*Lander v. HMTQ*, 2002 NWTSC 36

Date: 20020502
Docket: S-1-CR-2001000096

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KAREN LANDER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Summary conviction appeal from the Appellant's conviction by a Territorial Court Judge of assault causing bodily harm.

Heard at Yellowknife, NT on March 28, 2002

Reasons filed: May 2, 2002

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

Counsel for the Appellant: James Brydon
Counsel for the Respondent: Caroline Carrasco
Appellant present by Video Conference

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REASONS FOR JUDGMENT

[1] This is a summary conviction appeal from the Appellant's conviction by a Territorial Court Judge of assault causing bodily harm. The appeal was heard at the same time as the appeal in CR 2001000107.

[2] The Appellant says that the verdict was unreasonable and also raises a number of evidentiary issues on which she says the trial judge erred. For the reasons that follow, I have concluded that the appeal should be dismissed.

[3] The trial proceeded in a somewhat unusual fashion, albeit with the agreement of counsel. The trial judge heard both Crown and defence evidence on the assault causing bodily harm charge. He then heard the evidence on charges of sexual assault, unlawful confinement and entering a dwelling house with intent to commit an indictable offence, which were contained in a separate information (and are the subject of the appeal in CR 2001000107). Submissions on all the charges were then made by counsel and the trial judge gave his decision on all matters.

[4] On the trial of the assault causing bodily harm charge which is the subject of this appeal, the Crown called as witnesses the complainant and her common-law spouse. The defence called one witness. The Appellant did not testify.

[5] The complainant testified that she and her spouse had been drinking at a local bar and she invited the Appellant to come back to their home. She said that the Appellant made sexual advances to her while her spouse was passed out. When she objected, the Appellant became angry and inflicted a serious bite on her arm and kicked her in the face. The complainant's spouse was awakened by her yelling and came out of his room, the Appellant left the house, and the complainant went to a neighbour's apartment nearby. The complainant was intoxicated when the police picked her up in the apartment parking lot shortly after and she spent the night in the drunk tank. When it was suggested to her in cross-examination that it was her spouse who had assaulted her, she denied it.

[6] The complainant's spouse testified that he heard screaming and observed that the complainant had blood on her. He saw the Appellant and told her to leave. He denied that he had assaulted the complainant that night. He admitted to having a conviction for assaulting her in 1998 and one for breaching the terms of his probation by going to her home in 1999.

[7] The defence called as its only witness the neighbour to whose apartment the complainant had gone after the assault. As the evidence defence counsel at trial apparently sought to elicit from her gives rise to one of the issues on this appeal, I will refer to it in more detail below.

[8] Counsel for the Appellant, who was not counsel at trial, submitted that the defence was never properly brought out because the trial judge consistently "shut down" counsel and prevented him from cross-examining on matters relevant to the defence. He submitted that the defence was that the complainant's spouse may have committed the assault and that the complainant instead blamed the Appellant because she would lose her spouse's financial support if he went to jail.

[9] I will deal first with the submission that the trial judge prevented trial counsel from cross-examining on matters relevant to the defence. In my view, this submission has no merit. A review of the trial transcript indicates that the first time the judge intervened was when Crown counsel objected to a question put to the complainant's spouse in cross-examination as to whether the complainant had been refusing to sleep with him around the time of the incident. When the trial judge asked what the relevance was, defence counsel did not explain, but simply said he would explore something else.

Shortly after that the trial judge asked about the relevance of questions put to the spouse about who was paying the household expenses. Counsel did not respond to the trial judge, but went on to ask about the spouse's employment.

[10] The trial judge's next intervention arose from his concern that the complainant not be embarrassed by being asked to read her statement to the police after she stated that she is unable to read. He asked defence counsel to put the questions and answers from the statement to her orally and counsel did so.

[11] Finally, when the Crown objected to the way defence counsel was questioning the neighbour whom he had called as a defence witness, the trial judge asked about the relevance of his question. Defence counsel abandoned the question without further comment.

[12] The trial judge's questions were appropriate and there is nothing objectionable in his interventions. At the hearing of this appeal, the Appellant's counsel effectively conceded that this ground of appeal is not so much an objection to what the trial judge did as an allegation that trial counsel was incompetent in not pursuing some of the cross-examination of the Crown witnesses and the direct examination of his defence witness. There is a related issue arising from the fact that Crown and defence counsel at trial agreed that the complainant's statement taken by the police be admitted as an exhibit, which I will deal with further on.

