English translation of the judgment of the Court by SOQUIJ

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| Ratt c. R. | | | | | 2024 QCCA 463 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-10-007572-215, 500-10-007573-213 | | | | |
| (565-01-006925-184) | | | | | |
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| DATE: | April 17, 2024 | | | | |
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| CORAM: | | THE HONOURABLE | | MARTIN VAUCLAIR, J.A.  PATRICK HEALY, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| HAKIM RATT | | | | | |
| APPELLANT – accused | | | | | |
| v. | | | | | |
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| HIS MAJESTY THE KING | | | | | |
| RESPONDENT – prosecutor | | | | | |
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| JUDGMENT | | | | | |
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| **WARNING: An order restricting publication was made at first instance under section 486.4 *Cr. C.* directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.** | | | | | |

1. The appellant appeals from a verdict rendered on October 15, 2020, by the Honourable Alexandra Marcil J. of the Court of Québec, District of Gatineau, convicting him of the indictable offence set out in section 271(a) of the *Criminal Code*.
2. For the reasons of Vauclair J.A., with which Healy and Bachand JJ.A. agree, **THE COURT:**
3. **ALLOWS** the appeal in file No. 500-10-007572-215;
4. **QUASHES** the conviction;
5. **ADMITS** the fresh evidence;
6. **ORDERS** a new trial;
7. **DECLARES MOOT** the motions for leave to appeal referred in both File No. 500-10-007572-215 and in sentencing File No. 500-10-007573-213.

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|  | | MARTIN VAUCLAIR, J.A. |
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|  | | PATRICK HEALY, J.A. |
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|  | | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Christian Gauthier | | |
| CHRISTIAN GAUTHIER – AVOCAT | | |
| For the appellant | | |
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| Mtre Patrick Cardinal | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | |
| For the respondent | | |
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| Date of hearing: | February 29, 2024 | |

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| REASONS OF VAUCLAIR, J.A. |
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1. The appellant is a young Indigenous man from the reserve located in   
   Lac-Simon, near Val-d’Or. He was a junior hockey player playing for a local team in Maniwaki, 250 km south of Val d’Or. Kevin Flamand, to whom the Court will return, also played hockey and rented a shared room with the appellant from a landlady in Maniwaki. On the day of the assault, the appellant left Maniwaki and never returned.
2. At the end of his trial, the appellant was convicted of sexual assault against the complainant with respect to an incident that occurred in the early morning of Sunday, July 15, 2018, after a party at the home of some friends, which Kevin Flamand also attended: *R. c. Ratt*, 2020 QCCQ 5386.
3. The credibility of the appellant and that of the complainant was the central issue at trial, even though other persons testified and other evidence was adduced. The appellant’s account was that he and the complainant had had contact throughout the evening, that she had made advances toward him shortly before the sexual activity, that she had knowingly consented, and, last, that he had left Maniwaki to return to Val-d’Or to get some clothes and to do an internship there.
4. As will be explained, the appellant was never able to assert this version of the facts with the full force that the facts supported due to the ineffective assistance of his counsel.

The appeal

1. On appeal, the appellant raised several grounds concerning the verdict. A motion for leave to appeal on one of those grounds was referred to the Court. He also sought leave to appeal from the sentence.
2. At the start of the hearing, he waived all of his grounds of appeal, except the grounds concerning the ineffective assistance of his trial counsel. Fresh evidence was adduced and must be admitted into the record. The motion for authorization to raise grounds concerning the verdict has thus become moot.
3. Because I am of the view that the appeal from the verdict should be allowed, the motion for authorization to appeal from the sentence has also become moot.

Ineffective assistance of counsel

1. The analysis of this ground of appeal is highly contextual. While the legal principles that must guide the analysis of ineffective assistance are well established, their application must necessarily take the context into account. A [translation] “criticism” set aside in a previous case may be fatal in another. In this respect, the use of case law in the application of these principles must be nuanced and cautious.

