CA 94 004

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

YELLOWKNIFE CRIMINAL SITTINGS

OCTOBER 19, 1993

	COUNSEL	TRIAL JUDGE	COURT
JERRY OVILOK Appellant	S.A. Sabine, Esq.	Richard, J.	de Weerdt, J.A. McFadyen, J.A. Hudson, J.A.
- and -			
HER MAJESTY THE QUEEN Respondent	L. Rose, Esq.		

APPEAL #CA 00411

MEMORANDUM OF JUDGMENT

Leave to appeal was granted, to the extent sought by the appellant; but the appeal was dismissed from the bench with reasons to follow. Here are those reasons.

The appeal is against the appellant's conviction of a single count of sexual assault at Coppermine on Saturday, April 25th 1992.

The grounds of appeal fall into three categories:

(a) those relating to the appellant's attempt to adduce evidence of sexual activity on the part of the complainant, in addition to the subject-matter charged in the indictment;

(b) the trial judge's refusal to allow the appellant to put the defence of honest belief in consent to the jury; and

(c) alleged errors in the trial judge's instructions to the jury.

The appellant did not argue the grounds in category (a) on the hearing of the appeal. We take those grounds to have been abandoned. It remains to discuss grounds (b) and (c).

Ground (b): the defence of honest belief in consent.

It is the appellant's evidence that he had been asleep, that he awoke to find himself alone in his house with the complainant, and that he was "pretty high", presumably due to his consumption of alcohol earlier. According to him, she was asleep on a chair in the living room. He described waking her and the two of them talking together, though he could only remember her saying that they should await the return of their spouses. His next recollection was that he was on top of her on the couch in the living room and that she began to remove her pants, whereupon he pulled them off her. However, they then agreed to go instead into the bedroom to avoid being seen through the living room window. According to the appellant, the complainant pulled her pants on again to go to the bedroom, both of them walking there together. Once again, according to the appellant, the complainant herself began to remove her pants when in the bedroom; and he then completed that for her before they resumed sexual intercourse on the bed.

The complainant testified that she fell asleep on the couch in the living room and woke up with the appellant on top of her on the bed in the bedroom, having sexual intercourse with her. She also had been drinking earlier. Her evidence is that she tried to get the appellant to stop, by using her knee; but that he held her firmly by the wrists and that she was unable to dislodge him,

so that she ceased to struggle.

The jury evidently rejected the appellant's evidence completely in finding him guilty as charged. Given that the appellant's evidence was the only basis for any finding of "not guilty" on the basis of a reasonable doubt as to his honest belief in the complainant's consent, the jury's rejection of that evidence removed any basis for the ruling sought by the appellant from the trial judge as to there being "an air of reality" to that alternative defence. Even if the trial judge had ruled in favour of the appellant on that point, it is apparent that the jury's verdict would have been no different, given their complete rejection of the appellant's testimony as to the actions of both the complainant and himself at the time of the events charged.

This ground of appeal is therefore without merit.

Ground (c): alleged errors in the instructions to the jury.

1. Recklessness:

The appellant submits that the trial judge erred in his instructions to the jury by equating recklessness to mere carelessness; and, furthermore, by speaking of recklessness as the equivalent, in law, of wilful blindness. The appellant says that the trial judge in effect withdrew the issue of knowledge of lack of consent from the jury.

The trial judge did, however, directly address the issue of knowledge of lack of consent when he told the jury that, in addition to the other elements of the offence of sexual assault, the Crown must prove that the appellant knew that the complainant was not consenting and that this could be shown by the Crown either proving that the appellant actually knew that she did not

consent or that he was wilfully blind or reckless as to whether she was consenting. In that connection, the trial judge added, by way of further explanation:

> In other words, he went ahead and did it anyway and didn't care whether she was agreeing or not. He doesn't want to know whether she is consenting.

Had the jury found the appellant "not guilty", the Crown might perhaps have raised some objection to the trial judge's instructions, on the basis that they were insufficient to enable the jury to fully consider the appellant's guilt on the basis of either recklessness or wilful blindness instead of on the basis of knowledge of the complainant's lack of consent. That, of course, is not the situation here. Furthermore, the trial judge did not equate recklessness to mere carelessness. His remarks are to be read in their context, not in isolation. Given the evidence, it was not necessary for the trial judge to be more specific, in this instance, as to recklessness and wilful blindness.

2. Knowledge:

The appellant submits that the trial judge erred by instructing the jury that knowledge of the complainant's lack of consent can be imputed to the appellant if the complainant's evidence on that point is believed.

In that connection, the trial judge sought only to provide the jury with an example of the manner in which an inference of knowledge may be drawn from the evidence, including that of the complainant. The example was apposite, given the evidence and the importance of the point in question; all in the context of his instructions to the jury on the presumption of innocence

and proof beyond a reasonable doubt. The trial judge's instructions were not deficient or otherwise in error on this point.

3. Competency of experts

Whereas, as submitted by the appellant, it was for the trial judge to rule upon the competency of witnesses tendered as experts in a given field, for purposes of determining if those witnesses might be heard to express opinions within the field in question, it was for the jury to determine whether to accept the testimony of the expert witness who gave evidence, in whole or in part, or not at all. There is nothing in **R. v. Stevenson** (1990), 58 C.C.C. (3d) 464 (Ont. C.A.) to suggest otherwise.

