S.C.C. No. 02775

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Roscoe, JJ.A.
Cite as: R. v. L.E.N., 1993 NSCA 152

BETWEEN:		
L. E. N.		D. Brian Newton, Q.C. for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Gordon S. Gale, Q.C. for the Respondent
	Respondent	
		Appeal Heard: May 13, 1993
		Judgment Delivered: May 17, 1993

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: The application for the examination of Dr. Nigel T. Allison pursuant to s. 683 of the Criminal Code is dismissed and the conviction appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hallett and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted in the County Court Judges Criminal Court of District Number One of two counts of sexual assault on L.M. contrary to s. 271(1)(a) of the **Criminal Code**, one count of breaking and entering the dwelling of L.M. and committing a sexual assault upon her contrary to s. 348(1)(b) of the **Code**, and one count of uttering a threat to cause the death of L.M. contrary to s. 264.1(a) of the **Code**.

The appellant pled not guilty at trial. The victim L.M. was, at the material times, a tenant in an apartment building in Dartmouth. The appellant and his female companion occupied another apartment in the building where they acted as superintendents for the landlord. The victim, a mentally handicapped person, testified at the trial about the circumstances giving rise to the four charges, all of which occurred in the time frame of November 1, 1990 to September 30, 1991. The appellant did not testify, but an exculpatory statement taken from him by the investigating police officers was tendered in evidence by the Crown. The appellant also called as witnesses his female companion and her daughter whose testimony was aimed at discrediting that of the victim. The trial judge, in an oral decision, stated with respect to these witnesses:

> "I do not accept the evidence of Ms. R. or that of Ms. B.. I did not find them to be credible witnesses."

The trial judge was then left with only the testimony of the victim - obviously a special needs person of limited mental capacity - as to the relevant events, and in contradiction thereof the exculpatory statement of the appellant tendered by the Crown. The trial judge observed that the victim was 34 years of age and mentally handicapped. There was no evidence of her functional age. No medical evidence about her condition was given, although the general nature of her handicap was not only spoken of by witnesses, but her fears and frustrations in giving evidence are readily apparent from the record. There was also evidence from a social worker about the victim's special needs. She testified to the fact that the victim had attempted suicide and had been admitted to the Nova Scotia Hospital twice with drug overdoses.

In the decision, the court said:

> "As with most cases of sexual assault, the matter is one of credibility. While Mr. N. did not testify, his denial of the charges is a matter of

> record through his statement, which was tendered by the Crown. The burden, as always, is upon the Crown to prove its case beyond a reasonable doubt. The accused need not prove his innocence. In the context of this matter, only if I accept the evidence of [L.M.] on the material aspects and beyond a reasonable doubt, can I find Mr. N. guilty."

After referring to the troublesome nature of the case due to the victim's circumstances, the court continued:

> "Throughout her testimony, [L.M.] was consistent as to her recollection of the events charged. She was, at times, confused about the financial arrangements for her payment of rent. She has not been able to give dates with any precision. She has difficulty communicating and at times, became angry. On the whole, however, I found her evidence to be credible. It had the ring of truth. She searched for words to express herself in the manner of someone attempting to be as accurate as possible. She did not exaggerate when the opportunity arose."

Counsel for the appellant in his submission urged the trial court to consider that in her testimony concerning two of the sexual assaults, the victim gave evidence of absolutely no resistance whatever to the appellant. To this, the court said:

> "I do not find it surprising that [L.M.] did not struggle or scream out when attacked. She described herself as frozen. That reaction is not unknown in sexual assaults. The fact that [L.M.] was aggressive on other occasions, is not, in my view, evidence that she would necessarily have been so during a rape."

