

ORIGINAL

R. v. Hagen, 2003 NWTSC 21

S-1-CR-2002000082

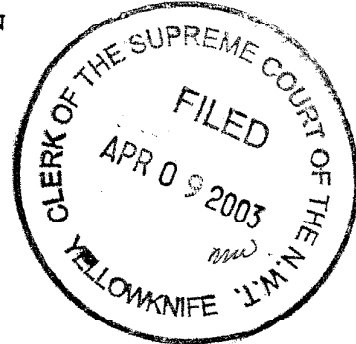
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

CHESTER ARTHUR HAGEN



---

Transcript of the Reasons for Judgment delivered by The Honourable Justice V.A. Schuler, in Yellowknife, in the Northwest Territories, on the 27th day of March, A.D. 2003.

---

APPEARANCES:

Ms. C. Carrasco:	Counsel for the Crown
Ms. M. Engley:	Counsel for the Defence

-----  
Charges under ss. 266 C.C. and 811 C.C.

1 THE COURT:

2 Mr. Hagen is charged with  
3 common assault and failing to comply with a condition  
4 of a recognizance to keep the peace. The fact that he  
5 was on the recognizance at the relevant time and the  
6 terms of the recognizance were admitted.

7 The main issue in this case is obviously the  
8 credibility of the two main witnesses, Ms. Firth and  
9 Mr. Hagen.

10 I remind myself that the burden of proof is on  
11 the Crown and that Mr. Hagen does not have to prove  
12 anything or explain the Crown evidence.

13 First of all, I am going to deal with what I will  
14 call the objective evidence, evidence that was not  
15 really disputed, and also the facts that I find are  
16 established.

17 Ms. Firth arrived at 10 p.m. at the Yellowknife  
18 women's shelter on the day in question. The shelter  
19 is a four-minute walk from the apartment she shared  
20 with the accused Chester Hagen where the assault is  
21 alleged to have occurred. On arrival at the women's  
22 shelter, she was noted by the worker there to be  
23 shoeless and to appear scared, confused and shaking.  
24 It is not clear how long she was with the worker, but  
25 I infer it was a few minutes, at least. The worker  
26 observed no injuries.

27 A few minutes later, the worker, having called  
the police, Constable Leduc arrived. He observed an

1 injury to the side of Ms. Firth's face. She was  
2 crying, shaking, and seemed to him to be quite  
3 fearful. He was with her for five to ten minutes.

4 A few minutes after that, Constable Varkonyi came  
5 along and met with Ms. Firth and observed her to  
6 appear scared and also observed various injuries on  
7 her.

8 Among those three witnesses - the women's shelter  
9 worker and the two police officers - there is a  
10 contradiction as to whether Ms. Firth appeared to have  
11 consumed alcohol. The shelter worker said that she  
12 smelled alcohol and thought that she had one or two  
13 drinks. The police officers smelled no alcohol.  
14 Having viewed the videotape of Ms. Firth's statement  
15 to Constable Varkonyi, I am satisfied that there is  
16 nothing on there in her behaviour or her manner of  
17 speaking or otherwise that would indicate that she had  
18 been drinking or was under the influence of alcohol.

19 I prefer the evidence of the two police officers,  
20 particularly that of Constable Varkonyi who was with  
21 Ms. Firth in a room for half an hour, and from what is  
22 on the tape. From Constable Varkonyi's testimony, she  
23 took care to assure herself that Ms. Firth was in a  
24 condition to give a statement.

25 The shelter worker said that for her it was a  
26 busy night, as usual, and in my view she simply made  
27 an error in her observation or her recollection as to

1 the alcohol and the lack of injuries.

2 Those are essentially the objective facts which  
3 do not depend on the testimony of the complainant or  
4 the accused.

5 Ms. Firth's statement to Constable Varkonyi was  
6 admitted as past recollection recorded.

7 Her evidence therefore is that Mr. Hagen, her  
8 common-law husband of some 20 or 30 years, was  
9 drinking in the apartment. They argued. She threw a  
10 cup of tea at him. He put a pillow over her face and  
11 would not take it away for some time, despite her  
12 screaming at him to and asking him not to hurt her.  
13 She also said that he hit her and pulled out some of  
14 her hair.

15 I will return to deal with her evidence later.

16 Mr. Hagen testified that there was an argument,  
17 that Ms. Firth threw things at him, that she accused  
18 him of drinking, which he said he was not doing in the  
19 apartment. She was getting upset. She was screaming.  
20 He said he put his arms around her to calm her down so  
21 that she would not have one of her seizures. She was  
22 trying at some point to get out of his arms. He  
23 tossed a couple of cushions at her and said "Scream  
24 into that." He denied hitting her or pulling out her  
25 hair or putting the cushion on her face.

