Date: 2015 04 27
Docket: S 1 CR 2014 000074

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRIAN JOSEPH McCARTHY AND KELLY McLEOD

Appellants

-and-

HER MAJESTY THE QUEEN

Respondent

Appeal from conviction and sentence.

Heard at Yellowknife, NT, on March 10, 2015

Reasons filed: April 27, 2015

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Appellants:	Shawn Beaver Beaver Leebody & Associates
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REASONS FOR JUDGMENT

[1] The Appellants, Brian McCarthy and Kelly McLeod, were convicted of assault causing bodily harm following a trial in Territorial Court. They appeal from conviction.

BACKGROUND

[2] Mr. McCarthy and Mr. McLeod were drinking in a bar in Inuvik with Stefan Allan, a co-accused, and Jason Baxter. Shortly after they received their last round of drinks, the bar owner, Rick Adams, insulted Mr. McLeod. Mr. McLeod became angry. Mr. Adams walked away from the men towards an area at the back of the bar that served as an office. Mr. McLeod followed him there. Mr. McCarthy, in turn, followed the two of them. It was in the office area that Mr. Adams said he was assaulted by the Appellants.

[3] In addition to Mr. Adams, the Crown presented evidence from three bar employees who were present: Ryan Dylan, Edna Kasook and Joel Campagna.

[4] Joel Campagna, testified he tried to assist Mr. Adams. He went to the office area and he saw Mr. McLeod had Mr. Adams in a headlock. He saw Mr. McLeod hitting Mr. Adams. Mr. Campagna said he was prevented from assisting Mr. Adams by Mr. Allan and by Mr. McCarthy. His testimony included evidence that Mr. McCarthy threw a number of punches at him and told him to "stay out of it". He also testified under cross-examination that he saw Mr. McCarthy make kicking motions towards Mr. Adams. Unable to assist Mr. Adams directly, Mr. Campagna pulled the fire alarm.

[5] The Appellants testified at trial. Mr. Allan and Mr. Baxter testified on the Appellants' behalf as well.

[6] The Appellants both denied assaulting Mr. Adams. Mr. McLeod said Mr. Adams fell in the office area and he tried to help Mr. Adams get up. He said Mr. Adams declined assistance.

[7] Mr. McCarthy said he came upon Mr. Adams and Mr. McLeod after Mr. Adams fell.

[8] Mr. Allan and Mr. Baxter both followed the Appellants to the office area, but their evidence disclosed that neither could see what was happening to Mr. Adams. Mr. Baxter said he could not see because his view was blocked by Mr. McCarthy. He denied Mr. McCarthy was intentionally blocking the door to prevent anyone from assisting Mr. Adams. Rather, he indicated Mr. McCarthy was up against a wall by the door to the office.

[9] The Trial Judge rejected Mr. Baxter's evidence.

[10] Mr. Allan said he did not actually go through the doorway and therefore, he could not see what was happening between Mr. McLeod and Mr. Adams.

[11] The Trial Judge determined the injuries sustained by Mr. Adams, in so far as they were documented and described by the medical evidence, amounted to bodily harm. She found Mr. McLeod assaulted Mr. Adams, causing bodily harm, in the office. She found Mr. McCarthy kicked Mr. Adams causing bruising to his leg and arm, but she concluded these injuries did not amount to "bodily harm". Nevertheless, she found Mr. McCarthy was a party to the offence committed by

Mr. McLeod and therefore guilty of assault causing bodily harm pursuant to s. 21 of the *Criminal Code.*

GROUNDS OF APPEAL AND STANDARDS OF REVIEW

[12] The Appellants contend the Trial Judge erred in failing to apply the analysis set out in *R v W(D)*, [1991] SCJ No. 26, [1991] 1 SCR 742 to the evidence. In particular, they submit she reversed the burden of proof and applied an incorrect standard of proof. This is a question of law and the standard of review is correctness.

