

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PUNIKIOK PERLEY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from the conviction entered on October 5, 2012, in the Territorial Court of the Northwest Territories.

Heard at Yellowknife, NT, on June 3, 2014.

Reasons filed: June 5, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE DEPUTY JUSTICE J.Z. VERTES

Counsel for the Appellant: R.J.A. Gregory

Counsel for the Crown: B. Demone

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REASONS FOR JUDGMENT

[1] The appellant appeals his conviction on a charge of sexual assault. He argues that the trial judge erred by rendering an unreasonable verdict, thereby resulting in a miscarriage of justice.

[2] To determine whether a verdict is reasonable, an appellate court must determine whether the verdict is one that a properly instructed trier of fact could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (i) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or (ii) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge: *R. v. R.P.*, [2012] 1 S.C.R. 746 (at para. 9).

[3] On this appeal the appellant submits that the trial judge failed to critically evaluate the complainant's testimony in light of what the appellant calls significant and unexplained inconsistencies. The reliability of the Crown's evidence was the issue at trial. In such a case, an appellate court must defer to the findings of the trial judge unless a palpable or overriding error, in her appreciation of the law or the evidence, can be shown: *R. v. Gagnon*, [2006] 1 S.C.R. 621 (at paras 10 and 24).

[4] The essence of the Crown's case at trial was as follows. The complainant, 17 years old at the date of the offence, was invited by her girlfriend, C.S., to come over to the apartment of C.S.'s new boyfriend (the appellant). There they drank vodka. In the complainant's words, they drank "a lot of alcohol really fast" (Transcript p. 17). C.S. went to sleep in the bedroom. A short time later the complainant tried to wake her up but she herself went to sleep. What happened next is succinctly described in the complainant's examination-in-chief at trial: "I guess I must have blacked out or something because by the time I woke up again I guess, Kiok (the appellant) was on top of me naked, trying to take off my clothes... I tried to push him off of me, and he was trying to take off my clothes still and so I just kicked him off and I ran out of the room." (Transcript p.15)

[5] The prosecution called four witnesses at trial: the complainant, her girlfriend C.S, another girlfriend A.D. who was at the apartment when the complainant ran out of the bedroom and observed her condition and spoke to her, and the investigating police officer. The defence did not call evidence. The trial judge convicted the appellant on the charge of sexual assault. She summarized her reasons for conviction as follows:

(The complainant) was a careful and honest witness, as were all of the witnesses on this trial. All of the witnesses had been drinking, some more than others, but I found all testified as best they could and were attempting to recall what they could of this day.

(The complainant) was candid in admitting that she was intoxicated, that she had difficulty remembering some parts of the day, but she knew what had happened to her in the bedroom. She was cross-examined at length and her evidence of what happened in the bedroom was consistent. (The complainant) did not testify as if this was something she could not be sure happened or something someone had told her or she had imagined or misinterpreted. She knew what happened. This was upsetting for her, she was afraid, she pushed, she kicked, she got out of there. As she said, Mr. Perley naked on top of her was what she remembered most.

She ran out that bedroom, she was crying, upset, she was hysterical, she was scared. She wanted to get out of there. That evidence is corroborated by (A.D.) who saw her come out, saw the state she was in. I accept (the complainant's) evidence of what happened to her, I find her credible, and even taking into account her state of intoxication, in a careful consideration of evidence I find her evidence of what happened to her in the bedroom to be reliable.

(Transcript pp.205-206)

[6] The appellant submits that the trial judge rendered an unreasonable verdict on the grounds that (i) she failed to critically evaluate the complainant's testimony;

and (ii) she failed to properly assess whether the complainant's evidence was reliable, in light of her level of intoxication during the alleged assault and what he characterizes as evidence of the "reconstruction" of events by the complainant.

