

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

NOAH AKHIATAK

Transcript of the Reasons for Judgment delivered by The Honourable Justice T. Ducharme, in Ulukhaktok, in the Northwest Territories, on the 27th day of November, 2013.

APPEARANCES:

Mr. K. Onyskevitch: Counsel on behalf of the Crown

Mr. S. Petitpas: Counsel on behalf of the Accused

Charge under s. 156 C.C.

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R. v. Noah Akhiatak
November 27, 2013 - Ulukhaktok
Reasons for Judgment

THE COURT: Noah Akhiatak stands charged that on or between May 1st, 1977, and May 31st, 1979, at or near the Hamlet of Ulukhaktok (formally known as Holman) in the Northwest Territories, being a male person, did commit indecent assault on Danny Taptuna, another male person, contrary to section 156 of the Criminal Code.

GENERAL PRINCIPLES OF LAW

Prior to reviewing the evidence in this trial, I wish to briefly outline some of the fundamental principles of our criminal law that I must apply in this case.

Burden on the Prosecutor

It is for the Crown to prove beyond a reasonable doubt that the acts alleged occurred and that Mr. Akhiatak committed them. Mr. Akhiatak does not have to prove that the events never happened. Mr. Akhiatak need not prove anything. The issue in this case is narrow, that

1 is has the Crown proven beyond a reasonable doubt
2 that Mr. Akhiatak engaged in the indecent acts
3 described by Mr. Taptuna?

4 The phrase "beyond a reasonable doubt" is
5 not an ordinary expression. It is a term that
6 has been used for a very long time and is an
7 important part of our criminal justice system. A
8 reasonable doubt is not a far-fetched or
9 frivolous doubt. It is not a doubt based on
10 sympathy or prejudice. It is a doubt based on
11 reason and common sense. It is a doubt that
12 logically arises from the evidence, or the lack
13 of evidence. It is a doubt about an essential
14 element of the offences charged.

15 This standard is a formidable one. Proof
16 beyond a reasonable doubt is closer to absolute
17 certainty, rather than a balance of
18 probabilities: see R. v. Starr (2000), 147
19 C.C.C. (3d) 449 (S.C.C.) and R. v. Lifchus
20 (1997), 118 C.C.C. (3d) 1 (S.C.C.).

21

22 Presumption of Innocence

23 The presumption of innocence means that Mr.
24 Akhiatak started this trial with a clean slate.
25 The presumption stays with him throughout the
26 case. It is only defeated if and when Crown
27 counsel satisfies the court beyond a reasonable

1 doubt that Mr. Akhiatak is guilty of the crimes
2 charged. The presumption of innocence also means
3 that Mr. Akhiatak did not have to testify,
4 present evidence or prove anything in this case.
5 In particular, Mr. Akhiatak does not have to
6 prove that he is innocent of these crimes.

7
8 Assessment of Evidence Generally

9 It is not proper, in a case such as this,
10 for a trial judge to simply decide whether or not
11 they believe the evidence of the complainant and,
12 on that basis, reach a conclusion of guilt beyond
13 a reasonable doubt. The totality of all of the
14 evidence must be examined in a cumulative way to
15 determine if there is a reasonable doubt
16 notwithstanding the apparent credibility of the
17 complainant: see R. v. Richardson (1992), 9 O.R.
18 (3d) 194 (C.A.); R. v. M.(P.) (1983), 31 C.R.
19 (3d) 311 (Ont. C.A.).

20
21 Review of the Evidence

22 The resolution of this case depends
23 primarily on the credibility of Mr. Taptuna and
24 of Mr. Akhiatak. The Court may believe all, none
25 or some of a witness' evidence. However, a
26 determination of guilt or innocence must not
27 devolve into a mere credibility contest between

1 two witnesses in a trial. Such an approach
2 erodes the operation of the presumption of
3 innocence and the assigned standard of persuasion
4 of proof beyond a reasonable doubt. Equally, it
5 must be acknowledged that mere disbelief of the
6 accused's evidence does not satisfy the burden of
7 persuasion on the Crown. This principle applies
8 to the testimony of the accused and the defence
9 evidence. The Court must be satisfied on the
10 totality of the evidence that there is no
11 reasonable doubt as to the accused's guilt. In
12 other words, in a criminal case it is
13 inappropriate to determine a verdict by asking
14 simply, "whom do I believe?"

