

acquitted

CR 03265

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

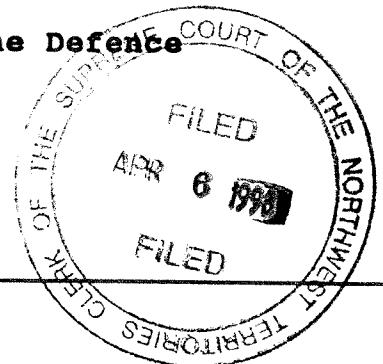
MARVIN EUGENE MURDICK

Transcript of the Oral Judgement by The Honourable Justice
J. Z. Vertes, sitting in Hay River, in the Northwest
Territories, on the 25th day of March, A.D., 1998.

APPEARANCES:

Mr. S. Couper: Counsel for the Crown

Mr. A. Mahar: Counsel for the Defence



1 THE COURT: Many judges have often said that
2 the law does not clothe a judge with divine insight
3 into the hearts and minds of witnesses. We cannot
4 profess to be able to determine absolute truth. All we
5 can do is apply time-honoured means to determine
6 whether an allegation has been proven to the standard
7 that is the only one acceptable in criminal law, that
8 being beyond a reasonable doubt.

9 The law sets down only one requirement. I must
10 examine all of the evidence and then decide whether the
11 Crown has proven the charge beyond a reasonable doubt.
12 And where, as here, one is confronted by contradictory
13 versions of what happened, one does not have to decide
14 which one of those versions is true, but rather whether
15 the evidence as a whole proves the guilt of the accused
16 beyond a reasonable doubt. And if there is a doubt
17 then the accused must be acquitted.

18 On a philosophical and practical level a trial
19 should be a search for the truth. But judges are not
20 detectives, they are judges. And what they must judge
21 are not the individuals but the evidence. Has the
22 evidence firmly convinced the judge of the accused's
23 guilt? So, often when there is an acquittal, that does
24 not automatically mean that the complainant was found
25 to be lying. On the contrary, a complainant may
26 honestly believe and recount what she thinks happened
27 but the evidence as a whole fails to meet the criminal

1 standard of proof beyond a reasonable doubt. Because,
2 in the final analysis, if the evidence fails to leave
3 the judge feeling sure that the accused committed the
4 crime, then the case must be decided on the basis of
5 the burden of proof, not on the basis of speculation or
6 suspicion.

7 In this case the accused, Marvin Eugene Murdick,
8 stands charged that he did commit "a series of sexual
9 assaults" between 1983 and 1987. The "series" alleged
10 by the Crown consist of three specific incidents
11 recalled by the complainant. The Crown is not alleging
12 that these three incidents are merely three in a
13 series. They, or any one or two of them, are the
14 series alleged in the indictment.

15 The complainant is now 18 years old. She was
16 from 4 to 7 years old during the relevant time frame.
17 The accused is her uncle. At the time both the
18 complainant's family and the accused's family were
19 living in Pine Point. They had constant interaction.
20 The accused's family consisted of himself, his wife,
21 and their four daughters. The accused worked a regular
22 work shift from 8 a.m. to 5 p.m.

23 Often the complainant would be baby-sat by the
24 accused's wife or one of his daughters. The
25 complainant, as she got older, would go to the
26 accused's home after school presumably to play with his
27 daughters. It is in these circumstances that the

1 complainant recalled the three alleged incidents
2 occurring.

3 One incident, the one that appears to be the
4 first in time, took place in the basement of the
5 accused's home. The complainant recalls that the
6 accused forced her to perform oral sex on him. She
7 thinks she was 4 or 5 years old at the time.

8 Another incident allegedly occurred in a shed
9 behind the accused's home. The complainant alleges
10 that the accused penetrated her with his penis. She
11 thinks she was "older," that is to say in the latter
12 part of the 4 to 7 year old stage when this occurred.

13 The third allegation is an incident of digital
14 penetration by the accused. This was said to have
15 occurred in one of the bedrooms of the accused's home.
16 Again the complainant thinks she was "older" when this
17 occurred.

