Whalen v. H.M.T.Q, 2001 NWTSC 63

Date: 2001 08 15
Docket: S-1-CR-20000000054

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RONALD WHALEN

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from conviction on a charge of unlawful confinement, contrary to s.279(2) of the Criminal Code. Appeal allowed.

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

Heard at Yellowknife, Northwest Territories
on May 24, 2001

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent Crown: Sadie Bond

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RONALD WHALEN

Appellant

-and-

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REASONS FOR JUDGMENT

[1] The Appellant was tried in the Territorial Court on the following charges, which the Crown proceeded with summarily:

> Count one:
>
> on or about the 25th day of August 2000, at or near the City of Yellowknife in the Northwest Territories, did without lawful authority confine K.E., contrary to section 279(2) of the Criminal Code;
>
> Count two:
>
> on about the 25th day of August 2000, at or near the City of Yellowknife in the Northwest Territories, being the parent of K.E., a child under the age of sixteen years, did fail without lawful excuse to provide the necessaries of life to K.E. and did thereby endanger the life of K.E., contrary to section 215(2)(a)(ii) of the Criminal Code.

[2] The trial judge convicted the Appellant on count one and dismissed count two. The Appellant appeals from the conviction. At the time this appeal was heard, he had served the two month gaol sentence imposed by the trial judge and was in the fifth month of the six months of probation that was also imposed. He has raised a number of grounds of appeal, alleging that the trial judge erred as follows:

> 1. in finding that the confinement was unlawful;

2. in refusing to permit the Appellant to call a witness in his defence;

3. in not swearing the witnesses at trial; and

4. in applying the evidence from the *voir dire* to the trial without obtaining the consent of the Appellant and the Crown.

Background

[3] The Crown called as witnesses two police officers who testified that they had become concerned about the safety of a woman they had seen on the street in a drunken condition and so decided to take her to her home. She gave them an apartment address and produced a key. Immediately upon entering the apartment with her, the officers saw that the door to one of the inside rooms had been secured with a cord which was wrapped around its doorknob, stretched around a corner and then wrapped around another doorknob. One of the officers unwrapped the cord and opened the door to find K.E., a four year old child, in bed. It appeared to the police officer that she had been sleeping. No one else was in the apartment.

[4] The police had arrived at the apartment at 5:50 p.m.. Upon finding the child, they called Social Services because the woman they had escorted to the apartment, who is the child's mother, was too intoxicated to take care of her. At 6:15 p.m. the Appellant, who is K.E.'s father, arrived at the apartment and advised the police that the child had been "grounded". The police concluded from the smell of alcohol coming from the Appellant that he was intoxicated.

[5] The Crown adduced evidence of a number of statements made by the Appellant to the police and to the social workers. These statements were admitted into evidence after a *voir dire* and no objection was taken on this appeal to the correctness of the trial judge's ruling that they were voluntary. Initially the Appellant told the police that he had gone upstairs to a neighbour's apartment for five minutes to get cigarettes, then that he had gone to a bank machine for ten minutes.

[6] In speaking to the social workers, the Appellant said at various times that he had gone uptown to get cigarettes; that he did not trust anyone in the building to babysit K.E.; that he had wired K.E. into the bedroom because she had run off on her own

earlier and he had put her in her room and she kept coming out; that she was acting up, he was tired and wanted her stay in her room.

[7] The Appellant, who was unrepresented, testified at trial that K.E. had been in his care for most of her life and that the mother, who had little involvement, was not supposed to have been at the apartment that day. K.E. had gone off with a little friend two days before this incident and he had gone looking for her. After finding her, he told her she was grounded. On the day in question, he was suffering from back pain and fell asleep on the couch while K.E. and a friend played. He awoke to find they were gone. After locating them in an alley, he told K.E. she had to stay in her room. She kept coming out of the room so eventually he tied the cord to the door. At some point he checked and found her asleep. He had a couple of beers at the apartment and left to go to the bank machine and get cigarettes. He presented as evidence a bank receipt marked 5:57 and said that he had been gone from five minutes before 5:57 until 6:20.

[8] The Appellant disputed the evidence of the police officer that the door was wired shut in such a way that the child would not have been able to get out. However, the trial judge rejected the Appellant's evidence and found as a fact that K.E. was in effect locked in her room.

[9] In the course of the Crown's submissions at trial, with respect to the charge of unlawful confinement, the trial judge raised the issue whether a parent has the lawful authority to confine a child. The Crown's position was that if such lawful authority exists, the Appellant exceeded it in this case by taking an unreasonable measure. The Crown also submitted that the charge of failing to provide the necessaries of life might be the more appropriate charge for the Appellant's behaviour. The Crown's argument was that the Appellant had failed to provide adequate supervision for K.E. for the approximately half an hour that he was gone and thus created a risk of danger to her life, giving the example that there could have been a fire.

