R. v. *Ahmed*, 2006 NWTSC 12

Date: 2006 03 07
Docket: S-1-CR 2005000060

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MOHAMMED MOHAMOUD AHMED

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Appeal from the convictions and sentences imposed in Territorial Court on three summary conviction offences.

Heard at Yellowknife, NT, on February 2, 2006

Reasons filed: March 7, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Appellant: Margo L. Nightingale

Counsel for the Respondent: Sadie Bond

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REASONS FOR JUDGMENT

[1] This is an appeal from the convictions and sentences imposed in Territorial Court on three summary conviction offences.

[2] The appellant was charged with four offences: (1) assault with a weapon, to wit a stun gun, contrary to s.267(a) of the *Criminal Code*; (2) assault with a weapon, to wit a knife, also contrary to s.267(a) of the Code; (3) possession of a prohibited weapon, to wit a stun gun, contrary to s.91(2) of the Code; and, (4) uttering a threat to cause death, contrary to s.264.1(1) of the Code. All of the offences arose from the same set of circumstances and the same complainant was named in the assault and threatening charges. The appellant went to trial on all four charges. The charge of possession of a prohibited weapon was dismissed at the close of the Crown's case for lack of evidence. The appellant testified. His defence was a denial that the alleged assaults and threat had taken place. The appellant was eventually convicted of the two charges of assault with a weapon and the charge of uttering a threat. He was sentenced to a total term of imprisonment of 90 days plus probation for 15 months. He has served his jail sentence.

[3] The conviction appeal is based on two substantive grounds. First, the appellant submits that the trial judge misapprehended the appellant's evidence such that there

was a miscarriage of justice. Second, the appellant submits that there was, with respect to count 1 (assault with a stun gun), insufficient evidence to convict. Thus the verdict was unreasonable. The appellant also appeals his sentence, in particular the length of the probation period.

The Trial:

[4] The case turned on the credibility of the complainant and the appellant. The complainant is a 42 year old taxi driver from Somalia. The appellant is a 41 year old taxi driver from Ethiopia. They are both Muslims. I mention this only because the events in question started out as an alleged exchange of insults, in Arabic and highly derogatory according to these men's religion. Also, the transcript reveals that both men frequently encountered difficulty in adequately expressing themselves in the English language.

[5] The two men worked for the same taxi company. They, with their families, lived in the same apartment building. Other than that they had no personal relationship.

[6] The complainant testified that, at approximately 4:30 a.m. on January 18, 2005, he went out to start his car so as to warm it up. The appellant was in the lobby of the apartment building. As the complainant passed by, the appellant said something derogatory in Arabic. The complainant said something in return and left to go to work. He returned at 7 a.m. and again the appellant was in the lobby. The complainant further testified that the appellant came out toward him, saying he was going to kill him and his family, and that he started to use what the complainant referred to as a "Tazer gun". They fought and the appellant dropped the gun. The complainant retrieved it. At that point the appellant went back inside the apartment building.

[7] The complainant then testified that he went inside and called the police. He then saw the appellant outside in the parking lot. He thought the appellant might damage his car so he went outside and confronted him. At that point he saw that the appellant held a large knife. The appellant again threatened him and swung the knife at him. They struggled and the complainant's finger was cut. The appellant left and went back into the apartment building when a car came into the lot.

[8] Shortly thereafter two police officers arrived. The complainant gave them the gun and then he was taken to hospital for treatment of the cut on his hand.

[9] The attending police officers also testified. They said that they received a call to attend at the scene at approximately 7 a.m. They arrived within 15 minutes. They saw the complainant bleeding profusely from his left hand. The complainant pointed out the appellant who was promptly arrested. Curiously no one asked either officer about a gun or a stun gun and neither officer said anything about having seen or received any such weapon.

[10] The appellant was the sole witness called by the defence. He denied the allegations. He testified that he was in the lobby of the apartment building at 4 a.m. when the complainant came to the door from the outside and asked him to open it. He said that, although he knew the complainant from work, he did not want to open the door for a stranger. The complainant eventually used his own key to open the door and came in. They exchanged some insulting comments and then there was a brief pushing and shoving match. After that the appellant went inside. Shortly after that the police arrived and arrested him. He said the total elapsed time was about 25 to 30 minutes. He testified that he was never outside with the complainant nor did he have any weapons.

