In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

The Court:
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

[4] The jury retired to deliberate. Later, the judge told counsel that he had been advised there was a verdict. He then added:

Mr. Sheriff was asked by the jurors, he advised me, if they could have a handwritten or typewritten list of the six elements to which I had referred. He said that he had requested the jury to put that in writing, and they have given a slip of paper that says, "Six elements". So, just for the record, I am going to ask Madam Clerk to mark that as Exhibit B for identification.

EXHIBIT B: QUESTION FROM THE JURY

THE COURT: And, as a result of that, and because it was so innocuous, I took from my written instructions which I had provided to you in part III, page 3 the contents of paragraph 4, which starts off by saying:

"For the Crown to succeed [on the charge in the indictment], it must be proved beyond a reasonable doubt the following 6 ingredients, as to sexual assault,"

and then they are listed. And then the last line reads:

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So I clipped that out of my notes and handed it to them and requested through Mr. Sheriff that, after they deliberate, to return that piece of paper. I don't think it needs to be marked with that description, but I am happy to have it marked as Exhibit C. Maybe that is the best way. We will have it marked as Exhibit C when it is returned to us.
A.B. 430/9-46

[5] The communication he received and marked as an exhibit was a piece of paper that simply said "6 elements": A.B. 444, Exhibit B. Exhibit C was essentially what he had said as regards the six elements in the middle of his charge, with some portions underlined.

[6] He invited counsel to comment on what he had done. There was no reply. The jury then returned with a guilty verdict.

Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

[8] In a related vein, the appellant asserts that the so-called question from the jury (the writing which said "6 elements") was not clear and the judge had an obligation to clarify it, see for example, R. v. H.(L.I.), 2003 MBCA 97, 176 C.C.C. (3d) 526, R. v. Fleiner (1985), 11 O.A.C. 181, 23 C.C.C. (3d) 415 (Ont. C.A.). The judge decided the jury wanted a written copy of what he had said about the six elements as a result of his discussion with court staff. Rather than relying on that discussion, the appellant argues that the judge should have sought clarification from the jury and discussed the matter with counsel before replying.

[9] While acknowledging that it would have been preferable had the judge handled the matter differently, the Crown takes the position that this communication from the jury concerned a purely administrative matter; its answer did not affect the vital interests of the appellant. It also suggests that the communication from the jury was not ambiguous. In any event, the judge's action (sending the jury a written version of what he had said during this charge) did not prejudice the appellant and did not detract from his right to a fair trial.

Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

[12] Second, the judge's treatment of the communication breached section 650 of the Criminal Code. This exchange between the judge and the jury was not about an administrative matter. It was not akin to a question from the jury about whether each juror had to fill out the "decision tree" form given to them by the trial judge to facilitate their decision-making: R. v. Ferguson, 2006 ABCA 36, 384 A.R. 318. Nor did it concern arrangements for smokers, lunch breaks, or the time at which the jury might retire for the night: R. v. Fontaine, 2002 MBCA 107, 168 C.C.C. (3d) 263 at para. 57.

[13] Rather, this was a matter that affected the appellant's vital interests. It was "a concern about an issue affecting the substantive decision-making" which might "indicate their desire for, or need of, direction on a particular issue.": Ferguson at para. 26. It was an inquiry that had the potential to affect the outcome of the trial in that it went to the heart of what the Crown had to prove in order to obtain a conviction.

[14] In a somewhat similar case, during the jury's deliberations the deputy gave the judge a piece of paper with three lines written on it which were not in the form of a question. The judge advised the deputy to return the paper to the jury and tell them that if they had a question to write it out. The jury did not reply. This event came to light when counsel asked the judge, just before the jury verdict, whether the jury had asked him a question. A new trial was ordered. The Court of Appeal disagreed that it could be assumed that this was a purely administrative matter. Rather, it appeared that the jury was seeking assistance with respect to their deliberations about the guilt or innocence of the accused. This affected his vital interests and the communication ought to have been read in open court and submissions taken about the appropriate response: R v. Giuliano (1984), 4 O.A.C. 66, 14 C.C.C. (3d) 20 (Ont. C.A.).

