COURT OF APPEAL OF YUKON

Citation: *R. v. Roberts*,
2016 YKCA 3

Date: 20160418
Whitehorse Docket: 15-YU772

Between:

Regina

Respondent

And

James Nathan Roberts

Appellant

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Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

On appeal from: An order of the Territorial Court of Yukon, dated August 4, 2015, and December 11, 2015 (*R. v. Roberts*, 2015 YKTC 44, Whitehorse Docket 13-00811).

Counsel for the Appellant: V. Larochelle

Counsel for the Respondent: N. Sinclair

Place and Date of Hearing: Vancouver, British Columbia
March 17, 2016

Place and Date of Judgment: Vancouver, British Columbia
April 18, 2016

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

Summary:

Appeal from sexual assault conviction. Held: appeal allowed; new trial ordered. The trial judge misapprehended the appellant's evidence and thereby missed the point of his defence. Comment on the misapplication of Browne v. Dunn.

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] James Nathan Roberts appeals from a conviction of sexual assault on two grounds: (1) the trial judge failed in her duty to assist him as a self-represented accused; and (2) the trial judge misapprehended his evidence.

[2] Having been satisfied that the second ground is clearly made out, we allowed the appeal at the close of the hearing with reasons to follow. We find it unnecessary to deal with the issues raised in the first ground. These are our reasons.

Background

[3] The appellant was charged that on 15 February 2014 at the Village of Teslin, in the Yukon Territory, he committed a sexual assault on the complainant contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[4] The road to trial was anything but smooth for the appellant. He was living and working in Terrace, B.C., and had to travel great distances to make court appearances in Teslin and later Whitehorse. He found it difficult to arrange legal aid representation and maintain telephone contact with legal aid counsel and the court. His counsel withdrew and he muddled some court dates. When he appeared for his trial in Whitehorse on 4 August 2015, he was unrepresented, although a lawyer had been appointed to cross-examine the complainant pursuant to s. 486.3 of the *Criminal Code*. He had only a short time to speak to that lawyer before the trial. The transcript of the brief trial, which featured only two witnesses, the complainant and the appellant, reveals that the appellant knew little about criminal practice and procedure. On appeal, the appellant presented a litany of complaints alleging

deficiencies in the trial judge's discharge of her duty to assist him throughout the trial. I see no point in engaging in a detailed analysis of this argument. The remedy of a new trial would be the same, whichever ground of appeal succeeds. I will say no more about the topic than to comment that, in my view, the trial judge's guidance was minimal and perfunctory.

[5] The complainant testified that the appellant visited her home in Teslin on the evening of 14 February 2014. They were joined by another man and they talked and drank. The complainant allowed the two men to stay over because they had been drinking and it was minus 30 degrees outside. She went to bed in the basement of her home to sleep with her two children. She testified that she awoke in the morning to find the appellant with his finger in her vagina. She screamed at him and told him to get out.

[6] Counsel's cross-examination of the complainant dwelt on the lighting conditions in the basement room. It was not put to her that the appellant never went downstairs and did not assault her.

[7] The other man, who spent the evening with them, was not available to give evidence, and the Crown's case closed. The appellant declined at that point to testify.

[8] When the appellant began his argument, it became obvious that he thought the information he received on Crown disclosure would form part of the trial and that his story would come out that way. He was then given an opportunity to testify. The gist of his defence was simply that he did not go downstairs. Since the appeal turns on his evidence, I will set it out in full:

> EVIDENCE IN CHIEF OF JAMES NATHAN ROBERTS:
>
> THE WITNESS: In my opinion, there's some discrepancies in what Ms. B. has said about where I had fallen asleep and the times that we had gone to sleep, and the times that I've went there.
>
> Also, if I had my cell phone with me, I would be able to prove that she called me over there, via texts, and it was for the purpose of drinking and smoking weed, which was why I went over there in the first place. And for her to say that she didn't invite me over is kind of --

I don't even know what to say, because she came right to the store where I was employed at the time. I was working as a clerk in Teslin, a Teslin gas bar, and she had -- she had recognized me about a week before, two weeks before and --

MR. PARKKARI: Your Honour, I appreciate that he's self-represented, but none of this was put to the witness.

