COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. H.A.***,
2006 YKCA 7

Date: 20060616
Docket: CA05-YU542;
CA05-YU547

Between:

Regina

Respondent

And

H.A.

Appellant

BAN ON DISCLOSURE

pursuant to s. 486(3) (now s. 486.4) C.C.C.

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Mackenzie

B.A. Beresh, Q.C.	Counsel for the Appellant
P.I. Chisholm	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 15 May 2006
Place and Date of Judgment:	Vancouver, British Columbia 16 June 2006

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Mr. Justice Hall:

INTRODUCTION

[1] The appellant appeals against his convictions on three counts of indecent assault pronounced on 13 May 2005, after a trial held before a judge alone in the Yukon. There is, as well, a Crown appeal against a 15-month conditional sentence pronounced 8 September 2005, by the judge. The reasons for conviction can be found at 2005 YKSC 29 and the reasons for sentence at 2005 YKSC 52.

[2] The case involved allegations of historic sexual assault alleged to have been committed by the appellant in the 1970s against his stepdaughter, L.S., and another young woman, L.P. (sometimes referred to as L.M.). L.S. was the daughter from a previous union of C.A., the then wife of the appellant. L.P., who was four or five years older than L.S., was at the date of the alleged offence the girlfriend and later became the wife of J., the stepson of the appellant. J., like L.S., was a child from a previous union of the then wife of the appellant. L.P. has been divorced from J. for several years and testified she has had little contact with the appellant and the family since her marriage ended. The appellant and C.A. divorced some years prior to the trial proceedings in 2005.

FACTS

[3] The appellant, who was aged about 58 years at the time of his conviction and sentence, met C.A. at Haines Junction around 1968. At that time, C.A. had in her custody and care the two children from previous unions. Her son, J., was born in 1958 and her daughter, L.S., was born in 1963. Both J. and L.S. testified in the trial

proceedings. When C.A. met the appellant, her children were respectively aged approximately 10 years and 5 years. C.A. married the appellant in 1970. The appellant and C.A. thereafter had two children together, one daughter born in 1971 and one daughter born in 1974.

[4] The family resided for a short time after their marriage in Whitehorse and then moved out to reside at Haines Junction for a couple of years between 1971 and 1973. In 1973, the family moved to Fort Smith in the Northwest Territories where C.A. had relatives residing. The family returned to Whitehorse around 1974 and resided in Whitehorse for some five years until there was a brief move to Norway in 1979. The family then returned to again reside in Whitehorse. There were times during the 1970s when J. resided away from the family with his grandparents in Fort Smith and there was one period of less than a year when L.S. resided with an aunt on Vancouver Island and attended school on the island. She was said to have disclosed to this relative molestation by the appellant.

[5] Soon after the family returned from Norway, the complainant, L.S., left home and she did not thereafter reside with the family. She did, however, from time to time thereafter have contact with the appellant in Vancouver, in Whitehorse and in Tuktoyaktuk. The contact in Tuktoyaktuk occurred because she and the appellant were both doing work for a drilling company in the Beaufort Sea. This was in the mid-1980s. The appellant testified that L.S. had not manifested any fear of him or reluctance to be alone in his company on such occasions. L.S. said she was always fearful of the appellant and tried to minimize contact with him when she was an adult.

[6] The complainant, L.S., testified at trial that the appellant had initially assaulted her in a basement at a time when the family was at Haines Junction. This incident would have occurred when she was relatively young. The appellant suggested he might have had some contact with the complainant at that time that she misconstrued because she had on occasion been subject to sleepwalking and had to be taken back to her bed by one or the other of himself or C.A. The judge did not find this allegation proven. The judge said this:

> [9] In all the circumstances, I am left with a reasonable doubt about the accused's guilt on this count. I agree with defence counsel that it is improbable that the accused would have picked that particular occasion during a social gathering to indecently assault L.S. That is especially so given that there was a significant risk of being detected in the open basement. I inferred that one would only have to come partway down the stairs to have a full view of the basement and any one could have come down at any time. Indeed, L.S. herself said that her nightgown was up around her neck at the point when her mother came partway down the stairs to find out [what] was going on. C.A., however, gave no evidence about this incident and one would expect she *would* have, if she had noticed L.S. in that state. I am also concerned that L.S. said this all happened fairly fast. Although she denied she was sleepwalking, I cannot dismiss the possibility that she might have been retrieved by the accused in that state and subsequently recalled the incident inaccurately. Therefore, I find the accused not guilty on count #1.
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> [Emphasis in original.]

