S.C.C. No. 02774

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. MacLeod, 1993 NSCA 151

Clarke, C.J.N.S., Matthews and Chipman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Kenneth W.F. Fiske, Q.C.	)	for the Appellant
Appellant	)	
- and -	)	
	)	Kevin Drolet
	)	for the Respondent
GREGORY DONALD MacLEOD	)	
Respondents	)	Appeal Heard: May 25, 1993
	)	Judgment Delivered: May 25, 1993

THE COURT: Appeal dismissed per oral reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Chipman, J.A. concurring.

The reasons for judgment of the court were delivered orally by:

MATTHEWS, J.A.:

On September 11, 1992, a jury acquitted the respondent on a charge of sexual

assault. The Crown now appeals from that verdict.

There is but one ground of appeal:

> "That the learned trial judge erred in law in instructing the jury on the defence of mistake of fact in relation to consent in the absence of any evidentiary basis for so instructing the jury."

The essential facts are not complicated. This is but a brief outline. The complainant and her female friend shared an apartment in Halifax. It was sparsely furnished and contained two bedrooms, one for each of the occupants. They met the respondent, whom they had not previously known, at a cabaret in Halifax. Alcoholic beverages were consumed. After conversation and non relevant activity the three went to the apartment. Each of the three of them had some beer. The two women changed into their bed clothes. It was agreed that the respondent would stay for the night. He first shared a bed with the complainant's friend. Later he went to the complainant's bedroom, entered her bed and had sexual intercourse with her. Their versions of that event and some of the surrounding circumstances differ substantially. He alleges, by way of a statement given to the police, that the intercourse was consensual - indeed that she was a willing and responsive participant. She alleges that when she awoke from sleep a pillow or blanket was over her face and the respondent was in the act of having forceful non-consensual intercourse with her; she resisted, told him to stop, struggled, but to no avail. The complainant sought the assistance of a male in a downstairs apartment to have the respondent leave her apartment. Later that morning she was examined at a hospital but no injuries were observed. The police interrogated the respondent. He was cooperative. He freely admitted having intercourse with the complainant, but that he did so with her consent.

At the conclusion of the evidence, respondent's counsel urged the trial judge to instruct the jury on the defence of honest but mistaken belief: s. 265(4) of the **Code**. See also

R. v. Pappajohn (1980), 52 C.C.C. (2d) 481 (S.C.C.). The Crown argued that the evidence did not cloak the defence with an "air of reality", submitting that the complainant's testimony excluded any notion of mistaken belief and that the respondent's evidence by way of his statement was that the complainant willingly consented to the intercourse. The respondent did not testify. The trial judge did instruct the jury on that defence.

The Crown now alleges that he did so in error. We agree. We have carefully read the transcript, including the addresses and charge to the jury, the factums and heard oral argument. There is no evidence to support an honest but mistaken belief in consent. The respondent made no mention of it in his statement. His position is clear: the complainant consented and did so willingly, actually participating in the act. She was equally unequivocal: intercourse was non consensual, it took place even though she struggled to prevent it, tried to strike him and told him to stop. The evidence from each of the participants does not support a mistaken belief in consent. In addition and importantly there is no other evidence which would support that defence and lend to it "an air of reality". See **Reddick v. R.** (1991), 64 C.C.C. (3d) 257 (S.C.C.). The issue is consent versus no consent. On all of the facts, there is no other.

The Crown requests a new trial: s. 686(4) of the **Code**. Crown counsel acknowledges that the onus upon the Crown on an appeal from an acquittal is a heavy one. See **Morin v. R.** (1988), 44 C.C.C. (3d) 193 (S.C.C.). There Sopinka, J. remarked at p. 221:

> "The onus resting on the Crown when it appeals an acquittal was settled in **Vezeau v. The Queen** (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277 (S.C.C.). It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.
>
> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has

> been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do."

Vezeau and **Morin** were applied by this Court in **R. v. Bedgood** (1990), 98 N.S.R. (2d) 426.

The Supreme Court of Canada had reason to consider the test for review again in **R. v. MacKenzie** (1993), 1 S.C.C. 212. La Forest writing for the majority commented at pp. 246-7:

> "The test for reviewing a Crown appeal of an acquittal pursuant to s. 686(4) of the **Criminal Code** was established by this Court in **Vezeau v. The Queen, supra**. The majority there stated the test in this way, at p. 292:
>
> > 'In the present case, therefore, it was the duty of the Crown, in order to obtain a new trial, to satisfy the Court that the verdict would not necessarily have been the same if the trial judge had properly directed the jury.'"

He added at p. 247 that in view of the majority, the "law today", is that set out in the above quotation of Sopinka, J. in **Morin**.

It is our opinion that, applying that principle, the Crown has fallen far short of satisfying this Court that the verdict as rendered by this jury "would not necessarily have been the same" if the impugned portion of the judge's charge to the jury had been deleted. In acquitting the respondent, clearly, the jury could not have believed the complainant.

Accordingly, we dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Chipman, J.A.

S.C.C. No. 02774

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- and -	)	R E A S O N S
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BY:		
GREGORY DONALD MacLEOD	)	
	)	MATTHEWS,
	)	J.A.
Respondent	)	