Citation: *R.* v. *Mackenzie*, 2012 YKTC 112

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Docket: 11-00412
11-00412A
11-00412B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

TROY ALEX MACKENZIE

Appearances:
Christiana Lavidas, Articled Student — Counsel for the Crown
Melissa Atkinson — Counsel for the Defence

REASONS FOR JUDGMENT

[1] COZENS C.J.T.C (Oral): Troy Mackenzie has been charged with having assaulted Melanie Jensen, contrary to s. 266 of the *Criminal Code*, and with four offences of having breached an undertaking to a peace officer prohibiting him from having contact with Ms. Jensen. These four breach allegations cover September 4th, September 6th, September 13th, and September 21st. There is no evidence before the Court to substantiate a conviction on the September 6th charge and, as conceded by the Crown, that charge is dismissed.

[2] With respect to the remaining charges, an Agreed Statement of Facts was filed

which deals primarily with how the information was relayed to the RCMP and how Mr. Mackenzie was arrested, and a few other matters, which I will not go into in any detail about. One substantive point in the Agreed Statement of Facts is that the RCMP, when attending at Ms. Jensen's residence in respect of the assault allegation, did not observe any injuries; however, the evidence of the assault does not provide any basis for believing there would have been any observable injuries on Ms. Jensen.

[3] The allegation of assault is that Mr. Mackenzie, who had been in an approximately eight month on again/off again relationship with Ms. Jensen that was currently off, came over to her house. She let him in. They were talking in the bedroom. Her two young children were present in the apartment. In the course of the discussion, which Ms. Jensen stated related to Mr. Mackenzie wanting to be back in a dating relationship, she asked him to leave. He would not leave. She pushed him off the bed with her feet. Mr. Mackenzie walked out of the room; Ms. Jensen walked out of the room, and at the door of the residence he put her into a chokehold, which she said lasted about two minutes, although she did clearly say that, in describing time, things can seem a lot longer when they are happening. She did not indicate that at any time her breath was cut off. So I understand the allegation to be a chokehold, in that his right arm was around her neck but not cutting off her breathing, and more of a restraint than anything else. Ms. Jensen indicated that she used her elbows to try to get him away and that he kind of released her, and her young son came over and hit Mr. Mackenzie, who then left. She said that her son and daughter had come over while she was in a chokehold and told Mr. Mackenzie to let her go, prior to him doing so. Ms. Jensen said she is not sure why he let her go.

[4] Mr. Mackenzie's version of events - and these are the only two witnesses, I would note - is substantially different and he denies any allegation of having physically assaulted Ms. Jensen. He agrees that they were in the bedroom. He agrees there was an argument, but he said that it was with respect to him observing a significant amount of mushrooms, which, it was clear from the evidence, were of the hallucinogenic kind and sufficient to have caused the death of, quite possibly, or harm the children had they taken them. It was his concern over what he saw and her hiding them, and his threatening to go to the police with pictures of them, if Ms. Jensen did not get rid of the drugs, that was the source of the argument. Mr. Mackenzie had not taken any pictures.

[5] With respect to the breach allegation of September 4th, Ms. Jensen says that there were repeated phone calls. This contact started on the 3rd and went until 4:00 - 4:30 a.m. in the morning of the 4th. Mr. Mackenzie denies making these calls but he does admit to having contacted her at 4:00 p.m. that afternoon in response to a phone call from her. The statement of facts actually indicates that both parties -- well, that Ms. Jensen told the RCMP that Mr. Mackenzie had phoned her from 2:00 a.m. until 11:00 a.m. that morning, which is one difference.

[6] With respect to the September 13th allegation, Ms. Jensen says that she got a ride home from shopping, that Mr. Mackenzie passed her in a vehicle, turned around and pulled up behind her in her parking lot while she was unloading the vehicles, called her names, made threats with respect to her children being taken away, and then left. When she called the police he had already called them. Mr. Mackenzie testified that, in fact, he was parked across the street at a public parking spot and running on the

Millennium Trail. When he came back, Ms. Jensen was yelling across the street at him and he simply left.

