

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LEONARD FISH

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

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Appeal of conviction and sentence.

Heard at Yellowknife, NT, on May 21, 2014.

Reasons filed: June 13, 2014

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REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE K. SHANER

Counsel for the Appellant: Michael Martin

Counsel for the Respondent: Kindra Lakusta

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**REASONS FOR JUDGMENT**

[1] On October 18, 2013 Leonard Fish was convicted in Territorial Court of sexual assault. He was subsequently sentenced to a term of 15 months in prison, to be followed by 2 years of probation. He appeals from both conviction and sentence.

**BACKGROUND**

[2] On the afternoon of May 19, 2013, the Complainant was at a house party with several other people, including Mr. Fish. She started drinking alcohol at about 1:30 or 2:00.

[3] At about 4:30 or 5:00 that afternoon the Complainant stopped drinking and she and her boyfriend went into a bedroom at the house. When the Complainant was asked at trial to describe her state of intoxication at that time, she said she “just wanted to go to sleep”, but that she was having no trouble walking or talking.

[4] The Complainant and her boyfriend had sex in the bedroom, after which she got dressed again. Her boyfriend got up and left the bedroom. The Complainant stayed in the bedroom and passed out.

[5] The Complainant testified that she awoke sometime later to find that her pants and panties were off and Mr. Fish was in the bed beside her, touching her on her stomach, breasts and towards her vagina. He was wearing a shirt, but his pants were down below his waist and his belt undone. She testified the light in the room was off, but she could see his face and she recognized Mr. Fish.

[6] The Complainant yelled at Mr. Fish and tried to push him away. She testified that two other guests, Peter John Lafferty and Jason Vital, came into the room and removed Mr. Fish. This took place in a matter of seconds.

[7] The Complainant's testimony on this point differed from that of Mr. Lafferty and Mr. Vital. Both testified that they did not see Mr. Fish in the bedroom with the Complainant, that they did not remove him and that they did not see him leave.

[8] The Trial Judge addressed the differences on this point in her reasons for judgment as follows:

Defence says that those two versions are strikingly different and I should not be able to reconcile the two versions and, therefore, I should have a reasonable doubt. With respect, I disagree.

[The Complainant] was adamant that Leonard Fish was still in the room when Peter John and Jason arrived and they, in fact, took him out of the room. I believe she was mistaken. I cannot say for certain she is mistaken, but I believe she is. But all of this happened so fast. She wakes up to someone rubbing her all over and her pants off and she looks and it is Leonard Fish. She is upset, yells at him, tries to push him away. She cannot believe this is happening. His pants are partway down and his belt is undone. It is not difficult to imagine the state she was in at that point. Leonard Fish gets up, gets his pants up and gets out of there. Peter John and Jason hear her crying and come to the room. Leonard Fish is gone, but [the Complainant] is upset and crying. [She] believes that they got him out of the room. I do not find the versions irreconcilable. I find they are two perceptions of events that happened quickly when [the Complainant] was very upset, had just woken up to a shocking or unbelievable situation; she could not believe it was happening. My finding that [the Complainant's] evidence that she believes Peter John and Jason Vital took Leonard Fish out of the room does not cause me to find the rest of her evidence unreliable.

*Transcript of Trial*, p. 104, lines 19-27; p. 105, lines 1-23

[9] The Complainant's testimony also differed from Mr. Lafferty's with respect to the bedroom light. She said Mr. Lafferty turned it on when he entered the bedroom. Mr. Lafferty testified that when he entered the bedroom, the light was already on. The Trial Judge dealt with this as well:

There was an inconsistency with respect to the light in the bedroom. Peter John Lafferty testified that the light was on when he got there. [The Complainant] testified

that Peter John had turned the light on. That type of inconsistency is not unusual on a criminal trial. I doubt very much a person would definitely remember whether or not they turn the light on. If he did turn the light on, then the light is on. But whether he turned it on or it was on when he got there, as I said, that is an inconsistency that is not uncommon on a criminal trial. That inconsistency causes me no concern.

*Transcript of Trial*, p. 106, lines 17-27; p. 107, lines 1-2

[10] There was a difference between Mr. Lafferty's evidence and the Complainant's evidence about what the Complainant was wearing when he entered the bedroom. The Complainant said she had clothing on her upper body. She was not wearing clothes on her lower body, but it was covered up with a bed sheet. By contrast, Mr. Lafferty recalled the Complainant being entirely clothed.

