*R v Koe,* 2019 NWTSC 58

Date:  2019 12 20

Docket:  S-1-CR-2019-000 006

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

RUTH KOE

MEMORANDUM OF JUDGMENT

1. This is an appeal from conviction following a trial held in Territorial Court in Fort McPherson. For the reasons that follow, I have concluded that the appeal should be dismissed.

I) THE TRIAL

1. The Appellant was charged with having assaulted her boyfriend Richard Robert on May 12, 2018.
2. At the trial, the Crown’s only witness was Cst. Michael Sylvestre. Cst. Sylvestre observed the incident between the Appellant and Mr. Robert. His evidence was largely uncontroversial and was not challenged to any degree on cross-examination.
3. Cst. Sylvestre testified that he was patrolling the community in his marked police vehicle that day. He came upon the Appellant and Mr. Robert. They were in the middle of the street, in front of the Appellant's residence. They appeared to be in the midst of a heated argument. The Appellant's young child was with them.
4. Cst. Sylvestre saw the Appellant and Mr. Robert arguing and yelling at each other. He testified they were "using their arms to kind of show their frustration" towards each other. They were inches apart when he first saw them. His impression was that the situation was escalating. He parked the police truck and walked over to try to separate them.
5. Both parties were intoxicated. They seemed very angry at each other, especially the Appellant. Cst. Sylvestre told her to go home. He also tried to get Mr. Robert to leave the area.
6. The Appellant did not listen to Cst. Sylvestre. He said she was too focused on Mr. Robert to listen to him. As for Mr. Robert, he did not leave as asked, but he did not argue with Cst. Sylvestre. Cst. Sylvestre testified that Mr. Robert seemed too intoxicated to even answer his questions.
7. Cst. Sylvestre went back to his vehicle, drove to a nearby street, and parked in a location where he could continue observing the Appellant and Mr. Robert in case matters escalated further. By this point the two of them were on the porch of the Appellant's residence. The child was still on the street. A relative of the Appellant's came by and took the child with her.
8. Cst. Sylvestre continued to observe the Appellant and Mr. Robert from his truck. After a short period of time he saw the Appellant grab Mr. Robert with her left arm and punch him twice in the face with her right fist. Mr. Robert did not attempt to block the punch and did not retaliate in any way.
9. Cst. Sylvestre immediately got out of his vehicle, walked over to them and placed the Appellant under arrest for assault. As Mr. Robert appeared too intoxicated to answer any questions, Cst. Sylvestre asked him to leave.
10. As part of Cst. Sylvestre’s testimony, a *voir dire* was held into the admissibility of a statement that he took from the Appellant after her arrest. Defence counsel indicated at the outset that he was not raising any *Charter* issues in relation to the admissibility of the statement.
11. The interview took place after the Appellant had been escorted back to the detachment and given an opportunity to speak to counsel. The statement was audio recorded. On consent of Crown and Defence, the recording was not played at trial. Instead, the Trial Judge was given a transcript of it. For an unknown reason, the transcript was not marked as an exhibit. However, a copy of it was placed before this Court at the hearing of the appeal.
12. The statement was brief. The transcript is only a page and a half long. The Appellant acknowledged that she punched Mr. Robert. When asked why she did that, she answered “Because he made me mad”. When asked why Mr. Robert made her mad she answered “It’s, it’s between me and him”.
13. On cross-examination, Defence counsel got Cst. Sylvestre to confirm that he did not see any injuries on Mr. Robert and that in her statement, the Appellant told him that she punched Mr. Robert because he made her mad but did not say what he did to make her mad.
14. Counsel also got Cst. Sylvestre to confirm that he did not hear what was being said between the Appellant and Mr. Robert before she struck him and that he could not say whether certain specific words were uttered:

Q. And so you don't know whether he said: Fuck you, bitch, take your best shot? You don't know what made her mad?

A. No.

Q. Correct?

A. No, I don't.

Q. And - - and, I take it, in terms of an explanation for what took place: What did you - -

"Why did you punch him?"

Answer: "Because he made me mad"

is as - - as good as it gets?

