Date: 2015 11 10
Docket: S 1 CR 2014 000077

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PETER ITSI

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Appeal from Conviction

Heard at Yellowknife, NT, on July 14, 2015

Reasons filed: November 10th, 2015

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Appellant:	Charles B. Davison Somba K'e Law Office
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REASONS FOR JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] The Appellant and his co-accused, Glen Norman, were tried in the Territorial Court of the Northwest Territories on a number of charges in October 2014. At the conclusion of that trial they were both convicted of having assaulted Aaron Kay. The Appellant was also convicted of a related charge for breaching an Undertaking. Norman was found not guilty of a theft charge arising from the same events.

[2] The Appellant appeals from his conviction on the assault charge.

1. Overview of Crown's evidence

[3] The main witness for the Crown was Kay. He testified that on the night of the incident, he was walking on a road in Fort McPherson, and was attacked by the Appellant and Norman. He described being struck by both of them, falling to the ground, and then being punched and kicked. He also said that after he fell to the

ground his phone fell out of his pocket and Norman reached for it. Kay said he had $200.00 in that same pocket, and that money was also taken during the incident.

[4] When he was asked if he knew why Norman and the Appellant attacked him, Kay said they knew he had money on him and they probably thought he had alcohol on him as well.

[5] Kay reported the incident to the RCMP that night and was treated for his injuries. Photographs of those injuries were filed as exhibits. They show various injuries to Kay's face: an eye swollen shut; a cut under that same eye; a deep gash on his cheek bone; marks and swelling on his neck; redness to one of his ears; and a small cut under his mouth. Photographs taken before Kay's face was cleaned show a large amount of blood on his face.

[6] Kay testified that earlier that same evening, there was another incident between him and the Appellant. He explained the Appellant was at Kay's uncle's residence. The Appellant was not welcome there. Kay asked him to leave. This led to a physical confrontation. Kay acknowledged that during that altercation he struck the Appellant on the head with a frying pan.

[7] The Crown also called Cst. Ryan Jewett, an R.C.M.P. member who was stationed in Fort McPherson at the time. He explained that on the evening of August 8, 2014, at about 9:00PM, he received a report that there was a fight going on at the Kay residence. When he got there, it appeared to him that there had been a fight. There was blood in the house. Cst. Jewett observed injuries on Kay. He was not able to provide any details about those injuries, beyond the fact that they were on Kay's head.

[8] Cst. Jewett further testified that a few hours later that same evening, he and another officer were on patrol in Fort McPherson. They were waved down by Kay, who had blood on his face. Based on the information provided by Kay, the officer formed grounds to arrest Norman and the Appellant. The Appellant was arrested by Cst. Jewett a number of days later, on August 19, 2014.

2. Overview of Defence's evidence

a. Norman's evidence

[9] Norman testified. His version of events was that he and the Appellant were walking in the community that night and came upon Kay. Kay confronted him,

accusing him of having stolen his phone, and pushed him. Kay attempted to punch him but he dodged the hits. Norman fought back and struck Kay twice in the face.

[10] Norman maintained that he acted in self defence. He said that the Appellant did not take part in the altercation. He acknowledged that he had been drinking most of the day and was feeling intoxicated when he encountered Kay. He also acknowledged that the Appellant is his good friend, and had told him about his earlier altercation with Kay.

b. The Appellant's evidence

[11] The Appellant acknowledged that he was drinking at Kay's uncle's residence on the day of these events and that he had an altercation with Kay there, but his account of what happened was very different from Kay's. He said he was visiting with people and everything was fine, until Kay attacked him suddenly for no apparent reason, and struck him from behind with brass knuckles. The Appellant says he was cut near the eyebrow and began to bleed.

[12] In his Evidence in Chief, the Appellant testified that he tried to get medical assistance, but the nursing station was closed. He said he called the police, but was told they would deal with the matter the next day. He went home, taped up his injury, and went back out to continue drinking.

[13] On his way to go get more alcohol at his grandmother's residence, he passed by Kay's house. Kay came out with a shotgun, swore at him and told him to get away. This happened before he met up with Norman.

[14] The Appellant testified that later on, he and Norman were walking on the road. The Appellant stopped to urinate and Norman walked ahead. The Appellant saw Kay approach Norman. There was a brief altercation between them. By the time the Appellant reached them the fight was over. The Appellant said he did not take any part in the altercation.

