

Citation: *R. v. Sydney*, 2009 YKTC 3

Date: 20081120
Docket: 08-00312
Registry: Whitehorse
Heard: Teslin

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

ROLAND KELLY SYDNEY

Appearances:
Ludovic Gouaillier
André Roothman.

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] RUDDY C.J.T.C. (Oral): Roland Sydney is before me facing a charge of assault on his former spouse, Santana Jules.

[2] Ms. Jules testified that on July 31, 2008, she was at the home she then shared with Mr. Sydney, drinking with a friend. Mr. Sydney returned home from playing poker with a couple of other individuals. Sometime later, Ms. Jules indicated she was in the bedroom with the door locked, Mr. Sydney kicked in the door, grabbed her by the hair and dragged her prone out of the house, leaving her outside.

[3] Mr. Sydney took the stand in his own defence. He stated that he returned home from poker and everything was fine for about an hour, with all parties present drinking

and having a good time. Mr. Sydney noted that he then felt he had had enough and wished to go to bed. He asked everyone to leave but they did not do so. He then went to turn off the music and the TV, which was a \$1700 large-screen TV which he had purchased with his own money.

[4] He says Ms. Jules threatened several times to smash the TV if he turned it off. When he went to turn off the TV she came at him, punching him two times, slapping him and kicking him three to four times in the left leg. He indicated he thought to call the police but his phone was not working. He further testified that he did not want to leave her alone in the living room with the TV, believing that she would make good on her threats to damage the television.

[5] He asked her to leave a number of times but she refused. He decided to remove her from the residence to prevent her from damaging the TV. He grabbed her by the sweater and pulled her out the front door, across the deck and to the bottom of the stairs. She apparently physically struggled to prevent removal and was on her bum as he pulled her out of the house.

[6] He then returned to the house, locked the door and went to bed.

[7] It should be noted that none of the other individuals present in the home testified and all apparently declined to provide formal statements.

[8] The first question to be determined is what evidence I accept based on all of the evidence that I have heard today. In considering the evidence and credibility of the witnesses, I am mindful of the *R. v. W.D.* case, [1991] 1 S.C.R. 742, out of the Supreme

Court of Canada, though in the circumstances of this case there are legal issues to be determined even if I do accept the evidence as presented by Mr. Sydney.

[9] Dealing first with the issue of the facts. I am satisfied that Mr. Sydney was forthright and credible in giving his evidence, and I accept his version of events. I come to this conclusion for the following reasons.

[10] Ms. Jules' state of intoxication, as observed by Constable Splinter, and as confirmed by her significant lack of recollection, are such that, in my view, her recollection of events can only be described as unreliable.

[11] Furthermore, I note Ms. Jules testified to facial bruising; however, this was not observed by Constable Splinter that night or the following day.

[12] In addition, I accept Constable Splinter's evidence that Mr. Sydney was much less intoxicated than Ms. Jules and was clear, coherent and cooperative when arrested shortly after the incident. He testified to having between seven and nine beer between 8:00 p.m. and 2:00 a.m., noting that he is careful not to exceed what he can handle. Indeed, it was because he felt he was at his limit that he asked everyone to leave so that he could go to bed.

[13] I also note that Mr. Sydney's version is more consistent with the physical evidence, namely the rip under the arm of Ms. Jules' sweater.

[14] Having accepted Mr. Sydney's evidence as to the events of July 31st, I must recognize that his version does involve the intentional application of force. Accordingly, I must decide whether he had a legal justification for the use of force, and if so whether

the force used was reasonable in all of the circumstances.

[15] Mr. Sydney's counsel argues that s. 27 of the *Criminal Code* provides Mr. Sydney with a defence to the offence as charged. Section 27 reads:

Every one is justified in using as much force as is reasonably necessary

- (a) to prevent the commission of an offence
 - (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
 - (ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or
- (b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

[16] As is evident by the discussions I had earlier with Crown, it appears to be s. 27(a) that is at issue with respect to these proceedings.

[17] I should also note, in terms of the requirements of s. 27, there was no issue raised as to whether or not the potential offence that we are talking about here, that being mischief, is one that would allow for the person who committed it to be arrested without warrant.

[18] However, the Crown argues that s. 27 does not apply, as the evidence before me does not support a finding that there was an immediate likelihood Ms. Jules would damage the television as threatened, thereby committing the offence of mischief. In addition, Crown argues that Mr. Sydney used excessive force in removing Ms. Jules from the home.

[19] Dealing first with the issue of immediacy, I do not accept the Crown's argument on this particular point. Ms. Jules clearly threatened to damage the television should

Mr. Sydney turn it off. In addition, when Mr. Sydney attempted to turn off the television, Ms. Jules went at him and physically assaulted him to prevent him from doing so. This use of physical force to prevent Mr. Sydney from turning off the television makes it entirely reasonable, in my view, to conclude that Ms. Jules had an immediate intention to carry out her threat to damage the television.

[20] This then leaves the question of whether, in physically removing Ms. Jules from the home to prevent her from committing mischief to the television, Mr. Sydney used excessive force. In considering this issue, I note that the law is clear that an accused is not expected to measure the force used to a nicety.

[21] On the facts of this case, I am not satisfied that the force used was excessive in all of the circumstances. Here Mr. Sydney grabbed hold of Ms. Jules' sweater to pull her from the home. He concedes he may have captured her hair in grabbing her sweater, but I accept that if he did so it was purely incidental to the grabbing of the sweater and not intentional. Ms. Jules clearly resisted her removal, struggling against Mr. Sydney and attempting to break free. It was clear that she was not going to leave willingly.

[22] Notwithstanding her resistance, there is no suggestion that Mr. Sydney escalated in any way the force used to remove her. He simply continued to pull her from the home. There was no other force used to subdue Ms. Jules' resistance: no punches, no slaps, or anything of that nature, and clearly on the evidence there were no weapons used. I cannot and do not conclude the force used in these circumstances was excessive.

[23] In conclusion, I am satisfied on the evidence I do accept that Mr. Sydney, pursuant to s. 27, was legally justified in using force to remove Ms. Jules from the home to prevent the commission of an offence, and that the force used in doing so was reasonable and necessary in all of the circumstances.

[24] In the result, I hereby dismiss the charge. Mr. Sydney, you are free to go.

RUDDY C.J.T.C.