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TC CR 84 005

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

and

DONALD EDWARD BERENS

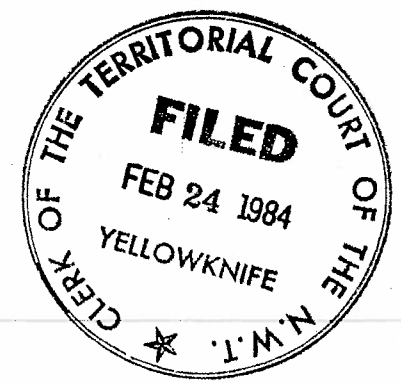
Heard at Yellowknife, N.W.T.

Judgment filed: February 24, 1984

REASONS FOR JUDGMENT

of

His Honour Judge Thomas B. Davis



Counsel for the Crown: Mr. Bernard Fontaine

Counsel for the Defence: Mr. George Carter

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J U D G M E N T

Donald Edward Berens is charged under Section 303 of the Criminal Code of Canada - theft with threats of violence to Robert Bourassa on 18 July 1983 at Hay River.

Evidence at trial was given by both the Informant and the Accused. It was agreed that the Informant knew the Accused for a short period of time before the alleged offence, when on a few occasions the Accused had driven the vehicle of the Informant and had spent some number of hours trying to do some repairs to the vehicle.

There is also agreement in evidence produced that the Accused came to the trailer residence of the Informant at about 2:00 a.m. and aroused the Informant by heavy knocking on the door, both before and after having broken the window in the trailer.

The Informant then opened the door and the Accused entered, along with some pups that he had with him, and some discussion took place for about ten minutes, the tone and substance of which is in conflict between the two persons.

The Informant gave evidence that the Accused refused to leave when requested. He further says that he tried to avoid giving the Accused the keys to the car by telling the Accused it was not working, and that he needed it by 8:00 a.m. the next day.

Mr. Bourassa also says that the Accused demanded the keys to his car, which he gave to the Accused so that the Accused would not hurt him or do damage to his car and to his place.

Although the Accused was fairly drunk, Mr. Bourassa says the Accused was angry, and when leaving the trailer had told the Informant not to call or tell anybody or get the accused into trouble.

The Accused's evidence of the conversation indicates that he tried to verbally con the Informant into giving him the keys. Upon the continual refusal, the Accused told Bourassa to stick the car - to which there was no reply.

The Accused then, after obtaining the keys, took the pups and left the trailer.

There is a further conflict in the evidence of the Informant and the Accused as to where the car was located when he left the trailer. The Informant said he observed the Accused get into and drive the car away from the trailer; while the Accused's evidence is that he had to get a battery and jumper cables to get the car started in a neighbour's yard where it had been sitting.

The following morning, the extra battery cables and tools of the Accused were found in the car, which the Informant says were not in the car before it was taken by the Accused.

Shortly after the Accused started to drive the car he was arrested by the police for impaired driving.

The Informant gave evidence about his difficulties in arousing his friends or of finding a non-pay telephone at a local hotel during a period of up to two hours before he called the police to report the car as being stolen. There is no record of the call, although the Informant estimated it to be at 4:00 a.m.

He then called the R.C.M.P. Detachment at 8:00 a.m., at which time he spoke to Cst. Wittig about the car, to learn that the Accused had been arrested and learned of the location of the car.

By Section 283 of the Criminal Code, theft occurs if a person, without right, takes anything from another with the intent to deprive the owner of it either temporarily or absolutely.

By Section 302, a person commits robbery if the theft is committed with the use of violence or threats of violence to a person.

To support a charge based on a threat, the Crown must prove that the victim felt threatened and believed the threat could be carried out.

I have heard very interesting argument on the law by Counsel who reviewed in detail the Supreme Court of Canada decision *Lefrance v. Q.*, 13 C.C.C. (2d) at 289, and the Ontario Court of Appeal case, *R. v. Wilkins*, 1965, 2 C.C.C. 189.

I am satisfied that the charge of theft using violence must have as an element the intention to deprive the owner of the goods.

Both the cases referred to indicate that theft of a vehicle is a more serious and separate charge than taking a vehicle without consent. In the theft charge, all the elements of theft of any item must be proven.

For the lesser offence, an accused can be convicted for taking a vehicle without consent even if it is his intention only to drive the vehicle and to return the vehicle to the owner.

On review of the facts in the *Lafrance* case, the Supreme Court, by a split majority, upheld a conviction for the more serious offence of theft of the vehicle when the accused was driving the stolen vehicle even though he had the intention of returning the car. Their Lordships found that if all the elements of the theft were established on the evidence, the conviction must be entered, and that the intention to return the vehicle did not negate the offence.

I must therefore make a determination on whether the Accused intended to deprive the owner of the car temporarily, or just to drive it and then cause it to be returned to the owner.

If it had not been for the fact that the Accused told the Informant not to report the incident to anybody so as

to get him into trouble, I would have been inclined to extend the jurisprudence to allow the Accused to have had the vehicle, wherein he would have been guilty only of "taking without consent", but the circumstances surrounding this taking are more involved and more serious.

The evidence of fear of a fight and injury to himself by Bourassa, and the warning to Bourassa by the accused, satisfies me that the Accused was doing more than joyriding.

On the facts as presented I am satisfied that the Crown has proved beyond a reasonable doubt that the Accused threatened the Informant and did commit theft of the Informant's motor vehicle under the requirements expressed in *Lafrance v. Q.*, by the Supreme Court of Canada.

A conviction will be entered.



Thomas B. Davis
Judge