Background

1. The appellant in this case is a young adult without a criminal record. He is not a sophisticated individual and has little if any previous experience in court. He is accused of a serious crime. He admitted to having sexual intercourse with the complainant. Vaginal samples revealed his DNA. Consent to the sexual activity was the central issue in dispute.
2. Accordingly, at trial, the defence was ultimately based on the credibility and reliability of the various testimony. The complainant’s testimony needed to be tested by a relevant and rigorous cross-examination. In addition, it seemed highly probable that the appellant would have to testify in his defence. His cross-examination was therefore likely to be just as relevant and rigorous, and he needed to be prepared to face it.
3. While preparation is always essential, it was all the more so because the case involved having to counter extremely prejudicial evidence, that is, the appellant’s departure from Maniwaki in the hours following the incident. This post-offence conduct, in the absence of a solid [translation] “innocent” explanation, undoubtedly affected the impression one might have of the appellant’s state of mind. The risk of inferring that this departure, which resembled fleeing, would be interpreted as an attempt to escape the consequences of his wrongdoing, was real.
4. These important background elements are relevant to the analysis of the ineffective assistance in this case.

Counsel’s “errors”

1. In his brief, the appellant raises several errors or faults committed by his trial counsel. Some of the decisions are part of the wide range of counsel’s conduct that falls within reasonable professional assistance. They cannot be considered a source of ineffective assistance within the meaning of the case law.
2. At the hearing, the appellant rightly concentrated on three “errors” committed by his trial counsel. In his view, this inadequate representation affected both the fairness of the proceedings and the reliability of the verdict. These errors are the failure to prepare him for his testimony, the failure to call the witness Kevin Flamand, and the failure to consider the post-offence conduct.

The law

1. There is no doubt that successfully establishing ineffective assistance is not easy. As Doyon J.A. noted on behalf of the Court, in addition to establishing ineffective assistance or incompetence on a balance of probabilities, it is necessary to establish prejudice in the nature of a miscarriage of justice: *R. c. Helpin*, 2012 QCCA 1523 at para. 68; *R. c. Paiement*, 2024 QCCA 304.
2. *R. c. Lajoie*, 2021 QCCA 1631, provides a good illustration of the fact that not all mistakes open the door to a conclusion of ineffective assistance. It is common ground that it is necessary to establish that the conduct of counsel falls outside the “wide range of reasonable professional assistance”: *R. v. G.D.B.,* [2000] 1 S.C.R. 520 at para. 27.
3. In addition, there is a point at which the prosecution’s evidence is so overwhelming that ineffective assistance becomes inconsequential. The Court has noted that it is possible that in the face of such overwhelming evidence, the ineffective assistance invoked will not affect the reliability of the verdict: *R. v. Vdovin*, 2021 QCCA 1969 at para. 24; *R. c. Vallières*, 2020 QCCA 372 at paras. 141–142.
4. However, both the fairness of the proceedings and the reliability of the verdict underlie the assessment of the quality of counsel’s assistance at trial. I reproduce here the remarks of the Court in *Agnant*:

[translation]

[9]   If our adversarial justice system functions well, it is because it can rely on a competent bar association to confront the facts, assert a party’s thesis, and promote the law, values, and constitutional guarantees, in short, to properly represent litigants before the courts.

[10]     In *R. v. G.B.D*., [2000] 1 S.C.R. 520, the Supreme Court confirmed the rather unanimous Canadian case law, according to which the right to the [translation] “useful” or “effective assistance” of counsel is the best way to determine the merits of the charges.

[11]   Major J. explained that the incompetence of counsel can compromise procedural fairness or the reliability of the verdict, two forms of miscarriage of justice that then occur, both of which are equally unacceptable: *R. v. G.D.B.*, cited above, at paras. 26–28.

See *R. c. Agnant*, 2015 QCCA 465 [references omitted] and case law cited.

1. I am of the view that in this case, the three “errors” alleged establish ineffective assistance, as do the consequences on both the fairness of the trial and the reliability of the verdict.

