

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

JEREK EYAKFWO

REASONS FOR DECISION

of the

HONOURABLE JUDGE B. E. SCHMALTZ

Heard at: Behchoko, Northwest Territories
February 16 & 17, 2012
Yellowknife, Northwest Territories
March 12, 2012

Reasons filed: March 15, 2012

Counsel for the Crown: M. Lecorre

Counsel for the Defendant: J. Bran

(Charged under s. 268 of the *Criminal Code*)

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and –

JEREK EYAKFWO

I. INTRODUCTION

[1] Jerek Eyakfwo is charged with aggravated assault, specifically that on October 11, 2011, in Behchoko, Jerek Eyakfwo in assaulting Bruson Washie, wounded Bruson Washie, thereby committing an aggravated assault.

[2] On October 11, 2011, in Behchoko, Jerek Eyakfwo struck Bruson Washie with a crowbar in the face. Bruson Washie suffered a gash on his upper lip, the area between his lip and his nose, requiring 8 stitches; the scar from that injury was clearly visible on Bruson Washie's face when he testified at the trial. Bruson Washie testified that his face and lips were swollen for several weeks after the attack, he had a cut inside his mouth that took nine weeks to heal, he suffered intense pain in his teeth, his mouth was so badly swollen that he had to wait four weeks before the dentist could examine his teeth, and two teeth were cracked.

[3] I find that the injuries suffered by Bruson Washie from being hit in the face with the crowbar do amount to wounding.

a) **Preliminary Remarks**

[4] This was a very difficult case. The Crown only called two witnesses on this case – Hadrian Smith and Bruson Washie. On the theory of the Crown, Hadrian Smith was one of the eye-witnesses to the incident. Bruson Washie has no memory at all of the incident; I do not know whether his lack of memory is from the consumption of alcohol or the attack itself.

[5] I am surprised at the dearth of evidence presented by the Crown on such a serious matter. No medical evidence was called or presented. I have no evidence of any medical procedures or medications or dental work done. I have no photographs of the injuries. I do not know whether or not the crowbar was found. I do not know how or when this matter came to the attention of the police. According to Crown witness Hadrian Smith, Guy Tlokka was present when Bruson Washie was hit in the face. Guy Tlokka was called as a defence witness. Guy Tlokka testified that he was never spoken to by the police or the Crown and was never asked for a statement with respect to what he knew of this matter.

[6] The offence of aggravated assault is one of the more serious crimes in our *Criminal Code*. It carries a maximum sentence of 14 years in jail. As I said before I am surprised at the lack of evidence called on this case, and I must say I am also disappointed. I find it difficult to believe that this incident, as serious as this appears to have been, did not warrant a more thorough and complete investigation and prosecution.

[7] In August last year I presided over a sexual assault trial in Behchoko, the case of *R. v. Ekendia*, [2011] N.W.T.J. No. 52. I also found the investigation of the matter in that case lacking, and I find the comments I made then, applicable in this case as well (para. 46):

Complete and conscientious investigations will clarify matters and may, not always but *may*, lead to the early resolution of criminal matters. And if not an early resolution, a careful and thorough investigation results in more complete evidence being available to put before the Court. The Court and the community expect no less than that on any criminal investigation, and all of those involved in the criminal justice system including victims, accused, and witnesses, are entitled to at least that.

[8] That being said, I must still decide whether or not it has been proven beyond a reasonable doubt that Jerek Eyakfwo is guilty of aggravated assault on the evidence that has been placed before me.

II. ISSUE

[9] Jerek Eyakfwo says he acted in self-defence in hitting Bruson Washie with the crowbar. The sole issue on this trial is can Jerek Eyakfwo rely on the defence of self-defence in these circumstances.

III. EVIDENCE

a) Hadrian Smith

[10] Hadrian Smith testified that he, Guy Tlokka, and Bruson Washie were outside near the sportsplex; he had not been drinking, nor had Guy Tlokka that he was aware of, but Bruson Washie was intoxicated.

