

Citation: *R. v. Smith*, 2009 YKTC 102

Date: 20090821
Docket: 09-00207
09-00323
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

RICK SMITH

Appearances:
Peter Chisholm
Elaine Cairns

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] FAULKNER T.C.J. (Oral): The defendant, Rick Smith, is charged on two Informations with charges of assault, assault wherein the use of weapon was threatened, and forcible entry. By consent both Informations were tried together.

[2] The case for the Crown relies, for the most part, on the evidence of the complainant, Laurie Patterson, who was once in a relationship with Mr. Smith. It should be mentioned that there are three children as a result of that relationship. Ms. Patterson testified that Mr. Smith appeared uninvited and drunk at Ms. Patterson's mother's home and caused an uproar resulting in the police being called. The police attended but Mr. Smith was not located at that time. Some hours later Ms. Patterson returned to her own

home, which was nearby her mother's home in Tagish, Yukon. Mr. Smith was there, still drunk and wanting entry to the house. Ms. Patterson told Mr. Smith to go away, ran into the house and attempted to bar the door. Mr. Smith kicked in the door and menaced her with a log skinner or peeler. Not having a telephone, Ms. Patterson ran from the home with Mr. Smith in pursuit. Mr. Smith caught up to Ms. Patterson and she was assaulted; punched and dragged across the driveway. She managed to end the assault by striking Mr. Smith in the head with a rock.

[3] Generally, I found Ms. Patterson to be a credible witness. Although she admitted to being angry with Mr. Smith at the time, she gave her evidence before me more in sorrow than in anger. There was no tendency that I could discern for her to aggrandise her evidence or demonstrate particular *mal fides* against the defendant. She conceded that she struck Mr. Smith with the rock and also possibly with a paddle. She conceded that she had been drinking and that her memory of the events was, in some respects, vague.

[4] One of the important points in finding some credibility in what she says is that some injuries that she sustained, that were observed and photographed by the police, are consistent with her evidence of being dragged across the ground, as well as being kicked in the legs. More importantly, the damage to the door, the photographs show it as clearly being, in the vernacular, kicked in at the bottom, and the finding of the log skinner on the porch are strongly corroborative of her version of events. There is also the fact that Mr. Smith had been in the area earlier attempting to make unwanted contact with Ms. Patterson and their children.

[5] I should mention, as to the door, it should also be noted that Constable Plamondon had been to the house sometime before and recalled other damage to the door but not the damage to the bottom of the door which is said to be caused by the defendant. Therefore, there is reasonably strong evidence to suggest that the damage to the bottom of the door is indeed an artefact of the forcible entry.

[6] In assessing Ms. Patterson's credibility, I am of course aware that she faces assault charges relating to the same incident and therefore has a motive to dissemble. Nonetheless, as I have said, I have found her quite credible.

[7] There is, however, the matter of the evidence of Tyrell Bayne to be considered. Tyrell is the 14-year-old nephew of Ms. Patterson and came along during the course of the affray at Ms. Patterson's residence. It should be noted that he was not there during the initial incident described of the kicking in of the door or the use of the log peeler, but he does claim to have been present during the struggle on the roadway. According to Tyrell, to put the matter shortly, Ms. Patterson was not acting purely in self-defence but he describes more of a mutual fight, with Ms. Patterson giving as good as she got. He also claims that it was he who dragged Ms. Patterson off the defendant, helpfully suggesting that that would have caused the injuries to her back that were observed by the police. He appears not to have had a theory as to how the bruises were occasioned to her legs but we will leave that to the side.

[8] I think the most important point with respect to Tyrell's evidence is that much of his evidence was elicited by very leading questions to which the witness readily but cryptically agreed by simply giving yes answers. A cross-examiner is, of course,

entitled to ask leading questions. However, by putting words in the mouth of a too compliant witness, the cross-examiner runs the risk that the trier of fact will place little weight in that witness's evidence, most of which came from counsel in the first place.

[9] At the end of the day, I am satisfied that the only rational conclusion to draw from the evidence is that Mr. Smith did indeed go uninvited to Ms. Patterson's house, broke in the door and menaced Ms. Patterson with the log peeler. No other explanation appears in the evidence for the broken door or the location of the log peeler on the step. To suggest that the log peeler somehow fell down from the light is pure fancy, given the shape of the item. It clearly would not simply dangle precariously awaiting only a jar of the door to dislodge it. Given the substantial corroborative evidence with respect to the charges of forcible entry and assault with a weapon, and for which no alternate explanation appears in the evidence, I find that those charges have been proved.

[10] I pause here to respond to several points made by Ms. Cairns. First, she says that there is no evidence that the house in question was the real property of Ms. Patterson, as s. 72 appears to require. However, I do not accept that it must be proved that the complainant owned the property in question, only that she was in lawful occupation of it. Her unchallenged evidence that it was her residence is sufficient for me to make the necessary inference in that regard.

[11] As well, with respect to the forcible entry charge, Ms. Cairns argued that there was no evidence that Mr. Smith actually entered the residence. However, in kicking in the door, of necessity at least his foot and part of his leg crossed the threshold, and this is sufficient in law to constitute a forcible entry.

[12] The third point made by Ms. Cairns was that there was little or no evidence that Mr. Smith did anything particularly unlawful with the log peeler, even assuming he had it in his possession. However, Ms. Patterson's testimony in that regard I find quite credible and telling. Essentially, she said he had the log skinner in his hand. She did not know whether his intent was to hit her with it or to threaten her with it, but in either case she was terrified. That, in my view, is sufficient to overcome the objection made by Ms. Cairns in that regard.

[13] It remains to consider the charge of assault, and this, it was agreed, relates to the matters occurring after the parties ended up away from the door of the house, I gather, essentially, in the driveway in front. This is the portion of events which young Mr. Bayne claims to have seen, at least in part. With respect to that matter, while I much prefer the evidence of Ms. Patterson on this aspect of the incident, there is not the same degree of corroboration available and I do not think I would be justified in entirely discounting the evidence of Mr. Bayne, frail though it may be. In consequence, the assault charge must be dismissed

[14] MS. CAIRNS: There is a victim impact statement. I am fine with it.

[15] MR. CHISHOLM: There is no issue with the victim impact statement.

[16] MS. CAIRNS: Your Honour, with respect to the remaining breach charges, at this time I will enter a plea to Count 1, a plea of guilty to Count 1.

[17] THE COURT: Thank you.

[18] MR. CHISHOLM: Your Honour, there is a criminal record that I would like to file. I will just make sure my friend has the same copy.

[19] THE COURT: I take it, with respect to the breach charge, you are simply adding the allegation he was on probation at the time with the relevant no contact clause.

[20] MR. CHISHOLM: That is correct Your Honour.

[21] MS. CAIRNS: That is admitted.

EXHIBIT 1: Criminal Record of Rick Smith

FAULKNER T.C.J.