S.C.C. No. 02784

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. K.J.F., 1993 NSCA 153

Hallett, Matthews and Freeman, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| K. J. F. | ) | D. Brian Newton, Q.C. |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| - and - | ) | |
| | ) | Gordon S. Gale, Q.C. |
| | ) | for the Respondent |
| HER MAJESTY THE QUEEN | ) | |
| | ) | |
| Respondent | ) | Appeal Heard: |
| | ) | May 18, 1993 |
| | ) | |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | May 26, 1993 |
| | ) | |

Editorial Notice

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

**THE COURT:** Appeal dismissed per reasons for judgment of Matthews, J.A.; Hallett and Freeman, JJ. A. concurring.

MATTHEWS, J.A.:

The appellant was charged:

> "that he between the 5th day of July, 1972 and the 22nd day of October, 1975, at or near [...], in the County of Halifax, Province of Nova Scotia did have sexual intercourse with R. G., a female person not his wife and under the age of fourteen years, contrary to Section 146(1) of the **Criminal Code** of Canada, R.S.C. 1970, C. C.34;
>
> AND FURTHER THAT he between the 5th day of July 1972 and the 22nd day of October, 1975, at or near [...], in the County of Halifax, Province of Nova Scotia, did indecently assault R. G., a female person, contrary to Section 149 of the **Criminal Code** of Canada, R.S.C. 1970 C.C-34;
>
> AND FURTHER THAT he between the 5th day of July, 1972 and the 15th day of August, 1975, at or near [...], in the County of Halifax, Province of Nova Scotia, did indecently assault J. M., a female person, contrary to Section 149 of the **Criminal Code** of Canada, R.S.C. 1970 C.C.34."

Judge Nancy J. Bateman, then of the County Court, after trial, found him guilty on each count. He now appeals from that verdict.

The appellant alleges that the trial judge erred in refusing to sever the third count respecting Ms. M. from the first two counts respecting Ms. G.. It is my opinion that the trial judge properly refused to do so. The test to be applied on a motion by the accused for severance requires the accused to show, on a balance of probabilities, that the interests of justice requires severance: s. 591(3)(a) of the **Code**. However, that is not the test on appeal according to the Ontario Court of Appeal in **R. v. McNamara et al** (No. 1) (1981), 56 C.C.C. (2d) 193, at p. 265:

> "However, we believe that the proper test to be adopted at trial is the one set out in s. 520 of the **Criminal Code**, namely, that the ends of justice require a severance. The onus is on the applicant to show, on a balance of probabilities, that this is so. In contrast, the proper test on appeal, where severance is refused at trial, is whether such refusal resulted in a miscarriage of justice."

The third count consisted, in part, of indecent assaults upon Ms. M. in which Ms. G. was involved or present. The trial judge was not before a jury. As she said: "This is not an indictment of undue complexity" and "There has been no suggestion that different evidentiary considerations are involved with one of the counts as opposed to the other."

The trial judge heard rather lengthy argument, reserved decision over a weekend and in a reasoned decision concluded that she was "not satisfied that the interests of justice require severance of the counts" and that she was "not satisfied that there is a risk of prejudice to the accused from the joint trial of these counts."

Upon review, in my opinion, whether the test of interests of justice or miscarriage of justice is applied the trial judge did not err in exercising her discretion in refusing to sever the third count. I would dismiss the appeal on this issue.

The next issue upon which comment should be made is the appellant's assertion "that the prosecutor, in denying his written consent to the appellant to re-elect to have his trial heard by Supreme Court judge and jury pursuant to s. 561(1)(c) of the **Criminal Code** of Canada has infringed upon Mr. F.'s rights under Sections 7 and 11 of the **Canadian Charter of Rights and Freedoms**".

Those sections are:

> "561(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,
>
> > (c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor".