[15] Although not on all fours with this case, in R. v. Paquette, [1979] 2 S.C.R. 26, aff'g (1978) 17 A.R. 376 (Alta. S.C.), the Supreme Court also ordered a new trial when the jury sent a note asking for a copy of the judge's comments on first and second degree murder and its relationship to self-defence. The judge consulted counsel in his private chambers and decided to answer the question by telling the jury that he did not have a form of copy he could give them, but that they should ask if they had particular questions. Without analysis, the Supreme Court concluded that this procedure was improper because the "jury was entitled to have its question answered and dealt with in open Court and the accused had to be present."

[16] A final matter concerns the applicability of section 686(1)(b)(iv) of the Criminal Code, which permits the court to dismiss an appeal when a procedural irregularity does not prejudice the accused. For the reasons stated above, this was more than a procedural irregularity and we cannot say that it did not prejudice the accused. Thus, this curative provision has no application.

[17] The appeal is allowed and a new trial ordered. The appellant will be subject to the same release conditions as those that were in force before his conviction.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, Northwest Territories
this 7th day of November, 2008

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Charbonneau J.A.

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J. MacFarlane
for the Respondent

A.D. Pringle
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A-1-AP 2007000024
A-1-AP 2007000025

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[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

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[15] Although not on all fours with this case, in R. v. Paquette, [1979] 2 S.C.R. 26, aff'g (1978) 17 A.R. 376 (Alta. S.C.), the Supreme Court also ordered a new trial when the jury sent a note asking for a copy of the judge's comments on first and second degree murder and its relationship to self-defence. The judge consulted counsel in his private chambers and decided to answer the question by telling the jury that he did not have a form of copy he could give them, but that they should ask if they had particular questions. Without analysis, the Supreme Court concluded that this procedure was improper because the "jury was entitled to have its question answered and dealt with in open Court and the accused had to be present."

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[17] The appeal is allowed and a new trial ordered. The appellant will be subject to the same release conditions as those that were in force before his conviction.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, Northwest Territories
this 7th day of November, 2008

Hunt J.A.

Martin J.A.

Charbonneau J.A.

Appearances:

J. MacFarlane

for the Respondent

A.D. Pringle
for the Appellant

A-1-AP 2007000024
A-1-AP 2007000025

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

MEMORANDUM OF JUDGMENT

In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

The Court:
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

[4] The jury retired to deliberate. Later, the judge told counsel that he had been advised there was a verdict. He then added:

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EXHIBIT B: QUESTION FROM THE JURY

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Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

[8] In a related vein, the appellant asserts that the so-called question from the jury (the writing which said "6 elements") was not clear and the judge had an obligation to clarify it, see for example, R. v. H.(L.I.), 2003 MBCA 97, 176 C.C.C. (3d) 526, R. v. Fleiner (1985), 11 O.A.C. 181, 23 C.C.C. (3d) 415 (Ont. C.A.). The judge decided the jury wanted a written copy of what he had said about the six elements as a result of his discussion with court staff. Rather than relying on that discussion, the appellant argues that the judge should have sought clarification from the jury and discussed the matter with counsel before replying.

[9] While acknowledging that it would have been preferable had the judge handled the matter differently, the Crown takes the position that this communication from the jury concerned a purely administrative matter; its answer did not affect the vital interests of the appellant. It also suggests that the communication from the jury was not ambiguous. In any event, the judge's action (sending the jury a written version of what he had said during this charge) did not prejudice the appellant and did not detract from his right to a fair trial.

Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

[12] Second, the judge's treatment of the communication breached section 650 of the Criminal Code. This exchange between the judge and the jury was not about an administrative matter. It was not akin to a question from the jury about whether each juror had to fill out the "decision tree" form given to them by the trial judge to facilitate their decision-making: R. v. Ferguson, 2006 ABCA 36, 384 A.R. 318. Nor did it concern arrangements for smokers, lunch breaks, or the time at which the jury might retire for the night: R. v. Fontaine, 2002 MBCA 107, 168 C.C.C. (3d) 263 at para. 57.

