

Citation: *R. v. Zgela*, 2017 YKTC 16

Date: 20170501
Docket: 16-11006A
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

IVAN ZGELA

Appearances:
Amy Porteous
Andre Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] Ivan Zgela has been charged with having committed offences contrary to ss. 253(1)(a), (b) and 264.1(1) of the *Criminal Code*.

[2] The trial of these charges took place in Dawson City, Yukon on March 8, 2017. Judgment was reserved.

[3] I provided my reasons orally in Court on April, 26, 2017 and reserved the right to issue written reasons. These written reasons are substantially the same as were read orally in Court, with minor editorial changes to improve clarity.

Evidence

[4] On May 14, 2016 Cst. Robson of the Dawson City, RCMP Detachment responded to a complaint from the front desk clerk at the Downtown Hotel. The complaint was in regard to a possibly impaired male driving a white pickup truck leaving the area of the hotel and heading to the bridge. There was a second call from the complainant to say that the white truck was still at the Downtown Hotel. Cst. Robson noted the white pickup truck parked in front of the Downtown Hotel. He testified that the truck was parked in a lane of traffic.

[5] A video was played during the trial which showed the location of the truck. It was parked parallel to the Downtown Hotel facing north and away from the intersection the Downtown Hotel was situated on. To the extent that the truck was in a lane of traffic, I note in the video obtained from the police cruiser that the street is fairly wide. I am also aware from my own experience, having been at that location a number of times, that the road is fairly wide and the lanes not distinct. The truck did not appear to be an obstruction, as was also testified to by Cst. Robson. He stated that the truck was parked in a “no parking” zone and was perhaps six feet from the side of the road.

[6] To the extent that the truck may have been “in a lane of traffic”, I find that any encroachment was minimal and did not create any hazard.

[7] I also note that the video started recording the white truck at approximately, according to the numbers on the video, 00:55:50 hours. (In real time this was in fact 00:26:00). The audio did not start until 01:09:57, just under 14 minutes after the stop. The police cruiser left the scene to take Mr. Zgela to the RCMP Detachment at

01:33:35. In that time, in reviewing the video, I observed only one vehicle passing the truck heading south while it was parked. I observed no vehicles passing the truck heading north.

[8] When Cst. Robson pulled up behind Mr. Zgela's vehicle, Mr. Zgela exited his vehicle from the driver's door. The vehicle was running.

[9] Cst. Robson and Mr. Zgela spoke outside of the truck. Cst. Robson observed Mr. Zgela to have symptoms associated with alcohol consumption, being an odour of liquor on his breath and slow, deliberate movements. He stated that he had consumed some alcohol at Diamond Tooth Gerties. He also testified that he told Cst. Robson that he was not driving the truck.

[10] Pursuant to a s. 254(2) demand, Mr. Zgela provided a breath sample into a roadside screening device, registering a fail. He was subsequently transported back to the RCMP Detachment where he provided two breath samples of .110 mg/%.

[11] Cst. Robson testified that, after processing Mr. Zgela, the plan was to release him and give him a ride back to the Downtown Hotel. This plan changed, however, after Cst. Robson was informed by assisting Cst. Nakonechny that Mr. Zgela had made some threatening comments.

[12] While being processed at the RCMP detachment in Dawson, Mr. Zgela, who was situated in the interview room, repeatedly stated words to the effect that before he left Canada he would burn the Downtown Hotel down. He told Cst. Nakonechny to write these words down.

[13] Mr. Zgela was noted at the time to be angry, indignant and quite upset about the complaint that had been called in by the front desk clerk at the Downtown Hotel, which had resulted in the police investigation and his arrest.

[14] Cst. Nakonechny noted Mr. Zgela to definitely be under the influence of alcohol, although he considered him to be able to carry on a coherent conversation and not to be confused.

[15] I accept that Cst. Nakonechny took these words seriously as a threat and was concerned enough that, as a result, the decision was made to keep Mr. Zgela in custody overnight rather than releasing him after he had been processed.

[16] In addition to Mr. Zgela being arrested and charged with the s. 253(1)(a) and (1)(b) offences, Cst. Robson also charged Mr. Zgela with the offence of uttering threats. Cst. Robson stated he was concerned that, if released, Mr. Zgela would confront the complainant and utter threats to him.

