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COURT OF APPEAL FOR ONTARIO

DOHERTY, LASKIN and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	Brian Snell for the appellant
	)	
Respondent	)	
	)	
- and -	)	
	)	Riun Shandler
JAMIE HOWE	)	for the respondent
Appellant	)	
	)	
	)	
	)	Heard: December 9, 2004

On appeal from the convictions entered by Justice John R. Belleghem of the Superior Court of Justice on March 4, 2003.

DOHERTY J.A.:

I

[1] The appellant was tried by a judge sitting without a jury on a ten count indictment. He was convicted on four counts and acquitted on five.*

[2] The appellant appeals from his convictions. Counsel advanced several arguments. His primary submission is that the trial judge made several errors in the approach he took to the assessment of the credibility of the complainant and the appellant. Counsel contends that these errors resulted in a skewed analysis of the credibility of the two main witnesses and necessitates the quashing of the convictions.

[3] I would allow the appeal. The trial judge's reasons are exemplary in many respects. However, they do demonstrate that the trial judge failed to give effect to his implicit finding that the complainant had a motive to falsely accuse the appellant and failed to give any effect to his finding that the complainant lied on material matters during her testimony. These errors necessitate the quashing of the convictions and the ordering of a new trial.

II

(a) Overview

[4] All of the charges involve the appellant and his former girlfriend, A.K. The appellant and Ms. A.K. were involved in an intermittent volatile relationship from June 2000 to March 2002. Ms. A.K. was 15 when the relationship began and the appellant was 22. She did not want anyone, especially her parents, to know about her involvement with the appellant. Ms. A.K. testified that she became pregnant twice during the relationship, the first ending in an abortion.

[5] Ms. A.K. and the appellant quarrelled throughout their relationship. Each accused the other of numerous infidelities. They would argue and break-up, only to make up a short time later. A new quarrel would follow and the cycle would repeat itself.

[6] The first nine counts in the indictment alleged assaults that occurred during the relationship. Ms. A.K. did not report any of these assaults to the police while she was in a relationship with the appellant. She and the appellant broke up for good in March 2002. Ms. A.K. did not go to the police immediately. However, according to her, the appellant repeatedly made harassing phone calls to her in the weeks following the break- up. Ms. A.K. finally decided she had had enough and went to a justice of the peace for a restraining order. She went to the police in early April 2002 and made the allegations that led to the charges in the indictment.

[7] The appellant testified that after the final break-up in March 2002, it was Ms. A.K. who made harassing phone calls to him. He also led evidence that Ms. A.K. was very angry with him after the break-up and threatened to get back at him.

[8] The Crown relied primarily on Ms. A.K.'s evidence on each count. On some of the counts, there was no evidence capable of supporting her testimony. The appellant testified and denied all of the allegations. He also called evidence of certain events which occurred after the final break-up. Ms. A.K. was called in reply and denied much of the conduct attributed to her in the evidence of the defence witnesses.

III

(b) The specific allegations

<u>Count one (sexual assault)</u>

[9] Ms. A.K. testified that in January 2001, the appellant called her at her home and asked if he could come over to play pool. There was no one home so Ms. A.K. agreed that he could come over. Ms. A.K. testified that while the appellant was at her home, he raped her.

[10] The appellant testified and denied that any sexual activity with Ms. A.K. was non-consensual.

[11] There was no evidence capable of supporting Ms. A.K.'s evidence on this count. The trial judge convicted.

<u>Count two (assault)</u>

[12] Ms. A.K. testified that in March 2001, she was at the appellant's home doing her homework. She was pregnant. A fight ensued and the appellant kicked her in the stomach. He later apologized. The appellant denied the assault.

[13] There was no evidence capable of confirming Ms. A.K.'s evidence on this count. The trial judge acquitted.

Count three (assault)

[14] Ms. A.K. testified that in May 2001 she happened to see the appellant at a McDonald's restaurant. An argument ensued over the abortion that Ms. A.K. had undergone about a month earlier. The appellant punched her in the face and slapped her. There was independent evidence that Ms. A.K. had a black eye the next day. The appellant later apologized. In the appellant's testimony, he acknowledged being at the McDonald's restaurant but denied the assault.

[15] The trial judge convicted.

