COURT OF APPEAL OF YUKON

Citation: *R. v. M.T.L.*,
2016 YKCA 11

Date: 20160830
Docket: 14-YU755

Between:

Regina

Respondent

And

M.T.L.

Appellant

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Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Sharkey
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of Yukon, dated December 19, 2014 (*R. v. M.T.L.*, 2014 YKSC 74, Whitehorse Docket No. 14-01503).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon May 16, 2016
Place and Date of Judgment:	Vancouver, British Columbia August 30, 2016

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Sharkey
The Honourable Mr. Justice Harris

Summary:

The appellant was convicted of sexual assault of a female friend. The issue at trial was consent, as to which credibility was key. The appellant testified the event was consensual. The complainant testified she did not consent. Held: appeal allowed. The judge relied in his credibility assessment on conclusions he drew from his own understanding of marks in which the causation of such marks is not so notorious as to beyond dispute. He also misapprehended evidence relevant to the credibility assessment of the complainant, and materially misapprehended the degree to which evidence of a witness corroborated the evidence of the complainant. As these errors were material to the central issue of credibility the verdict is set aside and a new trial is ordered.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] The appellant was convicted by a judge of sexually assaulting a close female friend in the early hours of August 31, 2013.

[2] The appellant contested the charge at trial on the basis the sexual encounter was consensual. He now appeals from conviction saying the judge erred:

1) in taking judicial notice of a matter not in evidence before him;

2) in misapprehending evidence in several respects;

3) in applying differing standards of scrutiny to the credibility assessment of the complainant and the appellant;

4) in failing to correctly apply the standard of reasonable doubt in respect to the evidence of the appellant;

5) in reaching a verdict that is unreasonable; and

6) in reaching a verdict by illogical means.

[3] G.C. is the complainant. At the time of the events she was 21 years old and engaged to be married to G.M. She had been living with G.M. in his parents' home but had recently moved out of that residence and was staying with two friends in a neighbourhood some distance from downtown Whitehorse.

[4] At the time of the events the appellant was 22 years old. He lived with his mother in Whitehorse.

[5] In the evening of August 30, 2013, the appellant and G.C. drove to meet friends at a nearby lake. There the appellant drank approximately six beers; G.C. drank two beers and smoked some marihuana. While at the lake, G.C. sent a text message to G.M. inviting him to the lake for drinks. He declined the invitation.

[6] Around midnight, the group of friends returned to Whitehorse to go to a bar. G.C. sent another text message to G.M. inviting him to the bar. G.M. declined the invitation. At the bar the appellant drank one pint of beer and G.C. drank approximately one-half of a pint of beer.

[7] G.C. and the appellant left the bar before 2 a.m. and walked to his residence. Sometime later they entered the residence and made their way to his room. He gave her a pillow and some blankets to sleep on a couch in his room.

[8] The appellant's mother heard them come in, but slept throughout the events that form the basis of the charge.

[9] It is undisputed that the appellant and G.C. had sexual intercourse in his room in the early morning of August 31, 2013, and that G.C. left his residence around 5 a.m. to 5:30 a.m. and made her way to G.M.'s house. Later that day, G.C. complained of soreness to a physician at Whitehorse General Hospital, who examined her. G.C. was concerned the sexual encounter had been without the protection of a condom and wanted to ensure she had not contracted a sexually transmitted disease. A rape kit was not performed at the hospital. The doctor's notes record tenderness and redness but no bruising, and say "no abrasions".

[10] On September 3, 2013, G.C. attended the Whitehorse RCMP detachment. There she gave a statement complaining of a sexual assault by the appellant. At that time she had discoloured marks on her neck that were photographed by the police constable. G.C. had further communications with the police but did not provide her cell phone to them for examination.

[11] Many of the details of events described by G.C. were disputed. These include:

- G.C. testified that after leaving the lake she asked the appellant to take her home. The appellant testified she did not make that request;

- G.C. testified that before she and the appellant entered the bar the appellant held her back while the others went ahead. She testified the appellant told her she could stay at his place and sleep back to back with him in his bed. G.C. testified she was angry with him at the suggestion of sharing a bed and said "no".

  The appellant denied having such a conversation with G.C. and testified that the whole group of friends entered the bar together. He testified that at some point – he thought at the lake – G.C. asked him if she could have a place to stay and he said she could stay on his couch.

