R. v. Mudaliar, 2005 NWTSC 51 Date: 2005 05 24
Docket: S-1-CR 2004000119

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CHANDRA MUDALIAR

Appellant

MEMORANDUM OF JUDGMENT

[1] The Appellant appeals his conviction for common assault after a trial before a Territorial Court Judge.

[2] The altercation that gave rise to the assault conviction occurred in the bathroom of the Appellant's apartment. The Appellant and the complainant ("Ms. A.") who were friends, gave different versions as to how they came to be in the bathroom together and what happened in there. Ms. A. testified that the Appellant was angry because of what she said to her girlfriend about him, and that he yelled at her and grabbed her by the throat. She used the words "he strangled me". The Appellant testified that Ms. A. became hysterical, accusing him of coming on to her girlfriend, and she would not let him out of the bathroom. He testified that he tried to move her away from the bathroom door by the shoulder so he could get out. He denied strangling her. Both had been drinking before the incident.

[3] The Appellant's two roommates also testified in his defence. Neither observed an assault. One of the roommates testified he heard arguing; the other testified he heard yelling. They said they banged on the bathroom door to get the Appellant and

Ms. A. to leave and also testified about their observations of the Appellant and Ms. A. when they came out of the bathroom.

[4] The main issue at trial was the credibility of the Appellant and Ms. A. The trial judge conducted a thorough review of the evidence and in particular the testimony of the main parties. The trial judge rejected the Appellant's evidence and, although acknowledging that there were frailties, accepted Ms. A.'s evidence.

[5] On appeal, the Appellant argued that the trial judge made a number of errors amounting to misapprehension of parts of the evidence and then applied a different standard in assessing the credibility of the Appellant from the standard used in assessing the credibility of Ms. A. He also argued that the trial judge erred in law in finding that certain evidence corroborated Ms. A.'s evidence.

[6] I will deal with the corroboration issue first. There are two main items of evidence involved.

[7] The first is the evidence of one of the roommates. He testified that he had been sleeping and was awakened by a bump in the hallway outside his bedroom door. That door was located across from the bathroom where the altercation took place. The witness testified that when he heard the bump, he thought someone was coming into his room. He described the bump as "just like somebody rubbed up against the door, maybe stumbled into the door". He also said he had no idea what caused the bump and denied that it could have come from inside the bathroom. When the witness went to check out the bump, he heard arguing coming from the bathroom and recognized one of the voices as the Appellant's.

[8] The trial judge found that the evidence of the bump, "if anything, corroborates [Ms. A.'s] evidence of what happened in the bathroom".

[9] Crown counsel on the appeal submitted that the trial judge's use of the phrase "if anything" merely amounts to an assessment that the witness' evidence about the bump did not help the Appellant, who had called him as a defence witness. Although I agree that the trial judge's words may be capable of being understood that way, in my view it is also clear that the trial judge found that the evidence about the bump corroborated Ms. A.'s evidence. Crown counsel conceded that it could not corroborate Ms. A.'s evidence about what happened in the bathroom, as the only

evidence, from the witness, was that the noise did not come from inside the bathroom. To treat the evidence about the bump as corroborative when it could not be was an error of law: *R. v. Hubin*, [1927] S.C.R. 442.

[10] The second issue involving corroboration arises from Ms. A.'s testimony that after leaving the apartment alone, she flagged down a police vehicle and was taken to the hospital, where a doctor examined her. Neither the police officers nor the doctor testified at trial. The evidence about the hospital visit and the injuries resulting from the alleged assault came solely from Ms. A.

[11] The trial judge agreed with the submission of defence counsel that there were frailties in the evidence of Ms. A., but found that her evidence was forthright. The trial judge noted that:

> I found her evidence made sense and further it is corroborated in some respects. She went to emergency that night, she had marks on her neck, and she was not cross-examined on the marks. I suppose she was cross-examined to some extent in that she was asked how long she was at the emergency for, but it was certainly not suggested to her that she did not go to emergency and this evidence was not contradicted.
>
> It is suggested that it is very weak evidence because it comes from her. I do not accept that. As I said, there was no cross-examination on it. It was not contradicted and basically she was simply asked how long she was in the emergency room for that night.

[12] It appears from the above passage that the trial judge found that Ms. A.'s evidence about the assault was corroborated by her evidence that she went to the emergency ward and had marks on her neck. The trial judge also appears to have considered the lack of cross-examination on that aspect of Ms. A.'s testimony as an admission that the testimony was true.

[13] Ms. A.'s evidence about her injuries and going to the hospital could not corroborate her testimony about the assault because it was not evidence independent of her testimony. For evidence to be corroborative, it must be independent of the evidence to be corroborated: *R. v. McNamara et. al (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.). It was therefore an error for the trial judge to consider that evidence corroborative.

[14] Failure to cross-examine on a point which is subsequently contradicted by the evidence of the accused does not constitute an admission that the evidence not cross-examined on is true, but only goes to the weight of the accused's evidence: *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.). Crown counsel on this appeal conceded that the lack of cross-examination on Ms. A.'s evidence about going to the hospital and her injuries could only affect the weight of the Appellant's evidence, but could not corroborate Ms. A.'s version of the events in the bathroom.

[15] It was therefore an error of law for the trial judge to treat the evidence as corroborative of Ms. A.'s testimony that the Appellant assaulted her.

[16] In addition to the evidence referred to above, the trial judge found that the evidence of the two roommates that they heard arguing in the bathroom corroborated Ms. A.'s testimony that she and the Appellant argued. The trial judge found that the Appellant had testified that he said nothing while in the bathroom. That is not correct. In his examination-in-chief and cross-examination, the Appellant testified that Ms. A. was arguing with him, he told her three times to open the bathroom door and it got to the point that they were yelling.

[17] The evidence of the roommates that they heard arguing or yelling was, therefore, consistent with the evidence of both Ms. A. and the Appellant and so could not corroborate Ms. A.'s evidence.

[18] Crown counsel argued that notwithstanding the errors of law and any misapprehension of the evidence, the assessment of credibility was for the trial judge, who was in the best position to make that assessment. Crown counsel took the position that, on the whole, the verdict is reasonable and supported by the evidence. However, it is clear from the reasons for conviction that the trial judge relied on the evidence, mistakenly held to be corroborative, in making the assessment of Ms. A.'s credibility and the reliability of her evidence. That error taints the finding of credibility and it cannot therefore be said that no substantial wrong or miscarriage of justice occurred, thus the curative proviso in s. 686(1)(b)(iii) cannot be applied: *R.* v. *Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont.C.A.).

[19] In view of my conclusion on the above grounds, I need not deal with the ground alleging that the evidence of the Appellant and Ms. A. was assessed according to different standards.

[20] The Appellant sought to have an acquittal substituted for his conviction. In my view, however, this is not a case where a reasonable jury properly instructed could not convict. The appropriate remedy is a new trial.

[21] Accordingly, I allow the appeal, vacate the verdict and order a new trial.

Dated this 24 day of May 2005.

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

Heard at Yellowknife
April 21, 2005

Counsel for the Appellant: Kirk MacDonald

Counsel for the Respondent: Jonathon Burke

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