

In the Court of Appeal for the Northwest Territories

Citation: *R v DP*, 2020 NWTCA 9

Date: 2020 10 28

Docket: A1-AP-2017-000014

Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

DP

Appellant

Restriction on Publication

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

By Court Order, information that may identify the victims must not be published, broadcast, or transmitted in any way.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 Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Jo'Anne Strekaf**

Memorandum of Judgment Delivered from the Bench

Appeal from the Conviction by
The Honourable Justice S.H. Smallwood
Convicted on the 1st day of June, 2017
(Sitting with a Jury)

(Docket: S-1-CR-2016-000043)

**Memorandum of Judgment
Delivered from the Bench**

Veldhuis J.A. (for the Court):

[1] The appellant was convicted by a jury of historic sexual assaults said to have occurred between 2003 and 2010.

[2] He appeals on two grounds, arguing in part that his trial counsel was incompetent and he seeks to tender new evidence before this panel.

[3] In a panel decision, *R v Palmer*, 2019 NWTCA 3, an application to appoint a Special Commissioner was granted on conditions. Those conditions have been met and we allow the new evidence which includes a detailed report prepared by the Honourable J. Z. Vertes in his role as Special Commissioner. An affidavit by a potential witness has also been filed and is admitted as new evidence.

[4] The Special Commissioner was directed to inquire into and report on the “factual dispute relating to trial counsel’s instructions, specifically, whether the Appellant instructed her to contact his daughters in preparation for the trial.”

[5] As at A34 in the Appellant’s Extracts of Key Evidence, he concluded at para 38 of his report:

I therefore find that the Appellant did in fact instruct his trial counsel to contact his daughters in preparation for the trial; and further, that his trial counsel failed or ignored his continuing instructions in this regard.

[6] The test that an appellant must satisfy to establish ineffective assistance of counsel is set out in *R v Sewak*, 2019 ABCA 303 at para 26 as follows:

- (a) the facts on which the claim of incompetence is based;
- (b) that the representation by trial counsel was incompetent; and
- (c) that the incompetent representation resulted in a miscarriage of justice.

[7] The facts on which the claim of incompetence is based are found in the Special Commissioner’s Report and are not at issue on appeal. The Crown disputes that the appellant has established the two remaining elements. It states that trial counsel’s decision was not incompetent, but tactical and consistent with the overall defence strategy. It also states there was no miscarriage of justice because the potential witness’s evidence would have been collateral, at best.

[8] While tactical decisions regarding which witnesses to call at trial are within the scope of a lawyer's responsibilities, those decisions must be the result of reasonable professional judgment. We agree with the appellant that it is impossible to make a reasonable tactical decision about whether to call a witness in the absence of information of what evidence that witness has to give. Here, trial counsel had no information about the daughter's potential evidence, and thus, had no ability to exercise reasonable professional judgment.

[9] The failure of trial counsel to contact the appellant's daughter cannot be described as a tactical decision. In fact, as argued by the appellant, ignoring the appellant's instructions and not even attempting to interview an identified, potentially relevant witness was incompetent.

[10] We also conclude that the appellant was prejudiced by trial counsel's incompetence. Had the daughter been called, the evidence given may have affected the jury's assessment of the credibility and reliability of the complainant as well as the reliability of the verdict.

[11] The appellant has met his burden. We find that a miscarriage of justice occurred and a new trial is ordered.

[12] We do not find it necessary to address the second ground of appeal.

[13] The appeal is allowed.

Appeal heard on October 27, 2020

Memorandum filed at Yellowknife, NWT
this day of , 2020

Veldhuis J.A.

Appearances:

A. Godfrey
for the Respondent

E. McIntyre
for the Appellant

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FOR THE NORTHWEST TERRITORIES

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- and -

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MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH
