Date: 20020531
Docket:CAC177316

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. Theriault,* 2002 NSCA 77]

Bateman, Cromwell, Hamilton, JJ.A.

BETWEEN:

PAUL NEWMAN THERIAULT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Darren R. Macleod for the appellant Dana Giovnnetti, Q.C. for the respondent
Appeal Heard:	May 27, 2002
Judgment Delivered:	May 31, 2002

THE COURT: Leave to appeal is granted but the appeal is dismissed, per reasons for judgment of Hamilton, J.A.; Bateman and Cromwell, JJ.A., concurring.

Publishers of this case please take note 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
> >
> > (c) 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complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Hamilton, J.A.:

[1] The Appellant was charged with sexually assaulting C.D.M. on December 8-9, 2000 and with threatening her on December 15, 2000, contrary to ss.271 and 264.1 of the **Criminal Code** respectively. As a consequence of these offences, the appellant was also charged with two counts of failing to comply with a probation order, contrary to s.733.1, and two counts of failure to comply with a recognizance, contrary to s.145(3)(a).

[2] The offences were tried summarily before His Honour Chief Judge Jean-Louis Batiot of the Provincial Court. He held that the appellant was guilty of committing the sexual assault and consequently convicted the appellant on one count each under ss.271, 733.1 and 145(3)(a). He did not find the appellant guilty of the threat offence, and consequently he acquitted the appellant on that offence and also on one count each with respect to the ss.733.1 and 145(3)(a) offences.

[3] The appellant appealed the three convictions to the Supreme Court of Nova Scotia. The appellant argued the trial judge erred in not critically reviewing the victim's evidence with respect to the sexual assault charge, given that he had a reasonable doubt in relation to the threat charge. Justice Carver dismissed the appeal.

[4] The appellant now seeks leave to appeal to the Court of Appeal pursuant to s.839(1), and, if granted, appeals from the decision of Justice Carver.

[5] Section 839(1) of the Criminal Code provides:

> Subject to subsection (1.1), an appeal to the court of appeal, as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> (a) a decision of a court in respect of an appeal under section 822; or
>
> (b) a decision of an appeal court under section 834, except where that court is the court of appeal.

[6] Thus an appeal to this court can be taken on any ground that involves a question of law alone. The error of law required to ground jurisdiction in this court is that of the summary conviction appeal judge.[**R. v Travers** (2001), 154 C.C.C. (3d) 426,¶ 21] Such an error includes an error in applying the appropriate standard of appellate review by the summary conviction appeal judge.

[7] The ground of appeal set out in the appellant's factum is

> (i) That the Summary Conviction Appeal Court Justice erred in law in his approach to and assessment of the evidence given at trial and also in his conclusion that the Trial Judge approached and assessed the evidence correctly.

The appellant continued to focus in this appeal on the reasonableness of the verdict in light of the evidence but during oral argument it became apparent he was also arguing that the inadequacy of the trial judge's reasons also amounted to an error of law.

[8] C.D.M.'s evidence with respect to the sexual assault, which the trial judge accepted, was that following a party at her home on December 8, 2000, where the appellant drank heavily, C.D.M. reluctantly drove the appellant to his girlfriend's house. The appellant raised sexual matters with C.D.M. as she was driving and when she stopped to let him out at his girlfriend's house he grabbed her hands with one of his hands and "felt around" her leg and breast, over and then under her clothing, with his other hand. He raised her bra over her breasts, pulled up her shirt and touched her underwear over a five minute period, while she was screaming and hollering for him to stop. She told him to get out which he eventually did.

[9] With respect to the threat charge, of which the appellant was acquitted, C.D.M. gave evidence the appellant threatened her in the parking lot of the liquor store on December 15, 2000, that he would get her when her boyfriend was not around. The appellant's parents gave alibi evidence that the appellant was eating supper with them very close to the time of the alleged threat.

[10] The trial judge dealt with the threat charge first in his decision. He noted the alibi evidence of the appellant's parents for the time of the alleged threat, stating it was "very credit worthy evidence", and the alibi evidence of an employee of the

bowling alley where the appellant gave evidence he went after supper. He then stated:

> ...on the whole of the evidence with respect to these events on the fifteenth of December, I cannot come to a conclusion beyond a reasonable that, in fact, Mr. Theriault was at the liquor store on that night. 'Beyond a reasonable doubt' are the operative words.

[11] As stated at ¶34 of the respondent's factum:

> The trial judge did not say he was acquitting on the threat offence because he rejected the victim's evidence; on the contrary, he explained that he was acquitting because he could not come to a conclusion beyond reasonable doubt and he emphasized that those were the "operative words". There is no inconsistency occasioned by, acquitting on the threat offence in the face of credible alibi evidence, and convicting on the sexual assault offence based on uncontradicted credible evidence. ...

[12] The trial judge then dealt with the sexual assault charge. He referred to the evidence of the appellant's girlfriend, which he stated he did not find credible with respect to the appellant acting normal on the night of the alleged sexual assault, and with respect to the evidence of C.D.M. he stated: "I accept Miss (M's) evidence of what happened to her". The trial judge did not indicate why he accepted C.D.M.'s evidence on the sexual assault offence given his decision on the threat charge.

[13] The summary conviction appeal judge noted the findings of fact made by the trial judge, reviewed s.686(1)(a) of the **Criminal Code** which sets out his scope of review with respect to the appeal and reviewed cases setting out the test for determining whether a verdict is unreasonable. (**R. v. W.(R.)**, [1992] 2 S.C.R. 122); **R. v. Riley** [2000] N.S.J. No. 346) These cases indicate a summary conviction appeal judge is required to some extent to re-examine, re-weigh and consider the effect of the evidence, while showing great deference to findings of credibility made at trial. The summary conviction appeal judge then noted the appellant's argument and stated:

> After reviewing, re-examining and re-weighing the whole decision and the whole of the evidence, I am satisfied the trial judge properly addressed the evidence before him on each case even though he did not specifically refer to her credibility on the December 15 incident.

[14] Considering the evidence in this relatively simple case, the deference to be given to the trial judge's determination of credibility, and the principle that the finder of fact may accept all, part or none of a witness' evidence, I am not satisfied the summary conviction appeal judge made an error of law when he found the trial judge's decision reasonable.

[15] Nor am I satisfied the summary conviction appeal judge erred in not finding that the reasons of the trial judge were inadequate. At ¶46 in **R. v. Sheppard**, [2002] S.C.C. 26, Justice Binnie states:

> 46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

[16] In this case there is no conflicting evidence on the sexual assault and no difficult issues of law to be dealt with. While it may have been preferable for the trial judge to indicate his reason for accepting C.D.M.'s evidence on the sexual assault offence, in light of his decision on the threat charge, his failure to do so on the evidence in this case, does not make his verdict unreasonable or amount to an error of law based on inadequate reasons. The decision of the summary conviction appeal judge makes it clear he knew what was required of him and did it without error.

[17] Accordingly I would grant leave to appeal but dismiss the appeal.

Hamilton, J.A.

Concurred in:

Bateman, J.

Cromwell, J.