Date: 20030527
Docket: C.A. 02-YU483
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

ORAL REASONS FOR JUDGMENT:

CORAM: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Veale

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

AND:

ROBERT SHORTY

Appellant

LOUDOVIC GOUAILLIER — Appearing for the Respondent

GORDON COFFIN — Appearing for the Appellant

REASONS FOR JUDGMENT

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[1] ROWLES J.A. (Oral): This is an appeal from conviction on June 24, 2002, in the Territorial Court of the Yukon, on a charge of sexual assault.

[2] The grounds of appeal, as it is set out in the appellant's factum, the trial judge erred:

1) In his assessment of the evidence and failure to properly apply the principles in *R. v. W.D.,* [1991] 1 S.C.R. 742;

2) In failing to address significant inconsistencies in the evidence of the Crown witnesses;

3) In failing to identify reasons for rejecting the appellants evidence.

[3] The evidence was that the complainant, who was aged 15 at the time of the alleged offence, had been drinking with two other young friends during the evening of January 18, 2002. The three young people eventually went to the complainant's home in a small community in the Yukon, where a number of people were sleeping, including the appellant. Now the complainant, Ms. Redies and Mr. Charlie, then went into the complainant's bedroom and there was some more drinking.

[4] In the early morning of January the 19th, the complainant went to bed. When she did so, she was wearing shorts or slacks, underwear, a tee-shirt and a bra. The next thing that the complainant recalled was being awakened by Ms. Redies, one of her friends. At that time, her pants and her underwear were down at her feet and her bra was undone. Ms. Redies testified that she was sleeping in the living-room and heard "stuff moving around in the bedroom." She went in and saw the appellant on top of the complainant. According to Ms. Redies, the appellant was wearing a shirt and his pants were down around his feet. Ms. Redies went outside and got a stick and struck the appellant with it. She said the appellant then got off the bed and went into the living-room.

[5] The other friend, Mr. Charlie, who had come back to the complainant's home, also testified. He said that he had not been in a fight that night with the appellant. He had not seen Ms. Redies fight with the appellant.

[6] Now there were inconsistencies in the testimony of the three Crown witnesses as to what happened after the complainant had been awakened.

[7] In his testimony, the appellant said that he had been drinking throughout the day and had fallen asleep in the complainant's home. He awoke when Mr. Charlie dug in his pockets for cigarettes. He said that sometime later the complainant, Ms. Redies and Mr. Charlie started to yell at him, accusing him of raping the complainant.

[8] His evidence was that there was no physical confrontation between himself and anyone else. He denied having sexual relations or any contact at all with the complainant that night.

[9] The appellant gave evidence as to what he had to drink. He said that he was drunk but that he knew what was going on around him.

[10] The evidence of Ms. Redies and Mr. Charlie was to the effect that he was "really drunk" and " pretty dammed well drunk."

[11] The complainant was examined by a nurse two days, I believe it was, after this alleged assault. There was no bruising of her genitals or anal areas noted. There was also expert evidence that had there been penetration, there was close to a 68 percent chance that the appellant would have contracted an infection that the complainant had.

[12] After referring to the evidence, the trial judge stated his conclusions:

> The key findings on all of the evidence are as follows: that no penetration happened in this case, this conclusion

> flows from the medical evidence of the nurse. I also conclude that Ms. Redies, had no ability to see the details of a sexual assault, either from the perspective that she had of it, or due to the lighting in the room.
>
> While you were significantly intoxicated at the time, Ms. Redies had been drinking but was not significantly intoxicated.
>
> The victim was asleep during the alleged sexual assault and she was awakened by being slightly shaken by Ms. Redies. She went to bed fully clothed, and she woke up with her pants down around her ankles.
>
> There is no motive for fabrication by Ms. Redies in this case. Her testimony, on all the salient points, was credible. She had a clear opportunity to see the assault. From her perspective she could not be mistaken about who was committing the sexual assault, but could be mistaken about some details of the assault.
>
> It's clear, either Ms. Redies lied or you lied. Your evidence was not believable on many key points.
>
> Two salient features, the believability of Ms. Redies evidence and the fact that the victim in this case went to bed fully clothed and woke up with her clothes around her ankles are determinative in this case. Those two things, overcome any inconsistencies in the evidence and lead to no other choice, but to convict you on the charge before this court.

[13] The grounds of appeal that have been put forward, and to which I have already referred, are interrelated and to some extent I will deal with them together. I should add that counsel for the appellant stressed one particular aspect of the evidence, that is the ability of Ms. Redies to make the observations that she said she made in her testimony.