The court then reviewed the evidence respecting one of the assaults in some detail. There was also a review of evidence of an assault alleged to have been committed by the victim upon the appellant's female companion. In finding the appellant guilty on all four counts, the trial judge concluded:

> "I am satisfied that although [L.M.'s] capacity to recall dates with certainty is limited, the evidence presented is sufficiently consistent with the time set out in the Indictment. In this regard, I have considered Section 604(4.1) of the Criminal Code and the cases of **R. v. C. (P.)** a decision of the Nova Scotia Supreme Court Appeal Division and **R. v. B. (G.)** a decision of the Supreme Court of Canada. In this instance, time is not an essential element of the offence."

The appellant was subsequently sentenced to terms of imprisonment on the four charges of one year, three years, thirty days and thirty days respectively, to be served consecutively. This was a total of four years and sixty days in a federal penitentiary.

The appellant appeals to this court against conviction. An application for leave to appeal sentence was abandoned. It is submitted that the verdicts were unreasonable and could not be supported by the evidence.

At the outset of this appeal, the appellant made a motion for an order under s. 683 of the **Criminal Code** requiring Dr. Nigel T. Allison, a psychiatrist on the staff of the Nova Scotia Hospital to release a copy of his file relating to the victim and to discuss relevant issues with appellant's counsel. This was obviously designed to develop evidence in support of an application to the court to admit fresh evidence.

After the appellant was sentenced, his counsel learned from a counsel representing the Crown in connection with the charges against the victim of the assault upon the appellant's female companion, that the victim was found fit to stand trial on this particular charge. Crown counsel referred to the fact that the victim's counsel in connection with the assault charge had forwarded a report from Dr. Allison relating to the victim. Subsequent investigation on behalf of appellant's counsel unearthed at the office of the prothonotary a letter from Dr. Allison to counsel representing the victim dated June 10, 1992. A copy of that letter is appended to counsel's affidavit.

Dr. Allison confirms that he had seen the victim on five occasions, most of them within the past six weeks. His diagnosis was:

> "I believe that this woman is suffering from a form of Multiple Personality Disorder, and am enclosing photocopies of some brief information concerning this disorder taken from the Diagnostic and Statistical Manual of the American Psychiatric Association, otherwise known as DSM IIIR. As you will note, the disorder is generally characterized by the development within the same person of two or more distinct personalities, each of which has a tendency to consistency in perception, behaviour, etc."

Dr. Allison opined that L.M. had a very large number of personalities, at least 20 and possibly more than 30. He said that in the course of his sessions with her he had spoken directly to at least six of the different personalities. He continued:

> "This disorder is a sub-group of a set of disorders known as Dissociative Disorders, and is very different from a psychotic illness such as Schizophrenia. In effect, everybody has different states or parts of their personality, but in the majority of people the personality parts intertwine successfully with each other so that they interact with each other and each part of the personality will have some influence on the functioning of the whole personality. However, in Multiple Personality Disorder the various parts of personality have developed individually, and have failed to integrate with other parts of personality.
>
> Consequently it is quite common for a person suffering from MPD to be unaware during the existence of one part of personality of the actions taken by another part of their personality. Thus, for example, an angry aggressive personality may carry out some action without the knowledge of the other parts of the personality, but which results in the whole person becoming responsible for some criminal action or other unpleasant consequence.
>
> In my examination of [L.M.] I have been struck by the fact that a few of the personalities that I have spoken to are aware of the existence of the other parts of personality, but usually refuse to believe the possibility that these other parts of personality are, in fact, all part of [L.]. Instead, these personality parts believe that the other personality parts are all separate persons. On the other hand, there are at least two personality parts which I am aware of which refuse even to acknowledge the existence of the other personality parts."

Dr. Allison concluded that the victim as a whole has refused to acknowledge her condition. He spoke of one part of her personality as strong but chronically depressed and that it was quite possible that this personality could carry out actions which may be regarded as criminal activity without realizing this. He recognized that this line of argument essentially appears to remove responsibility for her actions from the victim herself. He thought this was not necessarily good. He believed that she should, in a therapeutic sense, be held responsible for all of her actions even if she is unwilling to accept that responsibility or even denies that some of the actions that she has undertaken have in fact occurred. He seriously doubted whether incarceration was useful in her

treatment. He concluded:

> "I believe it is reasonable to state that therapy has just begun to scratch the surface of this very complicated woman, and that it will take a considerable period of time to help her to integrate her personality, if indeed this is ever going to be successful."

