CR 03226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**ANTHONY OKPATAUYAK**

Appellant

- and -

**HER MAJESTY THE QUEEN**

Respondent

## REASONS FOR JUDGMENT

1 The appellant appeals against his conviction on three charges of sexual assault. The Crown had elected to proceed by summary conviction and the trial was held in the Territorial Court.

2 The Crown called two witnesses. The complainant G.T., who was 15 years old at the time of trial and 14 at the time of the events in question, gave evidence of three discrete sexual assaults perpetrated on her by the appellant. These were as follows:

> a) that sometime in February of 1996, the appellant came to her house and touched her breast with his hand under her clothing;

b) that sometime in March of 1996, the appellant came to her house when she was there watching television with her friend S. A. (the complainant on the third count). The appellant touched both G.T. and S.A. on the bum with his hand over their clothing. G.T. ran to the bathroom, while S.A. started hitting the appellant. Later, both G.T. and S.A. played cards with the appellant in the house;

c) later on the same day as in b) above, the appellant came to G.T.'s house, told her that he missed touching her and touched her on her breasts with his hand.

3 The complainant S.A., who was 15 years old at the time of the event in question, testified that sometime in March of 1996 she was watching television with G.T. at G.T.'s house. The appellant came in and started touching them over their clothing. He touched G.T. on the legs with his hands and S.A. on the middle of her legs. G.T. went into the bathroom, while S.A. went into the living room. The appellant then touched her breast over her clothing and S.A. hit him with a chair. Later that night, G.T. and S.A. played cards with the appellant.

4 In cross-examination of both complainants, it was suggested to them by defence counsel that the appellant had come to the house to do laundry and that nothing else had happened. The following exchanges took place:

With respect to G.T. (sometimes referred to as Grace):

<u>On cross-examination:</u>

Q I'll suggest, in February, all he ever did at your house was come over and wash his clothes. Right?
A Yeah.
Q Nothing bad happened, did it?
A No.
Q I'm right, aren't I?
A Yeah.
Q In March, too, Anthony would come over and wash clothes; correct?
A Yeah.
Q Nothing bad happened then either, did it?
A Yeah.
Q Did it? Yes or no?
A No.

On re-examination

Q MR. COUPER: You told my friend that nothing bad happened in February or March when Anthony came over.
A Yeah.
Q What do you think he meant by something bad happening?
THE COURT: I think it would be a better question to find out what she meant by agreeing with him that nothing bad happened.
MR. COUPER: Yes.
Q When you told him nothing bad happened, what did you mean?
A I don't know.
Q Did Anthony actually touch you as you told us earlier?
A Yeah.
Q In the ways you described?
A. Yeah.
THE COURT: What are you saying, witness? Did he touch you?
THE WITNESS: Yeah.
THE COURT: Yes.

With respect to S.A. (sometimes referred to as Sabrina):

On cross-examination:

Q And she [G.T.] told you everything she had told the police; right?

A Yes.

Q And she -- because you're her close friend, she wanted you to back her up; right?

A Yes.

Q That's basically all you did, right, is help her?

A Yes.

Q Because nothing happened at Grace's house, did it? Just laundry.

A Yes.

Q Am I correct in saying that?

A Yes.

On re-examination:

Q MR. COUPER: Sabrina, when you said that nothing happened at Grace's house that night in answer to Mr. Blais' question, are you telling us that you weren't touched?
A Well, I was touched.
Q You were touched as you told us earlier?
A Yes.
Q Did you see Grace being touched?
A Only her legs.
Q So when you told Mr. Blais that nothing happened that night, what did you mean by that?
A I don't know.

5 The appellant testified. He said that he was in the habit of going to

G.T.'s house to do laundry. He denied sexually assaulting G.T.. He was not asked in examination-in-chief whether he had sexually assaulted S.A.. In re-examination, he was asked whether he had touched S.A.'s legs or breasts at any time and he denied it.

6 The defence also called as a witness the mother of G.T.. The main significance of her evidence is that she was present with G.T. at times during February and March when the appellant came by and she said "they were okay, as if nothing happened". Her evidence as to whether the appellant was in her presence continuously the night G.T. went to the police with allegations that the appellant had touched her was not entirely clear.