[7] The complainant, L.S., testified that the appellant frequently came into her room to wake her up in the mornings. She said that on several occasions when this occurred he lay on top of her and made sexual remarks to her. She testified that on occasions he put his tongue in her mouth when he kissed her and she said he also held her on his lap from time to time in a sexual way. She testified to a particular incident that had occurred at the family home when the appellant allegedly came up on to a roof area where she was sun tanning and touched her on her buttocks and

engaged in lewd conversation with her. These various incidents of alleged sexual assaults formed the factual foundation of the two convictions the judge registered against the appellant concerning the complainant, L.S.

[8] L.S. testified that the appellant had continually harassed her in a sexual manner when she lived in the household and that she frequently had occasion to tell him to leave her alone. Her mother, C.A., and her brother, J., both testified that the relations between the appellant and this complainant were at times fractious. C.A. testified that she had heard the complainant on occasion tell the appellant to leave her alone. The appellant acknowledged that he had a somewhat confrontational relationship with L.S., but he firmly denied any sexual misconduct towards her on his part.

[9] Concerning the complainant, L.P., there was evidence given by her and by L.S. that on one occasion when they were sleeping together in a bed in a basement area of the family home in Whitehorse the appellant had sexually molested L.P. L.P. said that she awoke to find the appellant fondling her breasts and moving his hand down toward her pubic area. She testified that she froze and that she turned to be closer to L.S., who was sleeping in the same bed. L.S. said that she woke up and observed the appellant engaged in what she perceived as molestation of L.P. She said she told the appellant in graphic terms to leave L.P. alone and get out of the room. The appellant denied this incident. The complainant, L.P., testified at trial that she had a memory of this incident stored in her pancreas area and in her groin area. She had spoken of body memory of the incident in her complaint to the police.

[10] Concerning this complainant, L.P., counsel for the appellant at trial argued that her narrative about storing the memory of the assault in parts of her body was incredible and ought not to be accepted by the judge. In the course of his reasons, the judge said this:

> [13] With respect to the body memory issue, L.P. acknowledged in cross-examination that she could clearly remember what happened between her and Mr. H.A. because she had stored that information in her body memory. She said memory can be intellectual or based on smell, emotions, or the body. In this case, she said that she stored the memory of the incident in her pancreas and groin area. Defence counsel seemed to suggest in his closing submissions that this evidence alone is reason for me to question her credibility and be left with a reasonable doubt. As I understood his argument, defence counsel said that all memory must come from the mind, that is the brain, and therefore it is non-sensical to speak about a "body memory" or storing and retrieving a particular incident from a body part or organ, such as the groin or pancreas.
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> [14] No expert evidence was called on the point by either the Crown or the defence. I conclude that, as a matter of common sense, and to some extent through judicial notice, that memory is a complex phenomenon. It does not strike me as unusual that someone such as L.P., who was allegedly traumatized by an improper touching of her skin in the area below her belly button, would associate the incident with her groin or even her pancreas. It is not uncommon for people to use memory cues to store memories for later retrieval. Indeed, that is a standard technique used by persons teaching memory enhancement skills. Further, I did not infer from L.P.'s evidence that the memory comes from her body without involving her brain. It would seem obvious that all memory must necessarily come from the brain, being the organ which serves as the neurological headquarters for the body. However, that does not mean that one cannot associate memories with various body parts or have a sense of a memory as emanating from the body. I understand this to be relatively common place, for example, among dancers, martial artists and athletes, where the memory relates to body movement or positioning. In short I am not prepared to discount the credibility of L.P. solely because she made reference to her body memory.
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> [15] The balance of L.P.'s evidence was consistent and credible both internally and externally. She said that this occurred in the family's Crestview home and that she and L.S. were asleep in the basement in the area where H.J. normally slept. L.P. described brick walls and other details about the features of the basement. She described the

