Date: 19981009 Docket: C.A.C. 146725

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Hurford, 1998 NSCA 187

Glube, C.J.N.S., Bateman, Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

CRAIG NEWTON HURFORD

Respondent

Denise Smith
for the Appellant

Brian V. Vardigans
for the Respondent

Appeal Heard:
October 9, 1998

Judgment Delivered:
October 9, 1998

Editorial Notice

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

ERRATUM

THE COURT: Leave to appeal is granted and the Crown's appeal is allowed as per oral reasons for judgment of Bateman, J.A.; Glube, C.J.N.S., and Flinn, J.A., concurring

BATEMAN, J.A.

The Crown has applied for leave to appeal and, if granted, appeals a decision of Justice Boudreau of the Supreme Court. The respondent, Craig Newton Hurford, was convicted by Judge Claudine MacDonald of the Provincial Court of committing a sexual assault contrary to **s.271(1)(b)** of the **Criminal Code**. Justice Boudreau, on appeal, set aside the conviction and ordered a new trial.

The facts are set out by the summary conviction appeal judge (reported at [1998] N.S.J. No. 109):

> . . . The accused, Craig Newton Hurford, appeals from his conviction for sexual assault. The assault is alleged to have occurred on or about November 20, 1994 and the trial took place on February 18, 1997. . .
>
> The complainant, [R.S.], alleges that the appellant applied force to her intentionally by pinching or twisting her nipple with the knuckle area of the back part of his hand. She said this occurred as she was passing behind the appellant in a very crowded bar and as he apparently quickly or suddenly turned around and she said it caused pain. The appellant admitted turning around suddenly and said it was in response to his friend, Ron Shirley, calling out his name. The appellant also admitted to the back of his hand striking the chest area of the complainant, but he said it was accidental and unintentional contact as a result of his turning around abruptly.

In an oral decision at the conclusion of the trial the judge said:

> . . . the Defence is arguing that the Crown has not proven all of the essential elements of this offence beyond a reasonable doubt and the Defence is arguing that the Crown has not proven that what took place was intentional. And of course for there to be an assault it involves the intentional application of force to another individual without the consent of that other individual. . . . So the Defence is saying that this was a crowded bar, that Mr. Shirley had called out to the accused, that the accused turned and basically what took place was that he moved his hand in such a way as to come into contact with the complainant's breast or chest area; however, this was not an intentional application of force.
>
> I am satisfied based on all the evidence that was heard here today that the Crown has established all the essential elements of this offence

> beyond a reasonable doubt. The evidence of the complainant was clear and unequivocal when she provided the description as to what exactly took place. She described this as a twisting of her breast by the accused using the knuckles of his right hand. She was questioned concerning that. She was cross examined concerning that and she was quite detailed concerning that. Also the fact that there was bruising as a result and Miss Y. testified concerning that as well. Also Miss Y. testified and I accept her testimony concerning witnessing the grabbing action that was made by the accused toward the complainant.
>
> . . .
>
> In any event as I say, given the evidence that was heard here today, I accept the evidence of the complainant and of Ms. Y. and I reject the evidence of Mr. Hurford. Then considering next but what has to be considered as I said earlier, I am satisfied beyond a reasonable doubt that the Crown has established all the essential elements of this offence beyond a reasonable doubt and therefore I find Mr. Hurford guilty of this charge. (Emphasis added)

The powers of the court on a summary conviction appeal are set out in **s.686(1)** of the **Criminal Code**, (see also **ss.813** and **822(1)**):

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (I) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

The respondent appealed to the summary conviction court alleging that ". . . the verdict should be set aside on the ground that it is unreasonable and cannot be supported by the evidence thereby making the verdict an unsafe one, not in accordance with proof beyond a reasonable doubt".

The test to be applied by a summary conviction appeal judge on an

appeal against a conviction, when an unreasonable verdict is alleged is succinctly stated in **Regina v. Grosse** (1996), 107 C.C.C. (3d) 97 (29 O.R. (3d) 785, [1996] O.J. No. 1840) at p.103:

> Under *ss. 686(1)(a)(I)* and *822(1)* of the *Code* the jurisdiction of the summary conviction appeal court judge to review the finding as to sufficiency of the evidence was limited. He was not entitled to retry the case but to determine whether the verdict was unreasonable: see *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 at p. 118 (Ont. C.A.). This required the appeal court judge to determine whether the trial judge could reasonably have reached the conclusion that the accused was guilty beyond a reasonable doubt: see *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 at p. 141, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257.

(See also **R. v. MacDonald** (1978), 29 N.S.R. (2d) 637 (N.S.C.A.), **R. v. Backman** (1982), 53 N.S.R. (2d) 39 (N.S.C.A.))

On the evidence before the trial judge, taking into account her findings on the critical issue of intent, the verdict meets the reasonable test. With respect, we disagree with the conclusion of the summary conviction appeal judge that the trial judge simply compared the two versions of events and decided who was the more believable witness. The evidence of the complainant was, in the words of the trial judge “unequivocal”. It was inconsistent with accidental contact. Ms. Y. provided corroborative evidence of intentional contact, which evidence was accepted by Judge MacDonald. Justice Boudreau failed to pay appropriate deference to the trial judge’s findings of fact and credibility and, with respect, improperly substituted his own view of the evidence for that of the trial judge. While not raised on appeal, the record reveals no error of law. We do not accept that Judge MacDonald misapplied the burden of proof. Nor was there a miscarriage of justice.

We grant leave to appeal, allow the Crown's appeal, set aside the decision of Justice Boudreau and any order thereunder and restore the conviction under **s.271(1)(b)** of the **Criminal Code** and the sentence imposed by Judge MacDonald.

Bateman, J.A.

Concurred: Glube, C.J.N.S.

Flinn, J.A.

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REASONS FOR JUDGMENT BY: Bateman, J.A.