COURT OF APPEAL OF YUKON

Citation: *R. v. Charlie*,
2019 YKCA 13

Date: 20190620
Docket: 18-YU838

Between:

Regina

Respondent

And

Franklin Junior Charlie

Appellant

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Territorial Court of Yukon, dated May 28, 2018 (*R. v. Charlie*, 2018 YKTC 26, Whitehorse Registry 17-00191).

Oral Reasons for Judgment

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia June 18, 2019
Place and Date of Judgment:	Vancouver, British Columbia June 20, 2019

Summary:

The appellant appeals from a conviction for aggravated assault on the grounds that the trial judge erred in his treatment of the appellant's evidence. Held: Appeal dismissed. The judge committed no reviewable errors in assessing the credibility of the witnesses and properly applied the framework set out in R. v. W.(D.). Nor did the judge commit a reviewable error in rejecting the appellant's alibi evidence. There was a basis upon which the judge could reasonably disbelieve the alibi and there is no indication that he went on to impermissibly infer the appellant's guilt from that disbelief.

[1] **ABRIOUX J.A**.: The appellant, Franklin Junior Charlie, was charged on a four-count indictment, comprising aggravated assault, unlawful confinement, uttering a threat to cause death or bodily harm and driving while disqualified. A co-accused, Tyrell Ollie, was charged with aggravated assault and unlawful confinement.

[2] On May 28, 2018, in reasons for judgment indexed at 2018 YKTC 26, the appellant was convicted by a Territorial Court judge of aggravated assault and operating a motor vehicle while being disqualified from doing so, with the remaining counts dismissed. Both charges against Mr. Ollie were dismissed.

[3] Mr. Charlie appealed his conviction of aggravated assault on the basis that the trial judge failed to properly apply the standard of proof beyond a reasonable doubt, improperly discounted the appellant's evidence and committed a reviewable error by finding that the appellant's defence of alibi was "contrived" and using that finding as the basis for an inference of guilt.

[4] This Court dismissed Mr. Charlie's appeal at the conclusion of oral argument, with reasons to follow. These are those reasons.

Background

[5] The trial took place over three days, including submissions, in March and April 2018.

[6] The alleged incident involved an altercation between the victim, Stephen Olsen, and both accused, which occurred in the early morning hours of June 18, 2017, in Ross River, Yukon.

[7] The Crown called four witnesses, including Mr. Olsen. Both Mr. Charlie and Mr. Ollie testified on their own behalf, as did Mr. Charlie's then girlfriend, Chelsea Etzel. Additional evidence was also called on their behalf.

[8] Mr. Olsen testified that he was assaulted by both accused. An agreed statement of facts detailed the serious injuries sustained by Mr. Olsen, including a fracture of the orbital bone which required him to be transported to Vancouver for surgery.

[9] Mr. Ollie admitted being involved in the altercation with Mr. Olsen, but testified that Mr. Olsen had been the aggressor. He also stated that when Mr. Olsen was on the ground, Mr. Charlie kicked him twice in the head, at which point he urged him to stop.

[10] For his part, Mr. Charlie denied being in an altercation at all. He testified that he arrived at the residence with Ms. Etzel, where he observed Mr. Olsen sitting on a couch, crying, with Mr. Ollie wiping blood off his face.

[11] Ms. Etzel confirmed Mr. Charlie's alibi.

The Trial Judgment

[12] The trial decision is 17 pages long and consists of 77 paragraphs.

[13] In his decision, the trial judge reviewed the evidence of each witness, set out the agreed statement of facts and referred to the photographs that had been filed as exhibits.

[14] In so far as the injuries sustained were concerned, he stated:

> [8] There is no dispute with regard to the injuries that Mr. Olsen suffered or that he meets the threshold required to constitute aggravated assault, in the event that either or both of the accused are convicted of having assaulted Mr. Olsen.

[15] In his review of the evidence of each witness, he noted where that evidence was contradicted by or inconsistent with that of others.