[13] The Appellants also contend the Trial Judge erred in rejecting the evidence of defence witnesses, misapprehending evidence of Crown witnesses and in failing to address arguments raised by the Appellants. They argue that combined, these result in an unreasonable verdict, which calls for the Court to determine if the verdict is one that a properly instructed judge could reasonably have rendered: *R v RP*, 2012 SCC 22, [2012] 1SCR 746 at para 9; *R v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381 at para 36; *R v Yebes*, [1987] 2 SCR 168.

The W(D) Analysis

[14] The burden of proof sits squarely on the shoulders of the Crown. It must prove all elements of the offence beyond a reasonable doubt. When an accused gives evidence, however, there is a risk the trier of fact will fall into the trap of comparing the evidence of the Crown and the accused and preferring one version over the other, without considering specifically whether the elements have been proved by the Crown beyond a reasonable doubt. The effect of this is to shift the burden of proof to the accused, thereby offending the presumption of innocence.

[15] The *W(D)* analysis, which applies when an accused calls and/or gives evidence, guards against erosion of the presumption of innocence by requiring triers of fact to consider whether the Crown has, in fact, proven the elements of the offence beyond a reasonable doubt. The offence may not be "proven" by default; that is, by reason only that the defendant's evidence is disbelieved or does not raise a reasonable doubt. The reasoning process was set out by Cory J., as follows (at 758):

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[16] Early in her reasons, the Trial Judge stated:

> Many witnesses were heard with respect to Count 1. I find that the rule of *R v W(D)* does not apply. With respect to Counts 2 and 3, the evidence boils down to what the accused – to that of the accused and that of the complainant and I find that the rule of *R v W(D)* applies to these two counts. [Emphasis added]
>
> *Transcript of Reasons for Decision*, p 2, ll 26 – 27, p 3, ll 1-5

[17] The Appellants contend that the reasoning in *W(D)* applies regardless of the number of witnesses and as such, the Trial Judge made an error of law in ruling it did not apply.

[18] Certainly, the *W(D)* framework applied in this case and the Trial Judge's remark above is inconsistent with this. That does not end the matter, however. The interests of justice require that the whole of the reasons be examined to determine if the Trial Judge did in fact shift the burden of proof to the Appellants.

[19] The Trial Judge did not follow the classic pattern of the *W(D)* analysis set out above, nor was she required to do so. As stated by Karakatsanis, J., in *R v Vuradin,* 2013 SCC 38, [2013] 2 SCR 639:

> [21] The paramount question in a criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused: *W.(D.)*, at p. 758. The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration. . .

[20] The analysis in this case started with an assessment of the Crown's evidence. This was followed by an assessment of the evidence presented by the Appellants. Ultimately, the Trial Judge rejected the evidence of both Appellants, as well as that of Mr. Baxter.

A. The Crown Witnesses

[21] As noted, there were four witnesses called by the Crown: Mr. Adams, Ms. Kasook, Mr. Campagna and Mr. Ryan.[1]

[22] The Trial Judge conducted a close and critical analysis of all of the witnesses. With respect to Mr. Adams' evidence, she noted he was contradicted extensively with the statement he gave to the police. She found that although not all of the contradictions were material, Mr. Adams had a tendency to exaggerate and he relied on others to reconstruct what he himself had forgotten. She determined he exaggerated the state of his injuries and she rejected his evidence on this to the extent it was inconsistent with expert medical evidence. Nevertheless, she found his injuries were corroborated by the medical evidence and that they constituted bodily harm. She also found they were inconsistent with those which would be sustained by a fall.

[23] The Trial Judge rejected Ms. Kasook's evidence, finding, *inter alia*, that Ms. Kasook would not have been able to see what was happening in the office. She noted Ms. Kasook's relatively small stature and found her view would have been blocked by a number of other, bigger, people.

