In the Court of Appeal for the Northwest Territories

Citation: R v JC, 2018 NWTCA 5

Date: 2018 06 29
Docket: A-I-AP-2017-000010
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

JC

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the victim must not be published, broadcast, or transmitted in any way.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 Frans Slatter
The Honourable Madam Justice Susan Cooper
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Decision by
The Honourable Judge B.E. Schmaltz
Dated on the 27th day of June, 2017

Memorandum of Judgment

The Court:

[1] On June 27, 2017, the appellant JC was convicted of sexual assault in the Youth Justice Court.

[2] The Crown stated that the issue for the trial judge was whether the Crown had established beyond a reasonable doubt that the complainant was asleep at the time sexual contact with the accused occurred. The Crown's theory was that because the complainant was asleep, she could not consent to sexual activity. In other words, the issue at trial was not merely consent but the *inability* to consent.

[3] During trial, however, the defence had tendered crucial evidence that at 3:26 am, less than 10 minutes before sexual activity occurred, a mysterious text message was sent from the complainant's cell phone. In closing, defence counsel repeated the Crown's theory that the complainant was asleep "so, obviously, there was no consent", but urged that the uncontroverted evidence of the sent text message raised a reasonable doubt about whether the complainant was asleep.

[4] Although the trial judge seemed to clearly reject any inference that anyone other than the complainant, including the accused, could have sent this mysterious text message, she said:

> Lastly, I have given a lot of thought to the text that was sent to [". . ."] at 3:26 am. As I said earlier, I accept [the complainant's] evidence that she had no memory, or does not recall sending a text to [". . ."]. I cannot make any clear or definite findings with respect to that text. There is some circumstantial evidence that [the complainant's] phone was not a secure phone, and I am referring to when Constable Savill questioned her about having deleted messages off her phone, she stated, and I quote, "I don't normally keep my messages because people go on to my phone and like to snoop around." This does not prove that her phone was not secure, but it raises the possibility that others were able to go onto her phone. There is no evidence that anyone else was on her phone, but, as I said earlier, I believe [the complainant], that she has no recollection of sending a text to [". . ."].

[5] The trial judge then said:

> I have given serious consideration to whether that piece of evidence raises a reasonable doubt about the rest of [the complainant's] evidence. It does not. I do not know and cannot make any findings as to who sent that text or how it was sent, but I am satisfied, when I consider all the evidence before me, that [the complainant] was asleep when it was sent. [Emphasis added]

[6] As summarized by the Supreme Court of Canada in ***R v RP***, 2012 SCC 22 at para 9, [2012] 1 SCR 746 [***RP***], citing ***R v Yebes***, [1987] 2 SCR 168, 3 WCB (2d) 77, and ***R v Biniaris,*** 2000 SCC 15 at para 36, [2000] 1 SCR 381, determining whether a verdict is unreasonable is an assessment of whether the verdict is one that a properly instructed jury or judge could reasonably have rendered. ***RP*** goes on to state that:

> [t]he appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge. (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190). [Emphasis added]

[7] In our view, the trial judge's finding that "[the complainant] was asleep when [the text message] was sent" cannot be rationally reconciled with her previous conclusions that "I cannot make any clear or definite findings with respect to that text", and "I do not know and cannot make any findings as to who sent that text or how it was sent".

[8] We are satisfied that this ground of appeal renders the verdict unreasonable; accordingly, we need not address the additional grounds raised by the appellant.

[9] The appeal is allowed and a new trial is ordered.

Appeal heard on June 19, 2018

Memorandum filed at Yellowknife, NWT
this 28th day of June, 2018

Slatter J.A.

Authorized to sign for: Cooper J.A.

Schutz J.A.

Appearances:

E. O'Keeffe
S.M. Purser
For the Appellant

B.W. Green
For the Respondent

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