In the Court of Appeal of the Northwest Territories

Citation: R. v. Giroux, 2010 NWTCA 10

Date: 2010 10 25
Docket: A-1-AP-2010-000007
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Lloyd David Giroux

Appellant

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Susan Cooper

Memorandum of Judgment
Delivered from the Bench

Appeal from the Conviction by
The Honourable Madam Justice V.A. Schuler
Dated the 27th day of April, 2010
Filed on the 31st day of May, 2010
(2010 NWTSC 33, Docket:S-1-CR-2009000036)

Memorandum of Judgment
Delivered from the Bench

Bielby J.A. (for the Court):

INTRODUCTION

[1] The Appellant appeals his convictions for break, enter and commit sexual assault as well as breach of probation contrary to sections 348(1)(b) and 733.1(1) of the *Criminal Code*, respectively. Evidence at trial showed that at approximately 1:40 a.m. on January 2, 2009 the complainant encountered an unknown male inside her residence who grabbed her by the arm and breasts. He briefly left after she hit him in the eye with a corner of a book but returned shortly afterward and succeeded in removing her pants. She began to scream and he left again. He was in her home about 10 minutes in total. She could not identify her assailant but did not believe it to be JK who resided in the house next door. She thought the assailant wore clothing similar to that of a man she had seen going next door previously but did not give a name for that man.

[2] The police arrived twenty-five minutes after the assault. They found many tracks in the snow but identified a set which appeared "more fresh" than others. They appeared to have been made by a shoe with a triangular shape on the bottom of the heel. These tracks formed a path between the complainant's house and JK's house and went in both directions.

[3] The accused was found in bed by the police in JK's house at 2:20 am that day. He was observed to have a tear drop shaped tattoo under one eye as well as tattoos on both sets of knuckles, both thumbs, on his wrist and below his palms. The police found a wet pair of shoes with a triangular shape on the heel in the basement of that house. AS, the accused's girlfriend who also resided there, told the police that those shoes had belonged to the Appellant but that he had given them to JK because they did not fit. JK, was also at home when the police arrived.

[4] A photo array was presented to the complainant which at 9:17 p.m. the evening of the assault. It included a photo of the Appellant. She did not identify him or anyone else from the array as being the intruder.

Standard of Review

[5] The parties agree that the standard of review to be employed to determine whether a verdict is unreasonable is "whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered": see *R. v. Morrissey*, (1995) O.J. No. 639 at para. 93 (Ont. C.A.); *R. v. Biniaris*, [2000] 1 S.C.R. 381. The test applies equally to cases in which the trier of fact is a judge sitting alone.

[6] A trier of fact may fail to render a reasonable verdict through a misapprehension of evidence, ie."a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence".

ISSUE - Did the trial judge arrive at an unreasonable verdict because she failed to develop a reasonable doubt due to a misapprehension of the evidence ?

[7] The Appellant argues that the verdict here was unreasonable because the trial judge should have had a reasonable doubt as to his identity, ie. that he was the person who assaulted the complainant. That reasonable doubt should have arisen because of the evidence which showed he could have arrived at JK's home well before the attack next door and did not leave again. Alternately, it should have arisen because JK could have worn the shoes that made the track between the two houses or because of the uncertainty that the track had been made by the intruder at all. Finally, it should have arisen because of the complainant's inability to pick the Appellant out of the photo lineup the same day and from her failure to describe her attacker as being tattooed.

[8] The Crown concedes that there was no direct evidence as to the time of the accused's arrival in the vicinity. The complainant testified that the intruder arrived at her home about 1:40 a.m. and that the entire incident took about 10 minutes. Both AS and JK awoke that morning to find the Appellant in their house. AS had left the door unlocked so that he could enter after she had gone to sleep. There is no evidence as to what time he arrived there; the only evidence that AS and JK were able to provide was of the time they each individually became aware that he was present in the house. Neither AS nor JK saw the Appellant leave the house after they became aware of his presence. Neither AS or JK testified that the Appellant looked cold from a walk in temperatures of minus 30 degrees nor that he was out of breath or flustered from a struggle that would have occurred only moments before if he had arrived at their home about 1:20 a.m.

[9] While the evidence suggests it is possible that the accused arrived at their house moments after the assault, it is also possible that he may have arrived there before the assault and did not leave after his arrival.

[10] AS testified that while a pair of Fox shoes which the police found in her house belonged to the Appellant, and that he wore them from time to time, she knew the Appellant had told JK that he could have them because they were too small for him. JK identified the shoes as his own. The police found these shoes made a triangular tread mark similar to that found in the trail between the two houses.

[11] It is possible therefore that JK wore those shoes to make the trail between the two houses rather than the accused if those shoes were, indeed, the ones which made the trail. He was present in the house and area at the time the assault occurred. While the complainant "didn't think" he was her attacker, she could not identify her attacker and did not, therefore, definitively exclude JK or someone else.

[12] The trial judge found that the Appellant matched the physical description of the assailant given by the complainant. She addressed the complainant's failure to pick the Appellant out of the photo lineup as meaning only that the complainant did not rule him out as the intruder, just that she could not identify him.

[13] There were significant physical differences between that of the Appellant and the complainant's description of her assailant, in particular relating to her failure to describe any tattoos. The complainant testified that the assailant was not wearing gloves and she could see his bare hands. She saw his face, including his eyes, nose and cheek area. She came close enough to him to hit him in the eye with the corner of a book. She was asked if she noticed any special features on either the assailant's hands or face and confirmed that she did not.

[14] However, the Appellant had a teardrop tattoo under his right eye that stood out to the officers at the time of arrest. Photos of him taken nine days later show that he had the word "HATE" tattooed across his left hand knuckles and the letters "LG" on his right hand below his thumb. A police officer confirmed that he was able to observe these same tattoos from the witness box approximately 8' away from the Appellant during the trial, as well as observing additional tattoos, a star and some lettering on his right wrist and writing on his left thumb. He confirmed that the Appellant also had a tattoo just below the palm of his right hand.

[15] Further, the complainant's failure to pick the Appellant from the photo lineup was not something which was simply a failure to provide evidence to assist the Crown. It was capable of raising a reasonable doubt as to the Appellant's guilt, particularly as the photo lineup was presented so shortly after the offence and because of his striking facial tattoo.

CONCLUSION

[16] We conclude that the verdict was unreasonable due to a misapprehension of the evidence of identity given the uncertainty over timing and over who could have worn the shoes that made the track in the snow and as to whether those were even the shoes that made the tracks as well as from the complainant's failure to describe her attacker as having tattoos and her inability to identify the Appellant from the photo lineup.

[17] The appeal is therefore allowed and an acquittal entered on both charges. The conviction for breach of probation turned on the conviction for the break, enter and commit sexual assault charge and thus must fall as it falls.

Appeal heard on October 19, 2010

Memorandum filed at Yellowknife, N.W.T.
this day of , 2010

Bielby J.A.

Appearances:

S.H. Smallwood
for the Respondent

C. Wawzonek
for the Appellant

A-1-AP 2010000007

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- and -

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MEMORANDUM OF JUDGMENT