[24] Mr. Campagna was found to be a reliable and credible witness and it is clear the Trial Judge placed great weight on his testimony, although she recognized its frailties, as she did with all of the witnesses. She stated:

> Joel Campagna also gave inconsistent evidence, in his case with respect to the involvement of Stefan Allan as well. He contradicted Ms. Kasook on about every aspect of her testimony. He contradicted many aspects of Mr. Adams' testimony, except that he confirmed Mr. Adams' evidence as to what Mr. McLeod did to him, albeit with more restraint. His description of what happened was also more realistic. I find that Mr. Campagna was in a position which allowed him to see what was happening to Mr. Adams. I reject Mr. Adams' testimony that is in conflict with that of Mr. Campagna.
>
> *Reasons for Judgment*, p 7, ll 2-14

[1] Mr. Ryan stayed behind the bar the entire time and his evidence indicated he did not see anything. The Trial Judge did not expressly consider his evidence, no doubt for this reason.

B. The Defence Witnesses

[25] In analyzing the evidence given by and on behalf of the Appellants, the Trial Judge noted both internal and external inconsistencies, just as she did in her analysis of the Crown's evidence. She considered it in the context of the balance of the evidence, something she was entitled to do, even within the *W(D)* framework. On this point I take what was said by the Ontario Court of Appeal in *R v Hull*, 2006 CarswellOnt 4786, 2006 CanLII 26572 as a correct statement of the law:

> 5 *W. (D.)* and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, including the testimony of the complainant, and in so doing comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment recognizing that one possible outcome of the assessment is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused. [Emphasis added]

[26] The Trial Judge disbelieved Mr. McCarthy's and Mr. McLeod's evidence that Mr. Adams sustained his injuries from a fall. She found it implausible and explained her reasons:

> So there are a few things that are problematic in his testimony. The first one is that it does not make sense to me that Kelly McLeod would not be angry after the insult served by Rick Adams. Next, it does not make sense that Kelly McLeod, being angry, would have walked – or simply walked behind Rick Adams. Third, if any, Kelly McLeod and Brian McCarthy are in their late 20s while Mr. Adams is in his mid 60s and not quite in shape. They would walk fast enough to keep up with him – or to keep up with one another. So it does not make sense to me that all that Mr. McCarthy would have seen is Kelly McLeod helping Rick Adams up. So there is basically not enough time for him to have fallen and him being so far behind that all he sees is Mr. Adams getting up.
>
> Rick Adams had many injuries which are not consistent with a simple fall. A suggestion that injuries could have been caused by the stampeding crowd does not make sense because the physical evidence is consistent with Mr. McLeod and McCarthy's testimony that the door was fine when they went through it, and it confirms, therefore – or I infer from that, that they were immediately behind Rick Adams and that the stampeding crowd was behind them. Therefore, I conclude that only Mr. McLeod and Mr. McCarthy could be responsible for Rick Adams' injuries.

Reasons for Judgment, p 16, ll 6-27, p 17, ll 1-7

[27] Next, the Trial Judge dealt with the question of whether Mr. McCarthy had caused Mr. Adams' injuries. Mr. McCarthy having denied there was an altercation in the office, she turned to the evidence of Mr. Campagna that he saw Mr. McCarthy kick Mr. Adams:

> I find it possible that Brian McCarthy kicked Rick Adams on the leg. I do not see how Mr. McLeod who was kneeling down and punching Mr. Adams could at the same time kick him. The circumstantial evidence of Rick Adams' injuries to the leg and forearm is consistent with them having been inflicted by a different person. No credible alternate theory was put forward. I am satisfied beyond a reasonable doubt that Brian McCarthy caused the bruising to the leg and arm. I am not convinced, however, that these two bruises would be considered as bodily harm when considered in isolation.
>
> Nevertheless, I am satisfied beyond a reasonable doubt that Brian McCarthy tried to keep Joel Campagna from intervening and, in doing so, he helped Kelly McLeod commit the assault causing bodily harm on Rick Adams and, by kicking Rick Adams, he also participated in the assault causing bodily harm committed by Kelly McLeod. [Emphasis added]

Reasons for Judgment, p 17, ll 24-27, p 18, ll 1-16

[28] Although the Trial Judge started her discussion on this point by saying it was "possible" Mr. McCarthy kicked the victim (something which might leave the reader with the impression she was not convinced beyond a reasonable doubt) that she went on to expressly state she was "satisfied beyond a reasonable doubt" that he had done so makes it clear she had the standard of proof in the forefront of her mind.

