COURT OF APPEAL FOR YUKON

Citation: *R. v. Torres*,
2013 YKCA 16

Date: 20131219
Docket: YU713

Between:

Regina

Respondent

And

Rodrigo Antonio Moreno Torres

Appellant

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials L.W. and K.W. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Territorial Court of Yukon, dated October 1, 2012 (*R. v. Torres*, 2013 YKTC 4, Whitehorse Docket No. 11-00618).

Counsel for the Appellant: G. Coffin

Counsel for the Respondent: L. Gouaillier

Place and Date of Hearing: Whitehorse, Yukon
November, 12, 2013

Place and Date of Judgment: Vancouver, British Columbia
December 19, 2013

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice Garson

Summary:

Appeal from conviction for sexual assault. The appellant and the complainant had sexual intercourse in the appellant's taxi. The issue at trial was whether the complainant consented. The complainant had been drinking, and said she had "blocked out" her memory of the incident. The appellant claimed her unresponsiveness to cross-examination denied him the opportunity to make full answer and defence.

Held: appeal dismissed. Assessing the effect of the complainant's unresponsiveness fell within the trial judge's discretion. The appellant failed to establish any basis for this Court to interfere with his conclusions.

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] The appellant appeals his conviction for sexual assault, imposed by a judge of the Territorial Court of Yukon on October 1, 2012.

[2] The incident giving rise to the charge occurred on the morning of December 3, 2011. After a night out drinking with friends the 23-year-old complainant got into a cab driven by the appellant to go home. It is common ground that at some point during the trip the appellant and the complainant had intercourse in the front seat of the cab. The only issue at trial was whether this occurred with the complainant's consent.

[3] The appellant contends the trial judge erred in accepting the evidence of the complainant when she was unresponsive to the point that his counsel could not properly cross-examine her. He says this denied him the opportunity to make full answer and defence and rendered his trial unfair, thereby violating his rights under ss. 7 and 11(d) of the *Charter of Rights*. He maintains the result must be to set aside his conviction or, alternatively, to order a new trial.

The Evidence and Proceedings at Trial

[4] The complainant testified she got into the passenger's seat of the appellant's cab, and recalled talking to a friend on her phone during the ride home, but she could not remember any conversation with the appellant. She said the appellant drove her to a bus stop down the road from her house. She remembered the meter reading approximately $18, and paying him with a $20 bill. She did not get out of the taxi, however, and gave no evidence as to why that was so.

[5] The complainant said the appellant then drove her to some bushes at a bus turnaround nearby. He stopped the cab, got out, and came around to the passenger's side, where he took his pants off and then removed hers. He reclined her seat, got on top of her, and forced his penis into her vagina. She did not recall any conversation between them during this. Nor could she remember how her pants

were removed and whether she did anything to try and stop the appellant. She did testify, however, that she did not want this to happen and she felt invaded afterwards. She did not recall how she got home afterwards but did remember the fare on the meter was just over eighteen dollars, and she paid it with a $20 bill. She could not say at what point this occurred. Her only recollection on arriving at home was that she went into the bathroom and, later, cried when Cst. MacQuarrie, an RCMP officer, came to the house at her mother's request and took her to the hospital.

[6] It was apparent during her testimony that the complainant's recollection of these events was incomplete. She agreed this was due in part to her intoxication after the night of drinking, and said this caused her to "black out" at times on the ride home. She also attributed her memory lapses to the fact she had "just blocked everything out" after the incident because she did not want to remember it. She explained she had dealt with an earlier similar experience as a college student in Inuvik by blocking it out. The complainant testified, however, that she had not been able to block the events out entirely, and said parts of the assault would "always be there". Despite the gaps in her memory she was consistent in maintaining she had not consented to intercourse with the appellant. For example, she gave this response to the defence theory of the case during her cross-examination:

