

Citation: *R. v. Smarch*, 2015 YKTC 18

Date: 20150629
Docket: 13-00700
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

JOSEPH EDWARD SMARCH

Appearances:
Jennifer Grandy
Joseph Edward Smarch

Counsel for the Crown
Appearing on his own behalf

REASONS FOR JUDGMENT

Introduction

[1] Joseph Edward Smarch has been charged with six offences, including a common assault, assault with a weapon, two counts of uttering threats, and two counts of breaching the terms of a section 810 peace bond, for failing to keep the peace and for possession of a weapon. All matters proceeded to trial on November 27, 2014 in Teslin, Yukon, with Mr. Smarch electing to represent himself, although he received some limited legal assistance through the appointment of counsel to conduct the cross-examination of the complainant, the Crown's sole witness. Subsequent adjournments were granted to accommodate Mr. Smarch's schedule and to allow him to make efforts to call an additional witness on his behalf. These efforts proved to be unsuccessful, and

final arguments were heard on June 4, 2015, at which time I indicated that I would provide written Reasons for Judgment by June 30, 2015. These are my reasons.

[2] At the outset, it should be noted that the Crown has quite properly conceded that, due to a deficiency in the evidence, count 4, alleging an offence contrary to section 264.1, has not been made out. I concur, and count 4 is hereby dismissed.

[3] The remaining charges relate to an altercation between Mr. Smarch and his then-boss, Douglas Smarch, Jr., which took place on January 13, 2014. As the two are related and share the same last name, for the purposes of this decision I will refer to each by the more familiar usage of their first names, specifically Joey and Doug. No disrespect is intended by doing so; it is simply necessary, in these circumstances, to avoid any confusion.

The Evidence:

[4] Joey and Doug have each testified, offering very different versions of the events of January 13, 2015. As a result, the sole issue to be determined is that of credibility. The evidence of each can be briefly summarized as follows:

1. Evidence of Doug Smarch:

[5] Doug testified that, in his capacity as Agriculture and Language Coordinator for the Teslin Tlingit Council (TTC), he hired Joey to fix the community drum set and assist TTC citizens with drum making.

[6] On the morning of January 13, 2014, Doug had plans to travel to Whitehorse, but a change in TTC timesheet procedures required timesheets to be submitted on

Monday rather than Friday. As a result, Doug first went to the office to check on the timesheets for Joey and another individual. The other individual was contacted by telephone to come in and sign his timesheet, but, as Joey had no telephone, Doug drove to Joey's house to get him to sign the timesheet.

[7] Upon arriving, Doug says he knocked on the door and was told to come in. Once inside, he showed the timesheet to Joey and asked him to sign it. Joey became upset as he felt he should be compensated for more hours than were reflected in the timesheet. Joey threw something toward the back room and said, "You were going to give me those days". Doug agreed that there were missing hours from the timesheet and took the timesheet back.

[8] Joey was upset and expressed concerns about his ability to pay his bills. Doug suggested he reach out to family for help, to which Joey replied, "How would you like it if I burn your house down?" Doug responded that it was not his fault; it was Finance's fault. Joey maintained that it was Doug's fault and told Doug to leave numerous times.

[9] Doug says Joey then lunged at Doug with his left arm bent at chest level. Joey pushed Doug with his elbow and forearm against Doug's chest, causing Doug to fall back into the wall. As he was falling, Doug reached out and grabbed Joey's shirt, tearing the shirt under the arm. Doug says that Joey then grabbed an axe leaning against the wall and raised it over his head with both hands. Doug told him not to do that, to which Joey replied, "I can do this in my house".

[10] Doug then left Joey's house and returned to his office where he spoke with Carlene from Finance. He told her something of what had happened and asked her to

pray with him. He then asked her about Joey's timesheet and what he could do to correct the problem. Apparently, Joey had attended for work on two occasions, but had been unable to work through no fault of his own. Accordingly, there was some question as to what time he was entitled to as a result. Doug says he created a new timesheet for Joey, crediting him for additional hours on January 2nd and 4th. That timesheet has been filed as exhibit 2 in these proceedings.