Section 683 of the **Criminal Code** which governs this application provides in part:

> "683(1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> (a) order the production of any writing, exhibit, or other thing connected with the proceeding;
>
> (b) order any witness who could have been a compellable witness at the trial, whether or not he was called at the trial,
>
> (i) to attend and be examined before the court of appeal, or
>
> (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
>
> (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;"

As pointed out by this court in **R. v. Ross** (S.C.C. No. 02757 - January 19, 1993 - as yet unreported), this section does not authorize either an order for production of a physician's file or discussions between the physician and counsel for a party to a criminal appeal. What it does authorize in appropriate cases is the production of documentary material connected with the proceeding or the examination of a witness before the court or before a person appointed for the purpose of the examination.

In **R. v. Ross**, this court dealt with an application by the appellant who had been convicted by a jury of a sexual assault. Both the appellant and the victim testified, the appellant denying that any sexual assault took place. Subsequent to the conviction, a psychiatrist who had

previously treated the victim contacted Crown counsel indicating that the victim had been his patient and expressed concern respecting the victim's credibility and the possibility of a miscarriage of justice. The doctor was unwilling to produce his file without a court order and the victim was unwilling to consent to the production of the file.

After hearing argument on behalf of the appellant, the victim as intervenor and the Crown, this court concluded that in view of the psychiatrist's opinion regarding concerns about the victim's credibility and concerns about a miscarriage of justice, an order should be granted authorizing the examination of the psychiatrist before a judge of this court. The purpose of the examination was to enable counsel for the appellant to secure information which might form the basis of an application for fresh evidence. Such an application was in fact made to this court following the examination and based on this fresh evidence and other fresh evidence produced on a subsequent application, this court ordered a new trial by decision dated April 23, 1993.

In ordering the examination of the psychiatrist in the **Ross** case, this court referred to the argument whether such evidence as might be revealed by the examination could meet the fresh evidence test set out in **Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193 (S.C.C.) and **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.). The court pointed out that the difficulty was that the psychiatrist's evidence being unknown, it was not possible to tell whether the fresh evidence test could be met.

In **Ross**, sufficient evidence was placed before this court to give rise to a real concern that a miscarriage may have occurred. In such a case, the court was prepared to exercise its power under s. 683 of the **Code** to order the psychiatrist's examination.

While the power of an appellate court to admit new evidence is broad and while the power under s. 683 to order the examination of a witness is equally broad, the power to admit fresh evidence is limited by the principles laid down in **Palmer** and **Stolar, supra**. So too the power to order an examination should only been exercised where there is a reasonable probability that such an examination will result in the discovery of evidence which can pass the test in **Palmer**. In **Ross, supra**, it is clear that a psychiatrist had expressed reservations about the victim's credibility with

reference to the very charge at issue and also expressed concerns about a miscarriage of justice. This court was obliged to act.

It is necessary therefore to examine Dr. Allison's opinion of the victim against the evidence at trial and the trial judge's findings to determine whether there is a reasonable probability that an examination of him would produce admissible fresh evidence. Clearly, it is insufficient for an appellant to come to the Court of Appeal, without more, and request an examination of the victim's psychiatrist's file or for that matter, an examination of any other documents, material or witnesses.

At the trial, counsel for both Crown and the appellant, as well as the trial judge, were fully aware of the victim's unfortunate mental handicap. The appellant's counsel was also aware that the victim had attempted suicide and had been admitted twice to the Nova Scotia Hospital with a drug overdose. In **Palmer, supra**, the principles on which fresh evidence should be admitted are stated:

(1) The evidence should generally not be admitted if by due diligence it could have been adduced at trial, although this principle does not apply to the same strictness in a criminal trial as in a civil trial.