7 In convicting the appellant, the trial judge addressed the submission by Crown counsel that a blanket denial of the events was easy for the accused to make but difficult for the Crown to counteract and the submission by defence counsel that the appellant was not shaken in cross-examination. His entire remarks were as follows:

> THE COURT: The innocent person can always say the same thing as the guilty person trying to evade punishment on a conviction. So there is not much I can say about somebody denying. I listen to when a person denies, however.
>
> I would note in this case that the person was never confronted in the examination -- or the Defendant was never confronted in the

> examination-in-chief as to the allegations of Sabrina. It came up for the first time in cross-examination and then in re-examination. He was never confronted with anything she said. I observed him during his denial, and all I can observe is the demeanour. And this business of the person being shaken, well, some of that is in the kind of responses and answers he or she makes verbally, but sometimes it's in actually the appearance and the behaviour when being closely questioned. So that's on the question of shaken.
>
> On the whole of the evidence -- I have considered all of it, and I have to keep in mind, and I am mindful of, the doctrine of reasonable doubt. I note that neither of the complainants was challenged as to the details of what they said in examination-in-chief. And I observed the demeanour of those three main witnesses, of course as well as the other witness.
>
> This Court is satisfied that the two complainants are to be believed with regard to the three charges. I don't believe the Defendant was telling the truth when he denied it, when he finally faced the denial. I don't believe he was telling the truth. I believe those two complainants, and you're convicted of all three charges.

8 The appellant submits that the trial judge erred in not dealing with the inconsistencies in the evidence of the complainants and in rejecting the defence evidence on the basis of demeanour.

9 The standard of review on a summary conviction appeal under section 822(1) of the Criminal Code is the same as that under section 686(1), which was stated by the Supreme Court of Canada in *Corbett v. The Queen, [1975] 2 S.C.R. 275* and re-affirmed in *R. v. Burke (1996), 105 C.C.C. (3d) 205 at 210*, as:

> ... whether the verdict is unreasonable, not whether it is unjustified. The function of the Court is not to substitute

itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.

10 In *Burke*, Sopinka J. said that:

... special concerns arise in cases such as this where the alleged "unreasonableness" of the trial court's decision rests upon the trial judge's assessment of credibility. In these cases, the court of appeal must bear in mind the advantageous position of a trial judge in assessing the credibility of witnesses and the accused. ...

> Despite the "special position" of the trial court in assessing credibility, however, the court of appeal retains the power, pursuant to s. 686(1)(a)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence. ...
>
> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the Criminal Code where the "unreasonableness" of the verdict rests on a question of credibility.
>
> I acknowledge that this is a power which an appellate court will exercise sparingly.

11 The appellant relies on the following cases in support of his position: *R. v. Norman (1993), 87 C.C.C. (3d) 153 (Ont. C.A.); R. v. M.G. (1994) 93 C.C.C. (3d) 347 (Ont. C.A.); R. v. W.S. (1994), 90 C.C.C. (3d) 242 (Ont. C.A.); R. v. T.S. (1995), 98 C.C.C. (3d) 529 (Sask. C.A.); R. v. Davis (1995), 98 C.C.C. (3d) 98 (Alta. C.A.).*

12 The above cases can, in my view, be distinguished from the instant case on the basis that in all of them there was some independent evidence which contradicted the complainant's testimony. By independent, I mean evidence other than the testimony of the complainant and the accused at trial. In each case, the trial judge either failed to consider that evidence or failed to appreciate its significance on the issue of reasonable doubt.

13 In this case, however, there was no evidence before the trial judge independent of the complainants and the appellant, on issues such as opportunity for the appellant to commit the offences, prior inconsistent statements of the

complainants, or impossibility or improbability of the events having occurred as related by the complainants.

14 This was a short trial. None of the witnesses who testified, nor the appellant, gave lengthy or very detailed evidence. The sole issue before the trial judge was the credibility of the witnesses and the appellant. At trial, defence counsel made three main points: that the appellant had not been shaken in his denials, that there were contradictions in the complainants' evidence and that the fact that they calmly played cards with the appellant shortly after the incident involving both of them was alleged to have happened cast doubt on their allegations of sexual assault. In addition, there was evidence elicited from both complainants that G.T. was somewhat unhappy and wanted to go to another community, although how this tied in with her allegations of sexual assault against the appellant was not made clear.

15 In my view the only major contradiction in the evidence of the complainants was when they responded affirmatively to defence counsel's leading questions to the effect that the appellant had done nothing in G.T.'s house except laundry and that nothing "bad" happened. In both cases, on re-examination they affirmed that the appellant had touched them. The trial judge was in the best position to assess the complainants' understanding of the questions put to them and the responsiveness of their answers along with their demeanour when faced with the apparent contradictions and their inability to give an explanation for same. There can

be no question that the trial judge was alert to the apparent contradictions that came out on cross-examination as the judge himself asked the complainant G.T. to clarify on re-examination whether the appellant had touched her.