[16] He commenced his analysis by stating:

> [55] I do not intend to set out in detail the reasons for my decision. I have considered the testimony of the witnesses and photographic and documentary evidence. I have examined the evidence with respect to any consistencies and inconsistencies which exist, not only internally, but when considered against the evidence of the other witnesses and documentary evidence. I have considered the demeanour of the witnesses. I am aware, as both accused testified in this case, that the principles in *R. v. W.(D.),* [1991] 1 S.C.R. 742 apply.

[17] He then made the following findings with respect to the key witnesses:

> [56] I find the evidence of Mr. Ollie, generally on all critical points, to be reliable and credible. His version of events best aligns with the physical evidence and the testimony of the others.
>
> [57] I find that much of Mr. Olsen's evidence is not capable of belief. I find that his testimony as to the severity and length of the beating he received, to be inconsistent with the evidence of the injuries he suffered as well as the evidence in regard to the blood on the steps, railings, and the interior of the residence.
>
> [58] I also find the evidence of Mr. Charlie to be unreliable and not credible. I do not accept his version of events that had him not present at the time of the altercation.
>
> [59] In this regard, I find that the evidence of Ms. Etzel to have been contrived in order to provide Mr. Charlie with a defence. With respect to Ms. Etzel's evidence, it is most likely that she went over to Amos Dick's residence to look for Mr. Charlie and when she did not see him there she left shortly thereafter, as testified to by Mr. Ollie.
>
> [60] Mr. Charlie, who testified after hearing Ms. Etzel's testimony, clearly appeared to be matching up most of his testimony with that of Ms. Etzel. It certainly, in my opinion, had the appearance of collusion. The fact that Mr. Charlie did not have any marks on his hands is not particularly a factor for me, although it would perhaps be relevant had I found there to be a lengthy and prolonged beating using fists, which I did not find.
>
> [61] The evidence, which I accept, did not involve Mr. Charlie striking Mr. Olsen in a manner that would likely have resulted in him having marks on his hands.
>
> [62] In terms of the evidence that I do accept, the physical injuries Mr. Olsen suffered are more consistent with the evidence of Mr. Ollie than the evidence of Mr. Olsen. Being brutally beaten, to the extent Mr. Olsen testified to, would have, in my view, led to more significant injuries than Mr. Olsen suffered or that are in evidence in the photographs that were filed.
>
> [63] That said, I accept that it is possible Mr. Olsen was struck in the ribs at some point but I am unable to say with certainty when and how. Whether when he fell after being flipped by Mr. Ollie, whether he was kicked not only in the head but in the ribs by Mr. Charlie while he was on the ground

> afterwards, I certainly find that this did not occur while he was inside the residence.
>
> [64] Likewise, I find that the extent to which there was blood located in the residence, the evidence is more consistent with the evidence of Mr. Ollie than Mr. Olsen. There is little in the way of blood noted and is in such locations and in such amounts that I find it inconsistent with the type of beating Mr. Olsen stated that he received in the residence. It is more consistent with Mr. Ollie sitting Mr. Olsen on the couch and cleaning up his wounds.

[18] The judge concluded his analysis by stating:

> [71] In my opinion, Mr. Olsen was exaggerating the events that occurred in an attempt to put himself in a positive light and to put Mr. Ollie and Mr. Charlie in a worse light.
>
> [72] This said, Mr. Olsen was clearly the victim of a serious assault. The most logical version of what happened and the version most consistent with all the evidence is Mr. Ollie's. I find that Mr. Olsen either specifically went to Mr. Amos Dick's residence or that he was passing by on his way elsewhere and that he engaged in a verbal confrontation with Mr. Ollie and Mr. Charlie outside of Mr. Dick's residence. This verbal confrontation escalated into a physical confrontation in which I am satisfied that Mr. Olsen was the aggressor. I find that he knocked Mr. Charlie to the ground and then turned to Mr. Ollie to begin fighting with him. Mr. Ollie, with legal justification, struck Mr. Olsen, as he testified to, and threw him to the ground. At this point, Mr. Charlie kicked Mr. Olsen twice, striking him in the head, and causing the injuries suffered by Mr. Olsen, in particular, those to his left eye area.
>
> [73] While Mr. Charlie may have been justified either in engaging in a consensual fight with Mr. Olsen or using force to resist, the initial physical attack by Mr. Olsen does not justify Mr. Charlie in kicking Mr. Olsen in the head and thus causing the harm to Mr. Olsen. This was not a reasonable use of force.