> area as being partitioned with blankets and that the basement walls were lined with blankets. There was only a single room partitioned in that fashion. She said that the incident happened just before or just after her 16th birthday, which would have been on July 23, 1975. That was consistent with the evidence of the accused that the basement in the Crestview home was not renovated until some time in the approximately early 1977. Her evidence that she slept over that particular night while babysitting is also consistent with the evidence of the accused, who agreed that she probably did so on occasion and would sleep with L.S. in the basement when that happened.

ISSUES ON APPEAL

[11] The appellant advances the following grounds of appeal:

I. The learned trial judge erred in law in taking judicial notice of the term "body memory".

II. The learned trial judge erred in law in his credibility analysis and failed to properly interpret and apply the principles set out in ***R. v. W.(D.)***, [1991] 1 S.C.R. 742.

III. That the convictions were unsafe and constitute a miscarriage of justice.

Counsel for the appellant suggested as a component of this third ground that the judge failed to take proper account of possible collusion by the complainants and the circumstances of their jointly seeing counsellors. The first and second grounds, if successful, could result in an order for a new trial on one or more counts. The relief sought pursuant to the third ground is a verdict of acquittal.

[12] There is before the Court an application for the admission of fresh evidence, being the report of a medical professional and an affidavit from an individual who was in a relationship with L.S. for a time in the mid-1980s. The Crown respondent opposes the admission of the fresh evidence sought to be tendered on appeal. In accordance with our usual practice, we heard argument on this, reserving our judgment on the admissibility of the evidence sought to be tendered.

DISCUSSION

[13] It is argued by the appellant that the judge erred in taking judicial notice of "body memory". I doubt, however, that this is really a case about judicial notice. It seems to me that the judge was simply responding in a common sense way to the argument advanced by trial counsel concerning the matter of the reliability or veracity of the memory of the complainant, L.P. The trial judge, correctly in my view, observed that memory is a complex phenomenon and he found that it was not unusual that the complainant might recollect her memory of the event by the methodology she described in her evidence. He said he did not infer from the evidence of this complainant that her memory came from her body without also involving her brain. In my opinion, the comments of the learned trial judge properly construed are really an assessment of his impressions of the evidence of the complainant, L.P., and his conclusions to the reliability of her evidence about the alleged assault by the appellant.

[14] The judge took an unfavourable view of the credibility of the appellant. The appellant submits that the judge's assessment of his credibility was factually and legally flawed. The appellant submits that, properly assessed, any inconsistencies

in his evidence were minor in nature and quite explicable, having regard to the substantial passage of time between the alleged instances of assault and the time of trial. He submits that the verdicts cannot stand because of the flawed credibility analysis.

[15] The judge found that the appellant had sought, in his evidence at trial, to minimize his opportunities to assault L.S. by asserting he did not wake her up very often or regularly. The judge found that when the matter was initially raised with him by a police investigator, the appellant indicated he had quite often awakened the complainant when she lived in the household. The complainant testified at trial that the appellant often took the opportunity to assault her when he came into her room to awaken her for school. Counsel took us carefully through the evidence of the appellant. I think that it becomes clear on a reading of the testimony of the appellant that he acknowledged he did often wake the complainant up, sometimes not going into her room. Ultimately, the appellant's position was not that he did not have many opportunities to assault L.S., rather he simply said he never did. I do not consider it could be found on a full consideration of his evidence and what he said to the police that he was inconsistent in his narrative as found by the trial judge. Such a finding, in my view, would amount to an evidentiary misapprehension.

