COURT OF APPEAL OF YUKON

Citation: *R. v. J.C.R.B.*,
2020 YKCA 14

Date: 20200908
Docket: 19-YU848

Between:

Regina

Respondent

And

J.C.R.B.

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of any information that could identify the complainant, referred to by the initials T.S. This publication ban applies indefinitely unless otherwise ordered.

A non-disclosure order has been imposed under s. 486.31 prohibiting the disclosure of any information that could identify the witnesses referred to by the initials J.B. and T.S. This order applies indefinitely unless otherwise ordered.

SEALED IN PART

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of Yukon, dated January 25, 2019 (conviction) (*R. v. J.C.R.B.*, 2019 YKSC 11, Whitehorse Docket 18-01503).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference): V. Larochelle

Counsel for the Respondent (via videoconference): N. Sinclair

Place and Date of Hearing: Vancouver, British Columbia
September 8, 2020

Place and Date of Judgment:	Vancouver, British Columbia September 8, 2020

Summary:

The appellant was convicted of sexual assault when the complainant's evidence was accepted and his was rejected. The appellant contends the trial judge erred in relying upon uncontested evidence as the predominant basis upon which he could find the appellant to be untruthful. That evidence may have suggested the appellant drank and used drugs with the complainant and offered drugs and alcohol to her in a hotel room, thus putting himself in a position where he might take advantage of her when he stood in a position of authority. It was not, however, inconsistent with the appellant's own evidence. Held: Appeal allowed. While a trial judge's credibility findings ought not to be interfered with in the absence of a palpable and overriding error, material reliance upon a reasoning error in an assessment of credibility is impermissible and an error of law. The Crown did not dispute that the conviction was founded upon such a reasoning error.

WILLCOCK J.A.:

Introduction

[1] My colleagues and I agreeing, the appeal is allowed and a new trial ordered for the reasons that follow.

[2] The appellant was tried before a judge in the Supreme Court of Yukon and found guilty of sexually assaulting T.S., his 19-year-old step-daughter, on the evening of September 29–30, 2017, in Whitehorse, contrary to s. 271 of the *Criminal Code*. Reasons for conviction are indexed as *R. v. J.C.R.B.*, 2019 YKSC 11.

[3] He appeals his conviction on numerous grounds, and applies for leave to adduce new or fresh evidence on this appeal. In light of concessions on the part of the Crown, which we review below, the parties have agreed the application to adduce fresh evidence would be withdrawn, and the appellant's grounds of appeal unrelated to the judge's assessment of the credibility of the complainant and the accused would not be argued by counsel.

Facts

[4] The offence was found to have been committed at a Whitehorse hotel at which the appellant was staying with the complainant, at the end of a long day and evening of drinking and drug use.

[5] At trial, the Crown called two witnesses: the complainant and her friend, D.T.K. The defence called one witness: the appellant. The case hinged upon the trial judge's assessment of the credibility of the complainant and the accused.

[6] There was little conflict between the evidence of the complainant and the appellant with respect to many of the significant events that occurred during the course of the afternoon and evening of September 29, 2017.

[7] After the complainant and the appellant had lunch, they went to a liquor store where the appellant bought beer for himself and rum for the complainant. From mid-afternoon onward, the appellant and the complainant drank alcohol at the hotel, at dinner at a nearby restaurant and at a bar. The appellant bought and used some cocaine at the bar. Shortly before 10:00 pm, the complainant left the appellant to visit her sister.

[8] The complainant testified that after meeting her sister briefly, she was picked up by a taxi. The driver took her out of town to a gravelled pull-out area by a river bank where she drank vodka and smoked some of his marihuana. She testified that he attempted to kiss her, and she was nervous and fearful. As a ruse, she convinced the taxi driver to take her back to her hotel, expecting the appellant to be there. He was, and the taxi driver left as she had hoped.

[9] As the trial judge noted, while the appellant denied that a sexual assault subsequently occurred, some of the facts with respect to what happened in the next 3½ hours were not in dispute.