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for the Respondent

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A-1-AP 2007000024
A-1-AP 2007000025

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

MEMORANDUM OF JUDGMENT

In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

The Court:
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

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EXHIBIT B: QUESTION FROM THE JURY

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Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

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[9] While acknowledging that it would have been preferable had the judge handled the matter differently, the Crown takes the position that this communication from the jury concerned a purely administrative matter; its answer did not affect the vital interests of the appellant. It also suggests that the communication from the jury was not ambiguous. In any event, the judge's action (sending the jury a written version of what he had said during this charge) did not prejudice the appellant and did not detract from his right to a fair trial.

Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

[12] Second, the judge's treatment of the communication breached section 650 of the Criminal Code. This exchange between the judge and the jury was not about an administrative matter. It was not akin to a question from the jury about whether each juror had to fill out the "decision tree" form given to them by the trial judge to facilitate their decision-making: R. v. Ferguson, 2006 ABCA 36, 384 A.R. 318. Nor did it concern arrangements for smokers, lunch breaks, or the time at which the jury might retire for the night: R. v. Fontaine, 2002 MBCA 107, 168 C.C.C. (3d) 263 at para. 57.

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A-1-AP 2007000024
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OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

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In the Court of Appeal of the Northwest Territories

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Date: 2008 11 05
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Registry: Yellowknife

Between:

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David Patrick Lucas

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The Court:
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Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

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Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

[8] In a related vein, the appellant asserts that the so-called question from the jury (the writing which said "6 elements") was not clear and the judge had an obligation to clarify it, see for example, R. v. H.(L.I.), 2003 MBCA 97, 176 C.C.C. (3d) 526, R. v. Fleiner (1985), 11 O.A.C. 181, 23 C.C.C. (3d) 415 (Ont. C.A.). The judge decided the jury wanted a written copy of what he had said about the six elements as a result of his discussion with court staff. Rather than relying on that discussion, the appellant argues that the judge should have sought clarification from the jury and discussed the matter with counsel before replying.

[9] While acknowledging that it would have been preferable had the judge handled the matter differently, the Crown takes the position that this communication from the jury concerned a purely administrative matter; its answer did not affect the vital interests of the appellant. It also suggests that the communication from the jury was not ambiguous. In any event, the judge's action (sending the jury a written version of what he had said during this charge) did not prejudice the appellant and did not detract from his right to a fair trial.

Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

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"jury was entitled to have its question answered and dealt with in open Court and the accused had to be present."

[16] A final matter concerns the applicability of section 686(1)(b)(iv) of the Criminal Code, which permits the court to dismiss an appeal when a procedural irregularity does not prejudice the accused. For the reasons stated above, this was more than a procedural irregularity and we cannot say that it did not prejudice the accused. Thus, this curative provision has no application.

[17] The appeal is allowed and a new trial ordered. The appellant will be subject to the same release conditions as those that were in force before his conviction.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, Northwest Territories
this 7th day of November, 2008

Hunt J.A.

Martin J.A.

Charbonneau J.A.

Appearances:

J. MacFarlane
for the Respondent

A.D. Pringle
for the Appellant

A-1-AP 2007000024
A-1-AP 2007000025

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

MEMORANDUM OF JUDGMENT

In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

The Court:
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Conviction by

The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

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Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

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Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

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assistance with respect to their deliberations about the guilt or innocence of the accused. This affected his vital interests and the communication ought to have been read in open court and submissions taken about the appropriate response: R v. Giuliano (1984), 4 O.A.C. 66, 14 C.C.C. (3d) 20 (Ont. C.A.).

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[16] A final matter concerns the applicability of section 686(1)(b)(iv) of the Criminal Code, which permits the court to dismiss an appeal when a procedural irregularity does not prejudice the accused. For the reasons stated above, this was more than a procedural irregularity and we cannot say that it did not prejudice the accused. Thus, this curative provision has no application.

[17] The appeal is allowed and a new trial ordered. The appellant will be subject to the same release conditions as those that were in force before his conviction.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, Northwest Territories
this 7th day of November, 2008

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Martin J.A.

Charbonneau J.A.