[11] In convicting the appellant, the trial judge provided extensive reasons for judgment. She carefully reviewed all of the evidence. I will review the parts pertinent to the grounds of appeal when I discuss those grounds. Suffice to say that she gave considered reasons for rejecting the appellant's evidence and accepting the evidence of the complainant as to what had occurred. She recognized that the onus of proof rested with the Crown throughout and that, after rejecting the appellant's evidence, and after concluding that his evidence did not raise a reasonable doubt, she still had to be satisfied of guilt beyond a reasonable doubt. In this she approached and analyzed the evidence in accordance with the principles set forth in *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742.

Misapprehension of Evidence:

[12] The appellant submits that the trial judge misapprehended several aspects of his testimony leading her to conclude that his evidence was unbelievable. These misapprehensions played a critical role, it is submitted, since the case turned on the assessment of the credibility of the complainant and the appellant.

[13] I said earlier that the transcript reveals that both the complainant and the appellant had difficulty at times in expressing themselves clearly in the English language. Yet at no time did either the Crown or defence raise language ability as an issue at the trial. No one requested the assistance of an interpreter. But, even with the

apparent difficulties both men faced, they were able to relate their respective versions of what happened in a coherent manner.

[14] The issue of misapprehension of evidence by a trial judge was dealt with at length in the judgment of the Ontario Court of Appeal in *R.* v. *Morrissey* (1995), 97 C.C.C. (3d) 193. A misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence. Errors in the apprehension or appreciation of evidence, though not errors of law and not leading to a finding that the verdict was unreasonable, may none the less call for appellate review because they result in a miscarriage of justice. But, as noted by Binnie J. in *R.* v. *Lohrer*, [2004] 3 S.C.R. 732 (at para. 2), there is a stringent test applied to any such claim:

> . . . The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive ranter than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[15] Appellant's counsel pointed to four specific aspects of the appellant's evidence that were misapprehended and cumulatively led to a colouring of her perception of the appellant's credibility. These four aspects dealt with the appellant's explanation as to the relationship between him and the complainant, the appellant's ability to tell time, whether the appellant was upset, and the appellant's repeated statements to the effect of "I don't know" when asked to explain why he allegedly said some things to the complainant.

[16] The trial judge, as I noted earlier, reviewed the appellant's evidence in detail. She said she had difficulties with his testimony, not because she did not understand what he was saying but because of inconsistencies in what he said. She described him as being evasive when cross-examined. But nowhere can I find that she mis-stated what he said.

[17] On the point of the appellant's relationship with the complainant, the trial judge noted that he said that he did not know the complainant personally, then said he did not know him well, then said that he saw him at work, and then said this incident was the first time he saw the complainant. All of this was said at one point or another by the appellant. If, from this, the trial judge concluded that the appellant's testimony was inconsistent then it was open to her to do so. The same could be said about the other points complained of under this heading.

[18] The reasons for judgment also reveal that the trial judge's consideration of the appellant's evidence was done in the context of the whole of the evidence. On the point about not being able to tell time, there was confusion during the cross-examination of the appellant. The trial judge, however, used the appellant's evidence about time to contrast it with the unchallenged evidence of the police officers. They said they arrived shortly after 7 a.m., a time that coincides with the appellant's evidence about when the police were called. The appellant testified that his encounter with the complainant occurred at 4 a.m. and the police arrived within 25 to 30 minutes after that. Whether the trial judge took the appellant's evidence as being that he could not tell time or that he simply did not know what time it was, the use to which she put his evidence was appropriate.

[19] I agree with Crown counsel's submission that the appellant's argument is not really about a misapprehension of the evidence; it is about the interpretation of the evidence. The trial judge made no mistake about what evidence was given. Thus she based her conclusions on a correct version of the evidence. The interpretation of that evidence is something the trial judge was uniquely positioned to do.

