

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

WILLIAM JOHN SPOONEMORE

HUGH CONNOLLY

For the Crown

GEORGE WOOL

For the Defence

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): The accused is charged with assault and assault causing bodily harm against Craig Leppert. The incident took place at an isolated outfitting camp on September 17, 2000. The principal issue arising is whether or not the accused acted in self-defence. Among others, one of the issues to address is did the accused reasonably believe, in the circumstances, that he was being unlawfully assaulted.

[2] The accused, Spoonemore, was a guide for an outfitter operating in the Ruby Range area near Haines Junction, Yukon Territory. He had sheep hunting experience. He was sharing a camp called the Isaac Creek camp with the victim, Craig Leppert. Leppert was the more experienced sheep hunting guide and had more experience in the Ruby Range area. Neither guide was in charge of the other,

although some deference was paid to Leppert because of his experience and aggressive take-charge personality.

[3] Some background is required. The Isaac Creek camp had two hunting parties at the time. They shared a cook shack which was a 20 feet long by 10 feet wide wall tent used for meals when they were in camp and not hunting. There were two inexperienced wranglers who looked after the horses and assisted the guides; they were Lee McAstocker who was 19 years old, and Karl Done who was 37. Both were wrangling for the first time.

[4] The different personalities and guiding styles was evident. Spoonemore had remained in camp with his hunter for two days because there was a low ceiling or cloud cover and it was raining and it would be difficult to see sheep. Leppert, on the other hand, was still hunting because the hunters had a 10 to 12 day hunt and they did not have a sheep yet. I have concluded that by the end of the summer in September of 2000, Spoonemore and Leppert were sick and tired of each other. Leppert did not think Spoonemore was working hard enough. Spoonemore was sick of listening to Leppert's racial slurs against Indians, his constant talk about beating up Indians, and the fact that he claimed he had killed an Indian in Texas. The Texas story was an outright fabrication by Leppert.

[5] Both wranglers were accustomed to these stories and slurs and did not pay much attention to them. However, they bothered Spoonemore a great deal as he had First Nation blood in his ancestry. Spoonemore would usually leave the table when Leppert started to talk in that fashion. He never told anyone in camp about his First Nation ancestry.

[6] Leppert was also somewhat of a bully in that he was loud and aggressive and liked to have things his way, despite the fact that he was not Spoonemore's superior except for his experience and knowledge in the area. Spoonemore was certainly the more knowledgeable horseman, but Leppert was

the more aggressive sheep hunter. The wranglers acknowledged that Leppert tried to intimidate them, but Done said that he was not intimidated, and McAstocker said he did not let it bother him. I find that up to September 17, 2000, despite some ill-feeling, there was no violence or threat of violence. To that point, any violent disposition of Leppert was all talk and Spoonemore did not fear him.

[7] When Leppert returned to the Isaac Creek camp on September 17, 2000, he was not in a good mood. He did not get a sheep on his hunt and he was upset with Spoonemore staying in camp for two days. Leppert made supper after the horses were cared for and all was normal until the hunters left the cook shack for their sleeping cabins. Leppert then started to criticize the wranglers for their lack of work at another camp; he also indirectly criticized Spoonemore for the lack of wood at the Isaac Creek camp.

[8] Spoonemore left the cook shack and slammed the door. He was clearly angry and fed up with Leppert's verbal aggression towards him and the wranglers. Shortly after Spoonemore left, Leppert put on his cowboy boots and said to Done that he was going "to put the mule ears" to Spoonemore. McAstocker did not hear this. Done interpreted it to mean that Leppert was going to, "Kick the crap out of Bill."

[9] Leppert approached Spoonemore who was talking to his hunter and asked if he could have a word with him at Spoonemore's wall tent. Spoonemore followed Leppert into the tent. Leppert was quite angry and said that the boss told Spoonemore to go hunt at Albert Creek and why hadn't he. Spoonemore said no, the boss did not; he just recommended it. At this point both Spoonemore and Leppert were very angry and shouting face to face. Spoonemore called Leppert a fucking liar; Leppert used the heels of his hands three times to push Spoonemore back a few feet. Spoonemore is a larger and heavier man than Leppert.

[10] Leppert then stepped out the door and was going down the steps. Spoonemore was following and said Leppert began to swing his arm around. Spoonemore was on a higher level and stuck out his leg which contacted Leppert's waist. Leppert came back in the wall tent and put Spoonemore down on the bed and held his head down with his knee and boot. Leppert said, "You call me a liar again and I'll kill you." At this point Leppert says Spoonemore agreed to go to Albert Creek. Spoonemore denies that he agreed.

[11] Leppert left and went to the cook shack where the wranglers were cleaning up. He said nothing and sat down at his usual seat, lit a cigar and was having a drink. Both wranglers thought the incident was over, although they had no idea exactly what had taken place before. Between five and ten minutes later Spoonemore entered without saying anything. He went over to the wall behind Leppert and took a steel-shanked claw hammer off the wall. I quote Karl Done for what happened next. The first quotation is from page 83, lines 21 to 27:

When Bill approached Craig from behind, Bill then struck Craig in the head, basically where his neck meets his -- his skull. He -- Craig then lurched forward; Bill then struck him one more time down the side of his head. At that point I grabbed Bill, asked Bill to drop the hammer, and then me and Bill went outside.

Page 85, lines 18 to 22:

Q And you said when they came back to the shack, you said it -- it appeared to be resolved?

A It seemed to be very calm; it seemed to be over. They both came in without really any emotion, never spoke. Nothing was said, absolutely nothing.

