C.A.C. No. 130450

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. MacGregor, 1997 NSCA 88

Freeman, Roscoe and Bateman, JJ.A.

BETWEEN:		
BARRY SCOTT MACGREGOR		Christopher Manning for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Stephanie A. Cleary for the Respondent
	Respondent	
		Appeal Heard: March 21, 1997
		Judgment Delivered: March 24, 1997

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Freeman and Bateman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from convictions entered against the appellant by Judge

Jean-Louis Batiot of the Provincial Court on charges of assault, sexual assault and uttering a threat.

The complainant testified that she met a man at a bar who introduced himself as either Barry or Gary MacGregor and after speaking with him briefly, they went outside to talk where it was quieter. They entered his truck, and went for a drive, eventually arriving at a secluded dirt road where they stopped and opened cans of beer. After a brief conversation, he kissed her, then began tearing at her clothes. She resisted, struggled, ran from the truck, was chased, grabbed, pushed down and threatened. Upon returning to the truck, he sexually assaulted her. The complainant provided detailed evidence of a prolonged, vicious sexual attack during which she was lying across the seat of the vehicle and attempting to remove a “round thing” attached to the steering wheel to use as a weapon against her attacker. She was eventually driven to a pay phone where she managed to telephone for help before he drove away. She noticed that the license plate on his truck started with a “C” and contained a double digit. Military police who responded to the call found her in a state of disarray and hysteria. The description of the perpetrator provided by her that evening was that he was approximately 5' 7" or 8". The following day she said he was taller, about six feet.

Evidence of the bouncer at the tavern, who was acquainted with each of them, confirmed that the complainant and the appellant, left the premises at the same time. Photographs of the truck driven by the appellant when he attended at the police station for questioning the day after the incident were introduced into evidence. Those photographs matched many, but not all, of the details in the description of the truck provided by the complainant.

The theory of the defence at the trial was that because of her alcohol consumption, lack of glasses, and darkness, the complainant was mistaken in her identity of Mr. MacGregor as her assailant. It was suggested that although she spoke to him at the tavern, it was some other person that assaulted her.

The appellant did not testify at the trial but three months after he was convicted, on the date scheduled for the sentencing hearing, he attempted to have the case reopened so that he could present evidence of himself and two others. The motion was denied.

On appeal, the appellant submits that the verdict is unreasonable and not supported by the evidence which he alleges is insufficient to prove identity beyond a reasonable doubt, and that the trial judge erred in not allowing the trial to be reopened after the finding of guilt.

The trial judge, in his decision, carefully reviewed all of the evidence, and after correctly asserting that the issue was one of identification, reviewed in more detail those portions of the evidence that specifically related to that issue including the complainant's sobriety, her observations which were corroborated by other evidence, her descriptions of the truck, and of her attacker. Discrepancies and inconsistencies in the descriptions were recognized by the trial judge. He concluded that on the whole of the evidence he was satisfied beyond a reasonable doubt that it was Mr. MacGregor who assaulted and threatened the complainant.

The test for reasonableness of the verdict was set out by the Supreme Court of Canada in **Yebes v. R**., [1987] 2 S.C.R. 168; (1987), 36 C.C.C. (3d) 417 and in **R. v. Burns** (1994), 89 C.C.C. (3d) 193 (S.C.C.), where the court stated at pp. 198-199:

> In proceeding under s. 686(1)(a)(i), the Court of Appeal is entitled to review the evidence, re-examining it and reweighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: . . . Provided this threshold test is met, the Court of Appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

This Court must determine whether a properly instructed trier of fact, acting judicially could reasonably have convicted the appellant. In doing so, we must re-examine and to some extent reweigh and consider the effect of the evidence. We have considered

the submissions of counsel and reviewed the evidence in the light of these principles and are satisfied that the verdict is reasonable; a properly instructed trier of fact, acting judicially, could reasonably have convicted the appellant. The verdict is supported by the evidence and although not necessary, the complainant's evidence of identification was corroborated by other evidence in certain respects.

On the second issue, the appellant submits that the trial judge did not act judicially in refusing to reopen the trial so that the appellant and two others could testify in order to establish an alibi. Although he did have the jurisdiction to do so, it is to be exercised only in exceptional cases. (See **R. v. Lessard** (1976), 30 C.C.C.(2d) 70 (Ont. C.A.) and **R. v. Sarson** (1992), 115 N.S.R. (2d) 445). We agree with the submissions of the respondent that the test adopted by the Ontario Court of Appeal in **R. v. Kowall** (1996), 108 C.C.C. (3d) 481 (leave to appeal to S.C.C. dismissed (without reasons) January 30, 1997, S.C.C. Bulletin, 1997 p. 152) is applicable to this case. At pp 493-494, the Court stated:

> The test for reopening the defence case when the application is made prior to conviction has been laid down by this court in *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.). However, once the trial judge has convicted the accused a more rigorous test is required to protect the integrity of the process, including the enhanced interest in finality. It seems to have been common ground in this case that the most appropriate test for determining whether or not to permit the fresh evidence to be admitted is the test for the admissibility of fresh evidence on appeal laid down in *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193 (S.C.C.) at page 205 (see *R. v. Mysko* (1980), 2 Sask. R. 342 (C.A.)). That test is as follows:
>
> (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;
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> (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.

> These criteria provide helpful guidance to a trial judge faced with an application to reopen after conviction. In addition to the *Palmer* criteria, a trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial. Counsel must make tactical decisions in every case. Assuming those decisions are within the boundaries of competence, an accused must ordinarily live with the consequences of those decisions. Should the trial judge find that the test for reopening has been met, then the judge must consider whether to carry on with the trial or declare a mistrial.
>
> (emphasis added)

The trial judge reviewed the long history of the matter and noted that since the evidence sought to be admitted upon a reopening had been available throughout and was within the knowledge of the defendant, there were no exceptional circumstances. In our view the trial judge did not err in arriving at that conclusion. An application of the **Kowall** test to the facts of this case would also result in the dismissal of the application to reopen.

Accordingly, the appeal is dismissed.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.