- G.C. testified that at the bar the appellant spoke to her in disparaging terms about G.M., while leaning towards her and grabbing her legs, knees, and hands, thereby making her physically uncomfortable. G.C. testified that she repulsed the appellant, arguing with him and crying. G.C. testified that she left with the appellant as he had offered her a place to sleep and she did not have a place to go that night. She further testified that while they walked to the appellant's residence he tried to hold her hand and tried to put his arm around her. She said he tried to kiss her when they reached the residence, and that she avoided all these advances.

  The appellant denied speaking to G.C. at the bar about her relationship with G.M., or "coming on" to her at the bar. He denied that G.C. was upset at the bar and denied trying to kiss her.

- G.C. testified the sexual encounter took place on the couch when she awoke to find the appellant on top of her. The appellant testified that the sexual encounter took place in his bed and started with G.C. coming to him on his bed.

- G.C. testified the appellant bit her on the neck "really hard" which left bruises. The accused said he could have given her a "hickey" by sucking on her neck a "little bit".

- G.C. testified that after intercourse the appellant grabbed her phone, threw it at her, and told her to phone G.M. to say he had sexual intercourse with her, that she was in love with him and that she was his girlfriend now. G.C. testified that she complied with this demand.

  The appellant testified that he told G.C. it would be a good idea not to tell G.M. about their encounter right away, but G.C. grabbed her cell phone, moved to the couch and sent a text message. He said G.C. told him she had texted G.M., telling him what had happened. He denied throwing the phone at G.C. or telling her to call G.M.

[12] G.C. testified that when she left the appellant's residence in the morning she did not put her shoes on and thought she had left them behind. She testified she ran all the way to G.M.'s place and on the way tried three times to call him, finally speaking to him on the third try. She said when she arrived at G.M.'s house she told G.M. what happened. She said she did not have her shoes. By G.C.'s account she then went to her own residence to shower and change clothes. As she was in pain and concerned about possible sexually transmitted diseases, she went to Whitehorse General Hospital for an examination, having first put makeup first on her neck to cover her bruise marks. G.C. testified she was examined but refused to have a sexual assault kit examination although the doctor recommended one. Contrary to the doctor's notes, she testified the doctor told her she had a lot of lesions, lacerations and bruising.

[13] G.C. gave her first statement to the police on September 3, 2013. She testified she had moved back to G.M.'s place, and that G.M. was angry with the appellant, threatening to harm him. She testified that on September 4, 2013, the appellant sent her a text message in which he said if she did not tell everyone she was lying about the incident he would kill himself. She said she then told the police that the appellant was threatening suicide. There was considerable evidence concerning G.C.'s phone, and as apparent from this recitation of evidence, many calls and messages relevant to the charge went through her phone. G.C. testified,

as the judge noted, that she offered to take her phone to the police "a couple of times" but the constable did not think it was necessary. She testified that she had a "loaner" phone from her service provider when she received the suicidal text message, and had it for about four or five days after she spoke to the constable.

[14] The constable testified that when she spoke to G.C. on September 4, 2013, about the suicidal text message G.C. told her the message was gone because, as the judge described, "she had put the phone back to its factory settings and either she or G.M. had shipped it back to the factory or supplier company." The constable denied that police had declined to view the phone or that G.C. had offered it to the police.

[15] The appellant's mother testified that she heard the appellant and G.C. come in, but heard nothing more until she awoke at 5:00 a.m. She arose and noticed G.C.'s shoes beside the doorway to her son's room. She made some coffee and then went to the living room. She testified she heard the door to the residence squeaking, rose and looked down the hallway to see the shoes were gone. She testified that she had not heard any sounds of crying or people talking loudly between hearing her son and G.C. come in, and the exterior door squeaking.

[16] G.M. testified that he went to bed around midnight, and received two calls from G.C. in the early morning of August 31, 2013. He testified that in the first call G.C. said "I have something to tell you, I slept with [the appellant]". He said she sounded sad. G.M. testified that he then called her back and they had a short conversation in which he questioned her and G.C. asked to come to his house. He testified that he also received a second, and longer call, from G.C. He said she was crying, confused and upset and scared of the appellant. He denied missing two other calls from her. G.M. testified that when G.C. arrived she was wearing shoes. He testified that at 8 a.m. that morning and later that day G.C. gave him her account of events.

The Reasons of the Judge

[17] The issue at trial was whether the sexual intercourse between G.C. and the appellant was consensual. G.C. contended she did not consent to any sexual activity with the appellant. The appellant testified G.C. consented to all sexual contact, including intercourse. The judge accepted the testimony of G.C. that she did not consent, and convicted the appellant.

[18] In his reasons for judgment the judge first classified this as a "he-said, she-said" case. He cited the well-known instruction in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 on the application of reasonable doubt in a case intensely dependent on credibility in which the accused testifies.

[19] After surveying the evidence, the judge addressed the credibility of the appellant. He described the appellant's evidence of when he offered G.C. a place to stay the night of August 30, 2013 and his evidence as to whether he considered himself intoxicated as internally inconsistent. He observed that the appellant used poor judgment in driving back from the lake after consuming six beers, and in not using a condom during his sexual encounter with G.C. He discussed the appellant's evidence that G.C. had asked him for a sleeping garment and that he gave her boxer shorts, observing G.C. and the appellant were conspicuously of different size. He also commented adversely on the appellant's equivocal evidence of his feelings towards G.C. The two aspects of the appellant's evidence receiving his sharpest comments were the evidence of the timing of the events and evidence concerning the bruise on G.C.'s neck. On the timing issue the judge said:

> [70] Further, according to ML, he and GC went into his bedroom at about 2 AM. He then testified that, about 10 minutes after each of them laid down to go to sleep, GC came up onto his bed. He then described about 15 minutes of kissing, about 15 minutes sexual intercourse, a blow job which lasted about 15 minutes, and then further sexual intercourse of about 15 minutes. Therefore, on the evidence of the accused, the sex would have been over by about 3:10 or 3:15 AM. However, he testified that when GC left his bedroom, it was about 5:30 AM. Therefore, the accused has failed to account for approximately 2¼ hours of time that he spent with GC in his bedroom. In my view, that seriously compromises his credibility.

[20] On the neck bruise issue he said:

> [72] I also have a significant concern about ML's evidence regarding the "hickey" that he said he gave to GC during the sex. First of all, the accused made no mention of this at all during his initial account of how the sex took place. Further, even when his counsel specifically brought the bite marks on GC's neck to ML's attention, ML testified: "I kissed her on the neck. I didn't bite or nothing." Then, it was only after his counsel asked a leading question suggesting that he might have given her a hickey that the accused replied: "I could have given her a hickey, yeah." However, the accused then continued that he only did so for "seconds really, like three seconds for the hickey".
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> [73] I find as a fact that the marks on GC could not have been caused by the accused simply sucking on her neck for three seconds. Rather, I am satisfied that, upon close examination of the photographs, the marks are more consistent with a bite than with a hickey. I also find support for this conclusion in Cst. DeWitt's description of the injury as "bruising", as opposed to a mere hickey. Thus, the evidence tends to corroborate the complainant's version of the sexual event.

[21] Having found he did not believe the appellant's version of the events the judge then asked whether the evidence of the appellant raised a reasonable doubt. He said on this issue, in its entirety:

> [79] As stated, for the reasons above, I disbelieve the evidence of the accused. I further conclude that his evidence is incapable of raising a reasonable doubt.

[22] Last, the judge turned to the third question from *W.(D.)*: on the evidence he accepted, did he have a reasonable doubt? The judge said he did not have a reasonable doubt of the guilt of the accused, explaining that he found G.C. "a credible and impressive witness". He said, in a passage criticized by the appellant:

> [80] … Her evidence was largely corroborated by that of GM, regarding her phone calls to him on her way to Riverdale and her distraught state. GC's evidence was also corroborated by the bruising on her neck. With a few exceptions, which I will come to below, she was not significantly challenged on cross-examination. …

[23] The judge addressed areas of G.C.'s evidence said by the appellant to demonstrate her lack of credibility, and found each area capable of reasonable explanation. In particular as to the evidence that G.C. did not provide her phone to the police he said:

> [92] Cst. DeWitt testified that GC left a message with the RCMP dispatch on September 4, 2013 that she had received a text message from ML in which he said that he would kill himself if she did not tell the police that she had lied about being sexually assaulted. That is the extent of the evidence that I have about the message left by GC. Cst. DeWitt then said that she attempted to call the complainant a number of times over the next few hours, but that there was no answer on GC's phone. When she finally got through to GC, Cst. DeWitt testified that GC told her that the text messages on her phone were gone because she had put the phone back to its factory settings and shipped it off to the company or service provider from which she purchased the phone. I have no reason to dispute the veracity of this testimony from Cst. DeWitt.
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> [93] However, Cst. DeWitt's evidence contradicts that of GC in cross-examination, where she testified that she had a "loaner phone" from her service provider when she received the suicidal text from ML and that her other one was then being repaired. She further testified that she had the loaner phone for about a week altogether. When cross-examined about her evidence at the preliminary inquiry, she acknowledged that she was truthful when she testified there that she had the loaner phone for four or five days after she spoke to Cst. DeWitt. Whether GC had the loaner phone for four, five or seven days is largely irrelevant. Rather, what is relevant is why she would have had the loaner phone when she received the suicidal text from ML. According to Cst. DeWitt's evidence, that text message would have been received on GC's own phone, which she then somehow erased before sending it back to the supplier for repair.
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> [94] GC also testified that there were "a couple of different times" when she offered to bring her phone in for inspection. GC was not asked about the details of the message she left with the RCMP dispatch. However, it seems a reasonable inference that, in leaving that message, she may have also offered to bring the phone in for inspection.
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> [95] In any event, the fact that GC appears to have been mistaken in this regard must still be considered in light of the fact that this was on September 4, 2013, only four days after the sexual assault. That GC was still in a confused and traumatized emotional state at that time is consistent with the fact that it was not until September 11, 2013, that GC was able to provide to Cst. DeWitt the further details of being forced by ML to call GM to report that she and ML had just had consensual sex.
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> [Emphasis in original.]

[24] In conclusion the judge said:

> [96] In the result, even if GC was mistaken about this evidence, it does not raise a reasonable doubt about the truthfulness of her evidence overall regarding the sexual assault.

Discussion

[25] The appellant's appeal is based on a challenge to the judge's recitation of evidence, the facts he found, and his credibility assessment of G.C. and the appellant. Choices made by the judge as to what evidence to accept and what to reject, the inferences to be drawn, and even the evidence chosen for mention, is entitled to high deference by this court. Thus the appeal addresses matters in which we may not interfere, absent a material error in respect to the findings of fact or recital of evidence, or an error in principle.

[26] I consider that the reasons for judgment demonstrate both a misapprehension of evidence and speculation in matters material to the assessment of credibility. As the judge's assessment of credibility is central to his application of *W.(D.)*, and thus to the proof of lack of consent, the verdict cannot stand, in my view, on these grounds alone, and I do not consider it is necessary to address the other alleged errors.

1. The Neck Marks

[27] The appellant contends that the judge erred in respect to his conclusion that the marks on G.C.'s neck were caused by biting. He says this is the judge taking notice of adjudicative facts that are not so notorious as to be beyond debate, or are not capable of immediate and indisputable demonstration: *R. v. Find*, 2001 SCC 32 at para. 48, [2001] 1 S.C.R. 863. The appellant says if the identification of the cause of the bruise is not a matter of which he could take judicial notice, the judge was obliged to rest his conclusion that they were bite marks upon an evidentiary foundation: *R. v. J.M.H.*, 2011 SCC 45 at para. 25, [2011] 3 S.C.R. 197.

[28] The Crown says that the inference the neck bruise was caused by biting was open to the judge based upon the evidence of G.C. that the appellant bit her "really hard", the evidence of the constable that there was bruising on G.C.'s neck, and the photographs taken by the constable. The Crown asks us to view the photographs as showing "the two bruises look like the result of an upper and lower set of teeth biting down on [G.C.'s] flesh".

[29] The judge put considerable weight upon the marks on G.C.'s neck as consistent with the evidence of G.C. of a "really hard bite" and inconsistent with the evidence of the appellant, saying "upon close examination of the photographs, the marks are more consistent with a bite than with a hickey". Yet having viewed the photographs, I am unable to conclude they support G.C.'s version of the sexual encounter as the judge said they did. They are at best equivocal and do not provide a basis upon which one may say "the marks are more consistent with a bite than a hickey." Further, that conclusion appears to be based on judicial notice of information that may not be correct, that is not so notorious as to be beyond dispute, and that was not tested by cross-examination. Nor does it take account of G.M.'s evidence that G.C. told him the mark was caused by the appellant sucking on her neck.

[30] There is no other evidence corroborating the appearance of the marks as showing a bite. The doctor did not see them, nor was the constable cross-examined as to her observations. She said in direct examination:

> [G.C.] reported she had some bruising on her neck, which I took some photos of on that day.