A. Yes.

1. Defence counsel concluded his cross-examination. The Crown closed its case.
2. Defence counsel announced he was making a motion for non-suit because there was no evidence of lack of consent.
3. The Trial Judge, after hearing submissions from the Crown, appeared to dismiss the motion:

All right. In the light of this, at the end of the Crown's case, there's a motion for nonsuit. If the Court sees a case, a prima faciae case, then I am going to ask the - - I will not rule on the substantive. I will ask defence counsel at this point if he wishes to call any evidence.

1. Defence counsel said that he was not calling evidence and was relying on the same argument that he had just articulated.
2. The Trial Judge asked Defence counsel to clarify his position. His question suggests that he had misunderstood the Defence’s position on the non-suit motion. The motion was focused on the absence of evidence of lack of consent, but the Trial Judge seemed to have understood that it was based on the absence of evidence on the element of intent:

OK. So, now, could you – well, res gestae has - - okay, the action has been observed and admitted to. You’re saying that there was no proof of intent to cause the assault?

1. Defence counsel explained again that his position was that the Crown has the onus of proving lack of consent and that it is not for Defence to establish that there was consent:

The Crown, in my respectful submission, has to prove there's no consent. It's not just a question of the defence proving there was consent. The Crown has to prove there was no consent. And so absent that, if he said the words that I used, I'm not going to repeat them, but if he said that, including, "take your best shot", that's consent to being struck. And absent proof that that didn't happen, which is always challenging without either bodily harm or a Complainant, the Crown can't prove that there was an assault being physical contact without the consent of the putative Complainant.

1. The Trial Judge heard submissions from the Crown and gave his decision immediately after. He concluded that it was speculative to suggest that Mr. Robert invited the Appellant to strike him. He found the Appellant guilty.

II) THE ISSUES ON APPEAL

1. The Appellant argues that the Trial Judge erred in his analysis of the circumstantial evidence that the Crown relied on to establish lack of consent.
2. She argues that the possibility that Mr. Robert invited her to strike him could not be ruled out on the whole of the evidence, and that the Trial Judge erred in concluding that this scenario was purely speculative.
3. The Appellant also argues that the Trial Judge's Reasons were deficient.

III) ANALYSIS

A. Insufficient Evidence of Lack of Consent

1. Standard of Review

1. As is often the case, the standard of review depends on how one frames the issue.
2. If the issue is framed as the Appellant challenging the Trial Judge’s findings of fact or the inferences that he drew, the standard of review is overriding and palpable error, which is a very high standard. *Housen v Nikolaisen*, 2002 SCC 33 para 10.
3. If the issue is framed as the Trial Judge having erred in his application of the legal framework to be applied to circumstantial evidence, the issue is not purely factual and becomes one of mixed fact and law. While the standard of overriding and palpable error applies to this type of error as well, less deference is owed if the disputed factual finding was based on the misapplication of a legal principle. And ultimately, if the error is such that it constitutes an extricable error of law, the standard of review is correctness. *R v S(B)*, 2019 ONSC 2664, para 53.

2. Legal Framework – Circumstantial Evidence

1. On a charge of assault, lack of consent is an essential element of the offence. It is concerned with the state of mind of the alleged victim. More often than not, the Crown relies on the evidence of the alleged victim to establish that element.
2. In this case, Mr. Robert did not testify. There was no direct evidence of his state of mind. The Crown relied exclusively on circumstantial evidence to prove lack of consent. That evidence consisted of Cst. Sylvestre's observations of what happened between the Appellant and Mr. Robert before she struck him, as well as some of the things she said in the brief statement she gave Cst. Sylvestre after her arrest.
3. In *R v Villaroman* 2016 SCC 33, in the context of explaining how a jury should be instructed in a case where the Crown relies exclusively on circumstantial evidence, the Supreme Court of Canada discussed the relationship between circumstantial evidence and the requirement for proof beyond a reasonable doubt. The Court's comments also inform the analysis that a judge sitting alone should undertake in such circumstances.
4. When a party relies on circumstantial evidence, it necessarily relies on inferential reasoning. If the Crown's case rests solely on circumstantial evidence, the risk is that the trier of fact will jump too quickly to conclusions and draw the inference that it is being asked to draw, without considering other inferences, not consistent with guilt, that might also be drawn from the evidence.

