

Her Majesty the Queen v. A.M.

[Indexed as: R. v. M. (A.)]

Ontario Reports

Court of Appeal for Ontario,

Hoy A.C.J.O., MacFarland and Watt JJ.A.

November 4, 2014

123 O.R. (3d) 536 | 2014 ONCA 769

Case Summary

Criminal law — Evidence — Witnesses — Credibility — Accused convicted of sexual interference — Complainant 19 years old at time of trial and testifying about abuse that allegedly occurred when she was between seven and 17 — Trial judge erring in assessing complainant's evidence as if she were child witness — Trial judge also erring in characterizing a prior inconsistent statement about a material matter at preliminary inquiry as "hyperbole" which was "badge of credibility" — Accused's appeal allowed.

The accused was convicted of sexual interference. He appealed, arguing that the trial judge made several errors in assessing the evidence adduced at trial.

Held, the appeal should be allowed.

The Crown's case stood or fell on the basis of the complainant's evidence. The complainant was 19 years old at the time of the trial and testified about abuse that allegedly occurred when she was between the ages of seven and 17. Generally, when an adult testifies about events that took place while the witness was a child, the credibility of the witness is assessed as an adult. However, when assessing the impact of inconsistencies about peripheral matters such as time and place, a judge should be mindful of the age of the witness when the events took place. The trial judge erred in assessing her evidence as if she were a child witness. The trial judge also erred in characterizing an admitted "exaggeration" by the complainant at the preliminary inquiry as a "hyperbole" which was a "badge of credibility". The admitted exaggeration was a prior inconsistent statement about a material issue given under oath. At best, it reflected a carelessness for the truth when testifying under oath and unexplained would tend to undermine the credibility of the witness. The trial judge's credibility analysis reflected fundamental legal errors and ultimately failed to sufficiently explain how the credibility and reliability concerns were addressed.

Cases referred to

R. v. Ay, 1994 CanLII 8749 (BC CA), [1994] B.C.J. No. 2024, 59 B.C.A.C. 161, 93 C.C.C. (3d) 456, 24 W.C.B. (2d) 623 (C.A.); *R. v. Braich*, [2002] 1 S.C.R. 903, [2002] S.C.J. No. 29, 2002 SCC 27, 210 D.L.R. (4th) 635, 285 N.R. 162, J.E. 2002-583, 164 B.C.A.C. 1, 162 C.C.C. (3d) 324, 50 C.R. (5th) 92, 52 W.C.B. (2d) 359; *R. v. Curto*, [2008] O.J. No. 889, 2008 ONCA 161, 230 C.C.C. (3d) 145, 234 O.A.C. 238, 54 C.R. (6th) 237, 77 W.C.B. (2d) 143; *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 2008 SCC 24, EYB 2008-133045, J.E. 2008-1022, 374 N.R. 198, 231 C.C.C. (3d) 177, 293 D.L.R. (4th) 375, 57 C.R. (6th) 48, 77 W.C.B. (2d) 514; *R. v. G. (M.)*, 1994 CanLII 8733 (ON CA), [1994] O.J. No. 2086, 73 O.A.C. 356, 93 C.C.C. (3d) 347, 24 W.C.B. (2d) 643 (C.A.) [Leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 390]; *R. v. Gagnon*, [2006] 1 S.C.R. 621, [2006] S.C.J. No. 17, 2006 SCC 17, 266 D.L.R. (4th) 1, 347 N.R. 355, J.E. 2006-961, 207 C.C.C. (3d) 353, 37 C.R. (6th) 209, 69 W.C.B. (2d) 278; *R. v. Gostick*, 1999 CanLII 3125 (ON CA), [1999] O.J. No. 2357, 121 O.A.C. 355, 137 C.C.C. (3d) 53, 26 C.R. (5th) 319, 43 W.C.B. (2d) 45 (C.A.); *R. v. Kendall*, 1962 CanLII 7 (SCC), [1962] S.C.R. 469, [1962] S.C.J. No. 27, 132 C.C.C. 216, 37 C.R. 179; *R. v. Kienapple*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729, [1974] S.C.J. No. 76, 44 D.L.R. (3d) 351, 1 N.R. 322, 15 C.C.C. (2d) 524, 26 C.R.N.S. 1; *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51, 235 C.C.C. (3d) 290, 83 B.C.L.R. (4th) 44, EYB 2008-148153, J.E. 2008-1861, [2008] 11 W.W.R. 383, 260 B.C.A.C. 40, 60 C.R. (6th) 1, 380 N.R. 47, 297 D.L.R. (4th) 577, 79 W.C.B. (2d) 321; *R. v. S. (D.D.)*, [2006] N.S.J. No. 103, 2006 NSCA 34, 242 N.S.R. (2d) 235, 207 C.C.C. (3d) 319, 69 W.C.B. (2d) 4; *R. v. Stirling*, [2008] 1 S.C.R. 272, [2008] S.C.J. No. 10, 2008 SCC 10, J.E. 2008-619, EYB 2008-130905, 371 N.R. 384, 229 C.C.C. (3d) 257, 54 C.R. (6th) 228, [2008] 5 W.W.R. 579, 77 B.C.L.R. (4th) 1, 291 D.L.R. (4th) 1, 59 M.V.R. (5th) 1, 251 B.C.A.C. 62, 76 W.C.B. (2d) 761; *R. v. Vuradin*, [2013] 2 S.C.R. 639, [2013] S.C.J. No. 38, 2013 SCC 38, 2013EXP-2200, J.E. 2013-1179, EYB 2013-223600, 446 N.R. 53, 298 C.C.C. (3d) 139, 80 Alta. L.R. (5th) 291, [2013] 8 W.W.R. 211, 361 D.L.R. (4th) 34, 3 C.R. (7th) 1, 553 A.R. 1, 108 W.C.B. (2d) 569; *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, [1992] S.C.J. No. 56, 137 N.R. 214, J.E. 92-909, 54 O.A.C. 164, 74 C.C.C. (3d) 134, 13 C.R. (4th) 257, 16 W.C.B. (2d) 304