A. The Evaluation of the Complainant's Evidence

[7] The trial judge gave extensive reasons for her verdict. She reviewed the various alleged inconsistencies in the complainant's evidence, both internally and where the evidence was inconsistent with the evidence of others. She found each particular inconsistency to be either non-material or reasonably explained by other evidence. This was not a case, such as *R. v. Davis*, [1995] A.J. No. 427 (C.A.), referred to by both counsel, where the trial judge made no specific findings of fact or credibility nor explain how contradictions in the evidence were resolved. Here the trial judge went to great lengths to discuss each apparent inconsistency, to say which were true inconsistencies and which in her opinion were not, and to explain her conclusions. In reviewing a trial judge's reasons, the appellate court must keep in mind that the test is not whether it would have come to a different conclusion. As stated by the appellate court in *Davis* (at para. 14): "It is for the trier to decide that any inconsistency has been effectively neutralized. Our function is only to assess whether that decision is a rational one."

[8] The primary focus of the appellant's submissions on this point centered on a conflict between the evidence of the complainant and that of her friend, the witness A.D., as to what the appellant may have said or done in the bedroom.

[9] In her evidence-in-chief, the complainant testified that when she ran out of the bedroom, she saw her friend A.D. on the balcony and went out to see her. She said that she did not tell A.D. at that time what happened in the bedroom. She said she only told her after they left the apartment.

[10] A.D. testified that when the complainant came out to her on the balcony she could tell she was upset, crying and appearing "panicky". She said that the complainant told her what had happened at that point. She testified that the complainant told her that, in the bedroom, the appellant had said to her, "You ready for this cock?", and that he had pinned her to the wall when she tried to get out.

[11] The complainant, during cross-examination, testified that the appellant did not say anything to her, other than telling her to "relax" and "calm down", and that she did not say anything to him. When asked if she told A.D. what the appellant supposedly said in the bedroom, the complainant replied that she could not recall

that. When asked if she told A.D. about the appellant pinning her to a wall, she again said that she could not recall that.

[12] The witness A.D. also testified that, after the complainant joined her on the balcony, she saw the appellant come out of the bedroom. He was shirtless and wearing only shorts. The complainant had testified that when she saw the appellant, after the incident, he was wearing a black t-shirt and shorts.

[13] On these two inconsistencies, the trial judge made what the appellant submits were contradictory and illogical findings.

[14] On the issue of what the complainant said to A.D. on the balcony, the trial judge rejected A.D.'s evidence. The appellant argues that this is unreasonable since A.D. was sober at the time, and her recollection would be clearer than that of the complainant who was admittedly intoxicated. The trial judge's conclusions on this issue were as follows:

I am not convinced that (A.D.) remembers exactly what (the complainant) told her or exactly when (the complainant) told her the details of what happened. (The complainant) was upset, crying hysterically, panicky and afraid. She would not have been reporting anything in a clear and calm manner at that point.

I know from the evidence that different people were told about this incident and that it was talked about between different people at different times. It does not make any sense to me that (the complainant) would have said to (A.D.) what (A.D.) says (the complainant) said to her and first, have no memory of that, and second, testify to a completely different set of circumstances, yet both scenarios being criminal.

Even knowing that (A.D.) was fairly sober at the time, I find she is mistaken about what (the complainant) told her. (A.D.) may have heard that from someone, but I do not believe she heard it from (the complainant). To be clear, I do not find that (A.D.) was deliberately lying or trying to mislead, but I do find that she was mistaken.

(Transcript pp.193-194)

[15] With respect to the question of what the appellant was wearing, the trial judge accepted A.D.'s evidence. She said:

(A.D.) said that when she saw Mr. Perley come out of the bedroom after (the complainant) had come out of the bedroom, that Mr. Perley did not have a shirt on. On (A.D.'s) evidence, this would have been the first time that (A.D.) had ever seen Mr. Perley. (The complainant) said that when she saw Mr. Perley standing in the living room after this incident before she left, that he had the same clothes on that he had on before, that is a T-shirt and shorts. I accept (A.D.'s) evidence

on this point. I accept that Mr. Perley came out of the bedroom without a shirt on. The reason I accept (A.D.'s) evidence on this point is not only because she was relatively sober at the time but perhaps more importantly because again this would have been the first time she had seen Mr. Perley, and I would expect seeing him there without a shirt on in a roomful of clothed people would be relatively memorable. (The complainant) was upset, hysterical, crying, scared. I find she was mistaken about what Mr. Perley had on, which in the circumstances is understandable.