[10] Both the complainant and the appellant testified the complainant was intoxicated, and she had been very upset when she returned to the hotel room. There was cocaine on a table in the hotel room. The appellant acknowledged he had been using it prior to the complainant's return.

[11] Over the course of the evening, he offered cocaine to the complainant and she used some on one or two occasions. He continued to drink beer, she continued

to drink rum, and he continued to consume lines of cocaine regularly until about 4:00 am, when he fell asleep.

[12] The appellant testified that he twice snorted cocaine from the complainant's bare buttocks, and took seven pictures of her while she lay naked on the bed. He deleted the photographs from his cellphone on the following morning, and was unable to recover them.

[13] At about 8:00 am on September 30, the appellant and the complainant went to a bank, and the appellant withdrew $1,000 and gave the money to the complainant.

[14] The complainant testified the appellant sexually assaulted her during the evening in the hotel room. While admitting all of the foregoing evidence with respect to the surrounding circumstances, the appellant denied that a sexual assault occurred. He testified the complainant removed her own clothes and invited sexual contact but he demurred.

[15] In the course of describing the complainant's evidence with respect to what she referred to as her "kidnapping" by the taxi driver, the judge said as follows:

> [26] It is evident that the taxi driver was charged with some offence or offences because T.S. was cross-examined about aspects of her testimony at the taxi driver's preliminary hearing. T.S.' version of events was corroborated, in part, based on the fact that the taxi driver was subject to a preliminary hearing. Further, the taxi driver was seen by J.B. when T.S. returned to the hotel room.

[16] The appellant contends it was an error to consider the fact there was a charge laid against the tax driver as corroborative of the complainant's evidence.

[17] When considering the evidence of the appellant, as a first step in his *W.(D.)* analysis [*R. v. W.(D.)*, [1991] 1 S.C.R. 742], the judge said as follows:

> [81] … The essence of J.B.'s evidence is that he did not commit any of the sexual assaults that T.S. alleged that he committed during the evening in the hotel room. Having considered the totality of his evidence, I do not believe his denials that sexual assaults took place.

> [82] The following points assist me in making that determination:
>
> - Because of her age, 19, and her ordinary residence with her father, I am not satisfied that J.B. was in a position of authority over her. But there clearly was a power imbalance.
> - He booked one hotel room for himself and his stepdaughter, who was then 19 years of age.
> - Immediately upon arriving in Whitehorse, he purchased for her a 26-ounce bottle of rum.
> - When he woke up from his afternoon nap, he observed that she had been drinking from the bottle. She continued to drink rum with mix later in the afternoon when they both returned about 4 p.m.
> - He observed that she had drinks at dinner, at the restaurant, and a drink while they had a game of pool together in a bar.
> - When she returned to the hotel room with the taxi driver at about 12:30 a.m., he observed that she was both intoxicated and upset.
> - Over the course of the evening, J.B. consumed about 16 beers and consumed numerous lines of cocaine at the bar, in the hotel room by himself, and in the hotel room in the presence of T.S.
> - He admitted snorting cocaine off her buttocks while she was unclothed on the bed, at a time when he was intoxicated, by his own admission, from alcohol and cocaine consumption.
> - He admitted taking sexual pictures of her while she was naked on the bed, later deleting these photographs, and initially lying to the police about the photographs.
> - He gave her $1,000 in cash the next morning. There were no documents suggesting this was a loan. He did not discuss this with his wife, T.S.' mother.
>
> [83] After considering these key facts, I conclude that I do not believe his evidence with respect to whether or not sexual assaults took place. However, he is still entitled to an acquittal if his evidence leaves me in a state of reasonable doubt about his guilt.

[18] The Crown agrees the judge erred in law by "incorrectly adding weight to his assessment of the complainant's evidence because the complainant had previously testified to the events of that evening during an unrelated preliminary inquiry into charges against a third party". The Crown also acknowledges that in paras. 81–83 of his reasons, the judge erred in law by "unreasonably diminishing the weight of the appellant's testimony based upon the circumstances surrounding the events of the

evening which were admitted to by the appellant and which were consistent with the complainant's evidence".