Analysis

The first “error”: failure to prepare the testimony

1. I accept that the right to a fair trial includes the preparation of the accused’s testimony: *R. v. Simpson*, 2018 NSCA 25 at paras. 45–46. The right to competent representation necessarily implies that counsel take the time required to prepare the accused person so that they may provide their account effectively without being unsettled, for example, by more difficult or sensitive facts, which the passing of time or another reason may have erased or attenuated. There is no rigid rule as to what consists of adequate preparation. The case and the accused person will dictate to the competent counsel the reasonable efforts that must be invested in this aspect of the case when there is a possibility that their client will testify.
2. However, such preparation must take place both before the trial and fairly close to the time when the testimony will be given. Counsel who are satisfied with one meeting before the trial, without more, clearly do not meet the standard, especially in the context where the defence is likely to rest on the testimony of their client.
3. The fresh evidence gathered and filed establishes that trial counsel was confronted very early on with the fact that the appellant had difficulty familiarizing himself with the evidence on his own. Counsel testified that he had to read the evidence to him because the appellant seemed to have a hard time doing so. Counsel was also unable to say with a reasonable degree of certainty whether the evidence disclosed by the Crown was provided to the appellant. He may have provided it to him, more than a year before the trial.
4. Counsel agreed during his testimony given as part of the fresh evidence that the appellant genuinely required preparation. He nevertheless waited until the start of the trial to [translation] “prepare” him. To that end, he had reserved several hours for a meeting on August 12, 2020, the day before the continuance of the trial, which had started on August 5. Contrary to what counsel suggested with some insistence, there is nothing to support the fact that the appellant refused to attend this meeting. Instead, the fresh evidence establishes that the appellant and his mother were late and that counsel, who did not want to meet with his client in the evening, postponed the meeting until the next morning at the courthouse.
5. Several witnesses provided probative evidence of counsel’s deficient follow-up between June 2019 and the trial in August 2020. The explanations provided by counsel at best merely raise a doubt as to this general description and are insufficient to reject it.
6. While the Court agrees that the appellant’s version of his relationship with his counsel contains difficulties, other witnesses strengthen his version. These witnesses, including his mother, were involved in his legal problems and in his contact with his counsel. These witnesses have no credibility problem. Their testimony adds elements to the account that are generally in conflict with the account provided by counsel.
7. It is surprising that counsel provided no notes from his file in support of his decisions, his understanding of the issues, his preparation of the examinations and cross-examinations of the witnesses, or other subjects. Such notes could have refreshed his memory when he drafted the affidavit he prepared for the purposes of this appeal. Thus, counsel testified essentially from memory about his contact with the appellant and his [translation] “preparation”, generally deducing answers, which were often vague or uncertain. In addition, the description of the professional acts on his invoices hardly supports his general explanation on the time invested in the case and the time spent with his client, in short, on the services he now claims to have rendered.
8. I therefore find that counsel met with his client on one or maybe two occasions. If that is the case, these meetings, held a year before the trial, were simply inadequate to prepare his testimony.
9. While it must be accepted that, one year before the trial, counsel discussed the incident with his client and gave him written copies of the summaries of the statement he gave the police, he nevertheless admits that he never had him listen to the audio recording of the statement, which was, however, included in the disclosure of evidence.
10. Reviewing all the important evidence, such as a recorded statement, is essential to adequate preparation. With great respect, not doing so is probably a significant breach in all cases, but definitely in the circumstances of this case. I reiterate that trial counsel admitted that the appellant had difficulty reading.
11. It was only on the morning of the continuance of the trial, and thus shortly before his testimony, that his counsel gave him a series of documents, essentially the summaries of the statements and the police officers’ notes, in a kind of [translation] “preparatory blitz”. Yet these documents had been received as part of the disclosure of evidence one year earlier. What is more, I understand that the appellant was left alone for long periods of time in a cubicle next to the courtrooms, even though he had difficulty reading. In the circumstances, all of this was too little, too late.
12. In the circumstances, considering the difficulties displayed by the appellant and that were known to counsel, as well as the obvious importance of the appellant’s testimony, giving him summaries of his own statements and those of the other witnesses was unlikely to contribute to the preparation required. It cannot be considered akin to what is expected in terms of the basic preparatory work required by this case. After all is said and done, it is clear that counsel left his client to the mercy of the prosecution, who, among other things, cross-examined the appellant at trial with the audio recording of his statement, making him look bad in several respects.
13. The fairness of the trial has already been seriously compromised, but there are two other additional “errors”. They are just as decisive and arise in fact from the deficient preparation. Of course, I have already referred to the preparation of the testimony, but competent preparation involves the preparation of the defence in its broader sense.