2. Evidence of Joey Smarch:

[11] Joey's version shares some similarity to that of Doug but differs on key points. Joey says he was in bed when Doug knocked on his door. He asked who was there, but Doug entered without invitation, and left the door open despite Joey's repeated requests that he close it.

[12] Doug showed Joey the time sheet. Joey says the timesheet he was shown had the same number of hours on it as the version filed as exhibit 2, but was handwritten rather than typed. Joey agrees he became upset upon seeing the timesheet, as he believed he was owed for 36 hours rather than 25. Joey agrees he did throw something toward the back room, namely a pair of socks he had left on a chair. Joey says he expressed concern about his ability to pay his bills and said he might as well burn his own house down. He denies ever having threatened to burn down Doug's house.

[13] Joey says he grabbed the timesheet and his own notes regarding the hours he had worked and flicked Doug in the chest with the papers. He did not touch Doug with his hand or arm. Doug grabbed Joey's shirt and pushed and pulled ripping his shirt.

Joey says he tried to get Doug to leave. He opened the door, but when he tried to close it, Doug stuck his foot in the door causing damage to the frame.

[14] Joey denies using an axe during the incident. He says he had purchased an axe not long before the incident, and Doug had seen it in his possession, however, it had been broken sometime in December while Joey was attempting to remove it from a block of wood in which it had become lodged. He indicated that a friend of his, Ryan Minette, had been present when he had broken the axe, and since that time, Joey had been using Mr. Minette's axe as required, but no longer had an axe of his own and there was no axe inside the house during the incident. It should be noted that Mr. Minette was the witness Joey had attempted to call, without success, to testify on his behalf.

[15] Doug did eventually leave Joey's residence. Sometime later, Joey says he felt badly about things he had said during the altercation, and went to the TTC offices to apologize to Doug. He was arrested by the police before he could do so.

[16] Joey acknowledges that he was very angry during the incident; he agrees to having yelled and been verbally abusive, but denies assaulting Doug or uttering threats to burn down Doug's house.

[17] There is no issue that Joey was subject to an 810 peace bond at the time of the incident. The original court file relating to the peace bond was before the court, allowing me to take judicial notice of its existence. Furthermore, while Joey did express concerns with respect to the basis upon which the peace bond was originally imposed, he does not deny that he was subject to the peace bond at the relevant time. The

peace bond, beyond the fact of its existence, does not relate in any way to Doug Smarch or the substantive charges before the court.

Credibility and the Law:

[18] In determining what evidence can and should be accepted in this case, I am mindful that any assessment of credibility must be made within the framework of the Supreme Court of Canada's decision in *R. v. W.D.*, [1991] 1 S.C.R. 742, which sets out the test to be applied as follows: If I believe Joey's evidence, I must acquit; even if I do not believe Joey's evidence, I must ask myself whether his evidence nonetheless raises a reasonable doubt, and, if so, I must acquit; finally, even if I do not believe Joey's evidence and find that it does not raise a reasonable doubt, I must ask myself whether, on the basis of the evidence I do accept, I am satisfied beyond a reasonable doubt that the offences have been made out.

Analysis:

[19] In assessing the credibility of the evidence presented at trial, I have concluded that there are problems on both sides of the equation.

1. Credibility – Doug Smarch

[20] Turning first to the evidence of Doug Smarch, Crown argues that I should accept his evidence noting him to be a well-educated man who testified with a quiet and thoughtful demeanour. However, in my view, he appeared to struggle with recollection, pausing on numerous occasions for extended periods to consider his evidence. His evidence was often confusing and difficult to follow, the chronology of events unclear,

and his answers, particularly on cross-examination, were often not responsive to the question being asked.

