COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Vansnick, 2022 ONCA 822
DATE: 20221124
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Pardu, Paciocco and Zarnett JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Mitchell Vansnick

Appellant

Nicolas Rouleau, for the appellant

Lilly Gates, for the respondent

Heard: November 21, 2022

On appeal from the conviction entered on November 16, 2021 by Justice Gregory J. Verbeem of the Superior Court of Justice.

REASONS FOR DECISION

[1] Mitchell Vansnick appealed his sexual assault conviction arising out of events that occurred after he and the complainant separated from a group of partiers who had gone for a walk together in the early morning hours of September 3, 2018. The party was being held at the “Coll residence”. At the end of his oral appeal hearing, we dismissed Mr. Vansnick’s appeal for reasons to follow. We did so because we were unpersuaded that the trial judge had

misapprehended material evidence, engaged in uneven scrutiny, or unreasonably treated neutral evidence as confirmatory.

[2] There is no dispute that the appellant, Mr. Vansnick, had sexual contact with the complainant after they separated from the group. Mr. Vansnick either penetrated the complainant with his penis, on her version of events, or unsuccessfully attempted to do so with the possibility of a “little bit” of penetration with his flaccid penis, on his account. The complainant alleged that Mr. Vansnick steered her away from the group before pushing her to the ground, holding her down, and prying her legs apart with his foot before penetrating her vagina with his fingers and penis without her consent. Mr. Vansnick said they moved away from the group willingly, and that she consented to the attempted intercourse after performing oral sex on him.

[3] The trial judge rejected Mr. Vansnick’s testimony and believed the complainant beyond a reasonable doubt. He arrived at these conclusions, in part, because he found medical evidence to be consistent with the complainant’s account of the penetration that occurred, but not with Mr. Vansnick’s. That evidence showed that shortly after the sexual contact occurred DNA that was reasonably concluded to be from Mr. Vansnick was extracted from deep inside the complainant’s vagina and that it was placed there by insertion and not migration. He also accepted testimony that Mr. Vansnick had confessed to sexually assaulting the complainant after being beaten up for having done so. The trial

judge did not rely on the coerced confessions as proof of the sexual assault, but Mr. Vansnick's disbelieved denial to confessing was found to harm his credibility.

[4] The trial judge recognized that the complainant's evidence was far from perfect. There were numerous inconsistencies between her testimony and the evolving accounts that she gave to a nurse during a sexual assault examination and then in two police statements. The trial judge addressed these inconsistencies in detail. He found a number of them to be peripheral and that the evolving nature of the complainant's accounts was explained by her physical condition during the early interviews. She was intoxicated, extremely so when speaking to the nurse, and she was distressed, confused, and felt "numb" and "blurry" when speaking to the nurse and the police only hours later. Despite the conflicts in her evidence, the trial judge believed the core allegations of her trial testimony relating to the essential elements of the offence, finding that she was attempting to be honest and forthright, and that the core details of her account were confirmed by other evidence.

[5] We do not accept that the confirming evidence the trial judge relied upon was neutral and therefore could not serve as proof against Mr. Vansnick. In addition to the medical evidence described above, there was evidence before the trial judge that the complainant was observed with her hands over her face walking quickly to the Coll residence from between nearby neighbouring houses, where items she had with her during the walk had been left behind in the grass,

including her cellphone. She did not walk beside Mr. Vansnick but ten or so steps ahead of him. Her clothes, which had not been in disarray before the walk, were muddy and disheveled. Her shorts were on sideways and her hoodie was “very stretched out” around her neck, and it was off her shoulder. She had multiple scratches, bruises, and blood on her lower body, and she was extremely distraught, hysterical, and unresponsive to questions. The trial judge was entitled to find that the nature of her return, the condition of her clothes, the injuries sustained, and her distraught condition were confirmatory of her account. The condition of her clothing fit her trial description of events, the injuries were entirely consistent with the force she described and inconsistent with the consensual events that Mr. Vansnick described, and her distraught condition—which was explained by the forcible rape she described—clashed with Mr. Vansnick’s account that she seemed fine only seconds before. We are persuaded that the confirmatory evidence relied upon by the trial judge provided a strong platform for his decision.

[6] We also reject Mr. Vansnick’s submission that the trial judge misapprehended evidence. The trial judge understood the DNA evidence, described above, and was entitled to use it as he did. We do not agree that his finding that the complainant was inaccurate about her alcohol consumption was a finding of dishonesty that the trial judge failed to appreciate the implications of. Nor do we find that the trial judge failed to appreciate the impact that the

complainant's advanced intoxication would have on her memory. As explained, the trial judge took an appropriately guarded approach to her testimony, accepting the core allegations because of the independent circumstantial support that existed. The trial judge was not unaware that the complainant's evidence evolved, even on the nature of the sexual contact that occurred, but as indicated, he chose, as he was entitled to, to rely on the medical evidence to accept the version she gave at trial.

[7] Nor do we find that the trial judge committed material error by failing to engage with the possibility that Mr. Vansnick may not have observed the complainant's upset demeanour on her return to the Coll residence because of his vantage point. Nor do we accept that he committed error by failing to grapple with the likelihood that if the complainant's account was true, partiers would have heard her protests or crying during the sexual assault. These submissions were not featured at trial and are not so solidly grounded in the evidence that they required explicit analysis.

[8] Finally, we do not accept that the trial judge engaged in uneven scrutiny. The indicia Mr. Vansnick relies upon fall far short of the clear foundation needed to make out this challenging ground of appeal. The concessions made by Crown witnesses differed in content and circumstance from the concessions made by Mr. Vansnick. The trial judge was not required to give those concessions equal measure and the inferences he drew show no pattern of preference. We have

explained why the trial judge chose to accept the complainant's trial testimony about penetration but not Mr. Vansnick's, and we find nothing in the trial judge's findings about the location of the sexual assault that indicates uneven scrutiny. The same is true about the trial judge's treatment of the nurse's record.

[9] Despite the able submissions of counsel, we therefore dismissed Mr. Vansnick's appeal.

"G. Pardu J.A."
"David M. Paciocco J.A."
"B. Zarnett J.A."