

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTOPHER LETAWSKI

-and-

HER MAJESTY THE QUEEN

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This conviction appeal relates to charges stemming from an incident that occurred on November 25, 2011, in Fort Liard. That day, Carla Payout returned home with the Appellant and another friend and found her common law spouse, Garrett Sassie, in their bedroom with another woman, Evangeline Fantasque. An incident ensued that led to a number of charges being laid against the Appellant and Ms. Payout.

[2] One of the offenses that the Appellant and Ms. Payout were charged jointly with was an assault with a weapon, a bottle, on Ms. Fantasque. It was undisputed at trial that Ms. Payout struck Ms. Fantasque with a bottle, breaking it on her head. There was no suggestion that the Appellant did anything to Ms. Fantasque with the bottle. The Crown's theory was that he was guilty as a party to the assault committed by Ms. Payout.

[3] The Appellant's trial was held in the Territorial Court of the Northwest Territories on July 23, 2012. He was found guilty of the charge of assault with a weapon against Ms. Fantasque. He appeals that conviction.

II) TRIAL EVIDENCE

[4] The Crown called four witnesses at the trial: Cst. Russel Jackson, Duford Kotchea, Garrett Sassie and Evangeline Fantasque. Some of this evidence was relevant to other charges that the Appellant was facing and of little to no assistance in establishing the circumstances of the assault on Ms. Fantasque.

[5] Cst. Jackson testified about the unfolding of the investigation and observations made at the scene. A number of photographs were also entered as exhibits during his testimony. This evidence was not controversial and has no bearing on the outcome of this appeal.

[6] Duford Kotchea had a very limited recollection of events. He acknowledged knowing the various people involved, being with the Appellant and Ms. Payout on the day in question, and going to Ms. Payout's home. However, he did not recall going inside the house. As a result, his evidence was unhelpful as far as establishing what occurred inside.

[7] Garrett Sassie was the alleged victim on some of the other charges that were laid against the Appellant and Ms. Payout. His testimony dealt mostly with the altercations forming the subject-matter of those charges. But some aspects of his testimony were also relevant to the assault on Ms. Fantasque.

[8] Mr. Sassie testified that he was very intoxicated that day. He acknowledged that he had been "fooling around" with Ms. Fantasque at his home and that Ms. Payout walked in on them. He testified that the Appellant was standing behind Ms. Payout when she walked into the bedroom.

[9] He explained that Ms. Payout slapped him, and that after that, he and the Appellant got into a scuffle. That altercation, he said, started in the bedroom and moved to the living room, and then to another room. At some point he realized that he could not breathe. He ran out and went to his aunt's house. By the time he got there he was covered in blood. He realized that he had been stabbed.

[10] The only evidence that Mr. Sassie gave that had anything to do with what happened to Ms. Fantasque was during his Examination in Chief:

Q. Now do you recall where Evangeline was when you were fighting with the accused?

A. Like after me and Chris kind of moved into the living room I guess Evangeline tried to run out herself, but I wasn't seeing what was going on over there. There was another individual there I think, I'm not too sure,

but I know that Evangeline and them moved into that room while me and Chris were fighting each other, going into the other room.

Transcript of Trial Proceedings (Evidence of Garrett Sassie), p. 42 line 26 to p. 43, line 8.

[11] The Crown's case, for all intents and purposes, rested on Ms. Fantasque's testimony. She acknowledged that she was with Mr. Sassie that day. She described what happened when Ms. Payou walked in on them in the bedroom:

A. First it was Carla. She came in, kicked the door, hit me twice, and after she did Chris was just standing by the door behind her. Then after she hit me twice with a bottle she went for Garrett who was behind me. I just tried to grab whatever I could to cover the bleeding and then get out of the room.

Q. Was there anybody stopping you from getting out of the room?

A. Yes.

Q. Who?

A. Chris.

Q. Did you stay in the room?

A. Yes, like it's just a small doorway.

Q. Yes.

A. Like a regular doorway.

Q. And where was he positioned?

A. Right in front of it, like right in the doorway

Transcript of Trial Proceedings (Evidence of Evangeline Fantasque), p. 54 lines 8-25.

