Zieba v. *HMTQ*, 2013 NWTSC 64

Date: 2013 09 11
Docket: S-1-CR-2012000039

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RICHARD ZIEBA

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant appeals his conviction on two counts of assault. The Crown proceeded by way of summary conviction and the trial was held in Territorial Court. The Appellant was sentenced to pay fines and to serve a term of probation.

[2] The grounds set out in the notice of appeal were refined in the Appellant's factum as follows:

1. The trial judge erred by unconsciously reversing the burden of proof;
2. The trial judge erred in failing to carry out a *R. v. W.(D.)* analysis;
3. The trial judge erred in failing to provide supported reasons for the findings leading to conviction.

[3] Both parties agree that these are all questions of law to be assessed on a standard of correctness. The Respondent also says that to the extent the questions are linked to underlying findings of fact, those findings are entitled to deference. The Appellant does not dispute that as a general principle, but says that the findings of fact in this case are tainted by overriding errors.

[4] To put the grounds in context, it is necessary to review the evidence of the three Crown witnesses and the Appellant, who testified at trial.

Evidence at trial

[5] The events in question took place at a retirement function held in a local pub. The witnesses and the Appellant were all known to each other, but had not interacted earlier in the evening. The Appellant and the female complainant, Mrs. Nowell, worked together in the same government department and there had been strains in their working relationship.

[6] Mrs. Nowell testified that as she was following her husband on the way out of the pub, she was suddenly attacked from behind by the Appellant. She said that her shoulders were gripped, she was lifted up and shaken, and was turned around. She described the Appellant shaking her violently, yelling and swearing.

[7] Mrs. Nowell testified that her husband came towards them, asking what the Appellant was doing. She said the Appellant pushed her out of the way and went towards her husband, calling him a coward. When Mr. Nowell backed away, the Appellant pushed him violently in the chest. The Appellant then walked away.

[8] Mrs. Nowell testified that she and her husband went over to another guest, Mr. Beaulieu, to tell him what had happened. The Appellant came toward them yelling, swearing, pushing and shoving; he called her husband a coward. He tried to grab both Nowells and did grab her. Mr. Beaulieu intervened. He restrained the Appellant and told the Nowells it would be best if they left, so they did.

[9] After leaving the pub, the Nowells drove to the local police detachment to report the incident. At the trial, Mrs. Nowell testified that she had been unable to work since shortly after the incident six months earlier and was afraid to return to the department where she and the Appellant were employed. She testified that she had been diagnosed with post traumatic stress disorder as a result of the incident with the Appellant.

[10] Mr. Nowell also testified. He stated that as his wife was following him out of the pub, he reached back for her hand and felt a sharp tug on his arm. He turned to see the Appellant, who "push punche[d]" him in the chest with his palm, saying "fight me" and making remarks about the incident with Mrs. Nowell. Mr. Nowell said he would not fight and the Appellant walked away. Mr. Nowell did not see the Appellant grab or shake Mrs. Nowell before or during this incident.

[11] Mr. Nowell testified that he spoke with another guest, Ms. Matthews, while Mrs. Nowell went to talk to Mr. Beaulieu. Mr. Nowell then joined his wife and Mr. Beaulieu. The Appellant came over to them, grabbed Mrs. Nowell and spun her around, swearing at her, and saying something about what she had done to his daughter. Mr. Nowell described the Appellant as spitting all over Mrs. Nowell, grabbing and poking her in the chest. Mr. Nowell pulled his wife away and they left.

[12] The third Crown witness, Ms. Matthews, testified that as she was leaving the pub she saw Mrs. Nowell coming towards the exit. She saw the Appellant walking towards Mr. Nowell and:

> ... I did notice something that - - I don't know whether it was a shove or that they did - - [the Appellant] touched [Mr. Nowell], but I did not know whether it was in jest or whether it was in anger. I didn't know anything about what was going on, but I did notice that exchange.

[13] Ms. Matthews testified that she was quite a distance away when she made the observation that the Appellant gave Mr. Nowell "a bit of a shove"; she could not say whether it was "a friendly little shove or whether it was in anger". She testified that Mr. Nowell came over to where she and Mrs. Nowell were standing. Ms. Matthews asked what had happened and received a response from Mr. Nowell, which she chose not to pursue. Ms. Matthews, her husband and the Nowells then had a brief discussion about children's soccer.

