Date: 2014 07 16
Docket: S-1-CR-2013-000097

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TIM ALLEN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a summary conviction appeal in which the Appellant appeals from his conviction on a charge of assault. The Territorial Court trial judge heard evidence from the complainant, a police officer who arrested the Appellant, and from the Appellant. He stated that he did not accept the Appellant's evidence and did not believe him.

[2] The Appellant raises two grounds of appeal. The first alleges that the trial judge did not consider or address his mind to the second step of the analysis set out in *R. v. D.W.*, [1991] 1 S.C.R. 742 ("W.(D).". The second, and main, ground alleges that the reasons given by the trial judge are not sufficient to explain why he was not left with a reasonable doubt by the evidence of the Appellant.

[3] To put the grounds of appeal in context, I will briefly summarize the evidence.

[4] The complainant testified that on the evening in question he went with his cousin to a room in a local motel. Already drinking in the room were the Appellant, whom the complainant said he had known for some time, and two other men. The complainant and his cousin had a couple of drinks there and the complainant went into the bathroom. As he was sitting with his pants down, the Appellant suddenly

came into the bathroom and started hitting him in the face. The Appellant called him "faggot" and other names. The Appellant threw the complainant to the floor outside the bathroom and punched him. The complainant was able to leave when one of the other men intervened and someone from the motel could be heard coming up the stairs.

[5] After a *voir dire*, utterances made by the Appellant in the presence of a police officer were admitted into evidence. The police officer, who arrested the Appellant a week after the incident at the hotel, testified that while in the police vehicle, the Appellant said, "Oh that faggot got what he deserved". Later, while being fingerprinted, the Appellant stated, "That guy was coming on to me".

[6] The Appellant testified that he did not know the complainant, except to say "hi" to him across the street. He testified that neither the complainant nor the cousin were in the hotel room before the Appellant passed out on a bed. The next thing he realized was that someone was digging in his pockets in the area of his groin. It was dark and he could see a shadow running or proceeding quickly to the bathroom. He could tell that it was the complainant. The Appellant went to the bathroom, opened the door, and found the complainant kneeling down having a smoke. He tried to make the complainant leave by dragging him out of the room; the complainant resisted and they wrestled. The Appellant heard footsteps running up the corridor so he took off.

Did the trial judge fail to consider or address his mind to the second step of the W.(D). test?

[7] The three steps outlined in *W.(D.)* are well known and I will not repeat them here.

[8] In his reasons, after reviewing the evidence at trial, the trial judge stated that because the Appellant had testified, he was obliged to use the *W.(D.)* analysis with respect to the credibility of the Appellant and the complainant. After stating that he did not accept the Appellant's testimony on the material points, the trial judge set out specific concerns about the Appellant's evidence. He then stated, "Now although I do not believe [the Appellant], I still have to be satisfied on the other evidence that was presented and this satisfaction has to be beyond a reasonable doubt".

[9] The trial judge then reviewed the complainant's testimony, addressing various issues in relation to it. He found that the complainant's evidence was believable and corroborated by what the Appellant said to the police officer about the complainant getting what he deserved. He found the Appellant guilty of assault.

[10] The Appellant says that the trial judge erred by failing to state, or to consider, the second step in *W.(D.)*, i.e. whether the evidence of the Appellant left him with a reasonable doubt about the Appellant's guilt. If it did, he was obliged to acquit the Appellant.

[11] The majority decision of the Supreme Court of Canada in *W.(D).* and cases after it make it clear that when a trial judge sitting alone does not vocalize the exact three-step process set out in *W.(D.)* in giving reasons for conviction, that is not fatal. A "ritual incantation" of the three steps is not required in every case: *R. v. Boucher*, 2005 SCC 72.

[12] Moreover, the Supreme Court has said that when a trial judge states that he or she rejects an accused's testimony, it can generally be concluded that the testimony failed to raise a doubt in the judge's mind: *R. v. Boucher*, *R. v. Vuardin*, 2013 SCC 38.

[13] In this case, the trial judge said that he did not believe the Appellant. That is sufficient to indicate that the Appellant's evidence did not raise a reasonable doubt about his guilt. Although it is always a good practice for a trial judge to specifically refer to all three steps in the *W.(D.)* test, the law is clear that it is not necessary and a court on appeal should look to whether the judge's reasons reflect that he applied the correct burden of proof, which is always on the Crown to prove the guilt of the accused beyond a reasonable doubt. In this case, the trial judge did acknowledge and apply that burden of proof. After rejecting the evidence of the Appellant, he reviewed the evidence of the complainant and considered what the Appellant had argued were weaknesses in that evidence. He considered the complainant's explanation for not having given a full statement to the police on the night the incident happened. He concluded that he believed the complainant about what happened.

[14] For the reasons set out above, the failure of the trial judge to refer to the second step in *W.(D.)* was not an error in this case.

Are the reasons given by the trial judge sufficient to explain why he was not left with a reasonable doubt about the guilt of the Appellant?

