Nitsiza v. R, 2007 NWTSC 53

Date: 2007 08 01
Docket: S-1-CR2007000051

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MICHAEL PHILIP NITSIZA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Appeal from conviction on a charge of sexual assault.

Heard at Yellowknife, NT on July 23, 2007.

Reasons filed: August 1, 2007

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REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Appellant: Bradley W. Enge
Counsel for the Respondent: Maureen McGuire

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REASONS FOR JUDGMENT

[1] The Appellant, Michael Nitsiza, appeals from his conviction on a charge of sexual assault. He argues that the Trial Judge made a number of errors in her assessment and analysis of the evidence. He argues that these errors compromised the fairness of the trial. He asks that an acquittal be entered, or in the alternative, that a new trial be ordered.

[2] The Notice of Appeal lists a number of grounds. There are overlaps between some of them. The Appellant's main areas of complaint are that the Trial Judge erred in applying the law relating to the interaction of reasonable doubt and credibility; that she misapprehended significant aspects of the evidence; and that her conclusions are unreasonable and cannot be supported by the evidence.

[3] I do not propose to refer to the witnesses' testimonies in great detail but a general overview of the trial evidence will assist in putting the issues in context.

A) Overview of trial evidence

[4] The Crown called the complainant as its only witness. The complainant had a contract whereby the Appellant and others lived at her house while they were in Gameti doing construction work. The contract also requiredher to prepare their meals. She alleged that on the afternoon of September 22, 2006, the Appellant came to the house to get some tools. He started talking to her and eventually asked her about having sex. She tried to get away from him but he persisted in approaching her. She testified that he eventually grabbed her from behind, put his hand down her pants and touched her in the pubic area. He gave her $50.00 and left. The complainant felt very uncomfortable after this incident. A short time later she stopped going to the house to prepare the men's meals. She admitted that a week after the incident she borrowed $100.00 from the Appellant for bingo.

[5] The Appellant testified and denied that the incident described by the complainant happened. He said that in the afternoon of September 22 he went to her house with his coworkers for a coffee break. As they were leaving the complainant asked him if she could borrow $50.00 to buy something for her kids so he gave her the money. He maintained he never returned to the house alone. He said it was the next day that she borrowed a further $100.00 from him for bingo. He said that sometime during the first week of October she stopped coming over to preparemeals for him and the others.

[6] Leon Nitsiza was also called by the Defence. He testified he arrived in Gameti on September 22 just before 4:00 P.M. The Appellant and John Beaverho picked him up at the airport and took him to the hotel to check in. They then went to the complainant's house and stayed there for about half an hour. Afterwards he dropped off the Appellant and Mr. Beaverho at the work site. He was not with the Appellant for the rest of the day. He confirmed that the complainant was cooking for the men who were staying at the house. He recalled that at one point they complained that she had stopped cooking for them.

[7] John Beaverho also testified for the Defence. He recalled going for a coffee break at the complainant's house with his coworkers. He said the break lasted for about an hour. Afterwards they went back to the work site. He and the Appellant worked together for the rest of the day. He said there was never a time where the

Appellant could have gone to the complainant's house alone because he was always within his sight.

[8] On the complainant's testimony, the elements of the offense of sexual assault were clearly made out. On the Defence evidence, the incident did not happen and could not have happened because the Appellant and the complainant were never alone in the house that day. The most important issue at this trial, therefore, was credibility.

B) Application of reasonable doubt to credibility

[9] The Appellant argues that the Trial Judge erred in her application of the law with respect to reasonable doubt and credibility. This ground of appeal does not have to do with the reasonableness of the findings that she made; rather, it goes to the process that she followed in analyzing the evidence.

[10] The rule that requires the Crown to prove its case beyond a reasonabledoubt is a principle of fundamental importance in our criminal law. That rule applies to the assessment of credibility of witnesses. If the trier of facts is left with a reasonable doubt arising from the credibility of witnesses, the accused is entitled to the benefit of that doubt. An important effect of this rule is that a trier of facts is not obliged to firmly believe or disbelieve any witness. Moreover, the assessment of credibility should not be approached as a "contest" where versionsof eventsare comparedand the "best one" is chosen.

