

# In the Court of Appeal for the Northwest Territories

Citation: *R v Akhiatak*, 2018 NWTCA 3

Date: 2018 05 29  
Docket: A-1-AP-2016-000011  
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

Noah Akhiatak

Appellant

## Restriction on Publication

**Identification Ban** – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any way.

**NOTE:** This judgment is intended to comply with the identification ban.

---

The Court:

**The Honourable Mr. Justice Ronald Berger**  
**The Honourable Mr. Justice Frans Slatter**  
**The Honourable Mr. Justice Thomas W. Wakeling**

---

## Memorandum of Judgment

Appeal from the Conviction by  
The Honourable Madam Justice L.A. Charbonneau  
Dated the 2nd day of May, 2016  
(Docket: S-1-CR2014000015)

---

## Memorandum of Judgment

---

### The Court:

[1] The appellant appeals his conviction for sexual assault and unlawful confinement. The complainant testified that when she visited the appellant's apartment, he would not let her leave, and sexually assaulted her despite her protestations.

[2] It was put to the complainant in cross-examination that the appellant told her she could no longer smoke marijuana in his apartment, this event made her angry, and that she had fabricated the allegations. She denied that the appellant told her she could no longer smoke marijuana in his apartment, and adamantly denied fabricating the allegations.

[3] The appellant testified that the assault never happened. He testified that he permitted the complainant to smoke marijuana at his apartment, but that at one point he told her she had to stop because she was underage and he was afraid of jeopardizing his tenancy. Defence counsel later invited the trial judge to draw an inference of fabrication from this event.

[4] In oral reasons covering 24 pages of the transcript, the trial judge carefully considered the evidence. She confirmed the burden of proof was on the Crown, and summarized the test in *R. v W.(D.)*, [1991] 1 SCR 742. She noted specifically that mere rejection of the defence evidence would not lead to a conviction, because it was still necessary to consider whether the Crown had proven the case beyond a reasonable doubt. Further, she particularly noted that it was an error to simply select which of the two versions of the events was more likely.

[5] The trial judge carefully reviewed the evidence of the complainant and a friend who corroborated parts of her story, and concluded that she believed the complainant. In particular, the complainant "appeared genuinely shocked and incredulous" when it was suggested to her that she had fabricated the allegations. She asserted she "would not do that to an elder". The trial judge found the complainant's denial of fabrication to be convincing. The trial judge made an express finding of fact that the conversation about smoking marijuana in the apartment never happened. The trial judge did not believe the appellant's denial that the assault happened, and confirmed that his denial did not leave her with a doubt.

[6] The trial judge reasoned, in part,

. . . [The appellant] says he did not do these things. He says he told [the complainant] she could no longer smoke pot at his house, and defence suggested this could be why she fabricated these allegations. . . . (transcript, p. 292, l. 14-8)

. . . For those reasons, I do reject [the appellant's] evidence on that point, and I find as a fact that this conversation [about smoking marijuana in the apartment] did not actually take place.

As I said, [the appellant] does not have the onus of proving that [the complainant] had a motive to fabricate these allegations, and even if I reject his evidence about that conversation, that certainly does not end matters because the assessment of credibility is not an all or nothing proposition. A trier of fact may reject some aspects of a witness' testimony and accept others. But it goes without saying that having concluded that this aspect of [the appellant's] evidence is untrue and is a fabrication on his part, this raises very serious concerns about the rest of his evidence. More specifically, it raises the question about why he would feel the need to lie about having had this conversation with [the complainant]. . . . (transcript, p. 294, l. 14-32)

I said previously that I rejected [the appellant's] assertion that he told [the complainant] she could no longer come to his house and smoke pot there, and I said already that that, in itself, calls into question the rest of his evidence for obvious reasons.

Given that, and given the fact that his evidence is directly contradicted by other evidence that I find strong and credible, I do reject [the appellant's] denial. I conclude that his denial that these events happened must be rejected. That denial also does not raise a reasonable doubt in my mind about what happened. (transcript, p. 302, l. 35-47, p. 303, l. 1)

The trial judge concluded that the evidence of the complainant was "compelling and believable", notwithstanding some inconsistencies pointed out by the defence. As a result, the Crown had proven its case, and convictions were entered.

[7] The appellant raises three related arguments, all arising out of the way the trial judge dealt with the allegation that the complainant's evidence of the assault was fabricated. Firstly, he argues that the trial judge erred in rejecting the appellant's evidence "solely" based on an argument by defence counsel, namely that the allegations were fabricated. Secondly, he argues that this amounted to the trial judge making a finding of credibility based on evidence not before the court. Thirdly, he argues that the trial judge used her conclusions about fabrication as the "sole" reason for not believing the appellant.

[8] These arguments do not disclose any reviewable error. First of all, it was put directly to the complainant that she had fabricated the allegations. She emphatically denied that, and her denial was believed by the trial judge. Her denial is evidence, made under oath, that the trial judge was entitled to consider. In addition, the appellant testified to a conversation about smoking marijuana in the apartment that the trial judge concluded never happened. That was

further evidence on which the trial judge could make her finding that the appellant's evidence was not credible. It follows that the trial judge did not base her finding on credibility solely on an argument made by defence counsel, nor was it made in the absence of any evidence.

[9] There is also no merit to the argument that the trial judge's disbelief of the appellant was based solely on the unaccepted allegation of fabrication. The trial judge reviewed all of the evidence in detail, and explained carefully why she believed some of it, but not other parts. She discussed the weaknesses in the evidence of the various witnesses, and noted that the complainant's evidence was corroborated by the evidence of her friend. Her rejection of the "marijuana conversation" and the related inference of fabrication were just two components of her overall credibility assessment.

[10] The trial judge stated that she disbelieved the appellant's evidence, and also clearly stated that it did not leave her with a reasonable doubt. The appellant argues that the trial judge did not explain why his evidence did not raise a doubt, but the reasons make it clear it was because the totality of the evidence had proven the case beyond a reasonable doubt. The trial judge's conclusion was based on her consideration of all of the evidence, which is not an error so long as the trial judge stays focussed on the need for the Crown to prove the case beyond a reasonable doubt: *R. v A.N.*, 2017 ONCA 647 at paras. 15-6. Where the trial judge rejects the accused's evidence it can be assumed it raises no reasonable doubt, even if independent reasons for that conclusion are not given: *R. v Boucher*, 2005 SCC 72 at para. 59, [2005] 3 SCR 499; *R. v Vuradin*, 2013 SCC 38 at para. 27, [2013] 2 SCR 639; *R. v Stamp*, 2007 ABCA 140 at para. 45, 74 Alta LR (4th) 47.

[11] The appellant argues that the trial judge reversed the burden of proof, because the appellant had no obligation to prove whether or why the complainant had fabricated the incident. The trial judge specifically recognized that the appellant had no obligation to prove fabrication (*supra*, para. 5; transcript, p. 294, l. 19-21). It was the appellant who raised the issue of fabrication, and the trial judge was entitled (and perhaps even obliged) to deal with that issue in her reasons. Rejecting the suggestion of a motivation for fabrication put forward by the appellant does not amount to reversing the burden of proof.

[12] Finally, the appellant argues that the trial judge subjected the defence evidence to a higher level of scrutiny. This is often no more than an invitation to the appeal court to retry the case: *R. v Radcliffe*, 2017 ONCA 176 at para. 23, 347 CCC (3d) 3. Merely because the Crown's evidence is accepted, and the defence evidence is rejected, does not mean the latter was subjected to a higher level of scrutiny. The defence pointed to certain weaknesses in the Crown's evidence, and the trial judge dealt with them in her reasons. Responding to arguments raised by the defence is a valid component of reasons for decision, and concluding that the identified issues did not affect the ultimate reliability of the evidence does not imply a different level of scrutiny. Confirming that the defence evidence is not only rejected, but that it does not even

leave a reasonable doubt, will often require a more intensive scrutiny of that defence evidence by the trial judge to ensure that nothing is overlooked.

[13] In summary, the convictions were amply supported by the evidence on the record, and the reasons of the trial judge, when read as a whole, amply disclose the line of reasoning that led to those convictions. The appeal is dismissed.

Appeal heard on April 17, 2018

Memorandum filed at Yellowknife, Northwest Territories  
this            day of May, 2018

---

Berger J.A.

---

Slatter J.A.

---

Wakeling J.A.

**Appearances:**

J. Potter  
for the Respondent

E.V. McIntyre  
for the Appellant

IN THE COURT OF APPEAL  
FOR THE NORTHWEST TERRITORIES

---

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Noah Akhiatak**

Appellant

---

MEMORANDUM OF JUDGMENT

---