[15] The Crown cross-examined the Appellant about his efforts to get medical assistance and help from police after the brass knuckles incident. The Appellant described placing a call to the police and getting through to a Telecoms operator. He described what he remembered of the conversation. He said he hung up during the call because he was being asked questions which related to officer safety and not about what happened to him.

[16] The Appellant was cross-examined about whether he told Cst. Jewett about the brass knuckles incident when he was arrested on August 19, 2014. He said that he did, and wanted to give a statement about it, but the officer refused to take one. The Appellant also said he asked Cst. Jewett to take a photograph of the injury to his eyebrow, which was still visible, and that Cst. Jewett refused to do so.

3. The rebuttal evidence

[17] After having completed the cross-examination of the Appellant, the Crown made application to re-call Cst. Jewett to rebut aspects of the Appellant's testimony about his dealings with the officer at the time of his arrest.

[18] Counsel for the Appellant (who is not counsel on the appeal) objected to the rebuttal evidence on the basis that Cst. Jewett had been in the courtroom during the Appellant's testimony (Cst. Jewett sat in the courtroom after he finished his testimony; he was asked to leave the courtroom partway during the cross-examination of the Appellant, when it became apparent that the Crown might seek to call him in rebuttal). In the discussion that followed trial counsel conceded that the issue he was raising was relevant to the weight to be given to the rebuttal evidence, and not to its admissibility. No other objection was made about the rebuttal evidence being called. The Trial Judge allowed the Crown to re-call Cst. Jewett.

[19] Cst. Jewett testified about his dealings with the Appellant when he arrested him. He testified that the Appellant did tell him, at the time of arrest, that the mark on his eye was caused by Kay. He testified he had no memory of the Appellant having asked him to take photographs, and no memory or notes of the Appellant having asked to make a statement. He testified he would ordinarily make a note of such a request being made. He also testified that someone wanting to make a statement in these circumstances would be permitted to do so.

4. The Trial Judge's decision

[20] The Trial Judge properly noted that the central issue at trial was the credibility of witnesses, and that the principles set out in *R.* v. *W.D.*, [1991] 1 S.C.R. 742 applied.

[21] The Trial Judge rejected the evidence of the Appellant and the evidence of Norman. She gave various reasons for doing so.

[22] The Trial Judge then referred to Kay's evidence. She concluded that he had been evasive on some aspects of his evidence, in particular when he was asked why he thought he was being attacked. She found this to be irrelevant. She concluded that the earlier altercation between the Appellant and Kay, which Kay admitted to, enhanced his credibility; she said that the earlier incident was the "pivot" for the evening and noted that it gave the Appellant a reason to want to retaliate against Kay. She also noted that Norman admitted that the Appellant had told him about this earlier altercation.

[23] The Trial Judge concluded that the injuries, evidenced by the photographs filed as exhibits, were consistent with Kay's version that he was punched and kicked in the face and rib cage by both men. She concluded both the Appellant and Norman participated in the commission of the offence, "either as parties or principals". *Transcript of Trial*, p.155, lines 5-13.

[24] In dealing with the theft charge against Norman, the Trial Judge noted the lack of detail in the evidence, and that she found Kay unconvincing when he testified about the reason why he would have been attacked by the two men. She said this left her with a reasonable doubt on that charge. She found Norman not guilty of theft.

B) GROUNDS OF APPEAL

[25] The Appellant argues that the Trial Judge made some legal errors that led her to consider evidence that she should not have. He argues as well that she made some errors in her assessment of certain aspects of the evidence. He says those errors had an impact on her decision to reject his evidence.

[26] More specifically, the Appellant argues that in concluding that the Appellant's version of the call to Telecoms was implausible, she took into consideration matters that were not in evidence, and to an extent mischaracterized the evidence that was before her. With respect to the rebuttal evidence, he argues that the Trial Judge erred in law in permitting the Crown to adduce it. He also claims that she misapprehended that evidence in a material way.

[27] Finally, the Appellant argues that the Reasons for Judgment failed to address a key aspect of the analysis that was required pursuant to the principles outlined in *R.* v. *W.D.*, *supra*, namely, whether Norman's evidence, even though the Trial Judge concluded it did not raise a reasonable doubt about his own guilt, was capable of raising a reasonable doubt about the Appellant's guilt.

[28] The Respondent's position is that the Trial Judge did not commit any reversible errors, that her conclusions are supported by the evidence and that there is no reason for this Court to intervene.

