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August 14, 2017

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R. V. A.N., 2017 ONCA 647

The appellant appeals his convictions of sexual offences arising out of two incidents the complainant testified occurred 33 years ago, when the appellant babysat the complainant. At the time, the appellant was 14 years of age and the complainant – his cousin – was just short of her sixth birthday.

Because of his age at the time of the alleged incidents, the appellant was tried in Youth Court. The appellant testified. He acknowledged that he had babysat the complainant, but denied the incidents occurred. The trial judge concluded that there was "nothing in [the appellant's] evidence that would justify me in concluding that he is not believable or credible except for the existence of conflicting evidence of [the complainant]." The trial judge found the complainant to be reliable and credible and, invoking this court's decision in R. v. J.J.R.D. (2006), 215 C.C.C. (3d) 252, rejected the appellant's evidence based on his acceptance of the conflicting evidence of the complainant.

The trial judge convicted the appellant of having sexual intercourse with a person under the age of 14 years without her consent (then s. 146 of the Criminal Code) and one count of indecent assault (formerly s. 149 of the Code). He stayed the charge of having sexual intercourse with a female person without consent (formerly s. 144 of the Code) and one count of indecent assault under the principles set out in R. v. Kienapple, [1975] 1 S.C.R. 729. The appellant was sentenced to 90 days custody and supervision (served as 60 days' jail, intermittent, and 30 days' supervision).

With the assistance of Duty Counsel, the appellant advances four grounds of appeal:

1. The trial judge erred in his application of J.J.R.D. by rejecting the appellant's testimony based on his acceptance of the complainant's testimony without a "considered and reasoned" analysis of that testimony and the whole of the evidence;

2. The trial judge erred in failing to adequately assess the reliability of the complainant's evidence;

3. Having determined that he required confirmation of the complainant's evidence, the trial judge failed to identify any such confirmation; and

4. The trial judge provided insufficient reasons to convict the appellant.

For the following reasons, we agree with the appellant that the trial judge erred in his application of J.J.R.D. Given that conclusion, and the overlapping nature of the appellant's grounds of appeal, we need not separately address the remaining grounds of appeal. We allow the appeal, set aside the convictions, and order a new trial.

To provide the necessary background, we first provide a summary of the trial judge's reasons.

The trial judge's reasons

As indicated above, the trial judge found that there was nothing in the appellant's evidence that the alleged incidents did not occur that would justify concluding that he was not credible.

The trial judge noted that when, in a criminal trial, it comes down to a complainant's testimony versus that of the accused, it is important that the trier of fact seek out confirmatory evidence that supports the complainant's evidence.

He also noted that in addition to the inconsistencies between the appellant's and the complainant's evidence, there were inconsistencies between the complainant's and her mother's evidence.

He found that the complainant's recollection of the events giving rise to the charges was excellent: "She was able to recall, with precision, details of how the assault evolved, the circumstances before and after the assault, and what she was doing before the assaults and what occurred afterwards."

In contrast, the mother testified that she had undergone operations to her head and things had been erased. Details were buried in her memory and her memory came and went. Because of this, the trial judge was reluctant to place much reliance on her evidence. Where the mother's evidence conflicted with that of the complainant, the trial judge accepted the evidence of the complainant.

He wrote as follows:

I find [the complainant] to be reliable and credible. I have already mentioned her ability to recall and relate in detail the assaultive behaviours of the accused. I might add, the evidence discloses no motive to fabricate and if she was

of a mind to make up the facts of the sexual assaults, she could have made the second incident a much worse scenario. In addition, [the complainant] gave her evidence in a calm and measured manner. She was articulate and unshaken in cross-examination.

The trial judge indicated that in finding that the appellant had been proven guilty beyond a reasonable doubt, he had followed J.J.R.D., which held that the rejection of an accused's evidence may be derived from a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence.

Both the complainant and M., the appellant's sister, testified about a third incident, often referred to at trial as the sticker book incident, which occurred about two years after the parameters of the charge. The Crown submitted that M.'s evidence about the sticker book incident was confirmatory evidence that supported the complainant's evidence. The trial judge was satisfied beyond a reasonable doubt as to the appellant's guilt without considering the evidence about the sticker book incident. Therefore, he concluded that it was unnecessary to rule on the admissibility of that evidence.

The principle in J.J.R.D.

At para. 53 of J.J.R.D., Doherty J.A. wrote for the court that, "An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence."

