

Citation: *R. v. Kendi*, 2014 YKTC 40

Date: 20140703
Docket: 13-00273B
Registry: Whitehorse
Heard: Old Crow

TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

RICHARD BENJAMIN KENDI

Appearances:
John W. Phelps
Gordon R. Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): This is the matter of Regina v. Richard Benjamin Kendi.

[2] Mr. Kendi is charged with a number of criminal offences as follows:

COUNT #1: On or about the 30th day of March in the year 2013, at or near the community of Old Crow, Yukon Territory, with intent to endanger the life of Donovan FROST, did discharge a firearm, to wit: a rifle, at Donovan FROST, contrary to Section 244(1) of the *Criminal Code*;

COUNT #2: On or about the 30th day of March in the year 2013, at or near the community of Old Crow, Yukon Territory, did in committing an assault on Donovan FROST, use a weapon, to wit: a rifle, contrary to Section 267(a) of the *Criminal Code*;

COUNT #3: On or about the 30th day of March in the year 2013 at or near the community of Old Crow, Yukon Territory, did use a firearm to wit: a rifle, while committing the indictable offence of Assault with a Weapon, contrary to Section 85(1)(a) of the *Criminal Code*;

COUNT #4: On or about the 30th day of March in the year 2013, at or near the community of Old Crow, Yukon Territory, did without lawful excuse, use a firearm, to wit: a rifle, in a careless manner, contrary to Section 86(1) of the *Criminal Code*; and

COUNT #5: On or about the 30th day of March in the year 2013, at or near the community of Old Crow, Yukon Territory, did without lawful excuse point a firearm, to wit: a rifle, at Donovan FROST, contrary to Section 87(1) of the *Criminal Code*.

[3] The Crown has proceeded by way of indictment and Mr. Kendi has entered not guilty pleas to all of the charges. Mr. Phelps, for the Crown, indicated that he would not be proceeding with Count #1 and, as a result, the accused will be found not guilty on that charge.

[4] These charges arose in relation to a house party at Michelle Rispin's residence in Old Crow. I am satisfied that this was a drinking party and that it involved at least 10 people. Of those in attendance, six testified. I am satisfied that all of these witnesses had been drinking and were intoxicated to various degrees at the time of the incident giving rise to these charges.

[5] Further, the witnesses are friends and over the course of a year and three months between the incident and this trial, they have had opportunities to talk to each other about the incident. As a result, the evidence given by each witness in chief was

generally similar but diverged significantly on cross-examination, as each witness was asked specifically what they saw and what they did.

[6] The Crown and defence agree that the incident giving rise to these charges occurred on March 30th around 6:45 a.m. This time is consistent with the evidence of Roger Kyikavichik who heard one or two gunshots and people yelling around 6:30 a.m. Mr. Kyikavichik reported this incident to the RCMP by telephone. The distance between Mr. Kyikavichik's residence and Michelle Rispin's house is approximately 0.7 kilometres as the crow flies.

The evidence of Tyson Wolf

[7] Mr. Wolf was at the drinking party at Ms. Rispin's house in the morning of March 30, 2013. He saw Mr. Kendi at the house for a short period of time, probably 20 minutes, and then Mr. Kendi left. He said he did not know why Mr. Kendi left. He himself left the residence about 20 minutes later. In fact, Ms. Rispin asked everyone to leave her house, consequently Mr. Wolf and the others left at the same time.

[8] Mr. Wolf saw Mr. Kendi again outside Ms. Rispin's residence. He said Mr. Kendi arrived on a ski-doo with a rifle in his left hand. When he saw the gun he started running away.

[9] On cross-examination, Mr. Wolf conceded that he started running because someone yelled "gun", not because he saw a gun in Mr. Kendi's possession. He heard something that sounded like a gunshot as he was running away. He assumed that

Mr. Kendi had a gun and had fired it. He said he could not say who had actually fired the gun and could not say where it was pointed.

The evidence of Marvin Frost

[10] Marvin Frost was at Ms. Rispin's residence that morning drinking. He said Mr. Kendi arrived at the party intoxicated and due to his "past history" they were concerned and asked him to leave. The party disbanded less than 30 minutes later.

[11] While outside, he saw Mr. Kendi come towards them on a ski-doo. Someone yelled "rifle" and Mr. Frost glanced towards Mr. Kendi and saw him stopped on his ski-doo and holding a rifle so that he could see the barrel. He was about 30 to 40 feet from Mr. Kendi and near the others. Mr. Kendi was parked near a street lamp.

Mr. Frost ran to his ski-doo to go home. He heard two gunshots with three to four seconds between shots.

[12] On cross-examination, Mr. Frost admitted that he was quite intoxicated. On the one hand, he said he saw Mr. Kendi standing up holding a rifle but he acknowledged Mr. Kendi could have been sitting with the gun on his lap. His statement to the police several days after the incident was different. He only glanced towards Mr. Kendi and said he was shooting "on the steps or something". He said he did not see the actual shooting but that "they sounded pretty close". He also admitted to discussing the incident with other people and that he "knew from other people" what happened.

