In the Court of Appeal of the Northwest Territories

Citation: R. v. Khatib, 2005 NWTCA 03

Date: 2005 07 14
Docket: A-1-AP200500001
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Talal Mohammed Khatib

Appellant
(Accused)

Restriction on Publication: By Court Order, there is a ban on publishing information that may identify the person/persons described in this judgment as the complainant/witness. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486(3)-(4.9).

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Virginia Schuler
The Honourable Madam Justice Marina Paperny

Memorandum of Judgment

Appeal from the Conviction and Sentence by
The Honourable Mr. Justice J.E. Richard
Dated the 8th day of December, 2004

Memorandum of Judgment

The Court:

A. Issues

[1] The main issues here are the same judge hearing previous cases, interventions in cross-examination, unreasonable verdict, inadequate reasons on reasonable doubt, and failure to give a conditional sentence.

B. Facts

[2] The complainant was about 21 years old. She and a friend had a great deal to drink and ended up partying in the private upstairs part of the appellant's restaurant, the appellant supplying some of the liquor. The complainant testified that she passed out on a couch, fully dressed. When she came to, she was naked from the waist down and the accused was lying on top of her. She protested, but he persisted for some time. He testified and denied that he had ever been on top of her. Two other women testified. Their evidence did not do much to clarify the conflict in evidence.

C. Conflict of Interest?

[3] The appellant complains that this judge had heard a pretrial conference respecting the same accused. It is said that that should disqualify the judge from hearing the trial.

[4] No authority on point is cited, not even any Rule or practice direction about hearing a pretrial conference and trial in the same case. The appellant cites "***R. v. Kumar*** (2005) Ont. C.A.". There are so far two decisions fitting that description and name. Presumably it is not one which rejects a conditional sentence for a sexual assault, and other procedural complaints: [2005] O.J. No. 814 (Mar 7/8). The other one merely says that a judge who hears a pretrial should not hear the trials, but it cites a specific Ontario Rule. It says that the mischief aimed at by that Rule is "the disclosure of communications or discussions of a guilty plea to the trial judge." It affirmed the conviction because the mischief did not occur there: [2005] O.J. No. 1417, 2005 Can L.I.I. 11783 (Apr. 7). The mischief did not occur here, because the pretrial conference was in a different prosecution with a different complainant and events.

[5] Similar arguments have often been raised in Canadian courts in the last few years, that a trial judge should be disqualified because he has heard other prosecutions or suits respecting the appellant. We have not seen them succeed.

[6] A pretrial conference would not hear evidence, nor would the judge ordinarily make fact findings, still less credibility findings. It would handle logistics and possibly see if a bargain (plea) is likely. We cannot see what principle would make hearing a pretrial conference in another case,

a ground to disqualify a judge from hearing the trial here. Trial judges often learn that the accused has a previous criminal record, even a related one, yet do not convict for propensity.

[7] Apart from principle, a significant proportion of trial judges in Canada sit in smaller communities in which there are only one, two or three judges who regularly sit. A rule of the sort suggested here would prove very dilatory and impractical, especially if a trial had to be adjourned at the last moment. It is ironic that the trial here opened with a request by the Crown for a one-day adjournment, which the defence opposed. The Supreme Court of the Northwest Territories has only three resident judges; to bring in a non-resident ***ex officio*** or deputy judge would become very common if this ground for recusal existed. Some such deputies come from thousands of miles away. All are either sitting justices elsewhere, or retired justices. Few can come on short notice. How the judiciary of Prince Edward Island could function under the rule of recusal suggested here, we cannot imagine.

[8] If one views this as an allegation of perceived bias, a properly-informed reasonable bystander would not fear an unfair decision, even from unconscious factors.

D. Excessive Intervention

[9] Counsel for the appellant (who was not trial counsel) complains that the trial judge cut off cross-examination by defence counsel of the complainant.

[10] In fact, he did not end that cross-examination, which occupies about 26 pages in the transcript. Nor did he really bar further questions about any given topic. He did suggest that further cross-examination on one topic was likely to be fruitless, and suggested what step to take instead.

[11] That occurred because the witness in question (the complainant) refused to acknowledge that she had made a previous statement, and professed to have no memory of its contents.