[15] The trial judge said that did not believe the Appellant and identified four specific reasons, which may be summarized as follows:

> (i) the Appellant admitted that he had been drinking all day, as he did every day. He assessed his memory as "half";
>
> (ii) the Appellant testified that when he woke up, he could tell that the figure running across the dark hotel room was the complainant; yet he also testified that the complainant was not in the room when he passed out and that he did not know him except to say hello across the street. The trial judge found this "simply unbelievable";
>
> (iii) the Appellant testified that he went into the washroom shortly after seeing the complainant run across the room, yet, according to the Appellant, as described by the trial judge, the complainant "had a chance to kneel and to light up a cigarette and to start smoking"; and
>
> (iv) the trial judge held that the Appellant's description of wrestling the complainant out of the motel room did not reconcile with his comment "that faggot got what he deserved", and indicated instead that what he really thought he'd done was more than removing the complainant from the room.

[16] The Appellant argues that the reasons are deficient because they do not allow him to know why he was not believed by the trial judge or at least why his evidence did not raise a reasonable doubt. The Appellant takes the position that there was nothing unusual or bizarre in his version of events, that the reasons are ambiguous in some respects, and that some of what the trial judge referred to also applied to the complainant's testimony, yet was not used by the trial judge as a reason not to believe the complainant.

[17] The trial was a very simple one, involving the credibility of the two main witnesses, each of whom gave a completely different version of events. The law is clear that a court of appeal will accord a high degree of deference to a trial judge's findings of credibility: *R. v. Vuardin.*

[18] The Appellant does not argue that the verdict in this case was unreasonable. What he says is that the trial judge's reasons do not adequately explain what the trial

judge thought about the points that concerned him in the Appellant's testimony and why he interpreted some of the evidence one way rather than another way, and why the Appellant's evidence did not leave him with a reasonable doubt.

[19] Counsel submitted many cases on this subject and I have read, but will not refer to, all of them. The law that applies can be summarized as follows.

[20] An allegation of insufficiency of reasons must be considered in the context of the trial, the evidence and the submissions made. An appeal court must not overturn a verdict on the basis of insufficient reasons unless the reasons are so deficient that they do not allow for meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26; *R. v. Dinardo*, 2008 SCC 24; *R. v. Vuardin.*

[21] Reasons will be sufficient if, read in context, they show why the judge decided as he or she did. The object is not to show *how* the trial judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision: *R. v. M.(R.E.)*, 2008 SCC 51.

[22] A trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial: *R.* v. *M.(R.E.)*.

[23] When considering the sufficiency of reasons for findings of credibility, an appeal court should keep in mind that credibility assessment does not always lend itself to precise and complete verbalization. The reasons should generally demonstrate that, where the complainant's and the accused's evidence conflicted, the trial judge accepted the complainant's evidence: *R. v. M.(R.E.).*

[24] A material misapprehension of the evidence, or credibility findings unsupported by the evidence, may justify appellate intervention: *R. v. Y.(C.L.)*, 2008 SCC 2.

[25] A failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error: *R.* v. *Dinardo*.

[26] An appeal court should start from a stance of deference toward the trial judge's perceptions of the facts unless it finds palpable and overriding error in those perceptions: *R. v. M.(R.E.)*.

[27] Applying these statements of the law to the reasons given by the trial judge for not believing the Appellant, I find the following in relation to the arguments put forward by the Appellant. First, I find there is no ambiguity in the trial judge's statement that the Appellant's drinking may account for some of the problems the trial judge found in his testimony. Clearly, the trial judge found the drinking and the Appellant's admitted memory problem to reflect adversely on his evidence and his credibility. The trial judge also concluded that the drinking might be the cause of some of the other problems in his evidence. This is clear from the first reason he listed; he was under no obligation to definitively tie the other problems to the fact that the Appellant had been drinking.

[28] I also note that on the evidence at trial, the Appellant had had far more to drink (at least two mickeys of vodka) than the complainant (two cups of vodka mixed with water, a third started). Therefore, it was not unreasonable for the trial judge to treat the Appellant's credibility in a different manner than the complainant's credibility when it came to the effect of alcohol.

[29] In order to assess the Appellant's arguments in relation to the second and third points listed by the trial judge, it is helpful to set out the relevant portion of his testimony at the trial:

> Q So you're on the bed. What's the next thing that you remember is happening?
>
> A Somebody was digging in my pockets, like touching me. And it was dark and I could see like a shadow running to the bathroom.
>
> Q When you say "running", how was the person moving?
>
> A Quickly. Not running but, you know, quickly, sneaky.
>
> Q Could you tell if it was a male or female?
>
> A I could tell it was that Mr. Sewi.
>
> Q What did you do?
>
> A I went to the washroom, I opened the door and he was kneeling down having a smoke. And I asked him, "What are you doing? How come you're so sneaky?" He didn't say nothing. I said, "You got to go." I

> didn't hit him; I just dragged him out to the front entrance and he started wrestling with me, so. And then downstairs, I could hear them running up so I opened the door and just, I just took off.