[11] They were on the cement near the sportsplex; Bruson Washie and Guy Tlokka were sitting on a bench that was approximately 10 feet from the building, and Hadrian Smith was standing beside them. Bruson was crushing marijuana, or in the process of rolling a joint, a marijuana cigarette. Though the three of them were getting ready to smoke marijuana, they had not yet smoked any. Hadrian Smith saw Jerek Eyakfwo approaching with Joey Eyakfwo and Richard Richardson; he did not see that Jerek Eyakfwo was carrying a crowbar; he told Bruson Washie that Jerek Eyakfwo was coming. Hadrian Smith said Jerek Eyakfwo came up to Bruson Washie and swung the crowbar at Bruson Washie, hitting Bruson Washie in the face. Hadrian Smith testified that when Bruson Washie was hit, Bruson Washie fell to the ground and was knocked out for a couple of seconds; Bruson Washie was bleeding from his face, and he had chipped or broken teeth. After Jerek Eyakfwo hit Bruson Washie with the crowbar, Jerek Eyakfwo “took off” with Joey Eyakfwo and Richard Richardson.

b) Bruson Washie

[12] Bruson Washie also testified. Bruson Washie is 18 years old, he is in grade 11, he is Jerek Eyakfwo's cousin and they were in his words, "childhood friends"; Bruson Washie was also "childhood friends" with Hadrian Smith. Bruson Washie had been drinking that day and/or evening, and had significant gaps in his memory. These gaps may have been from alcohol consumption.

[13] Bruson Washie remembered being in Our Video that evening with Jerek Eyakfwo, he recalled talking with Jerek Eyakfwo and then arguing, though he could not recall what they were arguing about. He then recalled being on the road, and Jerek Eyakfwo was down the road. Bruson Washie remembered seeing Hadrian Smith, and heading towards him. Bruson Washie then blacked out, or had no memory of anything until he regained consciousness at the clinic, the Health Centre in Behchoko.

[14] Bruson Washie had no memory of how he got "badly" injured on October 11, 2011, of how his face ended up swollen, of how his teeth got cracked, of how he ended up with a cut inside his mouth, of how he got the injury requiring eight stitches above his lip, or why he had a limp when he woke up.

c) Jerek Eyakfwo

[15] Jerek Eyakfwo testified on his own behalf. Jerek Eyakfwo is 18 years old, and Bruson Washie is his cousin.

[16] Jerek Eyakfwo admitted hitting Bruson Washie in the face with a crowbar. Jerek Eyakfwo testified of an incident earlier in the evening: he was walking his ten year old brother Nolan and his cousin Nathaniel home; at some point, near Our Video, he saw Bruson Washie; Bruson Washie was intoxicated, mumbling to himself, he looked at Jerek Eyakfwo and walked towards him. Jerek Eyakfwo was standing with his back to a wall, the side of a house, and Bruson Washie pushed Jerek Eyakfwo's shoulder against the house "multiple times".

[17] Jerek Eyakfwo's younger brother Nolan was sitting nearby on the outside steps of the house; Bruson Washie tried to grab Nolan, and Jerek Eyakfwo grabbed Bruson Washie's arm, at which time Bruson Washie pushed Jerek Eyakfwo away. Jerek Eyakfwo said Bruson Washie then grabbed Nolan, or tried to grab Nolan.

[18] Richard Richardson then came by on his bike and Jerek Eyakfwo called for help, because Bruson Washie kept pushing Jerek Eyakfwo. Jerek Eyakfwo told Richard Richardson to tell Bruson Washie to stop pushing Jerek Eyakfwo. Richardson then drove his bike in between Jerek Eyakfwo and Bruson Washie and told Jerek Eyakfwo "let's go". Jerek Eyakfwo then went behind Richardson, Nolan went behind Jerek Eyakfwo, and Nathaniel behind Nolan, and they all walked away. Bruson Washie just watched them go, and Jerek Eyakfwo testified that Bruson Washie was looking at him "really mean."

[19] Very shortly thereafter, Jerek Eyakfwo, Nolan, and Nathaniel again met up with Bruson Washie. At that point Bruson Washie put his hands behind his back and began pushing Jerek Eyakfwo with his chest. When Bruson Washie was pushing Jerek Eyakfwo with his chest, Jerek Eyakfwo just backed up and called to some people on the corner for help, to get them to stop Bruson Washie, because as Jerek Eyakfwo said, "he [Bruson Washie] was drunk and I was scared."

[20] Jerek Eyakfwo was asked what happened after Bruson Washie had done this to him and answered:

I went to the corner where I saw those kids. I was walking there and he kept doing that, and he started doing behind my back, doing the same thing. I just wanted to get away, so I walk. And my brother, he was just standing there like a couple feet behind me, and Bruson was just right behind me doing the same thing, doing it to my back.