[29] The Trial Judge went through the same exercise in assessing Mr. McLeod's evidence. As with Mr. McCarthy, she disbelieved his evidence, stating:

> I find that the totality of the evidence proves that Mr. McLeod ran after Mr. Adams because he was angry at him and that Mr. McCarthy immediately followed him. I find that Mr. McLeod is not credible when he alleges that Mr. Adams was already on the floor when he arrived. The evidence is clear that there was nobody between him and Mr. Adams. He reached him first and he was still with him when the alarm sounded. I do not believe Mr. McLeod when he said that Mr. Adams had no injuries when he told him to leave. So that was in the last part of their exchange. So I reject this part of his testimony.

> Joel Campagna said that he saw Kelly McLeod holding Rick Adams in a headlock and punch him. This testimony is consistent with the medical evidence. As a result, I find Kelly McLeod guilty on Count 1.
>
> *Reasons for Judgment,* p 18, ll 17-27, p 20, ll 1-8

[30] As noted, the Trial Judge rejected entirely Mr. Baxter's evidence. In doing so, she stated: "I reject the testimony of Mr. Baxter. He is clearly trying to help his friends and he did not convince me." *Reasons for Judgment,* p 13, ll 24-26.

[31] The Appellants rely on *R v Laboucan,* 2010 SCC 12, [2010] SCJ No. 12 in support of their argument that the Trial Judge erred in rejecting Mr. Baxter's evidence simply because of his friendship with the accused. Closer examination of both the reasons and the transcript of the evidence reveals, however, that her decision to reject Mr. Baxter's evidence was based on more than just his relationship with the Appellants. First, his evidence that Mr. McCarthy was not blocking the doorway in a manner intending to keep others out was contradicted by that of Mr. Campagna. Second, with respect to what was occurring between Mr. McLeod and Mr. Adams, Mr. Baxter said he did not see what was happening because his view was blocked by Mr. McCarthy. In light of this, I cannot conclude she placed undue weight on Mr. Baxter's friendship with the Appellants in assessing his credibility and determining his evidence should be rejected.

[32] The Trial Judge did not expressly state whether the Appellants' testimony, or that of Mr. Baxter, though disbelieved, nevertheless left her with a reasonable doubt. Given that she rejected their version of the events in the office entirely, however, it can be readily inferred from her comments that the evidence they presented did not leave her with a reasonable doubt about whether they were criminally responsible for Mr. Adams' injuries.

[33] Although she did not follow the classic *W(D)* pattern of analysis, I am satisfied that the Trial Judge conducted an analysis which satisfies its principles. She articulated a rational basis for rejecting the evidence offered by and on behalf of the Appellants. Her analysis of all of the evidence demonstrates she did not simply accept that which was offered by the Crown as proof of guilt by default. The burden of proof did not shift and from her comments respecting proof beyond a reasonable doubt, it is clear she addressed her mind to the need to apply the correct standard of proof. I find she did not err and so this ground of appeal fails.

Reasonableness of the Verdict

A. Did the Trial Judge Err in Rejecting the Evidence of Defence Witnesses?

[34] The answer to this question is "no", based, for the most part, on the reasons just set out above.

[35] An issue not addressed above is the Appellants' argument that the Trial Judge failed to consider the Crown's lack of compliance with the evidentiary rule known as the rule in *Browne v Dunn.* Specifically, they argue this rule was violated because the Crown did not put its theory with respect to the substantive allegations to either of the Appellants in cross-examination, leaving their evidence unchallenged on critical issues.