[19] The judge then convicted Mr. Charlie of aggravated assault. He was not satisfied, however, that the appellant had made any threats to cause death or bodily harm to Mr. Olsen or had unlawfully confined him and acquitted Mr. Charlie of those counts. He acquitted Mr. Ollie on all counts with which he was charged.

Issues on Appeal

[20] The issues on appeal are whether the judge erred:

(a) in his credibility assessment and his application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742;

(b) in discounting the appellant's evidence; or

(c) in his rejection of the appellant's alibi evidence, in so far as he found the evidence "contrived" and/or inferred the appellant's guilt from that finding.

[21] A theme which is evident throughout the appellant's submissions is that the judge approached the issues on the basis of a "credibility contest" and did not properly express in sufficient detail the reasoning behind the conclusions he reached.

Disposition

[22] The issues raised by the appellant all implicate the credibility assessments that were conducted by the judge. In *R. v. J.T.*, 2019 BCCA 180, Justice Smith succinctly summarized the applicable framework for addressing such issues on appeal:

> [21] It is common ground that a trial judge's credibility findings are entitled to significant deference on appellate review absent palpable and overriding error (see *Housen v. Nikolaisen,* 2002 SCC 33 at para. 24; *R. v. Gagnon,* 2006 SCC 17 at paras. 10, 20; and *R. v. Vuradin,* 2013 SCC 38 at para. 11). Stated otherwise, an appellate court should not intervene unless a trial judge's findings "cannot be supported on any reasonable view of the evidence" (see *R. v. R.P.,* 2012 SCC 22 at para. 10, citing *R. v. Burke,* [1996] 1 S.C.R. 474 at para. 7).
>
> [22] A finding of fact can amount to an error of law where the assessment of credibility that results in a finding of guilt is based on impermissible reasoning. A judge's assessment of credibility based on an error of law is not owed deference and is reviewable on a standard of correctness.

[23] In particular, the issues on appeal relate to the manner in which the judge applied the approach for assessing the credibility of an accused who elects to testify. This approach was set out by the Supreme Court of Canada in *W.(D.)* at 758:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[24] It is also the case that trial judges are not required to explain in elaborate detail why they do not entertain a reasonable doubt. As stated by Justice McLachlin (as she then was) in *R. v. Burns*, [1994] 1 S.C.R. 656 at 664:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see *R. v. Smith*, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

[25] These principles were expanded upon this way by Justice Neilson in *R. v. Kinney*, 2013 YKCA 5:

> [14] … Appellate courts recognize that because trial judges have the advantage of watching and hearing witnesses testify, they are in the best position to judge testimonial reliability and credibility. As well, they appreciate that “assessing credibility is not a science”, and so it is often difficult for trial judges to precisely explain why they have accepted or rejected a witness’ evidence. As a result, appellate courts approach findings of credibility with deference, and will only interfere if the trial judge has made a palpable and overriding error: *R. v. R.E.M.*, 2008 SCC 51 at para. 49, [2008] 3 S.C.R. 3; R. v. Gagnon, 2006 SCC 17 at para. 20, [2006] 1 S.C.R. 621. These principles were recently affirmed and summarized by the British Columbia Court of Appeal in R. v. Ceal, 2012 BCCA 19 at para. 25, 315 B.C.A.C. 138:
>
> > In determining whether a verdict is unreasonable or cannot be supported by the evidence, the focus of the inquiry is on whether there is <u>any</u> evidence to support the trial judge’s findings based on the totality of the evidence before him or her, and whether the verdict logically flows from those findings. An appellate court will not interfere with a trial judge’s assessment of credibility absent palpable and overriding error in the findings that support his or her assessment.
> >
> > [Emphasis in original.]