C) ANALYSIS

1. Standard of review

[29] Some of the errors that the Appellant alleges were made were on questions of law. This engages a standard of review of correctness. *Housen* v. *Nikolaisen*, 2002 SCC 33, para 33.

[30] Other grounds of appeal are based on alleged errors by the Trial Judge in her assessment of the evidence, and the impact of those errors on her findings of credibility. On that type of issue, the standard of review is much higher: a trial judge's assessment of the evidence, and in particular of the credibility of witnesses, is entitled to considerable deference on appeal. Appellate courts should not interfere with those findings unless a palpable and overriding error was made. *Housen* v. *Nikolaisen*, *supra*, paras 28-29; *R.* v. *Gagnon*, [2006] 1 R.C.S. 621, para 10.

[31] A palpable and overriding error is a mistake that is clear and obvious. It is a mistake that is material, and not merely peripheral, to the reasoning of the trial judge. It must be an error that could have affected the trial judge's decision. *L.H.* v. *A.G. Canada et alia*, 2005 SCC 25; *R.* v. *Loher*, [2004] 3 S.C.R. 732, paras 2, 6, 7.

[32] In relation to the last ground raised by the Appellant, which calls into question the sufficiency of the Trial Judge's Reasons, the issue is whether any deficiencies in the Reasons prevent meaningful appellate review. The examination of the Reasons must be approached from a stance of deference towards the Trial Judge's perception of the facts, based on the propositions that trial judges are in the best position to determine matters of fact and are presumed to know the basic law. *R.* v. *Sheppard*, 2002 SCC 26; *R.* v. *Gagnon*, *supra*,; *R.* v. *R.E.M.* , [2008] 3 S.C.R. 3, paras 52- 54.

[33] With those overarching principles in mind, I turn to the specific issues raised by the Appellant.

2. The Appellant's call to Telecoms

[34] The Trial Judge concluded that the Appellant's account of the call he says he made to Telecoms was not plausible; this was one of the factors she took into account in rejecting his evidence.

[35] In her Reasons, she made the following comments about the Appellant's evidence about what he did after Kay struck him with the brass knuckles:

> [the Appellant] said that he was bleeding profusely from the head when he was hit by Mr. Kay, and that he went to the health centre but that it was closed; and then he said about the health centre that they refused to treat him. As a result he said he went to call the R.C.M.P. and that he was directed to the dispatch in Yellowknife, but that the purpose of his call was to asking *[sic]* if he could receive treatment from the health centre, and that notwithstanding this request for help there was still no help forthcoming.
>
> The overall description of how he would be refused treatment from anybody from the health centre does not make sense to me given the extent of his injury, which he described - he described that he was bleeding profusely from the head, that it was going to his eye, so it was a significant injury, and it does not make sense that people would be indifferent to this. He says he also called the R.C.M.P. dispatch and that during - - or that during that call that nobody asked for his name, and that also does not make sense as the people from the operational call centre have a protocol to follow, which I take it would include to ask the caller for their name especially if they are a victim, especially if they mention significant injury and mention threat to use a firearm, the use of brass knuckles which are an illegal weapon, and, again, extensive head injury. Does not make sense to me as well that the response that he would have received was that someone would take care of it the next day. This combination of factors indicates to me that there would have been an urgency to respond to this. So again, what he says is the response from the dispatcher does not make sense.

Trial Transcript, p.149 line 15 to p.150, line 25.

[36] There was no evidence about any protocol or about standard procedures that are followed by R.C.M.P. Telecoms operators when they receive calls. The Respondent concedes that these are not facts of which a Court can take judicial notice. That concession is in line with the law that governs judicial notice. *R.* v. *Find* [2001] 1 S.C.R. 863.

[37] The Respondent argues, however, that the Trial Judge's apparent reliance on the existence of any such protocol is of no consequence because it was open to her to draw the inference, as a matter of common sense, that the Telecoms operator would ask for the caller's name when receiving a call from someone who is injured and is urgently seeking police assistance.

[38] The difficulty with that argument is that on the Appellant's evidence, the call was not completed. The Appellant said he hung up during the call because he was being asked questions related to officer safety, and not about what had happened to him. The duration of the call was not established.

[39] Given the Appellant's description of how the call unfolded, it could well have ended before the operator had a chance to ask for his name and for other details. Under those circumstances, the common sense inference that might have otherwise been available, had the call been completed, was not, in my respectful view, available to the Trial Judge.

[40] I must note, as well, that there was no evidence that the Appellant told the operator anything about a firearm. Moreover, in the sequence of events that he recounted, the threat with the shotgun happened *after* the Telecoms call.

[41] In these two respects, the Trial Judge erred in her appreciation of the evidence about the call to Telecoms.

[42] This was not the only aspect of the Appellant's evidence the Trial Judge relied on in concluding that his account of what happened after the brass knuckles incident was implausible. Given this, the errors, alone, might not give rise to appellate intervention. They must be considered in light of any other errors that may have been made in the assessment of the evidence.

3. The Rebuttal Evidence

a. Admissibility

[43] The principles that govern the admissibility of rebuttal evidence are grounded in concerns for trial fairness. On the one hand, the Crown should not be permitted to split its case, because at the close of the Crown's case, an accused should know exactly what case he or she has to meet. At the same time, if things that go to material issues, and that the Crown could not have foreseen, arise in the

Defence's case, the Crown may be given an opportunity to address them in rebuttal:

> The plaintiff or the Crown may be allowed to call evidence after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

R. v. *Krause*, [1986] 2 S.C.R. 466, para 17; see also *R.* v. *Aalders* [1993] 2 S.C.R. 482, p.497.

[44] Rebuttal evidence should not be permitted if its purpose is simply to contradict the accused or a defence witness on matters that are not essential for the determination of the case. This is merely a specific application of the more general rule about collateral facts: counsel have some latitude in the topics they can broach on cross-examination, but on matters not central to the case, they are bound by the answers of the witness:

> The general rule is that Crown counsel, in cross-examining an accused, are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded wide latitude in cross-examination which enables them to test and question the testimony of the witnesses and their credibility. However, where the questions asked by Crown counsel are not relevant to an issue essential for the determination of the case, the Crown is bound by the answers given and cannot present evidence in rebuttal to challenge the statements made by the witness.

R. v. *Aalders*, *supra*, pp.496-497.

[45] Whether the rebuttal evidence was admissible depends on how the subject-matter of that evidence is characterized: "relevant to an issue essential to the determination of the case", or "collateral". The Appellant's position is that his evidence about what he did after the altercation with Kay was not relevant to an issue essential for the determination of the case. The Respondent argues the opposite.

[46] In *R.* v. *Martens*, 2005 NWTSC 98, this Court suggested the following approach, which I find helpful, in determining whether a fact is collateral or not:

> [a collateral fact] is a fact that a party would not be entitled to prove as part of its case because it lacks relevance or connection to it. It is one that is neither material or relevant to a material fact.
>
> If the answer of the witness that a party seeks to contradict is a matter that the opponent could prove in evidence as part of its case independent of the contradiction, the matter is not collateral, contradictory evidence may be elicited.

R. v. *Martens*, *supra*, page 5.

[47] The altercation between the Appellant and Kay was a topic that was addressed in the testimonies of both Kay and the Appellant, without objection from anyone. Norman was also asked about his knowledge of that altercation. This is not determinative, because an irrelevant matter does not become relevant simply because no one objects to evidence being adduced about it. That said, it is telling that everyone at this trial appears to have seen the earlier altercation as relevant to the issues before the Court. Counsel led evidence about it and referred to it in their submissions. The Trial Judge found that it was "the pivot for the evening". *Trial Transcript*, p.152, line 10.

[48] In my view, although it was not the incident that formed the subject-matter of the charge, the earlier altercation between the Appellant and Kay was relevant to whether the accused were guilty of the assault on Kay later that evening: it was evidence that could show *animus* between Kay and the Appellant and provide a possible explanation for the subsequent incident. It was capable of providing an indication of the state of mind and disposition of the Appellant and Kay that evening. On either version, it could provide a motive for the Appellant to retaliate against Kay. On the Appellant's version, it might provide a motive for Kay to falsely implicate the Appellant in the assault against him later on, to deflect attention away from his own conduct.

[49] The rebuttal evidence pertained to the interaction between the Appellant and Cst. Jewett at the time of arrest, and to whether the Appellant had tried to pursue a complaint against Kay in relation to that earlier incident. This evidence was closely tied to the Appellant’s version of that earlier incident. Given this, in my view, it too was relevant.

[50] I also conclude that the Crown could not have foreseen that the Appellant would testify in the way he did about what he did after that altercation. It could not

have foreseen the Appellant's evidence about Cst. Jewett's refusal to take a statement or photographs because Cst. Jewett had no notes or recollection of this having happened.

[51] Given this, the basic requirements to make the rebuttal evidence admissible were met.

[52] The second reason why the Appellant says the rebuttal evidence should not have been permitted is that, he argues, it was unfair to allow the Crown to contradict him on matters that the Crown itself chose to pursue on cross-examination. The Appellant goes further and argues that he would not have been permitted to testify, in his Examination in Chief, about his request to give a statement and his request that Cst. Jewett take photographs of his injury, because statements by accused are only admissible at the instance of the Crown.

[53] Accused are generally not permitted to testify about out of court statements they gave to the police or to anyone else. They also cannot adduce such statements through another witness. There are a few legal foundations for this.

[54] First, an accused testifying directly about his or her own out of court statement to someone else may well, in many situations, offend the rule that renders prior consistent statements inadmissible.

[55] As for adducing evidence of such statements through another witness, this offends the rule that makes hearsay inadmissible. The Crown's ability to adduce an accused's out of court statement is an exception to that rule.

[56] Quite apart from these evidentiary rules, there are policy reasons not to permit an accused to have his or her version of events placed before the trier of facts through another witness:

> As a general rule, the statements of an accused person made outside court (…) are receivable in evidence against him but not for him. This rule is based on the sound proposition that an accused should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence to the jury without being put on oath and being subjected, as well, to cross-examination. It is, however, not an inflexible rule, and in proper circumstances such statements may be admissible; for example, where they are relevant to show the state of mind of an accused at a given time or to rebut the suggestion of recent fabrication of a defence.

R. v. *Simpson*, [1988] 1 R.C.S. 3, p.22.

[57] While it is true that accused person's out of court statements are generally only admissible at the instance of the Crown, as noted in the above-quoted excerpt, this rule is not absolute. In this case, I am far from persuaded that the Appellant's evidence about his request to make a statement to complain about Kay's actions, or about his request that photographs be taken of his injuries, would not have been admissible as part of his Examination in Chief. That evidence was relevant to his state of mind at the time of his arrest. It could also serve to rebut the suggestion that his version of events at trial (that Kay, not him, was the aggressor on the earlier altercation and throughout the events of the evening) was fabricated after the fact.

[58] For those reasons, I conclude that the Trial Judge did not err in allowing the Crown to call rebuttal evidence.

b. The Trial Judge's use of the rebuttal evidence

[59] The Appellant argues that the Trial Judge misapprehended the rebuttal evidence. In addressing this evidence, the Trial Judge said:

> [the Appellant] also says that he insisted to the arresting officer that he take a statement from him as he wanted to complain about Mr. Kay, and that is contradicted by the testimony of Cst. Jewett who said he had - - he made no notes about this and that he had no memory of it, and, again, it seems that if this person had an obvious injury to the head and that he was insisting to make a statement that they're [sic] would have been something done about it. So I find this is an internal inconsistency.

Trial Transcript, p.150 line 26 to p.151 line 9.

[60] The Appellant's argument is twofold. First, he argues that Cst. Jewett did not outright contradict the Appellant; he simply testified that he had no notes and no memory of the Appellant having wanted to complain about Mr. Kay. In my view, the distinction is subtle, and of little consequence overall.

[61] The Appellant's second point raises a more serious concern. Cst. Jewett recalled the Appellant telling him that the mark on his eye was from being harmed by Kay. This corroborated the Appellant's version that he complained to Cst. Jewett about what Kay had done. It also confirms that Cst. Jewett did not act on that complaint.

[62] For the purposes of this appeal, the question is not whether Cst. Jewett should have taken a statement or should have taken photographs of the Appellant's injury. What matters is that Cst. Jewett's evidence in rebuttal was one of the factors that the Trial Judge relied on to conclude the Appellant was not credible. In doing so she relied on aspects of Cst. Jewett's evidence that did not confirm the Appellant's version, without mentioning that other aspects of his evidence were consistent with the Appellant's version.

[63] In addition, and more importantly, one of her conclusions – that if the Appellant had complained about being harmed by Kay, something would have been done about it – is in direct contradiction with the evidence: the Appellant did tell Cst. Jewett that the injury on his eye was caused by Kay and Cst. Jewett did not, in fact, do anything about it.

4. The impact of the errors

[64] As noted above, to warrant appellate intervention on the basis of errors in the assessment of the evidence, it is not enough to show that there have been errors: the errors have to have affected the decision.

