S.C.C. No. 02757

NOVA SCOTIA COURT OF APPEAL

Chipman, Hart and Freeman, JJ.A.

Cite as: R. v. Ross, 1993 NSCA 95

BETWEEN:

KENNETH AVROM ROSS Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Craig M. Garson for the Appellant John C. Pearson for the Respondent Anne S. Derrick for the Intervenor/Complainant Appeal Heard: March 16, 1993 and April 6, 1993 Judgment Delivered: April 23, 1993

THE COURT: Appeal allowed; conviction of appellant set aside and a new trial to be conducted upon the original indictment ordered per reasons for judgment of Hart, J.A.; Chipman and Freeman, JJ.A. concurring.

HART, J.A.

On June 29, 1992, Kenneth A. Ross, a 28-year old, second year law student was convicted, after a jury trial, of having sexually assaulted a 29-year old woman who was also a university student.

On October 26, 1991, Mr. Ross and the complainant met in the early hours of the morning at the Misty Moon Cabaret in downtown Halifax. They had dated a couple of times four years earlier while both students at the university. When the bar closed they agreed to go back to Mr. Ross's apartment on Brenton Street to have some more beer and continue socializing.

After they had been sitting on the sofa for a while drinking beer, talking, joking and listening to music, Mr. Ross put his arm around the complainant. The complainant said that she decided to resist his advances and suddenly he went totally out of control, started striking her on the jaw and forced her to perform oral sex. Ross, on the other hand, testified that everything was going nicely, that she accompanied him to the bedroom and they were preparing to have intercourse when the complainant asked if he was going to tie her up. He said "No" and then she asked him to use a condom. He did not have one and then things started getting very strange. He testified that she asked him if he was going to force her to have oral sex and he told her he was not going to force her to do anything. At that point Mr. Ross says that she started kicking and twisting and thrashing her arms around and it was necessary for him to restrain her. The complainant then went to the bathroom. While she was there Mr. Ross says he called a cab and when it arrived he sent her home.

The cab driver found that the complainant was very upset and when she told him that she had been sexually assaulted he took her to the hospital and subsequently the appellant was charged with and later convicted of the sexual assault.

It is agreed by all counsel that the jury trial before Mr. Justice Davison was properly conducted and that there was ample evidence to support the conviction that resulted. If, on the other hand, the jury had believed Mr. Ross rather than the complainant or had a reasonable doubt, the

verdict would have had to be one of acquittal. Credibility was the issue of vital importance.

Dr. Eric Hansen had provided psychiatric services to the complainant over an eight year period starting in 1983 and continuing until September 24, 1991. He was advised by the complainant and her brother in the fall of 1991 that she had been sexually assaulted. He did not consider there was any psychiatric aspect to the assault until he read the media accounts of the trial late in June of 1992. Because of his knowledge of the complainant's background he saw a possibility that the complainant's testimony could really be wrong even though she believed it to be true and if this was the case she would suffer psychiatric damage and the conviction of Mr. Ross could be a miscarriage of justice.

Dr. Hansen had no wish to breach his confidentiality with his former client but was sincerely concerned about the possibility of a miscarriage of justice. He consulted his legal advisor and they approached the Provincial Medical Board concerning the confidentiality issue. The ethical dilemma was not resolved and Dr. Hansen's solicitor then wrote to the Crown prosecutor who had conducted the trial and advised her of Dr. Hansen's concerns. The Crown, in turn, advised the defence counsel who filed a Notice of Appeal and application to adduce fresh evidence on the appeal to this court.

At this point defence counsel was unable to determine the nature of this fresh evidence because Dr. Hansen had refused to open his file or discuss the matter without his former client's consent which had been refused. An application was therefore made to court to authorize the discovery of Dr. Hansen by counsel for Mr. Ross to determine whether fresh evidence existed that could be advanced on the appeal from Mr. Ross's conviction.

At the hearing of this application the complainant was permitted to intervene and be represented by counsel. Her right to privacy and the preservation of the doctor/patient confidentiality relationship was strenuously argued by her counsel and by counsel for the Crown. Counsel for Mr. Ross argued the prevention of a miscarriage of justice must prevail over the confidentiality and privacy rights and that the court could grant the order for discovery while, at the same time,

protecting the complainant's rights.