> [15] Despite these difficulties, it is incumbent on trial judges to sufficiently explain their findings on credibility to an accused. In *R. v. Dinardo*, 2008 SCC 24 at para. 26, [2008] 1 S.C.R. 788, the Supreme Court explained this as follows:
>
> > At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see R. v. Braich, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt" …

The Application of the Criminal Burden of Proof

[26] I propose to deal with the first two issues raised on appeal together.

[27] The appellant argues that the judge, despite not believing his evidence, did not perform the requisite analysis to assess whether he had a reasonable doubt about Mr. Charlie's guilt based on the evidence as a whole.

[28] The appellant's position is that the judge "appears to have proceeded on the basis that Mr. Olsen was the victim of an assault and then went on to decide which of the various versions presented to him was the most logical or consistent".

[29] I do not agree with these submissions.

[30] In his reasons, the judge commenced his analysis by recognizing the applicability of *W.(D).* He also stated he was not going to set out in detail the reasons for his verdicts. The issue thus becomes whether his reasons satisfy the framework to which I have referred.

[31] Having initially instructed himself in this manner, the judge then proceeded to consider Mr. Olsen's evidence in the context of the entirety of the evidence, including:

(a) the nature and extent of the injuries to the victim;

(b) Mr. Ollie's evidence;

(c) the crime scene photographs and forensic blood sample evidence;

(d) Ms. Etzel's evidence; and

(e) Mr. Charlie's evidence.

[32] While I accept that the judge did not describe in detail his analytical process, I am of the view that he recognized and took steps to avoid the "credibility contest" error which the appellant alleges occurred. This is shown, in part, by an exchange with the appellant's trial counsel during her closing argument:

> [COUNSEL]: Charlie wasn't -- claims he wasn't there […] I mean that you've got three different versions, each have some inconsistencies and problems. But because of the fact that you aren't able to say with certainty which version is correct I guess is what I'm --
>
> THE COURT: That's your submission, right? I may decide to like one version, but…
>
> [COUNSEL]: But you have to be very careful if you like one version you're -- you're not pitting, you know, the --
>
> THE COURT: Well, it can't be -- I just gave a long decision yesterday […] which I went through some pretty extensive documentation on not credibility contest, not deciding who do you like better and, therefore, it amounts to a conviction. Certainly not. There has to be evidence that makes the one version of events believable enough in order to either -- well, if you're going to have a conviction in order to prove the case beyond a reasonable doubt, I might like someone's better than the others, it still might not prove the case. So, I'm pretty aware
>
> [COUNSEL]: No, and I -- I mean --
>
> THE COURT: If I -- if I'm not sure what happened between the three of them, I clearly acquit, so.

[33] That exchange, coupled with both the judge's explicit recognition of *W.(D.)* and the fact he entered acquittals on the related charges of uttering threats and forcible confinement, demonstrates, in my opinion, that he recognized and adhered to his duty to consider the whole of the evidence in his assessment as to whether the Crown had satisfied its burden of proof.

[34] When I consider the reasons as a whole, I am of the view that the judge found Mr. Charlie guilty of aggravated assault because he concluded that the co-accused Mr. Ollie's evidence was credible and reliable and was consistent with the other independent and material evidence, including the nature and location of Mr. Olsen's injuries and the location and scale of the blood stains on the front porch and inside Mr. Dick's living room.

[35] I am also of the view that it is clear from the reasons that the judge did not believe Mr. Charlie or Ms. Etzel's evidence and that upon a consideration of the evidence as a whole, he was satisfied that the Crown had proven all the essential elements of the offence of aggravated assault beyond a reasonable doubt.

[36] The appellant takes issue with the fact that the judge commented that he testified after Ms. Etzel. I note that the judge did not direct the order of witnesses to be called. In my view, an observation by a trial judge in reasons for judgment concerning the order of defence witnesses and its impact upon the judge's determination of the weight of witnesses' evidence, such as the judge's brief observations in this case, does not amount to reversible error: see *R. v. Smuk*, [1971] 4 W.W.R. 613 at 614 (B.C.C.A.).