[30] With respect to the second point identified by the trial judge, the Appellant submitted that there are other possible interpretations of his testimony about recognizing the person running in the dark as the complainant. For example, he argued that his evidence could have meant that when he went into the bathroom, he recognized the person he found in there as the complainant. Or that despite not knowing the complainant previously, he had now, by the time of trial, learned his name. That is not, however, what he said at trial. At trial, when asked whether he could tell if the person was male or female, the Appellant answered, "I could tell it was that Mr. Sewi". Even if the interpretation the Appellant now urges could be said to be a reasonable one, it was up to the trial judge to interpret the evidence and the way he interpreted it was not unreasonable. The trial judge was in the best position, having heard the Appellant testify, to determine how to interpret what he said, to form a perception of what he was saying. This Court, reviewing only a paper transcript, is not in as good a position to do that.

[31] The third point that negatively affected the Appellant's credibility in the view of the trial judge, is set out in his reasons as follows:

> 3. He said he went to the washroom and there was Mr. Sewi kneeling, having a smoke. This was the same person who was running across the room or going quickly across the room, who Mr. Allen went after shortly after he saw him, yet this person had a chance to kneel and to light up a cigarette and to start smoking.

[32] The Appellant says that his own testimony was ambiguous, or could have been interpreted in a different way, and it could be that the complainant had just lit the cigarette, which would have taken no time at all.

[33] Again, it was for the trial judge to interpret the evidence and what "kneeling down having a smoke" meant. Later in his testimony at trial, the Appellant described the complainant as "sitting down having a smoke on the edge of the tub right next door to the toilet, having a smoke". When asked if the complainant had his pants down, the Appellant said that he would not have had time to take them down. In the context of all this evidence, it cannot be said that the trial judge's view or perception was unreasonable when he found that on the Appellant's version,

events from the time the Appellant first saw the shadow until he went into the bathroom proceeded too quickly for the complainant to have been able to sit down and have a smoke.

[34] The last point referred to by the trial judge was that the utterance made by the Appellant to the police about the complainant getting what he deserved was not consistent with the Appellant's description of simply wrestling the complainant out of the motel room, and that it indicated that the Appellant believed he had done more than that to the complainant. At trial, the Appellant made the submission that the utterance is consistent with the Appellant's version of events; obviously the trial judge rejected that submission. It is also worth noting that the name the Appellant called the complainant in that utterance is the same as the complainant said the Appellant used when striking him in the bathroom.

[35] The Appellant also submits that the second utterance he made is consistent with his version of events and inconsistent with the complainant's version and that this was not taken into account by the trial judge.

[36] The trial judge specifically mentioned the second utterance by the Appellant ("that guy was coming on to me") when reviewing the evidence in his reasons for conviction. He did not discuss its significance or lack of significance, however his emphasis was on what happened after the Appellant got to the bathroom and whether the Appellant had simply wrestled with the complainant or had hit and punched him as described by the complainant, that incident being the alleged assault. This explains his emphasis on the first utterance.

[37] The second utterance, on the other hand, is not entirely consistent with the Appellant's trial testimony, which was that he thought the complainant was digging in his pockets, trying to rob him or to touch or "bother" him. In any event, the trial judge made it clear that he did not believe the Appellant's version of events, so it follows that he did not place any significance on the utterance about the complainant coming on to the Appellant when it came to what happened in the bathroom. In my view, the fact that he did not specifically say that he did not place any significance on the second utterance does not indicate palpable or overriding error or make his reasons confusing or unintelligible.

[38] After giving his reasons for not believing the Appellant, the trial judge turned to the complainant's testimony. He acknowledged the fact that there was no

independent evidence of the many hits that the complainant said the Appellant inflicted on him. He accepted the complainant's explanation that he had waited until the next day to give a statement to the police because he had been drinking. He found that the complainant showed no bias or animus against the Appellant and that he "seemed genuinely surprised" that the Appellant would attack him. He considered, and rejected, submissions made by the defence about alleged contradictions in the complainant's evidence as to how he knew the Appellant. He found the complainant believable and stated that his testimony as to what happened in the bathroom was corroborated by the Appellant's utterance about him getting what he deserved.

[39] The question is not whether this court agrees with the trial judge's reasons. The question is whether his reasons are grounded in the evidence at trial. I find that they are. The reasons make it clear to the Appellant and anyone else reading them that the trial judge did not believe the Appellant and why he did not believe him. The reasons arise from the evidence. They are sufficiently understandable and detailed that the Appellant was able to make his submissions on this appeal and the Court has been able to conduct the appropriate review. In the words of Binnie J. in *R. v. Braich*, 2002 SCC 27, at paragraph 42, "The trial judge provided an intelligible pathway through his reasons to his conclusion".

[40] For the foregoing reasons, the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
16th day of July 2014

Counsel for the Appellant: Charles B. Davidson
Counsel for the Respondent: Annie Piché

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