

Citation: *R. v. Mervyn*, 2003 YKTC 34

Date: 20030508
Docket: T.C. No. 02-00530
Registry: Whitehorse
Trial Heard: Mayo

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

Simon Allan Mervyn Jr.

Appearances:

Ludovic Gouaillier

Malcolm Campbell

Counsel for Crown

Counsel for Defence

REASONS FOR JUDGMENT

[1] Mr. Mervyn Jr. has pled not guilty to a charge of assault. The charge arises from an incident that occurred on the morning of November 14, 2002 in the Village of Mayo. The complainant, Edward Hager, is a 48 year-old man, approximately 5' 4" tall and weighing about 140 lbs. Mr. Hager spoke in a manner that was, at times, difficult to understand because of a pronounced accent. As a result, Mr. Hager was asked to repeat his answers from time to time. Mr. Hager was sober the morning of November 14, 2002. In fact, he testified that he had not used alcohol for 15 years.

[2] Mr. Mervyn Jr. is a 30 year-old man, taller than Mr. Hager, and quite a bit heavier.

[3] The evidence given by Mr. Mervyn Jr. and Mr. Hager as to what happened on the morning of November 14, 2002 was quite similar. The differences

occurred at the point when Mr. Hager said that he was assaulted. Mr. Hager said that Mr. Mervyn Jr. got out of his truck from the passenger side, came around the back of the truck to Mr. Hager, grabbed him by the neck collar with his left hand and struck him in the face and head area with his right fist. Mr. Hager said he fell to the ground, whereupon Mr. Mervyn Jr. kicked him in the back several times.

[4] Mr. Mervyn Jr. described the incident quite differently. Mr. Mervyn Jr. said that he was driving by Mr. Hager's brother's house and saw Mr. Hager waving him over. Mr. Mervyn Jr. said he drove in and opened the passenger side window to see what Mr. Hager wanted. His evidence was that the complainant invited him to fight, stating, "you got a fucking problem – bring it up with me right now". He described Mr. Hager as "spitting mad". Mr. Mervyn Jr. got out of his vehicle and Mr. Hager met him half way. They both grabbed each other by the front jacket lapels. It was slippery and both of them were sliding around. He said that Mr. Hager reached into his coat with one hand, and that he knew Mr. Hager was going for a knife. Mr. Hager withdrew a little folded penknife with his hand, which Mr. Mervyn Jr. slapped away and onto the ground. Mr. Mervyn Jr. then punched Mr. Hager once on the side of his face. Mr. Mervyn Jr. then went back to his vehicle and drove away.

[5] No one else witnessed this altercation. While both witnesses are consistent in saying that there was an altercation, their versions of what happened differ substantially. If I accept Mr. Hager's version, Mr. Mervyn Jr. is guilty of assault. Mr. Mervyn Jr.'s version is consistent with a consensual fight or even with Mr. Hager being guilty of assault with a weapon. In these circumstances, I agree with counsel that the principles established by the Supreme Court of Canada in *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 apply.

[6] I found Mr. Hager to be a more credible witness than Mr. Mervyn Jr. for the following reasons:

1. Mr. Mervyn Jr. testified that he was looking for Winston Boss on the morning of November 14, 2002. He drove to Mr. Hager's home and asked Lanny McGinty where Mr. Boss was, and Mr. McGinty promptly reported this to Mr. Hager. Mr. Mervyn Jr.'s explanation as to why he wanted to find Mr. Boss was totally lacking in credibility. He said that Mr. Boss had been breaking into peoples' houses, that he had broken into his aunt's house and had stolen three thousand dollars from Richard Moses. In responding to Crown counsel's questions, Mr. Mervyn Jr. insisted that he just wanted to talk to Mr. Boss. He wanted to ask him why he was breaking into peoples' houses. Although he knew Mr. Boss had done it, he still wanted to question him to see "if he was bullshitting me". Mr. Mervyn Jr. said he wasn't upset with Mr. Boss, that he just wanted to know what he was doing and that he just wanted "to ask him a few questions" and "to have a little chat with him".

I do not accept this explanation. Not only does it not have a ring of truth, it is blatantly unbelievable. Mr. Mervyn Jr. was looking for Mr. Boss, but he was planning on more than a little chat. He was looking to physically confront Mr. Boss. In my view, this provides a clear indication of Mr. Mervyn Jr.'s state of mind that morning. He was not in a conciliatory mood.

