Date: 1999 02 18
Docket:CR 03696

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GORDON EUGENE SIMPSON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from conviction for assault causing bodily harm.

Heard at Yellowknife, NT, on February 11, 1999

Reasons filed: February 18, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Sarah Kay

Counsel for the Respondent: Loretta Colton

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REASONS FOR JUDGMENT

[1] The Appellant was convicted after trial in the Territorial Court on a charge of assault causing bodily harm on his common-law spouse and was sentenced to a term of imprisonment of nine months. The Crown proceeded by summary conviction. The Appellant appeals his conviction and the Crown has given notice of its intention to seek an increase in the sentence imposed.

[2] The conviction appeal gives rise to the following issues:

(i) whether the trial judge erred in admitting into evidence under the *res gestae* rule statements made by the victim of the assault to an ambulance attendant, a nurse and two police officers;

(ii) whether the trial judge erred in relying on the *res gestae* statements in convicting the Appellant;

(iii) whether the trial judge erred with respect to the *mens rea* required to convict the Appellant of assault causing bodily harm.

The *res gestae* statements

[3] At trial, a *voir dire* was held to determine the admissibility of various statements made by the victim. The ambulance attendant testified that on his arrival at the home, he saw some blood in the entrance. He observed that the victim had a fresh, two centimetres wide by five centimetres long cut on one arm, what looked to be a freshly swollen left eye and a fresh contusion under her chin. It appeared to the attendant that she had tried to stop the flow of blood from the cut prior to his arrival. He asked the victim what had happened. She responded that they were having a fight and that she was pushed, indicating, as she said this, towards the Appellant. The attendant bandaged the arm and put the victim on a stretcher for transport to the hospital.

[4] The attendant described the victim as upset and inebriated, but not slurring, orientated to person, place and time and appearing to understand his questions and the instructions he gave her.

[5] Constables McKay and Pierrot, who had also been dispatched to the home, met up with the ambulance as it was transporting the victim to the hospital. Constable Pierrot entered the hospital with the victim on a stretcher and observed as she was attended to by a nurse. He overheard the nurse ask the victim what had happened to her. He heard the victim reply, “He did it to me, he fucking hit me”.

[6] Constable Pierrot testified that he was also present when Constable McKay asked the victim what had happened to her and she replied, “He did this to me, he fucking hit me”. According to Constable Pierrot, Constable McKay then asked, “Where did he hit you?”, to which the victim responded by pointing to bruises on her eye and jaw area.

[7] Constable Pierrot testified that this conversation occurred within fifteen minutes of the initial call having been received. He said that the victim’s facial bruises appeared to be fresh and swelling. He described the victim as upset and angry. She had been drinking and there was a bit of slurred speech. She appeared to understand the questions put to her.

[8] Constable McKay’s recollection of his conversation with the victim was somewhat different. He testified that he asked her what had happened and that she said, “He pushed me hard”. He testified that she had bruises on her face that appeared to be fairly recent, although admitting on cross-examination that they could have been a couple of days old. Constable McKay testified that he asked the victim how the bruises had happened and she said “He did it”, but she could not recall how. Constable McKay testified that the victim was lying on a hospital gurney at this point and did not move her arms. He described her as heavily intoxicated with some problems speaking. He said she

appeared to understand his questions and that he had no reason to doubt what she was saying.

[9] Although the victim did not name the Appellant as the one who had hit or pushed her, both police officers said they understood her to be speaking about the Appellant. It was not suggested that there was anyone else she could have been referring to.

[10] The victim herself testified on the *voir dire* that she had blacked out from drinking on the day in question. She recalled having an argument with the Appellant but not whether there was a physical altercation. She did not recall how she got the injuries described but said that she did not have them prior to the date in question. She did not recall speaking to the ambulance attendant or the nurse or the police officers but said that she would have no reason to lie to those persons.

[11] In admitting the victim's statements, the trial judge held that there were no leading questions or suggestions put to the victim and that her answers were spontaneous. He took note of the fact that all the conversations occurred within fifteen minutes or so of the initial call to the police.

