

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SHAYNE ARTHUR BECK

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Heard at: Hay River and Yellowknife, Northwest Territories
June 4, 2013 and July 26, 2013

Date of Decision: September 4, 2013

Counsel for the Crown: Jennifer S. Bond

Counsel for the Accused: Charles Davison

[Sections 348(1)(b) and 344(a.1) of the *Criminal Code*]

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A. BACKGROUND AND ISSUE

A.1 Introduction

[1] Shayne Beck is charged that he:

On or about the 9th day of January, 2013 at or near the town of Hay River in the Northwest Territories did break and enter a certain place, to wit: a dwelling house situate at 7 Saskatoon Drive and did commit therein the indictable offence of Robbery contrary to section 348(1)(b) of the *Criminal Code of Canada*; and

On or about the 9th day of January, 2013 at or near the town of Hay River in the Northwest Territories did use a firearm, to wit: a black hand gun in robbing Leon Durocher of a suitcase containing articles of clothing, contrary to section 344(a.1) of the *Criminal Code of Canada*.

[2] Both of these offences are indictable by law and Mr. Beck elected to be tried in the Territorial Court. The trial began on June 4, 2013 in Hay River. The Crown called eight witnesses: Joanne Martel, Walter Beaulieu, Leon Durocher, Keith Thistle, Cst. William Sturgeon, Cst. Steve Beck, Dustin Martino and Austin Jimmy. On July 26, 2013, the Crown concluded its case in Yellowknife by calling Bernita Campbell. The accused did not call evidence. Counsel gave their submissions and I reserved my decision until today.

A.2 Issue

[3] It is not controversial that the evidence establishes that two men forced open the locked door of the house belonging to Leon Durocher at 7B Saskatoon Drive in Hay River in the Northwest Territories on January 9, 2013. There were three people in the house prior to the two men entering: Joanne Martel, Walter Beaulieu and Leon Durocher. One man stood by the door with a handgun. The other had a stick and went into the bedroom of Leon Durocher and removed a suitcase. The men left with the suitcase.

[4] The elements of the section 348(1)(b) offence are established on these facts. The issue is the identity of the two men. Dustin Martino testified that he was the man with the handgun, which he said was a pellet gun. Dustin Martino also testified that Shayne Beck was the man with the stick. If I accept the evidence of Dustin Martino, then Shayne Beck is guilty of the section 348(1)(b) offence.

[5] There is insufficient evidence before the Court to establish that the black pellet handgun located and tested by the police was the handgun used during this incident and the Crown has invited me to acquit the accused on the section 344(a.1) offence.

B. REVIEW OF THE EVIDENCE

[6] The first witness was Joanne Martel, who is 44. Ms. Martel testified that she was at the house of Leon Durocher in Hay River on January 9, 2013, when some guys came and kicked the door open after midnight. She was sitting on the couch watching a movie with Walter Beaulieu, the son of Leon Durocher. Leon Durocher was in his room. Ms. Martel and Mr. Beaulieu had been drinking a bottle of wine and a mickey of vodka.

[7] Earlier in the evening two guys came over; they left and then, later, four guys came and kicked the door open. With respect to the first visit, she saw the two guys walk by the window. They did not come into the house. They knocked on the door and Walter Beaulieu answered the door. They left.

[8] Then the four guys came over 15 minutes later. Ms. Martel saw them coming to the door. She told Walter Beaulieu. He was getting up to go to the door when they kicked in the door and the four of them came in. The door had been locked before it was kicked in.

[9] Ms. Martel did not recognize any of them at first. One of them had a long flat stick and went down the hallway. He was tall, wearing a red grey jacket and a

cap. His hair was light brown. He looked to be around 18 or older and appeared to be younger than the man with the gun.

[10] The others stood by the door and the little guy pulled out a black handgun from his black jacket. He had a hood on. She recognized him as Shayne Beck. She does not know Shayne Beck but had seen him on the reserve a few years ago. He pulled out the gun, pointed it at Walter Beaulieu and told Mr. Beaulieu not to move.