Statutes referred to

Canada Evidence Act, R.S.C. 1985, c. C-5 [as am.]

APPEAL by the accused from the conviction entered on May 24, 2012 and the sentence imposed on September 13, 2012 by Langdon J. of the Superior Court of Justice, sitting without a jury.

Carlos Rippell, for appellant.

Philippe G. Cowle, for respondent.

[1] Endorsement BY THE COURT: -- A.M. appeals his conviction of sexual interference. [1] He says the trial judge made several errors in assessing the evidence adduced at trial and, as a result, erroneously concluded the Crown had proven its case

beyond a reasonable doubt. He also submits his trial counsel did not provide effective legal assistance and seeks leave to appeal his sentence.

[2] We conclude the trial judge made reversible errors in his reasons for judgment. It is therefore unnecessary to consider either the claim of ineffective assistance of counsel or the sentence appeal.

The Background Facts

[3] The complainant, one of A.M.'s siblings, alleged years of sexual abuse in the family home. The abuse began when A.M. had the complainant masturbate him until he ejaculated. Thereafter, the abuse consisted of acts of oral sex occurring at least once and, eventually, two or three times a week. The incidents occurred, for the most part, in an upstairs hallway in the family home. From there, A.M. could see whether anyone was heading upstairs.

[4] The complainant told her mother about the abuse, but the conduct continued. To protect herself, the complainant had a friend, A.B., move into her room in the family home. Nevertheless, according to the complainant, the abuse continued, albeit with a reduced frequency.

[5] The complainant and her mother argued about A.B.'s constant presence in the family home. Her mother insisted A.B. had to leave. Concerned the abuse would become more frequent if A.B. left, the complainant disclosed to her mother, for the second time, what A.M. had been doing to her. A.M. was kicked out of the house, but returned the next day. The complainant left the family home and moved into A.B.'s home.

[6] The appellant did not testify or call any witnesses at trial.

The grounds of appeal

[7] A.M. alleges the trial judge's reasons reflect error in

- (i) the manner of assessing the complainant's testimony;
- (ii) failing to address the numerous inconsistencies and improbabilities in the complainant's evidence; and
- (iii) using a prior consistent statement made by the complainant to buttress her credibility as a witness and the reliability of her account.