18 The accused denied the allegations saying that
19 he never abused the complainant and that he never
20 touched her in a sexual way. He testified that on most
21 occasions when the complainant was at the house his
22 wife or some of his children would be there. He said
23 he never had a shed behind his house. He said that the
24 basement of his house was used as a bedroom by two of
25 his daughters. While the defence did not deny that the
26 accused may have had the opportunity to commit these
27 crimes, the clear implication is that it is highly

1 improbable that he could have done so in these
2 circumstances.

3 There was other evidence led. In an effort to
4 date these incidents, both the complainant and her
5 mother testified to a time, when the complainant was 6
6 years old and starting school, that her long hair was
7 cut short. The complainant recalls the shed and
8 bedroom incidents happening after her hair was cut with
9 the basement incident occurring before.

10 Evidence was also submitted, by way of agreed
11 statements of fact, of a hospital admission of the
12 complainant when she was 6 years old. In November,
13 1985, the complainant was admitted to hospital in
14 Edmonton for an examination as a result of a persistent
15 vaginal discharge. She was given an extensive
16 examination. The complainant recalls it as a very
17 stressful time for her. The examination revealed a
18 number of things, including that the hymen was intact
19 and no lesions were visible. The complainant was
20 diagnosed as having an immune deficiency which made her
21 less resistant to vaginal infections and irritations
22 from any source.

23 The Crown had a specialist in childhood sexual
24 abuse review these medical records. The doctor's
25 opinion was that the physical observations were
26 "nonspecific," that is to say they are not conclusive
27 of penetration nor do they rule out that possibility.

1 The doctor further gave the opinion that, while it is
2 not improbable that penetration could have occurred, it
3 is more than likely that if penetration had occurred
4 one would have observed tearing or other injury to the
5 hymen.

6 Related to this point, counsel for the accused
7 pointed out an apparent inconsistency in the
8 complainant's recollection. On cross-examination the
9 complainant acknowledged that in an early statement to
10 investigators she said that the incident in the shed,
11 the one alleging intercourse, occurred early in the
12 time frame prior to her hospital admission. She later
13 revised that to say that it happened later in the time
14 frame.

15 There was a great deal of exploration into the
16 circumstances of the disclosure of these allegations.
17 The complainant testified that at the time these things
18 were happening she did not tell anyone because she was
19 scared and she did not want to be the one to break up
20 the family. She then apparently lost her memory of
21 these events. I use the term lost cautiously since
22 what the complainant described was a process of memory
23 retrieval that she went through from ages 12 to 17.

24 The complainant testified that she started
25 getting flashbacks when she was 12 years old. These
26 were flashes of emotions, of feelings of anxiety and
27 fear. Then over the next two years she started seeing

1 and recalling indistinct images. And it was when she
2 was 15 she started to get a clear picture of these
3 incidents.

4 The complainant was in counselling since the age
5 of 13. She testified that she was very rebellious,
6 acting out, with feelings of anxiety and depression at
7 that time. The actual disclosure came when the
8 complainant attempted suicide at age 15.

9 On cross-examination defence counsel elicited
10 from the complainant evidence that at one time she
11 recollected ongoing and repetitive incidents of
12 intercourse perpetrated by the accused. She thought it
13 could have been 3 or 4 times per month. Now the three
14 incidents she described are the only ones she feels she
15 truly recollects. Defence counsel argued that this
16 change in her recollection, as well as the trauma suffered
17 inconsistency in dating of one incident, reveals
18 perhaps a subconscious effort by the complainant to
19 accommodate her recollections with external evidence.

20 The complainant's mother testified that after
21 they left Pine Point in 1986 the family lived in
22 Alberta for a year and then lived in Dryden, Ontario,
23 for a few years. The accused had moved to Dryden by
24 then and there was frequent contact between the two
25 families during that period. This was the time in
26 which the complainant says she had no memory of these
27 incidents. This may be significant to some extent

1 since I also heard evidence that it is unusual for
2 someone to have no memory if there are occasions when
3 such a memory may be triggered, such as contact with
4 the alleged perpetrator.

5 I also heard evidence from two expert
6 witnesses. Dr. John Read, called by the defence, is a
7 professor of psychology who has done extensive research
8 into the question of memory function and memory
9 recovery. Dr. Michael Stambrook, called in rebuttal by
10 the Crown, is a clinical psychologist who specializes
11 in the treatment of adolescents who suffer memory
12 impairment due to trauma. The sum and substance of
13 their evidence as I gleaned it is this:

14 1. The one thing we know positively about human
15 memory function is that we do not know very much.

