Date: 19970610 **Docket: CAC 133153**

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. O'Hara, 1997 NSCA 129

BETWEEN:

OAK MICHAEL O'HARA	)	Craig Garson/Stan MacDonald
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
	)	William Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	
	)	
Appeal Heard:		
	)	March 26, 1997
	)	
	)	Judgment Delivered:
	)	June 10, 1997

THE COURT: Appeal allowed. The conviction is set aside and a new trial ordered, per reasons of Pugsley, J.A.; Hallett and Chipman, JJ.A., concurring.

PUGSLEY, J.A.:

[1] The appellant, Oak O'Hara, appeals from his conviction before a provincial court judge, of unlawfully committing a sexual assault on LRJ, a female, on January 11, 1996, contrary to s. 271(1)(a) of the **Criminal Code**.

[2] Mr. O'Hara submits that Provincial Court Judge Atton erred in law in that he misapprehended the burden of proof, and further submits that he did not receive effective assistance from his trial counsel, resulting in the violation of his **Charter** right to make full answer and defence.

Background

[3] LRJ and Mr. O'Hara were students enrolled at the same university in Halifax. After an evening in which both consumed substantial quantities of alcohol at a downtown bar in the company of other students, LRJ, and Mr. O'Hara, ended up at the apartment of one Chisholm, a fellow student. LRJ testified that, while fully clothed, she fell asleep on Chisholm's bed, next to Chisholm who was already asleep. LRJ claimed she was awakened by the actions of Mr. O'Hara attempting to have sexual intercourse with her.

[4] Mr. O'Hara's main defence at trial was that he had an honest, though mistaken, belief that LRJ had consented to the sexual activity. His counsel submits that Judge Atton erred "by imposing an objective standard of reasonableness on Mr. O'Hara's stated belief in consent".

[5] Mr. O'Hara's counsel points to four separate comments made by Judge Atton during the course of his decision where the error is manifest:

> - "The actions of the complainant and the accused, in the time period after Mr. Chisholm fell asleep on the bed and the complainant awoke to find the accused on top of her and the interpretation thereof, are the factors to be considered in determining consent, no consent, or reasonable, though mistaken, belief of consent. . .
>
> - His [Mr. O'Hara's] ready acceptance of her lack of verbal or physical opposition to his advances and his belief that she was consenting was not, in my view, reasonable in the circumstances . . .
>
> - Since we only have the accused's version of what took place during the time period, was his stated belief that she was consenting, though mistaken, reasonable?
>
> - Having found that the complainant did not consent and that the accused's mistaken belief, if he had such a belief that she was consenting, was not based on reality (sic) . . ." (emphasis added)

Analysis

[6] The issue in this appeal involves a consideration of s. 265(4) of the **Criminal Code** and whether the trial judge failed to consider the issue of the honesty, or otherwise, of the appellant's belief and consent.

[7] Section 265(4) provides:

> Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[8] It is clear that the evidentiary burden placed upon Mr. O'Hara under s. 265(4) required him to be able to point to evidence that gave an air, or sense, of reality to his submission that he honestly believed LRJ consented to his actions. (See Judson, J. in **R. v. Workman**, [1963] S.C.R. 236 at 273, and Wilson, J. in **R. v. Robertson**, [1987] 1 S.C.R. 918 at 933).

[9] While there must be some support in the circumstances for the belief to be considered an honestly held belief, that is not not equivalent to "an objective test of what the reasonable person would have believed" (see comments of McLachlin, J. in **R. v. Osolin**, [1993] 4 S.C.R. 594 at 649, and **R. v. Livermore**, [1995] 4 S.C.R. 123 at 136).

[10] Having reached the conclusion that the Crown had established beyond a reasonable doubt that Mr. O'Hara had engaged in sexual intercourse without LRJ's consent, the trial judge was then obliged to ask himself - was there some evidence that Mr. O'Hara honestly believed that the complainant consented to sexual intercourse? (See comments of Sopinka, J. speaking alone on this issue in **R. v. Park**, [1995] 2 S.C.R. 836 at 874).

[11] The trial judge failed to consider this question and his failure, in my opinion, prevented proper consideration being given to the defence advanced on behalf of Mr. O'Hara.

[12] I am mindful of the caution that reasons for judgment must be read as a whole, and that a trial judge's reasons should not be read as if they were instruction to a jury, nor should they be considered "as a verbalization of the entire process engaged in by the trial judge in reaching a verdict". (Doherty, J.A., on behalf of the court, in **R. v. Morrisey** (1995), 97 C.C.C. (3d) 193 at 204 (Ont.C.A.), as well as **R. v. Burns** (1994), 89 C.C.C. (3d) 193 (S.C.C.)).

[13] There is, however, no indication in the trial judge's reasons that he ever directed his mind to whether, or not, the appellant had an honest belief in consent. This failure constituted an error of law. The conviction is unsafe, and a new trial ought to be ordered.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.

C.A.C. No. 133152

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

OAK MICHAEL O'HARA Appellant - and - **HER MAJESTY THE QUEEN** Respondent	)	REASONS FOR JUDGMENT BY: PUGSLEY, J.A.