NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ringer*, 2004 NSCA 94

Date: 20040804
Docket: CAC 208756
Registry: Halifax

Between:

Parker Leon Ringer

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Publication ban pursuant to s. 486 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and s. 94(1) of the **Children and Family Services Act**, S.N.S. 1990, c. 5

Judges: Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.

Appeal Heard: June 8, 2004, in Halifax, Nova Scotia

Held: Appeal from conviction dismissed; leave to appeal sentence granted but appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Chipman, J.A. concurring.

Counsel: Johanne Tournier, for the appellant
Dana Giovannetti, Q.C., for the respondent

<u>Publishers of this case please take note</u> that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > ©) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 94(1) OF THE <u>CHILDREN AND FAMILY SERVICES ACT</u> APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

I. Introduction:

[1] Following a retrial ordered as a result of his successful appeal, the appellant was convicted by Stewart, J. of indecently assaulting D.E.S. between August of 1981 and December of 1982. He was sentenced to two years imprisonment and two years probation. He now appeals his conviction and alternatively, seeks leave to appeal sentence.

[2] The appellant submits that the judge made errors of law, denied him a fair trial and reached an unreasonable verdict. However, in my respectful view, none of these submissions can succeed and the appeal from conviction should be dismissed. As for the sentence, I conclude, contrary to the appellant's arguments, that it is fit and untainted by error in principle. While I would grant leave to appeal, I would dismiss the sentence appeal.

II. Overview of the Facts:

[3] D.E.S., 26 years of age at trial, testified that in 1981, when he was a five year old grade primary student, he woke up at home to find that the appellant was in bed with him and touching his penis. The appellant, said D.E.S., then forced him to perform fellatio.

[4] D.E.S. made this allegation to the police in 1999. At that time, the police were investigating an allegation against the appellant made, and later retracted, by another person, E. D.E.S. was contacted as part of this investigation and provided a written statement. The prosecution of the appellant was therefore based on events alleged to have occurred some 20 years earlier and disclosed to the police some 20 years after the fact during the course of an investigation of another allegation by a different complainant.

[5] The appellant testified that the assault did not occur. It was common ground at trial that , in the years following the alleged incident, D.E.S. and the appellant had an otherwise normal relationship and that they worked and spent time together while D.E.S. was a teenager.

[6] At trial, the defence attacked D.E.S.'s credibility on the grounds of his long delay in coming forward, his earlier denials of any misconduct on the appellant's part and other prior inconsistent statements. D.E.S. agreed, for example, that he had told his maternal grandmother in 1987 that the appellant had never done anything to him and that he had made the same denial in 1999 to his paternal grandmother. He explained that he was scared of what they would say or what they would try to do and that his paternal grandmother had pressured him not to testify or to testify falsely prior to the first trial in these proceedings. D.E.S. agreed that he had misidentified the recipient of his first disclosure in his 1999 police statement and he denied his paternal grandmother's evidence that he had complained to her of sexual abuse by his parents.

[7] The trial evidence from family members related mainly to the issues of opportunity and credibility. D.E.S. had made allegations of physical abuse to the Children's Aid against his parents but he adamantly denied, and in this respect contradicted the testimony of a defence witness (V.R.), that his parents had sexually abused him. Several witnesses testified to the frequency of the appellant's visits to D.E.S.'s home. There was evidence that there had been occasional visits but that the appellant had not stayed over night or been left in charge of D.E.S. D.E.S.'s mother, S.S., admitted having written a note to the effect that her son's allegations were not true and that the appellant had never stayed at her residence or babysat her child. Her evidence, however, was that she felt pressured by V.R. to write the note, part of which was, she said, dictated by V.R. This account of how the note came into existence was disputed by V. R. and M.R.

[8] In her reasons for judgment, the trial judge found that none of the evidence foreclosed opportunity by the appellant to interact with D.E.S. as the latter had described. She accepted D.E.S. as a truthful witness and found that she had no reasonable doubt that the event occurred as he described it. She specifically disbelieved the accused and found that the rest of the evidence did not give rise to a reasonable doubt. The judge made strong and adverse findings with respect to the credibility of other defence witnesses, particularly J.R., M.R. and V.R. She found that V.R.'s evidence presented as coached and rehearsed and that V. R. had been instrumental in putting pressure on family members: in the case of S. S., to write the letter referred to earlier and in the case of D.E.S., for him not to attend court.

III. Issues:

[9] On the conviction appeal, the appellant raises seven grounds in the notice of appeal, two of which have been abandoned and, in his factum, raises four additional issues.

[10] Somewhat reorganized and restated, the issues to be addressed on appeal are these:

1. Was the conviction unreasonable? (This includes grounds of appeal 1, 2 and 3 as set out in the notice of appeal.)

2. Did the judge err in excluding a prior consistent statement by the accused? (This relates to ground 4 in the notice of appeal.)