[17] When Mr. Zgela was released on an undertaking later that morning, he was placed on a condition that required him to stay away from the Downtown Hotel.

[18] Mr. Zgela testified that he had been in the back seat of the truck while his partner, Amy White, drove it over from Diamond Tooth Gerties. An older male, Henry Kruger, was in the front passenger seat.

[19] Jerry Duhl, a miner who had known Mr. Zgela since the summer before, confirmed in his testimony that, when he spoke to Mr. Zgela at Diamond Tooth Gerties

just before midnight, Ms. White was driving, Mr. Kruger was in the front passenger seat and Mr. Zgela was in the rear seat.

[20] I accept Mr. Duhl's testimony as credible.

[21] Mr. Zgela stated that he and Ms. White planned to stay at the Downtown Hotel that night as it was a long drive home to the mining camp that they lived at. They parked in front of the hotel as they did because there were a number of fire trucks at the hotel blocking the parking areas.

[22] Mr. Zgela stated that he and Ms. White went into the hotel in order to obtain a room. However the front desk clerk was not prepared to provide them a room at the miners' rate Mr. Zgela stated he normally received. He said he left Ms. White, who was quite upset, at the front desk while he went to look for the manager, Shirley, at the Annex (a section of the Downtown Hotel across the street on the same block). He did not find her but spoke to some firefighters he knew. He then went back to the vehicle that had been left running in order to keep Mr. Kruger warm, and got into the driver's seat to talk to him. He sat there with Mr. Kruger for five or six minutes before the police arrived. He stated that he was sure once Shirley showed up he would get the lower miners' rate. He testified that he did not at any point change his mind about staying there.

[23] Mr. Zgela testified that he had no plans that night to drive the truck anywhere. He stated that he was not planning to park the truck. He explained that his comments in the audio recording to Ms. White, when she approached the police cruiser, that he

would park the truck, were things he said just to get her away. He testified that he believed someone else would move the truck.

[24] He also stated that Ms. White was not going to be driving home to the mining camp as it was too far and she was upset and emotional.

[25] Ms. White testified that she had been Mr. Zgela's partner for approximately eight years. She stated that she was at Diamond Tooth Gertie's with him. She was not consuming alcohol while there, only coffee and soda water.

[26] It had been a difficult day for her as it was the one year anniversary of her twin sister's death. She was too emotional to drive all the way back to camp so she drove the truck to the Downtown Hotel where she parked in front of the entrance to the lobby. She stated that she did so because the fire department vehicles were blocking the parking spaces. Otherwise she would have parked the truck in a parking spot right away.

[27] When she drove over from Diamond Tooth Gerties, Mr. Zgela was seated in the backseat and Mr. Kruger was in the front passenger seat.

[28] She and Mr. Zgela went into the Downtown Hotel where they attempted to rent a room for the night. However, there was a dispute with the front desk clerk over price for the room. Mr. Zgela left the hotel to go outside. She went outside before the police arrived and again afterwards.

[29] Ms. White testified that Mr. Zgela was not driving because he had been drinking and that, as a result of his drinking, would not have driven that night.

Case Law in regard to Care and Control

[30] The law regarding what constitutes care and control of a motor vehicle is set out in *R. v. Boudreault*, 2012 SCC 56.

[31] In para. 9, writing for the majority (Cromwell J. dissenting), in upholding the trial judge's acquittal of the accused, Fish J. stated:

For the reasons that follow, I have concluded that "care or control", within the meaning of s. 253(1) of the *Criminal Code*, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a *realistic risk*, as opposed to a *remote possibility*, of danger to persons or property.

[32] Fish J. further stated in paras. 12 and 13:

I recognize...that a conviction will normally ensue where the accused, as in this case, was found inebriated behind the wheel of a motor vehicle with nothing to stop the accused from setting it in motion, either intentionally or accidentally.

Impaired judgment is no stranger to impaired driving, where both are induced by the consumption of alcohol or drugs. Absent evidence to the contrary, a present ability to drive while impaired, or with an excessive blood alcohol ratio, creates an inherent risk of danger. In practice, to avoid conviction, the accused will therefore face a tactical necessity of adducing evidence tending to prove that the *inherent* risk is not a *realistic* risk in the particular circumstances of the case. (In para. 48, Fish J. stated that the evidence needed to be credible and reliable).

