NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Davidson*, 2022 NSCA 85

Date: 20221220
Docket: CAC 512662
Registry: Halifax

Between:

Paul Gordon Davidson

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: November 29, 2022, in Halifax, Nova Scotia

Subject: Credibility assessment; sufficiency of reasons

Summary: During the evening of July 22, 2018, the complainant suffered significant injuries consisting of bruises, abrasions, and scrapes over most of her body. She also sustained a broken foot. The complainant testified these injuries were caused by an hours long attack at the hands of the appellant, Paul Gordon Davidson, who confined her at his home, and threatened to kill her. The appellant, although acknowledging the complainant had been at his home on the evening in question, denies assaulting her. He says when she left his home after a short visit, she was uninjured.

After a trial without a jury in the Supreme Court of Nova Scotia the appellant was found guilty of three offences under the *Criminal Code* of Canada, namely aggravated assault

(s. 268) , unlawful confinement (s. 279(2)) and uttering a threat to cause death (s. 264.1(1)(a)).

The appellant sought to challenge his convictions in this Court.

Issues:

(1) Did the trial judge err in his application of *R. v. W.(D.)* resulting in a flawed credibility assessment?
(2) Did the trial judge misapprehend the evidence giving rise to a miscarriage of justice?
(3) Were the trial judge's reasons insufficient?

Result: Appeal dismissed.

The trial judge's credibility assessment was not tainted by legal error, nor did he misapprehend the evidence. The trial judge's reasons were sufficient.

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Appellant

v.

His Majesty the King

Respondent

Judges:	Wood, C.J.N.S., Bryson and Bourgeois, JJ.A.
Appeal Heard:	November 29, 2022, in Halifax, Nova Scotia
Written Release	December 20, 2022
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Wood, C.J.N.S., and Bryson, J.A. concurring
Counsel:	Daniel J. MacIsaac, for the appellant Glenn A. Hubbard, for the respondent

Reasons for judgment:

[1] During the evening of July 22, 2018, the complainant suffered significant injuries consisting of bruises, abrasions, and scrapes over most of her body. She also sustained a broken foot. The complainant testified these injuries were caused by an hour's long attack at the hands of the appellant, Paul Gordon Davidson, who confined her at his home, and threatened to kill her. The appellant, although acknowledging the complainant had been at his home on the evening in question, denied assaulting her. He said when she left his home after a short visit, she was uninjured.

[2] After a trial without a jury in the Supreme Court of Nova Scotia, Justice Patrick Murray found the appellant guilty of three offences under the *Criminal Code of Canada*, namely aggravated assault (s. 268) , unlawful confinement (s. 279(2)) and uttering a threat to cause death (s. 264.1(1)).

[3] The appellant seeks to challenge his convictions in this Court. After having heard from the parties at the hearing, the panel advised the appeal was dismissed, with reasons to follow. These are the reasons.

Background

[4] The trial was held over two days – August 13 and September 22, 2021. The Crown called the complainant, her friend Mary Anne MacDonald, and two police witnesses. The Crown introduced a series of photographs of the complainant taken by the RCMP several days after the alleged assault (Exhibit 3). The appellant testified in his own defence and also called two witnesses, Donna MacNeil and Caroline MacLean.

[5] In his unreported reasons, the trial judge reviewed the evidence offered by the various witnesses at trial. It was common ground the complainant and appellant had been involved in an intimate relationship in the past. It was also uncontested the complainant had been at the appellant's home on the evening of July 22, 2018, his birthday.

[6] The trial judge noted the complainant testified she attended at the appellant's home around 10 p.m., at his invitation, and that he was home when she arrived. Prior to going to the appellant's home, the complainant said she left her child with

Mary Anne MacDonald for the night. As to the complainant's evidence regarding the assault, the trial judge wrote:

> [13] In her lengthy testimony, [the complainant] described in detail, a long ordeal with P.D., during which she was subjected to a violent assault or series of assaults.
>
> [14] Specifically, [the complainant] testified that shortly after arriving, an argument ensued with P.D. who was, she said, very agitated. A confrontation ensued with P.D. She described significant aspects of the evening including the physical assaults, being pushed or knocked down constantly. She testified of her attempts to leave the residence, trying not to give P.D. reason to be even more upset. At one point she saw an opportunity to get out, she ended up being pushed off the step by P.D., landing on her foot, which was later determined to be broken. She was in terror, describing P.D. as a "narcissist psychopath". She testified that as a means of survival she attempted anything that would alter the situation, such as trying to get him in the bedroom as a means of changing his behaviour or stopping the violence.
>
> [15] She testified she was in a state of shock, and that P.D. was attacking her. He was grabbing at her bra, he was "like an animal", she said. Another time he had her outside and poured buckets of water on her head. This was at the horse trough. After being pushed to the ground from the step, she screamed, "Paul you are going to fucking kill me". She said he calmly replied "that's what I'm going to do and then I'm going to kill myself". She later said in direct examination he said he was going to kill her numerous times.
>
> [16] She identified the gravel that was embedded in the numerous cuts, breaks and blood on her skin, from being pushed, dragged and simply crawling as her foot was injured. She stated, she pleaded with P.D. for hours and hours to let her go.