[21] These frailties were particularly notable during his evidence in relation to the number of hours which had been on the version of the timesheet he had asked Joey to sign. Firstly, while his evidence suggested that he took the timesheet back from Joey, Doug had no explanation as to what had happened to it. It was not produced in court. He was asked numerous questions about the content of the sheet and how it differed from exhibit 2. His evidence as to the number of hours on the sheet, what days they were attributable to and the number of hours added to exhibit 2 kept changing over the course of his evidence, and was so confusing as to be almost unintelligible.

[22] In addition, there were inconsistencies in his evidence which caused me some concern. For example, his description of the common assault in direct examination included only that he fell back into the wall as a result of Joey pushing him. On cross-examination, when asked about falling back into the wall, he volunteered, for the first time in his testimony, that he tripped over a piece of wood he says Joey uses to prop open his door.

[23] Similarly, Doug's evidence in direct referenced Joey making numerous comments indicating a concern for his financial situation, before uttering the threat to burn down Doug's house. In cross-examination, when questioned about what Joey had said in relation to this particular threat, Doug noted that Joey had also uttered the very memorable phrase, "I'm off my meds. If I had a gun, I would shoot myself". This was not mentioned at any time in direct.

[24] Other areas of Doug's evidence did not fully make sense to me. For example, when Joey became angry with Doug for a short-changing him on hours, something Doug clearly acknowledged was the case, Doug responded by saying it was not his fault, it was Finance's. This makes little sense to me as a response to Joey's concerns. While I understand that Finance had made changes to the timing in relation to the submission of timesheets, Joey's dissatisfaction with the timesheet clearly related to the number of hours on it, and was not in any way that I could see related to being asked to sign the sheet on a Monday rather than a Friday.

[25] Doug's evidence with respect to leaving the home was similarly difficult to understand. He was clear in his evidence that he had been asked by Joey to leave. Doug maintained that he wanted to leave, although it is notable that his evidence as to when he formed the intention to leave varied. At first, he said he decided to leave when Joey refused to sign the time sheet and said, "I'm done with this". Later, Doug said he formed the intention to leave when Joey picked up the axe. In any event, what I found difficult to understand was Doug's evidence that, even though Joey wanted Doug to leave, and Doug wanted to leave, he could not leave. It is clear on his evidence that Doug was closest to the door, and that there was nothing, including Joey, to physically prevent him from leaving, and yet, he maintained that he was unable to leave because Joey kept "engaging" him, which appears to mean simply that Joey kept talking to him.

2. Credibility – Joey Smarch

[26] Turning to the evidence of Joey Smarch, there is no doubt that Joey was extremely challenging throughout the trial process. He frequently interrupted, lapsed into argument while giving his evidence, and was argumentative when challenged on

cross-examination. In particular, he had difficulty focusing his evidence and argument on issues of relevance. He remained fixated on a perceived unfairness in his treatment by police, and on previous issues he says occurred between him and Doug. He continually speculated as to Doug's intentions and motivations. However, it must be remembered that the question before me is one of credibility not one of personality. Being difficult cannot be equated with a lack of veracity.

[27] Nonetheless, Joey's evidence did include some definite frailties. Like Doug, Joey's evidence suffered at certain points with respect to plausibility. For example, he was adamant that the number of hours included on the copy of the timesheet presented for his signature did not differ in any way from the hours in exhibit 2. He maintains the only difference is that the first version was handwritten. Were this the case, it makes little sense that Doug would have created a second timesheet with exactly the same contents.

[28] Joey's description of the events of the evening before the incident was similarly implausible. He refers to an elder gifting him with a snake as a thank-you for helping her with a drum. He says that Doug then threw the snake into the fire, referring to it as bad medicine. This was apparently relayed in an effort to suggest that Doug was jealous of the gift, and this somehow plays in to a motivation to lie about the events of January 13, 2014. I have difficulty accepting Joey's evidence on this point, and greater difficulty in drawing the conclusions from it that he asserted should be drawn.

[29] Again, like Doug's evidence, Joey's evidence did include some inconsistencies. These include his maintaining that he was not on any medication, which contrasted with

the evidence of Marina Bailey in which she indicated that Joey had asked her, among other things, to pick up his medication.

[30] Lastly, Joey's evidence suffered from a lack of confirmatory evidence on items he maintained could be corroborated. He was unable to produce Ryan Minette to confirm his story in relation to the axe. He did not produce his calendar which he says demonstrated that his hours were being short-changed. He did not provide photos of the damage to the door.

3. The Rule in *Browne v. Dunn*:

[31] As a final point with respect to Joey's evidence, the Crown argued that Joey failed to comply with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L) on several key points, including a failure to put to Doug either the events of the evening before or Joey's story with respect to the axe having been observed by Doug at the time Joey purchased it, and by failing to show Doug the shirt shown to the court during Joey's evidence. Accordingly, the Crown argued this should affect the weight given to Joey's evidence.

[32] It must be remembered that at its root the rule in *Browne v. Dunn* is about ensuring trial fairness by ensuring that witnesses are confronted with contradictory evidence that will be called in an effort to impeach the witness's credibility (See *R. v. Drydgen*, 2013 BCCA 253).

[33] With respect to the events of the evening before, while likely a technical breach of the rule, having made the foregoing comments with respect to the plausibility of this evidence, I am not satisfied that this evidence in any way can be relied upon as a basis

to impeach Doug's credibility. Failure to put it to Doug does not, in these circumstances, adversely affect trial fairness.

[34] With respect to the axe, I am not satisfied that there was indeed a violation of the rule. Doug was asked, in cross-examination, whether he had ever seen the axe before, to which he replied that he had not. The fact that the specifics of Joey's version were not put to him is immaterial when one considers the following comments of the B.C. Court of Appeal in *R. v. Khuc*, 2000 BCCA 20, as quoted in *R. v. Drydgen*:

There can be no doubt that the general rule is that counsel must confront a witness with any new material he or she intends to adduce or rely on after the witness has left the box. However, the rule does not go so far as to require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change. (para. 17)

[35] Finally, with respect to the torn shirt, both Joey and Doug agree that Joey's shirt was torn. Having observed the torn shirt, I was satisfied that it did not add anything to the evidence nor was it particularly probative with respect to the credibility of either party. For that reason, the shirt was never made an exhibit in these proceedings. I fail to see how a failure to show the shirt to Doug during his testimony can be said to be a violation of the rule in *Browne v. Dunn*.

Conclusion:

[36] Having identified concerns with respect to the evidence of both of the central witnesses, the question remains whether I am satisfied, beyond a reasonable doubt, that the offences have been made out.

[37] Dealing first with count 3, the alleged threat to burn down Doug's house, I have a reasonable doubt in all of the circumstances. It is not disputed that Joey was extremely agitated about his financial situation when he observed the timesheet. In this context, Joey's version that what he said was, "I might as well burn my house down" is actually the more logical of the two versions. This is even more so, if I accept Doug's evidence that Joey also said, "If I had a gun, I would shoot myself". Count 3 is hereby dismissed.

[38] With respect to the remaining counts, the case has proven to be a quandary. As outlined above, there were frailties with the evidence of both Doug and Joey. On the other hand, both remained relatively consistent on key aspects of their evidence, central to the issue to be decided, and neither exhibited clear indicators of lying.

[39] Having considered the evidence of both at length, I have come to the firm conclusion that the truth of what actually occurred between Joey and Doug on January 13, 2014 very likely lies somewhere between the two versions presented to me. While I suspect the true events bear a closer resemblance to Doug's version than Joey's, I simply cannot reach the level of certainty required to satisfy the standard of proof beyond a reasonable doubt. In such circumstances, I have no option but to acquit. The remaining counts are hereby dismissed.

[40] Having so decided, Joey need not attend Court in Teslin on July 30, 2015 as previously scheduled.