NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. C.B.K.*, 2015 NSCA 111

Date: 20151216
Docket: CAC 437414
Registry: Halifax

Between:

C.B.K.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486 of the Criminal Code

Judges:	Scanlan, Saunders and Van den Eynden, JJ.A.
Appeal Heard:	November 10, 2015, in Halifax, Nova Scotia
Held:	Appeal of convictions and sentence dismissed per reasons for judgment of Scanlan, J.A.; Saunders and Van den Eynden, JJ.A. concurring.
Counsel:	Darlene MacRury, for the appellant Marian Fortune-Stone, Q.C., for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

Introduction

[1] On November 10, 2015, this Court considered an appeal of convictions and sentence in relation to the appellant. The convictions were under s. 271, s. 279(2) and s. 334(b) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. At the conclusion of the hearing the Court indicated that it was the unanimous decision of the Court to dismiss the appeal of convictions and sentence with reasons to follow. These are those reasons.

Background

[2] The appellant was tried by Nova Scotia Supreme Court Justice Robin C. Gogan for eleven offences. He was convicted on six of those offences. He appeals three of those convictions. The three convictions under appeal involve sexual assault, forcible confinement and theft. The appellant suggests that if he is successful on the appeal of the convictions, the sentence of imprisonment for a total of 4½ years for the six convictions should be adjusted as well. He acknowledged that if the appeal of convictions is not successful, there is no merit to the appeal of sentence. For the reasons set out below the appeal of convictions is without merit. I agree that there is no justification for changing the sentences as imposed.

[3] The trial judge's decision dated March 5, 2015 (reported as 2014 NSSC 458) sets out the facts giving rise to the charges and her reasons for conviction. Her reasons clearly and concisely set out her findings of fact. She logically related those findings to evidence and correctly applied the law to the facts as she found them.

[4] In her decision the trial judge focused on what occurred over a period of nine hours in the complainant's bedroom starting January 22, at 9:30 p.m., 2014, ending around 6:30 a.m. on January 23' 2014. I will summarize the facts as found by the trial judge.

[5] On the night in question the appellant attended at the complainant's residence and accused her of having a relationship with an ex-boyfriend while he was recently incarcerated. During this exchange the appellant took the complainant's phone and looked for text messages and pictures stored on the

phone. He admitted that, after he viewed photographs of the complainant and her ex-boyfriend on her cell phone, he became enraged. He threw the phone and then started to hit the complainant repeatedly about the head. He hit her arms if she attempted to protect her head. He also struck her with body blows. This physical violence continued on and off for about nine hours as the appellant ruminated about the so-called infidelity. He would sometimes calm down and then be overtaken by rage as he again thought about the ex-boyfriend.

[6] At trial the appellant was unable to recall how many times he struck the complainant with his hands. He agreed that the complainant was “a mess”. She had blackened eyes and bruising and swelling about her face and her arms. The appellant and complainant both described his fits of rage and violence. The appellant testified that he was so emotionally upset that he couldn’t recall specifically what happened at the various times throughout the night. He did not disagree with the complainant’s testimony which spoke of what can only be described as a pummelling that lasted on and off for nine hours.

[7] At some point during the exchange, and as the beatings continued on and off during the evening, the appellant insisted that the complainant would be taking a polygraph test to prove her fidelity. He said she would be paying for the polygraph, which he suggested would cost approximately $412. The complainant testified that she had received some money for Christmas and she turned $420.00 in cash over to the appellant. She testified that she did this in the hopes that it would stop the beatings. It did not. It did in the end constitute the grounds for a conviction of the appellant on the theft charge.

[8] The evidence suggests that there had been no violence in the relationship prior to the night in question. The appellant testified that as his rage waxed and waned throughout the night, he could see that the complainant was a mess, both physically and emotionally. According to him, he thought between fits of rage, he should somehow try and console the complainant. He thought an appropriate way to console her would be to engage in sexual activity. He referenced their very active sexual relationship prior to the night in question. He suggested at trial, and urged upon this Court that, because the complainant did not voice any objection when he removed her clothing, and lay close to him, and even kissed prior to engaging in intercourse that she, in fact, consented. Alternatively, he argued that he had an honest but mistaken belief that the lack of complaint or resistance, and the kissing, led him to honestly and reasonably believe that she was consenting to the sexual activity.

[9] The complainant's evidence was that she felt that if she could somehow calm the appellant down the beatings might stop. Hence, she stayed close to him as they lay in her bed. She felt that if she lay close to him he would not be able to strike her. This seemed to at least have temporarily stopped the beating. She testified that when the appellant removed her clothing, she let it happen so as not to trigger another outburst. When the appellant proceeded to engage in sexual intercourse she also let it happen so as not to trigger yet another beating. The complainant testified that the appellant hit her just before he had sex with her and he resumed hitting her sometime afterward as well.

[10] At this juncture I note the appellant had made threats earlier that evening to blow up the complainant's trailer. He also indicated that "there are 2 kinds of people in the world, killers and fighters and I am not a fighter." (trial judge's decision, ¶41) The complainant's evidence was that she feared for her life, thinking she may not get out of her home alive. Even the appellant acknowledged the complainant was a mess throughout the beatings; before, during, and after, the sexual activities.

