

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on
the information of Thomas Lowry,
a member of the Royal Canadian
Mounted Police, the informant

Respondent

- and -

EDMUND WHEELER

Appellant

Appeal against conviction on a charge of mischief contrary to s.430(4) of the *Criminal Code*. Allowed.

Heard at Yellowknife on August 22nd 1994

Judgment filed: August 25th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant: Austin F. Marshall, Esq.

Counsel for the Respondent: Ms. Susan Y. Bour

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN on
the information of Thomas Lowry,
a member of the Royal Canadian
Mounted Police, the informant

Respondent

- and -

EDMUND WHEELER

Appellant

REASONS FOR JUDGMENT

This appeal is brought against the appellant's summary conviction and sentence on a charge of mischief by wilfully damaging a Honda vehicle belonging to Mervin Richard Templeton, at or near the City of Yellowknife in the Northwest Territories on or about April 17th 1993, contrary to s.430(4) of the *Criminal Code*.

Mr. Templeton drove the vehicle at speed through a gate at Giant Mine on the occasion charged, when the gate was under picketing during a labour dispute between management and employees of the mine. As he drove through, his vehicle was struck by one or more objects which caused damage to its windshield and grille. A number of picketers were in the immediate vicinity, of whom the appellant was one.

The central issue both at trial and on this appeal was, and is, the identity

of the person or persons who caused the damage.

In addition to the appellant, another individual known as Robby Imbeault was charged with mischief in connection with the incident. Mr. Imbeault was charged separately. His trial on that separate charge was scheduled to be heard immediately following the conclusion of the appellant's trial. It appears that Mr. Imbeault had also been one of the picketers in the vicinity of the gate at the time in question.

A video recording of the incident made by a security guard posted on the mine property some distance from the gate was introduced in evidence at trial and was viewed by the trial judge. The guard who made the video recording, Timothy Zielke, testified that he had observed the incident also with his own unaided vision. Another guard, Brian Metcalfe, similarly posted on the mine property, was in telecommunication at the time with Mr. Zielke and also observed the incident. Both guards testified as Crown witnesses in addition to Mr. Templeton.

I viewed a portion of the video recording, covering the incident in question, on the hearing of the appeal, as displayed by agreement of counsel.

The faces of the picketers could not be distinguished for identification purposes, on the video record, so far as I could determine. The trial judge came to the same conclusion, as the transcript of his summing up shows, at page 73 beginning at line 6:

The one matter that I have difficulty with is identification. I think it is clear from the videotape that was played that there are no

faces that are visible and no identification of an individual as such can be made from facial features on that video.

That this was by no means the only problem with the identification of Mr. Wheeler as the person, or one of the persons, responsible for the damage charged, is furthermore apparent from the transcript, beginning at line 10 of the same page:

Mr. Templeton was not asked if the man -- he was asked, can he identify the man who threw the rock at him and he indicated Mr. Wheeler. But given the cross-examination by Mr. Marshall, I don't know what that word "identification" means to him or means to the questioner. If it's something that came up after the fact, something that was -- he was told by others, I don't know and that's a difficulty.

Mr. Zielke was questioned and identified the individual standing out on the road as Mr. Wheeler, but I think it's not clear if he could see his face and identify him as such or if he came to the conclusion that it was the accused on some other basis, I don't know.

There are other difficulties with the Crown's case. There are some inconsistencies in the Crown evidence. The one that sticks out is Mr. Templeton's evidence where he stated that he saw Mr. Wheeler bend down and pick up the rock and then throw it as he approached. All of the other witnesses who observed the situation indicated that it was another individual who bent down. Wheeler got his rock or whatever it was from the wood pile.

The only witnesses at trial besides Mr. Templeton were Messrs. Zielke and Metcalfe. The appellant did not testify. However, the appellant's silence at trial was not mentioned by the trial judge in reaching his verdict. There is nothing in the record to suggest that this feature of the case was weighed in the balance against the appellant.

In the course of his examination-in-chief, Mr. Zielke identified the appellant to the trial judge as a person known to Mr. Zielke "by sight". No further basis for the

identification was given. Mr. Zielke testified that he had "observed one of two gentlemen, the accused Mr. Edmund Wheeler and his associate at the time of the incident was Robby Imbeault". It should be mentioned that it was no part of the Crown's case at trial that the appellant and Mr. Imbeault acted in concert, with a common intention, to cause the damage charged. As earlier indicated, Mr. Imbeault was not called as a witness by either the Crown or the defence.