[14] The Appellant testified that a few days prior to the retirement function, his daughter had had some serious mental health issues. She had worked with Mrs. Nowell at one time and the Appellant wanted to talk to Mrs. Nowell about the role he believes she played in his daughter's problems. He testified that he went over to Mrs. Nowell, who had her back to him. He called her name, she turned around and he said that he needed to talk to her. She leaned in towards him and he extended his hands out onto her shoulders. He told her he was cursing her, called her a bitch, and said something about his daughter. He described himself as upset, but not yelling. He denied grabbing, pushing or shaking Mrs. Nowell.

[15] The Appellant testified that Mr. Nowell, who was some distance away, turned and came towards them, within the Appellant's personal space. The Appellant felt threatened because of Mr. Nowell's body language and the way he looked; he was

wearing a big black cowboy hat. The Appellant put his hand up to push against Mr. Nowell's chest to keep him at a distance. He denied punching Mr. Nowell. The Appellant then walked away, but subsequently came back to where the Nowells were standing with Mr. Beaulieu. He was going to apologize, but due to the Nowells' body language he did not. Instead, he spoke about his daughter and called Mr. Nowell a coward in relation to some litigation dealings between them years earlier. He denied touching the Nowells. The Appellant then left to sit with someone else.

Positions of the parties at trial

[16] Trial counsel for the Appellant characterized the Appellant's conduct as a mistake, but not criminal. He pointed out that there were contradictions in the evidence as between Mr. and Mrs. Nowell. He contrasted Ms. Matthews' description of what she saw with the violent attack described by the Nowells, submitting that had the attack been that violent, Ms. Matthews would surely have noticed it. The Appellant's position was that the Crown had not met the burden of proof and he should be acquitted.

[17] Crown counsel at trial argued that regarding the first incident, the Appellant had admitted putting his hands on both Mr. and Mrs. Nowell and that the version testified by the Nowells should be believed. Crown counsel submitted that the Appellant should not be believed when he said that he was merely upset, and the fact that he approached the Nowells a second time was evidence that he acted in anger.

Decision at trial

[18] The trial judge gave his decision immediately after counsel made submissions. At the beginning of his reasons, he said the following:

> ... We have basically two very different versions of what happened and we have a third party, totally independent, who saw only a bit of what happened.
>
> A number of matters were raised which might appear to be totally collateral, but I think were important to give context to the testimony of everyone. The versions that were given, what actually happened, probably lies somewhere between the two, and that is not suggesting any intentional colouring, but the fact that two very different perspectives ... (Emphasis added).

[19] The trial judge went on to say that the Appellant acknowledged confronting, placing his hands merely as a defensive measure in respect to both of the Nowells and, "bad language later on but no intention to do so". He found that the Appellant made the concerted decision to approach Mrs. Nowell and let her know that he felt she had some part in his daughter's problems. He contrasted the Appellant's version with Mrs. Nowell's version that the Appellant grabbed her from behind, turned her around and shook her violently. Regarding the latter, the trial judge stated that he is sure that Mrs. Nowell believes today that it was a violent shaking, "but the evidence might not establish that to a beyond reasonable doubt (*sic*)".

[20] The trial judge then made the following finding of fact:

> But I do find that she was grabbed by the shoulders and turned around and verbally assaulted. There is no question by either side. Even accepting Mr. Zieba's testimony, she was verbally assaulted, at a minimum, called names, cursed, and in a loud fashion. Certainly loud enough to be heard above a loud band and a crowded venue. And certainly I do not find his explanation of that encounter reasonable in light of the other factors I have referred to.

[21] As to the allegation of assault on Mr. Nowell, the trial judge said:

> [Mr. Nowell] turns around. He says he is grabbed. In any event, he turns around. And Mr. Zieba, in his emotional state, acknowledges he placed his hand on Mr. Nowell. But I think it is more. I am satisfied beyond a reasonable doubt that it was not a mere placing of his hand on Mr. Nowell to prevent him from getting in his face. He was mad and he was upset. We already have the emotional cursing and bad language in the face of Mrs. Nowell. I find that he may not have intended to hurt or whatever. It was a reaction, but it was still an intentional touching in anger and I find there was an assault on Mr. Nowell as well.