Count four (sexual assault)

[16] Ms. A.K. testified that in June 2001, she was walking past the appellant's home when he invited her inside. She initially declined, but eventually agreed to go inside with him. He apologized for hitting her at the McDonald's restaurant. As she was about to leave he attacked her and raped her. She tried to phone the police, but the appellant ripped the phone from the wall and threatened her. She left and went home. She did not tell anyone about the rape.

[17] The appellant testified that he and Ms. A.K. were in his basement watching television when his sister arrived. A violent argument ensued between the appellant and his sister. Ms. A.K. hid in the furnace room. The appellant testified that after the argument with his sister was over, Ms. A.K. left. He denied sexually assaulting her.

[18] There was no evidence capable of supporting Ms. A.K.'s testimony on this count. The trial judge acquitted.

Counts five and six (break and enter, sexual assault)

[19] Ms. A.K. testified that in June 2001, she arrived home in the afternoon to find the appellant sitting on her bed. There was no one else in the house and as far as Ms. A.K. knew, all of the doors were locked. The appellant had not been invited into her home. Ms. A.K. testified that the appellant attacked and raped her. He fled when he heard the garage door opening.

[20] The appellant testified that not only had the alleged incident never occurred, he had never even been in the house where Ms. A.K. said it occurred.

[21] There was no evidence capable of supporting Ms. A.K.'s evidence on these counts. The trial judge found the appellant guilty on both counts but stayed the conviction on the break and enter charge.

Count seven (assault)

[22] Ms. A.K. testified that in August 2001, she was visiting the appellant at his cousin's apartment. She found a receipt in his pocket that suggested to her that the appellant had gone to a hotel with another woman. They quarreled. Ms. A.K. testified that the appellant pushed her against the stair railing, bruising her shoulder and thigh.

[23] The appellant testified that Ms. A.K. would often visit him at his cousin's apartment. They would have sex in the stairwell. He denied that he assaulted Ms. A.K. He testified that Ms. A.K. became very angry whenever she thought that the appellant had been seeing other women.

[24] There was no evidence capable of supporting Ms. A.K.'s testimony on this count. The trial judge acquitted.

Count eight (assault)

[25] Ms. A.K. testified that by January 2002, she and the appellant were once again seeing each other. They were walking along the street when the appellant became angry, grabbed her arm and dragged her along the sidewalk. The appellant threatened to kill her. Ms. A.K. testified that when some neighbours came out to see what the noise was about, she asked them to call the police. When the police arrived, Ms. A.K. told them that nothing had happened and declined their offer to drive her home. She appeared composed.

[26] The appellant testified and denied that he had assaulted the complainant.

[27] There was no evidence capable of supporting Ms. A.K.'s testimony on this count, and the evidence of the police officer tended to contradict her allegation. The trial judge acquitted on this count.

Count nine (uttering death threats)

[28] Ms. A.K. testified that in February 2002, she was at her home visiting with a friend. The appellant called shortly after midnight. They argued because the appellant had not called her all day. Ms. A.K. testified that in the course of the argument the appellant threatened to burn down her house and kill her family.

[29] The appellant denied threatening the complainant or her family.

[30] There was no evidence capable of supporting the complainant's evidence on this count. The trial judge acquitted.

Count ten (criminal harassment)

[31] Ms. A.K. testified that in the weeks following their final break-up, she received dozens of telephone calls from the appellant. The calls consisted of rap music blended with obscenity-laced interjections by the appellant. The calls had a threatening tone and Ms. A.K. testified that she feared for her safety. Ms. A.K. tape recorded several of the calls and the tape recordings were played at trial.

[32] The appellant testified that he only called Ms. A.K. once at the end of their relationship. He spoke briefly to Ms. A.K.'s mother who told him not to call back. The appellant denied that it was his voice on the messages played in court. Counsel also argued that even if the calls were made, Ms. A.K.'s

own conduct belied her claim that they caused her to fear for her safety. The trial judge rejected the appellant's evidence as an outright lie and convicted on this count.

(c) The events after the final break-up

[33] The appellant's aunt testified that in the weeks following the break-up, Ms. A.K. repeatedly phoned the appellant. The aunt eventually went to a justice of the peace for a restraining order.

[34] The appellant's aunt taped one telephone call. In that call, Ms. A.K. said she was coming to the appellant's apartment to get her belongings, that if they were not ready she would "kick the fucking door open". Ms. A.K. admitted making this call but denied going to the appellant's home.