> Q Mm-hmm. Well, you know, I'm going to suggest to you that, for some reason or other, between the two of you, you decided that you would have sex with Mr. Moreno Torres and he decided he would have sex with you and you went to the bushes and you had sex. And after you had sex you felt really bad about it, you came home, you were embarrassed, your mother confronted you, "What's going on," and then you made up the version of the events saying that you were raped when, in fact, it wasn't a rape, that the whole thing took place with your consent, and that's why you're blocking it out because you're ashamed of having had an intercourse relationship with this man much older than you, that was a taxi driver, and you feel really bad about it, and that's what happened, okay. You don't remember exactly but I'm saying maybe that's what you're blocking out.
>
> A No. I don't think I would do that. I'm not that type of person to do that.
>
> Q Well, you were pretty drunk.
>
> A Drunk or not, I would still not do that. I know myself.

Q Mm-hmm. You would not, what, have sex with an older person?

A Yeah, with some random person. I'm not like that.

Q Okay. Well, this might be the one and only time you did it and maybe that's why —

A Why would I do that?

Q — it's really affecting you this badly.

A I would never do that.

[7] The complainant agreed that shortly after the incident she gave several statements about what happened to Cst. MacQuarrie of the RCMP. She said she told the truth in those statements, and acknowledged they included information that she had now blocked out.

[8] After defence counsel completed his cross-examination of the complainant, the Crown applied to hold a *voir dire* to determine whether her prior statements to the police could be admitted as "previously recorded past recollections under a hearsay exception". Over the objection of defence counsel, the trial judge granted the application and the complainant and Cst. MacQuarrie testified on the *voir dire*. The Crown was unsuccessful in its attempt to refresh the complainant's memory with her statements, however, and ultimately abandoned its application to have them admitted.

[9] The complainant's mother, K.W., testified that the complainant arrived home after 8 a.m. on the morning of December 3, 2011. She said she did not see the taxi but heard its door close. The complainant was upset and crying when she came in. She was also significantly intoxicated, at a level of nine out of ten. She went to the bathroom and then to her bedroom, crying hysterically, and shut the door. Eventually she gave K.W. some information about what had happened, and her mother called the RCMP and the taxi company. Cst. MacQuarrie came to the house and, after speaking with the complainant, took her to the hospital.

[10] The appellant testified in his own defence. He said he picked up the complainant, whom he knew as she had been a fare on earlier occasions. She got into the front seat, which was unusual, and was swearing and upset about some

issue with her boyfriend. He did not think she was very drunk as she was acting and speaking normally while she spoke to someone on her cell phone. He drove her to her parents' home as requested, and she paid him $20, but then told him she wanted him to take her to a "hot" cab driver. When he refused, she said she really wanted to have sex, and touched him. He drove to the bus turnaround where they each took their pants off, he came around to her side of the cab, and they had consensual intercourse. He said the complainant wanted more sex, but he declined and drove her home. When he left, she was not upset. She asked for his cab number and told him she would probably not remember anything the next day as she would black out.

[11] The appellant said about 15 minutes later he received a call from his dispatcher about a complaint from K.W. Later, he received a call from the RCMP asking him to come to the detachment. He testified that when the police questioned him there he was unaware they were investigating a complaint that he had sexually assaulted the complainant, and he denied that anything had happened between them as he was recently married and did not want to reveal he had had sex with her. Later, when an RCMP officer came to collect a blood sample from him for DNA testing, he acknowledged they had had intercourse.

The Reasons for Judgment of the Trial Judge

[12] Following a detailed review of the testimony of each witness, the trial judge recognized that the central issue before him was credibility, and observed the case clearly fell within the analysis set out in *R. v. (D.)W.*, [1991] 1 S.C.R. 742.