[11] When Ms. Martel gave a statement to the RCMP on January 10, 2013, she described the man with the stick as a taller man. The shorter man stayed at the door with a gun. The man with the gun looked native; his skin colour was brownish and he had short black hair.

[12] The guy with the stick came out of the bedroom carrying a duffle bag. He was not carrying the duffle bag when he came into the house. The four guys left. This was around 3 in the morning.

[13] When Ms. Martel was asked to identify Shayne Beck in the courtroom, she was not able to identify him, although the accused was sitting at counsel table with his lawyer. On January 10, 2013, Ms. Martel was asked to view a series of photographs with the police. These photographs were entered as an exhibit with the Court and contained a photograph of Shayne Beck. Ms. Martel was unable to identify anyone in the photographs as being at her house during the robbery.

[14] Walter Beaulieu is 38. He lives with his father Leon Durocher at 7B Saskatoon Drive, in Hay River.

[15] He said he was at home with Joanne Martel. They were drinking 4 or 5 bottles of Private Stock wine and watching television. He had been drinking all day including 4 or 5 hours with Joanne Martel. Mr. Beaulieu testified that he was slightly intoxicated (a 5 out of 10). The door, which was locked, was kicked open and two males came in. One was holding a stick. The other was holding what looked like a gun. It was a black handgun. The person with the stick came in first and said not to move. He went into a bedroom. The one holding the gun said "Don't fucking move." He pointed the gun at Mr. Beaulieu. According to Mr. Beaulieu, no one else had been at the house earlier in the evening.

[16] The person with the stick came out of the bedroom with a suitcase. The man with the gun left first followed by the man with the stick.

[17] The person holding the stick was wearing a black hood and was 5' 10" or taller and had brown hair. He was fair.

[18] The person holding the gun was shorter. He was wearing a hood and a face mask or it looked like a face mask because it was dark. Mr. Beaulieu could not tell his ethnicity.

[19] Mr. Beaulieu did not recognize either of the two individuals. Mr. Beaulieu had met Shayne Beck once and recognized him in the courtroom when he testified.

[20] Mr. Beaulieu saw a black Ford Focus later on January 9th an hour after the incident. The car had 3 males in it and he said that someone pointed a similar looking gun at him. He did not recognize any of the males in the car to have been in his house earlier.

[21] In evaluating the testimony of Joanne Martel and Walter Beaulieu, I note that even though they were in the same place at the same time, their recollection and perception have some significant differences:

- (a) Ms. Martel says that two men came to the door first; then the four men broke in; Mr. Beaulieu only recalls one interaction, where two men broke in;
- (b) Ms. Martel saw the man with the stick leave with a duffel bag. Mr. Beaulieu said it was a suitcase;
- (c) Ms. Martel says they drank a bottle of wine and a mickey of vodka. Mr. Beaulieu says that he and Ms. Martel drank 4 or 5 bottles of Private Stock;
- (d) Mr. Beaulieu said the lights in the living room were not on. Ms. Martel said that lights were on; and
- (e) Ms. Martel testified that Shayne Beck was in the residence holding the gun, but she could not identify Shayne Beck in Court or in a photo line-up. Mr. Beaulieu knew Shayne Beck in Court to identify him but could not identify that he was one of the men at the house.

[22] There could be a number of reasons for these differences. Both Mr. Beaulieu and Ms. Martel had been consuming alcohol. If Dustin Martino and Austin Jimmy are to be believed, the house was the source of bootlegged liquor and this may account for the reluctance of Mr. Beaulieu to refer to an earlier visit. This seems to be the most obvious explanation since after the robbery was completed, no one from the house phoned the RCMP. It was the neighbour, Keith Thistle, who alerted the RCMP.