[11] The Trial Judge addressed this as follows:

With respect to whether or not [the Complainant] had her clothes on, Peter John Lafferty testified that when he got to the room, she was sitting on the bed and had her clothes on. [The Complainant] testified that there was a sheet on the bed; the sheet was on her. Peter John said she was sitting up in the bed. She testified that she still did have her shirt on or clothes on above her waist. So it may well be that Peter John Lafferty would not know whether or not she had her pants on. She had her shirt on, she was sitting on the bed, she was crying. He was there for a very brief period of time. As he said, she had asked him to go get Rosa. So I do not find that is necessarily an inconsistency. As I said, she said she had the sheet on. He would not have known whether or not she had pants on. He may have well thought she had pants on. She is sitting there on the bed crying and had her clothes on.

*Transcript of Trial*, p. 107, lines 3-22

[12] The Complainant reported the sexual assault to the police almost immediately. They arrived to pick her up and take her to the Health Centre some ten to 15 minutes later. On cross-examination the Complainant confirmed the police wanted to wait before taking a statement from her to give her a chance to "sober up" and "sleep it off" because "it's all pretty dramatic right now". Accordingly, she did not give a statement until two days later.

[13] The Complainant described her condition at that time (that is, during her first conversation with the police) as feeling "tired and aftershock", as well as feeling "high" from the alcohol. She denied she was drunk at that time.

[14] In her statement to police the Complainant told them that Mr. Fish was rubbing his hands against her stomach and towards her breasts. When asked if she felt him touching her anywhere else she replied "No, that's about it, and then I got up". She did not say Mr. Fish was moving his hands towards her vagina in her statement,

which differed from her testimony. When asked about this omission on re-examination by the Crown she answered:

Like I said, it was just like an aftershock. I just couldn't believe what was happening to me and . . . And today I, I try not to think about that day ever since, it was hard. So today they said tell what you remember, everything you remember.

*Transcript of Trial, p. 52, lines 7-12*

[15] The Trial Judge determined that if this was an inconsistency (she was not certain it was), she understood it, considered it and it did not diminish the Complainant's credibility or reliability.

## **GROUND OF APPEAL**

[16] The conviction is appealed in accordance with s. 686(1)(a)(i) of the *Criminal Code* on the ground that the verdict is unreasonable. Mr. Fish argues first, that the Trial Judge used an illogical or irrational reasoning process in arriving at her conclusion; second, she misapprehended the evidence; and third, the verdict is not supported by the evidence.

[17] With respect to the sentence, Mr. Fish submits the Trial Judge did not consider the principle of restraint, nor attach sufficient weight to his aboriginal status, thus erring in principle and arriving at an unfit sentence.

## **LEGAL FRAMEWORK**

[18] To determine if a verdict is reasonable, the appellate court must decide if the verdict is one that a properly instructed trier of fact could reasonably have rendered: *R v Yebes*, [1987] 2 SCR 168 at para. 25; *R v Biniaris*, [2000] 1 SCR 381, at para. 36.

[19] In addition, a verdict may be found unreasonable by the appellate court if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or is shown to be incompatible with evidence not otherwise contradicted or rejected by the trial judge: *R v Sinclair*, [2011] 3 SCR 3; *R v Beaudry*, [2007] 1 SCR 190; *R v. RP*, [2012] 1 SCR 746.

[20] The verdict in this case turned very much on the Trial Judge's assessment of the complainant's credibility as well as the reliability of her evidence. Accordingly, much of the argument on appeal is focussed on this. While an appellate court is bound to review the record and determine if the facts found by the trial judge are reasonably available from the evidence, it must also exercise a high degree of deference. In the absence of demonstrated palpable or overriding error, an appeal

court must defer to the trial judge's findings on credibility: *R v Gagnon*, [2006] 1 S.C.R. 621.

## ANALYSIS

*Did the Trial Judge Arrive at her Conclusions Using an Illogical or Irrational Reasoning Process?*

[21] Mr. Fish submits that in finding the Complainant was mistaken about the presence of Mr. Lafferty and Mr. Vital in the bedroom at the same time as Mr. Fish, the Trial Judge made a finding of fact which was plainly contradicted by the evidence.

[22] The Trial Judge's finding on this is not contradicted by the evidence she accepted. It is, obviously, contrary to the Complainant's evidence about who was in the bedroom immediately following the sexual assault and how it was that Mr. Fish came to leave, but it is nevertheless entirely consistent with the evidence given on this point by Mr. Lafferty and Mr. Vital.

