere and came to Mr. Hartling's home seeking assistance. Mr. Hartling did not actually see Mr. James, but heard banging on the door and was told by his spouse, Ms. Atlin that Mr. James was at the door seeking assistance. Ms. Atlin left the home with Mr. James. She was not called to testify at trial.

[4] Mr. Hartling does concede that he and Ms. Atlin were likely yelling that night, as they often argue, but he went on to say that he does not own a hammer and therefore could not have assaulted Mr. James with a hammer. Furthermore, he notes that he was

extremely intoxicated, so much so that he doesn't really recall the police attending at his residence or being transported to Whitehorse.

[5] I have difficulty with accepting Mr. Hartling's evidence for a number of reasons. Firstly, it is implausible to me that Mr. James would go to Mr. Hartling's residence seeking assistance, when his uncle, Johnny Johns, the uncle who does not drink and who did in fact transport Mr. James to the nursing station, lived, as Mr. Johns described it, "eight inches away".

[6] Secondly, Mr. Hartling made statements against interest which raise serious concerns about the truthfulness of his testimony at trial. These statements, admitted into evidence following a *voir dire* with respect to voluntariness, include the following:

> 1. Cst. Jury testified that while Mr. Hartling was being transported to Whitehorse after being arrested for assault causing bodily harm he said words to the effect that he can beat up his wife and no one does anything, but if he beats up a guy, he's arrested. Cst. Jury maintained that Mr. Hartling spoke in the first person, using "I" when making the comment rather than speaking in generalities.
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> 2. On the day following the incident, Mr. Hartling was re-arrested for the more serious offence of aggravated assault, chartered and warned by Cst. Daniels. The meeting was both video and audio recorded. On the tape, Mr. Hartling is heard to insist on hearing the police's version of events. When Cst. Daniels indicates it is believed that Mr. Hartling hit Mr. James with a hammer, Mr. Hartling is heard to say "it wasn't even a hammer; it wasn't a fucking hammer". Cst. Daniels further testified that while transporting Mr. Hartling to court he heard Mr. Hartling say "I guess he thought it was a hammer".

[7] With respect to the first of these utterances, counsel for Mr. Hartling argues that I should place little weight on the comment made to Cst. Jury given Mr. Hartling's state of intoxication and the fact that Cst. Jury did not make notes of the comment. I am not

unduly concerned with the fact that Cst. Jury failed to write notes with respect to the utterance during transport given her evidence that she included the words in her occurrence report completed within hours of the event. With respect to Mr. Hartling's state of intoxication, Cst. Jury did confirm that Mr. Hartling was 'grossly intoxicated'. While I determined in the *voir dire* that Mr. Hartling made the statements voluntarily, noting that it was clear from Cst. Jury's evidence that Mr. Hartling understood that he was speaking to the police and that his comments and answers were coherent and responsive notwithstanding his state of intoxication, I would agree that his state of extreme intoxication does affect the weight I should place on the utterance.

[8] The same frailties do not exist, however, with respect to the second set of utterances made to Cst. Daniels. Mr. Hartling had been, at that point, in custody for several hours. There was no indication on the audio or video that he was grossly intoxicated when the statements were made. Defence counsel argues that I should conclude that Mr. Hartling, in making the comments that "it was not a hammer", really meant that, as he does not own a hammer, he did not assault Mr. James. With respect, this argument is neither persuasive nor does it accord with common sense.

[9] In my view, these utterances made by Mr. Hartling undermine the credibility of his evidence at trial in two ways. Firstly, they amount to an implied admission that he struck Mr. James, if not with a hammer, then with something; and, secondly, they call into question the validity of Mr. Harling's testimony that he recalls little to nothing of the evening due to his state of intoxication.

[10] While I did not find the evidence of Mr. Hartling to be credible, the rejection of his evidence does not, in and of itself, lead to a conviction. Instead, I must consider the credibility of the remaining evidence in determining whether I am satisfied that Crown has proven beyond a reasonable doubt that Mr. Hartling committed the offence as charged. This involves, primarily, an assessment of the credibility of the evidence provided by Mr. James.

Mr. James' evidence

[11] Mr. James testified that he had gone golfing after work with his brother, following which his brother went home and Mr. James went to Johnny Johns' home to play crib. He referred to Mr. Johns as Uncle Sammy. Mr. James had consumed three beer over a three hour period at the golf course, and five beer over a few hours at his uncle's home. He noted that he was not drunk, but that he would not have driven a vehicle.

[12] Mr. James' uncle resides directly adjacent to the residence of Mr. Hartling and his spouse Jennifer Atlin. When Mr. James was leaving the home, he heard screaming and hollering from Mr. Hartling's residence. Mr. James knocked on the door which was partially ajar. Ms. Atlin ran past him outside. Mr. James stepped into the house, saw Mr. Hartling, and asked him what was going on. Mr. Hartling did not respond. Mr. James turned to leave, at which point Mr. Hartling struck him with a hammer. He describes five to six blows to the back of the head and three to his arm. Ms. Atlin returned and helped Mr. James to his uncle's home. His uncle took him to the nursing station for treatment. Mr. James was transported to Whitehorse General Hospital, where he remained overnight and was released.

[13] Counsel for Mr. Hartling submits that Mr. James ought not to be believed due to inconsistencies between his evidence at trial and prior statements to the police. The alleged inconsistencies are that Mr. James told the police that his brother had accompanied him to his uncle's home after golfing; and that Mr. James told the police that he was seated inside Mr. Hartling's home when he was assaulted by Mr. Hartling.

