SC CR 89 083 S

date?
judge?

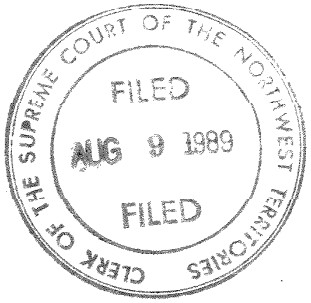
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

DINO JEROME



MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

THE COURT: The accused, after re-electing before me to be tried by a judge sitting without a jury, entered pleas of not guilty to the following charges,

1. Manslaughter, Sec. 219 C.C.
2. Criminal Negligence Causing Death, Sec. 203 C.C.

I conclude, and Mr. Vertes for the defence concurs, from the evidence of Dr. G. Dowling, a specialist in forensic pathology who performed the autopsy on the deceased, that the deceased died as a result of a subarachnoid haemorrhage of the right ventricle artery at the base of the brain. Is that accurate, Mr. Bruser?

MR. BRUSER: Yes it is, My Lord.

THE COURT: I further find that the haemorrhage was induced by trauma suffered by the deceased at the home of one Lucy Jerome in Inuvik in the Northwest Territories of Canada during the morning of June 19, 1988.

The evidence of the Crown witnesses of the circumstances leading up to the presence of the accused and the deceased at Lucy Jerome's home is confusing and at times conflicting. Fortunately, this evidence is, for the most part, irrelevant and not material to the issues before me.

I shall now summarize what I deem to be the essential facts as I find them. In doing so, I am compelled to state that with the exception of the witnesses Mitchell and Thrasher and to a somewhat lesser extent Louis Coyen-Jerome, I have viewed the evidence of the other witnesses with great reservation because of the intoxicated state in which they were at the time of this unfortunate incident.

At about 5 a.m. in the morning of June 19, 1988 the following persons were gathered at Lucy, otherwise known as Tootsie, Jerome's home. The deceased Andy Jerome; the accused Dino Jerome, who is a son of Lucy Jerome and a cousin of the deceased;

Leroy Jerome, a brother of the deceased; Louis Coyen, a cousin of the Jeromes; Lucy Jerome, Louis Coyen's mother; Karen Mitchell; Eunice Thrasher; Robert Cockney; and Bobby Ross. All the male persons had been drinking during the preceding hours except perhaps for Coyen who says that he had not been drinking before arriving at Lucy's home.

Mitchell and Thrasher were not drinking and had not been drinking on the evening prior. There is no evidence concerning the drinking of Lucy Jerome or of Louis' mother. Some few hours previously at Thrasher's home the deceased, Andy, had passed out because of drink. He recovered about 2 a.m. on June 19. On arrival at Lucy Jerome's he, the accused, and Leroy Jerome were, in the words of the witnesses, all "pretty high".

The party continued at Lucy's. All the male persons were drinking; some straight from the bottle, some with mix. Mitchell and Thrasher were not drinking. The atmosphere was convivial and the participants were in a joyful and playful mood. The deceased sat in an armchair and tried to go to sleep. Leroy Jerome threw water on the deceased's head in a playful mood saying that he was paying him back for throwing water on him, that is Leroy, a few days before. The deceased took this as a joke and laughed it off and tried to go to sleep again. The accused then

thew water on the deceased who again took it as a joke and laughed it off. The deceased then took another drink of straight whiskey.

The deceased and Leroy then engaged in a little playful wrestling neither was hurt. The deceased again tried to go to sleep. The accused prevented him from doing so by pulling his socks. The deceased again took this as a joke. He got up and another bout of good-natured wrestling ensued involving the deceased, Leroy, Louis, the accused, and Bobby Ross. The good-natured wrestling came to an end when the deceased struck Leroy in the mouth with his fist. Leroy struck back hitting the deceased in the jaw with his fist and knocking him to the ground. The deceased got up, grabbed Leroy around the throat and threw him against the wall. That fight was broken up by Louis, the accused, and Thrasher, with some help from Ross.

The deceased, who did not appear to be hurt, was conveyed to a couch where he was restrained by the accused and others. At this juncture, according to Mitchell's evidence which I accept on this point, the deceased struck the accused. Then, according to the evidence of Louis which from this summary it is apparent I accept, the deceased insulted the accused by calling him uncomplimentary names and insisted that he wanted to fight the accused. He was restrained by others but kept insulting the accused and challenging him to fight. The accused repeatedly

stated that he did not want to fight and at one point screamed his reluctance.

The deceased evidently broke free from those restraining him and struck the accused on the chest. The accused took off his shirt and indicated that he was finally now willing to fight. The deceased struck the first blow and thereafter blows to the head were exchanged. The two men were separated. The deceased had a bruise on his left eye. It was referred to in evidence as a black eye. The deceased said words to the effect that he was not going to let anybody get away with giving him a black eye and that he still wanted to fight. The fight resumed and the accused hit the deceased with two blows to the face. The deceased fell to the floor.

At first, all those present thought that the deceased had been knocked out but they soon realized that he had ceased breathing and was changing colour. An ambulance was called and the R.C.M.P. arrived shortly thereafter. The deceased never gained consciousness. He was conveyed to Edmonton where he was put on life support systems. He eventually died. An autopsy was performed.

Mr. Bruser, in his able and lucid argument for the prosecution, argues that the blows suffered by the deceased in his

fight with the accused caused the deceased's death and that notwithstanding this being a consensual fight, the accused is guilty of manslaughter; Count number 1. In spite of the fact that the deceased was the aggressor and that the accused was a reluctant participant, I find that this was a consensual fight in which no weapons except the fists belonging to each of the participants were used.