[12] She explained that after having hit her, Ms. Payou went towards Mr. Sassie. She described what happened then:

A. I couldn't see what she was hitting him with. I just knew that I was bleeding like a lot. Like it was just a lot of blood just streaming down my face like a faucet. I grabbed whatever was on the floor. When I looked at it later it was someone's pants. I just covered my head, and I looked back and like she was already all over him, like hitting him. I was trying to

leave the room, and she was yelling to the guys, like don't let that bitch out. Then I was trying to get by Chris and he pushed me back. I fell down, and I got up and I kept on trying to go for the door because I just wanted to get out of there.

Q. Did you eventually get out of the room?

A. Yes, I did.

Q. Did Chris say anything to you in the room?

A. No, just that I deserved the licking I was getting.

Q. Who said that?

A. Chris.

*Transcript of Trial Proceedings (Evidence of Evangeline Fantasque),
p. 55 line 11 to p. 56, line 4.*

[13] During Cross-Examination, Ms. Fantasque was asked a few more questions about what the Appellant was doing during the incident:

Q. You have told us that as you were trying to leave the bedroom Mr. Letawski was standing in the doorway, right?

A. Yes.

(...)

Q. So he's standing and watching what's going on, right?

A. M-hm.

Q. Yes?

A. Yes.

Q. You try to get past him, you bumped into him, and he doesn't move out of your way, right?

A. It's not bumping when someone has their hands against your chest pushing you.

Q. If I were to suggest to you, ma'am, that the incident happened at the outer door, the exterior door to the residence and not the bedroom door, would I have it right or wrong?

A. You would have it wrong.

Transcript of Trial Proceedings (Evidence of Evangeline Fantasque), p. 65, lines 18-21; p. 65, line 25 to p. 66, line 11.

[14] The Appellant did not present any evidence at the trial.

II) POSITIONS OF THE PARTIES AT TRIAL

[15] The theory advanced by the Crown at the conclusion of the evidence was that the Appellant had gone to the house with Ms. Payout for the purpose of assisting in the assault on Ms. Fantasque:

... (T)he Crown says he maybe didn't strike the blow but he's a party to the offence that is occurring, and that the inference you can draw from the evidence is that what was happening here is that the accused and Ms. Payout were going back to the residence and they were going to do just as the accused said, give Ms. Fantasque and Mr. Sassie a licking. That evidence is not shaken at least as it relates to Ms. Fantasque.

Transcript of Trial Proceedings (Submissions of Crown counsel), p. 75 lines 2-11.

[16] The Appellant's counsel argued that there was no evidence to support the inference that there was any planning involved in the attack on Ms. Fantasque. He argued that there was also no evidence that the Appellant did anything at the scene to assist Ms. Payout in the commission of the assault. Counsel noted that all the evidence showed was that the Appellant was present in the room and that at one point during the incident he told Ms. Fantasque that she deserved the "licking" that she was getting. That, counsel argued, did not make him a party to the offence that was being committed by Ms. Payout.

[17] There was an exchange between the Trial Judge and Defence counsel about the significance of the evidence of the Appellant having pushed Ms. Fantasque as she was trying to leave the room:

The Court: What about the pushing of Ms. Fantasque?

Mr. Davison: At most that would amount to an assault, but here the Information alleges that both Ms. Payer and Mr. Letawski committed an assault causing, or an assault with a weapon. We have to remember that any particular count on an Information can only refer to a single incident. There's no evidence that Ms. Fantaque was a party to the assault committed by Mr. Letawski when he pushed her. I'm sorry, there's no evidence Ms. Payer was a party to the assault committed when Mr. Letawski pushed Ms. Fantaque.

So we can't, in my submission, be referring in count number 1 to that push. Because they have included Carla Payer as an accused they can only refer to what might potentially be a joint action or an action committed by Mr. Letawski as a party to Ms. Payer's action, and that is where in my submission the evidence falls far short.