[35] The aunt further testified that on April 4, 2002, the day before the appellant was arrested on these charges, Ms. A.K. and a friend arrived at the appellant's apartment. According to the aunt, Ms. A.K. was very angry. She accused the appellant of seeing other women and intimated that she could get the appellant in a lot of trouble because he was on probation. The friend who accompanied Ms. A.K. to the apartment testified for the defence. She confirmed the aunt's evidence and described Ms. A.K. as very angry and wanting to get revenge against the appellant.

[36] Ms. A.K. testified in reply and denied that she went to the appellant's home as described by the aunt.

[37] The appellant testified that about the same time that Ms. A.K. went to his apartment and confronted his aunt, he was walking down the street with another woman when Ms. A.K. and a friend drove past. Ms. A.K. rolled down the window and screamed obscenities at the appellant. She threw a cup containing dark liquid, probably coffee, at the appellant.

[38] The appellant's evidence was confirmed by the testimony of the woman who was with him when this incident occurred. She testified that Ms. A.K. pulled up in a vehicle and was very angry. She demanded to know the woman's identity and yelled at the appellant:

> I'm going to get you, Jamie, and your fucking bitch.

[39] The friend further testified that as the car pulled away, Ms. A.K. threw a cup containing liquid at the appellant and the woman.

[40] A friend of Ms. A.K. testified that Ms. A.K. told her about the incident some time after it occurred.

[41] Ms. A.K. testified in reply and denied that the incident had ever occurred.

[42] Although the trial judge found Ms. A.K. to be generally credible and accepted her evidence over that of the appellant, he did reject her evidence concerning the visit to the appellant's home and the incident involving the throwing of the liquid substance at the appellant. The trial judge concluded, contrary to Ms. A.K.'s evidence, that these incidents occurred as described by the defence witnesses.

IV

The Argument

[43] The trial judge's reasons provide a detailed, careful and accurate summary of the evidence. He first engaged in a global assessment of the respective evidence of the appellant and Ms. A.K. He then moved to a consideration of the evidence relevant to the individual counts. While the trial judge clearly preferred the evidence of the complainant, he did acquit on five of the counts, concluding that her evidence standing alone did not satisfy him beyond a reasonable doubt of the appellant's guilt. Counsel for the appellant submitted that the acquittal on those five counts where there was no supporting evidence, is inherently inconsistent with the convictions on counts one and six where there was also no evidence capable of confirming Ms. A.K.'s allegations.

[44] I do not accept this submission as a stand alone basis for appellate intervention. In a multi-count indictment, the trier of fact must give separate consideration to his or her verdict on each count. A trier of fact is entitled to accept parts of a witness's evidence and reject other parts. Similarly, the trier of fact can accord different weight to different parts of the evidence that the trier of fact has accepted.

[45] Crown counsel has satisfied me that the different circumstances surrounding the different allegations made by Ms. A.K. provided a rational basis upon which the judge could come to the conclusion that her evidence proved the appellant's guilt beyond a reasonable doubt on counts one and six, but could not meet that same burden on the other counts without supporting evidence. The different verdicts arrived at by the trial judge on counts where there was no confirming evidence do, however, demonstrate the need to carefully scrutinize the trial judge's reasoning process.

[46] Careful scrutiny of the trial judge's reasoning process is not, however, to be equated with re-trying the case. An appellate court must always bear in mind the significant advantage enjoyed by the trial judge when it comes to assessing credibility. This trial turned almost exclusively on the assessment of the respective credibility of Ms. A.K. and the appellant. That assessment was a difficult and delicate task. There were aspects of the evidence of both that would give cause for concern when measuring credibility. In arriving at his ultimate credibility findings, the trial judge doubtless paid careful attention not only to what was said, but to how it was said. A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial. Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations: see *R. v. Francois* (1994), 1994 CanLII 52 (SCC), 91 C.C.C. (3d) 289 at 296 (S.C.C.).

[47] Some arguments on appeal, ostensibly directed at the trial judge's reasoning process, are in reality thinly veiled invitations to the Court of Appeal to substitute its own credibility assessments for those made at trial. Where the essence of the argument advanced on appeal comes down to an assertion that the trial judge was wrong in accepting the evidence of the complainant and rejecting the evidence of the accused, this submission should be treated for what it is, an assertion that the verdict is unreasonable. The success of that assertion turns, ultimately, not on the reasoning process of the trial judge, although that process is relevant, but on whether the verdict can withstand the limited review contemplated by s. 686(1)(a)(i) of the *Criminal Code*: *R. v. Biniaris* (2000), 2000 SCC 15 (CanLII), 143 C.C.C. (3d) 1 at 20-24 (S.C.C.).