[10] The trial judge completely rejected the testimony of the Appellant, referring to the different accounts he had given of his whereabouts at the time in question as well as other contradictions in his evidence. He stated, "He is not telling the truth. He did not tell the truth to the child protection officers, he is not telling the truth to the police, and I am not convinced that he is telling the truth here today".

[11] In convicting the Appellant of unlawful confinement the trial judge said the following:

> Count 1 states that
>
> > Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an offence punishable on summary conviction...
>
> To narrow that down to assist the accused in understanding what I am doing, I will say this, that the *Code* reads: Every one who, without lawful authority, confines another person is guilty of an offence.
>
> The question is: Does he have lawful authority? He is the father. Does a parent have the lawful authority to confine their child? They may. I do not have to answer that question. Because, in my view, the accused went so far beyond any lawfulness, he has distanced himself too far from any element of justification or lawfulness in terms of his conduct. He was away from that child who was locked in her room with this wire for, at the very least, a half an hour and I dare say longer. He was drinking and the four-year-old child had no choices here. I have no credible evidence before me that this was a consequence of bad conduct. And even for the moment, for argument's sake, accepting that this was a way of grounding the little girl, I question the reasonableness of locking a little four-year-old in her room because they went off and played with another child. I do not have to go into that. All I can say is that the accused went far beyond any possible authority he might have as a parent with respect to this child in confining her to a room secured by a wire and leaving her alone.
>
> In my view the little girl was confined. She had absolutely no choice. This is an adult, her father. And in my view the confinement was unlawful without any authority and beyond reason. He's convicted on Count 1.
>
> With respect to Count 2, I appreciate that in law, failure to provide adequate supervision can amount to a failure to provide the necessaries of life. But on all of the evidence that I have before me, essentially the Crown evidence, I am not satisfied beyond a reasonable doubt that a conviction should lie on Count 2.

Positions of the Parties

[12] The Appellant submits that the trial judge erred in law in convicting him of unlawful confinement. He argues that as a parent, he has certain rights of control over

his child and that simply placing the child in a room and locking the door, while not a smart thing to do, was not unlawful, nor did it become unlawful when he left the apartment. The Appellant argues further that insofar as the conviction is based on his failure to supervise the child or the risk of danger to the child, it is inconsistent with his acquittal on the charge of failure to provide necessaries. In essence, the Appellant says that what happened in this case may properly be a child welfare matter, but it is not a crime.

[13] Crown counsel submits that all that is necessary for there to be unlawful confinement is restraint of the victim's movements. Without conceding that a parent has authority to confine a child, Crown counsel submits that if such authority exists, it applies only where the parent confines the child for discipline or safety reasons. Since the trial judge rejected the Appellant's evidence that he confined the child to discipline her, it should be inferred that he confined her for his own convenience; he therefore exceeded any lawful authority he might otherwise have. By leaving her in the room while he went out, he put her at risk since no one else knew she was there. The Crown argues that the acquittal on the charge of failure to provide necessaries is not inconsistent because the latter requires proof of actual endangerment rather than simply the risk of it.

Analysis- unlawful confinement

[14] Section 279(2) of the *Criminal Code* reads in part as follows:

> Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of ... an offence ...

[15] Confinement has been defined as a physical restraint, contrary to the wishes of the person restrained, but to which the victim submits unwillingly, thereby depriving the person of his or her liberty to move from one place to another. Such confinement need not be by way of physical application of bindings: *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.) [leave to appeal to the Supreme Court of Canada refused May 17, 1985].

[16] In this case, there is no question that the child was confined. Her movements were restricted so that she was unable to leave the room, just as they would have been had the Appellant simply left her in the apartment and locked the door.

[17] The question is whether, in confining the child, the Appellant acted without lawful authority. Counsel did not provide me with any authorities which deal with the scope of a parent's authority to restrict the movements of, or confine, his child, and I have not been able to find anything directly on point.