Appearances:

J. MacFarlane
for the Respondent

A.D. Pringle
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A-1-AP 2007000024
A-1-AP 2007000025

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

MEMORANDUM OF JUDGMENT

In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

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The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
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Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

[4] The jury retired to deliberate. Later, the judge told counsel that he had been advised there was a verdict. He then added:

Mr. Sheriff was asked by the jurors, he advised me, if they could have a handwritten or typewritten list of the six elements to which I had referred. He said that he had requested the jury to put that in writing, and they have given a slip of paper that says, "Six elements". So, just for the record, I am going to ask Madam Clerk to mark that as Exhibit B for identification.

EXHIBIT B: QUESTION FROM THE JURY

THE COURT: And, as a result of that, and because it was so innocuous, I took from my written instructions which I had provided to you in part III, page 3 the contents of paragraph 4, which starts off by saying:

"For the Crown to succeed [on the charge in the indictment], it must be proved beyond a reasonable doubt the following 6 ingredients, as to sexual assault,"

and then they are listed. And then the last line reads:

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Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

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Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

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A-1-AP 2007000024
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- and -

David Patrick Lucas

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In the Court of Appeal of the Northwest Territories

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Date: 2008 11 05
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The Court:
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Louise Charbonneau

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice J.D. Rooke
Convicted on the 16th day of November, 2007
(Docket: S-CR-2007 000048)

Memorandum of Judgment

The Court:

[1] The appellant was convicted after trial by judge and jury of sexual assault on his daughter who was between 8 and 10 years of age at the time.

[2] There are two grounds of appeal. Our view about the second makes it unnecessary to consider the first.

Facts

[3] In his opening remarks to the jury, the trial judge outlined the six essential ingredients to be proved by the Crown. He said he would elaborate on them later. He referred more generally to these "six elements" in the middle of his charge and later discussed them in detail. There is no complaint about what he said.

[4] The jury retired to deliberate. Later, the judge told counsel that he had been advised there was a verdict. He then added:

Mr. Sheriff was asked by the jurors, he advised me, if they could have a handwritten or typewritten list of the six elements to which I had referred. He said that he had requested the jury to put that in writing, and they have given a slip of paper that says, "Six elements". So, just for the record, I am going to ask Madam Clerk to mark that as Exhibit B for identification.

EXHIBIT B: QUESTION FROM THE JURY

THE COURT: And, as a result of that, and because it was so innocuous, I took from my written instructions which I had provided to you in part III, page 3 the contents of paragraph 4, which starts off by saying:

"For the Crown to succeed [on the charge in the indictment], it must be proved beyond a reasonable doubt the following 6 ingredients, as to sexual assault,"

and then they are listed. And then the last line reads:

"Those are the 6 elements or ingredients that the Crown must prove beyond a reasonable doubt."

So I clipped that out of my notes and handed it to them and requested through Mr. Sheriff that, after they deliberate, to return that piece of paper. I don't think it needs to be marked with that description, but I am happy to have it marked as Exhibit C. Maybe that is the best way. We will have it marked as Exhibit C when it is returned to us.
A.B. 430/9-46

[5] The communication he received and marked as an exhibit was a piece of paper that simply said "6 elements": A.B. 444, Exhibit B. Exhibit C was essentially what he had said as regards the six elements in the middle of his charge, with some portions underlined.

[6] He invited counsel to comment on what he had done. There was no reply. The jury then returned with a guilty verdict.

Position of the Parties

[7] The appellant submits that this procedure breached section 650 of the Criminal Code, R.S.C. 1985, c. C-46, which requires that the accused be present during the whole of his trial. He says the jury - judge communications were steps that advanced his trial, so his presence was necessary. The proper procedure was for the judge to read the communication in open court, invite submissions from counsel, and then instruct the jury in open court in the presence of all parties.

[8] In a related vein, the appellant asserts that the so-called question from the jury (the writing which said "6 elements") was not clear and the judge had an obligation to clarify it, see for example, R. v. H.(L.I.), 2003 MBCA 97, 176 C.C.C. (3d) 526, R. v. Fleiner (1985), 11 O.A.C. 181, 23 C.C.C. (3d) 415 (Ont. C.A.). The judge decided the jury wanted a written copy of what he had said about the six elements as a result of his discussion with court staff. Rather than relying on that discussion, the appellant argues that the judge should have sought clarification from the jury and discussed the matter with counsel before replying.