The evidence of Keisha Kassi

[13] Ms. Kassi, like the others, was at Michelle Rispin's house partying and drinking alcohol. Richard Kendi showed up; he was drunk and angry and argumentative. The party ended when Ms. Rispin asked him to leave so that she could go to bed.

[14] She and five or six "girls" and some "boys" were outside the Rispin residence when Mr. Kendi arrived on a ski-doo. She said "he was pointing a gun at all of us", first towards the girls, then towards the boys. She was not sure what kind of gun it was but thinks it was a .22 calibre. Everyone ran to Brandon's, a neighbour, and stayed there until Mr. Kendi was gone. As they were running away she heard two rifle shots.

[15] On cross-examination, she admitted to talking to others about what happened that morning but was adamant that she had an independent recollection of the events. She admitted she did not see the gun initially but when someone yelled "gun", she looked back and saw the gun. She admitted to being scared and that everything happened quickly.

The evidence of April Kassi

[16] April Kassi was at the party and was with the crowd when they all left Ms. Rispin's house. Someone yelled "gun" and everyone, including Ms. Kassi, started running towards Brandon's house. She heard two gunshots but did not see the gun or who fired the shots. She said it sounded like a small calibre gun.

The evidence of Shane Frost

[17] Shane Frost was at the party on March 30, 2013, and saw Mr. Kendi. He said Mr. Kendi was intoxicated and aggressive and was asked to leave.

[18] He and the others left shortly after Mr. Kendi left. He saw Mr. Kendi stop on a ski-doo, pull out a rifle, and holding it to his shoulder look down the barrel. He could not say whether Mr. Kendi was aiming at anyone. He took off running and heard one gunshot.

The evidence of Donovan Frost

[19] Donovan Frost is a 19-year-old male who was at the party at Ms. Rispin's house in the early morning of March 30th. He was drinking and was intoxicated. Richard Kendi came to the party but he did not stay very long. Later, outside, he saw Mr. Kendi on a ski-doo but did not see a rifle on Mr. Kendi or Mr. Kendi holding anything. Everyone scattered and as he ran with the others he heard something that sounded like a gunshot.

The police investigation

[20] A police investigation was initiated by Roger Kyikavichik's telephone call at 6:45 a.m. on March 30, 2013. Mr. Kyikavichik reported a gunshot and women screaming.

[21] At 9:45 that morning, Marvin Frost Jr. came to the detachment to provide information about the shots fired earlier. He described an incident where Richard Kendi had shot at his brother, Donovan Frost. Marvin said he was not at the party.

[22] At 10:10 a.m., the police received a report from the nursing station that Richard Kendi had been injured as a result of an assault. Information received was that Marvin Frost Jr., Shane Frost Jr., and Donovan Frost had jumped Richard Kendi and assaulted him.

[23] I understood that the injuries were sufficiently serious as to require a medevac out of Old Crow. I have inferred that the three Frost men resorted to self-help in a form of extrajudicial justice in dealing with what they perceived to be an assault on Donovan Frost.

[24] It is evident from Cst. Gaetz's evidence that he encountered considerable difficulty in getting information from witnesses who had attended the party at Rispin's home.

The findings

[25] I indicated earlier the Crown is not proceeding with the charge in Count #1 and a not guilty verdict has been entered.

[26] The premise of the Crown in Count #2 is that by pointing a rifle at Donovan Frost, Mr. Kendi was threatening by an act or gesture to apply force to Mr. Frost. This would constitute an assault and, more specifically, an assault with a weapon.

[27] There is insufficient evidence to establish that Mr. Kendi pointed a rifle in the direction of Donovan Frost, or any particular person. The strongest evidence was from Keisha Kassi who said that when Mr. Kendi arrived on his ski-doo, "he was pointing a gun at all of us", first towards the girls, then towards the boys. But that changed on cross-examination. She said she did not see the gun initially but when someone yelled "gun", she looked back and saw the gun. She admitted to being scared and everything happened quickly.

[28] The mere statement, in these particular circumstances, that Mr. Kendi pointed the gun at all of us, first at the girls and then at the boys, is insufficient to permit a finding beyond a reasonable doubt that the gun was pointed towards Donovan Frost. There is no evidence that Donovan was in the group of boys described by Ms. Kassi. Moreover, it seems that Ms. Kassi made her observations after someone yelled "gun" and everyone was running. According to Donovan Frost, he was running as well.

[29] Again, there is no evidence as to where Donovan Frost was at the relevant time. I cannot find there was an assault or an assault with a weapon by Mr. Kendi on Mr. Donovan Frost. There will be a finding of not guilty on Count #2.

[30] The above analysis also disposes of Count #5. For the same reasons, I am not satisfied beyond a reasonable doubt on the evidence that Mr. Kendi pointed a firearm at Donovan Frost. Mr. Kendi is therefore acquitted on Count #5.