[16] The judge also appeared to be of the view that the appellant sought to downplay any unpleasant interchanges between himself and the complainant, L.S. However, as I read his evidence, the appellant did acknowledge that when L.S. was a teenager he had a turbulent relationship with her, as testified to by L.S., her mother and her brother. The appellant gave this evidence:

Q You heard the testimony of [C.A.] when it -- as it related to your stepdaughter L., at sometime when she was around 11, 12 years old, her general attitude changed?

A Yeah, I heard that.

Q Is that your recollection?

A Yeah, early teens.

Q Now you described your relation with her as "turbulent." Was it always turbulent?

A No, it wasn't.

Q When did the turbulence start?

A I would say it was the teenage years.

Q And when you're referring to teenage years, are we talking about 11 years old or are we talking about later?

A I would say 12 on.

Q And when you say the relationship was turbulent, she didn't like you, did she?

A No.

Q And I take it because she didn't like you, you didn't spend much time together?

A That's probably fair to say.

Q And it wasn't only turbulent, at times she would actually tell you to fuck off and get away from her?

A I cannot recall that.

Q Never?

A Not that I recall.

Q Did she ever curse at you?

A Probably.

In cross-examination, he said this:

> A Well, we didn't get along; we didn't see eye to eye. We had a lot of conflicts, school, work, and I don't know, or I don't know, other things that happen in teenage years. I always ever wanted her [to] be involved in skiing. That was one of the things she was involved in for awhile. She was militant.

[17] The appellant did testify that he felt their relationship was better after L.S. moved out of the household and became more mature. L.S. testified she never had a particularly good relationship, even in later years, with the appellant, but acknowledged that she tried to be civil to him because he was then married to her mother and was the father of her half-sisters.

[18] I do not consider it a fair summary of the evidence to suggest that the appellant tried to portray himself as having any very good relationship with L.S. in her teenage years. He frankly acknowledged it was a troubled relationship and there were unpleasant exchanges between him and L.S. It would not be appropriate to utilize his evidence in this regard to reflect adversely on his credibility as a witness.

[19] Another matter that the trial judge weighed in the balance against the appellant's credibility arose as follows:

> 6. With respect to the allegations about L.P., she said that she had been babysitting for Mr. and Mrs. H.A. when she was about 16 at their home in Crestview. Mr. and Mrs. H.A. came home late and L.P. decided to sleepover that night. She and L.S. went to bed in the basement in the area where L.S.'s brother H. normally slept. She claimed to have been awoken by Mr. H.A. touching her inappropriately. She heard L.S. wake up and say to the accused: "What are you doing? Get out of here or I'll wake her up. Fuck off." When the accused failed to leave

> immediately, L.P. said that L.S. told him again to leave her alone and "Fuck off".
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> When asked about these allegations, the accused simply denied them. He did not offer any alternative explanation or admit to being in the basement on that occasion for some innocent purpose such as checking on the girls, as was argued by his counsel. This is a notable distinction from his response to the other allegations of L.S., where he at least admitted that there were opportunities for him to commit the offences. Here he gave no evidence of such an opportunity.
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> For reasons which I will state shortly, I believe the evidence of L.P. and L.S. about this incident. L.S. corroborated L.P.'s testimony about what happened. Therefore, I find the absolute denial by the accused of even being present in the basement on or about that occasion is not believable and this detracts from his credibility generally.
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> [Emphasis added.]

[20] I am not sure that I follow the reasoning in the underlined passages. Why would the assertion of "opportunity" strengthen the credibility of the appellant concerning this alleged incident? And conversely, how could the lack of such assertion negatively impact on his credibility? A trial judge is clearly entitled to prefer the evidence of one witness over another, but the mere denial of the event in the circumstances of this case seems to me an unsatisfactory basis for the judge to draw an adverse credibility inference against H.A. Counsel for the appellant referred us to the following passage from ***R. v. Tucker***, [1992] ABCA that has a measure of application here:

> The learned trial judge compared the detail found in the complainant's evidence to the denial by the appellant. He said the appellant "merely came to the witness stand and said that he did not do it". If that were true, then in view of the six year interval between the time of the alleged offence and the trial, how else could the appellant have made his answer in defence? Any attempt to embellish his denial with recollections of where he was or what he was doing on some particular evenings in the

> expanded time frame set out in the counts, alleging a six year old offence, would have reeked of reconstruction. The danger in this case is that the approach of the learned trial judge to the evidence may well have inhibited him from objectively considering whether or not the evidence of the appellant, in all of the circumstances, would raise a reasonable doubt.