[9] While acknowledging that it would have been preferable had the judge handled the matter differently, the Crown takes the position that this communication from the jury concerned a purely administrative matter; its answer did not affect the vital interests of the appellant. It also suggests that the communication from the jury was not ambiguous. In any event, the judge's action (sending the jury a written version of what he had said during this charge) did not prejudice the appellant and did not detract from his right to a fair trial.

Decision and Analysis

[10] In our view a new trial must be ordered because of the manner in which the judge handled the communication from the jury.

[11] First, it was not proper for the trial judge to rely on a verbal communication from court staff to determine what information the jury sought relative to his charge. It was not clear what "6 elements" meant. It may have been, for example, that the jury wanted amplification of one of the elements. The procedure he followed was dangerous in that it filtered communications between the judge and the jury through a third party. As a result, the judge could not be sure what help was being sought from him.

[12] Second, the judge's treatment of the communication breached section 650 of the Criminal Code. This exchange between the judge and the jury was not about an administrative matter. It was not akin to a question from the jury about whether each juror had to fill out the "decision tree" form given to them by the trial judge to facilitate their decision-making: R. v. Ferguson, 2006 ABCA 36, 384 A.R. 318. Nor did it concern arrangements for smokers, lunch breaks, or the time at which the jury might retire for the night: R. v. Fontaine, 2002 MBCA 107, 168 C.C.C. (3d) 263 at para. 57.

[13] Rather, this was a matter that affected the appellant's vital interests. It was "a concern about an issue affecting the substantive decision-making" which might "indicate their desire for, or need of, direction on a particular issue.": Ferguson at para. 26. It was an inquiry that had the potential to affect the outcome of the trial in that it went to the heart of what the Crown had to prove in order to obtain a conviction.

[14] In a somewhat similar case, during the jury's deliberations the deputy gave the judge a piece of paper with three lines written on it which were not in the form of a question. The judge advised the deputy to return the paper to the jury and tell them that if they had a question to write it out. The jury did not reply. This event came to light when counsel asked the judge, just before the jury verdict, whether the jury had asked him a question. A new trial was ordered. The Court of Appeal disagreed that it could be assumed that this was a purely administrative matter. Rather, it appeared that the jury was seeking assistance with respect to their deliberations about the guilt or innocence of the accused. This affected his vital interests and the communication ought to have been read in open court and submissions taken about the appropriate response: R v. Giuliano (1984), 4 O.A.C. 66, 14 C.C.C. (3d) 20 (Ont. C.A.).

[15] Although not on all fours with this case, in R. v. Paquette, [1979] 2 S.C.R. 26, aff'g (1978) 17 A.R. 376 (Alta. S.C.), the Supreme Court also ordered a new trial when the jury sent a note asking for a copy of the judge's comments on first and second degree murder and its relationship to self-defence. The judge consulted counsel in his private chambers and decided to answer the question by telling the jury that he did not have a form of copy he could give them, but that they should ask if they had particular questions. Without analysis, the Supreme Court concluded that this procedure was improper because the "jury was entitled to have its question answered and dealt with in open Court and the accused had to be present."

[16] A final matter concerns the applicability of section 686(1)(b)(iv) of the Criminal Code, which permits the court to dismiss an appeal when a procedural irregularity does not prejudice the accused. For the reasons stated above, this was more than a procedural irregularity and we cannot say that it did not prejudice the accused. Thus, this curative provision has no application.

[17] The appeal is allowed and a new trial ordered. The appellant will be subject to the same release conditions as those that were in force before his conviction.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, Northwest Territories

this 7th day of November, 2008

Hunt J.A.

Martin J.A.

Charbonneau J.A.

Appearances:

J. MacFarlane
for the Respondent

A.D. Pringle
for the Appellant

A-1-AP 2007000024
A-1-AP 2007000025

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

David Patrick Lucas

Appellant

MEMORANDUM OF JUDGMENT

In the Court of Appeal of the Northwest Territories

Citation: R. v. Lucas, 2008 NWTCA 11

Date: 2008 11 05
Docket: A-1-AP-2008-000001
Registry: Yellowknife

Between:

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- and -

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Appellant

The Court:
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