[19] The Crown accepts that the specific admissions by the appellant enumerated by the trial judge are irrelevant to the assessment of the credibility or reliability of the appellant's evidence in relation to the contested issues in this case.

[20] Further, the Crown accepts that these errors cannot be saved by the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. The combined effect of inappropriately adding weight to the credibility and reliability of the complainant's testimony, while unreasonably subtracting weight from the credibility and reliability of the appellant's testimony, suggests a reasonable possibility that the appellant would not have been convicted of sexual assault but for those errors.

Discussion

[21] While it is unclear what weight the judge placed upon the fact the taxi driver appears to have been charged with an offence in relation to the complainant, the assessment of the appellant's credibility was clearly affected by an error, and because of the critical role of credibility in this case, a new trial should be ordered on that ground alone.

[22] The appellant, relying upon *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10, says it is an error to use a prior consistent statement as corroborative evidence. It is unclear this is what the trial judge has done. He has placed some weight upon the fact the taxi driver was charged. The only inference that could have been drawn from the fact a charge was laid, was that the charging authority concluded there was a reasonable prospect of a conviction of the taxi driver on some unspecified charge. The significance of that fact, and how it weighed in the assessment of the evidence in this case, is unclear.

[23] The complainant's testimony with respect to the incident with the taxi driver is not referred to by the trial judge, except in his recitation of the evidence. The incident is not specifically relied upon in the assessment of the complainant's credibility, at

paras. 84–94 of the judgment. A finding that the complainant's evidence about the incident involving the taxi driver was truthful may be implicit, but it is certainly not explicit in the judge's conclusion at para. 94:

> [94] When I consider the totality of her evidence, I find it to be credible in all the circumstances.

[24] However, the complainant's evidence was not accepted in its entirety. When expressly addressing the complainant's credibility, the judge notes that her evidence "bears close scrutiny", and he does not accept some of her evidence with respect to the alleged sexual assault.

[25] In *Stirling*, as in the case at bar, the impugned passage in the judgment in which the trial judge appears to have used a prior consistent statement for an impermissible purpose was somewhat ambiguous. Bastarache J. held the judge's remarks should be read in the context of the reasons as a whole, and as it was unclear whether impermissible use was made of the prior consistent statement, he did not accede to the appellant's argument.

[26] We are uncertain whether the Crown is right to say the judge improperly added weight to his assessment of the complainant's evidence because the complainant had previously testified to the events of that evening during an unrelated preliminary inquiry.

[27] We are, however, certain that the trial judge erred in relying upon all of the uncontested evidence that suggested the appellant drank and used drugs with the complainant and offered drugs and alcohol to her in a hotel room, thus putting himself in a position where he might take advantage of a person in relation to which he stood in a position of authority, as the predominant basis upon which he could find the appellant to be untruthful, without considering whether that undisputed evidence actually detracted from the veracity of the appellant's testimony about no sexual contact. While a trial judge's credibility findings are findings of fact and ought not to be interfered with on appeal in the absence of a palpable and overriding error, material reliance upon a reasoning error in an assessment of credibility is

impermissible and an error of law: *R. v. Roth*, 2020 BCCA 240; *R. v. A.R.D.*, 2017 ABCA 237; *R. v. Delmas*, 2020 ABCA 152.

[28] We are also in agreement with the view expressed by both counsel at the hearing of the appeal and in their factums, that there is a reasonable possibility that the appellant would not have been convicted but for the error identified, and that the curative proviso therefore has no application. Accordingly, we allow the appeal, set aside the appellant's conviction, and order a new trial.

"The Honourable Mr. Justice Willcock"

"The Honourable Mr. Justice Abrioux"

"The Honourable Madam Justice DeWitt-Van Oosten"