16 2. Some victims of trauma suffer memory loss as
17 a result but many others do not.

18 3. The difficulty with extrapolating backwards
19 from a subjective report of no memory to recovered
20 memory of an event is the lack of an external
21 validation that the event occurred.

22 4. Recollections of past events are influenced
23 and can be distorted by a host of factors, consciously
24 and unconsciously.

25 5. The correlation between one's confidence in
26 a memory and the accuracy of that memory is not as
27 great as may commonly be thought, similar in many ways

1 to the known dangers of eyewitness identification
2 evidence.

3 Where the two experts differed was in their
4 analysis of research data, not so much on the analysis
5 itself as on the result of that analysis. I think it
6 is fair to say that Dr. Read takes a more conservative
7 approach than Dr. Stambrook does to the frequency of
8 memory loss and recovery as well as to the dangers of
9 the unreliability or inaccuracy of such memories.
10 There is no point in delving into that debate in this
11 judgement. Criminal cases are not resolved by applying
12 a statistical analysis or a probability factor. There
13 is either proof beyond a reasonable doubt or there is
14 not. Every case has to be decided on the basis of the
15 evidence presented in that case.

16 This type of expert evidence can be helpful,
17 however, in explaining certain aspects of human
18 psychology. The area of memory recovery is not
19 something necessarily within the everyday knowledge of
20 nonprofessionals. This evidence could provide valuable
21 assistance so as to assess the reliability of the
22 complainant's testimony. And that is what this case
23 comes down to.

24 The defence is not accusing the complainant of
25 fabricating these allegations for some malicious
26 purpose. The defence argues that the complainant has
27 an honestly held but nonetheless mistaken belief that

1 the accused assaulted her. The defence does not say
2 that the complainant did not at some point suffer a
3 traumatic event; it was just not the events she
4 described. These descriptions arose, in defence
5 counsel's submission, as a way of resolving in her own
6 mind the many difficult and conflicting emotions the
7 complainant was trying to cope with as a teenager.

8 Many times in these types of cases, courts must
9 make a distinction between the complainant's
10 credibility as a witness and the reliability of that
11 evidence. The central issue is not whether a
12 complainant sincerely believes her testimony to be true
13 but whether that evidence is sufficiently reliable to
14 warrant a conviction. Secondary to this issue is, as
15 Crown counsel urged me to do in this case, the
16 assessment of evidence on the basis of the demeanor of
17 the witnesses.

18 We all know from our experience in trials that
19 honest witnesses, whether they are adults or children,
20 may convince themselves that inaccurate versions of a
21 given event are correct and they can be very
22 persuasive. The question, however, is not the
23 sincerity of the witness but the reliability of the
24 witness's testimony. Demeanor alone should not suffice
25 to found a conviction.

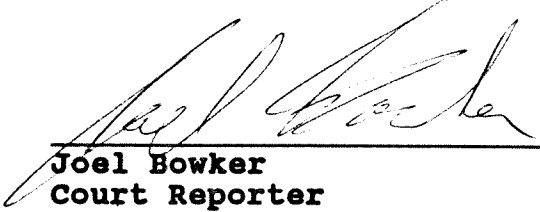
26 In this case I have a number of concerns about
27 the reliability of the complainant's testimony. First,

1 there are the inconsistencies in the complainant's
2 recollections as to the frequency of the assaults and
3 the timing of the incident alleging intercourse. There
4 is the opinion of the Crown's expert witness that the
5 fact that the initial disclosure was made at a time of
6 high stress for the complainant, that being the suicide
7 attempt, leads to a possibility of serious error in the
8 sorting out of the many influences on the complainant
9 at the time. There is the medical evidence from 1985
10 which, while not conclusive either way, would seem to
11 make more plausible the lack of assaults as recollected
12 by the complainant. All of these factors leave me to
13 have a doubt as to the reliability of the complainant's
14 evidence, that is to say I have a doubt as to a
15 conclusion of guilt on the basis of the totality of the
16 evidence in this case.

17 For these reasons the charge is dismissed.

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

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23 _____
24 **Joel Bowker**
 Court Reporter