The governing principles

[8] Several basic principles inform our decision regarding the trial judge's reasons for judgment.

[9] First, every witness, irrespective of age, is an individual whose credibility and evidence should be assessed according to criteria appropriate to his or her mental development, understanding and ability to communicate: *R. v. W. (R.)*, 1992 CanLII 56 (CSC), [1992] 2 S.C.R. 122, [1992] S.C.J. No. 56, at p. 134 S.C.R.

[10] Second, no inflexible rules mandate when a witness' evidence should be evaluated according to "adult" or "child" standards. Indeed, in its provisions regarding testimonial capacity, the *Canada Evidence Act*, R.S.C. 1985, c. C-5 eschews any

reference to "adult" or "child", preferring the terms "14 years or older" and "under 14 years of age". An inflexible, category-based system would resurrect stereotypes as rigid and unyielding as those rejected by the recent developments in our approach to children's evidence: *W. (R.)*, at p. 134 S.C.R.

[11] Third, despite this flexibility, there are some guiding principles. Generally, where an adult testifies about events that occurred when she was a child, her credibility should be assessed according to the criteria applicable to adult witnesses. However, the presence of inconsistencies, especially on peripheral matters such as time and location, should be considered in the context of her age at the time the events about which she is testifying occurred: *W. (R.)*, at p. 134 S.C.R. See, also, *R. v. Kendall*, 1962 CanLII 7 (SCC), [1962] S.C.R. 469, [1962] S.C.J. No. 27.

[12] Fourth, one of the most valuable means of assessing witness credibility is to examine the consistency between what the witness said in the witness box and what she has said on other occasions, whether or not under oath: *R. v. G. (M.)*, 1994 CanLII 8733 (ON CA), [1994] O.J. No. 2086, 93 C.C.C. (3d) 347 (C.A.), at p. 354 C.C.C., leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 390. Inconsistencies may emerge in a witness' testimony at trial, or between their trial testimony and statements previously given. Inconsistencies may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions.

[13] Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *G. (M.)*, at p. 354 C.C.C.

[14] Fifth, a trial judge giving reasons for judgment is neither under the obligation to review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel: *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, 2008 SCC 51, at para. 64. That said, a trial judge should address and explain how she or he has resolved major inconsistencies in the evidence of material witnesses: *G. (M.)*, at p. 356 C.C.C.; *R. v. Dinardo*, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 2008 CSC 24, at para. 31.

[15] Sixth, prior consistent statements of a witness are not admissible for their truth: *R. v. Stirling*, [2008] 1 S.C.R. 272, [2008] S.C.J. No. 10, [2008 SCC 10](#), at para. 7. Mere repetition of a story on a prior occasion does not make the in-court description of the events any more credible or reliable: *R. v. Curto*, [2008] O.J. No. 889, [2008 ONCA 161](#), 230 C.C.C. (3d) 145, at paras. 32, 35; *R. v. Ay*, [1994 CanLII 8749 \(BC CA\)](#), [1994] B.C.J. No. 2024, 93 C.C.C. (3d) 456 (C.A.), at p. 471 C.C.C.

[16] Seventh, in reviewing reasons for sufficiency, we must ask ourselves whether the reasons, taken as a whole and considered with

-- the evidentiary record;

-- the submissions of counsel; and

-- the live issues at trial

reveal the basis for the verdict reached: *M. (R.E.)*, at para. 55; *R. v. Vuradin*, [2013] 2 S.C.R. 639, [2013] S.C.J. No. 38, 2013 CSC 38, at paras. 12,15.

[17] Eighth, where a case turns largely on determinations of credibility, the sufficiency of reasons must be considered in light of the deference generally afforded to trial judges on credibility findings. It is rare for deficiencies in a trial judge's credibility analysis, as expressed in the reasons for judgment, to warrant appellate intervention: *Vuradin*, at para. 11; *Dinardo*, at para. 26.