[23] Further, the Trial Judge cited logical and compelling reasons to conclude the Complainant was mistaken on this. These were the short duration of the chain of events, the Complainant's shock upon waking up to Mr. Fish touching her and finding her own pants and underwear had been removed, and seeing Mr. Fish with his own pants undone and partially off.

[24] In my view, nothing turns on the Trial Judge's comment that she could not be certain the Complainant was mistaken. The fact is the Trial Judge concluded the Complainant was, indeed, mistaken.

[25] In her reasons the Trial Judge indicated she was not concerned with the inconsistency in the evidence about whether the light in the bedroom was on or off when Mr. Lafferty entered; however, Mr. Fish argues that this bears directly upon the issue of the perpetrator's identification.

[26] The evidence from the trial does not support this argument. The Complainant said it was dark in the room, but not pitch black. There was enough light that she could see and recognize Mr. Fish as the person who was in the room with her, touching her. Whether the light was on or off was, therefore, of no consequence.

[27] Mr. Fish also argues the Trial Judge did not consider other relevant evidence, specifically: (1) the Complainant was intoxicated to the point of passing out just hours before the sexual assault; (2) the police delayed taking her statement to allow her to get sober; (3) whether the "aftershock" from which the Complainant said she

was suffering affected her ability to perceive who, if anyone, had committed the sexual assault; (4) Mr. Lafferty's comment that the Complainant thought it was her boyfriend, and not Mr. Fish, who sexually assaulted her; and (5) the possibility that the sexual assault could have been committed by one of the other male guests present in the house at the time.

[28] In providing reasons, trial judges are not required to recite every detail of the evidence, nor are they required to demonstrate that they have considered and taken into account every aspect of it. They may state their conclusions in "brief compass" and so long as they are supported by the evidence, the verdict should not be overturned: *R v Burns*, [1994] 1 SCR 656 at 664. Reasons "are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict". *R v Morrissey* (1995), 22 OR (3d) 514 at 525; *R v REM*, [2008] 3 SCR 3 para. 18.

[29] The reasons the Trial Judge provided in this case demonstrate that she took into account that the Complainant, as well as the other guests, had been drinking alcohol that day before the offence occurred. They also demonstrate that she appreciated the Complainant's state of mind. The Trial Judge acknowledged in her reasons that "people were in various stages of intoxication", she heard evidence about how the Complainant felt in terms of intoxication and she noted the Complainant awoke to "a shocking and unbelievable situation". Nevertheless, the Trial Judge found the Complainant's evidence reliable.

[30] That the Trial Judge felt she could rely on the Complainant's evidence is not surprising. While she was mistaken on how it was that Mr. Fish came to leave the bedroom, the Complainant's evidence demonstrated that her memory of that day was very good. She was able to answer virtually all of the questions put to her in both direct and cross examination. She could recall what time she arrived and started drinking and what time she went to the bedroom with her boyfriend; she remembered seeing Mr. Fish sleeping on a couch while she and her boyfriend walked to the bedroom; she could recall what she was wearing, as well as what Mr. Fish, Mr. Lafferty and Mr. Vital were each wearing; she recalled getting dressed; she remembered asking Mr. Fish what he was doing and how he responded; she remembered that he had his pants partially down and she remembered him pulling them back up and doing up his belt; she could recall what the sheet covering the doorway to the bedroom looked like and where the blanket that had been on the bed was after the assault; she remembered her conversation with the RCMP following the event and how long it took them to arrive and pick her up; and she remembered how long she was at the Health Centre and when she left.

[31] It was put to the Complainant on cross-examination that it may have been Mr. Lafferty who committed the sexual assault. The Complainant was firm and unwavering in her evidence that it was Mr. Fish who sexually assaulted her. The possibility that it was one of the other male guests or the Complainant's boyfriend was not realistic and need not have been considered by the Trial Judge.

*Did the Trial Judge Misapprehend the Evidence Respecting the Complainant's Statement to the Police?*

[32] The Trial Judge said the following in her reasons respecting the difference between the Complainant's statement to the police and her evidence at the trial about where Mr. Fish touched her:

In cross examination it was put to her that in her statement to police she said that Leonard Fish had both his hands on her and was touching her arm, stomach, and slowly towards her breast, and when asked by the police, "Anywhere else?" she said, "That's about it." She agreed that was what she had said to the police. And when asked in redirect why she had not told the police that he had touched her vagina or towards her vagina, you could see her discomfort or reluctance, and she said that she was in aftershock and again could not believe what was happening, that today she was telling everything she remembered. If "towards her vagina" or "vagina" is inconsistent with what she told the police – which I am not sure it clearly is considering that her answer when asked "Anywhere else?" was, "That's about it" – I understand that inconsistency and I have considered it and it does not cause me to find [the Complainant's] evidence either not credible or unreliable.