[13] The right to effective counsel is an integral part of the right to make full answer and defence. Denial of that right may result in a miscarriage of justice. It is not enough, however, simply to allege that trial counsel was ineffective or even incompetent. The suggested procedure for bringing forth on appeal an allegation that trial counsel was incompetent is set out in *R. v. Delisle* (1999), 133 C.C.C. (3d) 541 (Que. C.A.) and in *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225 (Ont. C.A.). It is essential, except in the

exceptional case where the trial record contains all the evidence which demonstrates the incompetence of counsel at trial, that the lawyer whose conduct is impugned be given the chance to explain. The reasons for that are set out clearly in *R. v. Delisle* (at p. 548):

> There are several reasons why it is necessary for an appellate court to ensure that the lawyer whose conduct is challenged has an opportunity to explain himself. First, it would be too easy for an unhappy client to come forward and complain about the advice and decisions of his lawyer and leave the appellate court in complete darkness as to the reasons which may legitimize the lawyer's conduct. Second, a critical and valid review of counsel's conduct cannot be conclusive if one ignores the context and the dynamics of the trial. It is, therefore, in light of the decisions taken at trial that this question must be examined. Third, the consequences for a lawyer of a judgment which criticizes his conduct are too serious for him not to be allowed to participate in the case even if, strictly speaking, the case only concerns the appellant and the Crown.

[14] Where trial counsel whose competence is impugned is notified, he or she may file an affidavit as fresh evidence on appeal and the Crown is entitled to cross-examine on that affidavit so that the appellate court has a full and fair assessment of the conduct in question: *R. v. W. (W.)*.

[15] When I raised with the Appellant's counsel the fact that notice had not been given to trial counsel, he did not seek leave to take that step but instead took the position that the trial record itself shows incompetence. I do not agree and will address each of the aspects of trial counsel's conduct separately.

[16] Although he did not pursue the issue when the trial judge asked about its relevance, trial counsel did elicit evidence that the complainant's spouse was paying some of the household expenses, although the answers given fell short of establishing that the complainant was financially dependant on her spouse. In fact, trial counsel did cross-examine the complainant about whether she was dependant on her spouse for money and whether he had caused her injuries on the night in question because he was mad that she would not have sex with him. She answered "no" to those questions. It is not clear to me, absent some other evidence about the spousal relationship, what else he could have done.

[17] The next complaint about trial counsel's conduct arises from the way in which he questioned the neighbour, who was called as a defence witness. Trial counsel elicited evidence from her that the complainant had arrived at her apartment with blood on her and that she, the neighbour, had called the police. Trial counsel then started to ask her

whether she recalled saying something to the police but he was interrupted by a Crown objection that he was leading the witness and also that he seemed to be trying to adduce the neighbour's own prior statement from her. The trial judge asked counsel the relevance of what the witness told the police, whereupon trial counsel simply ceased his examination of the witness. The Crown did not cross-examine her.

[18] From his cross-examination of the complainant, it seems clear that trial counsel was trying to adduce from the neighbour a prior inconsistent statement made by the complainant, apparently a statement that her spouse had assaulted her. This would be fresh evidence for purposes of an appeal based on competence of counsel.

[19] There is, however, no way of assessing the evidence when it has not been placed before the Court in the form of anything other than a suggestion that the complainant made such a statement to the neighbour. No affidavit was filed, nor was there any indication as to whether the neighbour gave a written statement. So I am left not knowing whether the neighbour's evidence would have been that the complainant had initially told her that her spouse had committed the assault for which the Appellant has been convicted, or that the spouse had committed a separate assault from the one committed by the Appellant. I note that after some contradictory answers in cross-examination as to whether she had told the neighbour that her spouse had assaulted her, the complainant was re-examined by Crown counsel and confirmed that she had told the neighbour about the Appellant attacking and biting her. A logical inference is that the complainant told the neighbour about two assaults: one by her spouse and one by the Appellant. So if there was a prior inconsistent statement, it may have been only on the peripheral issue as to whether there was also an assault by the spouse. All of this is impossible to say with any certainty since the neighbour's evidence is not before me.

[20] I do not know whether there is a reason that trial counsel framed the question to the neighbour in such an unusual manner, in asking her what she had told the police, rather than what the complainant had told her. I do not know whether there was a reason that he did not pursue the issue when the Crown objected. Once could come up with a number of possible scenarios having to do with the clarity or reliability of the neighbour's recollection or whether she had changed her story after calling the police. However, a Court sitting on appeal in these circumstances should not engage in speculation, nor should it be asked to do so. Without knowing exactly what evidence the neighbour would have given, the Court does not have a proper basis upon which to assess the allegation that trial counsel's handling of the defence witness was incompetent and that it resulted in a miscarriage of justice. Therefore, I would not give effect to this ground of appeal.

[21] The Appellant also alleges that the trial judge erred in admitting into evidence a transcript of the complainant's statement to the police. She takes the position that this is another example of incompetence on the part of trial counsel and that it involves error on the part of the trial judge.

[22] Defence counsel attempted to cross-examine the complainant on inconsistencies between her statement to the police and her evidence at trial. When he referred her to the transcript, she said she cannot read. The trial judge, concerned about the complainant being embarrassed, directed defence counsel to read out loud the parts of the statement on which he wished to question her. Defence counsel did so. After a few questions put in that manner and in response to which the complainant said she did not remember having said what was in the statement, Crown and defence counsel agreed to file the transcript of the previous statement as an exhibit rather than have cross-examination on it.

[23] The trial judge immediately raised the concern as to what he was to do with the previous statement and whether he was to take it as proof of the veracity of what was contained in it. Counsel assured him that it was not put forward for that purpose, but only to show what the complainant had told the police on the date in question. This was ostensibly done to save the complainant any further difficulty on cross-examination, although her only difficulty seemed to be that she could not recall what she had said to the police.