If there were simply a charge of assault, a separate charge of assault against Mr. Letawski, simple assault on Ms. Fantaque, not with Ms. Payer as a co-accused, then it would be open to the Crown to say you could convict on the assault because of the push. But given that count is a count that's laid against them jointly, given the rule that any particular count can only refer to a single wrongdoing or a single transaction, that count can't mean one thing in relation to Ms. Payer and another thing in relation to Mr. Letawski. They particularize it that it's the assault committed with a bottle on Evangeline Fantaque. There's only one person who committed an assault with a bottle on her and that's Ms. Payer.

So really the question is limited to was Mr. Letawski a party to that, and for the reasons that I have set out in my submission he was not.

Transcript of Trial Proceedings (Submissions of Defence counsel), p. 83, line 18 to p. 85, line 3.

III) ANALYSIS

a. Standard of review

[18] The Appellant's position is that this appeal raises a question of law, reviewable on a standard of correctness. He asserts that the Trial Judge erred in applying principles of law dealing with how a person becomes a party to an offence.

[19] The Crown, by contrast, characterizes this appeal as one engaging the standard of review of overriding and palpable error. This is because the Crown characterizes this appeal as being a challenge of the Trial Judge's interpretation of the evidence and of his findings of facts.

[20] The Trial Judge found the Appellant was a party to the offence on the basis of the evidence that he pushed Ms. Fantasque as she was trying to leave the room. There was no real controversy in the evidence about when this occurred. The only evidence on that point was Ms. Fantasque's: she said that Ms. Payout struck her with the bottle twice, and then "went for" Mr. Sassie. Ms. Fantasque tried to leave, Ms. Payout yelled out not to let her leave, and the Appellant pushed Ms. Fantasque. That chronology of events was accepted by the Trial Judge and the Appellant does not dispute it.

[21] That being so, I do not think that this appeal raises issues about findings of facts or interpretation of evidence. What the Appellant takes issue with is the Trial Judge's finding that the Appellant's push was part of the transaction underlying the charge of the assault with a weapon. The Appellant also takes issue with the Trial Judge's finding that the Appellant, by pushing Ms. Fantasque moments after she had been assaulted with the bottle, became a party to that assault after the fact.

[22] The Appellant's argument requires examining the boundaries, from a legal standpoint, of a transaction alleged in support of a criminal charge. It also requires examining whether "after the fact" actions can engage criminal liability as a party to an offence. In my view, those are questions of law, reviewable on a standard of correctness.

b. Whether the Trial Judge erred in law

[23] The Crown, reasonably, concedes that the Trial Judge did not accept its trial theory that the Appellant and Ms. Payout had planned on going to the house to assault Ms. Fantasque. Nothing in the Reasons for Judgment suggests that the Trial Judge made any such finding.

[24] Rather, the Reasons for Judgment suggest that the basis for the Trial Judge's conclusion that the Appellant was a party to this offence was his conclusion that the push was part and parcel of the assault with the bottle committed by Ms. Payout. The close connection in time between the two events appears to have been his main reason for reaching that conclusion.

[25] The Trial Judge summarized the evidence, noting that the Appellant pushed Ms. Fantasque after Ms. Payout yelled “don’t let that bitch out”. He then went on to say:

...Obviously that is some evidence that Mr. Letawski joined with Ms. Payout in this whole incident. I have no other evidence other than that, but I am satisfied that he was assisting her at least in preventing Ms. Fantasque from leaving and became a party to the offence.

The defence is asking me to say well, hold it, she has already been hit in the head, the assault on her with the weapon had already occurred. This was part and parcel of it, there is no division in time to separate it. In my view, even though it was after the initial attack on Ms. Fantasque, we are talking just seconds here by the sounds of the evidence. He participated after Ms. Payout yelled to not let Ms. Fantasque out, and he pushed her back in the room and she fell down. Eventually she was able to leave, however. So I am satisfied that he participated with Ms. Payout at least after the fact on that assault, and I find him guilty on Count 1.

Transcript of Reasons for Judgment, p. 2 lines 2-22.