[31] I conclude that the judge erred in respect to his reliance on the photographs as corroborating G.C.'s evidence of a "really hard bite".

2. Misapprehension of Evidence

[32] The appellant contends that the judge misapprehended several aspects of the evidence. While he complains as a separate ground that the judge also erred in finding the evidence of G.M. generally corroborated the evidence of G.C., I have included that contention in discussing this larger ground of appeal.

[33] In respect to corroboration the judge said: "[G.C.'s evidence] was largely corroborated by that of G.M., regarding her phone calls to him on her way to Riverdale and her distraught state". This conclusion is restricted to a narrow aspect of the evidence of G.C. and even in this narrow area, on my review of the testimony of G.C. and G.M., the statement is not correct. More troubling is that in narrowing the

purported area of corroboration, the statement does not grapple with obvious differences in the overall accounts of G.M. and G.C. that could, depending on the trier of fact's view of those witnesses, reflect adversely on the reliability of G.C.'s testimony. For example, G.C. did not testify to receiving a call from G.M. as he testified. G.C. testified she made three calls after she left the appellant's residence and G.M. only answered the third call, contrary to G.M.'s evidence that after the call in which G.C. asked to come to his house there was only the one longer call. In relation to the events that morning, G.M. said G.C. was wearing shoes, G.C. said she was not; G.M. said he went to bed at midnight, G.C. said he was drinking with a friend when she arrived at his house around 6:00 a.m.; G.M. testified that G.C. told him what happened at 8:00 a.m. and later that day, G.C. said she told him what happened when she arrived at 6:00 a.m.

[34] To the extent the judge considered G.M.'s evidence largely corroborated G.C.'s, I conclude the corroboration was on narrow and relatively undisputed facts. Significant divergence between their evidence was not acknowledged in the reasons for judgment. This is best characterized, in my view, as a misapprehension of evidence, although it also supports a view of uneven consideration of the evidence.

[35] The appellant also challenges: the judge's understanding of the evidence of conversations by which G.C. came to stay at the appellant's residence; the judge's understanding of, and highly arithmetical approach to, the appellant's evidence of the timing of the events from returning to his residence to G.C. leaving it and the use of this evidence to doubt the appellant's credibility; the judge's understanding of the evidence relating to bruising on G.C.'s thighs; the judge's understanding of the evidence of G.C.'s level of intoxication; and the judge's treatment of evidence concerning G.C.'s cell phone and her failure to produce it to police when asked. I will address only this latter challenge.

[36] In paras. 92 through 95 replicated earlier, the judge acknowledged confusion in the cell phone evidence but excused G.C. on the basis the communications with police about her phone were "only four days after the sexual assault". This cell

phone, of course, presented one opportunity to gather objective evidence on a disputed allegation.

[37] It is clear that G.C. had the use of a cell phone during the events, and that the police asked G.C. to bring it in after the report of a suicidal text message from the appellant. It is also clear that G.C. said she could not do so because she had erased the text message (received only earlier that day) from her phone by putting it to factory settings and returning it to her service provider. Yet at trial G.C. testified that she received the text on a loan phone, that the loaner phone came into her possession two days before the message, and that she continued to possess that phone for several days after she reported the message to the police. Further, she testified that she made offers to bring the phone in and the constable says she did not.

[38] On my reading of the evidence, the point of discrepancy in the evidence was not as the judge appears to have thought in para. 93. The issue is that G.C. testified that she had the loaner phone with a suicidal text message from the appellant on it during and after talking to police on September 4, 2013, but the constable's reliable evidence was that G.C. stated that this message was on her original phone which had been cleared and returned to her service provider. If the judge had correctly conceived of this striking contradiction, he could not have excused this discrepancy as simply a mistake made because G.C. was confused and traumatized, but would have needed to consider both her accuracy in communicating with the police and the overall accuracy of her evidence – determinations that would bear upon her credibility.

Conclusion

[39] This was a case entirely dependent on the judge's assessment of credibility. I consider that the judgment rests on conclusions material to the credibility assessment that are either unsupported by the evidence or are based upon evidence that was misapprehended. In my view, the verdict cannot stand. The appellant asks that an acquittal be entered in the event the conviction is set aside.

As there is a body of evidence supporting the charge, I do not consider an acquittal should be entered. I would allow the appeal, set aside the verdict of guilty and remit the matter for a new trial.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Sharkey"

I AGREE:

"The Honourable Mr. Justice Harris"