The court, after granting an Order for Discovery explained in its reasons for judgment:

> " A sexual assault such as described by the victim here is a very serious crime and the sentence imposed by the trial judge is substantial. A reasonable person would conclude that, when a psychiatrist who has treated the victim has apparently expressed the view that there are concerns about her credibility and whether there was a miscarriage of justice, it is in the interests of justice to follow the matter up and clear the air. The public interest in avoiding a miscarriage overrides any claim of privilege that might be advanced in these circumstances respecting the patient/physician communications.
>
> The intervenor emphasizes the importance of her privacy interests in the confidential material in her former psychiatrist's file. There is no doubt that privacy "ranks high in the hierarchy of values meriting protection in a free and democratic society" and is essential for the well-being of the individual. **See Edmonton Journal v. Alberta (A.G.)**, [1989] 2 S.C.R. 1326 at p. 1327; **R. v. Dyment** (1989), 45 C.C.C. (3d) 244 (S.C.C.). The intervenor also stresses her equality interests and her interests to security of the person. However, all of these very important interests must be balanced against the interest of the public in the avoidance of a miscarriage of justice. Moreover, the privacy interests can receive protection in large measures by the terms that can be imposed in the order that the court makes.
>
> The exact nature of this evidence being totally unknown, it is not appropriate for an Appeal Court to exercise its power under s. 683(1)(b)(i) to order the attendance of Dr. Hansen to be examined before the court. In our opinion, the correct approach was to give the applicant's counsel an opportunity to examine Dr. Hansen and his file to enable such counsel to determine whether he wishes to make an application to admit fresh evidence and if so, to prepare the appropriate materials in support of it. This we believe can be accomplished by the exercise of the court's power under s. 683(1)(b)(ii).
>
> The court has ordered that Dr. Hansen be examined in the manner provided by the rules of this court relating to discovery before the Chambers judge of this court at a time to be fixed in the order. This procedure will permit the production at the examination of Dr. Hansen's file relating to the victim. In order to afford the greatest possible protection of the victim's privacy rights, the order has been made as restrictive as possible. It provided that such examination will be held in camera, that a ban be made on the publication of the evidence in any manner excepting only through necessary solicitor/client communications and for the purpose of any application

> to this court to admit fresh evidence. It further provided that at the conclusion of the hearing of this appeal, all material relating to the examination, including transcripts, affidavits or other documentation be sealed by the court. Finally, the order provided that all parties to this application have the right to be represented by counsel at the examination."

The evidence of Dr. Hansen was taken before Justice Roscoe on February 1st, 1993, and on February 19th, 1993 Mr. Craig M. Garson, who now was counsel for Mr. Ross, filed a notice of his intention to apply to admit Dr. Hansen's evidence as fresh evidence in the appeal to be heard on March 16th, 1993. On behalf of his client he abandoned all other grounds of appeal and relied solely on the admission of this fresh evidence to obtain a new trial for his client.

At the hearing of the appeal Crown counsel moved that the application to admit fresh evidence be considered by the court *in camera* and this motion was granted. If the fresh evidence was admitted for the purposes of the appeal and an Order for a new trial resulted, then, of course, it would have to be tendered and found admissible at a new trial in open court before it could be used in the criminal process. It could not, therefore, be said that the court was conducting public business behind closed doors. The temporary protection of the privacy interests of the complainant was, in our opinion, sufficient to justify the closing of the court. If the evidence tendered was found to be not admissible then, of course, it would remain sealed in accordance with our original order granted at the time of permitting the discovery.

The powers of a court of appeal in an application to receive fresh evidence are set forth in **s. 683** of the **Criminal Code of Canada**, R.S.C. 1985, Chapter C-46 as follows:

> " 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 proceedings;
> (b) order any witness who would 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);"

The classic interpretation of this provision of the **Code** is that of Mr. Justice McIntyre who delivered the judgment of the Supreme Court of Canada in **Palmer and Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 at p. 204:

" Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and Courts of Appeal in various Provinces have pronounced upon them: see for example *R. v. Stewart* (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); *R. v. Foster* (1978), 8 A.R. 1 (Alta. C.A.); *R. v. McDonald*, [1970] 3 C.C.C. 426, [1970] 2 O.R. 114, 9 C.R.N.S. 202 (Ont. C.A.); *R. v. Demeter* (1975), 25 C.C.C. (2d) 417, 10 O.R. (2d) 321 (Ont. C.A.) [affirmed 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, [1978] 1 S.C.R. 538]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:

(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;

(2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(3) the evidence must be credible in the sense that it is reasonably capable of belief, and

(4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

Counsel have agreed that the due diligence aspect of this test has been met since Dr. Hansen's evidence was unknown to the defence prior to the conviction.