[26] Section 21 of the *Criminal Code* sets out the different means whereby a person can be a party to an offence:

- 21 (1) Every one is a party to an offence who
- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.
- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[27] I agree with the Appellant’s submission that the wording of section 21 suggests that for a person’s actions or omissions to make that person a party to an offence, they must occur before or during the commission of the offence. It is difficult to see how something done after an offence is committed can be said to have assisted or encouraged the person who committed it. The key question, then, is whether the assault with the bottle was still ongoing when the Appellant pushed Ms. Fantasque.

[28] Although the offence of assault is not, from a legal standpoint, a continuous offence, it can be ongoing for a period of time. In other words, a single count of assault can encompass a transaction that includes several applications of force that occur over a period of time. In my view, if an assault is ongoing and a person does something that assists in its continuation, that person's criminal liability as a party can be engaged.

[29] But here, Ms. Payout's assault with the bottle was not still ongoing when the Appellant pushed Ms. Fantasque. The evidence was that Ms. Payout hit Ms. Fantasque with the bottle twice, and then went towards Mr. Sassie and became engaged in an altercation with him. Ms. Payout may well have wanted to perpetrate a further assault Ms. Fantasque, as suggested by her yelling to the Appellant not to let her leave. But by the time the Appellant pushed Ms. Fantasque, Ms. Payout was engaged in an altercation with Mr. Sassie and Ms. Fantasque was able to leave before that altercation ended.

[30] I conclude that by the time the Appellant pushed Mr. Fantasque, the transaction forming the subject-matter of the assault with weapon charge was complete. For that reason, the Appellant's push cannot be said to have been part of that transaction.

[31] With the greatest of respect to the Trial Judge, the Appellant could not become a party to the assault with the bottle *after the fact*. Criminal liability can be engaged by after the fact conduct, pursuant to section 23 of the *Criminal Code*, where a person is shown to have been an accessory after the fact. But if the basis alleged for criminal liability is section 21, the language of that provision does not support the notion of a person becoming a party to an offence retroactively.

[32] In this regard, the amount of time that passes between the end of the transaction and an accused's action is of no consequence. There is no question that very little time passed between the end of the assault with the bottle and the Appellant's push. But the point is that the assault with the bottle had ended. Whether the Appellant's push came seconds later, minutes later, or hours later does not change the fact that the earlier assault had ended.

[33] As properly conceded by the Appellant's counsel at trial, the actions of the Appellant were capable of making out a separate charge of assault by him against Ms. Fantasque. But the Appellant was not charged with assault. He was charged jointly with Ms. Payout for having assaulted Ms. Fantasque with a bottle. The subsequent push was a completely different transaction: it did not involve the use

of a weapon, and it did not occur while Ms. Payer was still assaulting Ms. Fantaque.

[34] My conclusions in this regard are entirely consistent with how the Crown approached this case at trial. The record of these proceedings makes it abundantly clear that the Crown's basis for prosecuting the Appellant was the assertion that he participated in the serious assault committed by Ms. Payer on Ms. Fantaque. The Crown's theory rested on the circumstantial evidence suggesting that the Appellant and Ms. Payer knew what was going on at the house and intended on inflicting punishment on Ms. Fantaque for her part in it.

[35] This is apparent from the final submissions of Crown counsel, referred to at Paragraph 15. Interestingly, in those submissions, Crown counsel made no reference at all to the Appellant having pushed Ms. Fantaque. And even after the exchange between the Trial Judge and Defence counsel about the significance of that push, when given an opportunity to make further submissions, Crown counsel declined to do so. While not determinative, I find that the position adopted by Crown counsel suggests that he recognized, at the time, that the evidence about the push was not, in and of itself, capable of engaging the Appellant's liability on the charge of assault with a weapon.

[36] Without question, the evidence presented at this trial showed that the Appellant's conduct on the day in question was anything but honorable. He pushed Ms. Fantaque when she was already in distress, bleeding profusely from the head, evidently scared, and trying to escape a situation that was completely out of control. He showed complete contempt and disregard for her. But reprehensible as the Appellant's conduct was, it could not form the basis for his conviction as a party to the assault committed by Ms. Payer.

[37] The appeal is allowed and the conviction is quashed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
21th day of February, 2013

Counsel for the Appellant: Charles Davison
Counsel for the Respondent: Danielle Vaillancourt

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