Date: 19980918 Docket: C.A.C. 146512

**NOVA SCOTIA COURT OF APPEAL**
Cite as: R. v. B.W.R., 1998 NSCA 185

**Freeman, Hallett, Bateman, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| B. W. R. | ) | |
| | ) | Appellant |
| | ) | (In Person) |
| Appellant | ) | |
| - and - | ) | |
| | ) | Dana Giovannetti |
| | ) | for the Respondent |
| HER MAJESTY THE QUEEN | ) | |
| Respondent | ) | Appeal Heard: |
| | ) | September 15, 1998 |
| | ) | Judgment Delivered: |
| | ) | September 18, 1998 |

**Editorial Notice**

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

**THE COURT:** Appeal dismissd per reason for judgment of Freeman, J.A., Hallett and Bateman, JJ.A., concurring.

**FREEMAN, J.A.:**

The appellant, B. R., was convicted of sexual assault upon his teenage niece under **s. 271(1)** of the **Criminal Code** as the result of incidents of touching which occurred between August 1992 and August 1995, when she was in her early teens and he was in his thirties.

Justice Hiram Carver of the Supreme Court of Nova Scotia, believed the evidence of the complainant, another uncle who told of inappropriate conduct by the appellant on two occasions, and the appellant's character witnesses. He did not accept the evidence of denial of Mr. R.:

> I accept Mr. R. has an excellent reputation in the community, but he was not a credible witness at trial.

Mr. R. has appealed his conviction on the ground:

> THAT I did not receive effective assistance of counsel at trial as guaranteed by ss. 7 and 11 (d) of the Charter and, as a result, the verdict is not reliable and a miscarriage of justice has occurred.

His principal complaint, expressed in his factum, is that his counsel did not contact J. R. B. of V., nor arrange for him to testify on his behalf as to when a kayak which figured in one of the allegations was being repaired, Mr. R.'s discussions of religious differences and problems caused by them with the complainant's parents, his whereabouts for most of the time between Labour Day, 1993, and the end of April, 1996, and his conduct around girls. Mr. R. stated that since the trial, four other witnesses had told him they would have testified for him.

The Crown submits

> . . . [That the Appellant has failed to make an application to adduce fresh evidence and his assertions are unsupported by affidavit evidence of these named persons. (s. 683(1)(d) **Code**). Further, it is submitted that, even if an application was filed in a proper manner, it would nevertheless fail to meet the test set out in **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193 (S.C.C.) and **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.). Nothing in the Appellant's factum raises any realistic concern on a potentially decisive issue. It is further submitted that tactical decisions are properly in the hands of counsel and there is nothing in this case which compellingly indicates a decision made outside the boundaries of competence. In this regard, it should be noted that when defence counsel, in open Court, closed his case, the Appellant voiced no objection that an essential witness had not been called. (Citing **R. v. Desjardins**, [1988] B.C.J. No. 1707 at para 16.)

In **Schofield v. R.** (1996), 148 N.S.R. (2d) 175 (C.A.) Justice Chipman stated that convicted persons alleging a miscarriage of justice resulting from failure by counsel to provide effective protection under **ss 7** and **11(d)** of the **Charter** must 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.

The test has not been met. The comments of Justice Flinn in **R. v. McNamara** QL [1998] N.S.J. No. 261 apply equally to the facts of this appeal:

> 1. This Court has no application before it to adduce fresh evidence. [There] 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 that 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.
>
> . . . 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. R.** (1987), 36 C.C.C. (3d) 417 (S.C.C.).

The appeal is dismissed.

Freeman, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.

C.A.C. No. 146512

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

B. W. R.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

Freeman, J.A.