In the Court of Appeal of the Northwest Territories

Citation: R. v. Gordon, 2011 NWTCA 06

Date: 2011 11 15
Docket: A-1-AP-2011-000005
Registry: Yellowknife, NWT

Between:

Her Majesty the Queen

Respondent

- and -

Lloyd Gordon

Appellant

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Judge C. Gagnon
Dated the 8th day of December, 2010

Memorandum of Judgment

The Court:

[1] The appellant appeals his conviction for aggravated assault on the basis that the trial judge erred by: (1) allowing the Crown to enter into a *voir dire* to establish the voluntariness of the appellant's statement during his cross-examination; (2) shifting the burden of proof to the appellant; (3) misapplying the principles set out in *R v W(D)*, [1991] 1 SCR 742, 63 CCC (3d) 397; and (4) misapprehending the evidence.

I. Background

[2] At 12:03 p.m. on May 28, 2010 Constable Fortin of the RCMP received a call from the appellant who complained about Jack Mouse banging loudly on his apartment door. Eight minutes later, Constable Fortin received a call from the Health Center about Mouse. Constable Fortin attended the Health Center at approximately 12:30 p.m. He observed Mouse lying on a stretcher with a hole in his t-shirt and a white bandage covering a large surface of his stomach. Mouse had a wound in his stomach that required 32 staples to close. At 1:11 p.m. Constable Fortin arrested the appellant at the appellant's residence.

[3] The Crown called three witnesses: the victim (Mouse), Constable Fortin, and Phillip Denethlon. There was no medical evidence, or forensic evidence and no weapon was found. Mouse testified that after banging on the appellant's door, the appellant opened it and struck him with something in the stomach. Mouse said that he saw blood on the appellant's hand and side. Mouse then walked away. He said that he didn't feel pain because he was intoxicated. He walked toward the main road and just outside the appellant's building he came across Phillip Denethlon. Denethlon testified that Mouse was "holding his stomach and after he released it, that's when I seen something sticking out of his stomach," and that the "something" was skin-coloured. Denethlon told Mouse to go to the Health Center. Mouse walked there holding his stomach. He said this took about four to five minutes.

[4] The appellant testified. He denied wounding Mouse. He stated that he was heavily intoxicated. In his examination-in-chief, the appellant stated that after hearing Mouse bang on the door, he opened the door and pushed him away stating: "go away" and "I called the police." The appellant testified that Mouse started knocking again, so the appellant opened the door and pushed Mouse out again. During the cross-examination of the appellant, the Crown stated that it wished to cross-examine the appellant on a prior inconsistent statement. This was a statement given to the police on May 30, 2010 in which the appellant stated that he only opened the door to Mouse once. The statement was not entered as part of the Crown's case. The Crown asked the trial judge to enter into a *voir dire* with respect to the voluntariness of the appellant's statement. The trial judge allowed the *voir dire* stating that:

> [T]he impact on the fairness of the trial, I do not see any prejudice at this point and I do not find that the Crown had actually renounced to cross-examine the accused on a prior statement now that it seems that an inconsistency has arisen.
>
> So, for these reasons, I will allow the voir dire to determine voluntariness, and I also will accept evidence or submissions by counsel with respect to any issue of fairness if they see one; but at this time, I do not think – I do not see that it is unfair to hold a voir dire.

[5] The appellant ultimately admitted that his statement to the police was voluntary. It was also exculpatory. The Crown was permitted to cross-examine the appellant on his prior inconsistent statement.

[6] The other witness who gave evidence on behalf of the appellant was his girlfriend, Janice Norwegian, who was in the apartment at the time but did not see the encounter between the appellant and Mouse.

[7] The trial judge found that the appellant's testimony appeared less than reliable as a result of his intoxication and the fact that there was a discrepancy between the evidence he gave at trial (as regards opening the door to Mouse a second time and pushing him out the door a second time) and his prior statement to the police (where there was mention only of one occasion on which he opened the door to Mouse).