11

Mr. Zielke continued his testimony in chief, as the transcript shows at page 6, beginning at line 17:

- A. At the time in question I was videotaping the incident, I had both eyes open and I noticed the one, Robby Imbeault pick up the rock, I also observed in shortly after that Mr. Wheeler pick up a rock which he had placed on the top of a wood pile.

12

It was Mr. Zielke's evidence that he was stationed approximately 20 feet away from the appellant. Under cross-examination, he changed this to 20 yards, saying that it was "just an approximation", adding "As I said earlier, it was an approximation of 20 feet". It is apparent from this and his further testimony that his estimate of the distance was no more than pure guesswork.

13

Be that as it may, Mr. Zielke's evidence-in-chief with reference to Mr. Imbeault having picked up a rock shortly before the vehicle was damaged by impact with something that made a loud noise, as heard on the video recording, was clearly a very material item of evidence in reference to the identification of the perpetrator (or perpetrators) of the damage, bearing in mind that the Crown's case against the appellant

was not based on any theory that the appellant had acted in concert with Mr. Imbeault.

14

Viewing the video recording in the course of his testimony in chief, Mr. Zielke told the court at trial, as shown at page 12 of the transcript, beginning at line 7:

A. Yeah, which now he has the radio, he'll take the radio and put it at the top of the wood pile. Now he grabbed the rock and he has it in the cupped position. He walks out, boom. At the same time Robby Imbeault throws the rock.

15

Crown counsel at trial (not counsel on this appeal) then concluded her examination of Mr. Zielke by having the video-recording marked as an exhibit in evidence. Counsel for the appellant immediately followed by opening his cross-examination. Once again, Mr. Zielke made reference to Mr. Imbeault, as shown on page 20 at lines 16 to 23 of the transcript:

16 Q. All right. And do I understand your evidence that at
17 the same time somebody else threw an object as well?

18 A. Yes.

19 Q. And that would be Mr. Imbeault?

20 A. Yes, and if you look at the videotape you can see that
21 Robby Imbeault picks up the rock that is as big as the
22 size of a baseball? He throws it first, initially,
23 okay?

16

As counsel for the appellant sought to pursue the cross-examination of Mr. Zielke with reference to the testimony which he had already given regarding the actions of Mr. Imbeault, the trial judge stopped counsel (see page 22 line 3 to page 23 line 4) and directed that the cross-examination not be continued with reference to Mr. Imbeault's

actions at the time of the incident charged against the appellant. In doing so, the trial judge was clearly concerned to avoid hearing further testimony regarding the actions of Mr. Imbeault, since Mr. Imbeault's trial was scheduled to follow immediately on that of the appellant.

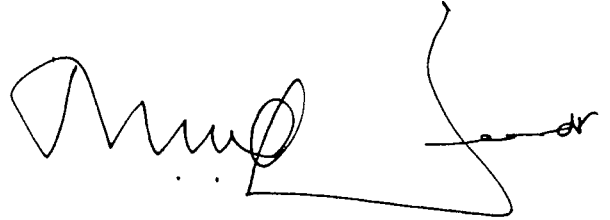
17 In his endeavour to ensure a fair trial (and the full appearance of a fair trial) for Mr. Imbeault, the trial judge unfortunately thereby took a step which now clearly throws into question the fairness of the appellant's trial, more particularly with reference to the issue of identification of the appellant as the person who caused the damage charged in this case. The trial judge's ruling that cross-examination, as to the actions of Mr. Imbeault, was to cease clearly interfered materially with defence counsel's legitimate questions on that very crucial aspect of the case. That ruling was made in error, and the error is one in point of law.

18 Given that the trial judge's ruling inevitably and materially restricted the later cross-examination of the Crown's other witnesses with respect to the actions of Mr. Imbeault, those actions bearing directly upon the issue of identity at the heart of the Crown's case (which, as I have mentioned, was not one of joint action by the appellant in concert with Mr. Imbeault), the error to which that ruling gave rise requires that the appeal be allowed.

19 There is consequently no need to consider the other grounds of appeal or of the application for leave to appeal. The conviction is set aside. There shall be a new trial if the Crown wishes to proceed further.

20

In the circumstances, there will be no costs.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', with a long horizontal stroke extending to the right.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
August 25th 1994

Counsel for the Appellant: Austin F. Marshall, Esq.

Counsel for the Respondent: Ms. Susan Y. Bour

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN
on the information of Thomas
Lowry, a member of the Royal
Canadian Mounted Police, the
informant

Respondent

- and -

EDMUND WHEELER

Appellant

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT

