Date: 19980617 Docket: C.A.C. 143843

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. McNamara, 1998 NSCA 149
Freeman, Pugsley and Flinn, JJ.A.

BETWEEN:

MICHAEL JOHN KENNETH McNAMARA	)	Appellant in person
	)	
Appellant	)	
	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	June 10, 1998
	)	
	)	
	)	Judgment Delivered:
	)	June 17, 1998
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THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Freeman and Pugsley, JJ.A. concurring.

FLINN, J.A.:

In a proceeding by way of Indictment, before Provincial Court Judge D. William MacDonald, the appellant was convicted of sexual assault, contrary to s. 271 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. He was sentenced to two years in a federal penitentiary to be followed by one year's probation.

The appellant appeals his conviction. He has abandoned his sentence appeal.

In its factum filed on this appeal, the Crown summarizes, fairly in my view, the prosecution evidence with respect to this matter as follows:

> The complainant was the principal witness for the Crown. She testified that on August 31, 1996 she and a number of her friends [(E.S., K.C., M.B. and K.B.)] drove out to Haggart's Hill near Hubbards, arriving there about 10 p.m. They built a fire and sat around talking and drinking for some time. Later, some of their male friends arrived. While the Appellant was not well known to the complainant or to her friends, he arrived with several young males who were well known to the complainant and to her friends.
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> At one point during the evening the Appellant mentioned that he was cold and the complainant loaned him a sweater. Shortly after that, the Appellant put his right arm around her waist. The complainant was not comfortable with that and she and her friend [M.B.] got up and walked away from the camp fire.
>
> Later, the complainant returned to the area of the camp fire. Being tired, she lay down on (M.B.'s] blanket and put her sleeping bag over top of her. She was fully clothed. She fell asleep. The complainant testified that she woke up feeling herself being moved and realized that someone was having

sex with her. She was face down and the Appellant was under her with his hands on her hips, moving her back and forth. Her pants and underwear were down around her ankles but her t-shirt was still on. When she realized what was going on she jumped up and pulled her pants up. She said to the Appellant "What are you doing?" He said "What do you mean?" The complainant said, "Exactly what I said. What are you doing?" The Appellant said "We were both doing it."

The complainant went looking for her friend [M.B.] and found her a short distance away. She told [M.B.] that she wanted to leave. She was crying and upset. The complainant told [M.B.] and a number of her friends what had happened and shortly after that there was an altercation between some of the complainant's friends and the Appellant.

The complainant and a number of her friends drove to [M.B.'s] house and from there went to the complainant's apartment. Later, the complainant called her parents who came to her apartment and took her to a hospital.

[K.C.] testified that on a number of occasions on the night in question the Appellant made advances to her. She was sitting on a log by the camp fire when the Appellant put his arm around her and rubbed her leg. She got up and walked away from him. Later, the Appellant put his arm around her and tried to kiss her, and [K.C.] told him to leave her alone and walked away again. On a third occasion, the Appellant put his arms around [K.C.], saying, "Oh, I know you want to. I know you want to." This time, [K.C.] said to him "This isn't going to happen, leave me alone." When the Appellant persisted, [K.C.] said "Fuck off" and walked away again.

[K.C.] went to the car to sleep but found that she couldn't sleep so she went back down to the fire. As she walked towards the fire, she said loudly several times "Hey, you guys, is anybody awake?" The fire was almost out. [K.B. and her escort] appeared to be asleep next to the fire. [The complainant] appeared to be asleep next to the fire. The Appellant was lying next to [the complainant] and was awake. [K.C.] walked back to the car. Less than ten minutes later [the complainant] and [M.B.] came to the car and [the complainant] was crying and shaking.

> [E.S.] testified that on the night in question the Appellant tried to put his hand up the back of her skirt. She got up and walked away. Later, she recalled [the complainant], whom she had earlier seen sleeping in front of the fire, being extremely upset. She was shaking and crying.
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> [M.B.] testified that she removed her blanket from underneath [the complainant] as [the complainant] was sleeping by the fire and that [the complainant] did not wake up when this happened. At that time, the Appellant was lying beside [the complainant] and he was awake. Shortly after that, [M.B.] walked away from the camp fire and lay down. Ten to fifteen minutes later, she heard a voice calling her name and she saw [the complainant] walking towards her. [The complainant] had her hands up to her face and was crying and very upset.

The appellant testified at the trial. He was the only witness called for the defence. The essence of his evidence concerning the evening in question was that "nothing happened". He testified that he slept on the complainant's blanket because he was cold and wanted to share the blanket. He acknowledged that the complainant was asleep at the time, and that he never sought her permission to lie down next to her. He admits to having been drinking beer and smoking marihuana on the evening in question. He testified that he was fully clothed and fell asleep. He testified that he did not know anything about the complainant's clothing and that he did not remove any of her clothing. He recalled waking up with the complainant's hair in his face. He was on his back and the complainant was on top of him. He was startled for a second and then the complainant asked him "What are you doing?" The appellant testified that he then said "What are you doing? What's going on?" He testified that the

complainant got up and left. He further testified that the zipper on his trousers was part way down because he had lost a button from the trousers. He acknowledged, in his testimony, that the complainant was upset after the event.

The appellant had given a statement to the RCMP which was admitted into evidence. In that statement the following exchange took place between Constable Williams and the appellant (McNamara):

WILLIAMS:	Were you thinking that you might be able to score with any of these girls down there that night? You know what I mean by score?
McNAMARA:	Yeah I know what you mean by score. No.
WILLIAMS:	What do I mean by score?
McNAMARA:	Get, get them or whatever, like.
WILLIAMS:	have sex with them?
McNAMARA:	Yeah.
WILLIAMS:	Yeah, that's what I mean.
McNAMARA:	No.
WILLIAMS:	A young fellow like you and it never crossed your mind to have six with somebody, if they were willing?
McNAMARA:	No, well I never even really thought about it, right. Because, I just had, we just had a baby like three weeks ago right, I got a lot of other things on my mind besides six right. I mean I have a girlfriend, I can have sex with her too right. (Emphasis added)

The trial judge, following a review of the evidence at the conclusion of

the trial, said the following:

> In the case before me I have absolutely no doubt that the evidence given by the Crown witnesses is true, that the occurrences were as they were related. Where there are differences between the evidence of the Crown witnesses and [the appellant], I reject [the appellant's] evidence and I find that he is guilty of the offence of sexual assault of [the complainant] as charged.

The appellant was not represented by counsel at the hearing of this appeal; although he acknowledged that his grounds of appeal had been prepared with the assistance of counsel.

There are, essentially, two grounds of appeal:

1. The appellant contends that his guilty verdict is unsafe. He contends that he was not properly represented by counsel at the trial. He told the Court that he had witnesses who could confirm his account of the evening who were not called to testify. Further, he told the Court that his counsel only spent one-half hour with him in preparation prior to trial.

2. The trial judge erred in allowing similar fact evidence to be introduced regarding his character and propensity for aggressive sexual behaviour.

Ineffective Assistance of Counsel

In the case of **Schofield v. The Queen** (1996), 148 N.S.R. (2d) 175 (C.A.), Justice Chipman said the following concerning that which an appellant must establish where he alleges that there is a miscarriage of justice resulting

from the ineffective assistance of counsel. He said at p. 179:

> Allegations by convicted persons that a miscarriage of justice has resulted from ineffective assistance of counsel are often made. ... In **R. v. Rockwood** (1989), 91 N.S.R.(2d) 305; 233 A.P.R. 305 (C.A.) this court stated at p. 309 that in order to render the Charter rights conferred by ss. 7 and 11(d) meaningful, where an accused is entitled to have counsel, such counsel must be sufficiently qualified to deal with the matter at issue with a reasonable degree of skill. See also **R. v. Joanisse (R.)** (1995), 85 O.A.C. 186; 102 C.C.C.(3d) 35 (Ont. C.A.). The appellant who contends that he has not received this protection must therefore establish: (a) that counsel at the trial lacked competence, and (b) that it is reasonably probable that but for such lack of competence, the result of the proceedings would have been different.

(See also **R. v. B. (L.C.)** (1996), 104 C.C.C. (3d) 353 (Ont. C.A.) and **R. v. Strauss** (1995), 100 C.C.C. (3d) 303 (B.C.C.A.)).

I have the following comments with respect to this ground of appeal:

1. This Court has no application before it to adduce fresh evidence. This is no affidavit indicating the names of the witnesses who did not testify at the trial, that they were able to attend and testify at the trial, and an indication of what those witnesses would have said in their testimony.

2. The appellant spoke on his own behalf at the sentencing hearing before the trial judge. At that time he said nothing concerning ineffective counsel, or that certain witnesses were

not permitted to testify on his behalf;

3. I have reviewed the entire record of this proceeding, including the cross-examination of the Crown's witnesses by the appellant's counsel at the trial, and the conduct of the appellant's direct examination by his counsel. There is nothing in that record which demonstrates ineffective representation of the appellant by his counsel at the trial.

There is no basis upon which this Court could grant an application to adduce fresh evidence. Further, there is nothing before us upon which we could conclude that with the testimony of the witnesses who did not testify at the trial, there is a reasonable probability that the result of the trial would have been different.

The appellant has, quite simply, not made out a case for ineffective representation by counsel at trial. I would dismiss this ground of appeal.

Similar Fact Evidence

The appellant did not speak to this ground of appeal at the hearing of the appeal. The only matter to which this ground of appeal could relate is whether evidence of the appellant's overtures to the complainant, and to two of her friends (K.C. and E.S.) earlier in the evening in question, was properly admissible.

No objection was taken to the admissibility of this evidence at the trial.

I agree with the Crown's position with respect to this ground of appeal. The evidence of the appellant's advances to the complainant and her two friends, prior to the alleged sexual assault, was relevant to issues in the case. All of these events took place in one evening at one party. The evidence of the appellant's prior advances to the complainant and her two friends provided background for the circumstances of the sexual assault for which the appellant was convicted. The evidence was also relevant to motive and intent. Further, it was relevant to the appellant's credibility, given the appellant's disclaimer (in the statement he gave to the RCMP) of any sexual interest in any of the women on the night in question.

I would dismiss this ground of appeal.

The verdict which the trial judge reached in this case was based, essentially, on findings of credibility. On the whole of the evidence, it was a verdict which a properly instructed jury, acting judicially, could reasonably have rendered (**Yebes v. The Queen** (1987), 36 C.C.C. (3d) 417 (S.C.C.).

I would, therefore, dismiss this appeal.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.

C.A.C. No.143843

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MICHAEL JOHN KENNETH McNAMARA	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN	)	
	)	FLINN, J.A.
Respondent	)	