

COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***HMTQ v. Stewart,***
2003 YKCA 15

Date: 20031110
Docket: YU0499

Between:

Her Majesty the Queen

Respondent

And

Thomas Stewart

Appellant

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

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Respondent

Place and Date:

Vancouver, British Columbia
November 10, 2003

[1] **THACKRAY, J.A.:** This Court has had the opportunity well in advance to read the carefully prepared factum of the appellant. As my colleague, Madam Justice Rowles, has said, we have also read the respondent's factum and the reasons for judgment of the trial judge. We have thereby found it unnecessary to call upon Crown counsel on this oral hearing.

[2] This is an appeal against conviction by Mr. Stewart. He was convicted of sexual assault contrary to s.271 of the **Criminal Code**. The trial of the action was heard by Faulkner T.C.J. in the Territorial Court of the Yukon. The citation is 2003 YKTC 56.

[3] The issue on this appeal is whether the verdict is unreasonable or cannot be supported by the evidence: see **R. v. Yebes**, [1987] 2 S.C.R. 168. At trial the defence case was that the appellant was not the only person with the opportunity to have committed the sexual assault which admittedly occurred. He alleges that the trial judge "placed too much weight and credibility on the evidence of Robert Stone and George Stewart."

[4] In the afternoon of 22 December 2002 Mr. Stewart and the complainant, Ms. M.H., were at the Gate way Bar at Watson Lake, Territory of the Yukon. The complainant had been drinking alcohol of various forms throughout the day. She went to her apartment where she was joined by Robert Stone, Lyndon Johnny and the appellant. She testified that she remembers only "bits and parts" of what happened thereafter in that she was "pretty foggy" due to the consumption of alcohol.

[5] She testified as follows:

Q And what did you find when you got back to your apartment?

A I walked in and I believe there was Robert Stone and Lyndon there at the time when I walked in. The next thing I come to, I was in the room sitting on the bed talking to George. We were talking - I was talking; I remember I was sitting on the bed talking to George. He was trying to talk to me, keep me on the phone before his ride got there. Then next thing I know, someone sat beside me on the bed and it was Thomas and he kept bugging me, trying to - kept bugging me and that and I kept telling him to - excuse me for my language, but I kept telling him to fuck off and leave me alone, get lost. Like I tried telling him to leave me alone but he kept bugging me.

Q How did you know it was Thomas?

A Because I knew it was him sitting beside me on the - on the side of my bed.

...

Q Do you remember anything else happening while you were on the bed?

A When I come to I was on the bed and someone was fiddling around with my buckle and trying to yank at it. The next thing, that came off, the next thing I know, my feet hit the edge of the bed; that's when I come to: I seen him standing in front of me. An I know I was trying to fight

him off me, I know - I remember bits and parts of it very vaguely, blurry bit, but I remember bits and parts of it so I know -

Q Why are memories of it vague, do you think?

A Because I was pretty foggy; I was drinking at the time, too.

Q Now, you indicated that you felt someone fumbling at your belt or at your buckle, rather? A. Yeah.

Q And then you felt your feet hit the edge of the bed. What caused your feet to hit the edge of the bed?

A Him removing my pants.

[6] In cross-examination the complainant testified that she knew it was the appellant who was sitting on the bed with her and "bugging" her. Then she was asked and testified as follows:

Q But you don't know who was pulling your pants off later on, do you?

A I do know it was him. After my feet hit the foot of the bed, the edge of the bed; where I was laying on my bed, my feet hit the - and who do I see very foggy, vaguely, foggy. That was him. I recognize him. I still got a bit of memory here and there.

[7] She was speaking of the appellant.

[8] The trial judge concluded that the identity of the perpetrator of the assault was the only issue in the case. He acknowledged that "it would be unsafe to convict the accused on her [the complainant's] evidence standing alone." However, he said that there was "additional evidence" from George Stewart and Robert Stone that gave "some evidence capable of supporting the complainant's version of the events."