[12] Since she was firm in that position, and indeed seems to have displayed a somewhat hostile attitude, it is very difficult to see what good more cross-examination on that topic would have done. She was unlikely suddenly to admit that she recalled the statement, and any questions about its contents would have been hypothetical, indeed useless.

[13] Statute gives a remedy as well, and the old English statute is now re-enacted in the ***Canada Evidence Act***, ss. 10, 11. If the witness being cross-examined does not distinctly admit having made the statement though his or her attention is called to the occasion, then evidence may be led to prove the statement. Here the trial judge reminded the defence counsel of that right, but defence counsel at trial did nothing about that. On appeal, it was suggested that using that procedure would have been difficult, as the constables present when the statements were given were not called by the Crown to testify at trial.

[14] However, there is no reason that defence counsel could not have asked the prosecutor to make one of those constables available as a witness, or (if she declined) to subpoena one of them. Once the previous statement was proved, any contradictions between it and the evidence in chief of the witness could have been argued. Without such proof, little could be done no matter what questions were asked in cross-examination.

[15] That in turn gravely weakens many of the defence arguments about credibility based on the alleged previous contrary statement, which no one put into evidence.

[16] Some of the trial judge's interventions were designed to calm down the complainant and to persuade her to answer defence counsel's cross-examination questions. They were helpful, not harmful.

E. Unreasonable Verdict

[17] The standard of review here is set in ***R. v. Yebes*** [1987] 2 S.C.R. 168 and ***R. v. Biniaris*** [2000] 1 S.C.R. 381. The Court of Appeal is to be even more deferential when credibility is an important issue: ***R. v. R.W.*** [1992] 2 S.C.R. 122, 137 N.R. 214, recon. den. (S.C.C. Nov. 18 1992). It is impossible for the appellant to meet that standard here. If one believes the complainant, her evidence would amply allow a jury to convict. There are no troubling aspects here which arouse fears based on our judicial experience, or send us to a more detailed examination of the transcript.

[18] We are not satisfied that the trial judge applied a stricter scrutiny to defence evidence than to Crown evidence, as appellate counsel suggests. Nor can we see that the other witnesses could have been more help in deciding credibility than the trial judge recognized. The second Crown witness confirms that the complainant was half naked.

[19] It is suggested that the trial judge erred as to the time of the small incident described by the other defence witness, but her evidence, though not clear, was reasonably open to the trial judge's interpretation. Nor do we see that incident as having much weight, whenever it occurred. We see little inconsistency between it and the complainant's evidence.

[20] Like the trial judge, we do not find the contradictions between the two Crown witnesses to be large, important, or symptomatic of anything.

F. Inadequate Reasons?

[21] All the evidence and oral argument occupied less than a day. Oral reasons followed the same day.

[22] The reasons for conviction were oral. They occupy exactly five single-spaced pages in the transcript.

[23] The trial judge's analysis of the complainant's evidence went far beyond surface appearances, or mere summaries of demeanor. The judge examined her state of mind, state of memory, and motives, all in a reasonable way.

[24] As the appellant's evidence was fairly brief, and parts of it ran off onto irrelevant topics, there is little more which the trial judge could have said about that issue than he did.

[25] Some of the topics which the appellant said that he did not notice (such as intoxication) are surprising, and the trial judge properly relied upon them.

[26] The appellant's counsel complains also that the reasons did not follow the steps in ***R. v. D.W.*** [1991] 1 S.C.R. 742, but there is nothing on the record to suggest that the steps in ***R. v. D.W.*** were not followed. In fact, the appellant does not submit which of the critical steps were omitted. Here the accused's testimony was clearly rejected and did not raise a reasonable doubt. The trial judge found that the complainant did remember the core events giving rise to the allegations and therefore accepted her evidence. It is clear from his analysis that despite strenuous argument on the part of the defence, the trial judge fairly concluded that no reasonable doubt remained on the totality of the evidence.

G. Sentence Appeal

[27] The appellant is 53 years old now, not 60 as his counsel alleges.