[36] The rule in *Browne v Dunn* is aimed at fairness to the witness and the parties. It prevents the witness from being ambushed. Simply stated, something which will be used to impeach the credibility of a witness must first be put to the witness so there is an opportunity to give evidence on the matters to be contradicted.

[37] The Appellants put forward no authority to support their argument that the Crown's failure to cross-examine them on the substantive allegations breached the rule in *Browne v Dunn* and, perhaps, required the Trial Judge to accept their evidence on the unchallenged points. There is, however, persuasive authority to support the opposite conclusion.

[38] One such case is *R v Mete,* in which the British Columbia Court of Appeal stated the following:

> 13 In my view, the cases do not go so far, particularly in a criminal case, where the evidence which was not cross-examined upon is in direct conflict with the evidence adduced by the Crown as the basis of its case. In default of authority binding on me that goes so far as to say what counsel suggested, I can see no reason or logic in any view that a judge may not reject evidence which he disbelieves merely because it has not been cross-examined upon. The usefulness of cross-examination in like circumstances has been a subject of comment in a civil case by Lord Halsbury, the Lord Chancellor, in *Aaron's Reefs Ltd. v. Twiss*, [1896] A.C. 273, an outstanding authority which has been long followed, in which the Lord Chancellor had these very pithy comments to make in dealing generally with this subject. At pp. 282-3 he said:

> Some comment has been made upon the absence of cross-examination on the subject. I should have thought for myself that it would have been very rash for those who had no means of contradicting anything that was said to cross-examine persons who had, by the hypothesis, not many scruples as to what they might say, and that it was far wiser (it seems to have been successful) to leave the statements which they chose to make to be judged of by the jury.
>
> 14 As I say, that was stated in a civil case and it may perhaps have not too much direct bearing on this case; but the thought that the Lord Chancellor enunciated, to my mind, is apt. I just add that I find it hard to think that, if this were a jury case, a judge charging a jury would have to direct the jury that, although they disbelieved the evidence of an un-cross-examined witness, they must accept that evidence notwithstanding and acquit the accused. As I say, in the absence of authority that binds me to that effect, I cannot accept that proposition.
>
> *R v Mete*, 1971 CarswellBC 269, [1973] 3 W.W.R. 709, (BCCA)

[39] A more recent case, which bears a similar fact pattern to the one at bar, is *R v I(I),* a decision of the Alberta Court of Appeal, in which Berger, J.A. stated:

> 10 In my opinion, the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) has no application to the case at bar. The Appellant testified with full knowledge of the case against her. She would have heard the testimony of the complainant setting out the allegations of misconduct which formed the basis of the charge against her. She was not taken by surprise. The material points in issue were addressed and denied by the Appellant.
>
> *R v I(I),* 2013 CarswellAlta 15, 2013 ABCA 2

[40] As in *R v I(I),* the Appellants sat through the testimony of all of the Crown witnesses. They had full knowledge of the allegations against them and the theory of the Crown's case. Through their own evidence they each put forward their own theory of how the victim sustained his injuries, which was completely at odds with what the Crown alleged and, in effect, denying that there was a physical altercation amongst the victim and the Appellants. Ultimately, the Trial Judge found the Appellants' version of events implausible and determined neither could be believed.

[41] In the circumstances, the rule in *Browne v Dunn* was inapplicable and moreover, the Trial Judge was not required to accept the Appellants' theory that the victim was injured in a fall simply because it was not expressly challenged.

B. Did the Trial Judge Misapprehend the Evidence?

[42] Under this heading, the Appellants argue a number of things, starting with the contention that the Trial Judge erred in failing to resolve conflicts between the evidence of Ms. Kasook and Mr. Campagna, who were the two eye-witnesses in addition to Mr. Adams.

