Itsi v. *HMTQ*, 2001 NWTSC 71

Date: 2001 10 02
Docket: S-1-CR200100048

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

REGGIE WILLIAM ITSI

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The appellant was convicted of assault with a weapon on the basis of circumstantial evidence. He appeals his conviction, submitting that there were other rational inferences that could be drawn from the circumstantial evidence, i.e., other than the guilt of the appellant. Yet an examination of the trial record yields no other inference that could reasonably be drawn from the evidence.

[2] Four people were present at the drinking party during which the victim sustained his injury — the 21-year-old appellant, his 20-year-old girlfriend, the appellant's brother Stanley Itsi, and the 70-year-old victim John Simon. Two of these persons testified as Crown witnesses, Stanley Itsi and the girlfriend Rhonda Francis. The police officer who arrived on the scene also testified.

[3] Stanley Itsi testified that his brother (the appellant) and the victim were arguing, that "maybe they got in a little scuffle or something", that his brother was getting too aggressive and out of control, yet he did not see how the victim received his injuries but only the result, i.e., the blood on the victim's face. The trial judge's observation was that Stanley Itsi was uncomfortable testifying against his brother.

[4] Rhonda Francis testified that the appellant and the victim were arguing, that the appellant was getting really mad at the victim. She says she went to the bathroom and when she came back she saw blood on the victim's forehead. She said the appellant looked like he had done something. At one point she said she asked the appellant to leave the victim alone and to stop what he was doing. She said Stanley Itsi told the appellant to leave because the police were coming.

[5] Corporal Garceau testified that when he and another police officer arrived at the house, the appellant fled through a rear window. He described the wound on the victim's forehead and a knife found on the floor.

[6] None of the Crown witnesses were cross-examined by defence counsel at trial.

[7] On this appeal, in addition to the general submission that the trial judge erred in convicting the appellant on circumstantial evidence, his counsel pleads error by the trial judge in i) finding that the victim was "carved" by the knife found by the police, ii) finding that the appellant used the knife on the victim, and iii) inferring consciousness of guilt from the evidence of the appellant's flight upon the arrival of the police.

[8] The objection to the trial judge's use of the word "carving" is mere semantic posturing and not a valid argument on this appeal, in my view. The trial judge had the advantage of viewing the witnesses' testimony in person. This allowed the trial judge as trier of fact to not only observe and assess the credibility of the two main Crown witnesses (i.e., appellant's brother and girlfriend) but also the evidence of Corporal Garceau as he described the "X" mark cut into the victim's forehead.

[9] As to the appellant's leaving the scene upon the arrival of the police, such after-the-fact conduct can be regarded by a trier of fact as evidence of an admission of guilt by conduct. The trier of fact ought to be cautious about drawing such an inference and must do so by considering the whole of the evidence. See *R.* v. *White* (1998), 125 C.C.C.(3d) 385 (S.C.C.). Here, the trial transcript shows that the trial judge properly instructed himself on the Crown's burden of proof and that he could only make reasonable inferences allowed by law. The trial judge did not rely solely on the appellant's after-the-fact conduct but also took into consideration other evidence including the appellant's aggressive anger at the victim and the fact that the police were

called because the appellant was out of control. The trial judge concluded that the whole of the evidence pointed to the appellant as the perpetrator.

[10] On this appeal much was made of the last sentence in the following extract from the trial judge's reasons:

> I think it would be fair and [not] unreasonable to conclude that John Simon didn't carve himself. The two witnesses that were called don't admit to carving him or cutting him. The evidence points towards Itsi. There may very well be an innocent explanation, but I don't have it.
>
> (emphasis added)

[11] The appellant submits that with these words the trial judge was acknowledging the existence of a reasonable inference other than the guilt of the appellant. I disagree. The reasonable interpretation of the trial judge's impugned words is, "There is no other explanation in the evidence before me".

[12] It is also submitted on behalf of the appellant, citing *R.* v. *Robert* (2000), 143 C.C.C.(3d) 330 (Ont.C.A.) that in using these words the trial judge was in effect reversing the burden of proof. There is no merit in this submission. *Robert* is distinguishable on its facts. There, the trial judge made reference to the accused person's testimony and put the accused's explanation to the test of whether it had been established by proven facts (thereby committing trial error). No such error is present here.

[13] I note that in final argument before the trial judge no explanation other than the accused's guilt was proffered.

[14] The trial evidence against the appellant was indeed wholly circumstantial. Before convicting the appellant the trial judge was required to satisfy himself beyond a reasonable doubt that the guilt of the appellant was the only reasonable inference to be drawn from the proven facts. See *R.* v. *Cooper* (1978), 34 C.C.C.(2d) 18 (S.C.C.). The trial record indicates that the trial judge applied the appropriate test and committed no error. The appeal against conviction must fail.

[15] Following conviction the appellant was sentenced to fourteen months imprisonment. In his Notice of Appeal he appeals both conviction and sentence;

however, during oral submissions the sentence appeal was not strenuously pursued. Given the circumstances of the offence, and the appellant's lengthy record of violence, the sentence imposed by the trial judge cannot be said to be unfit.

[16] The appeals from conviction and sentence are dismissed.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT this
2nd day of October 2001

Counsel for the Appellant: Andrew E. Fox
Counsel for the Respondent: Caroline Carrasco

S-1-CR 200100048

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

REGGIE WILLIAM ITSI

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.E. RICHARD