*Transcript of Trial, p. 105, lines 9-27; p. 106, lines 1-3*

[33] Mr. Fish submits the Trial Judge demonstrated a misapprehension of the evidence by stating the Complainant said "That's about it" in response to the question put to her by the police as to whether Mr. Fish touched her anywhere other than her stomach and breasts, instead of the Complainant's full answer, which was "No. That's about it". With respect, I do not agree.

[34] Viewed in context, the Trial Judge's reasons indicate she understood fully the difference between what the Complainant said to the police and what she said in her testimony. That difference did not arise from the presence or absence of the word "no" in the Complainant's response. The difference arose from the fact that the Complainant did not tell the police Mr. Fish had moved his hands towards her vagina or touched her vagina when she gave her statement. The Trial Judge determined that this did not diminish the Complainant's credibility or the reliability of her evidence and she explained this fully in her reasons.



*Is the Verdict Supported by the Evidence?*

[35] Mr. Fish submits the cumulative effect of the inconsistency between the Complainant's statement and her testimony, combined with divergent evidence about whether Mr. Fish was in the bedroom when Mr. Lafferty and Mr. Vital entered, whether the light was on or off and what the Complainant was wearing should have led the Trial Judge to conclude there was a reasonable doubt about whether Mr. Fish committed the offence.

[36] Inconsistencies in evidence, as well as between prior statements and testimony, are important in evaluating reliability and credibility. The Trial Judge engaged in just such an evaluation process with respect to each of the inconsistencies. She carefully and fully explained their impact on her assessment of the reliability of the Complainant's evidence and her conclusion about what happened. Ultimately, she found they did not make the Complainant's evidence unreliable, and she found the Complainant and the other witnesses credible.

[37] The Trial Judge did not use irrational or illogical reasoning to reach her verdict and she did not misapprehend the evidence respecting the Complainant's statement to the police. Her findings and conclusions were neither demonstrably incompatible with, nor otherwise contradicted by, the evidence upon which they were based. There was clear and unequivocal evidence of a sexual assault and the verdict is one which a properly instructed trier of fact could reasonably render.

*Is the Sentence Unfit?*

[38] Mr. Fish contends that in imposing sentence, the Trial Judge failed to give consideration to the principle of restraint and did not attach appropriate weight to his aboriginal status, resulting in an unfit sentence.

[39] In the absence of an error in principle, a failure to consider relevant factors or undue emphasis on certain factors, or the sentence itself is demonstrably unfit, a trial court's sentencing decision should not be disturbed. *R v Shropshire*, [1995] 4 SCR 227; *R v McDonnell*, [1997] 1 SCR 948.

[40] It is clear from her reasons for sentence that the Trial Judge appreciated and took into account all of the principles and objectives of sentencing and, in particular, she was conscious of both the principle of restraint and of Mr. Fish's aboriginal status. She recognized that incarceration should be considered only where less restrictive sentencing tools will not meet the goals and objectives of sentencing, particularly in the case of aboriginal offenders.

[41] The Trial Judge had the benefit of a pre-sentence report about Mr. Fish and his upbringing to assist her in imposing sentence. She found that although Mr. Fish is aboriginal, there were no systemic factors linked to his aboriginal heritage, such as attendance by him or his parents at residential school, which would diminish his moral blameworthiness or responsibility for the sexual assault. On the contrary, the report indicated Mr. Fish was raised in a healthy home.

[42] The Trial Judge considered at length the possibility of a conditional sentence, but determined it would be inappropriate in the circumstances. She was not convinced that Mr. Fish would not endanger the community, given his past criminal record, which included a number of offences of violence against the person and a sexual assault for which he received a 3-year sentence. The Trial Judge was also conscious of the need to impose a sentence that would deter both Mr. Fish and the larger community from engaging in this type of behavior and expressed concern that a conditional sentence would not achieve this.

[43] The sentence ultimately imposed is well within the range for a sexual assault of this nature.

[44] In my view, the Trial Judge made no error in principle, nor is the sentence imposed demonstrably unfit.

[45] The appeals from conviction and sentence are each dismissed.

K. Shaner  
J.S.C.

Dated in Yellowknife, NT this  
13<sup>th</sup> day of June, 2014

Counsel for the Appellant: Michael Martin  
Counsel for the Respondent: Kindra Lakusta

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