[21] Jerek Eyakfwo then ran and Bruson Washie chased him. Jerek Eyakfwo ran into a house, and Bruson Washie "took off". Jerek Eyakfwo waited in the house two to four minutes, and when he was leaving he saw a crowbar on the stairs and picked it up. Jerek Eyakfwo said he took the crowbar because he was scared that Bruson Washie may be waiting for him around the corner. Jerek Eyakfwo said he was going to use the crowbar if Bruson Washie tried to do

anything to him. The crowbar was approximately two and a half feet long, and was so heavy that Jerek Eyakfwo could not carry or lift it with one hand.

[22] At some point during the altercations with Bruson Washie, Jerek Eyakfwo said he gave his keys to Richard Richardson because Jerek Eyakfwo thought he may have to run away from Bruson Washie and did not want to lose his keys.

[23] Jerek Eyakfwo came out of the house and saw his uncle, Joey Eyakfwo; Jerek Eyakfwo called to Joey Eyakfwo and asked if he had seen Richard [Richardson]. Joey Eyakfwo told Jerek Eyakfwo that Richardson had gone towards the sportsplex. Jerek Eyakfwo and Joey Eyakfwo then went towards the sportsplex. Jerek Eyakfwo saw Richard Richardson on his bike at the corner of the sportsplex with some other people. Because it was dark out, being around 10:00 p.m. or later, Jerek Eyakfwo could not see who the other people were but recognized Richardson because he recognized Richardson's bike. Jerek Eyakfwo and his uncle started walking towards Richardson. Jerek Eyakfwo got to the side of the sportsplex and called to Richardson, and then took a couple of steps around the corner. Joey Eyakfwo was with Jerek Eyakfwo.

[24] Jerek Eyakfwo testified that when he went around the corner, Bruson Washie was kneeling down with his arms extended towards Jerek Eyakfwo, about three feet away from Jerek Eyakfwo. Jerek Eyakfwo did not notice Bruson Washie until Bruson Washie moved his arms and/or grunted. Jerek Eyakfwo testified that when he saw Bruson Washie at this point, he was scared; Jerek Eyakfwo thought Bruson Washie was going "to take me down", "attack me", "hurt me"; he thought this because Bruson Washie had chased him earlier in the evening for no reason. Jerek Eyakfwo then swung the crowbar at Bruson Washie hitting him in the jaw, causing the injuries referred to earlier.

[25] After Jerek Eyakfwo hit Bruson Washie, he dropped the crowbar and started yelling at Bruson Washie – Jerek Eyakfwo testified that he thought he had killed Bruson Washie; he was sorry and he just wanted Bruson Washie to be okay. Joey Eyakfwo pulled Jerek Eyakfwo back – Jerek Eyakfwo testified that Joey Eyakfwo thought Jerek Eyakfwo was going to hit Bruson Washie again, and told Jerek Eyakfwo "Let's go, let's go, let's go."

[26] Jerek Eyakfwo heard Bruson Washie grunt and testified that Guy Tlokka and Hadrian Smith then told Jerek Eyakfwo to take off. Jerek Eyakfwo said he helped Hadrian Smith and Guy Tlokka get Bruson Washie up to a position such that Smith and Tlokka each had one of Bruson Washie's arms around their shoulders in order to carry Bruson Washie. Bruson Washie could not get up or stand up on his own. Jerek Eyakfwo then grabbed the crowbar and took off.

[27] Jerek Eyakfwo then went to his auntie's to see if his mother was there as he was going to give his mother the keys. His mother was not at his auntie's house. Jerek Eyakfwo then went home, and on his way home he threw the crowbar in a little stream behind the school. After he had thrown the crowbar away he saw his mother, sister, and brother and ran to them.

[28] Jerek Eyakfwo testified that he was scared of Bruson Washie. Bruson Washie was and is bigger than Jerek Eyakfwo. Jerek Eyakfwo said that the reason he did not fight back when Bruson Washie was pushing him was because his brother Nolan was there, and Jerek Eyakfwo was afraid Bruson Washie would do something to Nolan.

[29] Jerek Eyakfwo is very slight; he did not know his height, but testified that in October 2011, he weighed about 110 pounds and was a couple of inches shorter than he was when he testified. Jerek Eyakfwo said his uncle Joey Eyakfwo is smaller than him.