[13] The judge first considered the appellant's exculpatory evidence, and rejected it. He found it implausible and incapable of belief, and also held it was not capable of raising a reasonable doubt. He stated:

> [20] … While there was no one point or aspect of his evidence that taken in isolation is ultimately damning with respect to his credibility, his testimony taken in its entirety and assessed against all of the evidence, including the evidence of the complainant, does not have the ring of truth. As a general comment, I find his evidence to have been somewhat conveniently presented

> and not at all persuasive. I am aware of the limited value of an assessment in demeanor, in particular when dealing with a witness of a different cultural background and language, and the potential for error if undue weight is assigned to demeanor assessment. This said, I find that Mr. Torres' demeanor did not assist me in leading me towards finding his evidence credible and believable.

[14] In reaching these conclusions, the trial judge referred to aspects of the appellant's testimony that he found unlikely, and noted he had initially lied to the police about having sexual contact with the complainant. As well, he accepted the evidence of the complainant's mother and Cst. MacQuarrie that the complainant was extremely distressed on arriving home. He found the appellant's testimony that he had telephoned the complainant's house later that morning and spoken to her was unsupported and inconsistent with the evidence of other witnesses as to her emotional state.

[15] The trial judge then turned to the question of whether the evidence that he did accept was sufficient to sustain a conviction. He found the complainant had been significantly intoxicated, and observed the key question was whether she had been able to make a voluntary and informed decision to engage in a sexual act with the appellant. He acknowledged there were problems with her evidence, and considerable gaps in her testimony due to her intoxication and her wish to block out what had occurred. He provided this assessment of her evidence:

> [27] … L.W. does remember getting into a Quality Taxi, talking to her friend on her phone, and being driven to her home in [redacted], where she paid Mr. Torres with a $20 bill for the $18 fare. Regarding the sexual encounter, she states that Mr. Torres drove her to the bus turnaround, came to her side of the vehicle and opened the door; reclined her seat, took off his pants and had sexual intercourse with her in the front seat of the cab. L.W. does not know how her pants were removed.
>
> [28] She testified that she did not ask to go to the bus turnaround and she did not want the sexual intercourse with Mr. Torres to happen. She does not have any recollection of saying anything to him or trying to stop him from having sex with her. L.W. testified that she blocked out all the details of what took place in the cab after Mr. Torres' penis was inside her and any details about him touching her in any other way. The next thing she remembers is being home and going to the bathroom. L.W. does not know how she got home, i.e. whether she walked through the bush or was driven there. She denied the assertion that she was making up the sexual assault story after being confronted by her mom because she was ashamed and felt bad. She

> denied blocking out many of the details on the basis of the same reason. L.W. stated in her testimony that she did not think she would do that or have sex with some random man, drunk or not.
>
> …
>
> [31] It is clear that L.W. recalled more detail on December 3rd than she does now. By her own evidence she was intoxicated but also aware of what was going on around her. So while I find L.W. to have been fairly intoxicated, I do not find that she was too intoxicated to consent to the sexual activity. The limited recollection of L.W. certainly made direct examination somewhat difficult and cross-examination even more so. There are a number of unanswered questions. L.W. had a cellphone in her possession but did not try to call anyone for help when she was driven to the bus turnaround. She had been taken home and had paid for the cab but did not get out of the vehicle, and there is no evidence that she tried to do so and no explanation for why she did not.
>
> [32] Although there were gaps in her evidence, I have no concerns about the truthfulness of L.W. Her demeanor while testifying was consistent with the evidence she provided and did not cause me any concerns about the credibility of her evidence. She was clear, steadfast, and unshaken on what she did remember. She candidly acknowledged the shortcomings in her evidence and readily admitted to blocking out details between the time of the assault and the time of the trial. The evidence she gave is consistent with the observations of her mother and Constable MacQuarrie. The only evidence not substantiated was with respect to the bruising that L.W. said she incurred, but there is no evidence about when the bruising would have been evident or any indication that anyone looked for bruising.

[16] On the issue of consent, the trial judge observed the appellant's evidence did not raise a defence of honest but mistaken belief since he testified the complainant's consent had been clear and unequivocal. As well, the judge was satisfied the complainant's evidence that she did not want sexual contact with the appellant removed the defence of implied consent, as her passive acquiescence could not establish consent.