The Crown's case is based upon the decision of the Ontario Court of Appeal in R. v. Jobidon (1987) 59 C.R. (3d) 303. In that case a five-member panel unanimously agreed that R. v. Dix (1972) 10 C.C.C. (2d) 324 (Ont. C.A.) was wrongly decided and adopted the reasoning of the English Court of Appeal in A.G.'s Ref. (No. 6 of 1980), 1981, 1 Q.B. 715. In so doing Zuber, J.A. said at pages 188 - 189:

> "The English Court of Appeal was asked the following question (p. 1058):
>
> > Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?
>
> and at p. 1059 provided the answer as follows:
>
> > The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are

> another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.
>
> Nothing which we have said is intended to case doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.
>
> Thus it would appear that, while the common law defines "assault" in the same terms as the Criminal Code, the concept of consent is limited and extends only to the application of force where bodily harm is neither caused nor intended."

In coming to this conclusion, Zuber, J.A. speaking for the Court, referred to several Canadian cases including R. v. Carriere (1987) 56 C.R. (3d) 257 (Alta. C.A.); R. v. Bergner (1987) 58 C.R. (3d) 281 (Alta. C.A.); and R. v. Setrum (1976) 32 C.C.C. (2d) 109 (Sask. C.A.).

Having considered the facts in Jobidon and having reviewed the cases referred to therein, I respectfully conclude that the Ontario Court of Appeal did not intend to lay down as a principle of law that in every case where, what is referred to as

a consensual fist fight takes place, consent is not a defence to a charge of assault even if actual bodily harm is intended and or caused.

To apply this principle to the case at bar would, in my view, impose a grave injustice. Here we are not dealing with a course of conduct similar to that in Jobidon where the accused struck the victim four to six times on the head after rendering him unconscious. On the contrary, the accused before this Court was a reluctant participant who, as soon as the deceased who was the aggressor fell to the floor, stopped fighting and attempted to resuscitate him.

With respect, I prefer the reasoning of Culliton C.J.S. in Setrum, to the interpretation of the judgment in Jobidon urged upon me by the prosecution in this case. Even if I were to adopt the common law principle propounded in Jobidon, I would hold that it had no application to the facts in the case at bar. The circumstances must be viewed with a sense of reality. This was clearly recognized by Laycraft, C.J.A. in Bergner where he said at page 288:

> "In the fist fight, once consent is truly established, it seems to me to be impossible to administer a test based on anger or the intention to cause injury or bodily harm. Indeed, that emotion or intention may even change in the course of the contest. I remain firm in the view I expressed in Carriere that the law can

> and should intervene to nullify consent when weapons are involved. I am, however, unable, as perhaps were the codifiers of our criminal law, to formulate or administer a test for the weaponless fighters based on anger or intent to do bodily harm. I would, accordingly, dismiss this appeal."

The accused, a young man participating in a friendly, albeit somewhat raucous, party in his own home, was insulted in front of his family and friends by a bigger man and repeatedly challenged to fight. He reluctantly agreed to do so and the unforeseen consequences proved to be tragically unfortunate.

In my view, the consent, or in this case it may be said the invitation, of the deceased is a complete defence to the first charge in the Indictment, and I find the accused not guilty.

Mr. Bruser, in his characteristically candid and fair manner did not seriously press the second count, namely that of criminal negligence. There is no evidence that the accused engaged in the fatal fight with a wanton or reckless disregard for the life of the deceased. I find the accused not guilty on this count.

Although it is not necessary for me to do so, I feel that I should deal with the question of causation. The evidence of Dr. Dowling was to the effect that in the vast majority of cases

persons who suffer a basal superachnoid haemorrhage collapse immediately. In answer to a hypothetical question posed to him by Crown counsel and based on the facts of the case at bar, he said that it was a classic case and that the scenario related to him was consistent with the injury found. However, he stated that in some cases persons may function for up to one-half hour after the fatal blow is struck. During that time, they usually complain of headaches and are somewhat irrational.

He further stated that it was possible, but not probable, that in the scenario related in the hypothetical question the deceased could have suffered the fatal blow in the first fight; that is, the fight with Leroy and have taken part in the following fight with the accused before falling as a result of the haemorrhage.

This, of course, is contingent upon all this occurring within one-half hour. There is no reliable direct evidence as to the time that elapsed between the deceased being struck by Leroy and his falling to the floor during the altercation with the accused. The estimates range from about 20 minutes to what I infer to be about 7 minutes. In any case I find that the time is well within the one-half hour limit set by Dr. Dowling .

Having regard to the deceased's condition, and I speak of the state of impairment or intoxication, it is impossible

to say whether he suffered headaches or acted irrationally during that critical period of time. In view of the atmosphere prevailing at the home of Lucy Jerome on the morning of June 19, 1988 including the drinking, the number of people present, and the wrestling of various persons, I am not satisfied beyond a reasonable doubt that the accused struck the blow that caused the basal subarachnoid haemorrhage that caused the death of the deceased.

In coming to this conclusion I have had regard to the decision of the Supreme Court of Canada in R. v. Smithers (1977) 34 C.C.C. (2d) 427. I should also add that in view of my finding that this was consensual fight, the defence of self-defence is not available to the accused.

Is there anything further, gentlemen?

MR. BRUSER: There is nothing further in this matter, My Lord.

(AT WHICH THE TIME THIS PROCEEDING WAS CONCLUDED)

Certified pursuant to Practice Direction (Civil #25, Criminal # 20) dated December 28, 1987.

Sandra Kamitomo, Court Reporter