Section 7 of the **Charter**:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section ll(f) of the **Charter**:

> "11. Any person charged with an offence has the right
>
> > (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;"

The appellant argues that his **Charter** rights have been infringed:

> "The original election by the appellant was to be tried by a Supreme Court judge with jury. The appellant later made a decision that because of the nature of the allegations against him he would not wish to be tried before a judge and jury. However, Mr. F. was called to serve upon a jury in May, 1992. Mr. F.'s jury experience informed him of the advantages of having his trial heard before such a body. As a result of his experience, he contacted his counsel and asked his counsel to communicate his request to re-elect to the Crown attorney. This request was made to the Crown attorney, Mr. Robert Fetterly, and it was subsequently denied on August 12, 1992."

He alleges that by reason of this refusal he "was arbitrarily denied of his rights pursuant to the **Charter**". He relies upon a decision of the Manitoba Court of Appeal in **R. v. Ruston** (1991), 63 C.C.C. (3d) 419. There, it was after committal and more than 14 days after the preliminary inquiry that the Crown for the first time gave the accused notice of its intention to call similar fact evidence. The accused filed notice that he re-elected trial by jury. The Crown withheld its consent to that re-election. As a result, the accused alleged that his s. 11(f) **Charter** right to a jury was denied. He sought remedy pursuant to s. 24 of the **Charter**. The trial judge held that his **Charter** rights had not been infringed. On appeal, in a per curiam judgment, the court said at p. 423:

> "Although the applicant attacked the constitutional validity of s. 561(1)(b) and (c) of the **Code**, we are of the view that this case turns not on the validity of those clauses, but on their interpretation. That is not to say that the **Charter** is irrelevant. Without the **Charter**, the clauses would bear their ordinary meaning which excludes the right to re-elect a jury trial in the circumstances of this case. But the **Charter** may be regarded as a beacon from which light is cast on Parliament's statutory intent."

And at p. 424:

> "The significance of the preliminary inquiry, as the event from which time for re-election runs, is that it is at that inquiry that the accused ordinarily will be apprised of the case he has to meet. Only when he has that knowledge can his decision not to seek the benefit of a jury trial be described as an informed one.
>
> If s. 561(1) is construed literally, the Crown might introduce at the inquiry the minimum of evidence required to obtain a commital and then give notice to the accused weeks later of its intention to introduce at trial additional

> evidence which changes the nature of the case. And an accused person, having made his decision not to re-elect on the basis of the case made out at the inquiry, would then be precluded from making a re-election on the basis of the totally different case now relied on by the Crown.
>
> Such a result, in our opinion, has the potential of amounting to a denial of the accused's **Charter** right to the benefit of a jury trial. It depends upon the nature of the additional evidence to be called. In circumstances such as the present, the possible introduction of similar fact evidence changes the Crown's case in a substantial way. And it does so in a way material to the mode of trial selected."

And further at p. 426:

> "In the present case, we do not think it necessary either to declare the statutory provision invalid or to legislate in order to give effect to the applicant's **Charter** right. We think it possible to construe the provision, albeit broadly, in a manner which both preserves the right of an accused person to make an informed choice of his mode of trial and avoids the mischief which the provision was intended to prevent."

The court concluded (p. 427):

> "In the case at bar, the applicant did not have the opportunity to acquire knowledge of the Crown's intention to call similar fact evidence until September 21, 1990. The addition of such evidence constitutes a substantial change in the case against him. Notice of re-election was filed within 14 days after he first had the opportunity of learning about this change. Accordingly, his re-election was made within the statutory time-frame, and it is unnecessary to find the statutory provisions invalid in order to preserve the applicant's **Charter** right. It is equally unnecessary to grant him a **Charter** remedy. He is entitled to a trial by jury under the statute."

Here the facts differ substantially from **Ruston**. The accused made his choice as to the mode of trial. He was at all times represented by counsel. Undoubtedly his choice was only made after careful consideration. That choice was made "because of the nature of the allegations against him he would not wish to be tried before a judge and jury". Contrary to the facts in **Ruston**, his change of mind was not due to anything done by the Crown nor was he within the time limits. It would appear obvious that the advantages and disadvantages of a trial by jury would have been carefully considered before his initial decision was made. He now desires that because the Crown would not accede to his request, an acquittal be entered or in the alternative, a new trial ordered before a judge and jury.