[23] More importantly, even by objective standards, this would have been a traumatic event for Ms. Martel and Mr. Beaulieu. At least two men kicked open the door and one man held a gun on them. The incident occurred and was over quickly. The lighting conditions were not good. Mr. Beaulieu says that he stood between the gun and Ms. Martel which would have blocked her view of the man with the gun. Given all of these factors, it is understandable why one or both of their descriptions of the men might be unreliable.

[24] Leon Durocher is 77 and lives at 7B Saskatoon Drive in Hay River with his son, Walter Beaulieu.

[25] He went to sleep at around 11 p.m. and heard a noise. He woke up and saw a guy carrying his suitcase out the door. The suitcase was 3' x 2' and black. Mr. Durocher did not see the face of this person. He thinks the person was wearing something with a hood on it.

[26] The person was also carrying a stick or board. Mr. Durocher had not been drinking that night.

[27] Keith Thistle is 61. He lives at 7A Saskatoon Drive, next door to Leon Durocher's place. They are in a duplex.

[28] He awoke to some commotion. He observed two people running out of Leon Durocher's unit. They were dressed in dark clothes. They were over 5 feet high but not of big builds.

[29] One was dragging some kind of suitcase and one had a stick in his hand. This was around midnight. They looked like they were heading toward unit 6A, another duplex on the opposite side of the street and further down. He saw them go into unit 6A which he believes is occupied by Kevin Campbell's daughter. Mr. Thistle called the RCMP.

[30] A couple of minutes after the two men went into 6A Saskatoon Drive, they came out of unit 6A. They were joined by a third person. Mr. Thistle did not know where this third person came from. At some point they all disappeared.

[31] Cst. William Sturgeon responded to a call from Keith Thistle on January 9, 2013. He conducted patrols for the individuals that had been seen. The police stopped some vehicles. As a result of conversations the next day with the people in 7B, he arrested Shayne Beck.

[32] The police also arrested Austin Jimmy and then Dustin Martino. The police also executed a search warrant at Bernita Campbell's residence at 6A Saskatoon

Drive in Hay River. As a result of the warrant and as a result of something seized by another officer, Cst. Sturgeon had control over 2 black suitcases, a pressed wood stick and a black air pistol handgun.

[33] Cst. Steve Beck spoke to Keith Thistle the day after the incident although dismissed what was said as possibly not true. Cst. Beck was serving subpoenas at Unit 7B and noticed the broken door. As a result of conversations with the occupants, he believed that a robbery with a fire arm had occurred the night before.

[34] Cst. Beck seized a black air pistol handgun from 82 Paradise Road on January 15, 2013. He had received information that the firearm was in a garbage can. The RCMP searched the Hay River dump but did not find the firearm. Further information was received that the firearm had been removed and taken to 82 Paradise Road. The owner gave permission for a search. August (a.k.a. Auggie) Martel was arrested and the firearm was seized.

[35] Dustin Martino is 28 years old. He is currently on remand charged with break and enter and robbery with a firearm. He came from Edmonton to stay with a friend, Bernita Campbell.

[36] Mr. Martino has fair hair and a beard which he also had in January, 2013. He has tattoos on his neck and above to his lower chin on the left side.

[37] At the beginning of his testimony, Mr. Martino said that he was not able to remember anything about the incident on January 9th. Dustin Martino then testified that he, along with Shayne Beck, kicked in the door at Leon Durocher's house. Dustin Martino testified that he had a black pellet handgun with him.

[38] Prior to going to Leon Durocher's house, he had been drinking Smirnoff's vodka at the house of Bernita Campbell. He was with Shayne Beck, Zara, Austin Jimmy and his girlfriend.

[39] They had gone to Leon Durocher's house twice. The first time that they went over, they asked for and were given a bottle.

[40] The second time, he and Shayne Beck walked over. Dustin Martino was wearing a black sweater, a pair of jeans and a black hat. The door was kicked in. Dustin Martino is not sure who kicked it in. Dustin Martino stood with the pellet handgun while Shayne Beck went out of sight. Shayne Beck took the suitcase out of the house.

