In the Court of Appeal of the Northwest Territories

Citation: *R* v. *Michel* et al, 2007 NWTCA 03

Date: 2007 04 27
Docket: A-1-AP-2005000040
A-1-AP-2005000041
A-1-AP-2005000042
Registry: Yellowknife, N.W.T.

Between:

NOEL MICHEL, RAYMOND MARLOWE and ANTOINE MICHEL

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

The Court:

The Honourable Madame Justice C. Conrad
The Honourable Mr. Justice L. Gower
The Honourable Mr. Justice J. Watson

Memorandum of Judgment
Delivered from the Bench

Appeal from the Conviction and Sentence
entered November 15, 2005
Before The Honourable Justice V.A. Schuler

Memorandum of Judgment
Delivered from the Bench

Watson J.A. (for the Court):

[1] This is an appeal by each appellant from a conviction for rape under s. 144 of the 1970 R.S.C. version of the *Criminal Code of Canada* relating to events in August of 1975. The first trial ended in a hung jury. The re-trial took place in September 2005 and the jury returned verdicts of guilty against all three appellants.

[2] The charges are with respect to an offence committed over thirtyyears ago. The complainant was fourteen years old at the time. The appellants Raymond Marlowe, Noel Michel and Antoine Michel were then aged 15, 16 and 20 respectively.

[3] Very briefly: the complainant alleged that Noel Michel followed her and abductedher off her doorstep somewhere between 2:00 and 4:30 a.m. and dragged her to a party at the Marlowe house. She alleges that Noel Michel took her to a bedroom where he raped her. She says he left her and several others, including the other Appellants, successively came and raped her as well.

[4] Cross examination revealed numerous inconsistencies between the complainant's testimony at trial and earlier police statements and evidence given at both the preliminary inquiry and at the first trial. There are also inconsistencies between her evidence and the evidence of Crown witness, Fred Marlowe, who testified that the complainant came to a party with Noel Michel, but said that they arrived together in the afternoon, appearing to be having a good time.

[5] The central issues in this appeal coalesce around alleged inadequacies in the charge to the jury. Initial grounds relate to the trial judge not having instructed the jury as to the differences in the positions of the appellants, and in not having discussed in any depth the difficulties with the Crown evidence.

[6] We are of the view the appeals must be allowed. In our view the trial judge failed to adequately address the individual positions and discrete defences of each appellant. The common thread of argument raised credibility of the complainant but in connection with these different defences, the accuracy of the complainant's recall and description was also in question. The Crown did not contend at trial that each was a party to the offence of the other. Whereas consent was said to be a main point for one, identification was said to be the central question for the other two.

[7] Accordingly, it was vital for the jury to understand the theory of each appellant, and how the evidence and the alleged defects in the evidence related to those positions. The jury was not bound to accept counsel's characterization of the issues: ***R. v. Pittiman***, [2006] 1 S.C.R. 381, [2006] S.C.J. No. 9 (QL), 2006 SCC 9 at para. 11. For example, as to Antoine Michel and Raymond Marlowe, there were serious concerns as to whether the complainant accurately recalled their involvement or whether they were present there at all. There was evidence of an earlier statement by the complainant to the police that she got the names of her assailants from other persons. There was also evidence that the room was dark where she was attacked. There were a series of assailants that she described, and she was inconsistent in her various statements as to the order of events and who took part in them.

[8] Identification of each of Antoine Michel and RaymondMarlowe were live issues at trial. The evidence on each of those issues differed. The trial judge did not separatethe identification concerns as to the parties. Morever, in parts of the charge, the trial judge treated the defence positions cumulatively on the subject of credibility. The trial judge'slongest passagesas to the evidencein her charge related to the direct evidence of the complainant.

[9] The trial judge told the jury they had to render an individual verdict for each appellantbut did not explain to the jury the critical issues and evidence touching upon each appellant's involvement. The trial judge's approach on this aspect did not meet the requirements of ***R.* v. *Azoulay*** [1952] 2 S.C.R. 495 at pp. 497 to 498 in these circumstances: see also ***R. v. Karaibrahimovic***, (2002) 164 C.C.C. (3rd) 431, [2002] A.J. No. 527 (QL), 2002 ABCA 102 at paras. 34 to 35.