[17] The trial judge ultimately concluded that the evidence of the complainant, her mother, and Cst. MacQuarrie established the following facts and satisfied him beyond a reasonable doubt that the appellant was guilty of sexual assault:

> [36] On the evidence I have heard I make the following findings. I find that Mr. Torres drove an intoxicated L.W. to her residence and was paid for the trip. He then decided to drive L.W. to the bus turnaround to have sexual intercourse with her. He did not use physical force against L.W. to do so outside of the force involved in the sexual act itself. He, somewhat spontaneously, took advantage of the situation that presented itself to him.

> He was faced with a young, intoxicated woman who, through the consumption of alcohol, was in his commercial vehicle in a vulnerable position. In such circumstances it was incumbent upon Mr. Torres to take reasonable steps to ensure that he had the consent of L.W. to have sex with him. I find that he did not do so. I accept the evidence of L.W. that she did not want to have sex with Mr. Torres, and that while she may have had the capacity to consent, she did not consent to Mr. Torres having sex with her.

Issues on Appeal

[18] The appellant's grounds of appeal are rooted in what he characterizes as the unresponsiveness of the complainant. I would frame these as follows:

1. the trial judge failed to recognize the complainant's lack of responsiveness restricted the appellant's opportunity to cross-examine her, precluding him from making full answer and defence and rendering the trial unfair;

2. the trial judge failed to carry out the analysis required by *R. v. Hart*, 1999 NSCA 45; and

3. the trial judge failed to recognize that the complainant's evidence was unreliable and should not be accepted.

Analysis

[19] It is common ground that the right of an accused to cross-examine Crown witnesses without restraint is essential to the right to make full answer and defence and to trial fairness: *R. v. Wyatt* (1997), 115 C.C.C. (3d) 288 (B.C.C.A.) at para. 36; *R. v. Lyttle*, 2004 SCC 5 at paras. 41-42; *R. v. Duong*, 2007 ONCA 68 at para. 22.

[20] In *Hart*, the Nova Scotia Court of Appeal considered the difficulty presented by an unresponsive witness in the context of a child who was the complainant in a series of sexual offences and who, during his testimony before the jury, frequently did not answer questions or said he did not recall. Defence counsel ultimately moved for a judicial stay or a directed verdict. The trial judge acknowledged there had been a limited right to cross-examine, but concluded a stay was not warranted as the defence was able to highlight inconsistencies in the child's evidence and use his unresponsiveness positively in its submissions to the jury. Following his conviction,

the offender appealed, claiming the witness's unresponsiveness was a breach of his right to make full answer and defence and his right to a fair trial under ss. 7 and 11(d) of the *Charter* respectively.

[21] His appeal was dismissed. Cromwell, J.A., writing for the Court, affirmed the importance of an accused's right to cross-examine and, at pages 41-48, set out a three-pronged framework within which a trial judge may consider the effect of an unresponsive Crown witness on the right to make full answer and defence and trial fairness. The first step is to determine the reason for the witness's silence. The second is to assess the impact of his or her unresponsiveness with respect to both the importance of the evidence and the ability of the trier of fact to evaluate it. The third step requires consideration of possible ameliorative action. Cromwell J.A. concluded that weighing these matters and deciding whether there has been a breach of the accused's *Charter* rights is ultimately a task that falls within the discretion of the trial judge. He decided the trial judge had properly exercised this discretion.