2. Mr. Hager is Mr. Boss' father. When Mr. McGinty told him that "Simon is after Winston for some deal that got rolled", Mr. Hager was clearly concerned. As I mentioned earlier, Mr. Hager is an older and smaller man than Mr. Mervyn Jr. Mr. Mervyn Jr.'s explanation that he was driving by when Mr. Hager waved him in, and that when he drove in, the smaller Mr. Hager confronted him and challenged him to fight is highly improbable.

3. I do not accept Mr. Mervyn Jr.'s evidence that in the course of the altercation with Mr. Hager, Mr. Hager pulled out a small folding knife. Mr. Hager denies owning such a knife. Mr. Mervyn Jr. said that they were both holding onto each other's lapels, slipping on the icy driveway. It is unlikely that Mr. Hager would have – or even could have, let go of Mr. Mervyn Jr. with one hand in order to reach into his coat for a small penknife that was still folded. Had he let go of Mr. Mervyn Jr., he would have been immediately put on the ground by the larger and stronger Mr. Mervyn Jr. Moreover, he would have needed both hands to open the small folding knife, something that was impossible in the circumstances.
4. Mr. Mervyn Jr. said that he knocked the knife out of Mr. Hager's hand, punched him once in the head and then went back to his vehicle and drove away. Mr. Hager's evidence was that Mr. Mervyn Jr. pulled up with his truck, got out, came around to him, grabbed him and punched him in the head area. He said he did not have a chance to say anything. When he fell down, Mr. Mervyn Jr. kicked him several times. In all of the circumstances, Mr. Hager's version is more credible. It is also consistent with the injuries Mr. Hager reported to Corporal Wyers.
5. Mr. Hager testified that he was bruised and that he hurt for a while. Mr. Hager said he ended up with a black eye. Corporal Wyers testified that when he interviewed Mr. Hager less than one hour after the alleged incident, Mr. Hager complained of sore ribs and bruising on his right cheek. Corporal Wyers said that Mr. Hager's cheek looked swollen or puffy, but that the injury did not justify taking photographs. Although he did not observe a black eye as stated by Mr. Hager, it is certainly possible that the bruising

observed by Corporal Wyers shortly after the incident subsequently turned into a black eye.

6. Mr. Hager referred to some photographs that were taken; and that they substantiate the nature of his injuries. Corporal Wyers did not take any photos. Mr. Hager was not asked who took the photos. Mr. Hager's references to a black eye or photographs do not undermine his credibility as suggested by Mr. Mervyn Jr.'s defence counsel.
7. When Mr. Mervyn Jr. was advised by Corporal Wyers that he could be charged as a result of this incident, he said that he would pursue charges against Mr. Hager. He was invited to come to the detachment to give a statement. He did not do so, even after he was formally charged. His explanation that he was too busy to do so is inconsistent with his own evidence that he has been unemployed for a significant period after the altercation. Defence counsel's suggestion that Mr. Mervyn Jr. "is not the kind of guy who goes to the police" is not believable considering the jeopardy he, himself, was in.

[7] Mr. Hager's evidence was not shaken in cross-examination. It was consistent with Mr. Mervyn Jr.'s except for the circumstances of the incident that resulted in the charge before the court. A number of propositions consistent with Mr. Mervyn Jr.'s evidence were put to Mr. Hager, all of which he denied. His account was coherent, appropriately detailed and did not seem scripted.

[8] Mr. Mervyn Jr.'s evidence did not have the ring of truth. He was not forthcoming about his intentions regarding Mr. Boss. Mr. Mervyn Jr.'s evidence of a knife and the circumstances in which it was handled by Mr. Hager was not plausible. His version of the altercation was not logical. His description of Mr. Hager drawing a knife would have been physically difficult, if not impossible.

[9] In all the circumstances, I do not believe the evidence of Mr. Mervyn Jr. Even so, I have asked myself whether his evidence could reasonably be true and whether it raises a reasonable doubt. It does not raise a reasonable doubt.

[10] Finally, in considering all of the evidence that I accept, I am convinced beyond a reasonable doubt that Mr. Mervyn Jr. assaulted Mr. Hager on the morning of November 14, 2002. I find Mr. Mervyn Jr. guilty of the charge contrary to s. 266 of the *Criminal Code*.

Lilles C.J.T.C.