COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***R. v. Brame***,
2004 YKCA 0013

Date: 20041004
Docket: YU511

Between:

Regina

Respondent

And

Kenneth Brame

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Mackenzie

Oral Reasons for Judgment

M.F. Allen — Counsel for the Appellant

D.A. McWhinnie — Counsel for the Respondent

Place and Date: — Vancouver, British Columbia
4 October 2004

[1] **DONALD, J.A.:** The basis of this appeal is an allegation that Chief Judge Lilles wrongly took judicial notice of behaviour patterns of victims of domestic violence. For reasons which follow I do not think the trial judge committed reversible error and I would dismiss the appeal.

[2] Defence counsel asked the trial judge to draw negative inferences regarding the complainant's credibility because of her late reporting of domestic abuse and her remaining with the appellant despite the abuse. The trial judge declined to draw the inferences because he said the line of reasoning proposed by the defence did not accord with the court's experience: what the defence argued to be a matter of common sense could not be accepted as such. The trial judge did not use the court's experience for any other purpose.

FACTUAL BACKGROUND

[3] This is an appeal from convictions for assault with a weapon contrary to s. 267(a) of the ***Criminal Code***; assault contrary to s. 266; and uttering threats contrary to s. 264.1(1)(a) pronounced on 16 October 2003 upon a trial before the Chief Judge of the Territorial Court of Yukon Territory: 2003 YKTC 76; [2003] Y.J. No. 119.

[4] The appellant and the complainant cohabited for three years in a common-law relationship. They have a daughter who was three years old at the time of trial. They separated in the fall of 2002.

[5] The appellant was charged in an Information on counts relating to three separate incidents. The first occurred in July 2000 when, as the trial judge found, the appellant arrived home drunk and an argument with the complainant began. The complainant was nursing their child during the argument. At one point the complainant told the appellant that if he did not quiet down, she would take the child and leave for the night. She testified, and the trial judge believed, that at this point the appellant pushed her against the wall and put a paring knife against her throat. The complainant left the home with the child and went to stay with a friend overnight.

[6] The second incident occurred in the period between July and October 2002. One morning after an argument the night before, the complainant leaned over to kiss the child goodbye before leaving to work and the appellant said, "If you fucking touch her, I'll crush your fucking skull."

[7] The third incident occurred in December 2002 after the couple had separated. The appellant was baby-sitting the child at the complainant's new residence. When the

complainant returned and asked the appellant to leave, he pinned her against the wall. The complainant called 911 and reported a domestic disturbance. The appellant took the phone away from her and said, "I am loading the .44". The appellant owned a number of firearms including two handguns: a 357 Magnum and a Smith & Wesson Magnum 44.

[8] The complainant fled the house with the child and returned with the police.

[9] After these incidents the complainant filed civil proceedings in the Supreme Court of the Yukon Territory regarding custody, access and property division. The complainant did not provide statements to the police giving rise to these charges until nine days after the civil suit was filed. The trial judge found that the disclosure was prompted by the appellant's aggressive behaviour in the presence of a member of the R.C.M.P. during a dispute over an access visit. The complainant revealed the past incidents of domestic violence to the constable who attended her residence to prevent a disturbance. The trial judge held:

> The disclosure was made in circumstances that negated premeditation and planning. The spontaneity associated with the disclosure increased its credibility.

ISSUE

[10] The appellant frames the issue in this way:

> Whether the learned trial judge erred in relying on evidence that was not properly before the court.

DISCUSSION

[11] The trial judge issued written reasons for conviction.