15 In assessing the evidence, I must do so in a
16 global fashion, assessing the evidence
17 cumulatively and as a whole. Once I have done
18 that my deliberations should be guided by the
19 three step approach set out by Cory J. in R. v.
20 W.D.

21 Step One

22 If I believe Mr. Akhiatak's evidence that he
23 did not commit the offences charged, then I
24 must find him not guilty.

25 Step Two

26 Even if I do not believe Mr. Akhiatak's
27 evidence, if it leaves me with a reasonable

1 doubt about his guilt, or, about an
2 essential element of the offence charged, I
3 must find him not guilty of that offence.

4 Step Three

5 Even if Mr. Akhiatak's evidence does not
6 leave me with a reasonable doubt of his
7 guilt, or about an essential element of the
8 offence charged, I may convict him only if
9 the rest of the evidence that I do accept
10 proves his guilt beyond a reasonable doubt.

11

12 Significance of Demeanour

13 In assessing the credibility of witnesses it
14 is important for a trial judge to keep in mind
15 the caution of O'Halloran J.A in *Faryna v.*
16 *Chorny*, [1952] 2 D.L.R. 354 at p. 357 (B.C.C.A.),
17 "[t]he law does not clothe the trial Judge with a
18 divine insight into the hearts and minds of the
19 witnesses." It is an error to make a credibility
20 determination based solely on the demeanour of a
21 witness. While the demeanour of a witness is a
22 factor that may be considered, it is only one
23 factor to be considered in the context of a
24 cumulative assessment of all the evidence. As
25 O'Halloran J.A stated in *Faryna v. Chorny*, *supra*,
26 at p. 357 (B.C.C.A.):

27

1 The credibility of interested
2 witnesses, particularly in cases of
3 conflict of evidence, cannot be
4 gauged solely by the test of whether
5 the personal demeanour of the
6 particular witness carried
7 conviction of the truth. The test
8 must reasonably subject his story to
9 an examination of its consistency
10 with the probabilities that surround
11 the currently existing conditions.
12 In short, the real test of the truth
13 of the story of a witness in such a
14 case must be its harmony with the
15 preponderance of the probabilities
16 which a practical and informed
17 person would readily recognize as
18 reasonable in that place and in
19 those conditions.
20 [Emphasis added.]

21 Thus, while I can properly consider the
22 demeanour of any witness in assessing his or her
23 credibility, my assessment of his or her
24 credibility turns on a broader assessment of his
25 or her testimony. Whether it is consistent,
26 whether it makes sense or is inherently hard to
27 credit, and how it ties in to all of the evidence
28 in the case.

29 The Witnesses

30 The Crown's first witness was the complainant,
31 Danny Taptuna. Mr. Taptuna described three
32 separate occasions when Mr. Akhiatak forced him
33 to perform oral and anal sex. These incidents
34 occurred in Mr. Akhiatak's home in the master
35 bedroom and in another bedroom in the house.

1 There is no issue that these activities
2 constituted indecent assault. Rather the issue
3 is whether or not the Crown has proven them
4 beyond a reasonable doubt.

5 The Crown called three other witnesses:
6 David Omingmak, the complainant's father, Alice
7 Omingmak, the complainant's mother and Winnie
8 Akhiatak, the ex-wife of the accused. Ultimately
9 none of these witnesses assisted the Crown's
10 case.