[30] Jerek Eyakfwo testified that he had a physical confrontation with Bruson Washie before October 11, 2011, and at that time Bruson Washie held Jerek Eyakfwo against a railing and threw a punch at him, but Jerek Eyakfwo got away. Bruson Washie also admitted to a previous physical confrontation between the two and that it had happened sometime between November and January before this incident, so some nine to eleven months earlier. Bruson Washie testified about this incident stating "I never tried to like really hurt him. Just wanted – like one punch and say, okay, you got me, then I got you. We can call it equal."

d) Nolan Eyakfwo

[31] Nolan Eyakfwo is Jerek Eyakfwo's ten year old brother, and also testified. Nolan testified that he was sitting on the stairs of a house close to Our Video with his cousin Nathaniel; when he went to get up Bruson Washie grabbed Nolan's sweater and pulled Nolan "down slowly", put him "down soft", and then pushed Jerek Eyakfwo once when Jerek Eyakfwo was leaning on the wall. Nolan testified that they then began to walk away, and Bruson Washie tried to hit Jerek Eyakfwo. Nolan then saw his mother and went with her; Bruson Washie then chased Jerek Eyakfwo. Nolan did not "see the whole thing."

[32] While Nolan was walking to his house with his mother, Jerek Eyakfwo met up with Nolan and his mother. Jerek Eyakfwo told his mother he [Jerek Eyakfwo] found a crowbar and showed it to his mother, and then threw it in the bush.

[33] Nolan saw Jerek Eyakfwo with the crowbar behind the school after Jerek Eyakfwo had hit Bruson Washie with the crowbar. Nolan testified that his brother [Jerek Eyakfwo] said "he ran around the corner and he was setting his trap and then he say he found a crowbar."

e) Guy Tlokka

[34] Guy Tlokka also testified at this trial. Guy Tlokka is 15 years old now, and would have been 14 on October 11, 2011. Guy Tlokka testified that he was not outside the sportsplex when Bruson Washie was hit with the crowbar. That night as he was coming from a friend's house walking towards the sportsplex, he saw Hadrian Smith helping Bruson Washie get up. Guy Tlokka also saw three people, two walking and one on a bike, going away from the area. When Guy Tlokka first saw Bruson Washie, Bruson Washie was lying on the ground. Guy Tlokka helped Hadrian Smith get Bruson Washie up and take Bruson Washie to Bruson Washie's grandma's house. Guy Tlokka then left. Guy Tlokka testified that Jerek Eyakfwo did not help Guy Tlokka and Hadrian Smith get Bruson Washie up.

IV. ANALYSIS

[35] Sections 34 - 37 of the *Criminal Code* state:

34(1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of persevering himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

[36] In considering the evidence in this case I find that neither Jerek Eyakfwo nor Hadrian Smith were being completely honest or forthright or telling the whole truth with respect to the events that occurred earlier in the evening, or the surrounding events from when Jerek Eyakfwo hit Bruson Washie with the crowbar.

[37] Jerek Eyakfwo's evidence is contradicted in some respects with the evidence of his younger brother Nolan Eyakfwo: Jerek Eyakfwo says that Bruson Washie pushed him "multiple times" against the house; Nolan Eyakfwo says that Bruson Washie pushed Jerek Eyakfwo once. Nolan Eyakfwo said that Jerek Eyakfwo said that "he [Jerek Eyakfwo] ran around the corner and he was setting his trap and then he say he found a crowbar"; Jerek Eyakfwo said he found the

crowbar on the steps of the house that he had ran to earlier in the evening. Jerek Eyakfwo says he first went to his auntie's to see if his mother was there, she was not, he then went home and on his way home he threw the crowbar in the stream behind the school, and after he had thrown the crowbar away he saw his mother, sister and brother; Nolan Eyakfwo says that Jerek Eyakfwo showed his mother the crowbar and then threw it in the bush. Nolan Eyakfwo said Jerek Eyakfwo could carry the crowbar with one hand and even demonstrated how Jerek Eyakfwo held the crowbar; Jerek Eyakfwo said he could not lift the crowbar with one hand and had to drag it around.

[38] Not only is Jerek Eyakfwo's evidence contradicted by his brother Nolan's testimony, but on the last point I find that Jerek Eyakfwo was also trying to paint himself as weak and defenceless – it did not work. Jerek Eyakfwo swung that crowbar at Bruson Washie hard enough to crack his teeth. I do not believe he could not lift it with one hand.