THE COURT: No.

MR. PARKKARI: *Browne v. Dunn* is causing some concern with his evidence and the weight it should be given.

THE COURT: Yes. There's a very good authority, Mr. Roberts, that matters shouldn't come up for the first time in evidence that haven't been put to a witness to give them an opportunity to respond to these matters.

MR. ROBERTS: Okay. But --

THE COURT: Like, none of these things were put to her, and they should have been --

THE WITNESS: Well, yeah, she -- well, she denied the fact that she had called me over. And if I had the cell phone that I was using at the time, I would show you that she had texted me and asked me to come over after work, which was, at the time, their hours were at early in the morning until 10 in the evening, and I was their -- their closer at the time. And she had texted me -- because she had asked me for my phone number, a way to get a hold of me -- so she -- so we could hang out and smoke weed, which was why we started hanging out in the first place.

And there was nothing peculiar about it. There was no -- there was no intentions. Whenever I went to go visit her, I talked about my girlfriend and I talked about how I was missing my daughter at home. And those were the purposes of our visits and our social get-togethers; it was to smoke weed and have drinks.

And with the night in question, from my recall, I was sitting at the table and then after I had enough to drink, I went to go lay down, and then I was sleeping, and then I -- I woke up to her screaming at me, telling her (sic) to get out. I was groggy. And I had -- I wasn't so drunk that I did not know what I was -- what was going on, because I'm usually pretty careful about how much I consume. I do not -- I do not consider myself to be a hard-core alcoholic.

As for the question that came up with Ms. B. having an alcohol problem, it is my -- to my knowledge that her children got taken away because of her drinking.

MR. PARKKARI: Your Honour, I'm going to object. I don't believe the witness has any firsthand knowledge of that.

THE COURT: If you don't know, put it directly, sir. That's not -- it would be called hearsay. It needs to be what you personally know.

THE WITNESS: When I was -- when I first started hanging out with her again, she did not have her children with her. They were going to visits. And she had just gotten her children back around the time of the incident.

She had told me it was because of a substance abuse. She didn't really specify but whenever -- whenever I had seen or encountered S.B., she was drunk. When she first encountered me at

the store, when she recognized me, she was intoxicated and she asked me to come over.

And at that time, there was -- the first time that she invited me over, … was also present there, as well as a couple of other people and --

MR. PARKKARI: Your Honour, I'm not sure what timeframe we're talking about. If it wasn't that night, I don't know what the relevance is.

THE COURT: You need to specify what you're talking about, sir, as to when we're talking about.

THE WITNESS: The night in question --

THE COURT: What we're dealing with here is an incident.

THE WITNESS: -- the day before, my friend here was questioning her. It is my recollection that S.B. was intoxicated and going to the store frequently for pop for chase as -- as well as cigarettes. Because she would frequently come in intoxicated to -- they had a -- they have a tab system and she would go in for cigarettes and pop for a chase.

Anything else that was in question? No, I don't have anything else.

THE COURT: Sorry?

THE WITNESS: I -- I can't recall anything else that happened or anything else to present, at the moment.

THE COURT: Any questions?

CROSS-EXAMINATION BY MR. PARKKARI:

Q Mr. Roberts, you say that on that night in question, you went over there to drink and do drugs?

A Smoke some -- smoke some weed, yes.

Q Yes. And to the point where you were sitting at the table and you -- you, basically, passed out?

A I did not pass out at the table.

Q But you went to sleep -- or where -- did you --

A No.

Q -- pass out that night?

A On the couch.

Q On the couch. So --

A Yes, and if you look at -- if you look at the statements --

Q I'm not asking about the statements. I'm asking you, you went and you laid down on a couch and you passed out?

A Yes.

Q And the next thing you remember is Ms. B. yelling at you, telling you to get out?

A Yes.

Q And were you upstairs or downstairs when she was yelling at you?

A I was upstairs.

Q You never went downstairs?

A Never went downstairs.

Q You don't remember going downstairs.