[14] Determining whether or not there were clear inconsistencies is hampered by both the confusing manner in which the prior statements were put to Mr. James, and also the apparent lack of clarity in the statements themselves as third person pronouns are used in a manner which makes it entirely unclear to whom Mr. James was referring. This is particularly true with respect to the alleged inconsistency relating to Mr. James' brother. I am satisfied; however, that there was a clear inconsistency with respect to Mr. James' earlier statement that he was seated inside Mr. Hartling's residence when attacked.

[15] The question, then, is whether this inconsistency undermines Mr. James' credibility to the extent that some, or all, of his evidence ought to be rejected as untruthful or unreliable. When asked about the inconsistencies, Mr. James explained that he was in a lot of pain at the time the statements were taken; as well, he was under the influence of medication and he had suffered a traumatic experience, all of which had affected his coherence and recollection when giving the statement.

[16] This, in my view, offers a clear and rational explanation for any differences, such that Mr. James' credibility is not undermined. His explanation is also consistent with the evidence of his uncle who noted that Mr. James was 'pretty good' when he first came

for help, but, at the nursing station where he gave his first statement, he became incoherent with his legs giving out.

[17] On the whole, I found Mr. James' evidence to be clear, plausible and unshaken on cross-examination. Furthermore, his account of events is consistent with the physical evidence of his injuries as depicted in the photographs. I have little difficulty in accepting his version of events, and find that it satisfies me beyond a reasonable doubt that Mr. Hartling assaulted Mr. James with a hammer.

A comment on the investigation

[18] Before turning to the question of whether the evidence satisfies me that the injuries resulting from the assault amount to 'wounding', it is necessary to make some comments with respect to the investigation conducted in this case.

[19] Defence counsel, in her written submission noted the lack of forensic evidence produced in this case. In particular, the fact that no weapon was located by the police and no blood was noted by the officers either inside Mr. Hartling's home or outside on the stoop. I will say that I was troubled by what I would term as frailties in the investigation. In particular, I had difficulty understanding why photos and observations of the scene would not have been done during daylight hours, when there would, logically, have been better lighting conditions to determine the presence or absence of blood. In addition, there appears to have been no steps taken to conduct a full search of Mr. Hartling's residence to locate the weapon used in the commission of the offence.

[20] Given the persuasiveness of Mr. James' evidence, I am not of the view that these frailties in the investigation are fatal to the Crown's case; however, it must be said that a full and comprehensive investigation would likely have greatly enhanced the strength of the Crown's case and may well have negated the need for a trial.

Wounding

[21] The remaining issue to be decided is whether the injuries suffered by Mr. James are sufficient to satisfy me that the Crown has established the wounding required to make out an aggravated assault.

[22] Crown relies on the case of *R. v. Littletent* (1985), 59 A.R. 100 (C.A.) a decision of the Alberta Court of Appeal, which stands for the proposition that a "breaking of the skin is necessary to constitute 'wounding'" (para. 2). It should be noted that the injuries in *Littletent* included a fracture of the jaw and of the left rib along with a perforated eardrum that required surgical intervention.

[23] Crown has also provided a decision out of the Ontario Court of Justice*, R. v. Hoare,* 2015 ONCJ 283, which notes that courts in Ontario have adopted the definition of wounding in *Littletent*, citing the Ontario Superior Court of Justice in *R. v. Palmer*, 2007 Carswell Ont 3161, in which the Court "described 'wound' as "…a cut or breaking of the skin which bleeds, which is more than transient or trifling, and which will leave a scar if not surgically altered"'. The injuries noted in *Hoare* include a 'significant breaking of the skin' with noticeable blood loss both in the victim's hair but also at the scene. The laceration was surgically glued. Reference is also made to long-lasting, post-

concussion effects, though the presiding judge took the view that wounding had been established even without the concussion.

[24] Defence relies on the decision of my brother judge Faulkner in *R. v. Germaine*, 2006 YKTC 42, in which the victim suffered a broken nose, substantial bleeding, facial bruising, and difficulty breathing. Faulkner J. reviews a number of authorities, including *Littletent*, before concluding that wounding had not been made out on the evidence. Of particular note, he refers to the decision of *R. v. Hilderman*, 2005 ABQB 106 noting:

> [20] …Martin J. expressed concern that a broad definition of wound might include injuries such as abrasions or small cuts and this could lead to illogical results. He concluded that wounding must contemplate and describe an injury which is more serious than mere bodily harm. …

[25] I would agree that something more than bodily harm must be contemplated by the term wounding. To conclude otherwise would be inconsistent with what one might term the hierarchy of offences in the *Criminal Code*. The *Code* contemplates a number of assault offences clearly increasing in both objective seriousness and maximum sentence. It would be entirely illogical to conclude that injuries sufficient to establish an assault causing bodily harm would be equally sufficient to establish an aggravated assault simply on the basis of a breaking of the skin.

[26] The evidence with respect to injuries in this case comes from Mr. James and from photographs taken at the nursing station. No medical evidence was provided to the Court. It is evident from the photographs that Mr. James received a cut to the back of his head. Blood is observed on the pillow, and throughout Mr. James' hair. The cut itself, however, is not visible through Mr. James' hair. Mr. James testified that in

addition to spending the night in hospital, he was off work for three weeks because of pain and swelling, and that he continues to experience occasional head pain.

[27] On the basis of the evidence provided, I am simply not persuaded that wounding has been established as required to make out the offence of aggravated assault. No evidence was provided with respect to the extent of the laceration or the treatment received, in particular, whether stitches or surgical intervention were required that would elevate the evidence above the standard required to establish bodily harm. I am, however, satisfied that the injuries described do clearly meet the test for bodily harm. In the result, I find Mr. Hartling guilty of the lesser included offence of assault causing bodily harm.

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RUDDY C.J.T.C.