[48] With the exception of an argument directed specifically at count ten (the harassing telephone calls), counsel for the appellant does not argue that the convictions are unreasonable. I think he was correct in not advancing that argument. The complainant's evidence, even where it stood alone, was in my view reasonably capable of supporting a conviction. A review of that evidence in the context of the entire trial record and taking into account the errors in the trial judge's reasoning process to which I will refer below, does not compel the conclusion that no reasonable trier of fact acting judicially could have convicted on those counts relying on the evidence of the complainant. In coming to that conclusion, I have applied my understanding of the "bulk of judicial experience" as it pertains to the kind of allegations made in the circumstances revealed by the evidence: *R. v. Biniaris*, supra, at 24. That judicial experience confirms that as bizarre as the relationship described by Ms. A.K. might seem to some, that kind of relationship and the abuse she describes are sadly far from uncommon.

[49] In considering the appellant's submissions aimed at alleged errors in the trial judge's reasoning process, I cannot factor into that analysis any independent assessment of the credibility of the witnesses. I must examine what the trial judge said in explaining how he arrived at his verdicts. The trial judge's reasons must be considered in their entirety bearing in mind that they are intended to explain the result to the parties, not convince the Court of Appeal that the result is the correct one. Where, as in this case, careful and detailed reasons have been given by the trial judge, an appellate court will be slow to find error arising out of some ambiguity in one part of those reasons, much less error arising out of the failure to expressly advert to some operative legal principle or specific piece of evidence.

[50] This trial judge provided a detailed map of the route he took to the verdicts he ultimately arrived at. The appellant says the trial judge took a wrong turn. It is incumbent on him to point to where that wrong turn occurred in the reasons.

[51] I am satisfied that Mr. Snell, counsel for the appellant, in an articulate and forceful argument, has met that burden. He submitted that the trial judge's failure to come to grips with an important inconsistency in his own analysis of whether Ms. A.K. had a motive to fabricate the allegations against the appellant irreparably damages the trial judge's finding that Ms. A.K. was not only credible, but that her evidence alone was sufficiently cogent to prove guilt beyond a reasonable doubt on some counts.

[52] In the first part of his reasons, the trial judge made a global assessment of the evidence and the credibility of the appellant and Ms. A.K. In the course of explaining why he found Ms. A.K. to be a credible witness, the trial judge said:

> She has had no motive to fabricate her allegations against the defendant because, as she says, all she wanted once she broke up with him, was to be left alone. In fact, she conceded that if he had left her alone and not commenced the telephone criminal harassment, that it is unlikely that any of the events to which [she] testified would have come to light. I am unable to find any rationale that would support a motive to fabricate evidence against the defendant [emphasis added].

[53] Later in his reasons, but while still addressing his global assessment of the credibility of the key witnesses, the trial judge turned to the defence evidence concerning Ms. A.K.'s conduct after the final break-up in March 2002. As described above, that evidence related to Ms. A.K.'s attendance at the appellant's home where she confronted the appellant's aunt, and an incident where Ms. A.K. allegedly threw a liquid substance at the appellant from a passing vehicle while screaming obscenities at him.

[54] The trial judge was alive to the potential evidentiary value of this evidence to the defence. He said:

> If I accept the evidence on behalf of the defendant that the coffee throwing incident occurred as described, the incident at the aunt's house, and the allegations that she said the defendant could get into a lot of trouble for being on probation, then this certainly constitutes some evidence of, not only the existence of a motive to act wilfully and with animosity against the defendant, but evidence that the complainant has demonstrated a propensity for so doing.

[55] After reviewing the defence evidence concerning these incidents, the trial judge made a specific finding that he accepted the evidence of the defence witnesses and rejected Ms. A.K.'s denial that those incidents had occurred given by Ms. A.K. in her reply evidence.

[56] The trial judge made no further reference to whether, in his view, Ms. A.K. had a motive to make false allegations against the appellant when she went to the police and made these allegations. Clearly, if she had such a motive, it was an important consideration in assessing her credibility.