(Transcript pp. 194-195)

[16] The appellant argues that it is error for the trial judge to have accepted A.D.'s evidence on a less material aspect of the trial evidence based on A.D.'s relatively sober, stable state as compared to the complainant's emotional, intoxicated state while not applying the same considerations to the contradictory evidence of what the complainant said to A.D. This, the appellant submits, is indicative that the trial judge failed to critically evaluate the evidence of the complainant. In the appellant's submissions, the rejection of A.D.'s evidence was a way to buttress her acceptance of the complainant's evidence. A.D.'s account of the conversation with the complainant makes sense if one finds that the complainant did not provide a reliable account of what happened.

[17] I respectfully do not agree with these submissions.

[18] First, it is axiomatic that a trier of fact may believe some, all or none of any witness' evidence. Here the trial judge gave a rational explanation for her conclusions on each point. The fact that they were not the same does not necessarily make them either illogical or unreasonable. These were not mutually exclusive considerations.

[19] Further, one has to consider the materiality of this evidence. Whether the appellant said anything to the complainant, or whether the complainant said anything to the witness A.D., does not go to the substance of what the complainant said happened in the bedroom. These questions, and the evidence about whether she was pinned to the wall, go to "how" the incident occurred, not whether the incident occurred at all. That was the real issue in this case. And there was no evidence contradicting the complainant's evidence as to what happened in the bedroom. The purported contradictions and inconsistencies were over peripheral matters as opposed to the evidence of the essential substance of the alleged assault.

[20] I am not saying that this evidence was not material at all. It was. It, along with all the other evidence, had to be taken into account in the assessment of the

complainant's credibility and the ultimate decision as to whether guilt had been proven beyond a reasonable doubt. In this case the trial judge did exactly that.

B. The "Reconstruction" of the Complainant's Evidence

[21] The appellant submits that the trial judge failed to critically evaluate the complainant's evidence in light of evidence revealing a substantial "reconstruction" of events by the complainant, as opposed to an accurate recollection. Thus, in the appellant's argument, the trial judge failed to distinguish sufficiently as between the complainant's *credibility* and the *reliability* of her evidence.

[22] The distinction between the *credibility* of a witness and the *reliability* of that witness' testimony was described by Doherty J.A. in *R. v. Morrissey*, [1995] O.J. No. 639 (C.A.), at para. 33:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.

[23] This submission focuses on evidence that the complainant had talked to a number of people – at least 4 that were identified in the evidence – both before and after she made her complaint to the police some 3 weeks after the incident. She said she spoke to them in an effort to patch together what took place. In her words, "parts were missing" due to her intoxication (Transcript p. 48). The complainant acknowledged in her evidence that she had experienced black-outs due to extreme intoxication on prior occasions; occasions when she could not remember what she did; times when she wondered if something really happened or whether it was a "dream" (Transcript pp. 36-37)

[24] The appellant submits that it is dangerous to convict when someone acknowledges relying on others to reconstruct her memory. This is pronounced in this case because, as the complainant testified, her ability to recall the events of the day in question was still compromised when she reported the incident to the police and, because of her intoxication at the time, it affected her perception of the events at the time (Transcript p. 49)

[25] The complainant, on re-examination by Crown counsel at trial, explained what she was trying to “patch together”:

Q. My friend had also asked you or put to you that because of the intoxication, it affected your ability to perceive what was happening on that day.

A. Yes, I guess.

Q. What were the things you had trouble figuring out what was happening, proceeding?

A. Just why he came into the bedroom after I went there and where was everybody else while this was happening and stuff like that.

Q. And how is the intoxication affecting your ability to remember those things?

A. It wasn't really helping with it, but I do remember him being in there.

(Transcript pp.72-73)

[26] Crown counsel on appeal argues that this demonstrates that the complainant spoke to others not to find out what happened to her but to make sense of it, to figure out why it happened, not to remember what happened. Only the complainant could say what happened in the bedroom.

