

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

and

WALTER BEBEK, DEAN LENNIE, COREY WAINMAN and RAYMOND WAINMAN

REASONS FOR JUDGMENT

Miss C. Carrasco, for the Crown

Mr. K. Tessoitch, for the defendants Dean Lennie,
Corey Wainman and Raymond Wainman

Mr. C. Thompson, for the defendant Walter Bebek

The Crown says the four defendants together assaulted Kelly Donovan and Blair Adams on June 30th, 2001. In a separate information Raymond Wainman is charged with another assault, earlier the same evening, on Donovan alone. Pursuant to the decision of the Supreme Court of Canada in *R. v. Clunas* [1992] 1 S.C.R. 595, 70 C.C.C.(3d) 115 counsel have agreed that the trials be heard together.

The disturbance which gives rise to the charges began at the Zoo Cabaret ("the Zoo"), an aptly named bar in the MacKenzie Hotel in the Town of Inuvik. A fight occurred there shortly after midnight between Mr. Donovan and Kurt Wainman, a brother of the two defendants with the same surname. Donovan clearly got the best of the confrontation and left Mr. Wainman's face cut and bleeding. According to the prosecution, after that fracas was broken up but before Donovan and his friend, Blair Adams, could be told to leave the premises, Donovan was

assaulted by Raymond Wainman. That incident gives rise to the charge he faces as a sole defendant. Shortly thereafter, Donovan and Adams were escorted from the Zoo to the hotel lobby where another disturbance occurred, during which the Crown alleges the assaults charged against the four defendants jointly.

Those events set the parameters within which the evidence was presented. Whether or not Miss Carrasco has proven the Crown's allegations depends on the clarity of the picture drawn by the 10 witnesses she called at the trial. As both Mr. Tessovitch and Mr. Thompson reminded me in their submissions, sufficient proof must be proof beyond a reasonable doubt on all of the evidence. They both suggest that "brawls" such as were described to me during the trial do not lend themselves to that standard of proof and ask for the acquittals of their respective clients. In addition, Mr. Tessovitch submits, with less conviction, that both consent and self-defence must be borne-in-mind with respect to the incident in the lobby. For the sake of completeness, I have also considered s.37(1) of the *Criminal Code* in assessing Raymond Wainman's actions in the Zoo. Finally, I note here that neither he nor Dean Lennie gave evidence at the trial so that the application of the standard of proof to them depends entirely upon an assessment of the Crown evidence since neither of the defendants who did give evidence mentioned those two in any significant way.

While credibility usually has some part to play in every criminal prosecution, the task of assessing it presents special challenges in situations involving bar fights. Assaults in those places usually happen without much warning. They occur, almost by definition, when emotions are high, even among those not directly involved. Typically the eyewitnesses have either been drinking themselves, are actively involved in separating the combatants, or both. None of that is conducive to careful observation. In short, one should not expect witnesses who were ready, notebooks in hand, to calmly record the unfolding of events. The fighters themselves, not surprisingly, can seldom be counted upon for an unbiased, accurate recapitulation of the events which bring them to court. I do not mean to suggest that prosecutions stemming from bar fights are doomed to failure, only that judges must adjust their expectations of the quality of evidence they are likely to hear.

In my experience contradictions among witnesses in cases like this concerning the minutiae of what occurred are to be expected, as is the lack of a precise memory about those details. While in some trials weaknesses like that can be fatal to a witness' testimony, in bar fights they must be accepted by the court as the inevitable by-product of the sudden breakdown of social peace. In assessing the evidence of witnesses caught in a maelstrom like that, the

broad strokes they paint are usually more important, and more reliable, than the finishing touches they apply to the portrait they are asked to paint. For example, it is often insignificant that a man cannot estimate with much accuracy the number of blows he received, where they landed or how many he himself delivered. However, even a drunken man can often remember with some accuracy whether he was kicked or punched, for example, or whether the blows came from one or more than one person. Generally, I have applied this approach to the evidence in this case, although I will try to point out with some particularity why I have accepted or rejected the evidence of any particular witness.

A short word about credibility before I begin. While the deceitful witness is the constant companion of most trial judges, the question of credibility is considerably more complicated than that. I have no hesitation in saying that many witnesses, even when their evidence is ultimately not accepted by the court, tell things as they believe, or have convinced themselves to believe, they happened. The assessment of credibility is by and large the measure of persuasive value to be given to the evidence of any particular witness. If in the end the persuasive value of the evidence as a whole reaches that standard of proof to which the Crown is put, then the accused will be convicted. When it falls short, there must be an acquittal.