[33] With respect to the threshold requirement of the risk, Fish J. stated in para. 35:

To require that the risk be "realistic" is to establish a low threshold consistent with Parliament's intention to prevent a danger to public safety. To require only that the risk be "theoretically possible" is to adopt too low a threshold since it would criminalize unnecessarily a broad range of benign and inconsequential conduct.

[34] With respect to the presumption set out in s. 258(1)(a) of the *Code*, Fish J. stated in para. 38:

At a minimum, the wording of the presumption signifies that a person who has been found drunk and behind the wheel cannot, for that reason alone, be convicted of care and control if that person satisfies the court that he or she had no intention to set the vehicle in motion. Dickson C.J. made this plain in *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 19: “It cannot be said that proof of occupancy of the driver’s seat leads inexorably to the conclusion that the essential element of care and control exists... .”

[35] With respect to what constitutes a realistic risk, Fish J. stated in paras. 41 and 42:

A realistic risk that the vehicle will be set in motion obviously constitutes a realistic risk of danger. Accordingly, an *intention* to set the vehicle in motion suffices *in itself* to create the risk of danger contemplated by the offence of care or control. On the other hand, an accused who satisfies the court that he or she had no intention to set the vehicle in motion will not necessarily escape conviction. An inebriated individual who is found behind the wheel and has a present ability to set the vehicle in motion – without intending at that moment to do so – may nevertheless present a realistic risk of danger.

In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least three ways. First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

Application of the law to the evidence

[36] I am satisfied on the evidence presented by the defence, which I find to be credible and reliable, that Ms. White drove the truck from Diamond Tooth Gerties to the

Downtown Hotel. Mr. Zgela did not drive the truck because he was aware that he had been drinking and could not do so.

[37] Ms. White and Mr. Zgela intended to park the truck at the Downtown Hotel and secure a room to stay in overnight. Ms. White was unable to park the truck in a proper parking space because of the fire trucks that were at the Downtown Hotel. As a result she parked it parallel to the Downtown Hotel in order to go in with Mr. Zgela and arrange for a room.

[38] I also understand that it is agreed between counsel that the fire trucks that were present and blocking the parking stalls left the scene approximately one minute prior to Cst. Robson arriving in his police cruiser.

[39] Mr. Zgela left the Downtown Hotel lobby and went back into the street to look for Shirley at the Annex. He spoke with several of the firefighters and then sat in the driver's seat of the truck to speak with Mr. Kruger while he was waiting for the hotel issue to be sorted out. I accept that Mr. Zgela had no intention at the time to drive the truck, including no intention to park it. I note that after the fire trucks left the hotel Mr. Zgela did not attempt to park the vehicle in the now accessible parking stalls. I also note his comment in the first transcribed audio recording that, when Ms. White approached the police cruiser in which Mr. Zgela was sitting, she asked if she could turn off the vehicle and Mr. Zgela told her that she could. Cst. Robson told her not to move it.

[40] I am aware that immediately after Cst. Robson told Ms. White to leave the truck, Mr. Zgela stated “You can’t drive it, ok I’ll drive it”. I am also aware that shortly afterwards the following exchange with Ms. White took place:

- Ms. White: Can you move the truck for me then?
- Cst. Robson: Well after we’re done here.
- Mr. Zgela: Yeah after we are done here, I’ll move the truck ok.
- Ms. White: Or I can get one of the other guys.
- Cst. Robson: No it stays there right now.
- Mr. Zgela: It’s ok Amy I’ll do it.

[41] Notwithstanding these words, I find that Mr. Zgela had no intention to drive the truck anywhere, including to park it. I accept Mr. Zgela’s evidence that he said what he did to Ms. White in regard to him parking the truck in order to get her away from the police vehicle or to end the conversation.

[42] I observed Ms. White’s demeanour at the trial of this matter, both in the stand and otherwise while in the courtroom and noted that she was highly emotional and somewhat up and down and all over the place in her emotional state. The evidence was that she was highly emotional at the time of Mr. Zgela’s arrest. I have no difficulty accepting Mr. Zgela’s explanation.

[43] I have found that Mr. Zgela had no intention, when he was occupying the driver’s seat of the running truck, to drive the truck, even solely for the purpose of parking it. The words Mr. Zgela stated to Ms. White, while seated in the police cruiser, given his explanation for them, cannot be equated to him having a prior intent to drive while he

was occupying the driver's seat of the truck, or a risk that he would have changed his mind and decided to drive the truck.