Rejection of an accused's evidence based on the acceptance of a complainant's conflicting evidence constitutes reversible error if the acceptance, beyond a reasonable doubt, is not considered and reasoned: R. v. D.H., 2016 ONCA 569, 338 C.C.C. (3d) 251.

Analysis

The issue of the reliability of a complainant's evidence is heightened where, as in this case, the complainant testifies to events she alleges occurred several decades before, when she was a young child.

We agree that the trial judge's acceptance of the complainant's evidence was not "considered and reasoned", in accordance with J.J.R.D.

The trial judge was not required, as a matter of law, to seek out confirmatory evidence in order to make a finding of guilt. Nonetheless, in his reasons, the trial judge identified what, in the circumstances of the case, was necessary for him to reach a "considered and reasoned" acceptance of the complainant's evidence beyond a reasonable doubt – the existence of confirmatory evidence supporting that of the complainant. However, the trial judge in his reasons failed to identify any independent evidence that strengthened his belief in the veracity of the complainant's evidence. By the standard he set, his acceptance of the complainant's evidence was not "considered and reasoned". Moreover, it is not clear that the evidence that the trial judge admitted includes any confirmatory evidence that supports the complainant's evidence.

Given the foregoing conclusion, it is unnecessary for us to address the appellant's other arguments.

Disposition

We allow the appeal, set aside the convictions and order a new trial. The admissibility of the evidence about the sticker book incident shall be determined, if required, on the re-trial.

NASON V. THUNDER BAY ORTHOPAEDIC INC., 2017 ONCA 641

The appellant, Darren Nason, was an orthotic technician working for the respondent, Thunder Bay Orthopaedic Inc. He developed problems with his arms and hands as a result of the physical demands of his work. The respondent placed him on a medical leave of absence on August 18, 2010, and terminated his employment on January 22, 2013. The appellant sued for wrongful dismissal and for damages under the Human Rights Code for his employer's failure to accommodate his disability and for disability related discrimination. The trial judge awarded damages for wrongful dismissal equal to 15 months' pay in lieu of notice, net of WSIB benefits the appellant received during that period, plus $10,000 in damages for breach of the Human Rights Code, finding that the disability was a factor in the respondent's decision to terminate the appellant's employment.

The appellant submits that the trial

judge erred by refusing to award him additional damages for loss of income between August 18, 2010, and January 22, 2013. He says the trial judge erred in concluding that the respondent had accommodated his disability to the point of undue hardship on August 18, 2010, and that the employer was justified in placing him on medical leave on that date.

The respondent cross-appeals. It submits that the trial judge erred by failing to find that the employment contract was frustrated by the appellant's disability. The respondent submits that at the time of termination, there was no reasonable likelihood of the employee being able to return to work within a reasonable time.

For the reasons that follow, both the appeal and the cross-appeal are dismissed. Neither party has demonstrated palpable and overriding error on the part of the trial judge.

A. THE TRIAL JUDGE'S REASONS

Both parties agree that the trial judge correctly articulated the applicable legal tests. Both disagree with his application of those tests to the facts as he found them.

B. ACCOMMODATION TO POINT OF UNDUE HARDSHIP

The trial judge found that the respondent had made significant changes to the appellant's work duties to accommodate his disabilities, but that it had reached the point of undue hardship in making those accommodations:

Pursuant to TBO's knowledge of Mr. Nason's condition and their knowledge of the physical requirements of a technician's job, modifications were put in place for Mr. Nason. It was agreed that he would be allowed to work at a pace compatible with his condition. Mr. Nason was allowed rest breaks at his discretion and breaks to perform stretching exercises. He was told not to use the computer at lunch and to rest his hands and wrists instead. He was allowed extensive paid time off as requested to attend physiotherapy and medical appointments. Most significantly, he was no longer required to do cast modifications, a job that Mr. McWhirter knew was physically demanding. Mr. Nason's evidence that he was not consulted and that all changes were made unilaterally is not credible.

In my opinion, the steps taken by TBO satisfy the substantive component of their duty to accommodate Mr. Nason's disability. Mr. McWhirter testified that despite these accommodations, the overall situation got worse. He testified that Mr. Nason's condition continued to deteriorate and his productivity declined to the point where it was 50% or less of what it should have been. I accept this evidence.