26 He did admit in his evidence that during this she  
27 said to him, "Look, you pulled my hair out." He says

1           that he made a joke about her hair being too long,  
2           although there is no indication in his evidence as to  
3           how the hair would have come out or that he questioned  
4           her accusing him of pulling it out at the time.

5           Mr. Hagen testified that he eventually went into  
6           the bedroom to change his shirt because it had tea on  
7           it, which she had thrown at him, and that when he came  
8           out she had left the apartment. He put this at 9:00  
9           or 9:30 p.m. He said that she had no injuries.

10          Her evidence was that she had left the apartment  
11          after he let her out from the pillow and then she went  
12          to the women's shelter.

13          The defence that is put forward is that anything  
14          that Mr. Hagen did was simply to calm down Ms. Firth,  
15          or that this is a case of a consensual fight.

16          Now, as I've said, it is clear that she arrived  
17          at 10:00 p.m. at the women's shelter and that she had  
18          injuries on her. It was clear from the evidence that  
19          the women's shelter is approximately a four-minute  
20          walk away from the apartment. So the question  
21          obviously that arises is, How did she get the  
22          injuries? Mr. Hagen does not have to explain that, of  
23          course, but I have to look at what the evidence is and  
24          not speculate as to ways that she might have received  
25          the injuries if they are not supported in the  
26          evidence.

27          Mr. Hagen asserted that he was not drinking at

1 all in the apartment because he was on a peace bond at  
2 the time, a condition of which prohibited him from  
3 having any contact, directly or indirectly, with  
4 Ms. Firth after consuming alcohol. Yet on his own  
5 evidence, after drinking on the way to and at his  
6 friend's place after Ms. Firth had left the apartment,  
7 he returned to the apartment to get her to give him  
8 his money from the cheque she had cashed, which  
9 obviously would have been contact with her and a  
10 breach of the peace bond. So in my view he was not  
11 very concerned that day about obeying the peace bond  
12 and that casts doubt on his assertion that he was not  
13 drinking in the apartment.

14 When the police arrested Mr. Hagen not long after  
15 Ms. Firth arrived at the women's shelter, he was,  
16 according to Constable Leduc, whose evidence on this  
17 was not disputed and I accept it, Mr. Hagen was quite  
18 intoxicated. He admitted to the Constable that he was  
19 drunk or half-drunk. He was also sitting on the grass  
20 in the rain when the police officer observed him,  
21 which I take as evidence of his condition, that he was  
22 not thinking clearly. His intoxication is a factor  
23 that suggests to me that his evidence is not reliable,  
24 his memory of the events is suspect.

25 I have to say that in listening to him testify, I  
26 found his evidence quite rambling and sometimes hard  
27 to follow.

1 I also note Mr. Hagen's criminal record. The  
2 criminal record goes only to credibility. While a  
3 criminal record does not necessarily mean that someone  
4 is not telling the truth, here is a man whose record  
5 spans 40 years and consists of, among many other types  
6 of convictions, 12 convictions for breaching various  
7 court orders or otherwise not following the direction  
8 of the court. So the question that arises is, Can I  
9 rely on his oath to tell the truth? I'm not convinced  
10 that I can.

11 Again, I remind myself that there is no burden on  
12 Mr. Hagen to prove anything.

13 For all of the above reasons however, I reject  
14 his evidence, I do not find it reliable or believable.

15 As per the direction of the Supreme Court of  
16 Canada in the case of *Regina v. W. (D.)*, I have to ask:  
17 Does his evidence raise a reasonable doubt in my mind?  
18 The answer to that is no, it does not.

19 I should note at this point, in my view there is  
20 absolutely no evidence at all that would support, even  
21 on Mr. Hagen's evidence, the defence of a consensual  
22 fight.

23 Now I turn to the evidence of Ms. Firth.  
24 Clearly, there were some problems with her evidence.  
25 She was reluctant at first to admit even that she had  
26 made the statement to Constable Varkonyi. She does  
27 not remember a lot of things that happened. She does

1 not remember a lot about the day and the night in  
2 question, but she did testify that what she told  
3 Constable Varkonyi in the interview was the truth.  
4 And, as I said, I found from the videotape that  
5 Constable Varkonyi was very careful to ensure that  
6 Ms. Firth was in a condition to give the statement and  
7 that she was doing so voluntarily. Much of the  
8 statement consists of Ms. Firth giving a recitation of  
9 what happened without hesitation and without  
10 interjection by the police officer. Following that,  
11 there were some questions and answers.

12 In my view, Ms. Firth was clear at the time she  
13 was giving the statement. Her story was coherent.  
14 While claiming lack of memory about some things, it is  
15 interesting that she was quite insistent on other  
16 things. I looked to see whether I could find any  
17 pattern in that, in other words, whether what she does  
18 say she remembers was either wholly in Mr. Hagen's  
19 favour or wholly against him. I did not find that  
20 there was any pattern. I think she was trying to be  
21 truthful to the best of her ability, considering her  
22 admitted problems from a head injury and, no doubt,  
23 excessive alcohol consumption throughout her life.

