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TC CR 86 015

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

AND

ROBERT ABEL

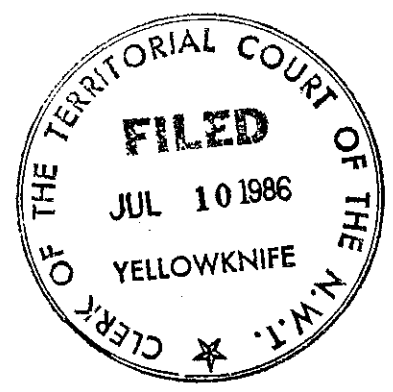
Heard at Yellowknife, N. W. T.

Reasons filed: July 10, 1986

REASONS FOR JUDGMENT

of

His Honour Judge R. Michel Bourassa



Counsel for the Crown: B. Bruser
Counsel for the Defence: V. Foldats

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vs

ROBERT ABEL

REASONS FOR JUDGEMENT

The Defendant, Robert Abel, is convicted of one charge pursuant to Section 245 of the Criminal Code.

Charge:

On or about the Twenty-Fourth day of January, A.D. 1986, at or near the City of Yellowknife, in the Northwest Territories, did assault, Matthew Bourke, contrary to Section 245 of the Criminal Code.

There is one issue raised by the defence, that is the issue of identification. There is another issue that was not argued or advanced by Defence counsel, I believe quite properly so, and that is the purported defence of alibi. I am of the view that counsel made the responsible, professional decision in that regard.

Dealing with identification: I am cautioning myself in deciding this case that (obviously) the Crown must prove its case beyond a reasonable doubt. The Crown has to prove its case. Whether Mr. Abel lies or not, whether he is a "good guy" or "bad guy" is irrelevant. The Crown still has to prove its case. If the Crown establishes a prima facie case it is open to the Defence, either in cross-examination or in its own evidence to raise a reasonable doubt and in this case the Defence called the accused, Robert Abel.

There is no question in my mind that the witness, Steele, is straight forward, honest, and that his evidence wasn't really compromised in any way. On the 25th of January, Mr. Steele picked up some fares in front of the Yellowknife Inn, one in the front seat and one in the back seat. He took them to the Liquor store around the corner.

The one in the front seat went in. He came back out with a woman, got back into the car, and ordered Mr. Steele to take them to the Red Rooster. Now, that individual who was sitting in the front seat with Mr. Steele is unequivocally identified by him as the accused before the court today, Mr. Robert Abel, particularly by the birthmark on his face. Now, Mr. Abel, in driving to the Red Rooster, is talking to the fellow in the back seat, and starts describing a fight. When this discussion took place, Mr. Steele testified that it twigged his interest, and that he looked carefully, and low and behold, in his own words, "I'll be damned, it is him", referring to the accused and back to the previous evening's fight that he witnessed.

Now, what was said about the fight? Robert Abel said to the people in the back seat that he had beaten a guy the night previous, that he was feeling bad or sorry that he couldn't have done a better job, that he couldn't kick high enough to hit him well, that he was disappointed over his technique. Now, there is no question that a fight or more accurately, a beating, took place on the 24th of January in front of the Gold Range, and that on that occasion, the victim, Matthew Bourke, was viciously assaulted and beaten. Was it Robert Abel?

Mr. Bourke doesn't pretend to be able to identify the aggressor. Mr. Steele does not advance the position, as I suppose one might be tempted to do, to say "that is the guy". He said he watched the fight. It took place within six feet of where he was. He watched what was going on, and then he left. The whole thing transpired in less than a minute, as Mr. Steele said, "punch, punch, kick, kick, and it was over". But when the discussions of the fight took place the next day by Mr. Abel, Mr. Steele looked at Mr. Abel carefully and concluded that from what he had seen the night before, of the aggressor, the physical mannerisms, impressions and general observations as defective as it was, that his fare, Mr. Abel, was that aggressor.

What about Mr. Abel? I believe Mr. Abel is lying. I think he stood here, was sworn in, and lied throughout. He first of all denies whatsoever being anywhere near the Gold Range the night the beating took place. At 7 o'clock he went to his auntie's at Northland Trailer Park and remained there the night. Where is his aunt? She could have been here to testify today. She is not.

Mr. Abel then testifies that he was never in a cab on the next day, that he doesn't remember all of a sudden, that it is too long ago. He remembers the night

of the 24th precisely right down to the time he went to his aunties', who he was with, that he drank two bottles of beer, but on the 25th, he has no memory. He doesn't think he was in the cab. Those two positions, I find in observing the witness, are incompatible.

I am led to the conclusion that for whatever reason Mr. Abel is lying, particularly about the next day about that cab ride. He was with Mr. Steele. There is no question about it in my mind. He was talking about beating someone, and he seeks in his evidence to avoid having to confront, deal with or explain that incriminating cab ride. It affects his evidence, obviously. The beating, including the kicks received by Mr. Bourke are consistent with the beating Mr. Abel boasted of in the taxi.

Whatever defects in the evidence of identification there may be they are not such as to be fatal to the Crowns case. In any event, Mr. Abel is convicted by his own words, his own boasts over heard by Mr. Steele.

I am quite easily able to conclude beyond a reasonable doubt that Mr. Abel beat Mr. Bourke on that evening; that he was the one that was seen by Mr. Steele, and that recognition was reconfirmed the next day. That Mr. Steele didn't

recognize him at first or make the connection at first when he picked him up in front of the Yellowknife Inn, I don't think amounts to anything. As he said, he was just another fare at that point, just another face, another group of people to be taken here and there. He had absolutely no reason to look at any of his fares. He was just doing his job. One is like another. Only when the discussion of the fight took place did he examine Mr. Abel carefully, and at that point made his conclusion that it was the same one the previous evening.

Together with Mr. Abel's evasiveness and lying about all matters, I am satisfied on all of the evidence that the offence is made out. The accused is convicted.

Robert Abel is convicted of an assault. The Crown elected to proceed by summary conviction. Robert Abel has been in and out of the courts on a regular basis every single year since 1979. He is convicted of 20 or 30 various items including as recently as October of 1985 of assault for which he received two weeks concurrent for a charge of breach of probation.

This assault was, and the only analogy or parallel I can think of, is the "rolling" a drunk right out of "Clockwork Orange", Matthew Bourke, on his own admission,

was intoxicated, comes out of the Gold Range Hotel, and for absolutely no reason Robert Abel starts beating him. He strikes him from behind. He knocks him down. Mr. Bourke tries to get up. He is kicked in the stomach. He is kicked in the face. His head is beaten against a steel post with a taxi stand sign when finally, Mr. Bourke is able to escape.

Then the very next day Mr. Abel can't even say he was drunk and possibly out of control, a common argument. The very next day Mr. Abel is overheard boasting to two friends that he could have done a better job and that he couldn't kick high enough to get a real good shot in.

This isn't an assault where two individuals get into a fight over something which is, I suppose in a sense, perversely understandable. It is not a fight where there is a disagreement between two people. This is just rolling someone, just picking on a victim to beat him for the sake of beating him.

I am of the view that a jail sentence is called for. Mr. Abel, at some point in time, I don't know if it is going to be when he is 35 or sooner, and I would hope sooner, is going to have to realize that his is subject to the same laws as everyone else.

Standup, please, Mr. Abel. Four months in jail.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

R. Michel Bourassa
Judge