[41] There were two people, a male and a female in the living room. Dustin Martino did not say a word.

[42] They walked back to Bernita Campbell's place with the suitcase; opened it and there was nothing in it.

[43] When they got back to Bernita Campbell's place, Austin Jimmy was there. 10 minutes after this, Shayne Beck and Austin Jimmy left. Dustin Martino threw the pellet gun in the garbage at his girlfriend's house.

[44] Austin Jimmy is 25 and in the past was known as Austin Todd. He prefers the name Austin Jimmy. He has a nickname, "Ozzie"

[45] He remembers drinking one night and waking up on Bernita Campbell's couch. His statements to the police were what he thinks happened.

[46] He was not involved in a robbery that night. He, Shayne Beck, Zara Cornokosky, Dustin Martino and a couple of others were at Bernita's. He remembers seeing Shayne Beck and Dustin Martino leave together. He does not remember seeing them come back. He remembers seeing a suitcase and clothing scattered on the lawn

[47] He remembers seeing Dustin Martino playing with a BB handgun.

[48] Bernita Campbell testified that she lives at 6A Saskatoon Drive in Hay River, NT. She is in a relationship with Dustin Martino and has been for 10 months.

[49] She acknowledged that Shayne Beck has been at her house at the same time as Austin Jimmy. She also acknowledged that at some point her friend Angel Martel, who was living in Bernita Campbell's house, told Ms. Campbell that she had a pellet handgun, although Ms. Campbell did not see the pellet gun.

C. ANALYSIS

[50] The evidence is clear that there was a break, entry and robbery in the residence of Leon Durocher in Hay River, Northwest Territories on January 9, 2013. There is no controversy that whoever broke through the locked door, stole the suitcase belonging to Leon Durocher. Dustin Martino admits to being the person who pointed the handgun. The issue before the Court is whether the Crown has proven beyond a reasonable doubt that Shayne Beck was the individual with Dustin Martino who carried the stick and took the suitcase.

[51] Dustin Martino testified that he and Shayne Beck kicked in the door and robbed Leon Durocher of the suitcase. Mr. Martino says that he had the handgun and that Shayne Beck left his sight and came back with the suitcase.

[52] There are some indicia which indicate that Dustin Martino is a witness whose evidence must be treated with caution. Dustin Martino first took the witness stand and under oath stated that he was on remand for break and enter and robbery charges from January, but he did not remember what happened that evening. He denied knowing Shayne Beck or ever speaking to him. He answered question about dates and who was at Bernita Campbell's with "I don't remember", "Can't be specific", "I am not sure; I was pretty drunk." He was given the opportunity to refresh his memory by reading a statement that he had given to Cst. Sturgeon, and although he did not actually read the statement, he said his memory was refreshed. He then proceeded to testify about the robbery at Leon Durocher's residence that he committed with Shayne Beck.

[53] When Mr. Martino was cross-examined about how when he first started testifying, he said he did not remember what happened. He claimed that "it had slipped my mind" and that "it came back a split second later."

[54] Finally, Mr. Martino explained his change in testimony by saying that when he first came into the courtroom, he did not know if he wanted to testify against Shayne Beck, but he came to the realization that the best thing was to tell the truth.

[55] In assessing the testimony of Dustin Martino, I must remember that he has lied under oath. He either lied when he said that he did not remember what happened on January 9th or he lied when he described the events. He lied when he told the defence lawyer that "it slipped his mind".

[56] As I indicated earlier, the evidence of Linda Martel and Walter Beaulieu is contradictory and does not assist in establishing that either Dustin Martino or Shayne Beck was present at the residence of Leon Durocher. I observed Dustin Martino to be fair haired and he has many tattoos including some that are visible in his chin area. He does not appear to be of aboriginal descent.