[11] Several years ago the Supreme Court of Canada suggested an approach that could be used to help explain to juries how the rule about reasonable doubt applies to credibility:

> A trial judge might well instruct the jury on the question of credibility along those lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left with a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which

> you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> *R.* v. *W.(D.)* [1991] 1 S.C.R. 742, at para. 28.

[12] This approach is now used on a regular basis by trial judges across Canada, not only in jury charges but also in articulating their own credibility findings. It is a very useful guide in focusing the analysis on the proper issues with the proper approach. But beyond the approach and how it is articulated in a given case, what is of fundamental importance is that trial judges correctlyapply the burden of proof in a way that makes it clear that they have analyzed the evidence properly.
*R.* v. *S. (D.D.)* (2006), 207 C.C.C. (3d) 319 (NSCA), at para.38.

[13] The Appellant acknowledges that the Trial Judge correctly set out the approach that she had to follow but says that she then failed to actually follow it. In my view, the transcript of the proceedings does not support this argument.

[14] The approach followed by the Trial Judge was exactlythe one suggested in *R. v. W.(D.), supra*. She considered first whether she accepted the Appellant's testimony:

> Michael Nitsiza testified, and I consider his evidence first, as I am urged to by the Courts of Appeal in considering the test in D.W.. And I do consider his evidence first, because if I believe Michael Nitsiza, I have to acquit him.
>
> Trial Transcript, p.93 line 25 to p.94, line 2.

[15] The Trial Judge analyzed the Appellant's evidence and concluded it should be rejected. She then examined the evidence of other defence witnesses. She concluded that she disbelieved Mr. Beaverho and his claim that the Appellant had never left his side the entire day. She accepted the evidence of Leon Nitsiza, but concluded that it was not helpful in deciding the issues on the case because he was not with the Appellant in the later part of the afternoon.

[16] After having made those findings, she turned her mind to the question of whether any of this evidence raised a reasonable doubt. She said:

> Does Mr. Nitsiza's evidence that nothing happened or that nothing happened that he remembers raise a reasonable doubt in my mind? No, it does not raise a reasonable doubt, even combining all of the

> defence evidence. As I said, I do not believe Mr. Beaverho at all, I do not find Mr. Leon Nitsiza's evidence helpful, and Michael Nitsiza I do not believe was being honest about being alone with Ms. Moosenose. He gave her $50.00. She quit cooking for "the boys". I do not believe him that he was not alone with Ms. Moosenose, nor does it raise a reasonable doubt.
>
> Trial Transcript, p.99, lines 9-10.

[17] Having found that the evidence presented by the Defence did not raise a reasonable doubt, the Trial Judge went on to consider whether the complainant's evidence persuaded her beyond a reasonable doubt of the Appellant's guilt.

> I then look at Ms. Moosenose's evidence. Am I convinced beyond a reasonable doubt on her evidence?
>
> Trial Transcript, p.99 lines 21-23.

[18] The Trial Judge reviewed and analyzed the complainant's evidence. She concluded that it did convince her to the required standard:

> When I consider all of her [Ms. Moosenose] evidence, which I do accept, I am convinced beyond a reasonable doubt that Michael Phillip Nitsiza did sexually assault Jessie Moosenose.
>
> Trial Transcript, p.102, lines 24-27.

[19] The Reasons for Judgment show that the Trial Judge examined all of the evidence, properly applied the burden of proof, and instructed herself correctly as to the application of reasonable doubt to credibility. She did not commit the kinds of errors that were at issue in the cases that the Appellant relies on. Unlike what the trial judge had done in *R.* v. *Minoose* 2007 ABCA 54, she did not simply compare the two versions and decide which one she preferred. Unlike what the trial judge had done in *R.* v. *S. (D.D.), supra,* she did not focus her analysis only on the consistency of the complainant's testimony without regard for the rest of the evidence or for the standard of proof.

[20] I find, therefore, that there is no merit to the grounds of appeal that relate to this area of complaint.

C) Misapprehension of evidence

[21] The Appellant argues that his conviction should be overturnedbecause the Trial Judge misapprehended certain aspects of the evidence.

[22] Misapprehensions of evidence must be assessed by reference to their impact on the fairness of the trial. If the error has rendered the trial unfair, the trial judge's decision cannot stand. To determine if the misapprehension has rendered the trial unfair, the nature and extent of the misapprehension, as well as its significance to the trial judge's verdict, must be considered. A misapprehension of materialevidence may lead to a miscarriage of justice if it plays an essential part in the judge's reasoning. *R.* v. *Morrissey* (1995) 97 C.C.C. (3d) 193 (Ont. CA), at 221; *R.* v. *S. (D.D.)*, *supra*, at para. 32.

1. Misapprehension of evidence about whether accused pulled out his penis before touching the complainant

[23] The first area where the Appellant says the Trial Judge misapprehended the evidence in a significant way is with respect to the evidence about what he was said to have done in the moments preceding the sexual assault. The complainant describedthe events in the following way:

> A. (...) Michael came in and then he was looking for tools or what not. But when he approached me when he came in the kitchen when he asked, like you know we were talking and that's when he was standing there. He was standing there. And while he was standing there he asked me some questions.
>
> Q. What kind of questions?
>
> A. Well, at first – I don't know if I should say this but I didn't wrote [sic] it in the statement. But he was standing there, like I said. He was using this blue coverall and then that's when he put his hand in and then he was going to pull his penis out to me and then that's when I – I felt nervous.
>
> Trial Transcript, p.6 lines 11-26..

[24] In her Reasons for Judgment, the Trial Judge summarized this part of the evidence incorrectly. She said:

> So I look at Ms. Moosenose's description of what did happen. She was there alone. She says Michael Nitsiza came back to the house. He came in. She had difficulty testifying. He had blue coveralls on; that he had pulled his penis out. She was very nervous in testifying. He asked her "if we were going to have sex". (...)
>
> Trial Transcript, p.100, line 26 to p.101, line 5.

[25] I am satisfied that the Trial Judge misapprehended this aspect of the complainant's testimony. The transcriptmakes it clear that the complainant did not say that the Appellant pulled his penis out. Rather, she said that he put his hand in his blue coveralls and was going to pull his penis out.

[26] In his Factum the Appellant argues that this error tainted the Trial Judge's mind because that conduct (pulling his penis out) would reflectnegativelyon him and would make the Trial Judge more likely to reject his testimony. That was also the submission presented in oral argument.

[27] The comment made by the Trial Judge about the Appellant having pulled his penis out was made at the very beginning of her summary of the complainant's evidence, in the narrative of events leading to the acts forming the subject-matterof the charge. The Trial Judge made no other reference to that part of the evidence in her Reasons. In making her findings of credibility, the Trial Judge outlined a number of concerns that she had about the Appellant's testimony, and the factors that led her to reject it. She did not make any reference to the evidence about him pulling out his penis at that point.

[28] Although I find that the Trial Judge made a mistake and misapprehended this part of the complainant's testimony, I am not satisfied that this error was of any consequence. There was no misapprehension of the evidence of the conduct forming the subject-matter of the charge, and nothing to suggest that the Trial Judge's error had any impact on her ultimate findings.

2. Significance of email sent to Dan Marion

[29] The second area of alleged misapprehension of evidence relates to an email message that the complainant was asked about during Cross-Examination. She acknowledged that about one month after the incident, she sent an email to a person named Dan Marion and complained about what the Appellant had done. A portion of the email was read to her and she acknowledged sending it. The portion of the Cross-Examination where the email was put to the complainant and where she adopted it reads as follows:

> Q. And you did in this email, you did, then, describe this assault that you said was by Mr. Michael Nitsiza, right?
>
> A. M'hmm.
>
> Q. And I want to ask you, then, and isn't it this correct the way that you described the assault or the alleged assault on October 26th, 2006, referring to Michael Nitsiza
>
> > First of all, he acted like there was nothing to worry about and at first he didn't make me feel uncomfortable until he made a move.
> >
> > When I speak of him making a move, I mean he started to make me feel uneasy and uncomfortable. He started talking dirty and saying things that would normally be said by boyfriends when a person is trying to flirt with you in a bad way and when they are trying to make you feel like there is no one there to understand. They speak as if no one would know.
>
> Isn't that what you said about this assault by Mr. – I'll let you read it again, if you wish. Isn't that what you said about this assault in that October email to Mr. Marion?
>
> A. Yes, I did.
>
> Q. Pardon?
>
> A. Yes, I did.
>
> Q. So the only accusation that you make there about the assault, alleged assault, is that he was talking dirty to you, right?
>
> A. M'hmm.

> Q. You didn't say anything there about anything else, did you?
>
> A. No.
>
> Trial Transcript, p.21 line 1 to p.22, line 13.

[30] During submissions at the end of the trial, Defence counsel pointed to the absence of any reference in the email about the Appellant having touched the complainant in any way. He argued that there was a "substantial and glaring inconsistency" between the complaint made in the email and the allegations put forward at trial, and that this inconsistency caused a "terrible internal conflict" in the Crown's case. The Crown argued that considering the context in which the email was sent, it was not significant, or surprising, that the complainant did not divulge the details of what the Appellant had done.

[31] In dealing with this issue in her Reasons for Judgment, the Trial Judge said:

> Mr. Latimer read to Ms. Moosenose a portion of an email that she admitted that she sent. I believe the email was sent to Dan Marion. In listening to that email, listening to what was put to her, I did not find that there was an inconsistency in that email. I certainly did not find a glaring inconsistency. That email did refer to, "until he made a move" and that email did not describe what the move was, but that email was a business email or an email sent in complaint in work. It was not a statement. I assume that then, it may well have started an investigation, but it was not a prior statement describing what had happened. It was a complaint.
>
> There was certainly a complaint in the email that Ms. Moosenose had felt uncomfortable, that his actions made her uncomfortable, his language made her uncomfortable and that he had made a move. Certainly from that I took it that there was more to what had happened than what was said in the email, and the email was clear on that. So I do not see that the email was inconsistent with her evidence today. It certainly was not as detailed, as I would expect in an email. It would not be as detailed as your evidence in court. This was an email being sent in complaint of something that happened, as I said, likely beginning an investigation after she had been paid.
>
> Trial Transcript, p.99, line 23 to p.100, line 25.

[32] The Appellant says that the Trial Judge made two serious errors in her treatment of the evidence about the email: she erred in finding that the email was "not a statement" and she erred in finding that there was no inconsistency between the email and the complainant's testimony.

[33] With respect to the first issue, it may have been an unfortunate choice of words for the Trial Judge to say that the email was not a statement. It matters little if a statement is handwritten, sent electronically, or made verbally without ever being reduced to writing. The form of the statement has a bearing on how it can be proven, not on its potential relevance as a prior inconsistent statement.

[34] However, the trial transcript shows that notwithstanding her choice of words, the Trial Judge did treat the email as a statement. She allowed counsel to put it to the witness during cross-examination. She confirmedwith counselthat he was puttingthis to her as a prior inconsistent statement. She accepted that the email reflected something that the complainant had said at an earlier time about the incident and analyzed it as such. It would be an entirely different matter if the Trial Judge had not permitted cross-examination on the email, or found that it was completely irrelevant because of the form it was in. But that is not what happened. Counsel made submissions about the significance of the email, what was in it and what was not in it. For all intents and purposes it was treated as a prior statement, the debate being about whether it was an inconsistent statement or not.

[35] Therefore, the real issue is whether the Trial Judge erred in finding that there was no inconsistency between the email and the complainant's testimony, or, put another way, whether she misapprehended the significance of the differences between the contents of the email and the contents of the complainant's trial testimony.

[36] The determination of whether an inconsistency exists is a question of fact. It is subject to the same standard of review as are findings of credibility: an appellatecourt should intervene only to correct an overriding and palpable error. *R.* v. *Gagnon* [2006] S.C.J. No. 17 at para. 10.

[37] This standard of review commands considerable deference to a trial judge's findings. Appellate courts have been directed a number of cases that they are not to substitute their own views or interfere merely because they disagree with the

conclusions reached. When they have substituted their own views, they have been admonished. *R.* v. *Gagnon, supra*, at para.23.