[7] On the same Information, there is an allegation that on September 21st there was a breach of the no contact at the Superstore, and the evidence of Ms. Jensen is that, while she was at the checkout, Mr. Mackenzie came up and got right in front of her and started yelling things to her, calling her names, like “Dirty bitch,” “Whore,” and “Skank.” He said that he would wait outside to see which guy was picking her up and beat the crap out of him, and then he waited outside in his car, across from the entrance to the Superstore, and he was still there when she left in a cab. His testimony is that while he did encounter her there, he did not actually notice her. She started to say things to him, and he called her a skank and left, and he again called the RCMP, as Ms. Jensen did. When she called he had already called to let them know about the incident.

[8] Both parties testified to some contact in the courthouse on the first appearance date, which was said to be September the 12th, which I am taking at face value since no one challenged that date and I have not looked at a calendar. Both parties stated that there was contact outside Courtroom 5, that a sheriff was nearby and, again, the versions of contact differ in that Ms. Jensen says that Mr. Mackenzie approached her and was asking her to do something about the recognizance he was on. His version of events was that she spoke to him and told him she was on her way to go and get Victim Services to deal with the no contact order and the charges.

[9] Ms. Jensen's testimony in respect of the courthouse incident did not arise in her direct examination, but it arose for the first time in cross-examination. I note, however, that there was no charge with respect to the September 12th contact, so that is not surprising.

[10] So what we have here are two markedly different versions of events, with no extrinsic third party or photographic evidence, and where both the complainant and the accused have testified. So this falls squarely into the case of *R.* v. *D.W.*, [1991] S.C.R. 742. That case has received considerable commentary from the court, in particular with respect to instances dealing with a complainant and an accused and the absence of external evidence. As stated in *D.W.*, if I believe the evidence of the accused, and again assuming that it is completely exculpatory, which, in this case, it is with respect to one of the breach charges, the September 13th charge, I must acquit. It is not completely exculpatory with respect to the September 4th and the September 21st; it is inculpatory; however, on markedly different facts.

[11] If I do not believe the testimony of Mr. Mackenzie, and if I am left with a reasonable doubt, I must acquit; and even if I am not left in a doubt by his evidence I must ask myself whether, on the basis of the evidence that I do accept, whether I am convinced beyond a reasonable doubt of his guilt. As stated in *R.* v. *Ay* (1994), 59 B.C.A.C. 161, in cases where you are dealing with exculpatory evidence, in order to convict I must reject the evidence of the accused insofar as it is exculpatory. There is an inherent danger in such a case of simply saying, well, I accept this evidence,

therefore I reject that evidence, or saying that it is one or the other. That is a danger that a trier of fact cannot fall into.

[12] As stated in the *Hull* case, [2006] O.J. No. 3177, from the Ontario Court of Appeal, a trial judge has a positive duty to assess the evidence of the accused in light of the whole of the evidence, and that includes the testimony of the complainant.

[13] In *R.* v. *Jaura*, again, a case out of Ontario, [2006] O.J. No. 4157, Duncan J. states that the rule in this regard is that:

> ... a trial judge can reject the evidence of the accused and convict solely on the basis of his acceptance of the evidence of the complainant, *provided* that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding this acceptance of the complainant's evidence.

[14] As Doherty J. said in the *J.J.R.D.* case, [2006] O.J. No. 4749, a Court of Appeal case - as was *Hull*; the *Jaura* case was a lower court decision - the trier of fact must carefully assess the evidence of the complainant, but in doing so cannot move directly from a finding to the guilt of the accused, but rather the trial judge must conclude that there is nothing in the testimony of the accused that would cause him to disbelieve the complainant's evidence, and that, of course, requires a fair and full assessment of the evidence of the accused. In any case, as Doherty J. went on to say in respect of the trial court's decision in that case.

