NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Lake, 2005 NSCA 162

Date: 20051215
Docket: CAC 250052
Registry: Halifax

Between:

Paul Eldon Lake

Appellant

v.

Her Majesty the Queen

Respondent

Revised judgment: The text of the original judgment has been corrected according to the erratum dated **February 15, 2006.**

Judge(s): MacDonald, C.J.N.S., Freeman, Fichaud, JJ.A.

Appeal Heard: November 14, 2005, in Halifax, Nova Scotia

Held: Appeal is allowed per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Freeman, J.A. concurring.

Counsel: James White, for the appellant
Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] After a trial before a judge alone Mr. Lake was convicted of assault. The verdict turned on credibility. The trial judge believed the Crown's witnesses who testified that Mr. Lake committed the assault. Mr. Lake's testimony denied the assault. The trial judge's reasons say nothing about Mr. Lake's credibility. The principal issue is whether the trial judge properly applied the first *W. (D.)* test governing belief of the accused.

Background

[2] Mr. Lake was charged with assault contrary to s. 266(a) of the *Criminal Code*. He was tried before Provincial Court Judge Claudine MacDonald on February 15, 2005.

[3] The Crown called three witnesses, the complainant Anita Cyr, Donna MacUmber and Jeffrey MacUmber.

[4] Ms. Cyr testified as follows. She and Mr. Lake shared a home. On June 13, 2003 Mr. Lake told her that he was leaving. She became angry. Mr. Lake left the home, entered his vehicle and drove onto the street. Ms. Cyr followed. She leaned into the passenger window of the vehicle to retrieve her cell phone. Then Mr. Lake punched her face with his fist at least four times.

[5] Mr. and Mrs. MacUmber testified that as they were driving their vehicle nearby, they saw Ms. Cyr leaning into the car window being beaten by Mr. Lake.

[6] Mr. Lake testified that Ms. Cyr entered the passenger side of the car. He denied punching her. He said Ms. Cyr was angry, tore off one of the car's sun visors and hit Mr. Lake with the visor. He testified that she then ripped out the glove compartment container and hit Mr. Lake with that. According to Mr. Lake, while the car was moving, Ms. Cyr tried to grab the gear lever to shift from drive into park or reverse. Mr. Lake said that he was worried about his safety and, while trying to push her away, his elbow hit Mr. Cyr in the face. He said that was his only physical contact with Ms. Cyr.

[7] The trial judge issued a decision on March 1, 2005 which convicted Mr. Lake of assault. The trial judge began by stating:

[1] . . . The Crown must prove the essential elements of the offence beyond a reasonable doubt before a person can be found guilty of an offence.

After reviewing Ms. Cyr's testimony, the trial judge said:

[4] . . . I accept her evidence with respect to the fact that she went out to the vehicle; that she had half of her body through the window of the vehicle; that she is reaching in and that Mr. Lake did indeed assault her in the way that was described by her.

After reviewing the testimony of all three Crown witnesses, Ms. Cyr and Mr. and Mrs. MacUmber, the trial judge stated:

[11] However, nonetheless, the fact is insofar as her [Ms. Cyr's] evidence with respect to the assault itself is concerned and when I consider all of the evidence as it relates to that I am satisfied beyond a reasonable doubt that the Crown has indeed proven the essential elements of the offence.

At this point in her reasons, the trial judge had not mentioned the defence evidence. Then the trial judge discussed Mr. Lake's testimony:

[12] What Mr. Lake testified to was that he was in the vehicle. His evidence was to the effect that it was around 4:30, 5 o'clock in the evening. That he had told Ms. Cyr that he was, he went to the house to pick up some of his things. That he got in the vehicle. That there was some discussion, I'll put it that way. That what took place really was that in fact he was the person who was assaulted and that the only time that he applied any force to the person of Ms. Cyr was when she was trying to grab the steering wheel and trying to get the vehicle to stop which was putting them in a very dangerous situation as he was trying to drive the vehicle and this taking place. So that's his evidence.