[20] It is important to keep in mind that reasons for judgment should not be analyzed on a piecemeal basis. They are to be considered as a whole from a functional perspective. Do they justify and explain the result in a rational manner? Do they demonstrate that the trial judge considered the relevant evidence? In this case, in relation to the argument about a misapprehension of evidence, the reasons taken as a whole reveal a careful consideration of the evidence. And because the case came down to an assessment of credibility, the trial judge was in the best position to do that.

[21] It is true that the trial judge used her analysis of the appellant's evidence on a cumulative basis to judge the appellant's credibility. But that is what a trial judge does in every case. Here the appellant failed to demonstrate that the trial judge proceeded on the basis of an incorrect version of the evidence, or that the trial judge ignored cogent evidence that speaks directly against the evidence relied on by the trial judge. How the evidence is interpreted in any case is the function of the trier of fact, in this case the trial judge, and absent some material error there is no basis for some different interpretation by an appellate court.

[22] For these reasons, this ground of appeal is dismissed.

<u>Insufficient Evidence on Count One</u>:

[23] Count one was a charge of assault with a weapon specifying a stun gun. The appellant submits that the trial judge erred in convicting the appellant on this charge because of a lack of evidence sufficient to satisfy this charge. The point is that the Crown failed to prove that what the appellant had, if he had anything, was a stun gun. As appellant's counsel noted, the Crown, once it particularized the weapon, had to prove that it was in fact a stun gun: *R.* v. *Saunders*, [1990] 1 S.C.R. 1020.

[24] It will be remembered that the attending police officers were not asked nor did they say anything about a stun gun. No such weapon was produced as part of the evidence. The only evidence relating to a stun gun came from the testimony of the complainant.

[25] The complainant testified in chief that the appellant started using "the Tazer gun". When asked how he knew what it was, he said: "... to be honest, I didn't know what was it." Crown counsel sought clarification as to the weapon the complainant described:

> Q MR. LEPAGE: Now, could you describe what you mean by Tazer, or what you saw?
>
> A I saw the electrical comes out of that device. And later the police told me it's name. I didn't even know - -
>
> Q Please don't describe what the police told you. But what did you see?
>
> A Okay. I see something like a gun, and I see some electrical lights come out of it.
>
> Q Were you affected by that?
>
> A No.
> Q Were you hit by it?
>
> A No.

[26] On cross-examination, defence counsel followed up on the issue of how the complainant knew it was a stun gun:

> Q But you didn't know it was a stun gun until the police told you.

A But I saw it's electrical.

Q Didn't you tell the police you thought it was a toy, in fact?

A What's that?

Q Did you actually think it was a toy at the time?

A No.

Q You had said it - - you thought it was a gun but it wasn't; you thought maybe it was more like a toy?

A Something - - something - - I didn't know that it was - - there is something called trailer (sic) gun. But I see there's electrical things coming out of the, the gun.

[27] It will also be remembered that count three of the Information charged the appellant with possession of a prohibited weapon, to wit the stun gun. At the close of the Crown's case, the Crown invited the trial judge to dismiss this charge. To be exact, the Crown initially advised the judge that it was "not proceeding" with both count one (the charge of assault with a stun gun) and count three. The judge however, dismissed only count three. The transcript reveals what transpired:

MR. LEPAGE: Your Honour, just to clear up before Crown closes its case. There are four counts here. The first count is the assault with the Tazer. We are - - Crown is not proceeding with that or the associated Section 91(2) which is the licence aspect.

THE COURT: Well, I can - - Mr. Lepage, what are you doing with those counts? You've started the trial here.

MR. LEPAGE: Yes, I'm aware of that, Your Honour, and I have - - before the trial started, I did explain it to Ms. Nightingale. The - - we have some difficulty in the proof of continuity of the exhibits on those particular charges, and given the facts that are before, the Crown is presenting no further evidence on those counts, Your Honour. So in that respect, certainly with the 91(2), I would submit there is no evidence and that can be dismissed.

THE COURT: So you're inviting a dismissal on Count 3?

MR. LEPAGE: That's correct, Your Honour.