11 David Omingmak testified in chief that Danny
12 Taptuna told him of the indecent acts back when
13 they occurred. However, in cross-examination, he
14 conceded that he told the police that Mr. Taptuna
15 told his mother, Alice Omingmak, about these acts
16 and that Mrs. Omingmak had in turn told him.
17 While Mr. Omingmak did not have an interpreter
18 during this statement he on more than one
19 occasion made it clear that Danny had not told
20 him of these allegations. Mr. Omingmak also
21 denied doing anything in response to this
22 information. In particular he did not go to look
23 for Mr. Akhiatak nor did he fight with Mr.
24 Akhiatak as described by Mr. Taptuna.

25 Alice Omingmak testified that Danny had not
26 complained to her about Noah back in the late
27 '70s. Rather she only heard of the allegations

1 "not very long ago". She never told her husband,
2 David, about anything happening between Danny and
3 Noah. In short, she did not corroborate Mr.
4 Taptuna's claim that he had told her about one of
5 the incidents.

6 Winnie Akhiatak testified that she did not
7 remember anything that happened in the 70s. She
8 was unhappy and apparently had been beaten during
9 that time and it appears that she was blocking
10 out any memories of the relevant time. In
11 particular she testified that she did not
12 remember if anything happened between Mr.
13 Akhiatak and Danny Taptuna, if Mr. Akhiatak ever
14 touched Danny Taptuna or if Mr. Akhiatak had
15 yelled at Danny Taptuna. Thus it appears that
16 she does not either corroborate or contradict Mr.
17 Taptuna's claim that she had been present for the
18 three indecent acts.

19 The case for the defence starts with the
20 testimony of Mr. Akhiatak who denied any sexual
21 improprieties between himself and Mr. Taptuna.
22 Indeed, he claimed that he got along well with
23 Danny Taptuna up until 2010 when the current
24 charge was laid. He denied ever having had an
25 argument with Mr. Taptuna and indeed he could not
26 remember ever having an argument with anyone.

27

1 The Case for the Crown

2 The Crown urges me to reject the evidence of
3 Mr. Akhiatak as incredible. In this regard, he
4 reminds me that I am to assess Mr. Akhiatak's
5 credibility in the context of all of the
6 evidence. He suggests that Mr. Taptuna was a
7 credible witness and that the contradictions in
8 his evidence do not essentially undermine his
9 evidence but rather are the sort of errors one
10 might expect from an adult who is testifying
11 about events that occurred many years previously
12 during his childhood. While the Crown concedes
13 the evidence of the other three witnesses he
14 called do not help the Crown, his position is
15 that they do not tend to undercut Mr. Taptuna's
16 evidence either. The Crown points out that Mr.
17 Taptuna has been consistent in his testimony
18 about the indecent acts and that his testimony in
19 this regard constitutes proof beyond a reasonable
20 doubt.

21
22 The Case for the Defence

23 The defence argues that I should believe Mr.
24 Akhiatak's denial of the allegations and acquit
25 him under the first branch of W.D. In the
26 alternative, even if I do not believe all of his
27 evidence, I should nonetheless be left with a

1 reasonable doubt about his guilt and acquit him
2 under the second branch of W.D.

3 Turning to the balance of the evidence, the
4 defence points to a number of contradictions
5 within the testimony of Mr. Taptuna and between
6 that testimony and the testimony of others which
7 make it clear that the version of events
8 recounted by Mr. Taptuna does not make sense and
9 demonstrate that he was being less than truthful
10 with the court. In considering these, I am
11 mindful of the comments of then Justice McLachlin
12 in R. v. W.R. [1992] 2 S.C.R. 122 at para 26:

13
14 In general, where an adult is
15 testifying as to events which
16 occurred when she was a child, her
17 credibility should be assessed
18 according to criteria applicable to
19 her as an adult witness. Yet with
20 regard to her evidence pertaining to
21 events which occurred in childhood,
22 the presence of inconsistencies,
23 particularly as to peripheral
24 matters such as time and location,
25 should be considered in the context
26 of the age of the witness at the
27 time of the events to which she is
testifying.
[Emphasis added.]