The passages relevant to this appeal are:

> [38] A number of facts ostensibly related to the credibility of the complainant were raised by the defendant. Four examples follow:
>
> - After the July 2000 incident, Ms. [L.V.] returned to live with Mr. Brame, thus suggesting that he had not assaulted her;
> - Although thinking that she might be killed or seriously injured by Mr. Brame, in August of 2002, she, nevertheless, remained in bed with him, with [K.] sleeping between them.
> - In the morning, on her way to work, as she was about to kiss [K.] goodbye, Mr. Brame threatened to crush her skull. She did not tell the police and returned to live with Mr. Brame; and
> - Although they separated in September 2002, and in spite of the previous abusive and assaultive behavior by Mr. Brame, Ms. [L.V.] was apparently content to have Mr. Brame baby-sit their daughter, occasionally in her home.
>
> [39] There is no evidence before the Court, expert or otherwise, that suggests that such conduct makes it less likely that the complainant was a victim of

> domestic violence. To the contrary, the experience of this court with domestic violence cases indicates that such conduct is often the norm, rather than the exception. This court's experience (of which I take judicial notice) is that:
>
> - Victims of domestic violence are often very willing to forgive their perpetrators;
> - The great majority of domestic violence victims return to live with their perpetrators;
> - Most victims seldom involve the police until they have been assaulted numerous times;
> - Victims honestly believe the violence will stop and do not appreciate the extent to which they are placing themselves and their children at risk; and
> - Education and financial independence do not immunize women against remaining in abusive or violent relationships.
>
> [Emphasis added]

[12] After a very careful analysis of the evidence, the trial judge accepted the complainant's evidence as credible and found the appellant's testimony did not raise a reasonable doubt.

[13] Finders of fact must often resort to the common store of experience in assessing credibility. This body of knowledge is never static. What one could say was a matter of common sense 25 years ago may not be valid today. We now question

formerly held assumptions about human behaviour in the context of domestic abuse.

[14] I think the trial judge correctly refused to draw inferences concerning the complainant's conduct in the absence of evidence supporting the defence position. This is consistent with the view expressed by Chief Justice McLachlin in ***R. v. Find***, [2001] 1 S.C.R. 863, 2001 SCC 32, where she criticized the lower court's assumption regarding bias harboured by sexual assault victims in the context of jury selection:

> 59 This is, however, merely the statement of an assumption, offered without a supporting foundation of evidence or research. Courts must approach sweeping and untested "common sense" assumptions about the behaviour of abuse victims with caution: see *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (*per* L'Heureux-Dubé J., dissenting in part); *R. v. Lavallee*, [1990] 1 S.C.R. 852, at pp. 870-72 (*per* Wilson J.). Certainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.
>
> [Emphasis added]

[15] The appellant submits that the trial judge should not have taken judicial notice of the court's experience. This is said to conflict with the judgment of Madam Justice Wilson in ***R. v. Lavallee***, [1990] 1 S.C.R. 852, requiring expert opinion on the subject. At para. 27 Madam Justice Wilson wrote:

> In *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672, at p. 684, this Court adopted the principle that in order for expert evidence to be admissible "the subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, this Court addressed the admissibility of expert psychiatric evidence in criminal cases in *R. v. Abbey* [[1982] 2 S.C.R. 24]. At p. 42 of the unanimous judgment Dickson J. stated the rule as follows:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)
>
> See also *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 415, in which McIntyre J. speaks of an expert witness possessing "special knowledge and experience going beyond that of the trier of fact".

And at para. 31 she wrote:

> Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of

> requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

[16] In my respectful opinion the trial judge's use of the phrase "judicial notice", appearing as it did in brackets, was not intended to be understood in the ordinary sense. The trial judge was simply referring to the court's experience as a reason why the defence assumptions adverse to the complainant's credibility could not be accepted in the absence of proof. He did not go on to reach the opposite conclusion, that the complainant was credible, on the basis of that experience. While the trial judge might have chosen another phrase to describe his process of reasoning, I do not think the use of the phrase affects the validity of the verdicts.

[17] I would dismiss the appeal.

[18] **HALL, J.A.:** I agree.

[19] **MACKENZIE, J.A.:** I agree.

[20] **DONALD, J.A.:** The appeal is dismissed.

"The Honourable Mr. Justice Donald"