THE COURT: All right. I agree. I take it this is - - the Crown is calling no further witnesses?

MR. LEPAGE: That's correct, Your Honour.

THE COURT: And has the Crown closed its case?

MR. LEPAGE: Yes, we have.

THE COURT: So that's the case for the Crown. And you're conceding there's not sufficient evidence to enter a conviction on Count Number 3?

MR. LEPAGE: That's correct, Your Honour.

THE COURT: I agree with that. So Count Number 3 will be dismissed.

[28] So what started out as an invitation to dismiss counts one and three, due to "difficulty in the proof of continuity" (to quote from above), ended up as a dismissal of only count three. There then followed an application by defence counsel for a directed verdict dismissing count one on the basis that there was insufficient evidence to prove that there was a stun gun. Defence counsel referred to the dismissal of the prohibited weapon charge and that, in the absence of the thing itself, the court cannot "know if it was in fact what would be described as a prohibited weapon or a weapon at all". The trial judge dismissed defence counsel's application on the basis that there was some evidence, being the description by the complainant, as to a stun gun.

[29] When addressing this charge in her reasons for judgment, the trial judge referred to the complainant's evidence and a dictionary definition of "stun gun" to find that the charge was proven. The trial judge said in reference to this point as follows:

> There is evidence from Mr. Elkhidir as to the device that was being used. I accept that evidence that there was one, that there was electricity coming out of the end of it, that it was white electricity. From his description, from his actions, I accept that there was some sort of a current coming out of the device that Mr. Ahmed was waving. The *Merriam Webster Dictionary*, the on-line dictionary, defines "stun gun". It is, as I said earlier today - - it is not a technical term. I do not find it a term of art. I find it simply a term that is now in our vocabulary. It is defined as "a weapon designed to stun or immobilize (as by electric shock) rather than kill or injure the one

> affected." I find that from Mr. Elkhidir's testimony, what he described would be a stun gun. I looked to the definition of "weapon" in the *Criminal Code*, which means: any thing used, designed to be used or intended for use. Subsection (b). This is in Section 2 of the definition section. Subsection (b) is: for the purpose of threatening or intimidating any person. Mr. Ahmed's actions that day toward Mr. Elkhidir with the device, which I find was a stun gun in the normal sense of the word, was to intimidate at the very least.

[30] The appellant submits that, in the absence of the thing itself, and evidence as to how it operates, there is a lack of proof that it was a stun gun. He also complains about the trial judge's reliance on a dictionary definition so as to determine what is meant by "stun gun".

[31] Addressing this last point first, I have no difficulty in saying that a trial judge may accept a dictionary meaning as a fact "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": see *R.* v. *Krymowski*, [2005] 1 S.C.R. 101, at para. 22. Thus to take judicial notice of what is meant by "stun gun" is not problematic. The question here is one of sufficiency of evidence, not judicial notice.

[32] Appellant's counsel argued that the trial judge's description of the evidence as being that there was "white electricity" coming out of the object was in error. As the above excerpts from the transcript show, the complainant never described it as "white" electricity. He referred to "electrical lights" coming out of it. There was no reference to a "current". Also, he was not hit by anything so no one could say whether it was an electrical current or whether it had the effect of stunning or immobilizing. The reference by the complainant to a "Tazer" is immaterial since it was based on something told him by the police (and, in any event, the trial judge did not rely on it).

[33] On this issue I agree with appellant's counsel. The complainant's evidence, even if totally accepted, merely established that the appellant was holding something that looked like a gun and light was coming out of it. It did not establish that it was an electric current capable of stunning or immobilizing a person.

[34] The Crown faced the same hurdle on count one as it did on the count charging possession of a prohibited weapon. Having specified a stun gun in both charges, it was incumbent to prove that that is what it was. Merely having the witness say that it looked like a gun and that lights were coming out of it was insufficient, especially

since the witness acknowledged that he did not know what it was that the appellant was holding. More was required in light of the fact that the alleged weapon was not produced.