[7] The trial judge related the evidence of Mary Anne MacDonald as follows:

> [39] ...Mary Ann MacDonald testified [the complainant] arrived to her place at 8:00 a.m. the next morning. Ms. MacDonald was shocked by [the complainant's] appearance as she watched her crawl from the vehicle. She sat with [the complainant] and helped her undressed (*sic*) and bathed. Ms. MacDonald testified at trial that the bruises, she witnessed, were larger and darker at that time than those shown to her in Exhibit 3. She confirmed the time of [the complainant's] arrival at her residence, that her clothes were torn, that her foot injured and she was unable to walk, crawling on the ground...

[8] The trial judge also reviewed the testimony of the appellant:

> [18] P.D. testified in his own defence. He stated, that he was away that evening at a birthday party, arriving home from the party around 12 midnight. [The complainant] was already there, he said, she was sitting in a chair and naked from the waist down.
>
> [19] P.D. testified that [the complainant] wanted to have sex with him and was expressing her wish that P.D. allow [her] and her family to move in with him. P.D. said the sex did not happen. He further testified that [the complainant] wanted him for this assets (money). He rejected these advances, he said.
>
> [20] In his evidence P.D. would often refer to what [the complainant] said in her direct testimony. He referred to her drinking vodka that evening, and wanting to get her sober. P.D. testified that [the complainant] visited for an hour and when she left she had no injuries or bruises. They discussed various things and people, he said.
>
> [21] P.D. said during their meeting they discussed a man named [K.C.], whom he said [the complainant] had been seeing that spring and summer. In cross-examination P.D. stated he had no idea where she went when she left his place, but "she claimed she was going down to [K.C.'s] place".
>
> [22] P.D. also suggested [the complainant] was going to report him to police, stating she said she "would fuck him up", for rejecting her and would "get him" if he did not "come to his senses".

[9] The trial judge noted the complainant did not go to the police until July 28, 6 days later. She testified her father had insisted she make a report.

[10] As referenced earlier, the appellant called two defence witnesses. Both said they were at a birthday party for the appellant on the evening in question and, consistent with his evidence, he left to go home at approximately midnight.

Issues

[11] The appellant sets out 17 grounds in his Notice of Appeal. Having considered the submissions of the parties and the record, the issues can be condensed and re-stated as follows:

1. Did the trial judge err in his application of *R. v. W.(D.)*, resulting in a flawed credibility assessment?

2. Did the trial judge misapprehend the evidence giving rise to a miscarriage of justice?

3. Were the trial judge's reasons insufficient?

Standard of Review

[12] I will address the relevant standard of review when considering each of the above issues in the analysis to follow.

Analysis

Did the trial judge err in his application of R. v. W.(D.), resulting in a flawed credibility assessment?

[13] The trial judge recognized credibility was the central issue for determination, and that his assessment was to be governed by the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[14] Both parties rely upon this Court's decision in *R. v. N.M.*, 2019 NSCA 4 ("*N.M.*") as setting out the applicable principles:

> [25] The following general principles are of assistance when considering the trial judge's *W.(D.)* analysis:
>
> - The purpose of the *W.(D.)* framework is to "explain what reasonable doubt means in the context of evaluating conflicting testimonial accounts" where the credibility of those accounts are at issue (*J.H.S.* at para. 9);
>
> - An allegation that a judge erred in applying *W.(D.)* is a question of law, reviewable for correctness (*R. v. J.A.H.*, 2012 NSCA 121 at para. 7);
>
> - Failing to use the precise wording in *W.(D.)* is not fatal, either before a jury (*W.(D).* at pg. 758*; J.H.S.* at para. 14), or by a judge alone (*R. v. Vuradin*, 2013 SCC 38 at para. 26);
>
> - An exact articulation of the three factors in *W.(D.)* will not prevent appellate intervention if a trial judge's reasons reveal that the underlying principle of reasonable doubt was not applied correctly (*R. v. J.P.*, 2014 NSCA 29 at paras. 62 to 64, 73 and 85);

- In considering a trial judge's reasons, they should not be "cherry-picked", or parsed, but rather considered as a whole to determine whether the trial judge correctly applied the principles *W.(D.)* intended to safeguard.