The Crown's position is:

> "In the present case, it is because the appellant subsequently served on a jury and found that his previous perception of jury trial was not sustained. Should this be allowed then there would be few cases where a person could not re-elect at any time because they could show that they never had experience with that mode of trial. To allow this to occur would cause innumerable delays and be prejudicial to the public interest of having trials held at the earliest time."

I agree. The appellant was given ample time to make his election. He made it. In order that justice be properly administered there has to be a termination date as to such election. Exceptional circumstances may permit a change in election as to the mode of trial, even if the Crown does not agree (see **Ruston**). In my opinion those circumstances do not exist here. There has been no violation of the appellant's constitutional rights. I would dismiss this ground of

appeal.

Respecting a further issue, the appellant argues that the learned trial judge erred in refusing to allow defence counsel to cross-examine the complainant about previous sexual behaviour. Defence counsel wished to cross-examine her on three points described in the appellant's factum as follows:

> " 1. R. G. was seen by the accused's son, S. F. (C.), playing 'spin the bottle' with a young male neighbour, first name D.. The complainant was partially naked at the time and was playing the game in the home of the accused and his wife.
>
> 2. R. G. forced the accused's son, P. F., to remove his clothes and after she removed her own clothes she laid on top of him. This was done in the home of the accused and his wife.
>
> 3. R. G. claims that V. C., the accused's current wife's brother-in-law, sexually assaulted her on more than one occasion while she was living at the home of the accused and his wife."

Following a *voir dire* conducted in accordance with the guidelines set out by the Supreme Court of Canada in **R. v. Seaboyer** (1991), 66 C.C.C. (3d) 321 the trial judge refused to allow the cross-examination.

The appellant's counsel argues that credibility was the critical issue in the case and the cross-examination ought to have been allowed. In addition, he asserts that the defence ought to have been allowed to call other evidence to rebut,if necessary, testimony given by the complainant. Counsel puts the argument this way:

> " In the present case, it is submitted that the credibility of the complainant is not a collateral matter. It is the main issue for the court to resolve. She states that sexual assaults took place, the

> accused states that they did not. Defence Counsel should have been allowed to put the questions to the Ms. G.. If she acknowledged the events, this line of questioning would end and the answers would not be relevant, they could not be used to attack her character. However, if she denied the events, Defence Counsel could have called witnesses to impeach her testimony on the central issue of whether or not she was being truthful. Where the questions go to the main issue to be resolved, and to the primary theory of the defence, they are not collateral matters.
>
> For these reasons, it is submitted that the trial judge erred in refusing to allow cross-examination on these events. This error has caused prejudice to the accused, by depriving him of the opportunity to challenge the truthfulness of his main accuser. In these circumstances, an acquittal should be entered or a new trial ordered to correct the error."

In **Seaboyer** McLachlin J., writing for the majority, summarized four applicable principles to be applied by trial judges in determining whether sexual conduct evidence should be admitted. The first and second principles are relevant with respect to this appeal; they are set at C.C.C. p. 409 as follows:

> " 1. On trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
>
> (a) more likely to have consented to the sexual conduct at issue in the trial;
> (b) less worthy of belief as a witness.
>
> 2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant where it possesses probative value on

> an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence."

Instances Nos. 1 and 2 are clearly not admissible under the **Seaboyer** test, as the sole purpose of introducing the evidence was to test the complainant's credibility. Instance 3 is not supported by the evidence. Counsel for the appellant relied on a statement given by the complainant to the R.C.M.P. on May 13th, 1991. Counsel read the statement into the record on the *voir dire*; the relevant portion is:

> " One time, when S. was at C', she called me to babysit the kids. They all went out, I thought to a movie, but when they got back I could smell alcohol on V. C's breath. He came back alone. He had taken his wife home, I think, and came to get the kids. He started to pet me and feel me up and he had sexual intercourse with me. That was in the summer of 1975. I had thought that after all the sex with K. that was--that it was known by the C and I didn't think any more of it. V. tried to ask me, though, in his broken English, why I wasn't a virgin. I said the doctor did it. He didn't believe me."