[12] On this appeal, counsel for the Appellant argued that the trial judge erred in admitting the statements in light of the victim's intoxication and the inconsistencies as between Constable McKay and Constable Pierrot. These factors, it was submitted, cast doubt on what the victim actually said and on the reliability of her statements.

[13] I reviewed the *res gestae* exception to the hearsay rule in *R. v. Oliver*, [1996] N.W.T.J. No. 69 (S.C.). As set out in that case, the essential requirements are that the statement is spontaneous, that it is made under the stress or pressure of a dramatic or startling act or event, that the stress or pressure is such that the possibility of concoction or deception can be safely discounted and that the statement is approximately contemporaneous to the event.

[14] Crown counsel argued that evidence of intoxication goes to the weight to be given to the statements once admitted rather than the question of admission. In *Oliver*, I referred to the considerations set out in *R. v. Andrews*, [1987] 1 All E.R. 513 (H.L.), one of which is:

> As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the trier of fact. Here

> again there may be special features that may give rise to the possibility of error, for example, intoxication at the time of the event about which the statement is made.

[15] The passage just quoted indicates, in my view, that intoxication is a special feature which should be considered on the issue of admission of the statements. The remainder of the passage in *Andrews* confirms this:

> In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error.

[16] I conclude that evidence of intoxication is relevant both at the stage of determining whether the statements are admissible and, if they are admitted, again at the stage of determining the weight to be given to them.

[17] In this case, it was not argued before the trial judge that the victim's intoxication should be considered on the question of admissibility of her statements. Nor was it mentioned by the trial judge in his ruling. In light, however, of comments he made at the end of the trial, and which I will refer to further on, he must surely have had in mind the evidence about the victim's intoxication. That evidence would go to the possibility of error, as set out in *Andrews*.

[18] Although the trial judge did not specifically say in his reasons for admitting the statements that he had ruled out the possibility of concoction or fabrication or error, the law is clear that a trial judge is not required to give reasons for his judgment since there is a presumption, in the absence of a clear error of fact or law on the record, that he applied the proper and relevant principles: *R. v. Burns*, [1994] 1 S.C.R. 656. In this case, the trial judge had heard submissions from the Crown on the issue of concoction, in which Crown counsel pointed out that there was some consistency to the statements made and that the victim did not remember at trial what had happened or what she had said but did testify that she would have had no reason to lie to the recipients of the statements. There is no reason to think that the trial judge was not alert to the issues of fabrication, concoction and error.

[19] I would distinguish this case from *R. v. LaChappelle*, [1995] S.J. No. 247 (Sask. Q.B.), cited by the Appellant although not a *res gestae* case, where the evidence was that the witness was so intoxicated that the police officer felt what she said was not reliable

and he refused to take a statement from her. The evidence of intoxication in this case does not approach that and all the evidence was that the victim was alert and responsive.

[20] In my view, the discrepancies in the evidence of the two police officers go to the weight of the statements rather than their admissibility. There may be cases where the evidence about statements made by a victim is so contradictory that one cannot say for certain that any particular statements were made. This is not such a case. While there were differences in the evidence of the police officers as to the conversation between Constable McKay and the victim, on both versions the victim identified "He", the Appellant, who was present at the hospital, as having caused the bruises on her face by hitting her. Constable McKay's evidence that she spoke of being pushed is consistent with what she had told the ambulance attendant earlier.

[21] In my view, the trial judge correctly applied the principles governing the admission of *res gestae* statements and did not err in admitting the statements in this case.

[22] It should be noted that the trial judge also referred to the case of *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) when he was dealing with admission of the victim's statements. The Crown had sought to have the statements admitted under the *res gestae* rule, not under *Khan*, although reference was made by counsel to the principles of necessity and reliability, which are set out in the latter case. Before me, counsel did not rely on *Khan*. However, it does seem to me, without ruling on the point, that *Khan* might well be an alternate ground upon which the statements could be admitted. They were necessary because the victim no longer had a memory of what had happened to her. They were reliable for the reasons found by the trial judge.