[22] The appellant argues the complainant's unresponsiveness in this case frustrated his opportunity to fully cross-examine her and violated his constitutional right to make full answer and defence, resulting in an unfair trial. He maintains the trial judge erred by failing to recognize this, and says the circumstances clearly required the judge to carry out the analysis set out in *Hart*. The appellant says that, had he done so, the trial judge would have found the complainant's unresponsiveness emanated voluntarily from the witness herself, and could not be attributed to the conduct of the defence or some illness or infirmity that was beyond her control: *Duong* at paras. 27-28. The complainant's testimony was clearly critical to the trial outcome. Her silence on important points hindered the trial judge's ability to properly evaluate the evidence, and led him to confuse credibility and reliability in assessing its weight. As to ameliorative measures, the appellant says these were attempted unsuccessfully by holding a *voir dire* to determine whether the complainant's prior statements were admissible, but her pervading unresponsiveness thwarted this.

[23] In short, the appellant contends that when the complainant's unresponsiveness is properly considered in the context of the *Hart* analysis it is clear his *Charter* rights were breached and his conviction must be set aside or, alternatively, a new trial ordered.

[24] I am unable to agree. While it may have been useful to embark on a *Hart* analysis, for the following reasons I am not convinced this would have produced a different result.

[25] The complainant gave two reasons for her inability to answer some questions: she was severely intoxicated and she had "blocked out" some of her memory of the event. The latter was not explored by either counsel at trial, beyond the complainant's comment that she had also blocked out a similar earlier incident. On the limited evidence available, it appears this might have been a coping method that she found effective in dealing with negative events, but whether she had any control over it remains unknown. Nothing in the complainant's testimony suggests she was deliberately intransigent or evasive. She did not refuse to answer questions from the defence, but appeared to answer to the best of her ability and recollection. To my mind, her unresponsiveness was no different than that of a witness whose recollection has been impaired by severe intoxication. I am not persuaded it was voluntary or blameworthy.

[26] With respect to the impact of the complainant's unresponsiveness, there is no question her evidence was critical to the central issue of consent. I am not convinced, however, that the limitations in her testimony were material to this issue. She was able to answer the questions on that topic from both Crown and defence, and was consistent in testifying that she had not wanted to have intercourse with the appellant and would not have agreed to do so.

[27] Nor is it apparent that her incomplete account of events forestalled the trial judge's ability to properly evaluate the evidence on consent. In accordance with the principles in *(D.)W.*, he first assessed the appellant's testimony and found it was incapable of belief and did not raise a reasonable doubt. That finding is not disputed

on appeal. Turning to the remaining evidence, the trial judge acknowledged the complainant's testimony had "considerable gaps", and this made cross-examination difficult. He nevertheless found her credible, and accepted her evidence that she did not consent to having sex with the appellant. In my view, the trial judge did not confuse credibility with reliability in reaching that conclusion, or fail to appreciate that these qualities are distinct. While he did not expressly address the reliability of the complainant's testimony, his findings that her account was both internally consistent and consistent with the evidence of her mother and Cst. MacQuarrie, spoke to its reliability.

[28] Nor am I able to agree that the trial judge should have explored further steps to ameliorate the complainant's unresponsiveness. The appellant's allegations of failure to make full answer and defence and unfairness are grounded in *Charter* violations, and the onus rested on the defence to raise these, request a *voir dire* to establish them, and put forward a suitable remedy. None of these steps was taken despite the fact the trial judge, during final submissions, raised the issue of whether the complainant's lack of recall had had an impact on the appellant's ability to make full answer and defence. While defence counsel adopted this point, he did not take it further and instead focussed his argument on issues of credibility. Further, there were areas for exploration during the complainant's testimony that were not pursued, such as pursuing her statement that she had "blocked" parts of the incident from her memory, or inviting the trial judge to do so. As well, it was open to counsel to put the complainant's prior statements to her in cross-examination if they revealed inconsistencies in her account, although I accept this carried a considered risk best assessed by trial counsel.

[29] Ultimately, assessing the effect of the complainant's unresponsiveness was a matter lying within the discretion of the trial judge. He was clearly aware of the potential difficulties it raised, but was nevertheless able to carry out a detailed assessment of her evidence in compliance with the framework mandated by *(D.)W.* I am unable to discern any basis on which this Court could interfere with his conclusions.

[30] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Garson"