16 The same applies to the questioning of G.T. by defence counsel about whether she had lied to the police when she told them that the appellant had touched her on the same night she gave her statement. Due to the somewhat contradictory nature of her answers on that issue, the trial judge was in the best position to assess whether G.T. was admitting that she lied to the police, was confused about the timing of events as having happened that same night or some hours before, or whether she even understood the questions. The effect, if any, on her credibility, was of course for the trial judge to decide.

17 That the trial judge did not expressly refer to the apparent contradictions in the complainants' evidence and how he resolved them or why he accepted that evidence despite the contradictions is not in itself a basis for allowing an appeal: see *R. v. Burns (1994), 89 C.C.C. (3d) 193 (S.C.C.)*.

18 Counsel for the appellant submits that the trial judge's statement that neither of the complainants was challenged as to the details of what they said in examination-in-chief is incorrect. But in my view, that comment must be read in the context of the preceding sentence in his reasons for convicting the appellant. The

preceding sentence is "On the whole of the evidence -- I have considered all of it, and I have to keep in mind, and I am mindful of, the doctrine of reasonable doubt".

19 When read in context, the passage indicates that the trial judge was doing what the doctrine of reasonable doubt obliges him to do: considering whether anything in the complainants' evidence left him with a reasonable doubt, quite apart from whether he believed the evidence of the appellant. He was correct in that the complainants were not cross-examined or challenged on the details of what they said happened.

20 No issue was raised that they could have been mistaken in their interpretation of the appellant's actions. It was a question of whether the events happened as described by the complainants or not at all, or whether there was on the evidence a reasonable doubt about that.

21 The appellant also complains that the trial judge rejected his evidence on the basis of demeanour. But that was likely the only way the trial judge could assess the appellant's evidence in this case. This was not a case like *R. v. Norman, supra*, where, in accepting the evidence of the complainant, the trial judge relied on her demeanour, while failing to analyze her evidence and to consider independent evidence which called into question the reliability of her evidence.

22 The Alberta Court of Appeal considered the issue of demeanour in *R. v.*

*Pelletier (1995), 165 A.R. 138*. In that case, the trial judge rejected the evidence of the accused on the basis of his demeanour on the stand, his evidence and his manner of giving evidence. It was not suggested that the accused contradicted himself, was shaken on cross-examination, had a reputation for dishonesty or told an implausible story. In addition, the trial judge accepted the complainant as a credible witness, based largely on her demeanour.

23 In dismissing the accused's appeal from conviction, the Court in *Pelletier* was somewhat critical of the use of demeanour as a sole basis for assessing credibility, but said the following:

> We do not suggest that demeanour is irrelevant when assessing credibility, nor deny that occasionally it may be decisive. But we have seen in recent months a surprising number of cases where demeanour is the only basis offered by a trial judge for rejecting the accused's evidence.
>
> However, those considerations do not suffice to dispose of this appeal. Though there are a number of weaknesses in the evidence adduced by the Crown, the law tells us to ask ourselves whether any reasonable properly-instructed jury could convict on this evidence. After anxious consideration, we decided that such a jury could. A properly-instructed jury acting reasonably could reject the defence theory that the complainant was honestly mistaken about the assault as too far-fetched to support doubt about guilt. What we would have done as trier of fact is not the test, and we resist the temptation to say any more about that. Furthermore, the Supreme Court has told us to be very slow indeed to find that no reasonable jury could convict in a case where credibility of witnesses is important. Though credibility is relevant only in a partial sense when considering the Crown's evidence on these particular facts and argument, it is fully applicable to the defence case.

24 In the case under appeal, credibility was fully applicable to both the Crown

and defence cases. In my view, a properly instructed jury acting reasonably could reject the appellant's denial of any sexual touching and be satisfied beyond a reasonable doubt of his guilt based on the evidence of the complainants.

25 Finally, in my view, the reasons for conviction given by the trial judge, although very brief, make it clear that he was alert to the issue of credibility and that he had in mind the doctrine of reasonable doubt. In a case such as this one, it cannot be said that he failed to consider anything relevant.

26 This appeal is accordingly dismissed.

27 I will just add that the Notice of Appeal was filed out of time, on July 22, 1996, the thirty day appeal period under the *Summary Conviction Appeal Rules* having expired on July 19. Although the Notice of Appeal states that the Appellant applies for an extension to the appeal period, no application for such extension was made and there was no material before me in support of such application. Counsel for the Crown did not, however, raise this as an issue and so I have given judgment on the merits of the appeal despite this defect in the procedure.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 2nd day of January 1997

Counsel for the Appellant: D. Blais, Esq.

Counsel for the Respondent: D. Claxton, Esq.

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Appellant

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# REASONS FOR JUDGMENT

HONOURABLE JUSTICE V.A. SCHULER