**In the Court of Appeal for the Northwest Territories**

**Citation: *R v R.G.K.*, 2019 NWTCA 2**

 **Date:** 2019 01 23

**Docket:** A-1-AP-2016-000002

**Registry:** Yellowknife

**Between:**

**Her Majesty the Queen**

 Respondent

 - and -

**R.G.K.**

 Appellant

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| **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Ban** – See the *Criminal Code*, section 486.4.By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any way.**NOTE:** This judgment is intended to comply with the identification ban. |

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**The Court:**

**The Honourable Mr. Justice Frans Slatter**

**The Honourable Madam Justice Barbara Lea Veldhuis**

**The Honourable Madam Justice** **Frederica Schutz**

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**Memorandum of Judgment**

 Appeal from the Conviction by

 The Honourable Deputy Judge M.D. Gates Sitting with a Jury

 Dated the 29th day of October, 2015

 (Docket: S-1-CR-2013-000106)

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**Memorandum of Judgment**

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**The Court:**

1. The appellant appeals his conviction by a jury for sexual assault. The main issue at trial was consent.
2. The complainant reported a sexual assault on the day of the events. She testified that she had been drinking heavily, and was dozing off and on all night. At one point she woke up to find the appellant having sex with her while she was passed out. She told him to stop but he “just kept on going and going”.
3. The appellant was interviewed by the police and denied any sexual contact with the complainant, but DNA evidence received several months later showed this to be untrue. At trial he acknowledged that there was sexual contact, but he testified that the complainant initiated it, she was fully awake all the time, and she never told him to stop. He testified that he had lied about the sexual contact because “I strayed from my marriage and I’m very sorry about that”. During his cross-examination by the Crown he recanted and made the following important admission:

Q. You had sex with her when she was sleeping?

A. Yes.

The Crown relied on his initial false statement to the police about there being no sexual contact to suggest that his evidence in chief (that the complainant had consented) was also fabricated, and that his admission in cross-examination that the complainant was asleep was the accurate version of what happened.

1. The appellant argues that the jury charge was unfair and unbalanced. The trial judge correctly told the jury that a sleeping person could not consent. The appellant argues that it was up to the jury to weigh the differences between his evidence in chief and his admission in cross-examination, and that the trial judge went too far in saying that the appellant admitted the complainant was asleep. The trial judge, however, specifically told the jury it was up to them to assess this evidence:

Later, during the same cross-examination, [RGK] told you a number of different things: First, that [the complainant] was highly intoxicated that evening and kept falling asleep. Second, that [the complainant] was asleep when he was having sex with her. Third, that [the complainant] never told him that she wanted to have sex with him. And fourth, that he **made up** the story about the sex being consensual once he found out the results of the DNA test that revealed his DNA and seminal fluid found in the vaginal swab taken from [the complainant].

It is for you to decide whether there is any difference between what [RGK] told Constable Turco, what he said to you under oath in direct-examination and what he told you under oath in cross-examination. It is also up to you to decide how much any such differences affect your belief and reliance on his evidence in deciding this case. (transcript, p. 276, l. 19 to p. 277, l. 11)

Defence counsel specifically discussed this aspect of the appellant’s evidence in his address to the jury (transcript, p. 217, l. 10-21).

1. Trial judges are entitled to comment on the evidence in a jury trial, so long as they make it clear to the jury that the ultimate findings of fact are up to them. In this case, the pivotal issue for the jury was whether the appellant had fabricated his evidence about the complainant’s consent, and it was perhaps unnecessary for the trial judge to express his opinion on that issue. However, the issue was simple and it would have been obvious to the jury what they had to decide.
2. The appellant also argues that the trial judge misstated the appellant’s acknowledgement that he “came up with” his evidence about consent after the DNA evidence showed that there was sexual contact. The appellant argues that, read in context, his evidence was that he denied sexual contact because he was married, not that he denied sexual contact because there was no consent. The relevant part of the cross-examination was:

Q: And isn’t it true that it was not until this – you **came up with** this consensual sex thing until your DNA was found – [the complainant] isn’t that right?

A: Yes (transcript, p.186, l. 9-13)

The trial judge could have been more precise in how he worded this part of the charge, but the jury would not have been distracted from the essential issue of whether there was or was not consent. The jury would not have been misled by the use of “made up” in place of “came up with”. This aspect of the case was also discussed in defence counsel’s closing address (transcript, p. 218, l. 15-23). This is not a case like ***R. v Adem***,2018 ABCA333 where the jury was told a disputed element of the offence had been conclusively proven.

1. It is not inappropriate for a trial judge to say of a witness that: “If you find that he did not tell the truth at any time while giving evidence under oath, you should approach all of his evidence with great caution” (transcript, p. 277, l. 24-7). When the evidence is that of the accused, care must be taken not to unfairly undermine his evidence. Directly after this comment, the trial judge gave a proper instruction on the principles in ***R. v W.(D.)***, [1991] 1 SCR 742 (transcript, p. 278, l. 21 to p. 279, l. 14). The jury was expressly told that the appellant’s evidence could raise a reasonable doubt even if it was not believed. Read in context, the challenged comment does not disclose a reviewable error.
2. The appellant also points to other parts of the jury charge where the trial judge might have said more on a topic, might have discussed the evidence in greater detail, or might have repeated the defence position or provided more examples. It has been said many times that an accused person is entitled to a fair charge, not a perfect charge. At the end of the day, the jury was faced with the complainant’s evidence that she was asleep during the sexual encounter, the appellant’s initial denial of that, and his subsequent acknowledgement in cross-examination that she was asleep. The issue would have been obvious to the jury. The appellant argues that the wording of the jury charge was “devastating” to his position, but what was actually devastating was his admission in cross-examination that the complainant was asleep. Any imperfections in the jury charge do not render the verdict unsafe.
3. The appellant has not demonstrated any reviewable error, and the appeal is dismissed.

Appeal heard on January 15, 2019

Memorandum filed at Yellowknife, N.W.T.

this  day of January, 2019

Slatter J.A.

Authorized to sign for: Veldhuis J.A.

Schutz J.A.

**Appearances:**

B. MacPherson

 for the Respondent

R. Clements

 for the Appellant

A1-AP-2016-000 002

IN THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

**Between:**

**Her Majesty the Queen**

Respondent

**- and -**

**R.G.K.**

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MEMORANDUM OF JUDGMENT

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