The reading of the complainant's statement does not indicate that the sexual intercourse with V.C. was non consensual. Whether the sexual intercourse between the complainant and the appellant was non consensual or not was not an issue on the trial, the complainant being under 14 years of age at the time. The appellant's defence was that sexual intercourse had not taken place. The evidence of two witnesses the defence proposed to call and who had testified on the *voir dire* that the complainant told them she had sexual intercourse with V.C. was not inconsistent with the statement given to the R.C.M.P. Therefore, the evidence is not relevant on the question of her credibility even if it could be introduced on that issue.

Defence counsel hoped that the complainant would deny these facts if the question were put to her, thus in his opinion establishing a justification for admitting the evidence to test her credibility. The trial judge decided that the proposed evidence was on a collateral issue. That being the case the defence could not have adduced evidence to rebut a false answer if given by the complainant when confronted with questions relating to her sexual conduct with V.C. In my opinion the sole purpose of seeking the admission of the evidence was to support the inference that the complainant was less worthy of belief as a witness, therefore the trial judge was correct in concluding that the evidence was inadmissible under the **Seaboyer** guidelines.

I now turn to the main ground of appeal, that is, that the decision of the trial judge should be set aside on the ground that it is unreasonable or cannot be supported by the evidence: s. 686(1)(a) (i) of the **Code**.

In a thoughtful decision of some thirteen pages the trial judge began in this fashion:

> "Mr. F. was charged on a three-count indictment with sexual offenses against R. G. and J. M.. The burden, as always, is on the Crown to prove its case beyond a reasonable doubt. There is no burden on the accused to establish innocence.
>
> The activity is said to have occurred some 17 to 20 years ago while Ms. G., then between 10 and 13 years old, was in Mr. F.'s temporary care.
>
> Without doubt, one of the most difficult type of cases coming before the Courts today involves allegations of sexual assault occurring many years before, while the alleged victim was a child. Presentation of the evidence is fraught with difficulty for both the alleged victim and the alleged offender. To remember events with any precision so many years ago is an almost impossible task. The problem is compounded when an adult witness attempts to give evidence about a time when he or she was still a child.

> Allegations of sexual abuse of children inevitably spark reactions of horror and disbelief, particularly by those closely associated with the alleged perpetrator. Notwithstanding the prevalence of this abhorrent crime in our community, it is still perceived to be reflective of one of the most deviant types of behaviour.
>
> Opposite the disbelief is the, not unusual reaction that the crime is so heinous it is almost impossible to believe that a person would fabricate such a story. The reality is, however, that sexual abuse of children has occurred with, what the courts call, alarming frequency in the past and continues today, as evidenced by the number of cases proven before the courts. There are, as well, false allegations of sexual abuse."

She analyzed the testimony of each witness and properly assigned little, if any weight to some of them, particularly in respect to the crucial issue. Central to the issue of the allegations of the sexual offences is the issue of credibility, particularly that of the complainants and of the appellant. The appellant denies the various allegations of the complainants.

In assessing the testimony of R. G. she commented that:

> "I do not find R. G.'s evidence as to the inadequacy of her clothing, nor the lack of food to detract from her evidence of the assaults. Again, I take these to be a child's perception of events and an honest account of her belief at the time. The fact that she may be wrong or mistaken about these peripheral matters does not lead me to conclude that she is fabricating either that evidence or the evidence of the assaults".

She took into account that Ms. G. is now an adult, 30 years old, attempting to recall events some 20 years ago when she was a child. The trial judge also acknowledged the fact that Ms. G. did not always tell the truth, either as a child or an adult.