[22] In turning to the incident where Mr. Beaulieu was present, the trial judge stated:

> In respect to the second incident, it is all one and the same. But, again, Mr. Zieba acknowledges he approaches, possibly regretting his initial action. But, again, it is a verbal assault and described by the Nowells as being grabbing and attempting to push and shove. But again in an agitated state, Mr. Zieba approaches them again.

[23] The trial judge convicted the Appellant of assaulting each of the Nowells. In his remarks on sentence, he said the following:

> You are facing two assault charges, but I am taking into account it was, in essence, one event, basically. The most serious was the confrontation with the two Nowells.

Did the trial judge err by unconsciously reversing the burden of proof and failing to carry out the analysis required by *R. v. W.(D.)*?

[24] The first two grounds of appeal are related and require much the same analysis, so I will deal with them together.

[25] The burden of proof in a criminal trial rests on the Crown; the Crown must prove the guilt of the accused beyond a reasonable doubt.

[26] The Appellant points to the trial judge's statement, set out above, that the "versions that were given, what actually happened, probably lies somewhere between the two [versions]". The Appellant submits that this statement implies two distinct findings that are inconsistent with conviction. The first is that the trial judge did not reject the Appellant's evidence and the second is that the Crown evidence did not meet the criminal standard of proof. The Appellant also says that the statement reflects an approach that the trial judge followed throughout his decision.

[27] The Respondent characterizes the impugned statement as an introductory comment and not a finding of fact. Judges are presumed to know the law, and the trial judge did go on to say that he was satisfied beyond a reasonable doubt as to certain facts. The Respondent points out that it was open to the trial judge to accept some, all or none of the evidence of any witness. The Respondent also submits that it was open to the trial judge to convict the Appellant on his own evidence.

[28] As an introductory remark, the statement "what actually happened, probably lies somewhere between the two [versions]"might not be problematic in a trial judge's reasons, so long as the rest of the reasons demonstrate no error. In this case, however, that cannot be said.

[29] The first problem is that there were not two versions, but four. The trial judge reviewed some of the evidence given by Ms. Matthews, although he did not refer to it in the context of the Appellant's testimony or the testimony of Mr. Nowell. Nor did the trial judge refer to the testimony of the witnesses about the incident at

which Mr. Beaulieu was present, although Mr. Nowell's version of that encounter was substantially different from Mrs. Nowell's version, as well as that of the Appellant. For example, Mr. Nowell testified that the Appellant grabbed Mrs. Nowell and turned her around and was spitting all over her, poking her in the chest. Mrs. Nowell's version of that incident was that the Appellant grabbed her. The trial judge did not address that contradiction and made no credibility findings about that incident, simply characterizing it as "all one and the same" and "a verbal assault". One could, however, infer from the latter comments that the trial judge accepted the Appellant's version of that incident, which was that he said things to the Nowells but did not touch them, or one could infer that the trial judge was left in doubt as to whether there had been the physical contact described by the Nowells.

[30] The second problem arises from the way the trial judge dealt with Mrs. Nowell's evidence about the first incident. She testified that she was grabbed from behind and turned around and shaken violently. The trial judge said about the violent shaking, that, "Whether or not it was, I am sure she believes that today; but the evidence might not establish that to a beyond reasonable doubt". The difficulty here is the meaning of "might not". The standard of proof is beyond a reasonable doubt and the evidence must either meet that standard or fail; it is not clear what the trial judge meant by "might not".

[31] The trial judge compared Mrs. Nowell's testimony that she was grabbed and turned around with the Appellant's testimony that he approached and called her name and when she turned and leaned toward him, he put his hands on her shoulders to keep her out of his space. The trial judge found that nothing unusual had happened up until then and that the Appellant was in an emotional state about his daughter and had gone over to Mrs. Nowell with the intention of confronting her. After making the comment that the evidence might not establish to beyond a reasonable doubt that Mrs. Nowell was violently shaken, the trial judge went on to say:

> But I do find that she was grabbed by the shoulders and turned around and verbally assaulted. There is no question by either side. Even accepting [the Appellant's] testimony, she was verbally assaulted, at a minimum, called names, cursed and in a loud fashion. ... And certainly I do not find his explanation of that encounter reasonable in light of the other factors I have referred to.

