Date: 19981006 Docket: C.A.C. 145390

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Cain, 1998 NSCA 182
Glube, C.J.N.S.; Freeman and Flinn, JJ.A.

BETWEEN:

MICHAEL LESLIE CAIN	)	Appellant in person
	)	
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	October 2, 1998
	)	
	)	Judgment Delivered:
	)	October 6, 1998

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

FLINN, J.A.:

Following a trial before Judge Shearer in Provincial Court, the appellant was found guilty of all charges in a nine count Indictment. Six of the counts relate to a series of events which occurred in 1988. Three of the counts relate to events which occurred in 1996. These offences involve sexual assault, procurement, confinement, intimidation and exploitation of a young female, W.B., who was 18 years of age at the time of the offences in 1988.

The following is a summary of the events which led to the appellant's conviction.

In October, 1988, the appellant took W.B. to a house in North Preston. He drugged her, and she lost consciousness. When W.B. regained consciousness she was tied to a bed. She was kept in the North Preston house for five or six days. The appellant would not allow her to leave. W.B. overheard conversation between the appellant, and other men in the house, indicating that if those men wanted to have sex with WB, they had to pay money to the appellant. During the 5 to 6 days that W.B. was kept in the house in North Preston 13 men had sexual intercourse with her, without her consent. W.B. saw one of these men give money to the appellant.

The events in 1996 occurred near Cherry Brook. W.B. was in an automobile with the appellant and one Basil Grant. The appellant was sexually

assaulted by both Basil Grant and the appellant. Further, WB was forced to perform oral sex on the appellant. The appellant had told WB that if she did not do so he would take her back to North Preston. W.B. complied out of fear that events similar to those which occurred in 1988 would happen again.

The trial judge sentenced the appellant to a term of incarceration of three and one-half years - two and a half years, with respect to the counts arising out of the events which occurred in 1988; and one year, consecutive to the two and one-half year term, with respect to the three counts arising out of the events which occurred in 1996.

The appellant appeals his conviction. He is not represented by counsel, and has filed no factum. The appellant did file a written notice of appeal. On five pages he identifies ten reasons why he feels entitled to a new trial, some of which reasons do not form proper grounds of appeal.

Essentially, the appellant wants a new trial because he alleges:

1. that there was evidence which he could not present at the trial because the witness, who had been subpoenaed, did not appear. Other witnesses “could not make it”. Further, that he has other “evidence” that “wasn’t provided”, and that he “failed

to provide." He says in his notice of appeal:

> All I want is an opportunity too (sic) bring forth some information and witnesses so that the Court can hear a more intense onlook of the matter, so I can get a fair opportunity to have case heard properly.

2. that he was only given disclosure by the Crown 2-3 weeks before trial which did not give him time to prepare;
3. that rape victims' counselling records can and should be produced and they were not; and
4. that he was unfairly treated, having been the only person charged with an offence arising out of these circumstances.

With respect to the appellant's first ground of appeal, the transcript of a pre-trial hearing before Judge MacDougall shows that on May 20th, 1997, the appellant requested a second adjournment of the proceedings in order to obtain counsel. He indicated to Judge MacDougall that if he could not get Legal Aid counsel he would conduct the trial himself. He told the Judge he had nine witnesses and that he had been talking to them. Judge MacDougall made it clear to the appellant that it was the appellant's responsibility to have the witnesses available for trial; and that if the witnesses failed to show up, without lawful excuse, the trial would go on without them. The appellant indicated to Judge MacDougall that he understood that directive. Further, that he understood

what a subpoena was. The appellant was directed by Judge MacDougall as to where subpoenas could be issued.

The record of the trial indicates that only one witness had been subpoenaed for the defence; namely, Basil Grant, who had been involved with the appellant in the events of 1996. At the conclusion of the Crown's case the trial judge asked the appellant if he had any witnesses that he wished to call on his behalf. The appellant replied:

> I have one witness, Warren Cain, for today unless Basil Grant's arrest and subpoena gets served. I think he is outside here, there.

Mr. Warren Cain was present and did testify on behalf of the appellant. At the conclusion of Warren Cain's evidence, the trial judge asked the appellant if he wished to have the trial set over until 1:30 to allow the appellant to call his other witness. The appellant replied to the trial judge:

> I have no more today unless the subpoenas get served and they show up but I will take the stand on my own behalf.

At the conclusion of the evidence of the appellant the following exchange took place between the Court and the appellant regarding potential witnesses for the Appellant:

> **THE COURT:** Is there any additional evidence you wish to call?