[43] This is contradicted by the record. The reasons for decision reflect unequivocally the Trial Judge's consideration of the contradictions, conflicts and frailties in all of the witness testimony. She found a number of problems with Ms. Kasook's evidence, including it being contradicted extensively by Mr. Campagna and thus, she rejected it, in favour of what Mr. Campagna said:

> Ms. Kasook appeared to be a credible witness, but upon her being cross-examined, it became clear that there were important inconsistencies in her testimony, including important contradictions between her testimony and that of the other witnesses, particularly with respect to the involvement of Stefan Allan.
>
> I find that she was trying to corroborate the testimony of Joel Campagna, but given her point of observation and that there would have been about ten to fifteen persons between her and him in a space of about four to six feet wide by nine to ten feet long, plus the fact that she measures five-foot five inches, it is difficult to accept that she would have seen what happened at the other end of the hall.
>
> Joel Campagna also gave inconsistent evidence, in his case with respect to the involvement of Stefan Allan as well. He contradicted Ms. Kasook on about every aspect of her testimony. He contradicted many aspects of Mr. Adams's testimony, except that he confirmed Mr. Adams's evidence as to what Mr. McLeod did to him, albeit with more restraint. His description of what happened was also more realistic. I find that Mr. Campagna was in a position which allowed him to see what was happening to Mr. Adams. I reject Mr. Adams' testimony that is in conflict with that of Mr. Campagna.

Reasons for Judgment, p 6, ll 13-27, p 7, ll 1-14

[44] The Appellants also argue the Trial Judge should not have accepted Mr. Campagna's evidence because of inconsistencies between his statement to police and what he said at trial, as well as certain omissions in the statement. Specifically, it was put to him that he told the police he did not know who picked up the cash register, but at trial testified it was Mr. McLeod who picked it up; that he did not

specify for the police the exact role Mr. McLeod took on in the office, other than to say Mr. Adams was being beaten up by a number of individuals, including Mr. McLeod; and that his statement suggested Mr. Campagna could not actually see Mr. Adams, nor what was happening to him, but he testified that he observed Mr. McLeod beating up Mr. Adams.

[45] The Trial Judge did not expressly deal with the issue of Mr. Campagna's statement in her decision.

[46] Regarding the cash register, Mr. Campagna told police:

> I never really saw who picked up the cash register, but somebody, one of the two, picked up the cash register, slamming it around, demanding more drinks.
>
> *Transcript of Evidence,* p 131, ll 25-25, p 132, l 1

[47] Mr. Campagna explained during cross-examination that he had further time to think about the events in the period following the statement. He also stated he did not see Mr. McLeod pick up the cash register, but rather, he heard the sound of it being picked up and slammed and he saw Mr. McLeod's hands on the cash register. This was not clearly articulated to the police, either.

[48] The extent of the inconsistency and its materiality are important in determining whether this should have caused the Trial Judge to expressly deal with this and, possibly, reject Mr. Campagna's testimony.

[49] There is no question Mr. Campagna's statement about the cash register is inconsistent with what his testimony ultimately was and is something which would properly factor into assessment of credibility. In my view, however, it was not an inconsistency of such magnitude that it ought to have been treated as irreparably undermining the Mr. Campagna's credibility or the reliability of his evidence. Viewed in the context of the whole of the evidence it is a relatively minor inconsistency. Mr. Campagna identified one of the two Appellants as picking up the cash register to the police. Thus, it was known that he said it was either Mr. McLeod or Mr. McCarthy who picked it up. It is not as if he suddenly injected the matter of the cash register being touched into the evidence at trial.

[50] Moreover, who picked up the cash register was not the main issue before the Trial Judge. Her responsibility was to decide whether an assault causing bodily harm took place against Mr. Adams and if so, by whom. The matter of the cash

register was at most part of the narrative to explain what happened. I find the Trial Judge did not err in deciding to accept Mr. Campagna's evidence, nor did she err by not addressing this inconsistency expressly in her reasons.

[51] I turn now to the concern that Mr. Campagna's testimony regarding whether he could see Mr. Adams and whether he could see who was attacking him was inconsistent with his statement to police.