[28] The Supreme Court of Canada's statement that no type of crime is excluded from being considered for a conditional sentence (***R. v. Proulx***, ***infra***, at para. 79) is often distorted or misapplied. Building on that error, the issue of starting points is sometimes then injected into the discussion. See ***R. v. Christie***, 2004 ABCA 287, 189 C.C.C. (3d) 274, 357 A.R. 47 (C.A.). Where denunciation and deterrence are paramount sentencing principles, as they are in sexual assault, they should not be improperly discounted in a quest for individual dispositions: ***Christie*** at para. 27; ***R. v. Wells*** [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368; ***R. v. Aburto*** (1998) 228 A.R. 317 (C.A.). The reference to starting point sentences in ***Proulx*** must be read in the context of conditional sentences which can only be imposed in relation to offences where there is no statutorily-prescribed minimum and for which a sentence of two years less a day would be appropriate.

[29] There are two distinct steps which are often mixed up. First is a fixed rule which bars a conditional sentence in certain types of case. For example, there must not be any danger to the safety of the community (s. 742.1(b)) or any statutory minimum imprisonment (s. 742.1)). Where no such firm rule applies, then that type of crime is not automatically excluded. One goes on to the next step.

[30] That next step is calculation. The fundamental principle of sentencing is proportionality: ***R. v. Proulx*** [2000] 1 S.C.R. 61, 107 (para. 82), and ***Criminal Code of Canada*** s. 718.1. And a conditional sentence is usually a milder sentence than actual jail of the same length: ***R. v. Proulx***, ***supra***, at para. 44. The court must weigh the gravity of the offence committed on this occasion,

including aggravating or mitigating circumstances, the degree of moral responsibility of the convicted person, and his or her personal circumstances and qualities. Sometimes there are other unusual circumstances too.

[31] The separateness of those two steps is confirmed in ***R. v. Proulx*, *supra*** (paras. 47, 77), and in ***R. v. Fice***, 2005 SCC 32, paras. 23, 25.

[32] Only after step two, weighing those circumstances carefully, can the sentencing judge decide what type and size of sentence is appropriate. And only after that can the judge see whether a sentence under two years is appropriate (another condition set by s. 742.1(a)) .

[33] If the offence is a bad one, and this offender's degree of moral responsibility for it is heavy, and there are no weighty mitigating circumstances, then arithmetic and proportionality dictate actual jail. A conditional sentence is not a heavy sentence, especially when it has the usual conditions. (I will not discuss a rare conditional sentence requiring confinement in a clinic or other institution.)

[34] One of these statements about sentencing (no crime is excluded) speaks of categories, absolute impossibilities, and the first step of analysis. The other statement (barring exceptional circumstances, a conditional sentence will not be given) speaks of individual fact circumstances, calculation, probabilities, and the second step of analysis. See ***R. v. Fice***, 2005 SCC 32, paras. 17, 23.

[35] The argument here turns ***Proulx*** on its head by suggesting that a sentencing judge, having concluded that the range of sentence falls within the two-years-less-a-day range, is mandated to grant, as opposed to considering, a conditional sentence. ***Proulx*** held that no offence ***per se*** is presumptively excluded. It did not say that it is automatically granted. It must be an appropriate sentence having regard to s. 718. Further, the judge must be satisfied that serving the sentence in the community would not endanger the public (and meet the other statutory conditions).

[36] Here the trial judge determined, in our view correctly, that denunciation and deterrence were paramount and that a harsher sentence, namely incarceration, was in order to reflect the gravity of the offence. He specifically considered the prevalence of the offence in the Northwest Territories, that the only mitigating factor was the absence of a criminal record, and the seriousness of the circumstances of the offence. These circumstances included assaulting someone who was intoxicated and a guest in the accused's private premises, and doing so deliberately even after she made her objections known.

[37] This trial judge did not say that conditional sentences were forbidden in cases of sexual assaults.

[38] Among a dozen or so separate reasons for sentence which he gave, one is that a certain set of facts is ordinarily serious enough to make a conditional sentence too light. What are those facts?

1. occurring in the Northwest Territories;

2. no mitigating facts, except absence of criminal record;

3. mature offender;

4. sexual assault by lying on top of woman who is first disrobed and so is naked below the waist;

5. doing so when the woman has passed out from excessive alcohol consumption; and

6. persisting even when the woman regains consciousness and objects or forbids the activity.