MR. CAIN: No, there isn't, not at the moment, no.

THE COURT: Well, it is your only opportunity sir. You indicated that you had subpoenaed somebody.

MR. CAIN: Yeah, and they never showed.

THE COURT: Do you wish the person to be arrested?

MR. CAIN: No, that's up to the Court. No, I don't wish it. No, I don't.

THE COURT: Well, what I am prepared to do is if this person is material or an important part of your defence and you wish to have the person present to act as a witness on your behalf, if you have and I have to clarify if you have had this person personally served with documents to be in this Court for your trial and the person was served and did not obey the subpoena, then I am prepared to, at your request, sir, issue a warrant for the arrest of that person to make sure that they are brought here to the Court so that you could question them as one of your witnesses.

MR. CAIN: No. That's all right.

THE COURT: You don't want to have the person

MR. CAIN: Arrested? No, I don't.

THE COURT: Alright. It is your case and your life, sir. It is -- the option is yours.

MR. CAIN: I know sir, but I don't wish to have him arrested. For what he has to do with this is not that significant anyway.

THE COURT: Well, you know that better than I do because I know nothing about the case other than what I've heard today. If you have no other witnesses to call, do you wish to have any other

> documented evidence, any papers that you wish to bring properly before the Court, anything else in your defence?
>
> **MR. CAIN:** No, I don't sir.
>
> **THE COURT:** Alright. So then you are closing your case. Is that the end of your defence?
>
> **MR. CAIN:** Yes sir. Yes sir.
>
> **THE COURT:** Because you don't have another chance. This is it. The reason I am going through all of this, please take your time as I realize that you are not a lawyer, sir, but there has got to be a finality to this. Either this is the end of your case or it isn't.
>
> **MR. CAIN:** You mean submission or whatever?
>
> **THE COURT**: No. The summation will be something different? But is this the end of the evidence?
>
> **MR. CAIN:** Yes. This is the end of my defence.
>
> **THE COURT:** Alright. Thank you.

The trial judge gave the appellant the opportunity to consider an adjournment of proceedings pending the issuance of a warrant and the arrest of the subpoenaed witness who did not appear. The appellant clearly indicated that he did not wish that to occur.

Further, the appellant was fully aware of his responsibility to have his witnesses available for trial, and that he would not have another chance if they did

not appear without excuse. The appellant did not raise with the trial judge - as a matter or concern to him - that certain of his proposed witnesses did not appear. He has no cause to complain, now, that there were witnesses that he should have called on his behalf at the trial.

Lastly, the appellant has not applied to adduce fresh evidence. To do so would require that he satisfy the four conditions for fresh evidence set down in **Palmer v. R.** (1982), 50 C.C.C. (2d) 194 (S.C.C.) at p. 205:

> 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;
>
> 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.

The Court has nothing before it, from the appellant, to determine if any of those four conditions are met.

In conclusion, there is no merit to this ground of appeal.

With respect to the appellant's second ground of appeal, the record of the proceedings in the trial court disclose that the appellant did not raise with the trial

judge any issue regarding disclosure. Further, there is no evidence before this Court of a lack of disclosure, nor of any prejudice to the appellant due to late disclosure.

I would dismiss this ground of appeal.

With respect to the appellant's third ground of appeal, there are specific provisions in the **Criminal Code** (s. 278.1 to 278.9) dealing with counselling records. Among other things, the **Code** provides that if an accused seeks the production of a counselling record, he must make a written application to the trial judge. He must identify the record he wishes produced, and the grounds upon which he relies to establish that the record is likely relevant to an issue at trial.

The appellant made no such application before the trial judge; nor has he provided this Court with any evidence as to the identity and relevance of any such record.

I would dismiss this ground of appeal.

With respect to the appellant's fourth ground of appeal, I agree with the submission of the Crown that the decision as to who to charge or not to charge, and with what offences, is a matter to be decided between the police and the

prosecution service. Courts have repeatedly stated that they will not interfere in these types of decisions unless there is an extreme abuse of process (see **R. v. Power**, 89 C.C.C. (3d) 1 (S.C.C.)).

Further, the respondent was the motivating force and the dominant mind behind the confinement and the assaults on W.B. He is the most logical individual to be charged.

I would dismiss this ground of appeal.

With respect to the appellant's conviction, generally, 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 the appellant's appeal against his conviction.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.

C.A.C. No. 145390

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MICHAEL LESLIE CAIN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.