[52] The Appellants' counsel's cross-examination of Mr. Campagna on this point went, in part, as follows:

> Q. Let's do it again. We'll do it as many times as you need to, okay?
>
> > Brian [McCarthy], Kelly [McLeod], Stefan [Allan], numerous other people storming into the office, destroying the place, literally beating up Rick [Adams]. Giving him a pounding. I tried to get in. I got into the door. The other door was destroyed. I still don't have full eyes on Rick [Adams]. I don't know where he's at.
> >
> > We stop there. You haven't seen Rick yet, correct?
>
> A. Correct
>
> Q. Okay. Then I continue. Your words, not mine.
>
> > I'm trying to get into the room to see where Rick [Adams] is. Brian [McCarthy] and Stefan [Allan] both stopping me from doing my job to break up the fight. Stefan pushed me, told me to stay out of it.
>
> I'm going to stop there. You still haven't seen Rick, correct?
>
> A. Not correct because I have seen him now.
>
> Q. Okay. You've seen Rick, but you didn't tell the police about it?
>
> A. I didn't tell the police about it?

Transcript of Evidence, p 157, ll 15-27 and p158, ll 1-10

[53] Crown counsel questioned Mr. Campagna on this point on re-direct, putting before him another part of the statement:

> Q. Mr. Beaver was asking you some questions from your transcript statement. I just want you to flip to the second page of that statement, and I want to direct you to line 18 where you said:
>
> I was pushed by Stefan Allan. He pushed me down when I was trying to get in, and I was trying to move Brian [McCarthy] out of the way. Brian [McCarthy] was just in the doorway. He wasn't letting us in there. Like, he wasn't letting me or Edna or anybody else in there. He was stopping and letting Kelly [McLeod] have his way with Rick Adams.
>
> That's what was happing. Did you tell the RCMP officer that?
>
> A. Yes
>
> *Transcript of Evidence*, p 169, ll 20-27, p 170 ll 1-7

[54] In light of the exchange between the Crown and Mr. Campagna on re-direct, one would be hard pressed to conclude Mr. Campagna's statement was inconsistent with his testimony at trial on this point. He did not tell the police he could not see Mr. Adams *at any point* during the events. Indeed, the words in the statement put to him by the Crown suggest he could, in fact, eventually see what was happening and in particular, he could see that Mr. McLeod was attacking, or "having his way with", Mr. Adams.

[55] The final point the Appellants make under this head is that there was a total absence of evidence to support the convictions. I disagree. The Trial Judge had before her the evidence of the argument between Mr. Adams and Mr. McLeod, the significant injuries sustained by Mr. Adams, which were corroborated by independent, medical evidence, and the eye-witness testimony of Mr. Campagna that Mr. McLeod was hitting Mr. Adams and Mr. McCarthy prevented anyone from aiding him. She also had his testimony about Mr. McCarthy making kicking motions towards Mr. Adams. She found Mr. Campagna's evidence both credible and reliable. The elements of the offence were made out.

C. Failure to Address Arguments Raised by the Appellants at Trial

[56] The Appellants argue the Trial Judge did not adjudicate on the primary issues raised during submissions at the trial, specifically, that Mr. Campagna's evidence should have been rejected because of his "combative" demeanour and his assertions of "major allegations" for the first time during cross-examination.

[57] The issue of Mr. Campagna asserting "major allegations" for the first time during cross-examination stems from the following exchange during cross-examination:

> Q. Did you ever see Brian kick at Rick?
>
> A. I seen the motions of him kicking at Rick. I never seen him kick Rick.
>
> Q. How does my friend Ms. Miller ask you what happened and you tell me that Brian's at the door and then when I'm asking you questions all of a sudden you have got Brian in the room with kicking motions? Is that something you forgot to tell Ms. Miller?
>
> A. Excuse me?
>
> Q. Why didn't you tell Ms. Miller about Brian being in a room with kicking motions? Ms. Miller asked a very open question. She says, What happened that night? Where were people standing? Where do you see them, and what have you, and you tell us that Brian is backed up against the doorway, right? And all of a sudden I asked you questions and you say, Well, Brian's in the room and he is kicking motion.
>
> A. I did not say that Brian was in the room kicking motions. I said Brian was at the doorway with kicking motions, is what I said.
>
> Q. But you didn't tell that to Ms. Miller, correct?
>
> A. Correct.
>
> Q. And you never said it in the statement to the police?
>
> A. No.
>
> Q. No. You didn't think that it was important to say, I saw Brian at the doorway with the kicking motions? I certainly would have if it was my boss, wouldn't you?
>
> A. I guess so, yes.
>
> *Transcript of Evidence*, p 144, l 23 to p145, l 27