[32] It is not clear to what the words "There is no question by either side" refer. If they refer to Mrs. Nowell being grabbed by the shoulders and turned around, they are clearly in error - the trial judge had just noted earlier in his reasons that the Appellant's version of the incident was that he put his hands on Mrs. Nowell's shoulders after she turned around. If they refer to a "verbal assault", consisting of loud name calling and cursing, it is true that the Appellant admitted using bad language in speaking to Mrs. Nowell, however that is not an assault under s. 266 of the *Criminal Code*.

[33] The trial judge made no assessment of Mrs. Nowell's credibility, save for as mentioned in the foregoing paragraphs. It is not clear why, having apparently rejected her evidence about the violent shaking, he accepted her evidence that she was grabbed by the shoulders and turned around. If he accepted the Appellant's evidence that he did not shake her, or was left with a reasonable doubt as to whether he did, or if he found Mrs. Nowell unreliable in her reporting of the shaking, then it is unclear why that conclusion did not carry over to the issue of grabbing Mrs. Nowell by the shoulders and turning her around. There was nothing inherently unreasonable in the Appellant's version of that incident, it was neither implausible nor clearly unbelievable.

[34] As in any trial, the trial judge was entitled to believe some, all or none of the evidence of any witness. However, when significant aspects of the testimony of a witness are rejected, as the violent shaking was here, there should be some credibility analysis to explain why other aspects of that same witness' testimony are accepted. This is especially important in this case where, as I have noted above, one could infer from his comments that the trial judge accepted the evidence of the Appellant about the second incident, or was at least left in doubt by it. In this sense this case is quite different, in my view, from *R. v. R.E.M.*, [2008] 3 S.C.R. 3. In *R.E.M.*, the trial judge generally found the complainant credible and accepted her evidence where it conflicted with the evidence of the accused. However, it cannot be said that the trial judge generally accepted Mrs. Nowell's evidence where it conflicted with that of the Appellant.

[35] Without an analysis of credibility, it is not clear why the trial judge found the Appellant's explanation of the incident unreasonable, particularly in light of his not being satisfied about the violent shaking. What the trial judge did say, including his remark about the truth probably lying somewhere between the two versions, suggests an approach whereby he was trying to come to a reconciliation of the

versions testified by Mrs. Nowell and the Appellant (what "probably" happened), instead of determining whether the Crown had proved the case beyond a reasonable doubt.

[36] The Respondent argued that on the Appellant's testimony alone, the trial judge could find that the *actus reus* of assault was made out - the putting of the Appellant's hands on Mrs. Nowell's shoulders. Therefore, the Respondent says, the trial judge had only to make a finding as to the *mens rea.* The finding he made was that the Appellant put his hands on Mrs. Nowell in an emotional, confrontational manner, not just to keep her out of his space.

[37] The difficulty with this argument is that it is by no means clear that the trial judge would have found that a criminal assault was made out had he not found that the Appellant had grabbed Mrs. Nowell and turned her around, actions the Appellant denied. Nor, on this record, am I prepared to say that a conviction would necessarily follow if it was found that the Appellant had merely placed his hands on Mrs. Nowell's shoulders in the manner he described.

[38] Turning to the incident with Mr. Nowell for which the Appellant was convicted, the same concerns arise about the trial judge's statement that the truth probably lies somewhere between the two versions. There was the third version testified by Ms. Matthews, in which, although she used the word "shove" a couple of times to describe what she had seen, she started off by saying that she did not know whether it was a shove or whether the Appellant touched Mr. Nowell. In that respect, her version was just as, if not more, consistent, with the Appellant's testimony rather than Mr. Nowell's testimony. Although the trial judge reviewed Ms. Matthew's testimony near the beginning of his reasons, he does not appear to have given it any consideration when dealing with the versions given by the Appellant and Mr. Nowell. Again, his reasons leave the impression that he was trying to come to a reconciliation of their two stories, looking for what probably happened, rather than analyzing whether the Crown had proved beyond a reasonable doubt that the Appellant committed an assault.