[27] The trial judge gave careful consideration to this question and the potential frailties in the complainant's evidence due to her level of intoxication and the fact that she spoke to others. Her reasons explain why she nevertheless accepted the complainant's evidence:

... (The complainant) testified that she was intoxicated that day, she testified her level of intoxication affected her memory, she admitted that she had to “patch together what took place”, and that portions of the day were unclear in her mind. She admitted speaking to others in trying to get clear in her mind some of the details of that day. She spoke to (A.D.) because (A.D.) was sober and admitted that “maybe she could help me figure out what was missing”. She admitted that her cousin Chris had encouraged her to remember as much as she could but (the complainant) did not speak to anyone to help her remember what happened to her in the bedroom that day.

(The complainant) candidly admitted that her level of intoxication affected both her ability to recall that day and also affected her ability to perceive what was going on that day. When it was suggested to (the complainant) in cross-examination that the events of this day were such that she could not say whether they really happened or she had dreamt it, she admitted that whereas she had

experienced times like that due to drinking, that was not the case with what she could recall of this afternoon. When it was suggested that she could not say whether the events had happened or she had dreamt it, she said “I know what happened”. Though (the complainant) had difficulty remembering all the events of the day due to intoxication, she had no difficulty remembering that Mr. Perley had been on top of her, as she said, and I quote, “I remember him being on top of me, and that was the most thing I could remember.” A different scenario, an innocent scenario, was suggested to (the complainant), and she responded “that’s not what happened”. I find that (the complainant) had no uncertainty or reservation at all about what happened to her in the bedroom.

(Transcript pp. 199-200)

[28] These findings were clearly open to the trial judge to make. She was in the best position to assess this evidence and I find no irrationality in her reasoning. There was no evidence contradicting the complainant on any of this.

[29] The appellant, however, also argues that the trial judge erred by finding that the incident in the bedroom occurred in the manner alleged by the complainant because A.D. observed that the complainant was emotionally upset. Specifically, the appellant points to the following comment in the trial judge’s reasons for conviction:

She ran out of that bedroom, she was crying, upset, she was hysterical, she was scared. She wanted to get out of there. That evidence is corroborated by (A.D.) who saw her come out, saw the state she was in.

(Transcript p. 206)

[30] The appellant submits that this was an error because the emotional state of the appellant is not corroborative of the complainant’s testimony as to what occurred in the bedroom. In my opinion, it is correct to say that evidence of the complainant’s emotional state does not corroborate her evidence as to what happened. But it can certainly be used to help assess the complainant’s credibility as a witness. However, as Crown counsel notes, a careful reading of the trial judge’s reasons shows that the trial judge did not use A.D.’s evidence to corroborate the complainant’s account of what happened in the bedroom. She used it to corroborate the complainant’s evidence as to her emotional state. This was clearly open for her to do so.

[31] Finally, the appellant argues that the trial judge failed to distinguish between the complainant’s credibility as a witness – her sincerity and attempt to be truthful – and the reliability of her evidence. This, it is urged, was critical due to the

complainant's admitted intoxication, difficulty of recollection and the passage of time between the incident and the trial.

[32] In my opinion, the trial judge's reasons demonstrate an awareness of all these potential difficulties. They also demonstrate that the trial judge was alive to the need to assess reliability as well as credibility (as those terms are used in the extract from the *Morrissey* case quoted previously). The trial judge found the complainant to be a careful and honest witness. She concluded her reasons with an explicit reference to the credibility-reliability distinction:

I accept (the complainant's) evidence of what happened to her, I find her credible, and even taking into account her state of intoxication, in a careful consideration of evidence I find her evidence of what happened to her in the bedroom reliable.

(Transcript p. 206)

[33] I find no error in the trial judge's reasoning. The verdict is one, based on a careful consideration of all the evidence presented, that a properly instructed trier of fact could reasonably render. The trial judge's findings are not contradicted by other evidence accepted by the trial judge nor are they demonstrably incompatible with evidence not otherwise contradicted or rejected by the trial judge.

[34] For these reasons, the appeal is dismissed.

J.Z. Vertes
J.S.C.

Dated in Yellowknife, NT this
5th day of June, 2014

Counsel for the Appellant: R.J.A. Gregory
Counsel for the Crown: B. Demone

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