[9] The trial judge noted that Mr. George Stewart confirmed that the complainant complained about the appellant bothering her and that he could hear his brother talking to the complainant. The trial judge also recorded in his reasons that Mr. George Stewart testified that the appellant said words to the effect of "Don't you share with your brother?" He said that comment clearly implicated the accused as being intent upon having sexual contact with the complainant.

[10] The trial judge also commented upon the evidence of Mr. Stone. He cautioned himself about the accuracy of Mr. Stone's evidence, noting, however, that Mr. Stone was a reluctant witness. He said that for the reasons that Mr. Stone was "very reluctant to give that evidence ... it strikes me as being credible." The evidence to which he was referring was Mr. Stone's testimony that he heard the complainant call out for assistance and that he entered the bedroom and saw the complainant and the appellant struggling on the bed, the complainant being without her pants.

[11] The appellant submits that the trial judge erred "in attaching a higher level of credibility to the evidence of Robert Stone because he was a reluctant witness." The appellant argues, based upon *R. v. W.(R.)*,

[1992] 2 S.C.R. 122; 74 C.C.C. (3d) 134 and **Burke v. The Queen**, [1996] 1 S.C.R. 474; 105 C.C.C. (3d) 205, that this Court has the power to overturn a verdict based on finding of credibility.

[12] In **W.(R.) McLachlin J.**, on behalf of the Court, noted that appeal courts are properly engaged in a review of facts pursuant to s. 686(1)(a)(i) of the **Criminal Code**. This is done in order to answer the test as to whether a jury, acting judicially, could have rendered the verdict in question. She then said: (p.131)

It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility....

[13] McLachlin J. then noted the importance of taking into account the special position of the trier of fact on matters of credibility. However, she added that as a matter of law it is open to an appellate court to overturn a verdict based on findings of credibility where it concluded that the verdict was unreasonable.

[14] In **Burke**, Sopinka J., on behalf of the Court, quoted the above-noted passages. He then said that this is a power that an appellate court "will exercise sparingly." He said that this power "was intended as an additional and salutary safeguard against the conviction of the innocent."

[15] In the case at bar, counsel for the appellant submitted that the trial judge "erred in finding Robert Stone a credible witness" in the face of evidence that he had lied to the RCMP and to a prosecutor about the events in this case. He further contended that the trial judge ignored inconsistencies between Robert Stone's evidence and the evidence of other witnesses.

[16] The other submissions of the appellant were that the trial judge placed too much weight on the evidence of Mr. George Stewart and that others than the appellant had the opportunity to commit the sexual assault.

[17] With respect, I cannot find, in the evidence, support for those submissions. The trial judge said that the testimony of Mr. George Stewart and Mr. Robert Stone was "capable of supporting the complainant's version of the events." He did not simply blindly accept it.

[18] The trial judge reviewed the testimony of Mr. George Stewart and found that it clearly implicated the accused. As to the testimony of Mr. Stone, the trial judge cautioned himself that it "should be viewed with caution" and referred specifically to different versions that he had given

to the police and to the prosecutor. He nevertheless found that there was credible evidence from Mr. Stone regarding the complainant's call for help and his viewing of the struggle on the bed.

[19] I can find nothing in the reasons to suggest that the trial judge was unaware of the potential for one of the other attendees at the apartment having been the perpetrator of the assault. Indeed, the trial judge said that identity was the only issue. He was thereby considering whether it was proven that the appellant was the person who committed the crime. In doing so the trial judge made it clear that he was aware of the presence of the other men in the apartment and of the opportunity they had to commit the assault.

[20] While *W.(R.)* and *Burke* are authority that an appellate court can reverse a verdict that was based on a credibility finding, the message is equally clear that this is a power that will be used sparingly. That means that it will only be used in cases where it is satisfied that the verdict was unreasonable and not supported by the evidence.

[21] That is not, in my opinion, the situation in the case at bar. Indeed, the findings of the trial judge and his articulation of the process by which he came to his decision, fully, in my opinion, support a guilty verdict.

[22] I would dismiss the appeal.

[23] **ROWLES, J.A.:** I agree.

[24] **LOWRY, J.A.:** I agree.

[25] **ROWLES, J.A.:** The appeal is dismissed.

"The Honourable Mr. Justice Thackray"