3. Did the judge err in refusing to order production of Children's Aid Society records relating to the apprehension of D.E.S.? (This relates to ground 5 in the notice of appeal.)

4. Was the accused denied a fair trial? (This relates to the additional grounds numbered 1 to 4 as set out at para. 34 of the appellant's factum.)

5. Was the sentence unfit?

IV. Analysis:

1. Conviction Appeal:

a. Unreasonable verdict

[11] As noted, this ground of appeal relates to issues 1, 2 and 3 as set out in a notice of appeal which read as follows:

> (1) That the learned trial judge erred in law in that her verdict was unreasonable in that the evidence led and the facts adduced should have been sufficient to create a reasonable doubt as to the guilt of the appellant;

(2) That the learned trial judge erred in law in finding that the testimony of the complainant was credible, given the inconsistences in his testimony and other factors, which tended to cast doubt on the credibility of the appellant.

(3) That the learned trial judge erred in accepting the complainant's testimony that the appellant had spent the night with the complainant, despite the testimony of the complainant's parents and defence witnesses that the appellant had never spent the night at the complainant's home, nor had he ever babysat the complainant.

[12] The appellant's argument amounts to saying that the learned trial judge ought to have had a reasonable doubt on this record. However, that is not the test for whether a verdict should be found to be unreasonable on appeal.

[13] The duty of this Court when an unreasonable verdict is alleged is to determine whether the verdict is one that a properly instructed jury or trial judge, acting judicially, could reasonably have rendered: **Corbett v. The Queen**, [1975] 2 S.C.R. 275; **R. v. Yebes**, [1987] 2 S.C.R. 168 and **R. v. Biniaris**, [2000] 1 S.C.R. 381. The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence. The reviewing court must not act as if it were the "13th juror". While the reviewing court must go beyond merely satisfying itself that there is at least some evidence in the record to support a conviction, its role is not to substitute its opinion for that of the trial court. The Court's task is "... to review, analyze and, within the limits of appellate disadvantage, weigh the evidence so as to examine the weight which the evidence could reasonably bear.": **Yebes** at 186.

[14] The appellate court must be particularly conscious of the advantages enjoyed by a trial judge in assessing credibility: **R. v. W.R.**, [1992] 2 S.C.R. 122. It is only if the judge's assessment of credibility cannot be supported on any reasonable view of the evidence that the court is entitled to intervene: see **R. v. Burke**, [1996] 1 S.C.R. 474.

[15] As in most trials, there were live issues of credibility at this trial for the judge to resolve. The trial judge did so, giving reasons as to why she accepted certain evidence and rejected other evidence. Her reasons disclose no serious misapprehension of the evidence or any failure to advert to potentially important evidence that she ought to have addressed. Her conclusions are reasonable.

[16] I would dismiss this ground of appeal.

b. Prior consistent statement:

[17] This issue relates to ground 4 in the notice of appeal which reads as follows:

> (4) That the learned trial judge erred in law by refusing to admit the statement of the accused into evidence either as part of the res gestae or otherwise, as a spontaneous statement when unexpectedly confronted with the allegation, tending to support the claim of innocence of the accused.

[18] To address this ground of appeal, I must set out some background as to how the point developed at trial.

[19] The accused had made a statement to Constable O'Callaghan at the investigative pre-trial stage. The Crown did not seek to place this statement into evidence but the defence, both during the Crown's case and again during its own case expressed the desire to lead the evidence of this statement.

[20] At the request of the defence, the Crown produced Corporal MacLellan for cross-examination prior to the close of its case. Corporal MacLellan had a file including a continuation report written in part by Constable O'Callaghan. After much discussion at trial, defence counsel, with the consent of the Crown, placed into evidence a portion of that continuation report as follows:

> Leon Ringer attended this office today and was interviewed by the writer in relation to allegations of sexual assault by [D.E.S.] .... Ringer was nervous throughout the interview.

[21] During the defence case, defence counsel indicated an intention to put into evidence the appellant's videotaped police statement. The defence supported the admissibility of this statement on three bases. First, the defence said it was attempting to pursue an issue concerning a defective and/or biased investigation by the police. The accused's videotaped statement, it was suggested, would show that Constable O'Callaghan's behavioural observation that the accused was nervous throughout the interview was false. The two additional bases advanced by the defence were that the accused's statement would be admissible for its truth as part of the *res gestae* or to show consciousness of innocence. As part of the argument

of this issue, defence counsel noted that the accused would be testifying and that the videotaped statement constituted a prior statement consistent with his proposed testimony.

[22] After receiving briefs and hearing submissions, the learned trial judge ruled that the prior statement of the accused was not admissible at the instance of the defence. The judge ruled that the videotape would not tend to prove a biased or flawed investigation and rejected the submissions that the statement was admissible as part of the *res gestae* or to show a consciousness of innocence.