[13] His evidence further is that he was in fact assaulted with the visor and that may very well be so, but the fact and what I find to be the fact is that at the start of this incident that took place on June 13 that Mr. Lake did what Ms.Cyr described he did to her and what Ms. Macumber and Mr. Macumber witnessed taking place and in fact it resulted in Mr. Macumber making the phone call to 911 in order to deal with the situation that caused them concern.

The reasons are silent on Mr. Lake's credibility. The trial judge did not say that she disbelieved Mr. Lake's denial of the assault. She concluded:

> [14] So considering all of the evidence and as I said considering the heavy burden of proof I am satisfied that the Crown has indeed met that burden and I find Mr. Lake guilty of the offence of committing an assault on Anita Louise Cyr.

Nowhere did the trial judge mention *R. v. W.(D.)*, [1991] 1 S.C.R. 742 or the three principles in Justice Cory's instruction.

[8] In a separate decision of June 7, 2005, the trial judge sentenced Mr. Lake to three months incarceration.

[9] Mr. Lake applies for leave to appeal and, if granted, appeals conviction and sentence under s. 675 of the *Code*.

Issues

[10] Mr. Lake submits that the trial judge misapplied the tests in *W.(D.)* governing the burden of proof when credibility is in issue. Mr. Lake's factum focused principally on Justice Cory's third question from *W.(D.)* - whether, on the basis of the evidence which the trial judge accepts, the trial judge is convinced beyond a reasonable doubt of the guilt of the accused. At the hearing, Mr. Lake's counsel also submitted that the trial judge failed to respond properly to the first and second questions. The court offered the Crown an opportunity to file further written submissions respecting the first and second *W.(D.)* questions. The Crown declined, and preferred to proceed at the hearing with its response to all three *W.(D.)* issues.

[11] Mr. Lake also submitted that the trial judge failed to give adequate reasons to address her findings on the contradictory evidence, contrary to *R. v. Sheppard*, [2002] 1 S.C.R. 869, and that the sentence was unfit.

The W.(D.) Tests

[12] In *W.(D.)*, at pp. 757-58, Justice Cory discussed the appropriate jury instruction in a case which depends on credibility:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable

> doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin, supra*, at p. 357. [Justice Cory's emphasis]
>
> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > 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.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

To the same effect *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 531-33.

[13] The trial judge did not say she disbelieved Mr. Lake. The issue is whether she applied the first *W.(D.)* principle:

> . . . Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. [Justice Cory's emphasis]
>
> . . .
>
> . . . First, if you believe the evidence of the accused, obviously you must acquit.

[14] The verdict depends ultimately on whether there is a reasonable doubt - *W.(D.)'s* second and third questions: *R. v. Sheppard*, [2002] 1 S.C.R. 869 at ¶ 65.

But a positive answer to *W.(D.)'s* first question mandates an acquittal. So the first question is an essential step: *R. v. Chittick*, 2004 NSCA 135 at ¶ 23-24. It is fundamental that, when the verdict turns on the accused's credibility, the trial judge's reasons should disclose whether she believes or disbelieves the accused.

[15] *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction. *R. v. Boucher*, 2005 SCC 72 at ¶ 29 and 59; *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542 (O.C.A.), at ¶ 22; *R. v. Brown* (1994), 132 N.S.R. (2d) 224 (C.A.) at ¶ 17 and 19; *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (O.C.A.) at ¶ 33, leave to appeal denied [2004] SCCA No. 340; *R. v. Saulnier*, 2005 NSCA 54 at ¶ 17, 19, 35, 37; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (O.C.A.) at p. 203; *R. v. Robicheau* (2001), 193 N.S.R. (2d) 42 (N.S.C.A.), at ¶ 27, per Roscoe, J.A. dissenting, adopted by the Supreme Court of Canada [2002] 2 S.C.R. 643; *R. v. Mah,* 2002 NSCA 99, at ¶ 41; *Chittick*, at ¶ 21; *R. v. Binnington*, 2005 NSCA 133, at ¶ 10.