Trying to deal with matters in chronological order, I start with the fight between Kelly Donovan and Kurt Wainman in the Zoo. Although he lost that encounter, I am satisfied that Mr. Wainman, as it turns out unwisely, provoked the confrontation. Only four witnesses gave direct evidence about how it started and only two of those, Dawn Anderson and Nancy Chinna, can be considered unbiased. While they were not focused directly on the table next to them, I am satisfied that they were aware generally of what was going on, particularly because they knew the history between the two. I find that both were sober so that alcohol did not interfere with their ability to observe or recount what they saw. I accept their evidence that Kurt was walking around the two tables in an unnecessarily provocative way and that eventually he confronted Kelly Donovan. Without commenting either way about the appropriateness of the latter's response, the scrap which followed must be placed squarely at Kurt Wainman's doorstep. As has been said, Donovan won that encounter decisively. The question for the court is whether Raymond Wainman assaulted him as a consequence of his victory.

Having considered all of the relevant evidence, I have concluded that there must be a reasonable doubt on that score. Despite that I hasten to point out that in general I was much impressed by the candour Mr. Donovan displayed in giving his evidence, as will become apparent later on. One of the first examples of that was his description of the "head butt" which

started the fight with Kurt. While it was totally unnecessary for him to do it and while it contradicted to some extent the evidence of his friend, Blair Adams, he frankly acknowledged that he dodged Kurt's attempt to head butt him and that his return blow was hard enough to stun Wainman. Nonetheless, the evidence of the role Raymond played in what followed is so confused and so contradictory that his evidence, even supported by that of his friend Adams and sincere as it might be, falls short of convincing me to the necessary standard.

While I am prepared to concede that Raymond Wainman "probably" assaulted him, I am not convinced of that fact beyond a reasonable doubt. The evidence of Dawn Anderson and Nancy Chinna, both unbiased, doesn't support Donovan's version of what happened. Miss Anderson, while she agrees that someone jumped in, was adamant, both in cross-examination and in re-examination by Miss Carrasco, that the person can have been no more than 5' 10" tall and may have been as short as 5'7". Both by visual demonstration in court and through *viva voce* evidence at the trial, I am satisfied that Raymond is at least 6' 4" tall. Miss Chinna, on the other hand, said someone jumped in but couldn't identify him at all. She also said that she saw Corey and Raymond Wainman, both known to her, enter the bar but didn't see them again after that. She confirmed in cross-examination that she didn't ever see Raymond do anything to Kelly Donovan.

Neither of the two bouncers, and I use that word in its widest sense, support the suggestion that Raymond assaulted Donovan. Oliver Fastnes didn't see him at all and Marty Verbonac, the more senior and the more credible of the two, testified that he saw Raymond trying to pull Kelly off his brother and that he was doing so "aggressively". But all of his evidence is in the context of Raymond trying to separate the two. Given the overwhelming preponderance of evidence that Donovan was laying a beating on Kurt Wainman, I am quite unable to say that the force Raymond was using went beyond what was reasonably necessary to prevent the continuation of the pounding his brother was taking at his opponent's hands, as is permitted by s.37(1) of the *Criminal Code*. I accept the fact that Raymond was angry and almost certainly would have fought Donovan if he could, but the evidence is confused enough that I am left in doubt that things went that far and I must resolve that doubt in favour of Raymond Wainman. Accordingly, I dismiss the charge of assault against him on the single count information.

There are two versions of what happened in the lobby. Kelly Donovan and Blair Adams both say, in slightly different ways, that they were standing at the top of the stairs leading from the lobby to the parking lot outside when Donovan was attacked by Corey Wainman, whose

momentum drove the two back into the lobby, whereupon they were attacked by a group of people which included the other three defendants. That they were both left bruised and beaten at the end is clear.

Corey Wainman and Walter Bebek tell a different story, not only different from Donovan and Adams but different from one another. Corey says he saw Kurt in the parking lot dazed and bleeding and asked him what had happened, not having been in the bar during the first incident. Kurt said, "They got me." As his brother asked, "Who got you?", he looked up and saw Donovan at the top of the stairs looking at them. According to Corey himself, he then approached Kelly and said, "Don't fuck with my brother" after which the two grabbed one another and "before (he) knew it they were pushed into the lobby". He conceded in cross-examination that Donovan hadn't done anything before that confrontation and that he took the action he did because, for reasons he had difficulty explaining, he was "worried about the safety of his brother". He also testified that during the ensuing melee in the lobby he did nothing but try to keep himself from being knocked down by the crowd around him. He denied punching or kicking Donovan or stomping on his hand, as alleged by Donovan and Adams.