The evidence of Dr. Hansen is, in my opinion, relevant in that it bears on the believability of the evidence of the complainant. It does not relate to credibility in the ordinary sense because the evidence does not suggest that his former patient may be telling an untruth. It merely presents a psychiatric reason for the complainant having given a version of the facts which she may believe to be true but which may not, in fact, represent what actually occurred. From this point of view the second test set forth in **Palmer** is met.

The third principle requires that the evidence given be credible in the sense that it is reasonably capable of belief. The evidence presented is that of a psychiatrist duly qualified to practice his profession in this Province. It consists of opinions based upon his knowledge of his ex-patient and his training in his specialty of psychiatry. He holds the view that there is a possible chance of a miscarriage of justice being occasioned here and although others may reject his opinion I have no doubt that it is reasonably capable of being believed. In that sense I would find his evidence credible.

The fourth requirement of the **Palmer** principles is that such evidence, if believed, could reasonably, when taken with other evidence adduced at the trial, be expected to have affected the result. Before I express any opinion on this matter I wish to discuss some further developments in this case.

After the hearing of the appeal had been completed on March 16th, 1993, the decision of the court was reserved. On March 22nd, 1993, counsel for Mr. Ross advised the court that additional fresh evidence had been discovered and asked that the appeal hearing be reopened before the decision was handed down. This request was granted and a second hearing was held on April 6th, 1993, to consider the additional fresh evidence. This evidence related to the complainant's sexual conduct with another person and by virtue of the recently enacted **s. 276** of the **Criminal**

Code was required to be held *in camera*. Counsel for the Crown moved for the exclusion of the public before the application proceeded and no position was taken by counsel for Mr. Ross. Counsel for the intervenor agreed with the submissions of the Crown.

Mr. David Coles, Q.C., asked to be heard on behalf of the Canadian Broadcasting Corporation to oppose the motion for an *in camera* hearing. He was permitted to present his arguments which were to the effect that the new legislation was contrary to **s. 2(b)** of the **Charter of Rights and Freedoms**, as it offended the freedom of the press and other media of communication.

The court ruled that the Supreme Court of Canada, when striking down the former rape shield law, in **R. v. Seaboyer**, [1991] 6 C.R.R. (2d) 35 had set forth guiding principles to control the admissibility of certain types of evidence in sexual cases and that the admissibility hearing should be held *in camera*. These principles were designed to protect the victims of sexual attack from harassment and at the same time allow accused persons to make full answer and defence to charges laid against them. It was our view that the amendments to the **Criminal Code** set forth in **s. 276** were a valid reflection of the views of the Supreme Court of Canada and that that section which came into force on August 15, 1992, was constitutionally sound. We therefore directed that the hearing proceed *in camera*.

Counsel for the Crown argued that the new fresh evidence being tendered was not admissible because it offended the provisions of **s. 276** of the **Code**. He suggested that the evidence was being offered to support an inference that the complainant was more likely to have consented to sexual activity or was less worthy of belief. If this were so then I agree that such evidence would be inadmissible and would not meet the requirements of fresh evidence as set out in the **Palmer** case.

In my view, this evidence is being presented for a different purpose then that suggested by the Crown. The defence of Mr. Ross was that sexual activity did not take place and, therefore, the question of consent is completely irrelevant. I cannot refer to the evidence specifically because

the hearing has been held *in camera* but in my view it relates not to the credibility of the complainant but to whether the appellant's story was correct. It tends to bolster not only the evidence of Mr. Ross but also that of Dr. Hansen who has said that both parties could very well be telling a story which they believed to be true.

I have reached the conclusion that the new fresh evidence is admissible and credible and certainly when taken together with the evidence of Dr. Hansen and the other evidence heard at the trial could have reasonably been expected to have affected the result.

It is always possible that none of this fresh evidence, if presented to a jury, would result in other than a belief in the complainant's story and a disbelief in that of Mr. Ross as was the case in the first trial. There is, however, a possibility that a miscarriage of justice may have occurred and it is the duty of this court to prevent such an event from happening. I would therefore admit the fresh evidence tendered, allow this appeal, set aside the conviction of the appellant, and direct that a new trial be conducted upon the original indictment.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.