[16] The Crown says it is implicit that the trial judge disbelieved Mr. Lake. No other conclusion, it is suggested, is consistent with the trial judge's finding:

> [13] . . . what I find to be the fact is that at the start of this incident that took place on June 13 that Mr. Lake did what Ms. Cyr described he did to her and what Ms. Macumber and Mr. Macumber witnessed taking place . . .

[17] An implied answer to one of *W.(D.)'s* questions clearly is acceptable. In *R. v. Boucher*, (SCC) at ¶ 29 and 59, the majority and dissenting judges agreed that, when a trial judge clearly rejects an accused's credibility, this not only answers *W.(D.)'s* first question but also may imply a negative answer to *W.(D.)'s* second question. To similar effect: *R. v. Smaaslet*, 2004 BCCA 432 at ¶ 8, 21; *R. v. Nelson*, [2004] O.J. No. 3103 (O.C.A.), at ¶ 19; *R. v. M.A.L*, 2005 BCCA 395 at ¶ 47-48.

[18] Mr. Lake's case is one step removed from these examples. The trial judge did not reject Mr. Lake's credibility. She just accepted the credibility of the Crown witnesses. Does that suffice to imply a negative answer to *W.(D.)'s* first question?

[19] At this point it is important to recall the essential principles which underlie the *W.(D.)* instruction. A trial judge is, of course, fully entitled to believe the Crown witness and disbelieve the accused. But she must respect the burden of proof. When the trial pits the credibility of the Crown witnesses against the credibility of the accused, the burden of proof is at risk in two ways.

[20] First, a verdict based on a choice of whom to believe may ignore the concept of reasonable doubt: eg. *Saulnier* ¶ 36-38, *R. v. Mah*, ¶ 42-46. This concern is addressed by the second and third *W.(D.)* questions. The trial judge here did not ignore reasonable doubt. She began:

> The Crown must prove the essential elements of the offence beyond a reasonable doubt.

She concluded:

> So considering all of the evidence and as I said considering the heavy burden of proof I am satisfied that the Crown has indeed met that burden.

Although the trial judge did not cite *W.(D.)* or its listed principles, she considered the principle of reasonable doubt.

[21] Second is the concern which arises here. The trial judge may discount the accused's testimony just because she has believed the Crown witnesses. The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W.(D.)'s* first question.

[22] The analysis of both the accused's testimony and the Crown's evidence is done with full knowledge of all the evidence that has been adduced at the trial. The first *W.(D.)* question does not vacuum seal the accused's testimony for analysis. In *W.(D.)*, p. 757, Justice Cory cited *R. v. Morin*, [1988] 2 S.C.R. 345

which, at pp. 354-55, 357-58, rejected the piecemeal analysis of individual segments of evidence for reasonable doubt. The point of *W.(D.)'s* first question is not to isolate the accused's testimony for assessment, but to ensure that the trier of fact actually assesses the accused's credibility, instead of marginalizing it as a lockstep effect of believing Crown witnesses.

[23] There is ample support in the case law for these principles.

(a) *R. v. Maharaj*, Justice Laskin for the court stated:

> [30] The trial judge's statement "that for me to have made these findings of fact, I reject outright Mr. Maharaj's denials" suggests that he may have engaged in the following forbidden reasoning: I accept the evidence of the complainant A.G.; the appellant's evidence differs from A.G.'s evidence on material matters; therefore I do not believe the appellant's evidence. This reasoning is forbidden because it appears to shift the burden of proof onto the appellant to explain away the complainant's evidence.

To the same effect *R. v. Strong*, [2001] O.J. No. 1362 (O.C.A.) at ¶ 9.

(b) In *R. v. Guan*, 2002 BCCA 542, at ¶ 23-24, Justice Smith for the Court of Appeal stated:

> 23 The trial judge's statements in that passage that he "carefully assessed the credibility" of the complainant, and that he found her to be "reliable and truthful", without any mention of having carefully assessed the credibility of the appellant in the context of the whole of the evidence in order to determine whether his evidence raised a reasonable doubt, suggest that he failed to approach his analysis of the evidence in the manner mandated by R. v. W.(D). The strength of that observation is amplified by his statement that since he accepted the complainant's version he "accordingly" rejected the appellant's evidence.
>
> 24 In my respectful view, to reject the appellant's evidence as a consequence of believing the complainant is wrong.