Walter Bebek tells quite a different story. He agrees that Kurt said, "They got me.", but says that he then pointed to Adams and Donovan at the top of the stairs. Although Corey doesn't even mention Bebek being there, the latter says he told Corey, "There they are. It looks like they're going to go at him again." Then, according to Mr. Bebek, the two villains in the piece started down the stairs toward them, where they were met by both Raymond and Corey and the brawl was on. He says everyone poured through the lefthand of the double lobby doors except him. He went through the right hand door where he was "sucker punched" by a waiting Blair Adams, who was apparently the only one of those in the lobby on the right hand side of the room.

I have no hesitation in accepting the version of events put forward by Donovan and Adams and rejecting the evidence of Corey in its most salient parts and the evidence of Walter Bebek in its entirety.

Although I was not persuaded by all of his evidence, I was impressed by the testimony of Kelly Donovan. His testimony is marked by a lack of exaggeration and a sense of fairness. In saying that, I recognize that he was cross-examined aggressively and sometimes effectively, especially as regards the inconsistencies in his testimony compared to the statements he gave to the police. However, he explained those inconsistencies reasonably and to my satisfaction. The discrepancy regarding the extent to which he was kicked by Raymond in the Zoo is, in the entire

scheme of things, relatively insignificant. The disparity concerning the number of people who were kicking him in the ~~bar~~^{lobby} is adequately explained by those general comments I made earlier. Victims often offer their opinions about the details of an incident shortly after it occurs, usually at the urging of police. Paradoxically, the credibility of their answers to questions like that is not necessarily increased just because the answers are given shortly after the event. Sometimes the opposite can be true. People in that situation are often suffering the effects of a relatively traumatic experience and that in itself can effect the quality of their answers. As Donovan himself said in answer to questions put to him by Mr. Thompson about things he had failed to mention in his first statement, "But I was roughed up and left a few things out."

Looking at his evidence as a whole, I find no attempt at embellishment, a willingness to candidly describe his own part in what occurred, as in the head butt incident, and an ability to concede that he could have been mistaken about some of the details, as in his concession that he in fact did not *see* Raymond Wainman in the lobby. Even where I am not persuaded by his evidence on particular points, I am satisfied that he was not trying to deceive, but that he was telling me what he honestly believed happened. That I did not accept all of it was ~~because~~ more a question of being unpersuaded on all of the evidence than finding that he was being deceitful or intentionally misleading. In its broadest strokes, his version of what happened is supported both by independent witnesses and by common sense.

That he and Adams were attacked by a much larger group is supported by the desk clerk in the lobby, the most impartial and uninvolved of all the witnesses called to give evidence. Despite attempts by defence counsel to characterize what was happening in the lobby as nothing more than "a big commotion", Miss Bradley was clear that what she saw struck her as a big group "ganging up" on the man who had been ejected from the hotel a short time before, an impression she was entitled to give. She resisted the suggestion that the police had put words like that in her mouth. Her opinion is supported by the fact that, on the evidence before me, the only people injured in this "big commotion" were Donovan and Adams. I am also satisfied on all her evidence that what she really meant when she said in her statement that she "had no idea what was going on" was that she had no idea what had precipitated the commotion she was witnessing or why these people were acting as they were, although I concede that she had difficulty expressing that when she gave her evidence.

Another aspect of Donovan's evidence which is supported both by other evidence ~~Donovan's evidence~~ and by common sense is his denial that he was advancing down the stairs toward the van just before the melee began, as Bebek said. In support of that denial he said,

"Why would I do that? That would be dumb." Considering the number of hostile people outside, it would have been dumb indeed and his evidence makes abundant sense on that point. That he and Adams had no such mayhem in mind is also confirmed by Marty Verbonac, a witness whose evidence was commended to me by both defence counsel. He stated that after the commotion in the Zoo had subsided, it was *Donovan* and *Adams* who wanted to leave by a different entrance and so he "let them go through the Brass Rail and out that way."