[18] Nevertheless, the failure of a trial judge to sufficiently articulate how credibility and reliability concerns are resolved may constitute reversible error: *Vuradin*, at para. 11; *Dinardo*, at para. 26; *R. c. Braich*, [2002] 1 R.C.S. 903, [2002] S.C.J. n° 29, 2002 CSC 27, at para. 23. After all, an accused is entitled to know why the trial judge had no reasonable doubt about his or her guilt: *R. v. Gagnon*, [2006] 1 S.C.R. 621, [2006] S.C.J. No. 17, 2006 CSC 17, at para. 21.

[19] Similarly, we take it as self-evident that a legal error made in the assessment of credibility may displace the deference usually afforded to a trial judge's credibility assessment and may require appellate intervention.

[20] Finally, when evaluating a trial judge's credibility analysis, there is no principled reason to distinguish between cases involving oath against oath from those in which no competing oath has been offered.

The Principles Applied

[21] In our view, the reasons of the trial judge, read as a whole and in the context of the issues raised and evidence given at trial, reveal legal error in his assessment of the evidence. Although we acknowledge that deficiencies in a trial judge's credibility analysis rarely merit appellate intervention (*Vuradin*, at para. 11; *Dinardo*, at para. 26), in this case, the trial judge's reasons are fatally flawed. As a result, the conviction cannot stand.

[22] In this case, as in many, the ultimate result turned largely on the trial judge's assessment of the credibility of the witnesses and the reliability of their evidence. The Crown's case against A.M. stood or fell on the basis of the complainant's evidence. However, her credibility was impeached and the reliability of her evidence challenged.

[23] Accordingly, it was essential to a fair trial that the trial judge apply the proper legal principles to evaluate her testimony, articulate how the credibility concerns were resolved and explain why her testimony left him with no reasonable doubt of A.M.'s guilt: *Gagnon*, at para. 21; *Vuradin*, at para. 11; *Dinardo*, at para. 26; *Braich*, at para. 23.

[24] In our view, the trial judge's credibility analysis is marred by two principal legal errors.

[25] First, the trial judge assessed the complainant's evidence as if she were a "child" witness. She was not. The complainant was 19 years old when she testified at trial about abuse that extended over a decade, until about her 17th birthday. Her testimony

was that of an adult regarding events that first occurred when she was a child and continued well into her teenage years. The trial judge was obliged to assess her credibility according to the criteria applicable to adult witnesses, not the somewhat lessened standard of scrutiny associated with child witnesses: *W. (R.)*, à la p. 134 R.C.S.; *R. v. Gostick*, 1999 CanLII 3125 (ONCA), [1999] O.J. n° 2357, 137 C.C.C. (3d) 53 (C.A.), at paras. 12-13; *R. v. S. (D.D.)*, [2006] N.S.J. n° 103, 2006 NSCA 34, 207 C.C.C. (3d) 319, at para. 54. While the trial judge was entitled to apply a less exacting standard to peripheral matters that occurred during the complainant's childhood, he erred in assessing the complainant's credibility as if she were testifying as a "child": *W. (R.)*, at pp. 134-35 S.C.R.

[26] Second, the trial judge characterized an admitted "exaggeration" by the complainant under oath at the preliminary inquiry as "hyperbole, a common form of literary emphasis" and thus "a badge of credibility". The admitted exaggeration was a prior inconsistent statement about a material issue given under oath. It is difficult to see how a prior statement under oath inconsistent with sworn testimony at trial, especially regarding a material issue, could serve as a credibility enhancer. At best, the exaggeration reflects a carelessness for the truth when testifying under oath. Left unexplained, this would tend to impeach the witness' credibility rather than enhance it: *R. v. G. (M.)*, at p. 354 C.C.C.

Conclusion

[27] For these reasons, the conviction cannot stand. In a case that turned on findings of credibility and an assessment of reliability, the trial judge's credibility analysis reflected fundamental legal errors and ultimately failed to sufficiently explain how the credibility and reliability concerns were resolved. The appeal is allowed, the conviction and conditional stay set aside, and a new trial directed on the counts of sexual assault and sexual interference.

Appeal allowed.

Notes

[1] A conviction for sexual assault was stayed on the basis of *R. v. Kienapple*, 1974 CanLII 14 (CSC), [1975] 1 R.C.S. 729, [1974] S.C.J. n° 76.