

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

– and –

BLAINE CHESTER ANTOINE

WRITTEN REASONS FOR DECISION
of the
HONOURABLE CHIEF JUDGE ROBERT GORIN

Heard at: Yellowknife, Northwest Territories
Date of Decision: December 18, 2019
Date of Written Judgment: January 27, 2020
Counsel for the Crown: P. Bergeron
Defence Counsel: C. Davison

[Charges under ss. 266 and 733.1(1) of the *Criminal Code*]

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INTRODUCTION

[1] On December 18th, 2019, I presided at the preliminary inquiry of Blaine Antoine. Mr. Antoine was charged with one count of common assault contrary to s. 266 of the *Criminal Code* and two counts of breaching a probation order contrary to s. 733.1, all alleged to have occurred on the same date during the same incident. Mr. Antoine consented to being committed to stand trial on the two breach counts but submitted that there was insufficient evidence to satisfy the *Shephard* test¹ on the assault charge.

¹ *United States of America v. Shephard*, [1977] 2 SCR 1067, at page 1080.

[2] The direct evidence of the assault consisted primarily of the testimony of a third-party witness who saw Mr. Antoine holding the neck of the alleged victim while they were struggling. Mr. Antoine submitted that because there existed only that limited snapshot of the altercation, a properly instructed trier of fact could not have reasonably found that what had been observed by the witness was not part of an ongoing consensual fight or that consent had not otherwise been provided.

[3] Mr. Antoine correctly pointed out that at trial the element of lack of consent must be proved beyond a reasonable doubt and that the Crown's case was circumstantial in so far as it was asking that an inference be drawn that there was not ongoing consent at the time during the struggle when Mr. Antoine was observed holding the complainant's neck.

[4] Mr. Antoine acknowledged that the test for committal in circumstantial cases is whether or not the inference the Crown is asking the trier of fact to draw is reasonable. However, he went on to state that given the high standard of proof that applies at trial, the justice presiding at a preliminary inquiry must take into account all of the reasonable inferences that are inconsistent with guilt when determining whether an inference consistent with guilt is also reasonable. In short, he asked that I apply the so-called "rule" in *Hodge's Case*² in determining whether or not to commit Mr. Antoine to stand trial.

[5] I determined that applying the approach urged by Mr. Antoine, would amount to an undue usurpation of role of the trier of fact and that in any event, the doctrine of *stare decisis* prevented me from doing so.

[6] I also concluded that regardless of whether or not one were to apply the test argued by Mr. Antoine, there was ample evidence from which a properly instructed jury could find it had been proved beyond a reasonable doubt that the victim was not consenting at the time Mr. Antoine was observed applying force to her.

² 168 ER 1136 (1838, England)

[7] I committed Mr. Antoine to stand trial on all three counts advising that written reasons for my committal on the assault count would follow. These are my reasons.

ANALYSIS

The Applicability of the Rule in Hodge's Case at a Preliminary Inquiry

[8] I will first deal with Mr. Antoine's submission that the rule in *Hodge's Case* should be applied – albeit to a limited extent – in determining whether the accused should be committed to stand trial on a circumstantial case.

[9] The rule in *Hodge's Case* is usually described as being an alternative means of describing the standard of proof beyond a reasonable doubt in circumstantial cases. Certainly, it is abundantly clear that at trial, when considering whether the Crown has proven its case beyond a reasonable doubt on circumstantial evidence, the trier of fact must consider the entire range of reasonable inferences that can be drawn from the evidence or lack thereof. The Supreme Court of Canada most recently dealt directly with this topic in the case of *R. v. Villaroman*, 2016 SCC 33, [2016] 1SCR 1000. In dealing with the rule in *Hodge's Case* the court stated:

[37] When assessing circumstantial evidence, the trier of fact should consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”: *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a “plausible theory” and “speculation” is not always easy to draw. But the basic question is whether the circumstantial

evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[39] I have found two particularly useful statements of this principle.

[40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

[41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.