[23] In essence, the judge found that the prior statement was irrelevant. With respect to the allegation that the investigation was defective or biased, the judge failed to see "... how possibly reaching the conclusion by viewing a videotape that the officer was wrong in his assessment that the accused was nervous during the interview leads to the conclusion that the investigation was flawed or biased against the accused." As for the suggestion that the statement showed that the accused had a "consciousness of innocence", the judge noted that the evidence did not relate to "... conduct that would yield a reasonable inference that the accused was prepared to do anything that a guilty person would not do."

[24] The appellant submits that the judge erred in this ruling and that the prior statement is admissible on any or all of the three bases relied on at trial. The Crown supports the ruling of the trial judge. In my view, the trial judge did not err in excluding the videotaped statement.

[25] In general, prior consistent statements of a witness are not admissible: **R. v. Simpson**, [1988] 1 S.C.R. 3; 38 C.C.C. (3d) 481 at 496 (C.C.C.). While there are several considerations underpinning this rule, one of the most fundamental is that evidence of a witness's prior statements has little, if any, probative value and that its admission may tend to expand, unnecessarily, the scope of the issues at trial: **R. v. B. (S.C.)** (1997), 119 C.C.C. (3d) 530 (Ont. C.A.) at 541. As noted, it was primarily on the basis of lack of relevance that the judge excluded the statement.

[26] In my view, she did not err in doing so. The comment by the officer about the accused's nervousness, even if wrong, had no capacity to make any material fact more or less probable. As for the suggestion that the statement showed a consciousness of innocence, such is demonstrated only where the evidence "... reasonably yields the inference that the accused was prepared to do something

which a guilty person would not be prepared to do.": **R. v. B(S.C.)** at 541. The making of an exculpatory statement, without more, hardly qualifies as something which a guilty person would not be prepared to do. Moreover, even if otherwise admissible as part of the *res gestae*, the evidence is not admissible if it fails to meet the threshold requirement of relevance.

[27] The controversy at trial and the submissions on appeal were concerned with whether the entire video-taped statement of the appellant ought to have been admitted. As noted, I am persuaded that the judge did not err in excluding it. No argument was addressed to the much narrower point that the accused might have been allowed to testify in chief that he had made an earlier exculpatory statement to the police and I make no comment on that possibility.

c. Third party records

[28] This ground of appeal relates to the trial judge's refusal to order production, pursuant to s. 278.5 of the **Criminal Code** of Children's Aid records relating to the apprehension of D.E.S. by Children's Aid.

[29] The trial judge ruled that the "likely relevant" prerequisite of s. 278.5(1)(b) of the **Code** was not satisfied and that accordingly the records would not be ordered to be produced for review by the court.

[30] I see no error in the judge's ruling on this point. No foundation was laid to establish the likely relevance of this material and the judge did not err in so finding. I would accordingly dismiss this ground of appeal.

d. Fair trial:

[31] There are two main submissions under this heading which I shall consider in turn.

[32] First, it is submitted that the judge erred by failing to permit the defence to recall its witness, V.R. She testified on September 10, 2002. It was not until February 24, 2003, at the end of the defence case, that the defence raised the issue of calling a doctor's evidence in relation to V.R.'s competency and of wishing to recall her to clarify or add to some of her earlier testimony.

[33] The trial judge recognized that she had a discretion to inquire into the competency of the witness even after the witness had testified and that she had a discretion to permit the witness to be recalled in the interests of justice. The judge found that there was nothing in the witness's demeanor or response to suggest that she was incapable of communicating the evidence or that she did not understand the nature of the oath that she had taken. Further, she was not satisfied that the interests of justice required her to exercise her discretion to recall the witness.

[34] As I read the judge's ruling, she concluded that the defence had not elicited as much helpful evidence from V.R. as was hoped and that the defence wished to recall the witness in an attempt to do better the second time. Not surprisingly, the judge did not think this was an appropriate reason to exercise her discretion. Neither do I. I would dismiss this ground of appeal.

[35] As his second main point, the appellant raises concerns about the conduct of the learned trial judge and crown counsel at trial. It is suggested that the judge's conduct towards defence counsel was such as to give rise to a reasonable apprehension of bias. Crown counsel at trial, it is said, was overzealous. I reject these submissions.

[36] In my respectful view, far from exhibiting anything which would give rise to a reasonable apprehension of bias, the trial judge acted with restraint, caution and patience. The conduct of defence counsel at trial on occasion justly attracted rebuke and expressions of displeasure from the trial judge. But justified judicial comment on unfortunate conduct by counsel does not equal judicial bias. This ground of appeal simply finds no support in the record and I would dismiss it.