24 She was quite insistent, for example, that she  
25 was able to tell, while in the apartment, that  
26 Mr. Hagen had been drinking. This is someone she has  
27 been with for 20 to 30 years, so she is obviously in a



1 position to know that.

2 I also note that at the preliminary hearing when  
3 one of her answers from that hearing was put to her  
4 from the transcript, the answer having been recorded  
5 that she answered a question saying that he,  
6 Mr. Hagen, let her "bleed a little", she was quite  
7 insistent that in fact she had said he let her  
8 "breathe a little".

9 Again, I question whether this was a selective  
10 memory rather than a real memory problem and, having  
11 considered it, it does not strike me that way. It  
12 strikes me that she has some memory problems, but  
13 there are some things she remembers and she was quite  
14 adamant that what she told the police was the truth.

15 Ms. Firth was obviously confused about some  
16 things. She was confused about whether she had been  
17 drinking on the day in question. She did not remember  
18 the letter that was put to her in cross-examination.  
19 Although she acknowledged that it contained her  
20 handwriting and signature, I note that there was no  
21 proof as to whom the letter was sent or who received  
22 the letter. There was no evidence of that and no  
23 evidence of that from Ms. Firth, who simply recognized  
24 her handwriting and signature but did not actually  
25 remember writing the letter. The letter contained  
26 some contradictions especially in terms of what she  
27 threw at Mr. Hagen, but I do not place a lot of

1           significance on that. Nor do I place any real  
2           significance on the confusion about whether she  
3           already suspected Mr. Hagen had been drinking when he  
4           arrived at the apartment after buying the lottery  
5           tickets.

6           In her statement to Constable Varkonyi, she used  
7           the term that he was "okay" when he got to the  
8           apartment. Certainly, I've heard many witnesses in  
9           many trials use that term to describe someone who has  
10          been drinking but is not drunk or causing problems.

11          Ms. Firth did agree in cross-examination with the  
12          suggestion made by defence counsel that maybe  
13          Mr. Hagen was using the pillow to make her stop  
14          screaming, but his motive for using the pillow does  
15          not affect whether an assault occurred. Certainly on  
16          Ms. Firth's evidence, she was telling him to take the  
17          pillow away from her.

18          Now that brings me to Constable Varkonyi's  
19          testimony, that in March of this year Ms. Firth told  
20          her that she lied in the original statement. That was  
21          not put to Ms. Firth so I don't know what her reaction  
22          would have been to being asked about that. So that's  
23          one thing I have to take into consideration.

24          On Constable Varkonyi's evidence, Ms. Firth had  
25          been drinking at the time that she said this. She did  
26          not want to talk to the Constable. She was angry and  
27          thought that she was being arrested by her. It's

1 clear to me that Ms. Firth would rather not have been  
2 involved in these court proceedings at all, and in all  
3 the circumstances I am not going to put any weight on  
4 what she said to Constable Varkonyi in March.

5 The approach that I think I have to take is to  
6 ask whether the contradictions, the memory problems,  
7 the various things I have referred to, cause me to  
8 reject or have doubts about Ms. Firth's evidence as  
9 recorded the night of the incident. Having considered  
10 this very carefully, I am convinced that, although she  
11 may now be confused about some of the details such as  
12 what she threw at Mr. Hagen, whether he hit her or  
13 punched her, and that she is even willing to speculate  
14 that maybe she fell and hurt her hand, although there  
15 is no evidence that she did fall, she was not confused  
16 about the essentials when she spoke with Constable  
17 Varkonyi in the interview that was recorded.

18 Her demeanour when she arrived at the women's  
19 shelter and as described by the worker there and the  
20 two police officers in my view is corroborative of her  
21 evidence that she had been assaulted.

22 I am satisfied beyond a reasonable doubt that  
23 Mr. Hagen did assault her, causing the injuries  
24 described. I find that they argued over his drinking  
25 and the things he was saying to her about other women.  
26 He put the pillow over her face for some time, maybe  
27 not half an hour but for some time in any event. It

1 may have been to stop her from screaming. It may have  
2 been in retaliation for her throwing things at him.  
3 But I find that he did it as she described, that he  
4 also hit her and inflicted the other injuries, and  
5 that he breached the peace bond by drinking while he  
6 was with her in the apartment, thus having contact  
7 with her after consuming alcohol. I convict him as  
8 charged.

9  
10 -----  
11  
12 Certified to be a true and accurate  
13 transcript, pursuant to Rule 723 and  
14 724 of the Supreme Court Rules of  
15 Court.

16 *Annette Wright*  
17 Annette Wright, RPR, CSR(A)  
18 Court Reporter  
19  
20  
21  
22  
23  
24  
25  
26  
27