[39] The Respondent argued vigorously that the Appellant admitted touching Mr. Nowell and that the trial judge only had to make a finding as to the *mens rea*, which he found to be an intention to touch arising from anger. However, again there was little or no analysis of credibility in the trial decision that could well have had a bearing on the issue of the Appellant's intention. Mr. Nowell's version was that he

felt a sharp tug on his arm and turned around to find the Appellant, who then "push-punched" him in the chest. According to Mr. Nowell, this left him with a sore chest for a couple of days afterwards. The reasons of the trial judge suggest that he did not accept that the Appellant grabbed or tugged Mr. Nowell's arm, since all he found was that "in any event, he turns around". Nor did he find that the Appellant did anything that could be described as a punch.

[40] Either the trial judge was not satisfied on Mr. Nowell's evidence that there was grabbing and punching, or he accepted the Appellant's evidence that there was not. This effectively amounts to a rejection of Mr. Nowell's evidence on those points. The trial judge did not go on to say why he then rejected the Appellant's explanation that he had put his hand on Mr. Nowell's chest to keep him at a distance when he felt threatened by Mr. Nowell. The finding that the Appellant was angry and upset does not in itself contradict or exclude a defensive gesture or reaction, in the face of Mr. Nowell coming up to him. And although in his direct examination, the Appellant did not use the word "reaction" to describe what he did, he did agree with Crown counsel in cross-examination that it was a reaction on his part, and the trial judge also used the word reaction.

[41] The Respondent characterizes the physical actions alleged against the Appellant that were not found to have been proven as "aggravating circumstances", which need not be proven in order for there to be a conviction for assault. I accept that this would apply in a case where the actions admitted by an accused are themselves clearly criminal, for example, where the Crown witness says the accused punched him and the trial judge finds, based on the accused's own testimony, that there was a slap only. In this case, however, it is not clear that putting a hand up to push back someone who is coming too close, even if done in anger, would justify a conviction for criminal assault, even if it is not the same as the reflex action that was at issue in *R. v. Wolfe* (1974), 20 C.C.C. (2d) 382 (Ont. C.A.). This issue was not really explored at trial, but certainly arose on the evidence.

[42] I turn now to the second ground of appeal, that alleges that the trial judge erred in failing to carry out a *R. v. W.(D.)* analysis. This is really another aspect of the argument about how the trial judge applied the burden of proof.

[43] The Appellant submits that the trial judge's reasons do not reveal that he applied the analysis required by *R. v. W.(D).*, [1991] 1 S.C.R. 742. The Appellant concedes that the analysis need not follow the exact wording set out in *W.(D.)*, but

says that use of the wording is a useful way to ensure that the criminal standard of proof is applied and an accused is acquitted even when the trier of fact concludes that the accused is probably guilty. In this case, the Appellant says that his evidence was never rejected and so the *W.(D).* analysis was critical on the issue whether he grabbed Mrs. Nowell on the shoulders and turned her around, something he denied. Nor did the trial judge say why he found the Appellant's explanation about his actions regarding Mrs. Nowell unreasonable. Nor did the trial judge consider whether any of the other evidence in the case raised a reasonable doubt.

[44] The Respondent submits that the trial judge did say why he did not believe the Appellant - with regard to the first encounter with Mrs. Nowell, he found the Appellant's explanation unreasonable in the context of what was happening and his emotional state. The Respondent also points out that the trial judge's decision followed immediately after counsel's submissions and that counsel had made reference to the test in *W.(D.).*

[45] The *W.(D.)* decision makes it clear that the paramount question in a criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused. The following principles have also recently been confirmed by the Supreme Court of Canada: the order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration; a verdict of guilt must not be based on a choice between the accused's evidence and the Crown's evidence; trial judges are not required to explain in detail the process they followed to reach a verdict: *R. v. Vuradin*, 2013 SCC 38.