A I do remember and I did not go downstairs at all.

Q But the next thing you remember after you passed out --

A Yes, I was sleeping.

Q -- was being upstairs?

A I was sleeping, yes.
Q You don't -- you don't remember sleeping, do you?
A I remember sleeping, yes, because I did not drink that much.
MR. PARKKARI: No further questions, Your Honour.
THE COURT: Anything else, sir?
THE WITNESS: No.
THE COURT: You may step down, Mr. Roberts.
(WITNESS EXCUSED)

[9] As the transcript shows, the prosecutor raised an objection based on the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). In her reasons, the trial judge adverted to the rule, seemed to find it applied, but did not make it clear how it applied or whether it affected the outcome.

[10] Ultimately, the trial judge concluded that the appellant offered no defence. This is how she reasoned to that result:

> [6] We also have the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, which indicates that, in a case of this nature, if I believe the accused then I must acquit. That, of course, is based on the idea that his evidence must constitute a defence. If I do not believe the accused but believe his evidence could reasonably be true, I must acquit. Again, that is on the basis that his evidence would constitute a defence. Finally, if I do not believe the accused or believe his evidence could reasonably be true, I have to be satisfied, on the evidence, that I do accept that the Crown has proven all of the elements of the offence beyond a reasonable doubt, otherwise I must acquit.
>
> [7] Mr. Roberts' evidence is that he was invited to the residence of S.B. on the date in question to smoke drugs and to drink. He went there. He passed out on the couch and awoke to her screaming at him to leave, which he did. He testified, "I was not so drunk that I did not know what was going on."
>
> [8] The issue, of course, is not what someone remembers. It is not a defence to say, "I don't remember doing that." It does not mean you did not do it or that it did not happen. It only means that you do not recall it.
>
> [9] Mr. Roberts also indicated that he remembers that he passed out. The next thing that he remembered was her screaming at him and that he remembered sleeping. It was certainly indicated that it is -- difficult to indicate -- sir -- a person remembers sleeping, the state of sleeping being one in which you are not awake therefore alert to what is going on, but he indicated he remembered going to sleep is what his comment was in summation.
>
> [10] Mr. Roberts stated that S.B. was screaming at him, that that woke him up. Obviously, if someone is screaming at you there would be some issue. Obviously, she was unhappy. In fact, that confirms her evidence in this matter that she was very unhappy and that she did scream at Mr. Roberts to leave

> after the alleged incident with him. Mr. Roberts, in his evidence, does not admit or deny the incident. In fact, he does not refer to it. He simply indicates that he passed out on the couch and woke to her screaming at him to leave, which he did.

And, again at the end of her reasons, she repeated:

> [16] Certainly the evidence of Mr. Roberts does not amount to a defence in respect of this matter, that he passed out and the next thing that he recalls is her screaming at him. As far as whether it could reasonably be true, it certainly, again, does not amount to a defence in respect to this matter.

Discussion

Misapprehension of Evidence

[11] The trial judge's understanding of the appellant's position does not accord with his evidence. Two important points of evidence stand out. The first is that the appellant did not admit that he "passed out", in the sense that his intoxication caused a memory blank and he could not say what he did. The prosecutor used double-barrelled questions on the subject which were objectionable, but as the appellant was unrepresented, no objection was taken nor did the trial judge intervene. The problem with such questions is that they assume a fact in issue. If the witness gave an affirmative answer, one cannot say whether the witness affirmed the principal part of the question or the assumed fact buried in the question.

[12] This exchange illustrates the problem:

> Q But the next thing you remember after you passed out --
> A Yes, I was sleeping.
> Q -- was being upstairs?
> A I was sleeping, yes.
> Q You don't -- you don't remember sleeping, do you?
> A I remember sleeping, yes, because I did not drink that much.

[13] The second important point of evidence that the trial judge misapprehended was the accused's account of his actions. The trial judge found that he did not remember what he did. With respect, that is a perverse finding. He said he did not go downstairs. The complainant locates the assault in the basement. It necessarily

follows that the appellant's evidence amounts to a denial of the allegation against him.