[39] Jerek Eyakfwo explains his actions in going to the area of the sportsplex by testifying that he was going there to get his keys from Richard Richardson. Jerek Eyakfwo did not mention getting his keys from Richard Richardson before or after he had hit Bruson Washie with the crowbar, yet he testified that after hitting Bruson Washie he had gone to his auntie's to find his mother to give her the keys. So, Jerek Eyakfwo must either have gotten his keys back from Richardson, or he never gave them to Richardson, and was going to the sportsplex for some other reason, perhaps as Nolan Eyakfwo testified that Jerek Eyakfwo told him: to set his trap.

[40] Jerek Eyakfwo testified that he helped Hadrian Smith and Guy Tlokka get Bruson Washie up after he had hit Bruson Washie with the crowbar. This is in conflict with both Hadrian Smith's testimony, who says that Jerek Eyakfwo "just took off" with Joey Eyakfwo and Richard Richardson, and with Guy Tlokka's testimony, who says that Jerek Eyakfwo did not help Hadrian Smith and Guy Tlokka help Bruson Washie.

[41] Hadrian Smith's evidence as to what was going on before Bruson Washie was hit is contradicted by Guy Tlokka's evidence – Hadrian Smith says Guy Tlokka was there and he had been with Hadrian Smith and Bruson Washie for some time before Bruson Washie was hit; Guy

Tlokka says he was not there, did not see anything happen, but did see Bruson Washie on the ground bleeding, Hadrian Smith trying to help Bruson Washie up, and three people leaving the area. I would infer from Guy Tlokka's evidence that the three people leaving, two walking and one on a bike, were Jerek Eyakfwo, Joey Eyakfwo, and Richard Richardson.

[42] I accept that Jerek Eyakfwo was scared of Bruson Washie at some point that evening, and Jerek Eyakfwo may have even been scared of Bruson Washie at the point that he hit him with the crowbar.

[43] I find beyond a reasonable doubt that in hitting Bruson Washie in the face with a crowbar, that Jerek Eyakfwo did intend to kill or cause grievous bodily harm to Bruson Washie. First, I do not believe that Jerek Eyakfwo was intending to hit Bruson Washie in the arm and inadvertently hit him in the face – that makes no sense at all, that is quite simply self-serving and unbelievable evidence. However, even if I did accept that Jerek Eyakfwo meant to hit Bruson Washie in the arm, the force that he obviously swung the crowbar with, considering the harm done here, would also support the intent to cause grievous bodily harm. When a person swings a crowbar at someone, at the very least the intent is to cause grievous bodily harm, and could very well kill someone, as Jerek Eyakfwo testified he thought he had – any reasonable person would think so. Again, I find beyond a reasonable doubt that Jerek Eyakfwo did intend to cause grievous bodily harm to Bruson Washie.

[44] Therefore Jerek Eyakfwo cannot rely on the defence set out in section 34(1), so I must then consider whether I am convinced beyond a reasonable doubt that the defence in section 34(2) is not available to Jerek Eyakfwo.

[45] Do I have a reasonable doubt as to whether Bruson Washie was simply rolling a joint at the time he was hit as Hadrian Smith said, or was he in an aggressive stance about to do something to Jerek Eyakfwo? If Jerek Eyakfwo's evidence that Bruson Washie was kneeling down in an aggressive stance, and that caused Jerek Eyakfwo to believe on reasonable grounds that Bruson Washie was going to take him down, attack him, or hurt him, that would be an assault on Jerek Eyakfwo by Bruson Washie. If I believed that evidence or even if it caused me

to have a reasonable doubt as to what Bruson Washie was doing before being hit, then I must consider the defence of self-defence set out in section 34(2). Without deciding, I will at this point proceed to consider self-defence under section 34(2).

[46] I must consider if it is proven beyond a reasonable doubt that Jerek Eyakfwo did not reasonably believe that he would be killed or be seriously hurt as a result of Bruson Washie's actions.

[47] On the evidence, even if I believe Jerek Eyakfwo, Jerek Eyakfwo could not have *reasonably* believed that he was going to be killed or seriously hurt. Earlier in the evening his shoulder had been pushed at least once and perhaps even a number of times by Bruson Washie, earlier in the evening Bruson Washie had pushed Jerek Eyakfwo with his chest, earlier in the evening Bruson Washie had chased Jerek Eyakfwo. At some point, a number of months ago, Bruson Washie had pinned Jerek Eyakfwo against a railing and tried to punch him and Jerek Eyakfwo had been able to get away. That very evening Jerek Eyakfwo was able to run away from Bruson Washie. Even if Jerek Eyakfwo came upon Bruson Washie on his knees with his hands up, Jerek Eyakfwo could not *reasonably* have believed that he was going to be killed or seriously hurt.