[8] The trial judge found some aspects of Mouse's testimony unreliable (such as his level of aggression when banging on the appellant's door) but found that, as a whole, Mouse's narrative was consistent with the time-line provided by the police. The trial judge stated that she was left with the following question: "How did Mr. Mouse end up with a cut to his stomach? This is where, in the absence of forensic evidence or medical evidence, I have to use common sense." The trial judge concluded that looking at the totality of the evidence, it would be illogical to conclude that the appellant did not stab or stick something into Mouse's stomach.

II. Grounds of Appeal

[9] The appellant says that the trial judge erred by:

(A) allowing the Crown to enter into a *voir dire* to determine the voluntariness of his statement, after it had closed its case;

(B) failing to correctly apply the doctrines of reasonable doubt, the presumption of innocence and the burden of proof;

(C) misapplying the principles set out in *R v W(D);* and

(D) misapprehending the absence of evidence relating to the appellant being the perpetrator of the offence, thereby rendering an unreasonable verdict.

[10] The first three grounds are reviewed on a standard of correctness, while the fourth ground mandates appellate deference unless the trial judge committed a palpable and overriding error.

III. Analysis

A. *Voir Dire*

[11] The appellant submits that the trial judge improperly permitted the Crown to open the *voir dire* after he had taken the stand. He says that the trial judge erred in her conclusion that the ultimate criterion for deciding whether or not it was permissible for the Crown to open a *voir dire* after the accused had entered the witness-box depended on the issue of trial fairness. He suggests that only one approach is correct since the advent of the *Charter*: that the right to silence and the right to make full answer and defence demand that the accused know the case that is to be met before waiving his or her *Charter* protected rights and choosing to take the stand in his or her own defence. He asks this court to articulate a principle to the effect that in all cases where the accused has given a statement to a person in authority, the Crown must enter into a *voir dire* before it closes its case, even where the Crown does not know whether the statement will be relevant.

[12] We decline to adopt such a principle. There is already a legal principle by which this court is bound. The Supreme Court of Canada in *R v Chaulk*, [1990] 3 SCR 1303, [1991] 2 WWR 385 endorsed the following passage from *R v Drake* (1970), 1 CCC (2d) 396 (SQB) at para 118:

> There is a well-known principle that evidence which is clearly relevant to the issues and within the possession of the Crown should be advanced by the Crown as part of its case, and such evidence cannot properly be admitted after the evidence for the defence by way of rebuttal. In other words, the law regards it as unfair for the Crown to lie in wait and to permit the accused to trap himself. The principle, however, does not apply to evidence which is only marginally, minimally or doubtfully relevant.

Drake was a pre-*Charter* case involving precisely this issue: the use of an accused's prior inconsistent statement to the police to cross-examine an accused, where the statement had not been put into evidence as part of the Crown's case. The *Drake* principle as endorsed by the Supreme Court is a sound, workable principle. The procedure proposed by the appellant would require the Crown to establish the voluntariness of an accused's statement in the off chance that the accused might offer contradictory testimony. This would result in a waste of the court's time

and of valuable resources, particularly in a case such as this where limited police resources must serve an area of communities separated by vast distances.

[13] Here the Crown sought to use the statement solely to test the accused's credibility. It did not propose to use the statement to establish a material fact. The trial judge correctly distinguished this situation from that in her previous decision in *R v Zoe*, 2009 NWTTC 19,[2009] NWTJ No 80, where the Crown stated at the opening of its case that it did not propose to tender any statement of the accused as part of its case or to cross-examine the accused. Moreover, the appellant admitted that the statement was voluntary.

[14] Accordingly, the trial judge did not err in permitting the Crown to enter into a *voir dire* for the purposes of cross-examining the appellant on his statement that Mouse had come to the door twice. This is the type of situation contemplated by the Supreme Court in *Chaulk*. This ground of appeal is dismissed.