[23] The next issue is whether the trial judge erred in relying on the *res gestae* statements in convicting the accused. In this connection, counsel for the Appellant referred again to the victim's intoxication. That factor was considered by the trial judge, who specifically directed himself to consider whether the victim's statements were reliable notwithstanding that they came from someone highly intoxicated. He expressed the concern whether they amounted to proof beyond a reasonable doubt. He said that the Court should be extremely wary and very careful about convicting on the statements of drunks, whose recollections and orientation towards space and time with respect to events are often, he noted, confused by the consumption of alcohol.

[24] Counsel for the Appellant argued that the following remark by the trial judge suggests that he did not in fact find the statements made by the victim to be reliable:

> I'm considering carefully if the evidence of alcohol abuse and intoxication compromises those statements. I don't think so. If I only had one statement like that, I'd have great difficulty in convicting given her level of intoxication. I have three, all consistent, all the same, all made in response to people asking her what happened with respect to her elbow. Now, I don't want to speculate as to what happened. The only thing I can find is that he pushed her hard, and with respect to the injury on her chin and eye, that he hit her.

[25] Counsel for the Appellant argued that three statements from an intoxicated person are no more reliable than one statement and that in any event, in the circumstances of this case, the statements were not consistent and it could not definitively be said that the victim was referring to different injuries when she was speaking about what happened.

[26] In my view, it was open to the trial judge to find on the evidence before him that the victim was consistent in identifying the Appellant as the one who had caused her injuries and that she was referring to the causes of two separate injuries: first, a push, as stated by the victim to the ambulance attendant who dealt with the arm injury at the home and second, a hit, as stated by the victim to the nurse and the police officers in relation to the bruises. The fact that Constable McKay said she also told him that she had been pushed does not, in my view, detract from or contradict what she told the others.

[27] It was for the trial judge to weigh and consider this evidence and to determine whether the victim's intoxication left him with a reasonable doubt. He was entitled to find and did find that despite her intoxication, the victim's statements were sufficiently consistent as to satisfy him beyond a reasonable doubt that the Appellant had assaulted her.

[28] The Appellant did not testify at trial. There was nothing in the evidence that was presented which would give rise to a specific concern about concoction or fabrication which might affect the weight of the evidence.

[29] Counsel for the Appellant submitted, however, that there was evidence suggesting that the victim's statements referred to a different incident. She relied on the evidence of a Crown witness, Ms. McLeod, who testified on the trial, and not the *voir dire*, that sometime in the afternoon of the day in question she had seen the Appellant push the victim, who fell to the ground and then got up and walked away. Ms. McLeod said that the victim did not suffer any injuries from that push and had no bruises on her face at that time.

[30] Counsel for the Appellant argued that it is possible that when the victim spoke to the ambulance attendant and the police officers, she was referring to the push seen by Ms. McLeod, which had not caused any injury. That push itself would, of course, constitute an assault.

[31] In my view, however, there was evidence before the trial judge upon which he could conclude that the victim was referring in the *res gestae* statements, not to the earlier push observed by Ms. McLeod, but to a later incident in which the injuries were caused. Ms. McLeod's evidence was that she had observed the push in the afternoon and that she later went home and sometime after that the Appellant came to her home with the children and asked her to look after them while he went to the hospital with the victim, who he said had been injured. The ambulance attendant testified that it was 9:45 p.m. when he got to the scene and that there was discussion then of the children being cared for while the adults went to the hospital. Ms. McLeod observed no bruises on the victim at the time of the afternoon push and no bleeding. The injuries must therefore have occurred after the push she witnessed.

[32] When the ambulance attendant arrived at the home, the concern was clearly the injury to the victim's arm. His question to her about what had happened and her answer must be viewed in that context. Similarly, her answers to questions at the hospital must be viewed in context. She was being treated for injuries. When asked what had happened to her, she identified the Appellant as being responsible. She identified her bruises as having been caused when the Appellant hit her. It is not logical to think that in those circumstances, she might instead have been referring to a push which happened earlier in the day and caused her no injury.