[48] I do not accept that Jerek Eyakfwo believed he was going to be killed or seriously hurt. Jerek Eyakfwo knew he could outrun Bruson Washie, he had done it before, he had done it earlier that evening, and that was without Bruson Washie starting from a kneeling position. Jerek Eyakfwo testified that the reason he did not fight back when Bruson Washie was pushing him was because his brother Nolan was there and Jerek Eyakfwo was afraid Bruson Washie would do something to Nolan. Nolan was not there when Jerek Eyakfwo came upon Bruson Washie at the sportsplex, and Jerek Eyakfwo was armed with a crowbar this time. Further, when it was suggested that Jerek Eyakfwo has had anger for years towards Bruson Washie for picking on him, Jerek Eyakfwo answered: "*No. I just thought he was doing it for fun. You know, ... chasing me when he was drunk. I never thought it was going to happen.*" Again, I find that Jerek Eyakfwo did not believe he was going to be killed or seriously hurt by Bruson Washie, and there was no reasonable basis or grounds for Jerek Eyakfwo to believe that. The evidence

establishes that Bruson Washie was at best annoying and at worst a bully towards Jerek Eyakfwo, but again, absolutely no reasonable basis to believe that Bruson Washie would kill or seriously hurt Jerek Eyakfwo.

[49] Even if I am wrong on whether or not it has been proven beyond a reasonable doubt that Jerek Eyakfwo did not reasonably believe that he would be killed or seriously hurt by Bruson Washie, I would then have to decide if it had been proven beyond a reasonable doubt that Jerek Eyakfwo did not reasonably believe that he could not otherwise preserve himself from death or grievous bodily harm. Again, I find Jerek Eyakfwo could not have reasonably believed that his only option was to hit Bruson Washie in the face with a crowbar. Jerek Eyakfwo's response was completely disproportionate to the situation he may have been in. Jerek Eyakfwo could have run. I do not accept that Jerek Eyakfwo was in a position where he could not run because of his proximity to the building – I find this incident happened at least 10 feet from the building near the bench. Jerek Eyakfwo was with two other people at the time, one of whom had helped him earlier in the evening with very little effort and no need for physical violence; there were other people around whom Jerek Eyakfwo could have asked for help. I find Jerek Eyakfwo was tired of being annoyed or bullied by Bruson Washie, and he took matters into his own hands, but not because there was any *reasonable* basis to believe that was the *only* thing he could do.

[50] In the circumstances of this case, and in light of the findings I have made with respect to the defence of self-defence under section 34 of the *Criminal Code*, Jerek Eyakfwo could not rely on the defence set out in section 35.

[51] Further, in considering section 37 of the *Criminal Code*, even if I accepted Jerek Eyakfwo's evidence, I would still be convinced beyond a reasonable doubt that the force he used in the circumstance he found himself in was excessive, that it was far more than was necessary to prevent any perceived assault on him, or the repetition of any earlier assault.

V. CONCLUSION

[52] So, lacking as the evidence on this trial was, and even taking into account the difficulties in determining the surrounding events on the evidence that is before me, I find even if I did accept Jerek Eyakfwo's evidence, I would not find that he could rely on the defence of self-defence. To be clear, I am cognizant that the Crown must prove that self-defence is not applicable in this case; Jerek Eyakfwo does not have to prove anything, but must only raise a reasonable doubt that he acted in self-defence. There is no evidence at all that Jerek Eyakfwo had a *reasonable* apprehension of death or grievous bodily harm; nor is there any evidence that would leave me with a reasonable doubt that Jerek Eyakfwo believed on *reasonable* grounds that he could not otherwise save himself from death or grievous bodily harm but to hit Bruson Washie with the crowbar.

[53] In conclusion, I am convinced beyond a reasonable doubt that Jerek Eyakfwo is guilty of committing an aggravated assault on Bruson Washie, and he will be convicted of that offence.

B. E. Schmaltz
T.C.J.

Dated at Yellowknife, Northwest Territories
this 15th day of March, 2012

R. v. Jerek EYAKFWO, 2012 NWTTC 04

*Date: 2012 03 15
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