[18] Clearly society grants (and expects of) parents a certain amount of control over their children's movements and a certain amount of force that would be unacceptable, if not criminal, in the case of an adult. In ruling on the constitutionality of s. 43 of the *Criminal Code*, which provides that use of force by a parent toward his child, and by a schoolteacher toward his pupil, is justified by way of correction, McCombs J. observed:

> The offence of assault is defined in s. 265 of the Code as "the intentional application of force to another person, directly or indirectly, without the consent of that person". This broad definition, standing alone, would make criminal any mild or moderate forms of physical discipline, including spanking as defined in this case. Without s. 43, other forms of restraint would be criminal, such as putting an unwilling child to bed, removing a reluctant child from the dinner table, removing a child from a classroom who refused to go, or placing an unwilling child in a car seat. All parties to this application agree that these are common and necessary applications of force.
>
> The fact that such commonly accepted forms of parental discipline would become criminalized without s. 43 is a very significant consideration.
>
> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2000] O.J. No. 2535 at para. 88 and 89 (Ont. Sup. Ct. Jus.)

[19] In this case, there was no evidence that the Appellant used physical force on the child to put her in the room; he was not charged with assault, so s. 43 is not applicable. Counsel for the Crown suggested that since s. 43 applies only to cases of assault and since no similar defence is provided for the offence of unlawful confinement, there is no similar "justification" defence available on the latter charge. However, in my view that cannot be so. Since the confinement, to be an offence, must be without lawful authority, one must consider what a parent has the lawful authority to do. Otherwise, to use one of the examples referred to by McCombs J., to restrain an unwilling child in a car seat would amount to unlawful confinement.

[20] There is no question that a parent has certain rights of control over a child (see, for example, the discussion of that issue in *R. v. Chartrand*, [1994] 2 S.C.R. 864,

[1994] S.C.J. No. 67). That right of control must also apply to the child's movements and whereabouts. The question is how far that right of control extends.

[21] Crown counsel argued that if a parent does have lawful authority to confine a child, it must be for the benefit or discipline of the child. If that is so, then presumably confinement would be justified in the following case. The commonly used discipline method of "time out" is imposed on a child who keeps hitting his sister . The child refuses to sit quietly and accept the time out, so the parent locks him in his bedroom to enforce the discipline lesson.

[22] On the other hand, one might consider the example of a parent who is engaged in a telephone call. Her child is upset and will not be quiet or leave her alone, interfering with the call. The parent locks the child upstairs in her bedroom until the call is over. This is not done for the child's benefit, and the child may not be doing anything "wrong", so it cannot be said to be a disciplinary measure. The step is taken solely for the parent's convenience. Surely that does not make it unlawful. Someone might say it is not a good way to deal with the problem, but in my view it is not criminal conduct.

[23] Similarly, if a parent is tired or unwell and wants to nap and for that reason locks a child in his room, one might say the parent is acting only for his own convenience. Yet in this scenario there is also an element of consideration for the child's interests. If the parent does not lock the child in the bedroom, the child may come to harm if left to his own devices elsewhere in the house while the parent sleeps.

[24] I refer to these examples as illustrative of the various scenarios that could be involved in an allegation of unlawful confinement of a child by a parent where the fact situation involves a fairly minor restriction on the child's movements. The limits on the control a parent should have over a child's movements may be difficult to define, even more so if the parent's motives come into the picture. The difficulty will be in drawing the line between what may be poor parenting or disciplinary methods and what is a crime.

[25] Turning to the Appellant's case, on the findings of fact and credibility made by the trial judge, it is clear that the Appellant left his four year old daughter alone and confined to her bedroom for at least half an hour. In my view, the manner in which he tied the door handle is irrelevant and the situation is no different than if he had simply locked the door. What is less clear is why he confined her. The trial judge rejected the

notion that it was a disciplinary measure and seems to have found that the Appellant did it for his own convenience, whether it was to go to the bank machine or to get cigarettes or to drink. The trial judge did not make a specific finding as to what the Appellant had been doing while he was away from the apartment. The Appellant admitted having had some beer while at the apartment and was not cross-examined on that or on his whereabouts. The Crown's cross-examination at trial focused on the suggestion that he put the child in the room because she was annoying him. It is not clear from the record that the trial judge's reference to the Appellant drinking was a finding that he had been drinking while he was absent from the apartment as opposed to while he was in the apartment.

[26] It seems to me highly unlikely that the Appellant's locking of his child in the bedroom would be regarded as criminal had he remained in the apartment and, for example, fallen asleep, or had he run down the hall to a neighbour's for cigarettes and stopped to chat for a few minutes. So the question then becomes whether the Appellant's absence or the length of that absence or what he was doing during that absence makes the confinement unlawful.

[27] Crown counsel argued that even if there was a lawful confinement to begin with, it became unlawful when the Appellant left the apartment, making himself unavailable to the child and leaving her without anyone else being aware of where she was. This argument is really the same as the trial judge's holding that the Appellant went beyond any lawful authority he might have by securing the child in a room and leaving her alone.