B. Burden of Proof

[15] The appellant states the trial judge erred in improperly shifting the burden to the appellant to propose an alternative source of the injury. The only other theory of the cause of the injury was suggested during the appellant's submissions to the trial judge. He suggested that Mouse had been wounded before he arrived at the appellant's door. There was no evidence supporting or refuting this theory. The trial judge did not comment on this theory in her reasons.

[16] The trial judge appreciated that this was a case where she was being asked to draw an inference from the evidence which she accepted and the facts that she had found. She accepted Mouse's testimony that the appellant struck him in the stomach with something. She noted from Denethlon's testimony that the victim was subdued at the time the two met, in sharp contrast to the belligerent man who had been pounding at the appellant's door moments before. She then placed this evidence in the time-line which started with the appellant's call to the RCMP and ended with the victim's arrival at the Health Center. Her reasoning as a whole does not support the appellant's submission that she placed the burden of proof on him to propose an alternate source of the injury.

C. *W(D)* Analysis

[17] The appellant submits that while the trial judge made reference to *W(D)* in her reasons, she did not properly apply it. In particular, he says that while the trial judge concluded that the appellant's testimony appeared less than reliable, she did not actually conclude that it raised a reasonable doubt as to his innocence, nor whether the Crown's case, standing on its own, was sufficient to prove the case against the appellant beyond a reasonable doubt.

[18] We are not persuaded that the trial judge so erred. She stated:

> The defence is correct to say that I will have to rely on *W.(D.)* in assessing the evidence. I cannot – the approach that I need to take must take into consideration the fact that the accused is presumed innocent until he is proven guilty, that he benefits from this presumption on questions of fact as well as on questions of credibility. I cannot engage in a comparison of testimonies, at least between the evidence, the testimony of Mr. Mouse and the testimony of Mr. Gordon and basically say which one I prefer or to say, well, if I believe Mr. Mouse, then I must disbelieve Mr. Gordon. That is not how it works. Technically, in order to give to Mr. Gordon the benefit of any doubt, I must proceed in fact to analyze his evidence first, with a caution that the analysis of such evidence is not done in a vacuum. So, ultimately, I need to look at the totality of the evidence and determine whether or not the Crown has proven the allegations.

[19] She then analyzed the appellant's evidence in some detail, observing that it was unusual that it was the appellant who called the RCMP first. She also accepted his evidence about the victim's loud and annoying behavior when he was knocking on the door. However, she did not find him to be credible with respect to what actually happened at the door, relying in part for her adverse finding with respect to the appellant's credibility on the different versions of the events which he had offered. She did not believe the appellant, nor was she left with a reasonable doubt by his evidence on the material issue. The trial judge then analyzed the balance of the evidence and was satisfied based on Mouse's version of the events, the encounter with Denethlon and the time-line, that she could draw the inference that the appellant had stabbed Mouse.

[20] When the reasons are read as a whole, we cannot conclude that the trial judge erred in her application of *W(D)*.

D. Misapprehension of Evidence

[21] The appellant submits that the trial judge failed to give due consideration to the absence of evidence from Billy Cholo or George Betsaka, who were in the appellant's residence at the time of the incident. It appears that Constable Fortin knew of the presence of Betsaka. He made no mention of Cholo. Presumably if these witnesses had assisted the Crown's case, they would have been called to give evidence. The appellant knew that they were in the residence at the time and could have called them to give evidence or even asked the Crown to make them available for cross-examination. There is no merit to this ground of appeal.

IV. Conclusion

[22] The appeal is dismissed.

Appeal heard on October 18, 2011

Memorandum filed at Yellowknife, N.W.T.
this 15th day of November, 2011

Martin J.A.

Rowbotham J.A.

O'Ferrall J.A.

Appearances:

M. Lecorre
for the Respondent

A. Parr
for the Appellant

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