1. The Supreme Court said that it is generally helpful to caution the jury about too readily drawing inferences of guilt. It suggested wording that could be used to do this:

Telling a jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences.

*Villaroman*, para 30.

1. Inferences consistent with innocence do not have to arise from proven facts. To require this would run against the fundamental rule that an accused has no obligation to prove anything in a criminal trial. *Villaroman*, para 35.
2. Consideration of theories alternative to guilt based on gaps in the evidence is not, in this context, speculative. At the same time, there are limits to the alternative theories that can properly be considered:

(...) a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence or the absence of evidence, assessed logically, and in light of human experience and common sense.

When assessing circumstantial evidence, the trier of fact should consider "other plausible theories" and "other reasonable possibilities" which are inconsistent with guilt [references omitted]. (...) the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" [references omitted]. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not speculation.

Of course the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

*Villaroman*, paras 36-38.

1. To justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternatives. *Villaroman*, para 41. Put another way, circumstantial evidence does not have to totally exclude other conceivable inferences. The trier of fact should not act on alternative explanations of the evidence that it considers unreasonable. Alternative inferences must be reasonable, not just possible. *Villaroman*, para 42.

3. Application to this case

1. Here, there was no evidence that Mr. Robert said anything to the Appellant to invite her to strike him. That possibility was evoked in a question put to Cst. Sylvestre during cross-examination but the officer’s evidence was that he did not hear Mr. Robert say those words. All that Cst. Sylvestre could say was that the Appellant and Mr. Robert were arguing back and forth and appeared angry. There was no evidence of any of the words that were actually exchanged.
2. This is not determinative because as noted above, a reasonable inference inconsistent with guilt does not have to be based on proven facts. It can also arise from the absence of evidence.
3. As I noted at the outset, the standard of review on this issue depends on whether the record discloses a legal error. Although the Reasons for Judgment were very brief, they suggest that the Trial Judge applied the correct legal framework by asking himself the right question: he considered whether the inference that Mr. Robert invited the Appellant to strike him was reasonably available or was purely speculative. As was noted in *Villaroman*, that this is not always an easy line to draw. The Trial Judge's assessment as to where to draw it is entitled to considerable deference.
4. In rejecting the Defence's argument that the evidence reasonably left open the possibility that Mr. Robert consented to being punched, the Trial Judge noted the following: Mr. Robert was the most intoxicated of the two parties; when Cst. Sylvestre tried to intervene, the Appellant was adamant that she wanted to continue to argue with Mr. Robert; she was the angrier of the two; there was no "tussle" or physical interaction between them before Appellant grabbed Mr. Robert and punched him; Mr. Robert was generally non-combative.
5. There was also evidence before the Trial Judge of what the Appellant said when she was asked why she struck Mr. Robert. She did not say anything suggesting that Mr. Robert challenged her or invited her to hit him: she said she hit him because she was mad. The Trial Judge did not mention this evidence but trial judges are neither expected not required to refer to every detail of the evidence. The Appellant’s own statement about why she hit Mr. Robert is another element of circumstantial evidence that supports the Trial Judge's conclusions.
6. This Court's task is not to retry the case. As I already said, the Trial Judge's decisions about facts and inferences are entitled to deference. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by a trial judge unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. *R v Clark*, 2005 SCC 2, para 9. In my view, the record does not disclose any such error.

B. Sufficiency of Reasons

1. The Appellant also challenges her conviction on the basis that the Trial Judge’s Reasons were deficient.

1. Law

1. Reasons for Judgment serve different purposes. They serve to inform the losing party why he or she has lost; they enable meaningful appellate review; and they ensure accountability to the public. *R v Sheppard*, 2002 SCC 26, para 24.
2. In the context of an appeal, even if the Reasons are deficient, intervention is not warranted unless the deficiencies foreclose meaningful appellate review. The appellate court does not have the power to intervene simply because it is of the view that the trial judge did a poor job of expressing itself. *Sheppard*, paras 25-26.
3. Reasons take on a particular importance if the judge is called upon to address confusing or troublesome principles of unsettled law, or to resolve confusing or contradictory evidence on a key issue. *Sheppard*, para 55. This was not one of those cases: there was no contradictory evidence and the applicable law was well settled.
4. Importantly, an assessment of the sufficiency of Reasons must not be done without consideration for the practical reality in which judges carry out their duties:

Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that a trial judge’s reasons provide the equivalent of a jury instruction

*Sheppard*, para 55.