[38] The excerpt of the Reasons quoted above shows that the Trial Judge relied on the context in which the email was sent. She found that it was not surprising, given this context, that the description of events would be less detailed in the email than it was in the testimony. She interpreted the email as a general complaint. She also interpreted it to mean that more had happened than what was described in it. On that basis she concluded that there was no inconsistency between the email and the complainant's testimony.

[39] To the extent that "inconsistency" means "difference" it may not have been entirely accurate to say that there was no inconsistency, because there were clearly differences between the email and the testimony. But the important question is whether the Trial Judge addressed her mind to the differences and what explanations she gave for deciding that the email did not impact negatively on the complainant's credibility.

[40] It is apparent from the Trial Judge's Reasons that she was alive to the fact that there was a difference between what the complainant had written in the email and what she had testified to at trial. Instead of characterizing those differences as inconsistencies casting a doubt on the complainant's credibility, she found the differences were not significant because the email was a communication in the nature of a general complaint, sent in a work context. She found there were good reasons why the complainant would not provide the same level of details in that context as she might in others.

[41] The Trial Judge did not misapprehend the contents or the email, or ignore its existence. She made findings about its significance. The question is not whether I would have reached the same conclusion, but whether the Trial Judge made an overriding and palpable error, or was clearly wrong, in making those findings.

[42] It is not unheard of to have a complainant make a partial disclosure to someone about an event, and provide a fuller disclosure, and more specific details, at some later point. I cannot say that the Trial Judge's finding was clearly wrong when she concluded that the evidence about the email did not affect the reliability or credibility of the complainant's testimony.

[43] In his Factum, the Appellant relies on the case of *R.* v. *G.(M.)* (1994), 93 C.C.C. (3d) 347 (Ont. CA) in support of the proposition that the failure to give weight to a serious inconsistency is a reversible error. I do not disagree with that principle, but in my view the inconsistencies that were at issue in that case bear no comparison to the evidence in the present case. In *R.* v. *G. (M.)* the complainant had written a letter to a close friend, describing in detail a number of sexual assaults at the hands of her cousin. In the letter she described a series of painful rapes that occurred in the basement of her house. She wrote this happened every week over a period of four years. At trial she testified about one incident that happened in the basement, and said it did not involve intercourse and did not cause her physical pain. Her explanation for the difference was that she had written the letter "quickly", "without concentrating exactly on what happened". I find that the nature and extent of the inconsistencies in that case are very different from what is at issue in this appeal. Therefore, although I do not disagree with the principles set out in the *R.* v. *G. (M.)* case, I find them to be of limited relevance.

[44] As a result, having regard to the standard of review that applies to these issues,I conclude that there were not, in this case, misapprehensions of evidence that justify appellate intervention.

D) UNREASONABLE VERDICT

[45] The Appellant argues that the Trial Judge's verdict is unreasonable and cannot be supported by the evidence. It is not alleged in this case that there was no evidence upon which a conviction could be based. The Appellant's claim that the verdict is unreasonable is really based on an argument that the Trial Judge's findings of credibility were unreasonable.

[46] The law as to the standard applicable to the review of findings of credibilityby a trial judge is settled. An appellate court must defer to the conclusions of the trial judge unless a palpable and overriding error can be shown. It is not enough for the appellate court to disagree with the conclusions reached by the trial judge. *R.* v. *Gagnon, supra,* at para.10.

[47] It is also settled law that trial judges must give reasons that show the process followed to reach their conclusions. This is required so the parties are not left

wondering why trial judges have arrived at a certain result. It is also required so that meaningful appellate review can take place. *R.* v. *Sheppard* [2002] 1 S.C.R. 869.

[48] This was a decision delivered orally, immediately after the trial evidence and submissions had been heard. The Trial Judge gave a number of reasons for rejecting the Appellant's testimony. She referred to the fact that he answered "I don't remember" to a number of questions. She recognized that it was important to be careful, and that sometimes witnesses answer "I don't remember" when they mean "no". Yet, she observed that the Appellant had denied certain things outright, answering "no", and that he was less assertive when responding to other questions or suggestions. The Trial Judge was troubled by the evidence about the $50.00 that the Appellant gave to the complainant. She noted that he claimed to have given her this money when he was at the house with his co-workers, and that neither of them gave evidence about money being given to the complainant in their presence. The Trial Judge also commented on the uncontested fact that the complainant, a short time after the alleged incident, stopped going to the house to preparemeals for the men who were staying there.

[49] Mr. Beaverho's testimony was also important to the Defence, because it foreclosed any possibility that this incident could have happened: Mr. Beaverho claimed that he had been with the Appellant the entire day. The Trial Judge explained why she rejected Mr. Beaverho's testimony. She said his manner of giving his evidence had a rehearsed quality to it. She said that he appeared to want to be overly helpful to the Defence and gave an example of this from his testimony. She found his version of events implausible, in that he claimed that the Appellant never left his side all day, not even to go to the bathroom. She commented on Mr. Beaverho'sapparently precise memory of a day that, on his evidence, was uneventful and which he would have no particular reason to remember.

[50] The Trial Judge did not disbelieve the third Defence witness, but found his evidence did not assist because although he was with the Appellant during the coffee break at the complainant's house, he was not with him later on that afternoon.

[51] In assessing the complainant's evidence, the Trial Judge referred to the manner in which she testified; to the fact that she stopped going to the house to cook for the men at some point after September 22nd; that she admitted taking the $50.00 that the

Appellant put on the table. She explained why she did not consider that the evidence about the email reflected negatively on the complainant's credibility.

[52] In assessing the reasonableness of the various credibility findings that the Trial Judge made in arriving at her decision, it is perhaps helpful to go back to some of the reasons why the standard of review in this area is as high as it is. In the words of the Supreme Court of Canada,

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex and intermingling of impressions that emerge after watching and listeningto witnessesand attempting to reconcile the various versions of events. That is why this Court has decided (...) that in the absence of a palpable and overriding error, his or her perceptions should be respected.
>
> *R.* v. *Gagnon*, *supra*, at para.20.

[53] When examining the reasons given by a trial judge in making findings of credibility, appellate courts must avoid minute dissection, and focus on the reasons' overall meaning:

> This Court has consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court. Having encouraged these expanded reasons, it would be counterproductive to dissect them minutely in a way that undermines the trial judge's responsibility for weighing all of the evidence. A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components.
>
> *R.* v. *Gagnon*, *supra*, at para.19.

[54] The Trial Judge gave reasons for rejecting certain aspects of the evidence and for accepting others. Her findings were based in part on conclusions or inferences she drew from undisputed facts. Some of these undisputed facts included that the

Appellant gave the complainant $50.00; that a short time after the alleged incident she stopped going to the house to prepare meals; that she expressed concerns about an incident through the email that she sent. The Trial Judge's findingswere also based on her observations of the witnesses, their manner of answering questions,the contentsof some of their answers, and overall impressions she was left with.

[55] To repeat some of the comments I have already made about the standard of review, the question is not whether the findings of credibility that were made were the only possible findings that could be made. Nor is the question whether I, sitting as the trial judge, would have made the same ones. The question for this Court sitting on review is whether the findings are unreasonable or "clearly wrong". I am unable to say that they are. They are conclusions that could be drawn from the evidence adduced. They were conclusions that a jury, properly instructed and acting judicially, could have arrived at.

E) OTHER ISSUES

[56] In the interest of clarity and completeness, I will address other issues raised in the Appellant's Factum that were not addressed in his oral submissions.

[57] The Appellant argues that the Trial Judge should have focused on the evidence of what occurred between 3:00 P.M. and 4:00 P.M. on the date of the incident. The Appellant appears to suggest that the Trial Judge ought not to have considered the possibility that the incident could have happened some time after the coffee break.

[58] The complainant's evidence, when considered as a whole, was that the Appellant had been at her house with others for the coffee break, left, and returned alone some time later. She did not testify about exact time frames in her Evidence in Chief; the issue of timing was explored at the beginning of the Cross-Examination:

> Q. Now, Ms. Moosenose, what time in the afternoon was this on September 22 that you say you had this incident with Mr. Nitsiza?
>
> A. It was between three and four.
>
> Q. All right.
>
> A. It was before supper so...