Mr. McWhirter testified that TBO employed only two technicians at this time, one of whom was Mr. Nason. As Mr. Nason's productivity decreased, Mr. McWhirter and Mr. Berezowski were required to work evenings and weekends, each working an additional 12 to 13 hours per week, to maintain productivity and to keep pace with others. This represents approximately 2/3 of a full time position. Mr. McWhirter testified that he and his co-owner came to realize that this was simply not sustainable. He testified that it made no sense to keep Mr. Nason on the payroll. TBO felt it was in the best interests of TBO and of Mr. Nason that he be put on leave, allowed to draw the WSIB benefits for which he was qualified and given time away from the workplace to recover from his injuries. I find this to be logical and reasonable.

A determination of whether an employer has accommodated a disabled employee to the point of undue hardship must take account of the specific fact situation and apply common sense. An employer is not required to create a new position for the employee. An employer is not required to make fundamental changes to the employee's job scope or working conditions. Hardship becomes undue when an employee is no longer able to fulfill the basic obligations of his employment position, despite accommodations.

I am persuaded that TBO fulfilled the procedural and substantive components of their duty to accommodate Mr. Nason. TBO is a small business in which all aspects of the operation are familiar to the owners. To a large extent, they work in close proximity to or alongside their employees. They know what is going on in their shop on a day to day basis. TBO understood Mr. Nason's disability and they acted proactively to accommodate that disability by significantly altering his employment duties over the summer of 2010. Despite such accommodations, his condition worsened and his ability to fulfill his employment obligations decreased beyond the point of viability. Keep him on as an active employee beyond this point would have required further fundamental changes to his job duties as well as hiring another technician to do what Mr. Nason could no longer do.

I find that as of early August 2010, TBO had fulfilled their duty to accommodate Mr. Nason to the point of undue hardship. Having done so, their decision to put him on unpaid leave on August 18, 2010 was not an infringement of Mr. Nason's rights to equal treatment with respect to employment. This aspect of the plaintiff's claim is dismissed.

The appellant argues that the respondent could have asked other employees to work through their lunches, or to work more hours. He submits that there was no evidence of financial hardship.

The trial judge had the benefit of hearing the evidence of the appellant and the respondent. There is no basis to interfere with his finding that each of the two proprietors of this specialized small business could no longer sustain 12-15 extra working hours each week.

C. FRUSTRATION OF THE EMPLOYMENT CONTRACT

The trial judge rejected the respondent's argument that the employment contract had been frustrated by the appellant's disability:

The issue of whether the termination of the employment contract of a disabled employee is a wrongful dismissal or the frustration of the employment contract depends on the facts. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of the employment contract depends on the fact of the case. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of contract applies because the permanent disability renders performance of the employment contract impossible, such that the obligations of the parties are discharged without penalty. Frustration of contract is established if at the time of termination there is no reasonable likelihood of the employee being able to work with a reasonable time. (Fraser v. UBS, 2011 ONSC 5448, paragraphs 15 and 32). The onus is on the employer to prove that the contract was frustrated.

TBO has failed to establish that there was no reasonable likelihood of Mr. Nason being able to return to work within a reasonable time of January 22, 2013. The evidence does establish that Mr. Belcamino was of the opinion that Mr. Nason had permanent restrictions. The evidence also establishes that WSIB felt that Mr. Nason's recovery had plateaued and that he had reached his maximum medical recovery. WSIB also concluded that Mr. Nason was partially permanently impaired as of the end of 2012. However, whether Mr. Nason could have returned to work, with accommodations, had not been sufficiently explored as of January 2013 such that one could conclude that there was no reasonable likelihood of it happening in the future.

TBO's statement in their January 14, 2013 letter to Mr. Nason undermine their position on this issue. In this letter they advised Mr. Nason that nothing is currently available but they will "re-evaluate" his desire to return to work if and when medically cleared.

The respondent, however, terminated the appellant's employment on January 22, 2013, about a week after sending a letter dated January 14, 2013 in which it stated that it would "re-evaluate his desire to return to work if and when medically cleared". The termination was made, on the findings of the trial judge, before the appellant could produce evidence establishing that there was a reasonable likelihood of an ability to return to work within a reasonable time. The trial judge correctly noted that the employer had the onus of establishing frustration of the employment contract. There is no basis for this court to interfere with his determination that the issue of whether the appellant could have returned to work within a reasonable time had not been adequately explored as at the date of termination.

Since success was divided on the appeal and cross-appeal, this is not a case for costs.

In the result both the appeal and the cross-appeal are dismissed without costs.