[15] Both parties further cite the following passage from *R. v. G.E.H.*, 2012 NSCA 69 regarding this Court's approach to credibility assessments:

> [15] The appellant submits that the judge erred in his assessment of credibility and reliability. The unique position that a trial judge enjoys in being able to see and hear the witnesses has been emphasized many times: see *R. v. Gagnon*, 2006 SCC 17 at ¶ 11; *R. v. R.E.M.*, 2008 SCC 51 at ¶ 68. Findings of credibility are entitled to deference and intervention on appeal is rare: see *R. v. Dinardo*, 2008 SCC 24 at ¶ 26. Appellate courts have been cautioned against substituting their decisions on credibility. They should not parse, dissect or microscopically examine a trial judge's reasons for judgment: *R. v. C.L.Y.*, 2008 SCC 2 at ¶ 11. Rather, the decision should be read as a whole.

[16] The appellant's trial strategy was two-fold. Firstly, he attempted to undermine the complainant's credibility by raising inconsistencies between her sworn police statement, her evidence at the preliminary inquiry and her trial evidence. Secondly, he attempted to bolster his own credibility (and challenge the complainant's) by adducing evidence regarding the timing of his departure from the birthday party the evening in question.

[17] The appellant argues the trial judge erred in concluding the complainant was credible in light of the inconsistencies brought out in her evidence. He further submits the trial judge also erred in finding he lacked credibility, and that his evidence did not raise a reasonable doubt as to his guilt. He says a proper application of *W.(D.)* should have resulted in an acquittal.

[18] With respect, there is no merit to the appellant's allegations of error. In reaching this conclusion, I note:

- This is not a situation where the trial judge ignored the purported inconsistencies being raised by the appellant. In his reasons, the trial judge noted:

> [24] [The complainant] was cross-examined at some length on the KGB statement given to police. The Defence submits [the complainant's] evidence at trial clearly differs from her earlier statement as well as the

> evidence given by her at the preliminary inquiry. This impacts her credibility, the Defence argues.
>
> . . .
>
> [49] The Defence has submitted that the evidence of [the complainant], is not credible, nor is it reliable. P.D.'s counsel has argued there are numerous inconsistencies in her story and, in particular, her evidence at trial compared to her KGB statement to the RCMP.
>
> [50] These submissions range from the number of times [the complainant] said she left the residence that night to the number of times she was in the bedroom with P.D. and the submissions about being forced to walk home, 2.5 hours, by P.D. Also included in these inconsistencies is her evidence at trial, that she wore swim shorts and not simply shorts, and the earlier referenced conversation with Donna MacNeil.

- The trial judge found the discrepancies and inconsistencies raised by the appellant, did "not detract from the [c]omplainant's credibility in a significant way". This is a finding, absent a clear underlying error in principle, to which this Court owes deference. The appellant has not demonstrated such an error;

- A review of the record satisfies me that the purported inconsistencies in the complainant's evidence either relate to inconsequential details, or are not clear discrepancies as alleged. For example, a significant detail argued at trial was the location of the horse trough on the appellant's property, and whether the complainant had been near it on the evening in question. The complainant testified the appellant had dumped buckets of water over her head that he had gotten from the horse trough. Where the horse trough was located and whether the complainant was near it were details that did not prevent the trial judge from accepting her evidence that she had sustained a lengthy assault perpetrated by the appellant;

- Referencing the complainant's evidence, the corroborating evidence of Mary Anne MacDonald and the photographs, the trial judge provided a reasoned explanation as to why he found her to be credible;

- With respect to the appellant, the trial judge also explained why he found him to be unbelievable. Although not lengthy, the trial judge's observations are supported by a review of the record:

> [64] Having considered the evidence of P.D., I have found it to be general, lacking in detail, with no coherent structure or order to the testimony. It lacked context, was anecdotal and was somewhat vague at times.

- The trial judge did not err in his treatment of the evidence provided by the two defence witnesses. It is the prerogative of the trial judge to weigh the evidence before him. He explained why he gave it little weight:

> [69] In terms of the evidence given by the defence witness, Donna MacNeil and Carolyn MacLean, both have known [P.D.] for some time. Ms. MacLean admitted in cross-examination there would be no reason for her to remember the specific time P.D. left, back in 2018. Both of these witnesses discussed these charges with P.D. prior to trial. I have difficulty accepting their testimony as objective and unbiased evidence. Accordingly I have assigned little weight to their evidence.

