

**In the Court of Appeal of the Northwest Territories**

**Citation: Smith v. HMTQ, 2007 NWTCA 02**

**Date:** 2007 03 29

**Docket:** A-1-AP-2005000002

**Registry:** Yellowknife, N.W.T.

**Between:**

**PETER ROBERT SMITH**

Accused/Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

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**The Court:**

**The Honourable Mr. Justice J.E. Richard  
The Honourable Mr. Justice P.T. Costigan  
The Honourable Madam Justice M.S. Paperny**

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**Memorandum of Judgment  
Delivered from the Bench**

Appeal from the Conviction entered October 27, 2004  
Before The Honourable Justice V.A. Schuler

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**Memorandum of Judgment  
Delivered from the Bench**

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**Paperny J.A. (for the Court):**

[1] Mr. Smith (“Smith”) appeals his conviction by a jury of one count of sexual assault and one count of touching for a sexual purpose a person under the age of fourteen years.

[2] He appeals on the basis that the Crown improperly cross examined him at trial on his propensity to lie when he (Smith) did not put his character at issue and that the Crown made inappropriate statements in his closing to the jury which were not remedied in the jury charge.

[3] The appeal is allowed and a new trial is ordered. The appellant did not put his character in issue in his testimony in chief. In cross examination the Crown asked him about his propensity to lie beginning with the question “Do you consider yourself to be an honest man?” In response to the Crown’s question, the appellant testified that he considered himself to be honest and that he had lied in the past to save himself and admitted that he did not wish people to think that he was the kind of person to do that which he had been charged with. The Crown then asked him four pointed questions specifically about whether he did the things that the complainant testified to. The appellant denied them.

[4] This line of cross examination was inappropriate in the circumstances. An accused person who testifies and has not placed his character in issue cannot be cross examined on discreditable conduct unless such conduct relates to an issue other than the credibility of the accused. See *R. v. G.(S.G.)*, [1997] 2 S.C.R. 716, 116 C.C.C. (3d) 193.

[5] The cross examination related solely to credibility. While defence counsel did not object to the cross examination, it is not immunized from scrutiny. See *R. v. F.A.* (1996), 30 O.R. (3d) 470 at 472 (C.A.). In our view the prejudicial effect of this inappropriate cross examination outweighed any possible probative value. See *R. v. Henderson* (1999), 134 C.C.C. (3d) 131 at 146-147 (Ont. C.A.).

[6] In his closing address, the Crown advised the jury to be fair to the complainant, to be fair to the truth and advised them to ask themselves who had a reason to lie and who did not. He indicated to them that the complainant was a victim who was telling the truth and that the accused had an opportunity to be alone with the complainant and “yielded to that temptation”.

[7] The Crown referred to his cross examination of the accused as to his honesty and that the accused testified that he will lie when there is a benefit for him.

[8] The Crown addressed the subject of the motive to lie at length and indicated that while the defence suggested that it does not have to explain why the complainant might lie, it was the defence job to “test” the evidence in that regard. The Crown emphasized that the defence could have asked the complainant and other trial witnesses about this, but did not.

[9] In our view, these statements are inappropriate and did not reflect the fair and dispassionate approach expected of Crown counsel. See *Boucher v. The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263. The address suggested the reversal of onus in regards to motive to lie and the failure of the defence to cross examine the Crown witnesses in this regard. The Crown also improperly adverted to unproven facts relating to the motive to lie.

[10] The cumulative effect of the inadmissible cross examination and the unwarranted statements in the closing address compromised the fairness of the trial and were not, and perhaps could not have been adequately addressed by the charge to the jury.

[11] While the trial judge did emphasize that the accused did not have the burden to prove anything and specifically he need not prove a motive to lie, this was insufficient given the suggestion in the Crown’s closing that the defence was required to, but did not test the evidence through cross examination.

[12] Here the Crown’s improprieties were focused on the central issue at trial, the relative credibility of the accused and the complainant, and are significant in considering whether this has deprived the accused of the right to a fair trial. See *Pisani v. The Queen* (1970), [1971] S.C.R. 738, 1 C.C.C. (2d) 477 at 479 and *R. v. Kusk*, 1999 ABCA 49, 232 A.R. 270 at para. 8.

[13] In short, the Crown inappropriately cross examined on the accused’s propensity to lie and then capitalized on having done so in the closing address. This compromised the fairness of the trial and was not adequately addressed in the instructions to the jury.

[14] Accordingly the conviction is overturned and a new trial ordered.

Appeal heard on April 19, 2006

Memorandum filed at Yellowknife, N.W.T.  
this day of March, 2007

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Paperny, J.A.

**Appearances:**

M.L. Nightingale  
for the Appellant

D.M. Gates  
for the Respondent

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