23 Thus, I am not concerned about
24 inconsistencies in Mr. Taptuna's testimony and
25 previous statements with respect to the dates
26 when the matter occurred, the colour of toy cars
27 at the house, the colour of the shirt worn by Mr.

1 Akhiatak during the indecent acts, what was on
2 the walls in the rooms or even such details as
3 which arm Mr. Taptuna was grabbed by or which arm
4 Mr. Akhiatak used to grab him.

5 However, there are some aspects of Mr.
6 Taptuna's testimony that cause me concern. In
7 particular, I must consider the following points:

8 (1) The suggestion that it would be difficult to
9 believe that a child who had been abused by the
10 accused would return to his assailant's house on
11 two other subsequent occasions;

12 (2) The suggestion that it would be unusual that
13 Mr. Taptuna did not seek medical attention
14 especially given the stomach pain he experienced
15 after the anal sex;

16 (3) In examination-in-chief, Mr. Taptuna said
17 when he woke up on the third occasion Mr.
18 Akhiatak was on the floor. In cross-examination,
19 Mr. Taptuna agreed he had told the police that
20 when he woke up Mr. Akhiatak was on the floor and
21 then changed and said Mr. Akhiatak was passed out
22 on the bed;

23 (4) Mr. Taptuna testified that on the third
24 occasion he told his father and then saw his
25 father go out and fight with Mr. Akhiatak. Mr.
26 Taptuna agreed that he had earlier told the
27 police that his father had gone out to look for

1 Mr. Akhiatak but had not been able to find him.
2 Not only was Mr. Taptuna internally inconsistent
3 on this point but his testimony was contradicted
4 by his father, Mr. Omingmak, who testified that
5 he had not gone to look for Mr. Akhiatak nor had
6 he fought with him;

7 (5) Mr. Taptuna testified that he had told both
8 his mother and his father about these incidents.
9 His father gave inconsistent evidence in this
10 regard but clearly told the police he had not
11 been told anything by Mr. Taptuna directly. As
12 for Mrs. Omingmak she testified that Mr. Taptuna
13 never told her anything and that she had never
14 told her husband anything; and finally

15 (6) There is the testimony of Winnie Akhiatak
16 who has bad memories regarding being beaten but
17 does not remember anything nothing about Mr.
18 Akhiatak and Mr. Taptuna.

19

20 Analysis

21 When I consider Mr. Akhiatak's testimony I
22 note that it was quite short. Moreover as was
23 the case in Jaura, [2006] O.J. No. 4157 as his
24 testimony "constituted a general denial of the
25 core of the allegations, it necessarily lacked
26 detail, substance and the flavour that can
27 sometimes alternatively either support or

1 undermine believability." I do reject Mr.
2 Akhiatak's facile suggestion that he did not
3 remember ever having an argument with anyone in
4 his life. However, viewed in isolation, I cannot
5 reject his evidence, particularly his denial of
6 any sexual impropriety, as untrue.

7 But I accept the Crown's submission that my
8 assessment of Mr. Akhiatak's credibility must be
9 done in the context of all of the evidence. I
10 found Mr. Taptuna's evidence about the indecent
11 acts to be consistent and he appeared to me to be
12 quite credible. I am not troubled by the fact
13 that as a child he returned to Mr. Akhiatak's
14 home after previously being abused by him.
15 Moreover I do not find it difficult to believe
16 that Mr. Taptuna did not seek medical attention
17 particularly given the fact that he lived in such
18 a remote community and had not reported anything
19 beyond a pain in his stomach.

20 But I am troubled by the fact that Mr.
21 Taptuna's testimony that he told his parents
22 about these incidents and the fact that he
23 claimed he saw his father fighting with Mr.
24 Akhiatak after the third incident are
25 contradicted by his parents. While these
26 contradictions do not relate directly to the
27 indecent acts they are so closely associated with