[28] In support of this argument, the Crown relied on *R. v. Velauthan* (1997), 117 C.C.C. (3d) 477 (Ont. C.A.). In that case, the accused had made a citizen's arrest of a person trespassing on his balcony. The Court held that while the initial confinement incidental to the arrest may have been lawful, the accused's subsequent conduct in forcing the complainant to go certain places and do certain things constituted separate and distinct acts of confinement which were unlawful. Those acts bore no relationship to the original arrest and confinement.

[29] In *Velauthan*, the subsequent acts of confinement were quite distinct from the initial one in that they involved restricting and directing the victim's movements in ways very different from the initial arrest, which was authorized by a provincial statute. In the Appellant's case, however, once he locked the child in the room, he did nothing further to restrict her movements. The only thing he did was absent himself

from the apartment. While that, in itself, may constitute a different offence, it does not, in my view, change the nature of the confinement because it has nothing to do with restraining the child. His absence cannot, therefore, affect the authority he had to confine her.

[30] Similarly, I take the view that in the circumstances of this case, neither the length of time for which the Appellant was absent nor what he was doing affect his lawful authority to confine the child to her room. Having said that, I do acknowledge that there may be cases where these factors are significant and may result in a different decision.

[31] This is not to say that the Appellant acted appropriately. There are offences in the *Criminal Code* aimed at the protection of children by ensuring that they are supervised. The other offence with which the Appellant was charged is failing to provide the necessaries of life, under s. 215(2)(a)(ii). I accept, as did the trial judge, that for a young child, adequate supervision is one of the necessaries of life. There is also the offence under s. 218 of the *Criminal Code* of unlawfully abandoning a child under the age of ten years, so that its life is or is likely to be endangered. Abandonment need not be total or permanent: see *R. v. Holzer* (1988), 63 C.R. (3d) 301 (Alta. Q.B.), where a child was left in a vehicle for a few hours while the parent was in a bingo hall. And s. 89(d) of the *Child and Family Services Act*, S.N.W.T. 1997, c. 13, makes it a summary conviction offence for a person having the care, custody, control or charge of a child to abandon the child without having made adequate provision for the child's care and custody. There is also, of course, authority under the *Child and Family Services Act* for child welfare workers to intervene where a child needs protection by reason of her parent's inability or unwillingness to care for her properly.

[32] The record in this case does not, of course, indicate what steps were taken by the social workers from the child protection perspective. Apparently the Appellant was not charged with abandonment under either the federal or the territorial statute.

[33] As I have indicated above, Crown counsel who appeared at the trial argued that failure to provide necessaries was actually the more appropriate charge in this case. However, the trial judge acquitted on that charge. The Appellant argues that the acquittal is inconsistent with the conviction on the unlawful confinement charge because it can only mean that the trial judge had a reasonable doubt about his failure to provide proper supervision, in which case that failure cannot form the basis for the

conviction for unlawful confinement. In other words, it does not make sense that the trial judge would acquit on that charge but still find that the Appellant had gone far beyond his authority as a parent in confining the child because he left her unsupervised.

[34] Crown counsel argued that the conviction for unlawful confinement is not inconsistent with the acquittal for failure to provide necessaries because the latter requires proof of actual endangerment rather than simply a risk of endangerment.

[35] Section 215(1) provides that a parent is under a legal duty to provide necessaries of life for a child under the age of sixteen years. Section 215(2)(a)(ii) makes it an offence for a parent to fail to perform that legal duty if the failure endangers the life of the child, or causes or is likely to cause the health of the child to be endangered permanently.

[36] In *R. v. Naglik*, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, the majority in the Supreme Court of Canada held that on a charge contrary to s. 215(2)(a)(ii), the Crown must prove a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child.

[37] I agree that the elements of the offences of unlawful confinement and failure to provide necessaries are different and that the latter offence requires proof of endangerment. However, that is not determinative. In my respectful view, the verdicts, on the facts of this case, are inconsistent. The test is set out in *R. v. Sillipp* (1997), 120 C.C.C. (3d) 384 (Alta. C.A.) [leave to appeal to the Supreme Court of Canada denied May 14, 1998]. There, the Court said that an Appeal Court should intervene on the ground of inconsistency only where the Appellant establishes that no reasonable jury could, acting properly and logically, have reached the verdicts.