Page 86, lines 13 to 25, "He," referring to Leppert:

...was basically sitting like at a picnic table; he was sitting like on a bench-type picnic table, and after Bill hit him the first time, basically his upper torso fell onto the table.

Q And the second blow?

A Craig was kind of convulsing, sort of, and Bill hit him a second time which grazed the left side of his head. Bill -- Craig was sort of just moving out of -- I don't know how to explain it. He -- I believe he was unconscious to be honest

- with you. It was very fast.
- Q Okay. At the time that Bill struck Craig the first time, did Craig -- was Craig aware of Bill's presence?
- A I would say not.

And in cross-examination of Done at page 107, lines 13 to 21:

- Q Now of course, you didn't -- at no time did you see what Craig Leppert was doing with, you know, with his legs or his arms or anything like that, did you?
- A Yes, I did.
- Q But I mean after the blow -- before the blow, you weren't expecting anything, were you?
- A No, but I was checking out the scenery, so to speak. I was looking over the room; I was looking in that direction.
- Q Yeah. But you weren't -- you weren't expecting anything, but I'm saying --
- A Oh, no, absolutely not.

And that completes -- the word "No" completes that exchange.

[12] I should point out that Karl Done did not give evidence at the trial. The Crown subpoenaed him and sent airfare; however, he did not attend and could not be reached. Defence counsel applied to have the transcript of Karl Done at the preliminary inquiry on May 17, 2001, admitted into evidence. Since it was a defence request based on the defence expectation that Done would testify, I allowed the transcript of evidence of Done to be admitted on the principled approach to hearsay for the purpose of establishing the truth of its contents. The Crown did not object. The necessity was based on the failure of Done to testify which would deprive the accused of making his full answer and defence. It was reliable because it was under oath and defence counsel had full opportunity and did cross-examine. It did not meet the conditions of s. 715 of the *Criminal Code*.

[13] I find the Done evidence ultimately reliable because it is very close to Lee McAstocker's *viva voce* evidence on the attack in the cook shack. McAstocker confirmed that Spoonemore came in, grabbed the claw hammer, turned around and swung it and hit Leppert on the back of the head. He described Spoonemore's arms coming down with quite a force and he heard a pop and a crunch sound.

He said Leppert fell forward on the table and Spoonemore hit him with a second blow. Leppert was unconscious and his hands started to go cold. Karl Done said he was worried that Leppert would expire that night.

[14] Amazingly, Leppert had a rough night under the alternate watch of the two wranglers. The next day he was up and around and did some laundry. On the 19th of September he actually rode horseback to hunt.

[15] Significantly, Spoonemore admitted in chief that if he had swung the claw hammer he would have killed Leppert. Spoonemore's evidence on this point is that he thought Leppert had risen one inch off his seat and was turning towards him to attack, so he had to react to protect himself. He said he flicked the claw hammer in a back-swing and the hammer glanced off the left side of Leppert's head. He described the second blow as simply dropping the hammer so it was just the weight of the hammer that struck Leppert on the back of the head.

[16] In *R. v. Petel* (1994), 87 C.C.C. (3d) 97, the Supreme Court has ruled that it is the accused's state of mind which must be examined and the danger of assault need not be imminent. The imminence of the apprehended danger is only one factor to be considered. One should not emphasize the victim's acts but the accused's state of mind. Also previous threats and assaults are to be considered.

[17] I must first instruct myself on reasonable doubt as it applies to self-defence. The Crown must prove beyond a reasonable doubt that the defence of self-defence cannot succeed. Therefore, the following applies: If I accept the evidence of the accused, I must acquit. Even if I do not accept the evidence of the accused, but I am left in a reasonable doubt about it, I must acquit the accused. Even if I am not left in a reasonable doubt by the evidence in support of self-defence, I must determine on the

basis of all the evidence that the accused has been proven guilty beyond a reasonable doubt.

[18] In this case, Spoonemore testified that he had been intimidated by Leppert's aggressiveness and assault during their physical fight which ended approximately five to ten minutes before he hit Leppert with the hammer. He had not been intimidated prior to that and he did not fear Leppert, even after Leppert's threat that he would kill him if he called him a liar again. When he walked back into the cook shack, he did not fear for his safety, nor did he think Leppert was waiting to get him. He testified he had no concern for his health or safety. He did acknowledge that he was still angry with Leppert when he returned to the cook shack to get the claw hammer. He was not going back to the cook shack out of any apprehension of danger or fear for his safety or a repetition of the previous assault. His evidence is that he returned to the cook shack to get the claw hammer to repair the door to his tent frame.

[19] It is only after having grabbed the claw hammer that he raises the self-defence claim based upon his fear of imminent assault by Leppert. I do not believe his evidence that Leppert was about to assault him, nor do I have a reasonable doubt. The physical fight between Leppert and Spoonemore was over. Spoonemore did not enter the tent to continue it or defend himself against a repetition of the earlier assault.

[20] I have not relied on the evidence of Craig Leppert as it was unreliable.

[21] I do find that s. 34(1) is not applicable because I find that Spoonemore intended to cause grievous bodily harm. Section 34(2) and 35 are not applicable because Spoonemore was not, in all the circumstances, under a reasonable apprehension of death or grievous bodily harm. Section 37 does not apply because he was excessive in his wilful and reckless infliction of hurt on Leppert.

[22] Considering all of the evidence, and particularly that of the two independent witnesses, I find that Spoonemore is guilty of assault causing bodily harm.

[23] I order a stay of proceedings on the s. 267(a) assault charge.

VEALE J.