[65] Here, the Trial Judge gave several reasons for rejecting the Appellant's evidence. Aspects of those reasons were well founded on the evidence and did not involve any error. It is difficult, in such a situation, to assess whether her conclusion would have been the same if the areas where she erred had not been part of her analysis. To examine this issue, the whole of her Reasons must be considered.

[66] When she dealt with the Appellant's credibility, the Trial Judge began by referring to his criminal record. She reviewed the entries on the record and concluded that it was not the most important factor in assessing his credibility. She then said:

> (…) what is more a problem for [the Appellant] are the internal inconsistencies in his testimony and the inconsistency that his testimony creates with respect to the testimony of other witnesses. Briefly summarized, keeping in mind that I did not have a lot of time to review extensively the evidence (I'm highlighting these aspects which I think are more major and that influence my decision) (…)

Trial Transcript, p.149, lines 7-15.

[67] Immediately after the excerpt quoted above, the Trial Judge referred to the evidence of what the Appellant said he did after being struck by Kay, including the evidence about the Telecoms call. Next, she referred to the Appellant's evidence about his attempt to make a complaint against Kay, which she found was contradicted by Cst. Jewett. She then referred to other reasons why she found the Appellant not to be credible. Nevertheless, the first two things she referred to were the two areas where I have concluded that she erred.

[68] I find it difficult to conclude, on the face of the record, that those two aspects of her analysis did not have an impact on her assessment of the Appellant's credibility.

5. The sufficiency of the Reasons in dealing with Norman's evidence

[69] The Appellant's last ground of appeal relates to the sufficiency of the Reasons in applying the concept of reasonable doubt to the credibility of witnesses. More specifically, the Appellant argues that the Reasons do not demonstrate that the Trial Judge considered whether a reasonable doubt about his guilt could arise from his co-accused's evidence.

[70] Norman's evidence had to be considered from two points of view in the context of this trial: the first was whether that evidence raised a reasonable doubt about Norman's guilt, and the second was whether it raised a reasonable doubt about the Appellant's guilt. It bears repeating, Norman's evidence was that he was the only one who struck Kay that night.

[71] It is well established that trial judges are not required to set out every step of their reasoning process, and that they are not required to spell out every reasonable inference that they draw. For example, if a trial judge explains that she has rejected an accused's evidence and finds that accused guilty, the conviction itself raises an inference that the accused's evidence also failed to raise a reasonable doubt. *R.* v. *R.E.M.*, *supra*, para 56; see also *R.* v. *Boucher*, [2005] 1 S.C.R. 72.

[72] The issue presents differently here, however, because the issue is not that the Trial Judge failed to say that Norman's evidence did not raise a reasonable doubt about Norman's own guilt: it is that the Reasons are silent as to whether Norman's evidence was capable of raising a doubt about the Appellant's guilt.

[73] The first reason the Trial Judge gave for rejecting Norman's evidence was his criminal record. This would have an impact on the reliability of the whole of his testimony.

[74] The second reason the Trial Judge gave was that she found that Norman's claim that he only threw two punches was inconsistent with the injuries suffered by Kay:

> (…) when comparing [Norman's] testimony to the photographs I find that although it is not impossible that a drunk person, being Mr. Kay, would want to pick a fight with him, I also find that what Mr. Norman described as his response to a punch, a push and a missed punch is a disproportionate use of force to defend himself, and I find that if the need to defend himself arose then he would have hit Mr. Kay more than twice in order to cause that many injuries. So as a result I reject his testimony.

Trial Transcript, p.154, lines 6-17.

[75] This excerpt deals with the implausibility of Norman's account as far as the amount of force he used, which was relevant to his claim of self-defence. It has nothing to do with the other aspect of Norman's testimony - and the most important from the Appellant's perspective – that the Appellant was not involved in the assault. The Trial Judge may well have rejected that aspect of Norman's evidence because the Appellant was his friend; she may well have found the similarities between their accounts of events suggested collusion (although this was not put to either accused on cross-examination). The problem is that the Trial Judge did not address this aspect of Norman's testimony at all. And as the Appellant notes, it is one thing for an accused to distort the facts and minimize his responsibility to avoid conviction. It is another thing to distort the facts to exonerate someone else.

[76] The Respondent argues that this is not fatal because it can be inferred from the Reasons that the Trial Judge rejected Norman's evidence completely and for all purposes, and accepted Kay's testimony and version of events. Kay's version of events, the Respondent argues, gave the Trial Judge ample basis to be satisfied beyond a reasonable doubt of the Appellant's guilt.