[19] The trial judge was alive to the evidence and, in particular, the defence arguments. He was aware of the alleged inconsistencies in her evidence, considered them and ultimately, was entitled to find the complainant credible. He explained why her evidence was compelling. The trial judge considered the defence evidence, and found it did not raise a reasonable doubt as to the appellant's guilt. Based on the record before this Court, there is no error in the trial judge's credibility assessment and application of *W.(D.)* that would require our intervention.

Did the trial judge misapprehend the evidence giving rise to a miscarriage of justice?

[20] The parties are once more in agreement regarding the principles to be considered in assessing whether the trial judge misapprehended the evidence. Both rely on the following from *N.M.*:

> [27] With respect to the misapprehension of evidence, Justice Watt recently explained in *R. v. Doodnaught*, 2017 ONCA 781:
>
> > 71 A misapprehension of evidence may involve a failure to consider relevant evidence; a mistake about the substance of evidence; a failure to give proper effect to evidence or some combination of these failings: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. **To succeed before an appellate court on a claim of misapprehension of evidence, an appellant must demonstrate not only a misapprehension of the**

> **evidence, but also a link or nexus between the misapprehension and the adverse result reached at trial.**
>
> 72 To determine whether an appellant has demonstrated that a misapprehension of evidence has rendered a trial unfair and resulted in a miscarriage of justice, an appellate court must examine the nature and extent of the misapprehension and its significance to the verdict rendered by the trial judge in light of the fundamental requirement of our law that a verdict must be based exclusively on the evidence adduced at trial. **The misapprehension of evidence must be at once material and occupy an essential place in the reasoning process leading to the finding of guilt: *Morrissey*, at p. 221.**
>
> 73 The standard set for misapprehension of evidence to warrant appellate reversal is stringent. An error in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground: *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 56.
>
> 74 Where an appellant alleges a misapprehension of evidence, an appellate court should first consider the unreasonableness of the verdict rendered at trial. A verdict may be unreasonable because it is one that could not have been reached by a properly instructed trier of fact acting reasonably, or because it can be seen from the reasons of the trial judge that the verdict was reached illogically or irrationally, in other words, due to fundamental flaws in the reasoning process: *Sinclair*, at paras. 4, 44.
>
> 75 Where an appellant succeeds in establishing that a verdict is unreasonable, an appellate court will enter an acquittal. On the other hand, where the appellate court is satisfied that the verdict is not unreasonable, the court must determine whether the misapprehension of evidence occasioned a miscarriage of justice. An appellant who shows that the error resulted in a miscarriage of justice is entitled to a new trial: *Morrissey*, at p. 219.
>
> (Emphasis added)

[21] The Crown submits the appellant has failed to demonstrate a misapprehension of the evidence that would justify intervention by this Court. I agree. It is not enough for the appellant to establish the trial judge made a factual error (which I am not convinced he did), but he must go further and show that the error occupied “an essential place in the reasoning process leading to the finding of guilt”. The appellant has demonstrated no such error on the trial judge’s part.

Were the trial judge's reasons insufficient?

[22] The appellant alleges the trial judge's reasons are not sufficient in relation to his *W.(D.)* analysis. He again relies on *N.M.*, in particular, the following:

> [26] The following principles relate to the sufficiency of reasons in the context of a *W.(D.)* analysis:
>
> - If the trial judge's reasons are such that an appellate court cannot determine whether the trial judge properly applied the burden of proof and principle of reasonable doubt to credibility, intervention is warranted (*R. v. Sheppard*, 2002 SCC 26 at para. 68; *R. v. Graves*, 2000 NSCA 150 at para. 23);
>
> - In terms of the adequacy of reasons, a bare rejection of the accused's evidence will be found to be sufficient, provided that the trial judge has undertaken a "considered and reasoned acceptance" of the complainant's evidence. . .

[23] As already explained, the trial judge's reasons set out his factual findings as well as the underpinnings of his credibility determination. It is apparent why the trial judge decided as he did, and why he was satisfied as to the appellant's guilt beyond a reasonable doubt. There is no merit to the appellant's complaint regarding the sufficiency of the trial judge's reasons.

Disposition

[24] For the reasons above, the appeal is dismissed.

Bourgeois, J.A.

Concurred in:

Wood, C.J.N.S.

Bryson, J.A.