Brownlee v. *H.M.T.Q.* & *Domkowsky* v. *H.M.T.Q.*, 2003 NWTCA 6

Date: 2003 04 23
Docket: A1 - AP 2002 0000019
& A1- AP 2002 0000020

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

THE HONOURABLE MR. JUSTICE TALLIS
THE HONOURABLE MR. JUSTICE VERTES
THE HONOURABLE MADAM JUSTICE M[c]FADYEN

BETWEEN:

DAVID BROWNLEE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

DARREN DOMKOWSKY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

APPEAL FROM THE CONVICTION BY
THE HONOURABLE MR. JUSTICE RICHARD

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

Counsel:

G. Watt, for the Appellant (Brownlee)
M. Hansen, for the Appellant (Domkowsky)
S.H. Smallwood, for the Respondent (Crown)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

VERTES J.A. (for the Court):

[1] The appellants, Brownlee and Domkowsky, were convicted of robbery after a joint trial before a judge sitting without a jury. Hence, these two appeals were heard together.

[2] The evidence accepted by the trial judge was that the complainant met the appellant Brownlee, introduced to him as "Dave", at a bar. Brownlee then introduced the complainant to the appellant Domkowsky, known to the complainant simply as "Darren". The three spent some time together, drinking and playing pool. The complainant bought some drinks. The complainant offered a one-day labour job to the appellants. There was evidence that the complainant had a significant amount of cash on his person and that Domkowsky commented on this to one of the bar servers. The complainant testified that as he left the bar the men known to him as "Dave" and "Darren", along with a third person, left at the same time, or closely thereafter. They expressed an interest in the complainant's truck and, when they went to look at it, these three men jumped the complainant, beat him, and stole his money.

[3] The principal complaint of the appellants is that the trial judge placed undue reliance on the complainant's identification of these appellants as two of the men who robbed him. They argued, quite correctly, about the dangers in relying on identification evidence and noted the many inconsistencies in the identification evidence, particularly the complainant's initial physical description of the assailants.

[4] In our opinion, it is somewhat of a mischaracterization to call this case a typical identification case. This is not a case where an alleged victim is identifying a stranger to him or her from a line-up or from the dock. This is a case of the complainant testifying as to his recognition of persons already known to him, albeit briefly. There was evidence to support a conclusion that the complainant had a reasonable opportunity to form a sufficient impression of the people he knew as "Dave" and "Darren" so as to permit a later identification, by names, of these two people as the perpetrators. This is what distinguishes this case from the usual identification case.

[5] The trial judge considered all of the evidence; he instructed himself on the frailties of identification evidence; but, as he noted, the evidence here rested on the complainant's assertion that the people who robbed him were the two men he knew as "Dave" and "Darren". The trial judge carefully considered the various inconsistencies in the evidence; he considered the defence arguments as to how the complainant was "reconstructing" his evidence; and, he made his findings, findings that were set out in clearly articulated reasons.

[6] Great deference must be accorded to the trial judge in his assessment of credibility and, in particular, his assessment of the reliability of the complainant's evidence. In our unanimous opinion, the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[7] What the appellants are really asking us to do is to conduct a wholesale reweighing of the evidence. While we must necessarily review and reweigh, to some extent, we cannot simply retry the case. That is not the function of an appellate court.

[8] There is one further aspect of the identification evidence on which we wish to comment.

[9] The complainant testified that after he was robbed he immediately told his girlfriend and one of the bar servers that the people who attacked him were the "Dave" and "Darren" he had met earlier. The trial judge referred to this as being consistent with his trial testimony.

[10] Evidence from the complainant as to what he did and said after the robbery would be admissible, in the circumstances of this case, as part of the narrative. Such evidence would not, however, be admissible to show consistency in the absence of some exception to the rule respecting prior consistent statements. While that evidence could not be used as proof of the truth of what the complainant said at trial, nor as a form of self-corroboration, it could be used as proof that they were made and thus could be used by the trier of fact to assess the overall conduct and general credibility of the complainant. And since we do not regard this case as a typical identification case, we make no comment as to whether this meets the exception for prior identification evidence. Nevertheless, if the trial judge erred by referring to this evidence as showing consistency on the part of the complainant in his identification of the appellants, we are of the opinion that no substantial wrong or miscarriage of justice

occurred thereby and we invoke the curative proviso in s.686(1)(b)(iii) of the *Criminal Code*.

[11] Finally, there was one point in the evidence that related to the appellant Brownlee only. At trial he advanced an alibi (the appellant Domkowsky did not testify). The trial judge found that the times given by the witnesses in support of this defence were inexact and insufficient to raise a reasonable doubt. In our opinion, the trial judge considered this evidence carefully. We find no misapprehension as to any material aspect of this evidence, nor do we find that the trial judge simply discounted it or "swept it aside", as appellant's counsel put it. Upon our review we find no flaws in the trial judge's evaluation or analysis of the evidence, certainly not one that leads us to conclude that the verdict is unreasonable or unsafe.

[12] For these reasons, the appeals from conviction are dismissed.

Vertes J.A.

APPEAL HEARD April 23, 2003
at Yellowknife, NT

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