Analysis

[11] The appellant challenges the reasonableness of the verdicts. He argues that on the night in question the complainant handed over her money voluntarily and consented to sexual activity suggesting therefore the evidence does not reasonably support the convictions. I do not accept that submission. The trial judge's decision is a model of clarity in terms of her reasoning path, findings of fact and application of the law as it relates to the issues under appeal. In *R. v. Izzard*, 2013 NSCA 88, at ¶39, this Court said:

> [39] To test if a verdict is unreasonable or cannot be supported by the evidence, an appellate court must re-examine, and to some extent, re-weigh the evidence, and consider its effect. The question to be answered is: whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. An appellate court may also find a verdict unreasonable if a trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied upon by the judge in support of the inference or finding; or is shown to be incompatible with evidence that is not contradicted or rejected by the trial judge (*R. v R.P.*, 2012 SCC 22 at para. 9).

On appeal it is not the function of this Court to retry the case.

[12] The appellant testified at trial. The trial judge referenced and properly applied *R.* v. *W.(D.)* [1991] 1 S.C.R. 742 in her weighing of the evidence. She correctly identified the law relevant to the issue of burden of proof as shouldered by the Crown. She specifically referenced the Supreme Court of Canada decisions in *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Starr*, 2000 SCC 40, identifying the burden on the Crown and the concept of reasonable doubt.

[13] The trial judge did not accept the appellant's suggestion that because the complainant handed him the $420 he could not be convicted of theft in relation to that money. The trial judge determined that the appellant beat the complainant to the point that she handed over the money in the hopes that it might stop the beatings. Consent in those circumstances is vitiated by the appellant's actions. The trial judge was satisfied beyond a reasonable doubt that there was no legal consent when the money was handed over. The evidence and law clearly support that conclusion.

[14] As regards the sexual assault conviction the appellant says the history of sexual relations between the parties is relevant to the issue of consent. He says the earlier active sex life of the couple led him to believe that her laying close to him, along with the absence of resistance and the kissing, all led him to honestly believe that she was consenting to sexual activity.

[15] The complainant's evidence was that she was trying to do whatever she could to stop the beating. She said that it got to the point where she let the sexual activity happen in the hopes it would stop the beating. A person who beats their partner to the point of submission must understand that their actions belie any notion of consensual sex. Letting intercourse happen in the hopes that it would stop the beating is not legal consent. The trial judge in the matter under appeal referred to vitiated consent when she said:

> [105] In the present case, I am satisfied that the complainant consented to the sexual activity. She therefore consented for the purpose of s. 273.1 (1). However, I find that her consent was vitiated at stage 2 of the analysis in keeping with s. 265(3)(b). In my view, she consented under fear of the application of force. She made a choice that she would rather have sex with the accused than be subjected to continued beating.

[16] The complainant's fear of violence, as noted by the judge, was one which she found was honestly held. I have already noted the beating continued up to the time the parties engaged in sexual activity and resumed after the sexual activity

ended. As noted by the trial judge, the appellant conceded the complainant was scared; she did not feel safe. From his perspective he said he was "doing what he could to "take the scaredness away" and make things "normal"." I agree with the trial judge's clear findings at ¶108 where she said in relation to the violence that night:

> [108] In this environment, she testified that she tried to find ways to calm the accused and prevent further violence. She chose to have sex with the accused when he initiated the act. In these circumstances, she did not consent in law. If the accused somehow believed that he had the complainant's consent, I find that this was completely disingenuous in the circumstances.

[17] The trial judge did not misapply s.265(3) of the *Code*. I endorse the words of the Alberta Court of Appeal in *R. v. MacFie*, 2001 ABCA 34 at ¶20:

> [20] Where, the commencement of the encounter is characterized by violence or threats which would negative [sic] consent, the honest belief must be one which, if true, would establish innocence. In these circumstances, it is not sufficient that the accused honestly believe that the victim is communicating consent; he must also have an honest belief that she was doing so voluntarily and not as a result of the threats or violence he perpetrated against her. ...

The evidence supports the trial judge's conclusion that even if the appellant honestly believed the complainant had consented he could not have honestly believed she did so voluntarily. The evidence as accepted by the trial judge does not support the appellant's assertions that the consent was voluntary in that environment of threats of violence and actual violence he bestowed upon her.

[18] The same line of reasoning applies to the theft. An offender cannot assault, or otherwise abuse, partners or strangers to the point whereby they are simply prepared to hand over worldly goods and then claim that those items were given to them voluntarily. In this case, the evidence clearly supports the trial judge's conclusion that the $420 was given to the appellant as a result of the beatings; not because she was legally consenting.

[19] Finally, on the issue of unlawful confinement, the trial judge reviewed the evidence in detail in reaching her conclusion that the appellant had unlawfully confined the complainant. Even the appellant said of the complainant that "she was scared to death, she wouldn't look at me. There were marks on her face." The appellant described the complainant as being in shock. He had told her she could

not leave until her bruises had disappeared. All of this supported the trial judge's finding that she was not free to leave the house. It was only after the complainant was able to trick the appellant into closing the bathroom door that she was able to escape the residence at the first opportunity. She put his shoes on and escaped to a neighbour's house in the midst of a snow storm that was so severe that the appellant was not able to have a taxi drive him all the way to the complainant's home the evening before. When the complainant arrived at a neighbour's house they observed her obvious injuries and emotional distress and called 911. The evidence clearly supports the trial judge's finding that the complainant was unlawfully confined by the appellant. I refer again to the evidence which indicated that the appellant told the complainant that he'd be keeping her there until her blackened eyes had disappeared.

[20] The judge's findings were unassailable. The verdicts were reasonable. The appeal of convictions and sentence should be dismissed.

Scanlan, J.A.

Concurred in :

Saunders, J.A.

Van den Eynden, J.J. A.