[46] As I have already stated, in this case there was little analysis of credibility. Based on the trial judge's comments about the truth probably lying somewhere between the two versions, and his restricted focus on the evidence of only Mrs. Nowell and the Appellant as to the first encounter with her, and of only Mr. Nowell and the Appellant as to the first encounter with him, and despite the fact that counsel referred to *W.(D.)* in their submissions, the trial judge's reasons leave considerable doubt that he undertook the analysis required by *W.(D.)*, particularly as to whether reasonable doubt arose from other evidence in the case, on its own or in combination with the evidence of the Appellant.

[47] As I have noted above, the trial judge did not make any findings about the incident that occurred when Mr. Beaulieu was present, characterizing it as "all one

and the same" and a "verbal assault". However Mr. Nowell's evidence about what happened in that incident was significantly different from Mrs. Nowell's and was relevant to the issue of credibility, yet does not appear to have been taken into account. Further, if the trial judge's finding was that nothing more than a verbal assault occurred during that incident, his reference to it being "all one and the same" suggests that he may have viewed the earlier incidents with the Nowells as also verbal assaults, thus casting doubt on his finding that there was any touching by the Appellant that would amount to criminal assault.

[48] For the above reasons, I find that the trial judge erred in not undertaking the *W.(D.)* analysis and in approaching the case by attempting to ascertain what probably happened, rather than determining whether the Crown had proved the guilt of the Appellant beyond a reasonable doubt.

<u>Did the trial judge err by failing to provide supported reasons for the findings leading to conviction</u>

[49] In light of my decision on the first two grounds, it follows that the trial judge's reasons do not support his findings leading to conviction.

[50] *Vuradin*, referred to above, summarizes the law with respect to sufficiency of a trial judge's reasons. An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach, considering the reasons in the context of the evidence, the arguments and the trial. Reasons will generally withstand challenge if, read in context, they show why the judge decided as he or she did. For an appeal based on insufficient reasons to succeed, the trial judge's reasons must be so deficient that they foreclose meaningful appellate review.

[51] As also stated in *Vuradin*, credibility determinations by a trial judge attract a high degree of deference. In *R. v. R.E.M.*, 2008 SCC 51, the Supreme Court explained that the failure of a trial judge to explain why he rejected an accused's plausible denial of the charges does not mean that the reasons are deficient so long as they generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required because the convictions themselves give rise to a reasonable inference that the accused's denial failed to raise a reasonable doubt: *Vuradin*.

[52] The Appellant's arguments are already referred to above: that the reasons of the trial judge lack any analysis of credibility, and fail to address correctly the burden of proof and show logically how the trial issues were resolved.

[53] The Respondent submits that this Court should defer to the advantage that the trial judge has, particularly in a case like this one where, at trial, witnesses sometimes demonstrated physically what happened without a verbal description. The Respondent relies on *R.E.M.*, where the Supreme Court recognized that it is not always possible for a trier of fact to articulate why he or she does or does not believe a witness. In the Respondent's submission, the Appellant clearly admitted touching the Nowells and the only issue was whether that touching was intentional and therefore criminal and the trial judge's reasons, although unclear in some respects, adequately illustrate how he came to the conclusion that there was intentional touching amounting to assault.

[54] I bear in mind that the trial judge has an advantage and that in a busy trial court a judge does not always have time to develop thorough reasons and analysis in coming to a decision. In this case, however, it is not simply that the reasons do not explain the trial judge's findings or provide an analysis of the credibility of the witnesses or why any part of their evidence was or was not accepted. Some of the statements made by the trial judge, to which I have referred above, put into question the findings of fact that he made and whether he correctly applied the burden of proof. Judges are presumed to know the law, but in this case I find that the reasons for decision cannot be read without coming to the conclusion that the trial judge tried to reconcile the versions told to him by the main witnesses rather than applying the required burden of proof and considering all the evidence before him.

<u>Decision</u>

[55] As a result, the appeal is allowed. Although the Appellant sought an acquittal, I cannot say that on the record before this Court, an acquittal must necessarily follow. Accordingly, a new trial is ordered.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
11th day of September 2013

Counsel for the Appellant: Laura K. Stevens, Q.C.

Counsel for the Respondent: Mathew Johnson

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