[57] The trial judge's recognition that the defence evidence could establish a motive to falsely accuse the appellant, and the trial judge's acceptance of that evidence, lends strong credence to at least an implied finding that Ms. A.K. had a motive to falsely accuse the appellant. The trial judge's failure to recognize and reconcile the apparent inconsistency between this finding and his earlier finding that she had no motive to fabricate lead me to conclude that the trial judge's ultimate assessment of Ms. A.K.'s credibility was made without regard to the implicit finding that she had a motive to falsely accuse the appellant. This motive was potentially a significant consideration in assessing her credibility. The failure to factor that motive into the trial judge's credibility assessment resulted in a miscarriage of justice.

[58] Counsel submits that the reasons of the trial judge reveal a second error. He contends that the trial judge applied a higher standard of scrutiny in his assessment of the appellant's evidence and credibility than he did when considering the evidence and credibility of Ms. A.K.

[59] This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.

[60] In this case, counsel relies on the very different way in which the trial judge treated the part of Ms. A.K.'s evidence which he found to be untrue and the appellant's evidence which he found to be untrue.

[61] In considering the appellant's evidence, the trial judge concluded that the appellant had deliberately lied in his testimony when he refused to acknowledge that it was his voice on the taped telephone calls. The trial judge then said:

> The fact that the defendant would deny making the calls, when it is so patently obvious that they were his, leads me to conclude that there is nothing whatsoever of any substance in his entire testimony that is worthy of belief … Not only do I reject the defendant's evidence in its entirety, I find nothing, whatsoever, in it that is remotely capable of raising any reasonable doubt.

[62] Counsel submits that the damning effect on the appellant's credibility of what the trial judge found to be a lie in his testimony should be compared with the much more benign treatment afforded Ms. A.K.'s evidence which the trial judge also found to be a lie. As described above, Ms. A.K. had denied that she ever went to the appellant's home after their final break-up and had a confrontation with his aunt, and denied the "coffee throwing" incident. The trial judge accepted the defence evidence on both matters and concluded that Ms. A.K. was not telling the truth when she denied that these events had occurred. He then said:

> She is reluctant to make any admission which will compromise her allegations.

[63] Counsel contends that on the trial judge's findings, both Ms. A.K. and the appellant told deliberate lies in the course of their testimony. Counsel argues that the fact that the appellant's lie led to a complete and emphatic rejection of his evidence, while Ms. A.K.'s lie led only to the observation that she seemed reluctant to admit facts that hurt her case, can only be explained by the application of two very different standards in determining the respective credibility of Ms. A.K. and the appellant. Counsel asks rhetorically: why did the lies told by the appellant in his testimony lead to an outright rejection of his evidence, while the lies told by the complainant in her testimony were so insignificant as to not preclude a finding of guilt based exclusively on her evidence?

[64] I think there is merit to this submission, although I would frame it slightly differently than counsel for the appellant. The essential problem with this part of the trial judge's reasons is that he failed to factor into his assessment of Ms. A.K.'s credibility his finding that she deliberately lied on important matters in the course of testifying in reply. Her denial, which the trial judge clearly rejected, was much more than a mere reluctance to admit matters that could hurt her case. Having found that significant parts of Ms. A.K.'s evidence were untrue, the trial judge had to factor that finding into the assessment of her overall credibility and particularly her credibility as it applied to the counts for which there was no confirmatory evidence. In my view, the trial judge failed to take Ms. A.K.'s deliberately false testimony into account in making his ultimate credibility assessments.

V

Conclusion

[65] The trial judge failed to give effect to his implicit finding that Ms. A.K. had a motive to falsely accuse the appellant and also failed to give any effect to his finding that Ms. A.K. had lied on material matters during her evidence. These errors lead me to conclude that the appellant was convicted as a result of a seriously flawed analysis of the credibility of his accuser. This constitutes a miscarriage of justice.

[66] I would quash the convictions and direct a new trial on the counts on which the appellant was convicted (counts 1, 3, 5 and 10) and count 6, the count that was stayed pursuant to *R. v. Kienapple*, supra.

RELEASED: "DD" "JAN 11 2005

"Doherty J.A."
"I agree John Laskin J.A."
"I agree Robert P. Armstrong J.A."

* The appellant was found guilty on an additional charge, but that conviction was stayed pursuant to *R. v. Kienapple*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729.