Finally, there is the question whether all four of the defendants are shown to be part of what I find on the facts is a group assault on the two men. Much was made during their cross-examination of the unlikelihood of either of them being able to identify exactly who was doing what, when. I agree that I would be hard pressed to find to the necessary standard that any of the defendants inflicted a particular injury or assaulted one as opposed to the other in a particular way. That is unnecessary. The charge here is assault *simpliciter* on both counts. I need only be satisfied that all four were involved together in a concerted effort to assault both of them. The evidence is overwhelming in that regard. There can be no doubt that these four are part of the "Kurt Wainman camp", for want of a better term. They work together; two of them are his brothers; one is his business partner. Even though Donovan and Adams cannot positively identify all four as being there, their evidence supported by others convinces me all four were and not just as bystanders.

The esteemed Mr. Verbonac, relied on by both defence counsel, saw *all four* of them running up the stairs into the lobby. His evidence draws a clear picture of the mood most of them were in. There can no doubt that Raymond Wainman was incensed by what had happened in the bar. Whether the evidence falls short of convicting him of assault there or not, it is clear from Verbonac that even when he was trying to get Donovan off his brother in the Zoo he was doing so "aggressively", to use Verbonac's euphemism. Also according to Verbonac, Corey Wainman was the most aggressive in the lobby, trying repeatedly to get back in even after he had been pushed out by the bouncers. As for Mr. Lennie, Verbonac, perhaps unintentionally, gave a significant clue as to his state of mind when he said, "He grabbed me and then he realized it was me." That, together with the evidence of Donovan that he heard Lennie's first name and the word "Don't", just after he was he hit, evidence which I accept, convinces me to the necessary standard that Mr. Lennie took an active part in the assault on the two men.

Mr. Verbonac could only say that he saw Walter Bebek running into the lobby and that at one point later on Walter helped him get the Wainman brothers out. He also conceded in re-examination that there was time for Bebek to get involved in the assault before he got there. I am

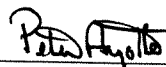
satisfied that he was involved at least initially in the assaults even though he may have calmed down more quickly than the others. In saying that I accept the evidence of Blair Adams that he saw Walter kicking them. While I have not dwelled on Adams' evidence, I place it in much the same category as Donovan's and for many of the same reasons. While he was clearly more confrontational with counsel on cross-examination than was Kelly Donovan, he acquitted himself well there and I am satisfied that I can rely on his evidence, at least to the extent that he confirmed the participation of all four defendants in the attack. That identification is bolstered by his uncontradicted assertion that, "I know these guys; I used to hang around with them."

Finally, dealing with the evidence of Corey Wainman and Walter Bebek, I find neither is able to raise a doubt on all the evidence of their active participation in the attack in the lobby. Corey's description of his passive role in all that was happening there, apart from being unbelievable in the context of the events as they unfolded, is belied by Marty Verbonac's description of his demeanour in the lobby.

Of all the witnesses I heard, Walter Bebek's evidence was the least credible. Apart from the fact that he clearly had an agenda of his own on the witness stand, so much so that he was unresponsive even to the questions his own counsel asked him, his description of what happened outside on the steps is not even supported by Corey Wainman, whose story is at least close to the version given by Kelly Donovan. His suggestion that Donovan and Adams came down the steps toward Kurt Wainman and the others is in my view pure fabrication and fabrication which cannot be explained by either emotion or drunkenness, since he was not present at the fight in the Zoo and was by his own assertion sober, a fact supported by Verbonac. His description of what happened when he burst through the lobby door makes neither practical nor logical sense. There is nothing in any of the evidence, from the desk clerk on down, to suggest that Donovan and Adams were at any time separated so that everyone but the latter was on one side of the lobby while he lurked on the other side waiting for someone to come through the door. That he would stay with his friend to protect him makes sense and I accept it. Mr. Belek's evidence, on the other hand, is, quite frankly, nonsense and I reject it. That he was in the same frame of mind as the others is best reflected by the way he described the events in this courtroom some ten months later, especially his purely fictional account of what they did at the top of the stairs. I find that he was as incensed as the others at what had happened to his business partner in the Zoo. Unlike the others I am satisfied that he was also sober enough to realize that the police were probably on the way and that that explains his attempt to help Verbonac get the Wainman brothers out of the lobby.

For those reasons I am satisfied beyond a reasonable doubt that the four defendants acted together in a concerted effort to assault Kelly Donovan and Blair Adams and that in the result they succeeded. That other unidentified persons may also have been involved is irrelevant to the question of their guilt so long as the evidence proves *their* involvement, as it does. Accordingly, I find all four guilty as charged on both counts.

DATED at the Town of Inuvik in the Northwest Territories this 12th day of April, A.D. 2002.



Peter Ayotte
Deputy Judge of the Territorial Court
of the Northwest Territories