[21] The judge also appeared to discount the evidence of the appellant in part because he had an imperfect recollection of what schools L.S. attended and for how long in Whitehorse. Given the rather peripatetic lifestyle of the family in the 1970s, I doubt if it would be appropriate to lay any stress on such facts as a relevant matter having to do with a credibility assessment of H.A.'s evidence in this trial.

[22] Assessment of credibility is a delicate and challenging task for any trier of fact. See ***R. v. Gagnon***, 2006 SCC 17, [2006] S.C.J. No. 17 (QL) at paras. 20 and 21. Often, a judge may simply find a person to be an evasive or unreliable narrator of events or find the evidence of a person out of accord with reality or inconsistent with other proven surrounding circumstances. Findings of credibility on the part of a trial judge are entitled to a high degree of deference by an appellate tribunal because the latter does not have the advantage of seeing and hearing the witnesses. The cold print of a transcript is oft times quite inferior to the live presentation available to the trier of fact.

[23] In the instant case, the adverse credibility findings of the judge concerning the evidence of the appellant that rest upon the considerations I have adverted to above seem to me to rest upon flawed premises. I do not consider that it was properly open to the judge in this case to use these as indicia of a lack of reliability or credibility on the part of the appellant. It was clearly open to the judge hearing the case to find he did not believe H.A. and to prefer the evidence of L.S. However,

such a finding cannot be sustained if it rests upon a demonstrably flawed analysis of the evidence. For the reasons I have expressed above, I consider the credibility analysis here was flawed. Because his consideration of the respective credibility of L.S. and the appellant as to what did or did not occur was vital to his assessment of the guilt of the appellant on the counts involving L.S., I do not consider those convictions can stand. I would order a new trial on the counts involving L.S.

[24] The case against the appellant concerning the complainant, L.P., stands on a rather different footing from the counts involving L.S. Although the incident itself as testified to by L.S. and L.P. has a more clouded aspect to it than the narration of numerous incidents by L.S. involving herself, the occurrence of this incident was testified to by both women. There is corroborative testimony on this alleged assault of L.P. emanating from L.S., a feature not present in the counts involving L.S. Counsel for the appellant submitted that the trial judge ought to have scrutinized the evidence concerning this count with a more vigilant eye than he did because of the possibility of collusion, having regard to contact between the two complainants and their disclosure to counsellors shortly before charges were laid. The trial judge had the advantage of hearing evidence from the counsellors and the two complainants that they sedulously avoided discussing the facts of any alleged assaults in some meetings where both were present with the counsellors. The two complainants also said they had avoided discussing with each other the factual circumstances of the alleged assaults. Looking at the record here, I am not of the opinion that there is any real substance in the suggestion made by counsel of a danger of "collusion" between the women or the "tainting of evidence" by the actions of the counsellors.

[25] However, the more salient problem with the conviction on the count involving L.P. is that the adverse finding against H.A. is necessarily related to the adverse credibility findings made against him by the trial judge. The judge's decision to reject the evidence of the appellant that he did not commit this alleged act was dependent on his view of the credibility and reliability of the testimony of the appellant. I consider that because of the flawed credibility analysis of the trial judge concerning the counts involving L.S., this conviction for the assault of L.P. also cannot safely stand. As with the other counts involving L.S. on which convictions were registered against the appellant, I consider that an order for a new trial is warranted on this count involving L.P. and I would so order.

[26] In light of the conclusions I have reached above, I do not find it necessary to address the issues relating to the admissibility of fresh evidence or the reasonableness of the verdicts. I would allow the appeal of the appellant and order a new trial on the three counts upon which he was convicted. This order, of course, renders moot the Crown's sentence appeal.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Mackenzie"