

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

EDWIN MORTEN

Before Justice C. Kehoe
Heard on August 27, 28, September 2, 3, October 29, November 10, 2008
Decision released on March 20th, 2009

Ms. M. Dufort for the Crown
Mr. M. Crystal..... for the accused Edwin Morten

KEHOE, J.:

[1] Mr. Edwin Morten is charged with assault causing bodily harm to Cindy Rivard, and two counts of mischief. The decision follows the decision concerning the *Charrier* application and I will rely on and attach that decision as it provides the factual background in this case. I will not repeat the entire background in this the decision concerning Mr. Morten's guilt or innocence.

[2] Basically Mr. Edwin Morten and Ms. Cindy Rivard, the complainant, had been in a common law relationship for approximately 22 years. There were three children in the relationship, however, none were home at the time of the incident.

[3] This is a credibility case and therefore *R. v. W.D.* applies:

- 1) If I believe Mr. Morten's evidence I must acquit;
- 2) If I disbelieve Mr. Morten's evidence but that evidence has raised a reasonable doubt, I must acquit;
- 3) If I reject the defence evidence, has the Crown proved the elements of each offence beyond a reasonable doubt?

[4] Let me say at the outset that I reject Mr. Morten's evidence. I found Mr. Morten to be an evasive witness who, as he stated to the 9-1-1 operator, "I work for a company that [has some sort of relationship with the making of] 9-1-1 tapes. I know what to do." Mr. Morten's evidence was inconsistent with his statement to the 9-1-1 operator that "he was flabbergasted and had no idea what had taken place in his home" on the night Ms. Rivard called 9-1-1 screaming "help me, help me" into the phone in the presence of Mr. Morten. During the 9-1-1 call, one can hear Ms. Rivard and Mr. Morten, according to both versions, in the kitchen and in the hallway. Ms. Rivard dialled 9-1-1, screams into the phone "help me, help me" and then, at some point drops the telephone, but both are audible in the background as the 9-1-1 operator calls out, "9-1-1" several times.

[5] The telephone is hung up and Mr. Morten answers the telephone when the 9-1-1 operator immediately phones back. Mr. Morten answers the telephone and tells the operator that he has no idea why 9-1-1 was called or what has happened other than to say Ms. Rivard became upset with him after the movie, hit him, and he did not know what had brought it on. He does eventually say that Ms. Rivard hit him and he defended himself.

[6] When asked if either party needed an ambulance he states that he does not. He does not indicate that Ms. Rivard is injured in any way. He does not relate to the 9-1-1 operator that he had been hit in the mouth and was bleeding. One would have expected that if, as he testified at trial, Ms. Rivard had knocked his front tooth out, injured the inside and outside of his mouth and hit him so hard he had swelling and bruising behind the ear, he would have indicated one or some of those injuries to the 9-1-1 operator as opposed to continuously repeating he simply did not know what was going on at his house that night. He continues to indicate how shocked and surprised he is about what is happening with Ms. Rivard. However, at trial, he testifies that he could also hear "muffled thumping sounds from outside that he could not identify, but they certainly felt like blows to a body. I certainly heard those sounds." However, he never mentions the "muffled thumping sounds that sounded like blows to a body" to the 9-1-1 operator when she asks him several times "where is your wife now". He continuously tells the 9-1-1 operator that Ms. Rivard is outside. He tells her that he is closing the door to keep the insects from coming in, and not to close Ms. Rivard out. This would have been at the time that he claims to have "certainly" heard the muffled thumping sounds from outside. When asked if this had happened before, Mr. Morten says no. This is in direct contrast to his evidence at trial where he says he had been hit by Ms. Rivard on previous occasions and they had in fact attended counselling as a result.

[7] I disbelieve Mr. Morten's evidence at trial that he is still in the kitchen when Ms. Rivard is heard on the 9-1-1 tape yelling "keep away from me". Mr. Morten states "I'm in the hall" when he picks the phone up just after it was hung up on the 9-1-1 operator. He states that Ms. Rivard is outside at that time. On the 9-1-1 tape the phone is nearby as Mr. Morten and Ms. Rivard can be heard arguing after the phone is dropped. Ms. Rivard can be heard yelling "keep away from me" during that part of the argument, well after she had left the kitchen and was going down the hall towards the front door.