[14] In his factum, the appellant argues that the trial judge erred in his assessment of the evidence and failed to apply the *R. v. W.D.*, *supra*, formulation which sets out a

three-step process the trier of fact should apply in assessing the evidence when an accused has testified. What prompts the appellant's argument in this case is the trial judge's observation at paragraph 13 of his reasons that:

> ...either [that] Ms. Redies lied or you lied.

[15] The appellant contends that the trial judge instructed himself that he had to believe either Ms. Redies or the appellant in order to determine whether the charge was proven beyond a reasonable doubt. The appellant also submits as part of that first ground that the trial judge failed to appreciate significant inconsistencies in the evidence of the three Crown witnesses, and internal inconsistencies in the evidence of Ms. Redies.

[16] If the trial judge had instructed himself in the manner that the appellant contends, the instructions would follow the danger identified in *R. v. W.D.*, *supra*, of excluding the alternative: The trier of fact, without believing the accused, may still have a reasonable doubt as to his guilt after considering the accused's evidence and the context of the evidence as a whole.

[17] I am unable to agree that the trial judge misdirected himself in the manner that the appellant has suggested, or that he failed to appreciate or consider inconsistencies in the evidence or failed to consider the opportunity that Ms. Redies had to observe what she said she observed, and to identify the appellant.

[18] In referring to the evidence, the trial judge noted the appellant was "quite intoxicated at the time," and that his evidence "principally tracks the Crown's evidence up to moment of the assault." The trial judge then said:

> Ms. Redies' evidence is the primary basis upon which the Crown proceeded. Her demeanor was consistent with the nature of the testimony she gave. Her age and maturity affects her evidence, but only slightly overall. Some of her evidence, especially the details of the sexual assault, I agree with your counsel were prompted by, in many respects by, the choices provided by Crown. Her evidence in chief needed to be prompted in several key turnings of the evidence. However, she was certainly clear that she had seen you on top and with your lower clothes down to your ankles and that you were moving your body in a sexually assaultive manner. There was no significant prospect that she could have been confused about who was involved in this sexual matter unless she made up the entire story.
>
> Mr. Ashley's evidence was not determinant of any of the key points in testimony. The major inconsistencies around whether a fight happened or not did not, in my mind, raise or cast significant doubt about any salient testimony.

[19] It is clear from those passages that the trial judge was alive to the inconsistencies in the evidence of the Crown and in the evidence as a whole. When the statement of the trial judge that either Ms. Redies lied or the appellant lied is read in context, it does not indicate that he reached his decision by choosing between the evidence led by the Crown and the evidence led by the appellant or that he instructed himself in such a manner.

[20] Moreover, the reasons, when read as a whole, show that the trial judge was not left in any doubt by the evidence of the appellant.

[21] The second and third grounds, as I indicated to begin with, are interrelated. On the second ground, the appellant submits that the trial judge failed to address significant inconsistencies in the evidence of the Crown witnesses. The appellant’s complaint is that the trial judge did not refer to all of the inconsistencies and merely

concluded that the believability of Ms. Redies, in addition to the description of the complainant's clothing, overcame the inconsistencies

[22] In making those submissions the appellant relies on *R. v. R.(D.),* [1996] 2 S.C.R. 291, at page 217-18, where there is a discussion of inadequate reasons. That was a case involving historical sexual assaults on children. Mr. Justice Major, for the majority, described the complainant's evidence in that case as bizarre and contradictory. In that case the trial judge did not identify the evidence on which the conviction was being based, and failed to address, according to Mr. Justice Major, the confusing evidence and separate fact from fiction.

[23] In the third ground of appeal, the appellant argues that the trial judge erred in failing to identify the basis for rejecting the evidence of the appellant. I am unable to agree with the submissions put forward on those grounds.

[24] The present case is not complex, as the trial judge observed at the outset of his reasons. The basic facts are "fairly simple." There were inconsistencies in the evidence of the Crown witnesses, but as I have already said, the trial judge was alive to them.

[25] In this case, unlike *R. v. D. v. L.R*. the trial judge identified the evidence on which he was relying in convicting the appellant.

[26] Ms. Redies, in identifying the appellant, whom she knew, had the opportunity to make observations over a period because, as indicated earlier, she had come into the room. She said that there was a light in the hall behind, she had gone out and got a stick and had brought it in and struck the appellant.

[27] In my opinion, the appellant failed to demonstrate any errors in principle or in the trial judge's appreciation of the evidence. Accordingly, I would dismiss the appeal.

[28] HALL J.A: I agree.

[29] VEALE J.A.: I agree.

[30] ROWLES J.A.: The appeal is dismissed. Thank you, counsel.

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ROWLES J.A.