[58] Reasons for judgment "are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict". *R v Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 OR (3d) 514 at 525; *R v REM*, 2008 SCC 51 (CanLII), [2008] 3 SCR 3 para. 18. A trial judges need not recite every detail, nor every issue raised by, the evidence. Conclusions

may be stated in "brief compass" and as long as they are supported by the evidence, the verdict should not be overturned: *R v Burns*, 1994 CanLII 127 (SCC), [1994] 1 SCR 656 at 664.

[59] The Appellants' counsel addressed this matter during the submission phase of the trial, suggesting Mr. Campagna was "manufacturing" evidence and/or that Mr. Campagna somehow deliberately held back on disclosing this issue. That was not the only conclusion, nor the most logical conclusion, to be drawn, however.

[60] From the transcript it appears the Appellants' counsel decided to ask Mr. Campagna about the kicking in particular. Crown counsel had not asked him specifically about the kicking or kicking motions during direct examination and so up to that point, the only evidence on kicking came from Mr. Adams.

[61] Mr. Campagna's answer served to support Mr. Adams' testimony that Mr. McCarthy kicked him. It is clear from the exchange set out above and the Appellants' counsel's submissions at the trial that the answer came as a surprise. Nevertheless, that was the answer he gave in response to a very specific question. This kind of thing is not an unusual occurrence in a criminal trial.

[62] The circumstances under which this information was elicited at trial would have made it unreasonable for the Trial Judge to use it to conclude Mr. Campagna was being untruthful in his answer and could not, therefore, be trusted. It was reasonable for her to accept Mr. Campagna's evidence on this point and it was reasonable for her to conclude he was credible.

[63] With respect to the suggestion that Mr. Campagna was combative or evasive, this is, again, something that arises frequently in trials. Counsel routinely draw the judge's attention to frailties in evidence and reasons to question credibility, including witness demeanour.

[64] Whether a trier of fact finds a witness to be combative is a matter of opinion. Thus, just because the Appellant's counsel found Mr. Campagna combative and evasive did not require the Trial Judge to agree. That she accepted Mr. Campagna's testimony, despite what the Appellant's counsel submitted at trial, implies she did not share his view. While I did not have the advantage of seeing Mr. Campagna testify and to hear manner in which he responded to questions, there is nothing on the written record to suggest Mr. Campagna was an overly

difficult witness such that his demeanour is something which must have been addressed.

[65] It is trite that while demeanour is a valid consideration in determining credibility, it cannot be the primary or the only factor upon which a trier of fact relies in deciding whether to accept or reject testimony. As we tell juries, witnesses will react differently to testifying in court. Some are calm and confident, while others appear nervous and meek. Moreover, cross-examination can be a confrontational experience for a variety of reasons, including a witness's perception that he or she is "under attack", regardless of how restrained the examining counsel may be. The Trial Judge was not required to reject Mr. Campagna's testimony simply because he may have been combative, nor was she was required to address this issue expressly in her judgment.

CONCLUSION

[66] For the foregoing reasons, I find the Trial Judge did not err and that the verdict she rendered was one which a properly instructed trier of fact could reasonably have rendered.

[67] The appeal is dismissed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT, this
27th day of April, 2015

Counsel for the Appellants:	Shawn Beaver Beaver Leebody & Associates
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S-1-CR-2014 000074

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BRIAN JOSEPH McCARTHY AND
KELLY McLEOD

Appellants

-and-

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER