Harris v. H.M.T.Q., 2008 NWTSC 49 Date: 2008 07 08
Docket: S-1-CR 2008000010

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DION HARRIS

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a summary conviction appeal from conviction and sentence on a charge under s. 151 of the *Criminal Code*, sexual touching of a person under the age of 14.

Background

[2] The complainant, who was 10 years old at the time of the events in question and 11 at trial, testified that while staying at a cousin's house, in the early hours of the morning, she had gone to sleep on a bed with her younger sister. She testified that the 19 year old Appellant, also her cousin, came into the room and touched her vagina under her pyjamas. She heard someone call out to him and he left the room. The complainant went into the bathroom and then the living room. When the Appellant's sister came in from outside and asked the complainant why she was crying, she told the sister about the Appellant touching her.

[3] The Appellant's sister testified that she saw the complainant crying and asked her what happened, whereupon the complainant said the Appellant had touched her. The sister's evidence is referred to in more detail below. The only other Crown witness was the complainant's mother, who testified about her observations of the complainant on the day following the incident and the complainant's behaviour after that and how the police came to be contacted.

[4] The Appellant did not testify at the trial. He was convicted and sentenced to 10 months in jail followed by two years of probation.

The conviction appeal

[5] The Appellant argues two grounds of appeal: (i) that the trial judge improperly rejected exculpatory evidence; and (ii) that the trial judge drew an improper inference of guilt from circumstantial evidence.

Rejection of exculpatory evidence

[6] The exculpatory evidence that the Appellant submits was improperly rejected by the trial judge was the testimony of the Appellant's sister, E.H. She was staying in the same house as the Appellant and the complainant on the night of the incident. She saw the complainant crying in the living room and she was the first person to whom the complainant spoke of the touching.

[7] E.H. testified that she had been outside having a smoke with the Appellant and some others, came back in and saw the complainant crying and that is when the complainant told her what happened. She testified in chief, "Then I was just thinking how could it have happened when we weren't even there for not even 45 minutes and [the Appellant] was with me the whole time?".

[8] She was then questioned by Crown counsel and answered as follows (transcript, p. 22):

> Q He was with you the whole time?
>
> A Yeah.
>
> Q And you weren't on the other side in one of your rooms?
>
> A I was in the room, yeah.
>
> Q So - -
>
> A I had to check on my kid. I'm not going to leave my kid in a room alone by herself, she was only one and a half years old.
>
> Q So it's fair to say that you weren't with Dion all the time?

A Well, he was - - I could see Dion though.

Q From the other room?

A Yeah.

Q And you saw Dion at every single point in time during that evening?

A Pretty well, we were only there for 45 minutes.

[9] At that point, defence counsel quite properly objected to the leading questions and Crown counsel moved on to another part of the evidence.

[10] In cross-examination, defence counsel did not ask any questions about E.H.'s ability to see where the Appellant was during the evening but did elicit from her that she, the Appellant and about eight other people were smoking outside the house.

[11] Defence counsel argued to the trial judge that if E.H.'s evidence about being able to see the Appellant was believed, an acquittal must follow.

[12] The trial judge found that the complainant had been touched as she described. She did not find that E.H.'s evidence raised any doubt with respect to the issue of who had done the touching. She found that E.H.'s evidence corroborated the complainant's evidence in some respects (that they had gone outside and that the complainant was upset). She also stated about E.H.'s evidence (transcript of reasons for decision, page 4):

> Yes, she had reservations, as I am sure anyone would about their brother, that he had been outside having a cigarette with her and how could this have happened, that she had been there and he had been with her. As properly pointed out by defence, there were many people in that house. I do not believe she [E.H.] saw him the entire time. I do not believe she was lying or trying to mislead, it is just an overstatement, if I can say that. But she did say, when she was putting her child to bed, at first I understood her testimony to be that was the only time she did not see him, but then she changed that to she could even see him from that room.
>
> I found [her], I will not say I found her dishonest. I did not find her dishonest ... . I simply found her evidence perhaps somewhat slanted to her brother. She did not want to say anything that would hurt her brother, and I am sure she did not want to

> believe that her brother could have done this. I do not believe she had her brother in her line of vision, if I can put it that way, the entire time with a house full of people. I have no difficulty accepting both [E.H.'s] evidence and [the complainant's] evidence, and as I said, I found aspects of [the complainant's] evidence are corroborated by [E.H.].

[13] The Appellant says it was error for the trial judge to disregard the exculpatory part of E.H.'s evidence without finding her to be dishonest, but use other parts of her evidence as corroboration of the complainant's testimony.

[14] A trier of fact is entitled to accept all, none or part of a witness' testimony. There is nothing illogical or wrong in the trial judge accepting E.H.'s evidence that when she came inside after having a smoke, the complainant was crying, but rejecting her evidence about seeing the Appellant the entire time they were at the house.

[15] Counsel for the Appellant relies on the case of *R. v. Mudaliar*, [2005] NWTSC 51. There, the trial judge was held to have erred in considering evidence of a noise heard by the witness to be corroborative of an event alleged to have occurred in a bathroom even though the witness specifically denied that the noise had come from the bathroom. In that case, however, the witness' evidence that the noise had not come from the bathroom was not rejected by the trial judge. Here, E.H.'s evidence that she was able to see the Appellant during the whole of the relevant time was disbelieved by the trial judge. That is a finding of credibility to which an appellate court should defer.

[16] The trial judge found that other parts of E.H.'s testimony corroborated aspects of the complainant's evidence, not that it corroborated all of the complainant's evidence. There is no error in that finding.

[17] The Appellant also argues that the trial judge erred in rejecting the exculpatory aspect of E.H.'s evidence on the basis that E.H. was "slanted to her brother", the Appellant. He points out that E.H. is also related to the complainant and testified as a Crown witness, arguing that detracts from any suggestion that she was biased toward the Appellant.

[18] While the rejection of a witness' testimony based solely on the relationship between that witness and another individual in the proceeding without more may be an error, in this case the trial judge's reasons indicate that the brother - sister relationship was but one factor in her assessment of E.H.'s evidence. Other factors were that E.H.

admitted being occupied at one point with her child in another room and then seemed to change her testimony to say that even then she was able to see the Appellant. The trial judge also did not believe that E.H. had her brother in her line of vision the entire time in a house full of people.

[19] E.H.'s relationship with the Appellant was not the sole reason for the trial judge's rejection of her evidence about seeing him. It was not an error for the trial judge to take the relationship into account as one factor in rejecting that portion of E.H.'s evidence.

[20] For the above reasons, I find that the trial judge did not err in rejecting the exculpatory aspect of E.H.'s testimony while accepting other aspects of it and finding that they corroborated aspects of the complainant's testimony.

Improper inference of guilt from circumstantial evidence

[21] The Appellant submits that because the complainant testified that she did not see the Appellant touch her, the evidence does not amount to proof beyond a reasonable doubt. In essence, this is a submission that the verdict was unreasonable.

[22] The test concerning reasonableness of the verdict is: could a jury or judge properly instructed and acting reasonably have convicted: *R. v. W.R.* , [1992] 2 S.C.R. 122. In applying the test, the appellate court should show great deference to findings of credibility made at trial.

[23] The complainant's evidence was that at the time she went to bed, her cousin, the cousin's boyfriend and their daughter were sleeping in the living room. The complainant and her five year old sister were the only occupants of the room where the incident occurred; they were both on one bed. The complainant woke up when the television was turned on. She saw the Appellant watching television; she could see him "around the bed".

[24] The complainant testified that when the Appellant touched her she was lying on her back and could not see him. In cross-examination she said she was not looking at him when he was touching her. She said that she started moving around, he took his hand away and when she stopped moving he started touching her again. He stopped and then left the room when E.H. or another girl called him. The complainant testified

she thought he went outside with E.H., after which she left the room and went to the washroom.

[25] When questioned by the trial judge as to how she knew it was the Appellant who had touched her, the complainant testified that he was the only one there apart from her younger sister.

[26] The trial judge carefully considered the complainant's testimony that she did not see the Appellant when she was being touched and concluded that did not raise a reasonable doubt in her mind as to whether the complainant knew who was touching her. She interpreted the complainant's testimony as meaning "that at the time he is touching her she is not looking at him, she does not see him then, which I do not see means she does not know who is touching her then" (transcript of reasons for decision, page 2).

[27] The Appellant points out that the complainant gave different answers about what woke her up and admitted that she was told after the fact by someone else that the Appellant had gone into the room to watch a movie. All of that went to the complainant's credibility and was for the trial judge to assess. At no time did the complainant say that she had not seen the Appellant in the bedroom watching television before the touching happened or that she had not seen him leave the room after it stopped. The trial judge was well aware that the complainant's identification of the Appellant was a live issue as she asked the complainant how she knew it was him.

[28] To the extent that the complainant's credibility was in issue in the sense of her knowledge that it was the Appellant who touched her and her ability to express how she knew that, this Court must show deference to the trial judge's findings, particularly since the complainant in question was a child: *R. v. W. R.*, [1992] 2 S.C.R. 122; *R. v. Markell*, [2001] O.J. No. 1813 (C.A.). It was certainly open to the trial judge to interpret the child's evidence to mean that she saw the Appellant in the room and at the bed but simply did not look at him when he was touching her.

[29] The Appellant says that the trial judge erred in simply accepting the complainant's testimony without regard to the evidence as a whole, including the evidence of E.H.. As indicated above, however, the trial judge did consider E.H.'s evidence but concluded it did not raise any doubt on the issue of identification.

[30] The Appellant also submits that there were other reasonable inferences to be drawn from the evidence which would exculpate the accused. However, having rejected E.H.'s evidence that she was able to see the Appellant throughout the time they were at the house, the only evidence the trial judge was left with was that of the complainant, who said that the Appellant was the only person in the room apart from her younger sister. Although there were other people in or outside the house, there was no evidence at all that any of them entered the room where the complainant was in bed.

[31] It was for the trial judge to decide what inferences to draw from the evidence; absent palpable and overriding error, this Court will not intervene.

[32] In my view, the trial judge's decision to convict was not unreasonable. It is a verdict that a properly instructed jury or judge, acting reasonably, could have rendered on the evidence.

[33] The appeal from conviction is accordingly dismissed.

The sentence appeal

[34] Section 151, the section under which the Appellant was charged, carries a minimum term of imprisonment of 14 days when the charge is proceeded with summarily, as it was in this case. The Crown's position at trial was that a jail term of eight to twelve months should be imposed; the defence position was that six to nine months in jail would be appropriate. The trial judge sentenced the Appellant to ten months in jail followed by two years of probation.

[35] The Appellant submits that the trial judge erred in failing to consider mitigating circumstances particular to the Appellant and in not applying the proper approach in sentencing him as an aboriginal offender.

[36] The trial judge did recognize the difficulties the Appellant had faced in his life and took them into account. She found there were no mitigating factors in the case and referred in that context to the vulnerability of the young victim, the young, but mature, Appellant and his position of trust and the fact that the victim had not been spared the need to testify.

[37] Section 718.1 of the *Criminal Code* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In general, a mitigating factor will be something relevant to one of those two circumstances. No factor was identified that would mitigate either the gravity of the offence in this case or the Appellant's degree of responsibility or moral blameworthiness. I find no error in the trial judge's statement that there were no mitigating factors.

[38] As to the Appellant's argument that the trial judge did not properly apply the principles or methodology required by *R. v. Gladue* (1999), 133 CCC. (3d) 385 (S.C.C.), it must first be noted that those principles and s. 718.2(e) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender: *R. v. Kakekagamick* (2006), 81 O.R. (3d) 664 (Ont. C.A.). The status of being aboriginal is not in itself a mitigating factor or one that will result in a lesser sentence, although it can make certain other matters relevant in the right case: *R. v. Andre*, [2000] N.W.T.J. No. 43 (C.A.).

[39] The Appellant's main argument is that the trial judge erred in saying that a restorative sentence was not available in this case because the Appellant did not take responsibility for his crime. I do not read the trial judge's reasons as going so far as to say that a restorative approach is never available where an offender does not plead guilty to an offence. The trial judge carefully reviewed the *Gladue* principles; she was clearly concerned about the fact that the Appellant did not acknowledge responsibility. She was also concerned about what she termed the "notorious" number of sexual assaults in this jurisdiction, the serious social problem of sexual abuse of children and the need for sentences for such crimes to serve the principles of denunciation and deterrence. As did the Court of Appeal in *Kakekagamick*, the trial judge in this case had to determine whether the objectives of restorative justice should weigh more favourably than those of separation, denunciation and deterrence (paragraph 73, *Kakekagamick*). In serious cases the latter objectives will often, if not usually, be determinative.

[40] Here, the trial judge found that the principles of restorative justice should not carry more weight than those of separation, denunciation and deterrence. Her decision in that regard and the sentence she ultimately imposed are entitled to deference: *R. v. L.M.*, [2008] S.C.J. No. 31.

[41] In this case there was no alternative to a sentence of incarceration because of the statutory minimum penalty. The trial judge correctly noted that it was only the length of the term of incarceration, beyond the 14 day minimum, that was at issue. The Appellant's position is that had the principles of *Gladue* been properly applied, a sentence of fewer months incarceration might have been imposed. The issue is not, however, whether a more lenient sentence might have been imposed, but whether the sentence that was imposed is fit. The fact that the sentence is very close to the top end of the range proposed by the defence at trial is some indication that the sentence is fit.

[42] In all the circumstances, I do not find that the trial judge made any error in applying the *Gladue* principles. The sentence is not unfit. The appeal from sentence is therefore dismissed.

[43] I thank counsel for the very helpful briefs filed in this case.

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

Dated at Yellowknife, NT
this 8th day of July, 2008.

Counsel for the Appellant: Caroline Wawzonek
Counsel for the Respondent: Sadie Bond

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