[33] The Appellant's counsel also relied on testimony from the victim about blacking out a lot when drinking, sometimes being confused when drinking, sometimes waking up with bruises she could not explain and sometimes falling down and not remembering it. This evidence, it was submitted, could provide an alternative explanation for the victim's injuries. It was, however, up to the trial judge to consider that possible alternative explanation when assessing the weight to be given to the victim's statements about how the injuries in this instance were caused. As set out above, the trial judge was very alert to the issue of whether statements made by an intoxicated person should be relied upon. I cannot say that he made an error in finding as he did that the victim's statements provided a sufficient basis upon which to convict.

[34] I find therefore that the trial judge committed no error in admitting the *res gestae* statements into evidence or in convicting the Appellant based on those statements.

[35] I will note here that during counsel's submissions before me, there was reference to exculpatory verbal statements made by the Appellant to one of the police officers. Although I had initially thought that they were entered into evidence as part of the Crown's case at trial, a careful review of the record leads me to the conclusion that the Crown had asked that they be ruled admissible only so that the Crown could use them in cross-examination if the Appellant testified. It appears that they were dealt with on the same *voir dire* as the *res gestae* statements for the sake of convenience, although in submissions at the conclusion of that *voir dire* Crown counsel did not address them. They then appear to have gone in as part of the Crown's case without counsel specifically addressing their use when the evidence on the *voir dire* was applied to the trial proper. If they did go in as part of the Crown's case, then they were part of the evidence which the trial judge was entitled to consider and which I must assume that he did consider but did not view as giving rise to a reasonable doubt.

The *mens rea* for assault causing bodily harm

[36] The Appellant submits that the trial judge erred in law with respect to the *mens rea* required for a conviction for assault causing bodily harm.

[37] The trial judge found that the bodily harm was the cut to the victim's arm. He ruled on the *mens rea* requirement as follows:

> I note that reasonable foreseeable harm that occurs is not a necessary element of the offence. Crown counsel provides me with the case of R. v. Swenson, a decision of the Saskatchewan Court of Appeal, 1994. It indicates and approves, in quoting R. v. Brooks, the mens rea to commit the assault, that is the intentional application of force to the person of the victim, and that such force resulted in bodily harm. The offence is made out on the mens rea or intent to intentionally apply force to the victim is proved beyond a reasonable doubt in circumstances where bodily harm results. In my view, the accused intentionally applied force to her, pushed her and hit her on the chin. When he pushed her, she fell and somehow cut her arm. The reasonable foreseeability of the harm is not a requirement. The injury occurred as a result of being pushed down. In my view, those particular circumstances may go to sentence but they don't go to the validity of the offence, and I convict him.

[38] In the cases referred to by the trial judge, *R. v. Swenson* (1994), 91 C.C.C. (3d) 541 (Sask. C.A.) and *R. v. Brooks* (1988), 41 C.C.C. (3d) 157 (B.C.C.A.), it was held that the mental element required for assault causing bodily harm is the intention to commit the assault.

[39] The Courts of Appeal of Ontario and Alberta have, however, held that there must be objective foreseeability of the risk of bodily harm: *R. v. Nurse* (1993), 83 C.C.C. (3d) 546 (Ont. C.A.); *R. v. Dewey*, [1998] A.J. 1456 (Alta. C.A.). The judgment in the latter case was not filed until after the Appellant's conviction.

[40] In this jurisdiction, it has been held, in a case not cited to the trial judge, that the *mens rea* for assault causing bodily harm is the general intent to apply force and an objective foreseeability that the assault would subject the victim to the risk of bodily harm: *R. v. D.D.*, [1993] N.W.T.J. No. 59 (S.C.).