[77] There may well be cases where this argument would prevail, but I am not persuaded it should here, because there are other aspects of the Reasons that raise issues. In particular, the Reasons demonstrate that the Trial Judge had serious misgivings about Kay's credibility and the reliability of his account of what happened that night.

[78] The Trial Judge noted, for example, that there were many inconsistencies in the evidence, that the three main witnesses had all been drinking on the night in question, and that this affected their ability to reliably recall events. She concluded that they were *all* unreliable in their account of what took place:

> Counsel suggested that the inconsistencies found in each witness's *[sic]* testimony should result in an impossibility to make any finding of fact. What is clear is that I must assess each witness's *[sic]* evidence in light of the totality of the evidence and, more specifically, in relation to the evidence that is not contradicted.
>
> So up to a certain point as well, the fact that all witnesses are unreliable kind of annuls itself. I cannot make a finding one way or another except that everything is analyzed through the knowledge and the information that they were all intoxicated. So obviously there will be things missing, there will be things that are perceived in a different way, and that may or may not have happened the way they say. I find, however, that this does not prevent me from continuing the analysis of the evidence.

Trial Transcript, p.145, lines 9-26.

[79] The Trial Judge also found Kay evasive in some aspects of his testimony. She appears to have outright disbelieved him on others:

> Although Mr. Kay was evasive as to why he thought he was being attacked I find it difficult to accept that the reason for the attack would be a belief that he had money on him. The totality of the evidence seems to indicate that there is more to the relationship between Mr. Kay, Mr. Norman, and Mr. Itsi that any of them care to acknowledge, but ultimately it is irrelevant.

Trial Transcript, p.154, lines 18-25.

[80] The Trial Judge's concerns about Kay's credibility and reliability led her to dismiss the theft charge:

> (…) given the lack of detail and also the fact that I found Mr. Kay unconvincing with respect to the reason why he would have been attacked I find I have a reasonable doubt with respect to [the count of theft] and I dismiss this count with respect to Mr. Norman.

Trial Transcript, p.155, lines18-23.

[81] Triers of fact are, of course, free to accept portions of a witness' testimony and reject others. But where a trier of fact concludes that a witness has been evasive and has deliberately not given a full and candid account of events under oath or solemn affirmation, that gives rise to serious concerns and may taint the whole of that witness' evidence. Juries have to be instructed to this effect and judges sitting alone must adopt the same cautious approach.

[82] While the injuries offered corroboration on the assault charge, they were of no assistance in establishing the identity of the perpetrator, or the number of perpetrators. The injuries were consistent with a number of different scenarios: Norman having used excessive force in defending himself; Norman having inflicted an unprovoked beating on Kay on his own; or with Norman and the Appellant both having been involved, as Kay claimed.

[83] The only evidence capable of implicating the Appellant was Kay's. The Trial Judge did not articulate why Kay's evidence, which she found unreliable, and problematic enough to dismiss the theft charge, was sufficiently reliable to establish beyond a reasonable doubt that the Appellant took part in the assault. This is especially problematic considering that the theft charge and the assault charge essentially arose from the same transaction. In the result, it is not possible to meaningfully review the Trial Judge's findings in this regard.

D) CONCLUSION

[84] I conclude that the Trial Judge misapprehended some of the evidence that she relied on to conclude that the Appellant's evidence should be rejected. In addition, with the greatest of respect to the Trial Judge, the Reasons for Judgment, reviewed as a whole, are insufficient to permit a meaningful review of her application of the principles outlined in *R. v. W.D.*, *supra*.

[85] It must be acknowledged that this matter was heard during a circuit of the Territorial Court. It is apparent from the record that although she took a thirty minute adjournment before giving her decision, the Trial Judge had very little time to formulate her Reasons for Judgment. This presents very real challenges and decisions delivered orally in such circumstances cannot be expected to meet a standard of perfection.

[86] At the same time, where the record discloses that reversible errors were made, this Court has a duty to intervene. In this case, there are sufficient issues arising from the Reasons for Judgment to persuade me, after careful consideration, that it would be unsafe to allow the Appellant's conviction to stand.

[87] For those reasons, the appeal is allowed, and the Appellant's conviction is quashed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
10th day of November 2015

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PETER ITSI

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE L.A.
CHARBONNEAU
