

Date: 19980815

Docket: C.A.C. 146067

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Rogers, 1998 NSCA 183

Freeman, Hallett, Bateman, JJ.A.

BETWEEN:

HEDLEY VINCENT ROGERS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

) Donald C. Murray
) for the Appellant

) William D. Delaney
) for the Respondent

) Appeal Heard:
) September 15, 1998

) Judgment Delivered:
) September 15, 1998
)
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)

Editorial Notice

Identifying information has been removed from this electronic version of this judgment.

THE COURT:

Appeal dismissed per reasons for judgment of Bateman, Hallett and Freeman, JJ.A., concurring.

BATEMAN, J.A.:

The appellant, Hedley Vincent Rogers, was convicted, after trial before Judge Patrick Curran of the Provincial Court, of committing a sexual assault, contrary to **s.271** of the **Criminal Code**. He appeals that conviction alleging that the trial Judge erred in making inferences in the absence of evidence; in drawing inferences adverse to the appellant based upon a failure to make a post arrest utterance; and in failing to apply **R. v. W.(D.)**, (1991), 63 C.C.C. (3d) 397 (S.C.C.).

Dealing with the last issue first, Judge Curran, in rendering judgment at the conclusion of the trial said:

I don't believe Mr. Rogers nor do I have a reasonable doubt about his testimony that he did not place his hands on this girl in the ways she has described. And I find on the whole of the evidence and specifically on the testimony of Miss N., that the Crown has shown beyond a reasonable doubt that Mr. Rogers did do the actions alleged and consequently did commit a sexual assault upon J. D. N..

Mr. Roger's defence was a complete denial of the alleged conduct. Having reviewed the evidence before the trial Judge, we are satisfied that the Judge properly applied the requirements set out in **R. v. W.(D.)**, as he demonstrated in his oral remarks.

Contrary to the appellant's assertion, Judge Curran did not improperly rely upon the appellant's failure to make a post arrest utterance. This is not analogous to the cases cited by the appellant where an accused's silence in not giving a statement to the police was used in evidence against him. It was appropriate for the Judge in these circumstances to take into account, in assessing credibility, the

appellant's failure to include in his statement to the police, a key exculpatory explanation relating to his contact with the complainant, given the nature of the questioning by the police officer.

Nor is there merit to the submission that Judge Curran drew an inference in the absence of evidence.

Accordingly, the appeal is dismissed.

Bateman, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.