> "R. G. was a child who was admittedly given to lying about some things. I do not conclude that that renders her a liar now. While it

> might make it more likely that she would, as a child, have fabricated events, it does not make it more likely that she would now fabricate events which happened then. I accept her explanation as to the contradiction in her evidence as regards Mr. F. touching or sucking her breasts and as to the lock on the bedroom door. I accept as well that she did not disclose the sexual encounter with K. F. after he was dating his current wife out of concern for L. F.. While the fact that she was untruthful at the preliminary hearing is a serious matter, it does not, in this instance, cause me to discount her evidence as a whole, which I find otherwise to be credible.
>
> R. G.'s continued contact with K. F. is not, in my view, inconsistent with him having abused her."

The trial judge grappled with these issues and gave reasons for reaching her conclusions respecting the credibility of each of the three main actors.

Commenting upon the inconsistencies in Ms. G.'s testimony, she referred to **R. v. W. (R.)**, [1992] 2 S.C.R. 122, where McLachlin, J. remarked at p. 134:

> "It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to 'adult' or 'child' standards - to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying."

The trial judge then said in part:

> "I found R. G.'s evidence to be credible, the detail was compelling. I do not accept that the sexual assaults occurred as frequently as 200 or 300 times. I take this to be her estimate only. I do accept, however, that she was sexually assaulted by K. F. regularly and frequently. I accept as well, that as a child, she believed it to be occurring constantly. I reject the defence submission that Mr. F. was out of the home too much to have the opportunity to abuse her. These were clearly not loving encounters of long duration, but rather, would have taken little time. While R. G. was not a consensual partner, I believe she cooperated in that she recognized she had no other choice. She could not look to S. F. for protection and believed this was her last chance with the Children's Aid Society. Given that situation, therefore, I am satisfied that she accommodated K. F.'s advances which lessened the likelihood of detection. There was no suggestion of struggle or crying out.
>
> I reject, as well, the defence submission that Mr. F. would not be so brazen as to assault R. G. with others in the home. Such assaults clearly can and do take place. According to Ms. G.'s evidence, Mrs. F. was not at home for many of the assaults, and the other children were regularly playing outside of the home."

And also:

> "Overall, I found R. G.'s evidence to be specific and credible."

The trial judge did not accept the testimony of the appellant who denied the charges respecting the two complainants.

As previously mentioned the thrust of this appeal is that the decision of the trial judge should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

With respect, the appellant, in his lengthy factum and oral argument, wishes us to try this case again. This court has said on many occasions, that is not our function. We are required, as enunciated by the Supreme Court of Canada in **Yebes v. R.**, [1987] 2 S.C.R. 168, (1987), 36 C.C.C. (3d) 417, to determine whether a properly instructed trier of fact, acting judicially could

reasonably have convicted the appellant. In doing so, we must re-examine and to some extent reweigh and consider the effect of the evidence. This jurisdiction extends to findings of credibility. See **R. v. W. (R.)**, **supra**, where McLachlin, J. after setting out the test remarked:

> "That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: **White v. The King**, [1947] S.C.R. 268, at p. 272; **R. v. M. (S.H.)** [1989] 2 S.C.R. 446, at pp. 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable."

The appellant asserts in some detail that the testimony of the various witnesses is conflicting, particularly with that of the complainant G. and stresses that the testimony of the complainants is not worthy of belief. It is the primary duty of the trial judge to make findings of fact and determinations of credibility and an appellate court should not interfere with those findings unless it concludes that the verdict is unreasonable.

After reviewing the material presented to us in the manner required by **Yebes** and hearing the oral submissions of counsel it is my opinion that the decision of the trial judge is one that a properly instructed jury acting judicially, could reasonably have rendered. The trial judge made no reversible error in her assessment of the testimony of the various witnesses and in reaching her conclusion as to the guilt of the appellant. The verdict was not unreasonable.

I find no merit in the other issues raised by the appellant. In summary I would

dismiss the appeal in respect to all of the issues raised by the appellant.

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.