[37] The appellant's counsel also cast aspersions on the motives of Crown counsel at trial. I will not perpetuate these ill-considered allegations by repeating them. It is enough to say that there is in this record absolutely nothing to support these submissions and that it was improper to advance them in this Court absent such support.

e. Disposition of the conviction appeal

[38] I would dismiss the appeal from conviction.

2. Sentence Appeal:

[39] The judge sentenced the appellant to 2 years imprisonment, intending that he receive credit for the 6 months he had served in custody following the conviction at his first trial. She imposed as well a 2 year period of probation and made some ancillary orders, none of which is in issue on the sentence appeal.

[40] The grounds advanced for the sentence appeal are these:

> 1) That the learned trial judge erred in accepting the opinion of the forensic psychologist for the Crown as to the risk for re-offending and opinions as to psychopathy and other psychological characteristics of the appellant in light of flaws in the assessment disclosed by cross-examination and by the expert witness called by the appellant.
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> 2) That the learned trial judge erred in accepting the qualifications of the PPG technician as an expert for the purpose of interpreting PPG tests and placed undue emphasis upon the possibility of the appellant being aroused by a story of an adult having sex with a passive child in light of the generally discredited test results and the fact that the testimony of the PPG technician herself indicated that the result was anomalous.
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> 3) That the learned trial judge erred in disallowing the line of questioning as to the usefulness or applicability of the risk assessment/PPG in the event that the individual being tested was in fact innocent of the offence.
>
> 4) That the learned trial judge erred in law by over-emphasizing general and specific deterrence in sentencing the accused.

[41] These issues boil down to two points: first, that the judge erred in her assessment of the expert evidence and second, that the sentence of incarceration ought to have been ordered to be served in the community.

[42] There is no dispute about the standard of review: absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, the appellate court may intervene only if the sentence is demonstrably unfit: see, e.g. **R. v. Brown**, [2004] N.S.J. 133 (C.A.) at para. 5.

[43] At the sentencing hearing, a great deal of time was spent in relation to the PPG test administered to the appellant and its significance for assessing the risk of his re-offending. However, at the end of the day, and as the judge correctly

observed, the findings and recommendations of the defence expert, Dr. Konopasky, were not in marked contrast to those of the other experts. The Crown's main expert, Dr. Starzomski, rated the appellant's risk of re-offending as moderate to high while Dr. Konopasky rated it as low to moderate. Dr. Konopasky noted that there was some consensus between them on the assessment of the appellant as a moderate risk. And, as Dr. Konopasky himself acknowledged in his testimony, he and Dr. Starzomski were "... actually quite close" in their recommendations for treatment and follow up.

[44] In my view, there is no reviewable error in the sentencing judge's assessment of the evidence.

[45] I also am of the view that the length of the sentence is within an acceptable range. Offences of this nature against helpless children call for sentences that denounce and deter. A penitentiary sentence is a fit sentence for this offender and this offence.

[46] That leaves for consideration whether the judge erred in principle by failing to impose a sentence of less than 2 years and ordering it to be served in the community. In my view she did not.

[47] The judge gave the possibility of a conditional sentence close and careful attention. The judge was concerned as to whether the appellant's wife, who agreed to monitor him if given a conditional sentence, could be counted on to do so effectively. The judge noted that the appellant's wife did not accept that he posed any risk to anyone, tended to minimize his criminal activities and had been reluctant to reveal the appellant's assaultive behaviour in court even though she had revealed it to Dr. Konopasky. The judge noted her concern that a conditional sentence on the terms proposed by the defence would place the appellant in the regular presence of a young child and that access to and the presence of a passive child was of concern to all the professionals involved. The judge noted that the appellant had been given a conditional sentence in 1997, but that it had been revoked. The accused's record for numerous offences suggested to the judge that the accused had difficulty in conforming to the rules of society and abiding by court imposed directions.

[48] In short, the judge concluded in effect that there was a real risk that the appellant would re-offend, that the conditions of a conditional sentence would not

be adequate to minimize this risk and, given the nature of the offence involved, the gravity of the potential damage in the case of re-offending was great. These conclusions, all of which are amply supported by the record before the judge, negate the appropriateness of a conditional sentence: the judge could not be satisfied that such a disposition would not endanger the safety of the community: s. 742.1(b) of the **Criminal Code** and **R. v. Proulx**, [2000] 1 S.C.R. 61 at paras. 69 - 74.

[49] In my view, it was clear that the judge intended that the appellant receive credit for the roughly 6 months he had served of the sentence imposed following his first trial. We were assured by the Crown that such credit would be applied.

[50] I would grant leave to appeal the sentence, but dismiss the appeal.

V. Disposition

[51] I would dismiss the appeal from conviction. I would grant leave to appeal the sentence, but dismiss the appeal.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.