2. Application to this case

1. The Trial Judge’s Reasons were brief. Since their sufficiency is in issue, I will reproduce them in their entirety:

All right. Thank you very much. Now I understand the - - I just want to make sure I have understood.

The matter of raising the fact that the Crown has to prove there was, or establish, at least, that there was, let us see, it was a consensual fight, it is based right from the observations, from the evidence, it is based on pure, I find, speculation.

And what I see here, what I see here is two people arguing. They are in a relationship. They were both intoxicated to a certain – to a certain degree, perhaps one more than the other, which would be the Complainant who is the subject of the assault.

When police intervene, the argument and the bad feelings do not subside. As a matter of fact from the evidence is that the accused here was adamant to continue and would not cooperate, was adamant that she would continue to argue and was still angry toward her mate, Mr. Richard [sic]. And notwithstanding the efforts by the police, they did, both of them, move from the street. A family member, somebody came to pick up the child. The argument continued. It escalated.

We do not know what is being said, but the police being concerned could see at one point without any provocation from one side, except they are both arguing, without any provocation she swings and punches him in the face.

It would be pure speculation that he would have invited her to strike him. There was no indication that they were in a tussle. They were pushing each other, that they were - - that would show physical interaction. There was no physical interaction until the moment that she grabbed him by the arm and threw the punch, so all indicate that she was assaulting him, and that is the evidence I have.

He was more or less, he says, arguing. He was more or less non combative in the physical sense of the word at least, so the assault has been made out by the observation of the police officer, and she is found guilty of the assault.

1. The Trial Judge’s introductory comments were not particularly clear. Perhaps this is because he began delivering his Reasons immediately after counsel made their submissions.
2. However, he ultimately did address the issue before him, which was whether the possibility that Mr. Robert invited the Appellant to strike him was purely speculative or was a reasonable inference that could be drawn from the evidence. He acknowledged that Cst. Sylvestre could not hear what was being said, but referred to the observations the officer made of the two parties. It is implicit from what he said that he concluded that the inference that Defence counsel was asking him to consider could not reasonably be drawn.
3. These Reasons were not perfect but in my view, they were responsive to the issue raised by the Appellant at the conclusion of this short trial. They permit meaningful appellate review of the matter.

IV) CONCLUSION

1. These are the reasons why I have concluded that the appeal must be dismissed. I am compelled to add a few observations arising from the manner in which this trial unfolded.
2. As was noted by the parties at the hearing of this appeal, the trial in this matter proceeded expeditiously. With respect, I would suggest it proceeded a little too expeditiously.
3. Territorial Court circuits are usually very busy. In that Court, counsel and the judges are required to deal with a large volume of cases with time constraints and other challenges. The overall pace is fast and sustained. Understandably, and especially for routine cases, the submissions and rulings are brief.
4. But even in that environment, legal issues that arise during a criminal trial must be addressed. In this case, the pace was so fast that certain key things were missed entirely: the transcript of the Appellant's statement was not marked as an exhibit; a *voir dire* was held into the admissibility of that statement, but the Trial Judge did not invite submissions on admissibility and did not rule on the issue; the nonsuit motion was dealt with so quickly that it appears the both Crown counsel and the Trial Judge misunderstood what element of the offence it was based on.
5. None of these shortcomings formed the basis for this particular appeal. But they illustrate why even in a busy, high-volume court, where it is necessary to use time efficiently, there is a limit to how fast the pace should be permitted to become. There comes a point where trying to do too much too quickly can lead to substantive errors that compromise the process and may result in a new trial having to be ordered. That is not a desirable outcome and does not serve the public interest.
6. The appeal is dismissed.

L.A. Charbonneau

J.S.C.

Dated in Yellowknife, NT this

20th day of December, 2019

Counsel for the Crown: Jeffrey Major-Hansford

Counsel for the Appellant: Peter Harte

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