[57] Linda Martel described the person with the gun as wearing a black jacket and a hood. According to her, he had nothing distinctive or unusual about his appearance. He was shorter than the person with the stick. She recognized the person with the gun as someone who she knew as Shayne Beck but was not able to identify Shayne Beck in the courtroom. According to Ms. Martel the man with the gun looked native with black hair. The man with the stick was tall, wearing a red grey jacket and a cap. He was dark and had light brown hair. He was 18 or 20 and younger than the man with the gun.

[58] Mr. Beaulieu said that the man with the gun was wearing dark clothes with a hood and possibly a face mask. The man with the stick was wearing a black hood, was 5' 10" or taller, had brown hair and was fair.

[59] I also recognize that Dustin Martino's testimony is contradicted in the following regard. Linda Martel says that the man with the gun told Walter Beaulieu not to move. Walter Beaulieu said the man with the gun said, "Don't fucking move". Dustin Martino said that he did not say anything but just pointed the gun at Walter Beaulieu.

[60] On the other hand, the testimony of Dustin Martino is confirmed in part by the following:

- (a) Austin Jimmy saw Dustin Martino playing with a black BB handgun
- (b) Austin Jimmy said that Shayne Beck and Dustin Martino left the house together;
- (c) Both Linda Martel and Walter Beaulieu saw two men in the house; one with a gun; one with a stick, although Dustin Martino does not remember whether Shayne Beck had anything with him or not;
- (d) Linda Martel and Walter Beaulieu said the second man left with either a duffel bag (Linda Martel) or a suitcase (Walter Beaulieu). Dustin Martino said Shayne Beck left with a suitcase;
- (e) Linda Martel confirms that there were two visits to Leon Durocher's place; although, she says there were two guys the first time; and four the second. Dustin Martino also says there were two visits: there were two men the first time and two the second.

[61] The Defence submits that the Court must caution itself with respect to Mr. Martino's testimony. Because he has perjured himself, the Court cannot accept his testimony that Shayne Beck was his accomplice without some independent corroborative evidence of this.

[62] I agree that I must caution myself with respect to the testimony of Dustin Martino. I disagree that it is necessary to have independent corroborative evidence that Shayne Beck was the person in the residence with the stick. In my view, recognizing that Dustin Martino has shown himself to be untrustworthy, in order to accept or reject his testimony with respect to Shayne Beck, I must satisfy myself as to whether or not he should be trusted with respect to that evidence. If I have a reasonable doubt about Mr. Martino's evidence, I will have a reasonable doubt about the guilt of Mr. Beck.

[63] In *R. v. Vetrovec* (1982), 27 C.R. (3d) (S.C.C.) Justice Dickson stated that with an unsavoury witness, there should be independent evidence confirming the

evidence needing corroboration, making it safe to convict; however the corroborating evidence need not itself implicate the accused. He explained at paras. 317-318:

The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. This is because, as Wigmore said, the matter of credibility is an entire thing, not a separable one:

... whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not how our trust is restored, but whether it is restored at all [Vol. VII, para. 2059, at para. 424].

[64] This approach was confirmed by the Supreme Court of Canada in *R. v. Kehler*, [2004] S.C.J. No. 1, which was a case where the conviction of the accused for robbery was based on the evidence of his accomplice. The accomplice was assessed as someone whose testimony had to be treated with caution. On the issue of whether the evidence that implicated the accused had to be corroborated, the Court said this at paras. 20 to 22:

20. Where a particular risk attaches to one critical element of the evidence of “an accomplice, or a disreputable witness of demonstrated moral lack” (*Vetrovec, supra*, at p.832), the trier of fact must be satisfied that the “potentially unreliable” evidence of the witness can be relied upon as truthful in that regard.

21. Such a risk may arise, for example, where there is any basis in the record for suggesting that the unsupported evidence of an accomplice, though evidently truthful as to his own participation in the offence charged, is for any reason subject to particular caution as regards his implication of the accused.