[37] The judge observed the witnesses first-hand. Given the many advantages of this vantage point, his conclusions on the witnesses' credibility are entitled to appellate deference, as explained in *Kinney*.

[38] Accordingly, since the appellant has failed to identify any palpable and overriding error of fact arising from the record, and since the legal conclusions reached by the judge arise from that evidence and adhere to a legally correct decision-making pathway, I would dismiss this ground of appeal.

The Alibi Evidence

[39] The appellant takes issue with the judge's finding that Ms. Etzel's evidence had been "contrived" in order to provide Mr. Charlie with a defence. He also argues

that the judge performed impermissible "'circular reasoning" to conclude that this was incriminating evidence which related to Mr. Charlie's "consciousness of guilt".

[40] But what occurred is that the judge did not accept the alibi evidence:

> [58] I also find the evidence of Mr. Charlie to be unreliable and not credible. I do not accept his version of events that had him not present at the time of the altercation.
>
> [59] In this regard, I find that the evidence of Ms. Etzel to have been contrived in order to provide Mr. Charlie with a defence. With respect to Ms. Etzel's evidence, it is most likely that she went over to Amos Dick's residence to look for Mr. Charlie and when she did not see him there she left shortly thereafter, as testified to by Mr. Ollie.
>
> [60] Mr. Charlie, who testified after hearing Ms. Etzel's testimony, clearly appeared to be matching up most of his testimony with that of Ms. Etzel. It certainly, in my opinion, had the appearance of collusion. The fact that Mr. Charlie did not have any marks on his hands is not particularly a factor for me, although it would perhaps be relevant had I found there to be a lengthy and prolonged beating using fists, which I did not find.

[41] The issue of whether an alibi defence raises a reasonable doubt is a matter for the trier of fact to decide. Furthermore, a conclusion that an alibi has been fabricated must be supported by evidence independent of the accused's own claim of alibi and other than evidence that proves the crime itself: *R. v. Tessier* (1997), 87 B.C.A.C. 269 at para. 68 (C.A.).

[42] In my view, there was a basis upon which the judge could reasonably disbelieve Ms. Etzel's evidence. This was to the effect that when she provided her first statement to the RCMP twenty days following the event, she knew that they were interested in locating Mr. Charlie regarding the alleged assault and yet it did not occur to her, although she admitted it should have, to tell the police that the appellant had nothing to do with Mr. Olsen's injuries. The judge was also entitled, in my view, to take into account Ms. Etzel's admission that she and Mr. Charlie communicated about the events in question both before and after the appellant's arrest.

[43] Accordingly, I am of the opinion that when the alibi evidence is considered in its totality, the judge's conclusions are entitled to deference.

[44] Nor has it been established, in my view, that the judge improperly inferred the appellant's guilt on the basis that the alibi evidence was "contrived".

[45] Where a proffered alibi is disbelieved and there is evidence linking the accused to the concoction or fabrication of that alibi, the trier of fact may consider the proffered false alibi as incriminating evidence indicative of the accused's consciousness of guilt: *R. v. Hibbert*, 2002 SCC 39 at paras. 61−63. Yet the consciousness of guilt inference cannot legitimately arise from only a process of "circular reasoning", whereby the disbelief of the alibi evidence, without anything more, is relied upon as evidence of guilt: *Tessier* at para. 68.

[46] I agree with the Crown on this point that the appellant's submission amounts to mere speculation that the judge moved from disbelieving the appellant and Ms. Etzel's alibi evidence to drawing a consciousness of guilt inference against the appellant without sufficient proof of the appellant's participation in a deliberate effort to fabricate his alibi.

[47] Accordingly, I would not accede to this ground of appeal. The appellant has not established that the judge erred in disbelieving the alibi evidence. Nor has he shown that the judge improperly relied upon the rejection of the alibi as a basis for inferring guilt.

Conclusion

[48] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"