[24] Crown counsel also submitted to the trial judge that she should be entitled to "re-direct [the complainant] on the consistent aspects of the statement". This was put forward to the trial judge as another reason the statement itself should be filed.

[25] The trial judge was persuaded to enter the statement as an exhibit, after again confirming with counsel that it was not to be taken as proof of the truth of its contents. In my view, his concern was well placed. While admitting the statement as an exhibit may have saved the time and trouble of taking the complainant through the parts counsel wished to examine her on, to admit it in this fashion also meant that the complainant was not given the opportunity to explain any inconsistencies, assuming that she might have been able to do so. However, as counsel for the Appellant pointed out, the more serious concern is that the consistent parts of the statement were not admissible.

[26] The submission by Crown counsel at trial that she would be entitled to re-examine the complainant on the consistent parts of her statement was not necessarily correct. It

is not clear on what basis Crown counsel would be entitled to re-examine. The rule is that except in certain circumstances, a party to criminal proceedings may not introduce a statement given by her own witness on an earlier occasion to show that the witness is consistent. There is no general exception to the effect that where counsel cross-examined to show inconsistencies, the witness can be re-examined to show consistency: *R. v. Beattie* (1989), 89 Cr. App. R. (C.A.).

[27] After the previous statement was admitted into evidence, defence counsel asked no further questions about it and instead questioned the complainant about telling the neighbour her spouse had assaulted her. When that concluded, Crown counsel, without any objection from defence, and presumably to show that the complainant had been consistent, asked whether the complainant had told the police in her statement about what happened with the Appellant. The complainant said she had told them. That would have been evident from the filed transcript in any event.

[28] In convicting the Appellant, the trial judge said of the complainant's evidence that it was:

> ... a little problematic in some respects. I read the statement that she gave to the police, which was filed in evidence, and compared that to the evidence she gave in court, and there were some discrepancies. However, I don't see that those discrepancies amounted to an indication or even a slight suggestion that she's trying to mislead the Court. Rather, it's a chronological confusion, perhaps due to the alcohol abuse, or it amounts to minor variations in detail.
>
> The essential revelation of what transpired that night is constant: Lander made a pass at her; she rejected it; Lander attacked her, hit her on the head and face and bit her arm. Nothing in cross-examination compromised that essence.

[29] In my view, the remarks made by the trial judge when counsel filed the previous statement show that he understood that counsel were not entering it as proof of the truth of its contents. The passage just quoted above indicates that the trial judge did with the statement exactly what counsel had asked him to do. He reviewed it for discrepancies. He concluded that the discrepancies were minor. He found that the complainant's testimony about being assaulted by the Appellant had not been compromised in cross-examination.

[30] The Appellant's counsel argued that the trial judge's reference to the revelation of what transpired that night as "constant" means that he used the statement improperly as

a previous consistent statement. In my view, however, when his reasons are read as a whole it is clear that he was simply pointing out that the inconsistencies were not in the details of the assault by the Appellant. He did not use the consistencies to bolster the credibility of the complainant, but rather distinguished the inconsistencies as being on non-essential matters.

[31] So although the filing of the statement as an exhibit was unusual and not to be recommended, I do not see that in the circumstances it resulted in any harm or led the trial judge into any error in coming to his decision. Nor is its admission by consent a basis upon which to find incompetence by counsel in these circumstances.

[32] The Appellant also submitted that the trial judge focused unduly on whether the complainant was lying rather than simply confused about who had assaulted her. But it must be borne in mind that the defence itself was based on both those possibilities. On the one hand, trial counsel brought forward the evidence about the complainant being financially dependant on her spouse and did specifically ask her why she lied to the neighbour if her spouse had not beaten her up. So although trial counsel did not return to this theme in his submissions at the end of the trial, the suggestion that the complainant had lied was before the judge. On the other hand, in his submissions, trial counsel suggested that even though she might believe that what she testified was in fact true, the complainant was too intoxicated at the time of the event and her evidence too full of contradictions to be reliable. The trial judge noted the contradictions and suggested there was some confusion so he did have regard to that issue.

[33] Finally, the Appellant argues that the verdict was unreasonable, mainly because of the various discrepancies in the complainant's testimony. The trial judge found the discrepancies not to be serious and he was in a much better position than I am on an appeal to assess the complainant's testimony and the effect of any discrepancies on her credibility. In my view, nothing takes this case outside the general rule that credibility is a matter for the trial judge and that absent some error in law the Court on appeal should not intervene. The complainant's testimony that the Appellant assaulted her by biting and kicking her was not successfully challenged at trial. There was no evidence that her injuries were caused by her spouse. The Appellant did not testify.

[34] In all the circumstances, it has not been shown that there has been a miscarriage of justice or that the verdict was unreasonable. Accordingly, the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
2nd day of May 2002

Counsel for the Appellant: James Brydon
Counsel for the Respondent: Caroline Carrasco
Appellant present by Video Conference

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