[39] In any jurisdiction, that would be a crime of significant gravity. It would attract a significant sentence unless there were some factor not usually encountered, such as reduced mental capacity, coercion, a comparatively minor role in an act by another accused, great youth and immaturity, or some very specific factors in upbringing.

[40] One cannot obey s. 718.2(b) (on parity) without discussing similar cases and identifying what makes them similar. Such "categories" cannot be forbidden territory.

[41] The sentencing judge is very experienced. He also pointed out a fact well within his trial experience in every Northwest Territories community, and referred to statistics. This particular scenario and type of sexual assault is extremely common in this Territory, much more than in southern Canada. So it needs general deterrence, denunciation, and promotion of a sense of responsibility.

[42] That in turn reduces the relative weight properly given to some individual circumstances, such as need for individual deterrence or lack of such need.

[43] It is true that a conditional sentence can deter and even denounce. But once again, it would be fallacious to confuse usually with always, or rarely with never. Still worse would be to confuse sometimes with always. Usually actual jail is a stronger deterrent to the bulk of would-be future offenders, and a stronger denunciation to most of the public, than the usual type of conditional sentence. See ***R. v. Fice*, *supra***, at para. 32; ***R. v. Proulx*, *supra***, at para. 44. Therefore, the trial judge's reasoning here seems to us apt and well justified.

[44] As noted, the trial judge did not simply announce a "rule" (that barring exceptional circumstances this crime attracts jail in the Northwest Territories) and use it alone. He spent some time considering the facts (pp. 227-9 in the transcript) and then more time (pp. 229-31) weighing the usual factors, personal and general, which the ***Code*** directs the sentencing judge to weigh and

apply. Counsel for the appellant discusses few (if any) of them, let alone allege any error in principle there.

[45] Since the offence here occurred in the premises where the appellant works and usually lives, a conditional sentence would do little to restrict his activities or punish him, would not be visible to the community, and would do little to prevent repetition of criminal activity. Indeed, it would appear ironic.

[46] Counsel for the appellant also complains because the trial judge was not satisfied that this appellant would pose no danger to the community under s. 742.1(b). Counsel contends that there is no evidence to support that, but the trial judge had a chance to see and hear the appellant. And the complainant's friend's evidence showed that the appellant's upstairs premises were a place where they partied a number of times, the appellant usually supplying the alcohol. Despite the appellant's argument that the trial judge thought that s. 742.1(b) of the ***Code*** refers to the need for jail to deter <u>other</u> wrongdoers, the trial judge did not say that. Nor can we deduce such an idea from what he did say.

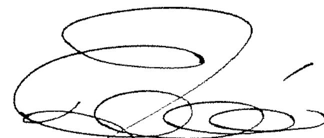
[47] Beyond that, the question of the proper sentence here was a question of weight of all of the relevant factors, including mitigation. Absent any error of principle, we cannot substitute our idea of weight even if we were inclined to (which we are not). It cannot be fairly suggested that this sentence is outside a proper range.

H. Conclusion

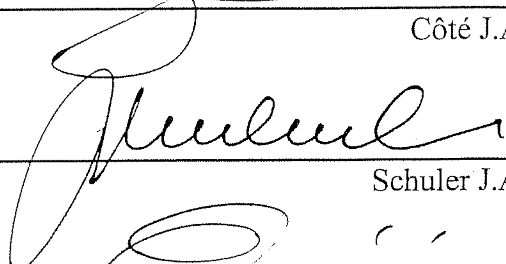
[48] For those reasons, we dismissed the appeal at the end of oral argument.

Appeal heard on June 22, 2005

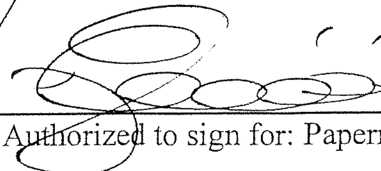
Memorandum filed at Yellowknife, N.W.T.
this 14th day of July, 2005



Côté J.A.



Schuler J.A.



Authorized to sign for: Paperny J.A.

Appearances:

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AP 2005000001

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

TALAL MOHAMMED KHATIB

Appellant (Accused)

MEMORANDUM OF JUDGMENT