(2) The evidence must be relevant in that it bears upon a decisive or potentially decisive issue.

(3) The evidence must be credible; and

(4) The evidence must be such that if believed it could reasonably be expected to have affected the result.

While the Crown does not strenuously argue that the appellant could not meet the first branch of the test, we are of the opinion that the evidence of Dr. Allison could, in view of what was known, have been adduced at trial by due diligence. The appellant's counsel knew of the victim's mental handicap and of the admissions to the Nova Scotia Hospital. If it was intended to suggest that the victim suffered such disease of mind as to render her unreliable as a witness, the trial was

the time to have sought out the victim's medical records by subpoena to bring them and her doctors to testify at the trial. It is not, however, necessary that this case should turn on this point because we are satisfied that in any event the evidence was not relevant in bearing upon a decisive or potentially decisive issue, nor was it such that if believed it could reasonably be expected to have affected the result.

The trial judge was aware of the fact that the victim was mentally handicapped. The trial judge heard the victim's evidence and made an express finding that it was credible. There was nothing in Dr. Allison's report which would indicate that the appellant's complicated medical condition, however unfortunate, was such as to make her evidence about a sexual assault made upon her unreliable. A mentally handicapped person is clearly more vulnerable to being victimized than others. The mere fact that such a victim, particularly of sexual assault, has a psychiatric history is not of itself relevant.

A psychiatric condition of a witness, just as any other medical condition, is admissible to show that the witness suffers from such disease or abnormality as might affect the reliability of his or her evidence. To deny such an attack upon the capacity of the witness could lead to an injustice. Clearly it would be unthinkable that medical evidence to show that a witness's eyesight or hearing was too impaired to enable such witness to see or hear that about which testimony was or was to be given should be refused. So too a disorder of the mind which makes a witness's testimony unreliable is a fair subject for exploration. See **R. v. Hawke** (1975), 22 C.C.C. (2d) 19 at pp. 39 - 42; **R. v. Desmoulin** (1976), 30 C.C.C. (2d) 517 at pp. 522 - 523; **R. v. French** (1977), 37 C.C.C. (2d) 201 at p. 212; **R. v. Julien** (1980), 57 C.C.C. (2d) 462.

Is there any reason to believe that the evidence sought to be developed here bears upon such a potentially decisive issue as the reliability of the victim's account of the events and that such evidence could be expected to have affected the result?

That the victim suffers from multiple personality disorder characterized by the development of two or more distinct personalities has not been shown to make less reliable her

testimony about a sexual assault perpetrated upon her. If anything, Dr. Allison's letter gives a clear explanation for the apparently inconsistent conduct of the victim in being "frozen" at the time of the assaults and then showing aggressive and outgoing behaviour at other times. The trial judge understood the victim's limitation and notwithstanding many difficulties experienced by the victim giving her evidence, the trial court was satisfied beyond a reasonable doubt that it was true, and that the assaults and threat as alleged did take place. Neither Dr. Allison nor any other medical doctor who has reviewed his letter of June 10 has expressed any concern about the reliability of her testimony at this trial or otherwise has expressed a concern that there was any miscarriage of justice. The case in my view was clearly distinguishable from **Ross, supra**, which was obviously an exceptional case.

We decline to grant an order for the examination of Dr. Allison and dismiss the application pursuant to s. 683 of the **Criminal Code**.

With respect to the conviction appeal, in determining whether the trial judge could reasonably have convicted the appellant, this court must re-examine and to some extent reweigh and consider the effect of the evidence. The test is whether the trial judge properly instructed and acting reasonably could have convicted. Where, as here, the verdict was based solely on the credibility of the victim, this court, in applying the test, must show great deference to the findings of credibility. See **The Queen v. R.W.**, [1992] 2 S.C.R. 122. Having reviewed the record with these considerations in mind, we are satisfied that the verdict must stand.

The appeal from conviction is dismissed.

J.A.

Concurred in: Hallett, J.A.

Roscoe, J.A.