> The trial judge [totally rejected] the accused's denial because stacked beside [the complainant's] evidence, and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection

> of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of the accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[15] In the *R.* v. *C.L.Y.* case, [2008] S.C.J. No. 2, out of the Supreme Court of Canada in 2008, the Court, through Abella J., stated that while *D.W.* is a helpful map, it is not the only route that a trial judge must strictly adhere to and the purpose of *D.W.* is to explains that:

> ... the verdict should not be based on a choice between the accused's and the Crown's evidence, but on whether, based on the whole of the evidence, the trier of fact is left with a reasonable doubt as to the accused's guilt.

[16] In *R.* v. *Dinardo*, [2008] S.C.J. No. 24, Charron J. noted that:

> What matters is that the substance of the *W.(D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[17] Crown counsel urges me to reject in its entirety the exculpatory evidence of Mr. Mackenzie and points to apparent inconsistencies in his evidence, such as his great care and concern for the children, on the one hand, regarding the drugs, and leaving the drugs there nonetheless, in the house. Also the Crown refers to minimization and some untruthfulness, basically, with respect to Mr. Mackenzie's statements in cross-examination, that he thought that the no contact had been removed on the basis that he

had been told she was in the process of doing so, notwithstanding his indications in his evidence and several references to his being somewhat involved in the justice system. I am urged to accept the evidence of the complainant in that it proves every offence that Mr. Mackenzie is charged with, obviously, the dismissed offence not being included as having not been proved beyond a reasonable doubt.

[18] Defence counsel says that this is a case where I should not accept the evidence of the complainant and that I should accept the evidence of Mr. Mackenzie, or that I should at least find that it raises a reasonable doubt.

[19] When I look at the evidence of the complainant, firstly, I note that while there were early concerns in the analysis of *D.W.* that courts should not look at the complainant's evidence first, that has been overtaken by a more practical approach, and that it does not really matter whose evidence you consider first, as long as you give all the evidence a fair consideration. The complainant testified first; therefore, I will consider her evidence first.

[20] I do not find anything in her evidence or in how she delivered her evidence that causes me, either in direct examination and through cross-examination, to have any particular concerns about her truthfulness. She was not, in my opinion, dramatic, or exaggerating or embellishing what took place. Her evidence seemed to be fairly straightforward; fairly simple and fairly plausible. Her description of the assault and how it occurred and why it occurred I find to be not problematic. Her descriptions of the breaches of the no contact I do not find to be problematic either. It would have,

perhaps, been helpful to have had, if my assumption is correct, that given that she caught a ride home in the vehicle when she was confronted on September 13th, information as to whether there had actually been a person that gave her a ride home that was present, and that might have been able to say something about where this took place. That did not happen, but there was no questioning in that regard by either party. So while it may have been helpful, I do not find the absence of that evidence to compromise her evidence, and certainly I do not expect the children to have provided any evidence in court, given their young ages. I do not find that would have been necessary at all.

[21] There were inconsistencies in her oral testimony when compared to her statements. She did not talk about hair pulling in her testimony on the stand today, but it was in her statement with respect to the incident of August 31st. She said on the stand today, well, she had forgotten about it until she saw it in the statement, and was pretty straightforward about that.

[22] With respect to the cross-examination on how the chokehold was effected, she was asked whether it was one event, and she said yes. Then when the statement was put to her she indicated that he was “trying” to do it. The one transaction or one event issue was not developed to the point that I could say that the two are necessarily inconsistent. He is trying, according to her, to put a chokehold on; she is resisting; he does, and that could be viewed as one transaction. Again, it was not an area that was explored in such detail such that there is a clear and apparent inconsistency in the evidence.

