under appeal

SC CR 95 040

CR 02991

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

JAMES ARVALUK

Transcript of the Voir Dire Ruling Delivered by The Honourable Mr. Justice J. E. Richard, sitting at Yellowknife in the Northwest Territories, on December 11th, A.D., 1995.

APPEARANCES:

MS. U. ARVANETES: Counsel for the Crown

MR. V. FOLDATS: Counsel for the Defence

THE COURT: In the indictment filed by the Crown, the accused is charged with two counts of sexual assault which allegedly occurred at his home in Yellowknife in the early morning hours of February 19th.

I am told that the expected testimony of the Crown witnesses will be to the effect that each of the two complainants had been invited to a hot tub party at the accused's home. The people in attendance at the party were drinking and using the hot tub. Each of the complainants became intoxicated.

The first complainant says that after exiting the hot tub in an intoxicated condition she received permission from the accused to lie down in his bed in his bedroom. She says that she awoke at one point to find the accused lying with her in the bed having sexual intercourse with her without her consent.

The second complainant says that at one point in the party she exited the hot tub in an intoxicated condition, and the accused offered her a blanket to wrap around herself. She says she then passed out on the living room floor. She says at one point she woke up to find the accused lying on top of her having sexual intercourse with her without her consent.

On this voir dire the Crown seeks a ruling on the admissibility of the evidence of the count 1 sexual assault as similar fact evidence to be considered by

the jury in determining the guilt of the accused on count 2, and vice versa.

For his part, the accused makes application for severance of the two counts pursuant to Section 591(3) of the Criminal Code. The accused acknowledges through his counsel that he participated in sexual activity with each of these complainants. His position on count number 1 is that the complainant consented to the sexual activity, or alternatively that he honestly believed at the time that she was consenting. His position on count 2 is that that complainant consented to the sexual activity.

Counsel advise that the credibility of each of the two complainants will very definitely be an issue at the trial or trials with particular focus on the effect of intoxication on the accuracy of the complainants' memory.

Counsel have kindly provided the court with many case authorities regarding the admission or exclusion of similar fact or similar act evidence. In **L.E.D.** the Supreme Court of Canada summarized the inherent dangers of allowing similar fact evidence to be used in support of a criminal charge being tried by a jury. Mr. Justice Sopinka in that decision described the process that the trial judge should use before exercising his or her discretion in favour of admitting such evidence and I quote at page 156:

"The process of reasoning therefore is to determine whether the evidence of similar acts has probative value in relation to a fact in issue, other than its tendency to lead to the conclusion that the accused is guilty because of the disposition to commit certain types of wrongful acts. If the evidence has such probative value, the court must then determine whether its probitive value is sufficient to justify its admissibility, notwithstanding the prejudicial tendency of such evidence".

In the present case, I acknowledge the many common characteristics of the sexual assaults alleged by the two complainants. The act alleged by the one complainant is indeed similar to the other act alleged by the other complainant. There is no question but that these are similar acts alleged.

However, upon reflection, I cannot find that the evidence of a similar act just an hour or so earlier or later is probative of any fact in issue. The fact in issue in count 2 is whether that complainant, the second complainant, consented to the sexual activity with the accused. There is no basis in logic for asserting that the fact that the accused had non-consensual sex with the first complainant is probative of the fact that the second complainant was not consenting as well. There is also no basis in logic to assert that because the accused had non-consensual sex with an unconscious woman on one occasion that he is likely to have had non-consensual sex with an unconscious woman on another occasion.

In that respect, this case is distinguishable from other cases where the fact that is in issue is the identity of the perpetrator of a crime or the mens rea or motive of the accused person, or whether an event occurred at all. In those other examples, the similar fact evidence may indeed have probative value for the jury in determining the particular fact in issue.

Here in my respectful view the probative value of the similar fact evidence is nonexistant. Having made that determination, that there is no probative value in the similar fact evidence, it is therefore not necessary for me to proceed with the second step suggested by Mr. Justice Sopinka in the excerpt quoted, that is a balancing of the probative value with the prejudicial effect of the evidence.

At this point I rule, therefore, that the evidence in support of the allegation in count 1 is not admissible in support of the allegation in count 2, and vice versa. As always this kind of ruling is subject to being revisited as necessary as the evidence at trial unfolds.

I turn now to the accused's application for severence of the two counts. On this application, the onus is on the accused to show on a balance of probabilities that the interests of justice require separate trials for these two criminal charges. The interests of justice include the accused's interests,

in particular the right to a fair trial, and also the interests of the administration of justice generally.

Upon consideration of all of the relevant factors, and the submissions of counsel, I find that the accused has not met the onus of establishing that separate trials are required in the interests of justice.

As the Alberta Court of Appeal recently confirmed in **R. vs Ryman**, one of the main factors in a severence application is whether there is a sufficient nexus in time, place, or other circumstances between the two charges. Here there is clearly such a nexus. Crown counsel advises that the Crown intends to call the same witnesses, a number of whom are travelling from Baffin Island and elsewhere, to testify regarding both charges brought by the Crown.

I fail to see that there is prejudice to the accused to have one jury decide these two matters at the same time. The jury can receive adequate instructions to avoid any improper inferences. Those instructions are fairly clear and easy to understand, and that is simply that the evidence on count 1 cannot be used to prove the guilt of the accused on count 2 and vice versa, and the jury's decision of guilty or not guilty on each count must be made independently of the decision on the other count.

Accordingly the application for severence is

dismissed or denied. Counsel, unless there is anything further at this time, we will adjourn until 10:00 a.m. at which time we will proceed with the jury selection.

(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED)

Certified Pursuant to Practice Direction #20 dated December 28, 1987.

Laurie Ann Young
Court Reporter