[42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that “[c]ircumstantial evidence does not have to totally exclude other conceivable inferences”; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[10] However, the standard of proof to be applied at a preliminary inquiry is far lower than the standard of proof beyond a reasonable doubt that applies at trial. In *Arcuri*, [2001] 2 SCR 828, 2001 SCC 54, the Supreme Court of Canada stated, beginning at para. 21:

21. The question to be asked by a preliminary inquiry judge under s. 548(1) of the Criminal Code is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of

guilty”: *Shephard, supra*, at p. 1080; see also *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 160. Under this test, a preliminary inquiry judge must commit the accused to trial “in any case in which there is admissible evidence which could, if it were believed, result in a conviction”: *Shephard*, at p. 1080.

22. The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pp. 842-43; *Monteleone, supra*, at p. 161. The nature of the judge’s task, however, varies according to the type of evidence that the Crown has advanced. Where the Crown’s case is based entirely on direct evidence, the judge’s task is straightforward. By definition, the only conclusion that needs to be reached in such a case is whether the evidence is true: see *Watt’s Manual of Criminal Evidence* (1998), at §8.0 (“[d]irect evidence is evidence which, if believed, resolves a matter in issue”); *McCormick on Evidence* (5th ed. 1999), at p. 641; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at §2.74 (direct evidence is witness testimony as to “the precise fact which is the subject of the issue on trial”). It is for the jury to say whether and how far the evidence is to be believed: see *Shephard, supra*, at pp. 1086-87. Thus if the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the judge’s task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.

[11] The court then went on to set out the approach to be followed in cases where the evidence is circumstantial.

23. The judge’s task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed: see *Watt’s Manual of Criminal Evidence, supra*, at §9.01 (circumstantial evidence is “any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue”); *McCormick on Evidence, supra*, at pp. 641-42 (“[c]ircumstantial evidence . . . may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired

conclusion”). *The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed could reasonably support an inference of guilt.*

[Emphasis in italics added.]

[12] As stated, Mr. Antoine’s submission is that I need to take other alternative inferences into account when determining whether or not an inference consistent with an accused’s guilt is reasonable. As I understand his submission, he says that doing so is necessary given that the *Shepard* test requires that the preliminary inquiry justice determine:

[. . .] whether or not there is evidence upon which a *reasonable* jury properly instructed could return a verdict of guilty.³

[Emphasis added.]

[13] Mr. Antoine states that in making that determination, it is incumbent on the preliminary inquiry justice to weigh the different possible inferences arising from the evidence against each other. He submits that the justice must do so in order to determine whether a trier of fact could *reasonably* convict.

[14] His position does not on its face appear to be illogical. However, if a justice at a preliminary inquiry were to proceed with comparing the likelihood of one or more possible scenarios against others, the ultimate weighing of the evidence would be greatly expanded. Doing so would result in a far more subjective analysis and the likelihood of different justices arriving at different conclusions on the same evidence would be unduly increased.

³ *Shepard*, [supra], at page 1080.

[15] In short, the justice would, to a substantial extent, be determining which inference(s) to draw – something expressly prohibited in *Arcuri*⁴ – and entering too far into the realm of the trier of fact.

[16] Indeed, one might argue that weighing competing inferences against each other when determining the *Shephard* test is analogous to the forbidden process of weighing conflicting testimony when carrying out the same exercise.⁵

[17] For these reasons, I have rejected Mr. Antoine’s submission that a justice presiding at a preliminary inquiry should – even to a limited extent – apply the rule in *Hodge’s Case* when determining whether an inference consistent with the accused’s guilt, is reasonable.

The Evidence of Lack of Consent

[18] As stated earlier, I have also found that regardless of whether the rule in *Hodge’s Case* were to apply in determining whether or not to commit an accused to stand trial, the evidence on lack of consent was sufficient to warrant committal in the present case.

[19] The civilian witness called by the Crown testified to the following salient facts:

- She was working at the guest services desk of a local hotel in Yellowknife when she heard several banging sounds along with swearing and screaming from outside the hotel which she then went to investigate;
- She saw a man and woman conceded to be Mr. Antoine and complainant -sitting close together on a bench with Mr. Antoine’s arm around her shoulders and assumed that they were a couple;
- After a few minutes, she heard more banging;
- She was not in a position to see Mr. Antoine and victim clearly from her desk and assumed that they were perhaps playing or perhaps cuddling;

⁴ *Arcuri*, *supra* at para. 23

⁵ *Ibid*, at para 22.

- After hearing a third series of bangs accompanied by screaming and swearing, she got up and through a window saw Mr. Antoine and complainant sitting on the bench facing away from her;
- Mr. Antoine was holding the complainant's neck "choking" her with his right arm;
- She could not see what Mr. Antoine was doing with his left arm. Both he and complainant were swearing;
- In response to being choked, the woman was struggling and screaming. Her legs were kicking and she was trying to get away. At no point did she see the woman touching the male.

[20] Mr. Antoine argued that under the circumstances, a trial court could not reasonably rule out that a consent fight was ongoing at the time when he was observed "holding" or "choking" the complainant. He submitted that the evidence was such that it would be unreasonable for any properly instructed trier of fact to find otherwise.

[21] I have rejected this argument for the following reasons. Firstly there was no evidence of any application of force by the complainant on the person of the Mr. Antoine and no evidence of any invitation by the complainant to Mr. Antoine to choke her or otherwise apply violent force to her. Other than the banging and the swearing there was nothing to indicate any physical confrontation at all prior to the point when the choking was observed. Certainly it is ultimately for the Crown to prove beyond a reasonable doubt that the application of force was not consented to. However, I think that a jury could, even when considering alternative explanations arising from the evidence – or in this case the lack of evidence – reasonably find that the application of force by Mr. Antoine was not consented to. It was immediately after the last series of loud bangs that he was observed "choking" the complainant. A reasonable jury might well find that the physical violence began with Mr. Antoine choking the complainant and that no consent was otherwise provided by her.

[22] Secondly, a victim can withdraw consent at any time and a reasonable trier of fact might well find that any consent provided earlier had been withdrawn. A reasonable jury might find that this was being indicated and communicated by the

complainant as a result of her swearing, struggling, and kicking while the choking was ongoing.

[23] Finally, a reasonable jury might well find that in going to the extreme of “choking” the complainant Mr. Antoine went beyond the parameters of any consent to a physical fight that may have occurred or been communicated.

[24] Given my findings I was obliged to commit Mr. Antoine to stand trial on the common assault count before the court. The Crown asked for no committals beyond the charges that were before me and accordingly none were ordered.

[25] I note that a very similar issue was recently before the Supreme Court of the Northwest Territories. In the case of *R. v. Koe*, 2019 NWTSC 58, the court was acting in its capacity as a Summary Conviction Appeal Court. One of the arguments presented by Ms. Koe was that her conviction was unreasonable because there was insufficient evidence to support the trial judge’s conclusion that the victim had not consented to Ms. Koe twice punching him in the face during an ongoing dispute between the two of them.

[26] In *Koe* the sole witness was the arresting police officer. The evidence referred to by the Supreme Court is set out in the following paragraphs:

[4] Cst. Sylvestre testified that he was patrolling the community in his marked police vehicle that day. He came upon the Appellant and Mr. Robert. They were in the middle of the street, in front of the Appellant's residence. They appeared to be in the midst of a heated argument. The Appellant's young child was with them.

[5] Cst. Sylvestre saw the Appellant and Mr. Robert arguing and yelling at each other. He testified they were "using their arms to kind of show their frustration" towards each other. They were inches apart when he first saw them. His impression was that the situation was escalating. He parked the police truck and walked over to try to separate them.

[6] Both parties were intoxicated. They seemed very angry at each other, especially the Appellant. Cst. Sylvestre told her to go home. He also tried to get Mr. Robert to leave the area.

[7] The Appellant did not listen to Cst. Sylvestre. He said she was too focused on Mr. Robert to listen to him. As for Mr. Robert, he did not leave as asked, but he did not argue with Cst. Sylvestre. Cst. Sylvestre testified that Mr. Robert seemed too intoxicated to even answer his questions.

[8] Cst. Sylvestre went back to his vehicle, drove to a nearby street, and parked in a location where he could continue observing the Appellant and Mr. Robert in case matters escalated further. By this point the two of them were on the porch of the Appellant's residence. The child was still on the street. A relative of the Appellant's came by and took the child with her.

[9] Cst. Sylvestre continued to observe the Appellant and Mr. Robert from his truck. After a short period of time he saw the Appellant grab Mr. Robert with her left arm and punch him twice in the face with her right fist. Mr. Robert did not attempt to block the punch and did not retaliate in any way.

[10] Cst. Sylvestre immediately got out of his vehicle, walked over to them and placed the Appellant under arrest for assault. As Mr. Robert appeared too intoxicated to answer any questions, Cst. Sylvestre asked him to leave.