The second “error”: failure to call the witness Kevin Flamand

1. This second “error” concerns counsel’s decision not to communicate in any way with the witness Kevin Flamand, the appellant’s friend and teammate. The two of them rented a shared room from a landlady in Maniwaki during the hockey season.
2. This witness was crucial. He was the only person who confirmed the appellant’s remarks regarding his contact with the complainant throughout the evening, and, moreover, he could explain the appellant’s departure. These two pieces of information that this witness had could have supported the appellant’s version. Deciding not to communicate with the witness, without further effort, unreasonably deprived the appellant of essential evidence, thereby affecting the fairness of the trial and the reliability of the verdict.
3. This information was clearly set out in the statement that the witness Flamand gave to the police during the investigation, and it was provided during the disclosure of evidence.
4. Flamand confirmed that the complainant and the appellant were in contact in the evening at the party. This witness was the only known witness, other than the appellant, to confirm this. Not only did this confirm part of the appellant’s account, but more fundamentally, it contradicted the account provided by the complainant, who categorically denied having had any contact with the appellant. It is true, as counsel noted in his testimony filed with the fresh evidence, that Flamand may not have been a [translation] “voluntary” witness and that he may have created some difficulties. Indeed, Flamand accused the appellant of having stolen clothes from him when he left Maniwaki.
5. However, it is the lack of any attempt to communicate with such a crucial witness that is well below what is expected of counsel who accepts to defend an accused. To make a decision, counsel had to verify the witness’s version, the seriousness of his allegation of theft, and his willingness to testify. A decision not to call this person as a witness could not be made in the abstract.

The third “error”: failure to properly consider the post-offence conduct

1. The third “error” concerns the complete lack of preparation to counter the evidence of the post-offence conduct. This evidence was overwhelming, according to counsel’s own admission at trial. Indeed, it could be understood from the evidence that the appellant left the city immediately after the alleged assault. The likelihood that the judge would set aside his [translation] “innocent explanation” was high. Similar to alibis, such explanations are at times too easy to fabricate after the fact. Although the appellant testified to explain this departure in general, he was not believed.
2. Counsel for the appellant explained that he was aware of the issue but that he never sought to find out whether confirmatory evidence existed. He did not ask his client any questions before the trial to determine whether such evidence was available. He did not see the witness Flamand’s statement as supporting the appellant’s explanations. He in no way addressed the subject with the appellant during his testimony before the judge. Once again, the appellant was left to himself without any explanation from his counsel as to the importance of this part of his account.
3. Yet, the fresh evidence shows that several witnesses could have provided evidence in support of the appellant’s version regarding the reasons for his departure the day after the events.
4. Unsurprisingly, the absence of Flamand and of evidence confirming this innocent explanation greatly affected the credibility of the account. The judge did not fail to point out that Flamand was the only witness who spoke about contact with the complainant during that evening, and she twice revisited the issue of his aforementioned departure after the assault.
5. In the face of this portrait, I am of the view that the appellant did not receive the minimal assistance of counsel acting reasonably and that this affected the fairness of the trial and the reliability of the verdict.
6. I want to be clear. Counsel do not have the obligation to investigate within the police’s meaning of the term. Clearly, that is not the standard used to assess the work expected of counsel. In this case, counsel did not follow up on what was available and known in the evidence disclosed, and, moreover, he in no way investigated the serious problem of the post-offence conduct that absolutely had to be neutralized.
7. When credibility is at issue, like in this case, errors in the decision-making process affect an intangible aspect of the judgment – the credibility of the witnesses – and are unlikely to be innocuous: *R. c. F.D*., 2024 QCCA 100 at para. 14; *R. c. Foomani*, 2023 QCCA 232 at para. 92; *R. c. Lessard*, 2022 QCCA 1396; *R. c. G.G*., 2021 QCCA 1835; *LSJPA — 1521*, 2015 QCCA 1229.
8. As a result of counsel’s gross negligence, the judge did not have all the information required to assess the account of the appellant or that of the complainant.

Conclusion

1. This is sufficient to allow the appeal, and I propose to order a new trial. As for the motions referred to the panel, in both the appeal concerning guilt and the appeal concerning sentencing, they have become moot.

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| MARTIN VAUCLAIR, J.A. |