[41] The Supreme Court of Canada may rule on this issue in the appeal pending before it from *R. v. Groot* (1998), 129 C.C.C. (3d) 293 (Ont. C.A.). Until the Supreme Court makes a final ruling, the decision of the Alberta Court of Appeal in *Dewey* is highly persuasive. I note as well that in *Dewey*, the decisions of the Supreme Court of Canada in *R. v. Creighton*, [1993] 3 S.C.R. 3 and *R. v. Godin*, [1994] 2 S.C.R. 484 were considered and it was found that they had put in doubt the reasoning in *Swenson*.

[42] Accordingly, I find that the trial judge did err in holding that the only intent required for a conviction for assault causing bodily harm is the general intent to commit the assault.

[43] Counsel for the Respondent Crown argued that even if I should find that the trial judge erred, I should apply s. 686 of the *Criminal Code* and find that there was no substantial wrong or miscarriage of justice. Counsel submitted that any push, especially a hard push, can result in a fall and any fall can result in bodily harm.

[44] In support of this submission, Crown counsel relied on *Dewey*. The facts of that case were that the accused had come between the victim and another man who were fighting and the accused forcefully shoved the victim, who hit his head on a jukebox or corner of a wall when he fell and was seriously injured. The trial judge found as a fact that the accused had pushed the victim more forcefully than would cause a stumble. The Court of Appeal applied s. 686, holding that what is objectively foreseeable in a certain

situation is a question of law and that it was objectively foreseeable that the accused's action in that case would create a risk of bodily harm.

[45] What distinguishes the case before me from *Dewey* is the lack of detail as to what happened between the Appellant and the victim. The trial judge found that the only evidence on that point was contained in the statements admitted under the *res gestae* rule, in other words that the Appellant had pushed her hard and hit her.

[46] There was no evidence as to how the victim was cut. Although questions were posed by defence counsel to the ambulance attendant about the possibility of a knife having made the cut, the witness, whose qualifications to give that opinion were not canvassed, said in the end that he was not sure. There was no evidence at all that a knife was involved. Similarly, although questions were posed about a sharp-cornered vent in the baseboard in the entrance of the victim's home, there was no evidence that the victim fell on the vent. In light of the absence of blood on the vent, there is certainly some doubt that she did.

[47] There was no medical evidence called about the nature of the cut to the arm or how such a cut might have been caused.

[48] In *Dewey*, there was sufficient evidence that the trial judge could find that the accused pushed the victim more forcefully than would cause a stumble. There was no evidence in this case as to how the Appellant pushed the victim except the victim's statement that he pushed her "hard". There was no evidence as to where on her body he pushed her, what their respective positions were when it happened or where they were and what was nearby. Although the trial judge, in his reasons for conviction referred to above, found that the Appellant had pushed the victim down and that she fell, there is nothing in the victim's statements or the rest of the evidence that goes that far.

[49] The result of all this is that there was simply no evidence from which the trial judge (or a judge sitting on appeal) could make a determination as to whether the hard push or the hit were such that it was objectively foreseeable that the victim was subject to the risk of bodily harm. In order to make such a determination, one would need to know the circumstances of the assault. In this case, the circumstances are unknown.

[50] Accordingly, I conclude that s. 686 is not available in this case. The conviction for assault causing bodily harm is set aside and a conviction for assault pursuant to s. 266 of the *Criminal Code* is substituted.

Whether the sentence imposed by the trial judge was unfit

[51] In light of my decision on the conviction appeal, the maximum sentence available on summary conviction is six months' imprisonment pursuant to s. 787(1) of the *Criminal Code*. The Crown's application for an increase in sentence cannot be considered and is dismissed.

[52] The Appellant has served almost six months of the nine month sentence imposed. I therefore order that the sentence be reduced to time served.

Conclusion

[53] To summarize, the appeal is allowed in part. The conviction for assault causing bodily harm is set aside and a conviction for assault pursuant to s. 266 of the *Criminal Code* entered. As a result, the sentence is reduced to time served.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
18th day of February 1999

Counsel for the Appellant: Sarah Kay
Counsel for the Respondent: Loretta Colton

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