[14] In misconstruing the appellant's testimony, the trial judge negated his defence and failed to address whether his explanation was capable of raising a reasonable doubt. There must, in my view, be a new trial.

The Rule in *Browne v. Dunn*

[15] Last, I would briefly discuss the trial judge's reference to the rule in *Browne v. Dunn*. While not determinative of the outcome of this appeal, the rule ought not to have played any role in this case. I think the rule is often invoked inappropriately and this is one of those instances.

[16] Crown counsel's objection during the appellant's testimony was raised in relation to the appellant's evidence that the complainant invited him to come over, which is different from the complainant's narrative that the appellant basically invited himself. But surely this is a marginal fact and unlikely to carry any significance in the case. If the trial judge's concern was that the complainant was not confronted with the appellant's denial that he went to her bedroom, I fail to see how this created any unfairness to the complainant, which is a necessary precondition to the application of the rule.

[17] After listing a number of factors in the assessment of credibility and reliability, the trial judge went on to say this:

> [4] The case of *Browne v. Dunn* indicates that you have to put to a witness your version of the events so that that witness has an opportunity to agree, disagree, or clarify the situation, but you are not to raise that version for the first time in your defence, without giving a witness that opportunity.
>
> [5] In this case, Mr. Roberts is representing himself. However, counsel was appointed, in order to conduct the cross-examination of S.B. in this matter, as set out in the *Criminal Code*. Certainly there was experienced counsel who would have been in a position to put those matters to S.B. with respect to a lot of the evidence that came from Mr. Roberts in his evidence when he choose to give it. Those were matters that should have been put to her, but she did not have an opportunity to address those, agree or disagree with him. As a result, it is a question of how much weight, if any, should be given to that evidence.

[18] The trial judge made no further reference to the rule in her decision. Since she found that the appellant offered no defence known to law, there would be no reason for her to test his narrative against the rule.

[19] In *R. v. Drydgen*, 2013 BCCA 253, the Court allowed an appeal on the basis that the rule may have been applied to the detriment of the appellant in circumstances where no unfairness arose. The Court urged a restrained approach to the rule:

> [17] While a problem of fairness could theoretically arise from a failure to cross-examine on a point later advanced in argument, the concern will almost always be considerably attenuated. This is especially so when the argument flows naturally from the direction taken in cross-examination, rendering any suggestion of ambush illusory: see *R. v. Ali*, 2009 BCCA 464 at para. 39. The confrontation must be a meaningful exercise rather than merely the performance of a ritual where the witness is invited to agree with a proposition later to be argued to the effect that his testimony is unreliable. I refer in this regard to the remarks of Chief Justice McEachern in *R. v. Khuc*, 2000 BCCA 20, 142 C.C.C. (3d) 276:
>
>> [44] Crown counsel's point is well taken. There can be no doubt that the general rule is that counsel must confront a witness with any new material he or she intends to adduce or rely on after the witness has left the box. However, the rule does not go so far as to require counsel to ask contradicting questions about straightforward matters of fact on which the witness has already given evidence that he or she is very unlikely to change. Judges tell juries that they may accept or disbelieve all or any part of the evidence of a witness. That instruction does not depend upon opposing counsel asking unnecessary questions. With respect, I believe the law is correctly stated in the case of *R. v. Mete*, [1973] 3 W.W.R. 709 (B.C.C.A.), particularly at 713. I do not believe the rule is any different if the evidence on which there is no cross-examination directly contradicts the evidence of the Crown or merely supports a fact inconsistent with the Crown's theory of the case. Counsel who does not cross-examine takes the chance that the evidence will be accepted; but rather than embark upon a futile cross-examination, counsel is entitled, as Crown counsel did in this case, to rely on the judgment of the jury as to what evidence it will accept.
>
> [Emphasis added in *Drydgen*.]

[20] While the reference to the rule in the trial judge's reasons is regrettable, I think it was harmless.

Disposition

[21] The appeal is allowed, the verdict of guilty is set aside, and a new trial is ordered.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Saunders”

I agree:

“The Honourable Mr. Justice Groberman”