R. v. McDonald et al, 2009 NWT 20

S-1-CR-2007-000106/S-1-CR-2008-000052

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

LEONARD MORRIS MCDONALD

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HER MAJESTY THE QUEEN

- v -

IRVIN DOUGLAS MCDONALD

Transcript of the Ruling (re in-dock identification)
delivered by The Honourable Justice D.M. Cooper, in
Yellowknife, in the Northwest Territories, on the 26th
day of March, 2009.

APPEARANCES:

Ms. J. Luke: Counsel on behalf of the Crown

Ms. C. Wawzonek: Counsel on behalf of the Accused
Leonard Morris McDonald

Mr. J. Bran: Counsel on behalf of the Accused
Irvin Douglas McDonald

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Charge under s. 271 C.C.

Ban on Publication of Complainant/Witness
Pursuant to Section 486.4 of the Criminal Code

THE COURT: The accused, Leonard McDonald and Irvin McDonald, stand charged with having sexually assaulted Chantal Shae on March 10th, 2007, at Norman Wells, in the Northwest Territories; specifically, there was one assault by one of the accused acting alone at approximately 4 a.m. and another assault, allegedly, by the other accused acting alone at approximately 11 a.m.

Prior to the commencement of trial, the accused Leonard McDonald applied to prevent the Crown from asking the complainant and another witness, Lorraine Gardebois, from identifying him "in-court" and to preclude the Crown from reading from the transcript of the preliminary inquiry evidence of prior identification. The application was based on the Charter of Rights and Freedoms and specifically, sections 7, 11(d), and 24(2). I ruled that section 24(2) was not available as a remedial tool since it could only respond to evidence illegally or wrongfully obtained and not that which was properly obtained but may be deficient and potentially wrongfully tendered. As well, I found the application to be premature in any event. In dismissing that application, I noted that it was always open to the applicant to apply during the trial to have

evidence excluded based on the residual discretion in the trial judge to exclude evidence which may be of minimal probative value when compared to the prejudicial effect to the accused in order to ensure a fair trial. Being alive to the issue of alleged tenuous identification, I directed that the Crown not attempt to have the complainant or any other Crown witness identify the applicant in court until after the conclusion of cross-examination when counsel for the applicant would have an opportunity to renew the application based on my residual discretion.

The evidence of the Crown has now been tendered and defence counsel have concluded cross-examinations. In accordance with my previous direction, the complainant has not been asked to make in-court identification pending a potential application to exclude and my ruling. The Crown is not seeking to have Lorraine Gardebois identify either of the accused but only the complainant.

Both Leonard McDonald and Irvin McDonald

have now brought application to have me exercise my residual discretion as trial judge to preclude the Crown from having the complainant make in-court identification of them.

The issue then to be decided is whether I



consider the evidence so lacking in probative value when measured against its prejudicial effects that I should exclude it from consideration by the jury or whether I should leave the evidence to the jury to weigh since findings of fact and credibility are exclusively within its province while ensuring that appropriate cautions about the frailties of in-dock identification and specific portions of evidence are given.

There are a number of cases which suggest that in virtually all cases the evidence should go to the jury.

In the case of R. v. Mezzo from the Supreme Court of Canada, the court said:

> It is impossible to disagree with Lord Widgery when he speaks of the danger of error in visual

identification. Nobody could disagree with his assertion of the need for a careful and complete direction to the jury with regard to their treatment of such evidence. When, however, he introduces the suggestion that the trial judge should consider the quality of the evidence and, where he finds it wanting, take the case from the jury, he enters more controversial ground and authorizes the trial judge to encroach on the jury's territory. Such a step blurs or even obliterates the clear line separating the functions of judge and jury. Questions of credibility and the weight that should be given to evidence are peculiarly the province of the jury. The term "quality", as applied by Lord Widgery, is really nothing more than

a synonym for "weight".

I note that that case was heard by the court in 1985. It was cited with approval by Mr. Justice de Weerdt, as he then was, of our court in R. v. Abel, a case that was decided in 1986.

As well in R. v. Gagnon, Mr. Justice McIntyre, speaking for the Ontario Court of Appeal, had this to say:

> The trial judge was correct that the generally accepted state of the law is that, where evidence is tainted, either because identification was suggested by the accused's presence in the prisoner's box or as a result



> of inappropriate police procedures, the evidence is not thereby rendered inadmissible. Rather, the evidence of tainting is a factor going to the weight of the evidence...

Further, the court said:

> It is not always easy for a trial judge to know when to exercise his or her role as the guardian of a

fair trial and when the judge is trespassing on the exclusive prerogative of the jury to weigh the evidence.

There are, however, many, many cases where convictions of accused have been overturned on in-dock or so-called "fleeting glance" identification, including R. v. Bennett, R. v. D.R.H., R. v. Williams and R. v. Bigsky, to name a few. In each case, the evidence of identification was deficient and/or so tainted that the appellate courts found that the verdicts could not be supported by the evidence and were unreasonable and entered acquittals.

The defence has tendered the case of R. v. Sandhu where the trial judge excluded identification of the accused in a murder case on a motion prior to the trial while the judge



exercised his residual discretion.

The Crown is correct in arguing that in most cases dealing with this issue, the evidence went to the jury as triers of fact or to put it

another way, the evidence was tendered and upon conviction and appeal the verdict was overturned. In some cases the appeals were dismissed. To exclude evidence of identification from going to the jury puts the trial judge just one short step away from directing an acquittal. I am of the view that a judge should only exercise his discretion to exclude evidence of this nature in the most compelling of cases where he is satisfied that the ends of justice demand that he do so.

The Crown asks that a distinction be made in this case between identification and recognition where the assailant is not someone the complainant has never seen before. Here the evidence is that the complainant observed Irvin McDonald sleeping on a couch in the trailer but never talked to him and paid little attention to him since she was concentrating on talking to Lorraine Gardebois and Justin McDonald. There is some question of whether from her vantage point at the kitchen table she could see the head of Irvin McDonald. She says she was in close

proximity to Leonard McDonald at the kitchen table for a period of time long enough to have one and a half beers, but the evidence is that she did not engage in conversation with him and basically paid no attention to him. And on this occasion, the evidence points to her being somewhat intoxicated. Therefore, while this is not a "fleeting glance" case per se, the brief and indifferent contact the complainant had with both accused and especially given her level of intoxication, would put them in or very close to the category of strangers.

The Crown relies on R. v. Bob where the B.C. Court of Appeal said:

> The difficulty he (the accused) faces, however, is that this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity,

recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence.

The accused here, however, were not known to the complainant prior to the night of the assault and as I have already said, the contact was indifferent and brief.

There are many cases where the courts have suggested that the judge could or should exercise his or her discretion to exclude evidence, including R. v. Gagnon and R. v. Aulakh and Gill.

Referring to the Gagnon case, the court said:

> It is now clear that a trial judge enjoys a general discretion to exclude evidence on the basis of the trial judge's duty, now enshrined in s. 11(d) of the Charter of Rights and Freedoms to ensure a fair trial.

He cites the case of R. v. Harrer.

> Identification cases are no exception. In deciding whether the admission of the evidence would

render the trial unfair, the trial judge should engage in a balancing exercise, balancing the probative



value of the evidence against its prejudicial effect. Prejudice in this context means the danger that the jury will use the evidence for an improper purpose despite the judge's instructions to the contrary.

Further, the court said:

> The decision in Harrer may have the effect of pre-empting the need for an appeal based solely on in-court identification if the trial judge exercises his or her discretion to exclude the evidence on the basis that its probative value is overborne by its prejudicial effect. A conviction based on in-court identification evidence alone is unsafe and will likely result in an

acquittal on appeal on the basis of that the verdict is unreasonable and cannot be supported by the evidence. In the case of Aulakh and Gill, the court said:

> There are well entrenched evidentiary rules to prevent evidence from being "wrongfully tendered" in violation of an accused's right to a fair trial. Apposite to the instant application, the trial judge has the discretion to exclude evidence where its prejudicial effect exceeds its probative value. The exercise of this discretion requires a case specific analysis and the decision will turn on the unique circumstances of the case.