[8] Mr. Morten came across, on the 9-1-1 tape and at trial, as someone who knew what to say. His evidence in chief sounded artificial and practiced. He even states at one point in what came across as a practiced recitation. "I moved to the other side of the kitchen, still emotionally shocked by what had gone on and as I did that she picked up the wireless handset for our home phone system and which was on the kitchen counter and dialled I can only assume 9-1-1 and from what I've heard on the 9-1-1 tape my assumption I believe is correct and I think at that point you reached the beginning of the 9-1-1 call."

[9] I found his evidence to be without credibility. He was manipulative as he claimed he recalled what Ms. Rivard had changed into that evening as it was not as attractive on her as what she was wearing earlier in the day. He testified that he was not in the least angry when he was confronted with accusations of hiding money, having an affair, Ms. Rivard wanting a divorce, and knowing that Ms. Rivard had withdrawn at least \$28,500.00 from the joint bank account that afternoon. Mr. Morten calmly described his mood as "one of concern, one of anxiety, but I certainly didn't in any way, shape, or form feel anything else other than anxiety and concern and I suppose the other thing I did feel was the need to explain and ensure that I could appease Ms. Rivard." While simultaneously expressing his love for Ms. Rivard, that he only wished to appease Ms. Rivard, the defence case was intended to embarrass Ms. Rivard by asking whether she was taking any medication when she testified, to make her out as the physical abuser in the relationship by leading private and inadmissible hearsay and finally to lead evidence that she framed Mr. Morten by injuring herself that evening. It is inherently inconsistent that Mr. Morten filed for divorce shortly after the incident but does not intend to divorce her.

[10] I reject Mr. Morten's evidence entirely and it has not raised a reasonable doubt.

[11] However, when I review Ms. Rivard's evidence I cannot find that any of the offences have been proved beyond a reasonable doubt. Ms. Rivard could not say where or when on the 9-1-1 tape she would have been slammed into the wall in the hallway by Mr. Morten. That, in and of itself, is not fatal. However, when you listen carefully to the 9-1-1 tape, as I have on several occasions, Ms. Rivard's evidence in court is not credible. Ms. Rivard maintains that the pushing and shoving, that she describes in the kitchen, causes her to become so concerned for her safety that she calls 9-1-1. However, on the 9-1-1 tape, Ms. Rivard is immediately yelling "help me, help me" followed by four bangs that sound as though the telephone is striking a counter. Ms. Rivard does not say anything else even though the 9-1-1 operator asks Ms. Rivard to stop screaming. Ms. Rivard can be heard in the background swearing at Mr. Morten, arguing with Mr. Morten and consistently saying "keep away from me" until the phone line goes dead. Could the assault have happened after the phone line is dead and before the call back which is a matter of seconds? Possibly, but Ms. Rivard can again be heard in the background saying, keep away from me. She is not crying and seems to be outside yet close by as she is again heard on the 9-1-1 as Mr. Morten asks if she would like to speak to the operator. Ms. Rivard does not shout "help me" or "he slammed my head into the wall", or "I need an ambulance", but can be heard calling Mr. Morten "an idiot" and "keep away from me". Her voice on the tape, when she is heard in the background, is not consistent with someone who has just had their head slammed into a wall several times.

[12] Ms. Rivard's recollection of the details of the evening was problematic concerning the details of the assault. Ms. Rivard's evidence concerning the clothes she was wearing at the time is also inconsistent with the evidence of Constable Kay. Constable Kay testified that Ms. Rivard's blue floral t-shirt was torn down the middle in the front. Ms. Rivard's evidence is that she has the clothing at home and is still wearing the t-shirt.

[13] There was no evidence concerning the damage, if any, to the telephone. The evidence on the 9-1-1 tape does not show that Mr. Morten was preventing Ms. Rivard from use of the phone. In fact, he offers Ms. Rivard the telephone in order that she can speak to 9-1-1. Ms. Rivard's response is "keep away from me."

[14] Similarly, even though there is evidence of a hole in the wall in the hall way, I have a reasonable doubt that Mr. Morten caused that hole to be made.

[15] Therefore, as a result of the problems with Ms. Rivard's evidence, I have a reasonable doubt on all charges.

[16] Basically, I have two versions and I do not believe either. I find that neither witness was credible or reliable, and I must therefore acquit Mr. Morten on all charges.

Released: March 20th, 2009

Signed: "Justice Kehoe"