Nor is there anything in the trial judge's instructions to the jury to suggest that they were to determine the competency of the expert witness. Rather, the qualifications of the witness were cited by the trial judge as constituting one of several pertinent considerations to be taken into account by the jury in weighing the opinions of the expert witness. There was no error in the trial judge's instructions in this connection.

4. Evidence Review:

It is submitted on behalf of the appellant that the trial judge failed to fully and completely review the evidence in the course of his instructions to the jury, more particularly the evidence relied upon by the appellant for his defence.

Of course, it was entirely within the province of counsel for the appellant to fully

review the evidence in his address to the jury at the conclusion of the testimony. The record of counsel's remarks is not before us; but we presume that those remarks drew the jury's attention to any inconsistencies or other aspects of the evidence which weakened the Crown's case or supported that of the appellant. It is no part of the trial judge's duty to perform this task on behalf of counsel, or to attempt to make a further or additional detailed review of the evidence, as submitted on behalf of the appellant. If counsel has chosen not to deal with points arising on the evidence, it may be that this has been for a purpose. The trial judge, in such a situation, may well decide to let matters lie wherere counsel has left them. It is not error for a trial judge to do so, without more.

5. Alternative grounds for conviction:

It is submitted on behalf of the appellant that the trial judge erred in his instructions to the jury to the effect that they could find the appellant guilty on the basis of either one of two sexual assaults, as an alternative to a single continuing sexual assault.

Only one continuous offence of sexual assault was alleged by the Crown. It was the appellant who introduced evidence from which the jury might infer two separate acts of sexual intercourse. Accordingly, in pointing out the various inferences which the jury might draw from the evidence as a whole, it was within the province of the trial judge to instruct them as to the implications of those inferences for their verdict.

6. Credibility and reasonable doubt:

The appellant submits that the trial judge failed to explicitly instruct the jury to return a verdict of "not guilty" if they had a doubt that the appellant's testimony was true, or as to what to do if they were in doubt as to whether to accept any part of the evidence.

The trial judge specifically instructed the jury as follows:

> Now, specifically in this case, it is not simply a matter of believing the complainant, ... , or the accused, Jerry Ovilok. If the accused person's or the defence evidence leaves you in a state of reasonable doubt after you have considered it in the context of all of the evidence, then you must find him not guilty. Even if you disbelieve the accused person, you must still consider whether, on the rest of the evidence, the Crown have proven beyond a reasonable doubt that he committed the crime.

The appellant says that the trial judge should have added words to the effect that the jury should bring in a "not guilty" verdict if the Crown, in the jury's view, had not proved the appellant's guilt beyond a reasonable doubt. It is frequently the practice for a trial judge to do this, if only to reinforce the earlier more general instructions given to the jury on the subject of proof beyond a reasonable doubt; but it is not essential that this be done if, as occurred in this instance, adequate general instructions on that subject have already been given. As to the alleged failure to tell the jury what to do where they are uncertain as to whether to accept or reject certain evidence, here again the trial judge gave the jury perfectly adequate general instructions, which was all that was necessary.

7. Question from the jury:

In the course of their deliberations, the jury sent a note to the judge with a question about certain marks on the complainant's body. The question was:

> Were the three narrow marks on the right-hand side of Joyce's lower back, marks that she obtained the same day or did they appear to be old marks?

Neither counsel made any objection (or asked to be allowed to make submissions) before the jury was brought in, after the trial judge had read out the note in open court in the jury's absence. It is submitted now, on behalf of the appellant, that the trial judge should have invited counsel to make submissions to him before he called in the jury. It may be noted that counsel for the appellant remained silent at the time, both before the jury was called in and, as well, afterwards - when it was still open to counsel to seek an opportunity to make submissions in the absence of the jury. The silence of counsel, in the circumstances, is indicative of his agreement with the view of the trial judge that he would simply have to tell the jury that they would have to take the evidence as it stood, all the evidence by then being in. That is what the trial judge in fact did, saying, among other things:

> So I'm just going to confirm for you that there is no evidence on this point about the age of the marks that the nurse noticed. The only evidence is what you have in paragraph 4 of that exhibit that you have in the jury room. That's the only description we have of the marks and you'll have to make do with that. So with that, I'll ask you to return to the jury room.

The appellant was not denied any opportunity to address the trial judge in reference to the note after it had been read out in open court in his presence. He was represented by counsel who chose to make no intervention or objection on his behalf at the relevant time. Indeed, given the nature of the jury's question and the trial judge's response to it, there is nothing which the appellant could usefully have put before the trial judge in that connection. The appellant's counsel appeared, at the time, to accept that as the situation. There is nothing to

suggest any neglect of his duty in doing so. The same is to be said respecting the action taken by the trial judge.

Conclusion

For all of the foregoing reasons, the appeal is dismissed.

M.M. de Weerdt, J.A.

AUTHORISED TO SIGN FOR: E. McFadyen, J.A.

AUTHORISED TO SIGN FOR: R.E. Hudson, J.A.

Dated at Yellowknife, N.W.T.
this 25th day of January 1994

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