Turning to this case and the evidence. Other than the ages of her assailants, the complainant gave no evidence of physical appearance of either accused, not of hair or

facial features or clothing or weight or the fact that one of the accused may or may not have worn glasses. There was an initial confusion respecting the name of one of her assailants, although I will say that this in itself is not critical.

The accused Irvin McDonald was asleep on the couch but there is no evidence from the complainant that she got close to him or really paid any attention to him. She did say that she could see his face from where she was sitting, but her own drawing of the trailer and the



positions of the various individuals casts doubt on that assertion. There is no evidence of lighting in the living room or in the kitchen for that matter.

The complainant testified on two different preliminary hearings that Irvin had been the one who assaulted her at trial. Excuse me. She testified at a preliminary inquiry on November 26th, 2007, that Leonard McDonald was the one she saw on the second assault in the morning yet she

changed her testimony to say that Irvin was the one who had committed this assault here at trial.

At the first preliminary inquiry at -- rather at the inquiry for Irvin McDonald -- I'm sorry -- for Leonard McDonald she identified Leonard in court as the one who committed the second assault, and at the second preliminary she identified Irvin who committed the first assault. Now she says she got mixed up at that time.

The complainant was 16 and is very slight physically. She consumed a number of shots of vodka and two or more beers on the evening in question. The fact that on two separate occasions an assailant was able to remove her clothing without her waking would infer that she was somewhat intoxicated. She agreed with defence counsel that after consuming a number of



beers and shots of vodka when she went to bed, she did not as much go to sleep as she did "pass out". Her powers of observation would be diminished.

When asked if she saw the face of the man who assaulted her in the first bedroom she said

she could not remember but added she would recognize him. There was no evidence as to how she would recognize him. And that, as defence counsel has pointed out, is a conclusion and not evidence per se.

There is no identification here prior to the preliminary hearing whatsoever. Given this, the Crown could have asked police to put together photo arrays of the two accused for the witness to identify and could have arranged for there to be a number of older aboriginal males in court for the preliminary inquiries and to have the accused sitting in the body of the court. This is hindsight but it does not change the fact that the in-court identification of the accused is to be accorded very little weight. Had the preliminaries instead been trials, both accused could stand convicted for acts the complainant now says they did not do.

This case is unique. Assuming the sexual assaults occurred, the evidence points to the



perpetrator or perpetrators being one or both of

the accused as opposed to an accused or someone whose identity is an utter mystery. I have reviewed no cases where the complainant identified one accused at the preliminary inquiry and another at trial. This is akin, however, to picking the wrong person out of a lineup or photo lineup and then doing an in-dock identification of another person. Also, while this is not a situation of a fleeting glance, it falls short of being a question of recognition as opposed to identification.

As I understand the law, I have a duty to exclude evidence to ensure the accused receive a fair trial pursuant to section 11(d) of the Charter where the probative value of that evidence is outweighed by the prejudicial effects to the accused. This is not done lightly. Here it can be said that there is virtually no evidence or reliable evidence of identification. It is for all intents and purposes in-dock and many courts have opined that this is to be accorded little or no weight. This is especially so when the complainant seeks to change her in-dock identification. We are all familiar with the many celebrated cases of mistaken identity or identification which led innocent people to be

convicted and sent to jail in some cases for many years for offences they did not commit. The exercise of judicial discretion in appropriate cases is intended to prevent that.

Accordingly, I will exercise my judicial discretion and I will direct that the Crown shall not be permitted to ask the complainant to identify either of the accused and order evidence of identification excluded from this trial.

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Certified to be a true and accurate transcript pursuant to Rule 7 23 and 7 24 of the Supreme Court Rules of Court.

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Annette Wright, RPR, CSR(A)
Court Reporter

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