(c) In *R. v. Jeng*, 2004 BCCA 464, at ¶ 37, Justice Ryan stated:

> 37 The appellant's first point in his factum is that the trial judge characterized the issues as a credibility contest. Where a complainant and an accused give two different versions of an event, the trier of fact must attempt to resolve the issue of credibility. To convict, the trier of fact must not only believe the complainant, she must reject the evidence of the accused.

To the same effect: *M.A.L.* (B.C.C.A.) at ¶ 44.
(d) In *R. v. C.J.L.*, 2004 MBCA 126, at ¶ 50-53, 60-64, Justice Freedman for the Manitoba Court of Appeal made similar comments.

[24] I am not satisfied that the trial judge actually assessed Mr. Lake's credibility as required by the principle which underlies *W.(D.)'s* first question.

[25] After discussing Ms. Cyr's testimony, the trial judge said:

> [4] . . . I accept her evidence with respect to the fact that she went out to the vehicle; that she had half her body through the window of the vehicle; that she is reaching in and that Mr. Lake did indeed assault her in the way that was described by her.

The trial judge found that Mr. Lake "did indeed assault her" before any reference to Mr. Lake's denial.

[26] The trial judge then reviewed the testimony of the other two Crown witnesses and stated:

> [11] . . . I am satisfied beyond a reasonable doubt that the Crown has indeed proven the essential elements of the offence.

This again was before any reference to the defence evidence.

[27] Only then did the trial judge mention Mr. Lake's testimony. After summarizing his denial, her only comment was, "So that's his evidence". The reasons omit even an adjective to signal the trial judge's view of Mr. Lake's credibility.

[28] The reasons for judgment give every appearance that the trial judge decided: first to believe the Crown witnesses; second, based on this belief, the Crown had proven its case; and third, as a result of the first two conclusions, Mr. Lake's opposing testimony must be discounted. Nowhere did the trial judge say a word about Mr. Lake's believability. It appears that, solely because she believed the Crown witnesses, the trial judge marginalized Mr. Lake's testimony, without actually assessing then disbelieving it. This is inconsistent with an essential principle that underlies the *W.(D.)* instruction. So I cannot imply a negative answer to *W.(D.)'s* first question.

[29] Had the trial judge answered the first *W.(D.)* question either expressly or impliedly but with deficient reasons, the appeal court could consider whether to remedy that deficiency with its own reasons. Where the Crown's case is clear, a deficiency in reasons for a *W.(D.)* finding has been resolved by the appeal court's own analysis to support the conviction, without a new trial: eg. *Binnington*, at ¶ 21; *R. v. Tzarfin*, 2005 O.J. No. 3531 (O.C.A.) at ¶ 10-11; *Nelson* at ¶ 18-19; *R. v. R.L.,* 2002 O.J. No. 3061 (O.C.A.) at ¶ 3. The appeal court acts under s. 686(1)(b)(iii) of the *Code*: *Sheppard*, at ¶ 55(10); *R. v. Braich*, [2002] 1 S.C.R. 903 ¶ 41-42. That does not apply here. The concern here is the reasoning, not the reasons. The trial judge did not expressly or impliedly answer the first *W.(D.)* question. The accused's credibility is a basic trial issue which should not be assessed for the first time in the Court of Appeal. This is not a ground of appeal based on a suggested unreasonable verdict, where the appeal court has a limited power to review credibility under *R.v. Burke*, [1996] 1 S.C.R. 474. At the hearing of this appeal, the Crown confirmed that the Crown is not asking this court to consider the curative proviso in s. 686(1)(b)(iii).

Conclusion

[30] Given my conclusion on the *W.(D.)* issue, it is unnecessary to consider the other grounds of appeal - the sufficiency of reasons to explain contradictions in evidence and the fitness of the sentence. I would allow the appeal and order a new trial which may be initiated at the discretion of the Crown.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Freeman, J.A.