22. However, even then, having considered the totality of the evidence, the trier of fact is entitled to believe the evidence of the disreputable witness – even on disputed facts that are not otherwise confirmed – if the trier is satisfied that the witness, despite his or her frailties or shortcomings, is truthful.

[65] As I watched and listened to Dustin Martino testify, it was clear that at a specific point in time during his testimony, he decided to stop feigning that he did not remember and that he would testify as to what happened. His attitude and demeanour changed. He appeared to become open and forthright about what happened.

[66] Yet, on cross-examination, he tried to first explain away the change by saying that things had “slipped his mind.” Finally, he admitted that when he first walked into the Courtroom, he was unsure as to whether he would tell the truth but then decided to tell the truth.

[67] In cautioning myself, I do have to recognize that Mr. Martino was prepared to lie in Court. Can I have sufficient confidence in his testimony to accept it as being truthful when he stated that Shayne Beck was his accomplice?

[68] The only inconsistencies in Mr. Martino’s testimony, of which the Court was made aware, were the inconsistencies between what Mr. Martino first stated on the witness stand and what he later said. In this regard, I accept his explanation for those inconsistencies. He is a prisoner on remand. So is Shayne Beck. That Mr. Martino might come into Court and not be sure whether he would testify against Mr. Beck is completely understandable.

[69] I must also take this explanation in the context of someone who is admitting to using a handgun in a break, enter and robbery. Identifying Mr. Beck does not divert blame from Mr. Martino. There was no evidence that Mr. Martino was being offered “a deal” to testify against Mr. Beck. To the contrary, he denied that he benefited or will benefit from such testimony in any way. On the face of it, there is no motive for him to lie about Mr. Beck’s involvement.

[70] Mr. Martino’s evidence that he committed robbery with Shayne Beck is partially corroborated by the testimony of Austin Jimmy. Mr. Jimmy says that at one point in the evening, Shayne Beck and Dustin Martino left the residence of Bernita Campbell together. I recognize that there was no time frame given with this response by Mr. Jimmy.

[71] On that evening, there were only a handful of people who could have being involved in this robbery. Mr. Thistle’s evidence connects the residence of Bernita Campbell to the robbery. Shayne Beck was at Bernita Campbell’s. At one point, he left with Dustin Martino. There is no evidence linking Austin Jimmy to the incident. It was not put to Austin Jimmy that he participated in the robbery in cross examination; but he was asked in examination in chief, and he said no. It was not put to either Walter Beaulieu or Joanne Martel that Austin Jimmy was one of the two persons in the house.

[72] Although there is no evidence other than the testimony of Dustin Martino that establishes that Shayne Beck was in the Durocher residence during the robbery, the evidence from other witnesses creates a framework which establishes that Shayne Beck could have been the accomplice. However, in order for me to

find that Shayne Beck was the accomplice, beyond a reasonable doubt, I must accept the evidence of Dustin Martino on this issue.

[73] In the context of the other evidence and recognizing that I must be cautious of his evidence, I am satisfied that Dustin Martino is telling the truth when he says that Shayne Beck was his accomplice. I accept his explanation for why he began his testimony with claiming to not remember what had happened on January 9, 2013.

[74] Dustin Martino also testified that he had the handgun and pulled it out at the residence of Leon Durocher. With respect to the second charge:

- (a) There is no direct evidence that Shayne Beck knew that Dustin Martino had a handgun; and
- (b) There is insufficient evidence that the gun that was tested by the RCMP was the gun that Dustin Martino used; hence, there is insufficient evidence that the handgun that Dustin Martino used would “cause serious bodily harm” as required in the definition of “firearm”.

[75] The Crown has invited me to dismiss the second count, being the charge under section 344(a.1) of the *Criminal Code*.

D. SUMMARY

[76] I find Shayne Beck guilty of the first count, that is, breaking and entering into the residence of Leon Durocher and committing robbery contrary to section 348(1)(b) of the *Criminal Code*. I acquit him with respect to the second count.

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest
Territories, this 4th day of
September, 2013.

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