[38] In my view the verdicts are inconsistent in the sense referred to in *Sillipp*. The trial judge's reasons for conviction on the unlawful confinement charge indicate that he felt the Appellant exceeded any lawful authority he might have to confine the child because he left her alone in the apartment for his own convenience. Yet if the circumstances of his leaving her alone were not sufficient for a conviction for failure to provide necessaries under s. 215(2)(a)(ii), it is illogical to say that those same circumstances are sufficient to negative his lawful authority to confine her movements.

Put another way, even if the acquittal is based solely on lack of proof that the child's life was endangered, that means that the Crown did not prove that the Appellant failed to live up to what Lamer C.J.C. called in *Naglik,* "a *minimum* level of care to be provided for those to whom it applies" (emphasis in the original). That being the case, it is not reasonable or logical that the same facts can render his confinement of the child unlawful, or that he can be said to have exceeded his lawful authority as a parent.

[39] There can be no doubt that in leaving the four year old child unsupervised, the Appellant acted irresponsibly, although it might be argued that his actions showed at least some concern for the child in that locking her in the bedroom, where she might simply fall asleep, might be a safer course of action than leaving her in an unlocked apartment where she might wander out on the street. But surely to the extent that his actions might be criminal rather than simply unreasonable or neglectful, it is the leaving of the child without supervision that is the basis of any offence. Whether the Appellant could properly have been convicted of child abandonment is not, however, an issue I need to decide.

[40] For all the above reasons, I find that the trial judge did err in finding that the confinement was unlawful on the facts of this case. I therefore allow the appeal on this ground, set aside the conviction and direct that a verdict of acquittal be entered.

[41] In light of the above finding I will deal with the remaining grounds of appeal only briefly.

Failure to permit the Appellant to call a witness

[42] The Appellant also alleged that the trial judge did not permit him to call as a witness the child's mother, who, according to the police officers' evidence, was in an intoxicated state when they arrived at the apartment and found the child. The record indicates, however, that the trial judge simply asked the Appellant what evidence the witness was expected to give and told him that he should focus on evidence about the incident. The Appellant then immediately stated that he would not call the witness. The trial judge was entitled to inquire as he did so as to ensure that the evidence had some relevance. He did not refuse to let the Appellant call the witness.

[43] On the hearing of this appeal, it was not shown what evidence the witness was expected to give or what relevance it might have, as was done in *R. v. Cook* (1960), 127 C.C.C. 287 (Alta. C.A.). There is no basis to think, either from the evidence at the

trial or from what was said on the appeal, that the mother had anything relevant to add. Counsel for the Appellant also submitted that either the Crown or the trial judge ought to have called the mother as a witness, but in my view, in these circumstances, neither one had an obligation to do so. I would not give effect to this ground of appeal.

Failure to swear the witnesses

[44] The trial judge did not have the witnesses sworn, but simply had each one affirm without an inquiry into whether they objected to taking an oath. In all the circumstances, including the somewhat defective nature of the affirmation in the case of one of the witnesses, I would apply the curative proviso in s. 686(1)(b)(iv) on the basis that these procedural irregularities caused no prejudice to the Appellant.

Failure to obtain consent to apply the *voir dire* evidence to the trial

[45] At the conclusion of the *voir dire*, the trial judge did not ask whether the Crown and the Appellant consented to having the *voir dire* evidence applied to the trial proper. There are several cases which hold that this is an error: *R. v. Gauthier* (1975), 27 C.C.C. (2d) 14 (S.C.C.); *R. v. Camara*, [1997] B.C.J. No. 2832 (S.C.); *Beaulieu et al. v. H.M.T.Q.*, 2001 N.W.T.S.C. 46.

[46] The result was that both the Appellant's evidence on the *voir dire* and a statement made by the child to the police officer were admitted. The child's statement, which the Crown had not initially sought to have admitted but which the trial judge raised during submissions, and then admitted as substantive evidence, was actually a question asked by the child: "Do I have to leave because my mommy and daddy are drinking again?" The Appellant's evidence on the *voir dire* included an explanation as to why he had locked the child in the room and a statement that he had not been drinking. The trial judge referred to his different versions about drinking and about the incident in finding him not credible. It is not clear whether he also considered the child's statement in convicting the Appellant. In my opinion, it would not be appropriate to apply the curative provision as the error may well have prejudiced the Appellant, particularly with respect to the child's statement. The Appellant was told only that the *voir dire* was to determine the admissibility of statements he had made. I would have allowed the appeal on this ground. The appropriate remedy would have been to order a new trial, but I need not do so since I have decided on the first ground that an acquittal should be entered.

[47] In the result, as indicated above, the appeal is allowed. The conviction is quashed and a verdict of acquittal will be entered.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 15th day of August, 2001.

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent Crown: Sadie Bond

S-1-CR200000005

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