[23] There was also the statement, that she indicated the police told her was a September 3rd statement, that she had said that she provided September 4th, and about not including in the written statement something about his threatening comments or about having the kids taken away and others. She simply said in response to that, that, well, she was just more in depth on that today than she was in her statement and nothing further, which is not at all implausible. Her explanations of the contact that took place were plausible, and I do not know how easy it is to get phone records or other such information, but those are not reasons to find her evidence incredible. But finding her evidence to be credible and believable does not end the matter at all, because Mr. Mackenzie's evidence, if it raises a reasonable doubt, is sufficient to show that the Crown has not proved its case. It is not a question of choosing between one or the other necessarily. So a finding of credibility with respect to her evidence does not mean that Mr. Mackenzie's evidence was not credible on its face.

[24] I have to look at his evidence, and I will say at the outset with respect to demeanour that, clearly, between the two witnesses, he was the one that was more nervous. That is, in my opinion, while you cannot not look at demeanour, certainly only one factor amongst many and not too much emphasis should ever be placed on it, absent something that is clearly so unusual and not otherwise explained but by something that would directly affect credibility. Demeanour is simply one, and I call it a very minor, factor. So I do not really place any weight at all on it in this case; I am just aware of the differences now that they have testified, but innocent people can be extremely nervous, and people that are being untruthful can be tremendously

persuasive and calm on the stand. I guess that is why we have movies and actors and actresses, so I am not putting any weight on that.

[25] There are problems with Mr. Mackenzie's evidence, certainly. I do find it quite inconsistent for him to, throughout his testimony, talk so much about his concern for the kids and yet leave such dangerous drugs in her possession. That is not in and of itself a reason to reject his evidence and find him not credible. It is one issue. Calling her a skank in front of the kids is certainly not consistent with real concern or care for the kids, but it would be somewhat wrong to find that people in domestic or ex-relationships of a domestic nature do not do things that are damaging or hurtful to children, even if that was not their intention, or they otherwise would think that children need to be protected.

[26] The phone calls to the police, the pre-emptive calls, are consistent both with someone trying to get the upper hand and make the first strike when they have done something wrong, or with someone thinking this could go backwards because "I know the other person and I am just going to call the police first." So I cannot make anything of that one way or the other.

[27] The areas that give me more problem with respect to minimization start with areas like "I am right-handed, that is not how I would put someone in a chokehold; you can't do this and do that at the same time." She is five -- well, he did not say she is five-five; that is what the evidence was. There was no actual testimony as to size, but he talked about the difficulties of him doing that and stated that he did not know whether his martial art training was more than hers. All seem to be attempts to show why he

could not have done it that way, and I do not find that evidence to be very helpful with respect to his credibility, because right-handed or left-handed, I do not see any reason why a person could not do it one way or the other, and to say that a person cannot do it because of something, or would not have done it that way, is a red flag that gets thrown into all the other evidence.

[28] The parking outside the store, to talk about how that could not happen, "I'd be blocking a lane." I have been to Superstore; there are parking stalls right across there; I do not see any reason why that should have been presented as -- given all the questions that took place, why that would be presented as an impediment to the truthfulness of her story.

[29] Then there is the issue of the breaches, where Mr. Mackenzie's evidence was that on the 12th of September she told him that she was going to go over and have the no contact order removed. He bootstrapped this and proffered it as sort of an explanation for why he thought he was not on a no contact order. This seems to me to, again, affect his credibility. Just because he is involved in the justice system does not mean he knows how it all works in every facet; that is not a problem, but clearly, notwithstanding his testimony in cross-examination that she told him earlier the removal of the no contact order was in place, there was no real basis for him to believe that it had been removed. The fact that he states he "would not have done that in there [have contact with her], with everyone around" and that "he would not have done that the way that she said" is just a red flag that I throw into the mix of all the evidence.

[30] So while none of these concerns that I have with respect to Mr. Mackenzie's evidence, taken individually, would allow me or cause me to reject his evidence, I find, on the basis of the concerns I have with his evidence, and with respect to my assessment of the credibility of the complainant's evidence, that I do reject his evidence on the points where his evidence contradicts that of Ms. Jensen, and I find that he is guilty of the s. 266 and the three s. 145(5.1) charges on the facts, essentially, as set out in the testimony of Ms. Jensen.

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COZENS C.J.T.C.