[31] In order to convict on Count #3 as worded, I would need to find Mr. Kendi guilty of an assault on someone. While there was some evidence that Mr. Kendi pointed a

rifle in the general direction of the individuals leaving the party, that is insufficient to find a conviction pursuant to s. 85(1)(a) of the *Criminal Code*.

[32] That point was made in *R. v. Pringle*, [1989] 1 S.C.R. 1645. Quoting from the head note:

A conviction for an offence under s. 83(1)...

-- now 85(1) --

...cannot stand alone. This Court has identified the purpose of this section as a measure to enable the Crown to obtain additional penalties where a firearm is used during the commission or the attempt to commit an offence. This purpose can logically be achieved only if a sentence is tacked on to a previous one. A prerequisite, therefore, is a sentence for the conviction of the underlying and distinct offence, as opposed to only a finding of fact.

[33] In other words, to convict on Count #3 as worded, Mr. Kendi must also be convicted of an assault. He has not been so convicted, therefore I find him not guilty on Count #3.

[34] That leaves Count #4: careless use of a firearm, contrary to section 86(1) of the *Criminal Code*.

[35] My relevant findings of fact are as follows:

1. Several witnesses testified that Mr. Kendi arrived at the party shortly before Ms. Rispin asked everyone to leave. I am satisfied that he was intoxicated and argumentative and that he was asked to leave the party.

2. The party broke up about 20 minutes later. While people were still outside the Rispin house deciding what to do next, Mr. Kendi arrived on a ski-doo carrying a rifle. It was either a .22 or a large calibre rifle.
3. Mr. Kendi handled and displayed the gun in such a fashion so as to frighten the individuals standing outside the Rispin house. The evidence of Shane Frost and Keisha Kassi indicate that the gun was handled in a manner that they perceived was threatening. In fact, everyone felt threatened and dispersed on the run.
4. A matter of seconds later, one or two shots rang out, although no one saw who pulled the trigger as everyone was running away. With their backs towards Mr. Kendi, the only person at the scene with a gun was Mr. Kendi. At 6:45 a.m., it would be highly unusual for anyone else to be hunting or shooting in the village. That is why Roger Kyikavichik called the police when he heard the shots. The witnesses clearly heard the shots from close proximity and believe that Mr. Kendi had discharged the rifle.

[36] There is no air of reality to the alternative suggested by defence counsel that it could have been a bear banger or some other noise and not a rifle.

[37] I am satisfied that Mr. Kendi did discharge the rifle. There is no evidence that he was shooting at a particular person. In all likelihood, he was firing shots in the air to cause fright. Moreover, the location of the shooting is in the village of Old Crow.

The Law

[38] *Regina v. Creighton*, [1993] 3 S.C.R. 3 involved in a charge of careless use of a firearm. It stands for the proposition that the accused's conduct must constitute a marked departure from the standard of care of a reasonably prudent person. This is the *actus reus* of the offence. It sets out an objective standard. The *mens rea*, objective foresight of risk or harm, may be inferred from the facts. Again, the standard is a reasonable person in the circumstances of the accused.

[39] I would add that voluntary intoxication is not a defence.

[40] In *Regina v. Zimmer*, 1981 60 CCC (2d) 190 (BCCA) the offence was made out where the accused intentionally discharged a firearm over the head of another in order to scare him.

[41] *Regina v. Loring*, 2009 BCCA 166 also involved a charge of careless use of a firearm. After an altercation, Mr. Loring obtained a rifle and returned to the scene. He shot the rifle into the air towards a non-residential hill on the way. Police were called. He was found intoxicated in the bushes with a loaded rifle and an unspent shell in his pocket. He was found guilty of careless use of a firearm.

[42] *Regina v. Frost*, 2001 YKSC 45 is a case from Old Crow. On the facts, the accused was intoxicated and got into an argument with his grandmother. He then went into his bedroom and came out with a rifle. He loaded the rifle with four bullets while facing the wall. He then proceeded to unload the rifle and took it back to his room. The

two adults did not feel threatened. Police were contacted by other members of the community. Justice Veale found these actions constituted careless use of a firearm.

[43] In *R. v. Wagner*, 2012 BCJ No. 2371 the accused was involved in a motor vehicle accident. Two hours later, he was found drunk and angry outside his home. The police attended and the accused reached for an unloaded rifle and made angry threats. He was convicted of careless use of a firearm on these facts.

[44] Mr. Kendi's conduct of wielding a firearm in an intoxicated condition in the village of Old Crow and firing one or two shots constitutes a marked departure from the standard of care of a reasonably prudent person. A reasonable person would also foresee the real risk of harm to people present, including others living in the village. As I mentioned earlier, voluntary intoxication is not a defence on these facts.

[45] Based on the findings of fact in this case, I find Mr. Kendi guilty on Count #4, an offence contrary to s. 86(1), the careless use of a firearm.

LILLES T.C.J.