[10] While it was fair to say that all Appellants challenged credibility, it was necessary to instruct the jury as to how the critical evidence related to the different positions of Antoine Michel, Noel Michel and Raymond Marlowe.

[11] A further issue on appeal concerns the treatment of the evidence of the RCMP investigators who spoke to two women who the complainant said were present at the party. The police officer indicated that they were "evasive" and the trial judge properly told the jury not to rely upon that expression or the opinion by the officer. However, the trial judge also told the jury that they must not speculate about the reasons why those two people were not called as witnesses:

> Now you have to consider all the evidence in this case. The second witness that you heard from was RCMP Corporal Neil Flett. You will recall he was the initial investigator in this matter, and he said that he attempted to obtain information from Bertha Sanderson and Doris Catholique in December 2001, but they did not want to supply information. He said he tried again in January, 2002, but he was not successful, and he did not issue subpoenas for them.

> Now, I have to tell you that in any criminal trial the Crown is not obliged to call every witness who might have some knowledge of the matters at issue, and you must not speculate as to why these two women, Bertha Sanderson and Doris Catholique, did not want to supply information or would not give statements to the police. There is absolutely no evidence before you about the reasons for that. In particular, I am going to tell you that you must not draw any conclusion for Corporal Flett's description of them as evasive. That is a very subjective assessment, you heard no evidence at all to explain that, and it would be improper and unfair for you to draw any conclusions from that in the absence of evidence about it.

[12] This was an error. The jury could find the absence of those women as witnesses to raise a reasonable doubt as to the circumstances. The complainant having said that both women were present, the jury could wonder why they were not called and would not be in error to do so. If the women were present, they could have been expected to provide vital information as to who else was present at the party and as to what happened, whether or not that information was helpful to the Crown: ***R. v. Jolivet*** [2000] 1 S.C.R. 751, [2000] S.C.J. No. 28 (QL) at paras. 24 to 30. If the women were not present, their evidence would contradict the complainant's evidence.

[13] Crown Counsel's submission to the jury implied that they could disregard the absenceof such evidence. Crown Counsel said:

> You cannot draw inferences from what you have not heard. I say this as I anticipate the defence will want to argue to you given the historical nature of the offence there are not sufficient checks that could have been made or there are witnesses who are not presently available either because they are deceased or not called by the Crown. Consequently there is an absence of evidence. You have got to decide this case on the evidence that you have heard. You cannot decide this case on the strength of evidence that you have not heard.

[14] Crown Counsel's submission to the jury was not accurate. The issue was not whetherCrown Counsel acted properly in not calling the women as witnesses, but in the effect of their absenceupon the jury's confidence in the Crown's case. Nor are we satisfied that the explanation provided as to their absence offered any basis for any conclusion as to the materiality of the evidence that these witnesses could have given.

[15] Related to this point, the trial judge answered a question of the jury which shows that the jury was concerned about matters of this kind, i.e. lack of evidence and what to do about it. The jury's question was as follows:

> Direction on lack of evidence versus belief in evidence given.

[16] The trial judge in her answer to the jury did not make clear to the jury how the absence of witnesses or other lack of evidence was a matter from which doubt could arise even if they believed the complainant on some issues.

[17] More directly, mindful of ***R. v. Lifchus*** [1997] 3 S.C.R. 320, [1997] S.C.J. No. 77 (QL), and ***R. v. Starr***, [2000] 2 S.C.R. 144, [2000] S.C.J. No. 40 (QL), the direct answer to the question was that if the jury found gaps in the evidence, those gaps could raise a reasonable doubt. Belief in the evidence given by the complainant would not be the end of the matter. They could believe parts of the evidence of the complainant but still have a reasonable doubt as to the guilt of one or all of the appellants.