[44] I also find that Mr. Zgela had no intention to leave the Downtown Hotel and drive to another location. I accept his evidence that he was certain that the cost issue in relation to the renting of a room at the Downtown Hotel would be worked out and that he and Ms. White would be staying there.

[45] With respect to the criteria set out in *Boudreault*, I find therefore that Mr. Zgela did not occupy the driver's seat of the truck with any intent to drive the truck anywhere. I also find on the evidence that Mr. Zgela would have been very unlikely to have changed his mind and then driven the truck at a later point in time.

[46] In this regard and in regard to the risk of Mr. Zgela accidentally or intentionally setting the truck in motion, in my view his level of intoxication was not so high that this would have happened. He was able to communicate coherently without any difficulty and certainly appeared to be aware of what was going on around him. While impaired, he was far from being grossly intoxicated. This is relevant because his decision-making process at the relevant time, in my view, was not impaired to the extent that he would have resiled from his stated and demonstrated determination that he should not be driving because of his alcohol consumption. The risk of him accidentally putting the truck in motion was also largely reduced. This is an important factor.

[47] The final factor is whether the location of the vehicle at the time Mr. Zgela was in the driver's seat was such that it created a risk to the public. I find that it was not. The vehicle was parked where it was due to the fire trucks having blocked the parking

spaces. While in a non-parking zone *per se*, there was no evidence of any actual obstruction of traffic or of any associated risk. The truck was not in a dark location where it would catch any driver by surprise who came upon it. There was ample room for vehicles to drive by. Further, the intent was to have the vehicle properly parked by someone legally able to do so, as soon as possible.

[48] On a consideration of the whole of the evidence in light of the **Boudreault** decision, I am not satisfied that there was any realistic risk of harm to persons or property created by the actions of Mr. Zgela. As I have also found that Mr. Zgela had no present intention to operate the truck, I am not satisfied that the Crown has proven its case beyond a reasonable doubt and I acquit Mr. Zgela of the charge under s. 253(1)(b). I note that Crown counsel was not seeking a conviction on the s. 253(1)(a) charge and he is therefore acquitted of that charge as well. On the evidence before me, he would not have been convicted on that charge in any event.

Case Law in regard to Uttering a Threat and application of the law to the evidence

[49] The law is set out in the case of **R. v. McRae**, 2013 SCC 68.

[50] In considering whether an accused committed the prohibited act, in para. 16 the Court states:

...the prohibited act of the offence of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm.

[51] In the present case, Mr. Zgela is charged with having made a threat in regard to property (264.1(1)(b)), and not to cause death or bodily harm (264.1(1)(a)). However the same reasoning applies.

[52] I am satisfied that Mr. Zgela committed the prohibited act. The threat was clear and I am satisfied that a reasonable person would have perceived the words uttered by Mr. Zgela to constitute a threat to burn, damage or destroy property.

[53] Certainly, Mr. Zgela's words resulted in both RCMP officers deciding to alter their original plan to release Mr. Zgela after processing him on the s. 253 offences, and to detain him in custody overnight instead.

[54] With respect to the fault element, the Court stated in para. 23 that

...the fault element of the offence is made out if the accused intended the words uttered or conveyed to intimidate *or* to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat. A subjective standard of fault applies.

[55] It is not necessary to find that the accused actually intended to carry out the threat (para. 18).

[56] Mr. Zgela clearly uttered the threatening words and I find that he intended them to be taken seriously by Cst. Nakonechny. I accept that Mr. Zgela was upset and angry. I also am satisfied that he had no actual intention of burning down the Downtown Hotel. However, he repeated the threats and told Cst. Nakonechny to write them down. He was released from custody on an undertaking to a peace officer that required him to stay away from the Downtown Hotel. While the terms of release do not therefore mean

that the offence has been committed, it nonetheless is consistent with the perception Cst.'s Nakonechny and Robson had of the words uttered by Mr. Zgela.

[57] I am satisfied that the fault element of the offence has also been made out beyond a reasonable doubt.

[58] I therefore convict Mr. Zgela of the s. 264.1(1) offence.

COZENS T.C.J.