Q. But isn't that the time that the men there take their coffee break in the afternoon?

A. Well, nobody was there like I said. I don't know if it was a coffee break for him, but he is the one who came in – so came in the house, so I haven't seen anybody.

Q. Ms. Moosenose, I want to suggest to you that at that time, that at three o'clock that afternoon and between three and four, not only was Mr. Nitsiza there but also the other men that were with him, John – do you remember John Beaverho and also Edzo Nitsiza and all the men that were staying there, I'm suggesting to you, came there at three o'clock because there was coffee there and that was their coffee break; isn't that correct?

A. I recall when there was a number — I recall I remember the time, yes, they were there, but at the ending he came back, he came back to the house. So when they left – I haven't said some stuff in the statement, but when they left he came back by himself.

Q. So these people were there for the coffee break right at 3:00 in the afternoon and you just weren't there alone at three o'clock in the afternoon with Mr. Nitsiza, were you?

A. Well I wasn't there alone until after.

Q. Well what time then? When you say "after", what is that, four o'clock?

A. Well I said between three and four, okay. I didn't look at the time, I said three and four, that's it.

Q. But I want to suggest to you again that you are wrong there, that all the men left together and never came back.

A. No, it's not like that. He came back.

Trial Transcript, p. 17, line 21 to p. 19, line 8.

[59] At the close of the Crown's case, the allegation was that the sexual assault had occurred on September 22, some time after the coffee break and before supper. Evidence about what happened after the coffee break was clearly relevant. The Trial

Judge cannot be faulted for having considered the evidenceof what happenedafter the men left the complainant's house.

[60] The Appellant also argues that the Trial Judge should have considered it significant that the complainant borrowed $100.00 from the Appellant a short time after the alleged incident. It is apparent from the Reasons for Judgment that the Trial Judge considered this evidence as part of he deliberations, and decided it was not significant either way: she treated it as neutral evidence.

[61] In his Factum the Appellant makes the following submission:

> It is our position that this money factor should have concerned the Trial Judge in the sense that people who are sexually assaulted usually behave with hostility to their assaulters - not in a friendly way!

[62] This submission assumes most or all people who have been sexually assaulted will react the same way. That submission, with respect, is grounded neither in reality nor in law. The Supreme Court of Canada expressed concern about this type of reasoning in the context of assessing the significance of delay in reporting a sexual assault. What the Court said in that context, in my view, is equally relevant to the assessment of other aspects of a person's conduct following an alleged sexual assault:

> A trial judge should recognize and so instruct a jury that there is no inviolable rule how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some may never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of a complaint is simply one circumstance to consider in the factual mosaic of a particular case.
>
> *R.* v. *D.(D.)* (2000), 148 C.C.C. (3d) 41 (SCC) at para. 65.

[63] The Trial Judge examined the evidence about the borrowed money in the context of the rest of the evidence adduced at trial. The Crown was suggesting this evidence reflected negatively on the Appellant, arguing that it was strange that he would lend her money for no reason and never claim it back from her. The Appellant's

counsel was arguing that the evidence should reflect negatively on the complainant because she would not borrow money from someone who had sexually assaulted her. The Trial Judge cautioned herself about jumping to conclusions one way or another, and in the end, decided that the evidence was not significant either way. I can find no error in her treatment of that evidence.

F) CONCLUSION

[64] Having reviewed the trial transcript and the submissions advanced by the Appellant in his Factum and in oral submissions, and having regard to the standard of review that I am bound to apply on the issues raised, I find no grounds to interferewith the Trial Judge's decision. The appeal is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
1st day of August 2007

Counsel for the Appellant: Bradley W. Enge
Counsel for the Respondent: Maureen McGuire

S-1-CR-2007000051

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IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

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BETWEEN:

MICHAEL PHILIP NITSIZA
Appellant

- and -

HER MAJESTY THE QUEEN
Respondent

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REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

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