[18] We are also concerned with the trial judge's handling of the evidence of Fred Marlowe. In her charge she reported that Fred Marlowe had testified that the complainant acquired the nick name "rough nine" after the party. Fred Marlowe's evidence was ambiguous on this point, as even Crown Counsel effectively acknowledged in her address to the jury. The evidence was:

> Crown Counsel: And did you know that [A.S.] was called rough nine?
>
> Fred Marlowe: Yeah.
>
> Crown Counsel: And I just want to direct your attention to a party prior to [A.S.] being called rough nine. Were you present at that house?
>
> Fred Marlowe: I was there.
>
> Crown Counsel: Prior to her being called rough nine at a party?
>
> Fred Marlowe: No, after I heard it.

[19] This was ambiguous evidence, as it could mean that he was at the party after hearing the name and not before.

[20] The issue of the name "rough nine" was also potentially prejudicial in that it suggested to the jury that the complainant acquired this name as a result of this incident. The trial judge attempted to remove this inference in her charge but in so doing, twice said that Fred Marlowe said the name was given after the party, notwithstanding the ambiguity.

[21] Another feature of the Fred Marlowe evidence is important. He allegedthat Noel Michel and the complainant arrived together at the Marlowe residence in the afternoon and they appeared to be having a good time as previously mentioned. The complainant's version was that she was attacked

by Noel Michel between approximately 2:00 and 4:30 a.m. abducted and raped in the residence. This was a significant contradiction that was not identified by the trial judge in her charge not withstanding objection of counsel that followed the charge. The trial judge did not recall the jury on this point.

[22] The trial judge told the jury in her charge that not all inconsistencies are important. We agree with this, but some inconsistencies were serious. She did not sum up, in connection with the separate positions of each appellant, the important inconsistencies in the evidence.

[23] In the result the convictions must be quashed.

[24] We are now calling on counsel to speak to the question of remedy. . . [counsel submissions]

[25] We are of the view in the ordinary situation that a third trial would not be necessarily be an abuse of process: ***R. v. Keyowski***, [April 28, 1988] 1 S.C.R. 657, [1988] S.C.J. No. 28 (QL). Although the first trial resulted in a hung jury, the evidence of the complainant in this instance was accepted by this jury. We do not by these reasons either on the conviction appeal or on this aspect make a decision as to the veracity of the evidence.

[26] Nevertheless, having regard to the cumulative effect of all of the relevant circumstances we are of the view that further proceedings would not be in the interest of justice in this matter.

[27] We consider the following factors:

1. The age of the Appellants at the time; in particularwith respectto RaymondMarlowe who was only 15 years of age.

2. The long passage of time since the alleged offences.

3. The amount of the sentences already served coupled with the amount of time upon judicial interim release conditions (following their arrest in 2002) which we understand to be as follows:

    (i) Mr. Noel Michel has 19 months of custody served plus three years of judicial interim release.

    (ii) Mr. Antoine Michel has 18 months of custody served plus three years of judicial interim release.

(iii) Mr. Raymond Marlowe has 9 months of custody served plus three years and perhaps 9 months of judicial interim release.

Accumulating time spent on judicial interim release with the time spent in custody places the overall result certainly within the range of sentence for an offence of this type in regard to their young ages at the time of the offence.

4. The fourth factor that we consider are the difficulties with respect to the acquisition of potential defence evidence according to the submissions made by counsel.

[28] In view of these circumstances it is not necessary for us to formally address the question of whether or not Raymond Marlowe was at the time subject to prosecution under the *Juvenile Delinquents Act* or the successor legislation based upon his then legal status.

[29] In the result we allow the appeals, set aside the convictions, and direct stays of proceedings in relation to the indictment as against each of the appellants.

Appeal heard on April 17, 2007

Memorandum filed at Yellowknife, N.W.T.
this “27" day of “April”, 2007

Watson, J.A.

Appearances:

The Appellant Noel Michel appeared on his own behalf

H. Latimer
for the Appellant Raymond Marlowe

A. Tralenberg
for the Appellant Antoine Michel

M. McGuire
for the Respondent

A-1-AP 2005000040
A-1-AP 2005000041
A-1-AP 2005000042

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BETWEEN:

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Appellants

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MEMORANDUM OF JUDGMENT
