Date: 20021008
Docket: CAC 177351

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. D.P.B.*, 2002 NSCA 117]

Glube, C.J. N. S., Davison, J., Hamilton, J.A.

BETWEEN:

D. P. B.
Appellant

- and -

The Queen Respondent

REASONS FOR JUDGMENT

Counsel: Jean C. Morris for the appellant
Kenneth W.F. Fiske, Q.C. for the respondent

Appeal Heard: September 30, 2002

Judgment Delivered: October 8th, 2002

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

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

HAMILTON, J.A.:

[1] This is an appeal from the decision of Justice F.B. William Kelly of the Supreme Court, dismissing the appellant's appeal of the December 9,1999 decision of Judge Robert A. Stroud of the Provincial Court. Judge Stroud found the appellant guilty of sexually assaulting his common law wife's fifteen year old granddaughter. The appeal was dismissed at the hearing, with reasons to follow. These are the reasons.

[2] Section 686(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 sets out the powers of a court on a summary conviction appeal as follows:

> 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
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> (*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,
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> (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;

[3] Counsel for the appellant stated three grounds of appeal as follows:

1. Did the learned Supreme Court Judge, in reviewing the evidence presented at trial and the reasons given by the Provincial Court Judge err in law in finding the trial Judge had properly applied the criminal standard of proof to the facts before him.

2. Did the learned Supreme Court Judge err in finding that the evidence safely supported the conviction entered at trial.

3. Both the learned trial Judge and the learned Justice of the Supreme Court misapprehended certain pieces of evidence resulting in a miscarriage of justice.

[4] With respect to the first ground of appeal the court is not satisfied the trial judge erred by applying the wrong standard of proof. It follows that the summary conviction appeal court judge did not err in upholding the trial judge's decision on this point.

[5] Counsel for the appellant argued that the trial judge erred in dealing with proof beyond a reasonable doubt, by failing to apply the correct burden of proof to the evidence in this case. As evidence of this she pointed to the lack of reference in the decision to the case of **R. v. W.(D.)**, [1991] 1 S.C.R. 742 and more importantly the lack of reference to the reasoning process prescribed by **W.(D.)**.

[6] As set out in **R. v. Mah**, [2002] N.S.J. No. 349 (Q.L.), failure to specifically refer to **W. (D.)** is not a reversible error:

> [41] The **W.D.** principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, **W.D.** describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. **W.D.** reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: see **R. v. Avetysan**, [2000] 2 S.C.R. 745; [2000] S.C.J. No. 57 (Q.L.) at 756. As Binnie, J. put it in **Sheppard**, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> [42] The judge did not expressly instruct himself in terms of the so-called **W.D.** formula nor did he at any point in his reasons state that he had considered all of the evidence in light of the reasonable doubt standard. However, as Matthews, J.A. said in **R v. Brown** (1994), 132 N.S.R. (2d) 224; [1994] N.S.J. No. 269 (Q.L.)(N.S.C.A.) at para. 19, the failure of the trial judge to use the language of Cory, J. in **R. v. W.(D.)** does not of itself constitute reversible error. The question is whether, upon consideration of the whole of the judge's decision, it is apparent that the judge did not apply the proper test or did not address "... his mind, as he was required to do, to the possibility that despite having rejected the evidence of the respondent, there might nevertheless ... be a reasonable doubt as to the proof of guilt": **Sheppard** at para. 65.

[7] The appellant did not testify in this case and the manner in which the trial judge described the evidence and his consideration of it does not suggest he did not apply the correct burden of proof.

[8] Counsel for the appellant also argued that the trial judge erred in not giving adequate reasons. She argued the trial judge failed to reconcile what she describes as "confused and contradictory evidence" as required by **R. v. Sheppard** (2002), 162 C.C.C. (3d) 298; S. C. J. No. 30 (Q.L.). She pointed to the inconsistencies in the victim's evidence and the unchallenged evidence of her grandmother as to the victim's motive to fabricate, and argued the trial judge erred by not saying more in his decision about why he accepted the victim's evidence and not the evidence of her grandmother .

[9] It is desirable for a trial judge to give reasons for his or her findings of credibility. In this case there was only one witness, the victim, who gave evidence about the events of the assault. The trial judge makes it clear in his decision that he believed her evidence on these events and that this belief was not shaken by the difficulties she had on peripheral matters or by her grandmother's evidence of the victim's motive. The trial judge's review of the evidence in the decision makes it clear he considered all of the evidence in coming to his decision. After reviewing the evidence he stated he had "no difficulty in concluding that the Crown has proven all the elements of the offence against the accused beyond a reasonable doubt". The court is satisfied the extent of his reasons did not deprive the appellant of his right of appeal.

[10] With respect to the second ground of appeal, the court is again not satisfied the trial judge or the summary conviction appeal court judge erred. To support this ground of appeal counsel for the appellant again argues inadequate reasons and also argues that the trial judge's conviction of the appellant is an unreasonable verdict that cannot be supported by the evidence. As evidence of this, she points to the trial judge's treatment of the grandmother's evidence and the summary conviction appeal court judge's misstatement that a particular witness was a defence witness rather than a Crown witness.

[11] These comments do not satisfy this Court that the appellant's conviction is an unsafe verdict. An attack on the victim's credibility was the main defence at this trial as the trial judge noted. The appellant did not testify but other defence witnesses did. As noted above, the trial judge found the victim's evidence concerning the offence credible despite noting weaknesses in her peripheral evidence. The trial judge was in

the best position to assess credibility. The record discloses nothing to justify this court interfering with the trial judge's determination.

[12] With respect to the last ground of appeal, again the court is satisfied neither the trial judge nor the summary conviction appeal court judge erred. The Court is satisfied the trial judge did not misapprehend the evidence so as to result in a miscarriage of justice. To support this ground the appellant again referred to the grandmother's evidence and the summary conviction appeal court judge's misstatement referred to above.

[13] The appellant also argued that the victim's perjury should in effect trump the question of her credibility. A trial judge is often faced with witnesses some of whose evidence he or she believes and some of which is not believed. While an admission of perjury at trial is very significant even on a peripheral matter, it does not trump the rest of the evidence of that witness. In his oral comments before he filed his written reasons, the trial judge indicates he disbelieved the victim's evidence about her mother not beating her before he heard her admit her perjury. The appellant's arguments do not satisfy the Court the conviction of the appellant amounts to a miscarriage of justice.

[14] Accordingly, the appeal is dismissed.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Davison, J.