[27] There was also a statement by Ms. Koe admitted into evidence:

[13] The Appellant acknowledged that she punched Mr. Robert. When asked why she did that, she answered "Because he made me mad". When asked why Mr. Robert made her mad she answered "It's, it's between me and him".

[28] In responding to Ms. Koe's argument that there was insufficient evidence to support the trial judge's finding that lack of consent to a fight had been proven beyond a reasonable doubt, Supreme Court held:

[37] Here, there was no evidence that Mr. Robert said anything to the Appellant to invite her to strike him. That possibility was evoked in a question put to Cst. Sylvestre during cross-examination but the officer's evidence was that he did not hear Mr. Robert say those words. All that Cst. Sylvestre could say was that the Appellant and Mr. Robert were arguing back and forth and appeared angry. There was no evidence of any of the words that were actually exchanged.

[38] This is not determinative because as noted above, a reasonable inference inconsistent with guilt does not have to be based on proven facts. It can also arise from the absence of evidence.

[39] As I noted at the outset, the standard of review on this issue depends on whether the record discloses a legal error. Although the Reasons for Judgment were very brief, they suggest that the Trial Judge applied the correct legal framework by asking himself the right question: he considered whether the inference that Mr. Robert invited the Appellant to strike him was reasonably available or was purely speculative. As was noted in *Villaroman*, [. . .] this is not always an easy line to draw. The Trial Judge's assessment as to where to draw it is entitled to considerable deference.

[40] In rejecting the Defence's argument that the evidence reasonably left open the possibility that Mr. Robert consented to being punched, the Trial Judge noted the following: Mr. Robert was the [more] intoxicated of the two parties; when Cst. Sylvestre tried to intervene, the Appellant was adamant that she wanted to continue to argue with Mr. Robert; she was the angrier of the two; there was no "tussle" or physical interaction between them before [the] Appellant grabbed Mr. Robert and punched him; Mr. Robert was generally non-combative.

[41] There was also evidence before the Trial Judge of what the Appellant said when she was asked why she struck Mr. Robert. She did not say anything suggesting that Mr. Robert challenged her or invited her to hit him: she said she hit him because she was mad. The Trial Judge did not mention this evidence but trial judges are neither expected nor required to refer to every detail of the evidence. The Appellant's own statement about why she hit Mr. Robert is another element of circumstantial evidence that supports the Trial Judge's conclusions.

[42] This Court's task is not to retry the case. As I already said, the Trial Judge's decisions about facts and inferences are entitled to deference. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by a trial judge unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. *R v Clark*, 2005 SCC 2, para 9. In my view, the record does not disclose any such error.

[29] The appeal in *Koe* was decided two days after I committed Mr. Antoine to stand trial and therefore it obviously played no part in my conclusion. However, I will note that the factors considered by the Supreme Court in *Koe* were largely the

same factors I have considered in this case. Also, although the sufficiency of the evidence in applying the *Shephard* test is ultimately a question of law, I think that it is important to again note that the Supreme Court in *Koe* when speaking of the difference between speculation and reasonable inference stated:

[. . .] this is not always an easy line to draw. The Trial Judge's assessment as to where to draw it is entitled to considerable deference.⁶

[30] In my view this observation further reinforces the position that when applying the *Shephard* test, courts should appreciate that reasonable triers of fact may come to dissimilar conclusions. In circumstantial cases they may locate the boundary between speculation and reasonable inference differently and the possibility of them doing so should be accorded considerable deference when determining whether to commit an accused to stand trial.

CONCLUSION

[31] For the foregoing reasons, I found that there existed sufficient evidence upon which a reasonable jury properly instructed could find Mr. Antoine guilty of common assault. I accordingly committed him to stand trial on that count.

[32] Mr. Antoine consented to his committal on the two counts of breach of probation arising from the same incident and in any event I found that in both instances the *Shephard* test was made out.

[33] I take this opportunity to thank both counsel for their assistance.

Robert Gorin
Chief Judge of the
Territorial Court

Dated at Yellowknife, Northwest
Territories, this 27th day of January, 2020.

⁶ *Ibid*, para. 39.

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Date: 2020 01 27
Files: T-1-CR-2019-001718

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