[35] I agree with the trial judge when she said that the term "stun gun" is not a technical term or a term of art. But the argument here is not over what is meant by "stun gun". It is a question of whether the Crown proved that what the appellant had was in fact a stun gun. In my opinion, it did not. Not everything that looks like a gun and has a light coming out of it is necessarily a stun gun.

[36] The trial judge did not say specifically why there was sufficient evidence on count 1 but not on count 3. A stun gun is a prohibited weapon according to the *Criminal Code* provisions. So, if it was because the Crown failed to prove that the weapon was a stun gun, then the same reasoning should apply on count one.

[37] Crown counsel on this appeal argued that there was no inconsistency in having the prohibited weapon charge dismissed due to a lack of evidence and a conviction entered on count one. She submitted that the elements of the two charges are different since the Crown had to prove, on the possession charge, that the accused lacked a licence to possess that weapon. But that was not the reason articulated by Crown counsel at trial when he invited the trial judge to dismiss the possession charge. He stated that the Crown was having "some difficulty in the proof of continuity" on both charges relating to the alleged stun gun. This could only refer to the fact that the weapon could not be produced at the trial. There was no reference to the licensing aspect of the possession charge. And, in any event, s.117.11 of the *Criminal Code* places the onus on an accused to prove that he or she is the holder of a licence.

[38] In my opinion, a review of the evidence on this issue meets the test for an unreasonable verdict. The verdict on count one is not one that a properly instructed jury acting judicially could reasonably have rendered: *R.* v. *Yebes*, [1987] 2 S.C.R. 168.

[39] The conviction on count one is therefore set aside. The question then is the appropriate remedy. It could be argued that, since it is a matter of insufficient evidence, the Crown should be entitled to try to prove the charge at a new trial. However, the appellant has already served the jail sentence imposed with respect to this conviction. In my opinion, nothing would be gained by a new trial. The appropriate remedy would be a stay of proceedings.

Sentence Appeal:

[40] Both counsel referred to the governing principles. An appellate court may vary a sentence where it is demonstrably unfit, or where there has been an error in principle, a failure to consider a relevant factor, or an overemphasis of appropriate factors: *R.* v. *M.(C.A.)*, [1996] 1 S.C.R. 500. The approach is one of deference. To be demonstrably unfit, the sentence must be clearly excessive or inadequate, or fall outside the accepted range of sentences for the offence: *R.* v. *Shropshire*, [1995] 4 S.C.R. 227.

[41] The sentences imposed were, in my opinion, quite lenient. The appellant received sentences of 30 days jail for the assault with a stun gun, 60 days jail for the assault with a knife, and 90 days jail for the charge of uttering threats, all to be served concurrently. The trial judge also ordered that the jail sentences be served intermittently so that the appellant could continue his employment. Subsequently, however, the intermittent aspect of the sentence was converted to straight time at the appellant's request. The trial judge also placed the appellant on probation for 15 months. The conditions are not unusual or particularly onerous. The most significant aspect is probably a non-contact provision regarding the complainant and his family.

[42] It was noted at the sentencing hearing that the appellant was at risk of losing his job as a taxi driver because of the criminal convictions. That has come to pass. The sentence appeal is now directed at the length of the probation order presumably because, once the probation period is finished, the appellant can try to get his job back. Appellant's counsel submitted that it was not necessary to order probation so as to deter the appellant or protect the complainant in light of the absence of a criminal record and the lack of any ongoing contact between the two of them.

[43] The trial judge emphasized community safety, deterrence and denunciation in her reasons for sentence. As Crown counsel argued, this was appropriate when dealing with offences of violence involving weapons. In my opinion, the sentences were fit. The probation order provided a measure of control over the appellant and a measure of safety for the complainant. This is just as applicable without the conviction on the charge of assault with a stun gun.

Conclusion:

[44] The appeal with respect to count one is allowed. The conviction and sentence on that charge are set aside, a new trial ordered and a stay of proceedings entered.

With respect to the other two counts, the conviction and sentence appeals are dismissed.

J.Z. Vertes
J.S.C.

Dated this 7th day of March, 2006.

Counsel for the Appellant: Margo L. Nightingale

Counsel for the Respondent: Sadie Bond

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