NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v .J.B.J.***, 2011 NSCA 16

Date: 20110208
Docket: CAC 332557
Registry: Halifax

Between:

J.B.J.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

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

Publication Ban: pursuant to s. 486.4 of the Criminal Code of Canada

Judges: Saunders, Oland and Farrar, JJ.A.

Appeal Heard: January 18, 2011, in Halifax, Nova Scotia

Held: Appeal allowed, conviction quashed and a new trial ordered per reasons for judgment of Farrar, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Joel Pink, Q.C. and Andrew R. Nielsen, for the appellant
Daniel MacRury, Q.C., for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

Background

[1] The appellant appeals from the decision of the Honourable Judge Robert A. Stroud dated March 26, 2010, convicting the appellant of sexual assault contrary to s. 136(a) of the **Criminal Code of Canada**, 1953-54, c. 51.

[2] The appellant appeals on the grounds that the trial judge misapprehended the evidence and failed to properly assess the alibi evidence.

[3] The appeal hearing was held on January 18, 2011. Following the conclusion of oral argument we advised counsel that, with reasons to follow, the appeal was allowed, the conviction quashed and a new trial ordered. What follows are those reasons.

The Evidence At Trial

[4] L.B., the alleged victim, was born in February, 1958. She is a niece of the appellant and has known him all her life. At the time of the alleged assault she was nine years old and living with her parents and four siblings on * , next door to her maternal grandparents (the appellant's parents).

[5] At the time of this trial in February, 2010, it was one week before her 52nd birthday.

[6] The incident that gave rise to the charges is alleged to have taken place on July 23, 1967, the day following the wedding of the appellant's brother.

[7] By all accounts, the wedding was a large family event with approximately 300 people in attendance, many of whom were relatives of the appellant.

[8] Ms. B. testified that she woke up early the morning after the wedding and put on the same pretty blue dress that she had worn to the wedding. She went outside to see if her cousins, who were staying with her grandparents, wanted to play. However, her cousins were not around.

[9] What she saw was a group of men “horsing around” near the side of her grandparents’ house. Although there were a number of men present, the only one who she could identify at the time of trial was the appellant. She stood and watched them for a period of time. By this time it was early afternoon. (No further explanation was given by Ms. B. about what occurred from the time she woke up that morning until the early afternoon.) After a while the group of men dispersed with the exception of the appellant.

[10] Ms. B. said the appellant noticed her and he asked if she wanted to fight (or so she thought). She agreed and he told her to go into the house and take off her dress.

[11] After she had taken off her dress and put on shorts and a shirt, she said she told her mother what she was doing and then went back outside and the appellant led her towards the brook behind her parents and grandparents’ houses to an area that was used as a dumping ground. She thought they were going to have a water fight because they were heading towards the brook. However, when they got to the dumping ground, the appellant told her to sit down and lay back on an overturned chair.

[12] He told her to close her eyes. He then took off her shorts and underwear and commenced to sexually assault her. At one point she told him to stop because it was hurting her. He did not stop. When it was over he told her not to tell anyone.

[13] The assault lasted approximately ten minutes. After the appellant left, Ms. B. jumped into the brook and sat in the water up to her waist. She does not recall how long she was in the brook, however, she knew it was for a long time.

[14] While she was in the brook, she saw someone coming up the other side of the brook.

[15] The next thing she remembers is waking up, as it was getting dark, on the pathway leading to the brook. She then went home and went to bed. Again there was no further explanation about what occurred between the time of the assault, in the early afternoon, and dusk, when Ms. B. woke up on the path.

[16] Ms. B. has a scar on her left arm about two inches long which, she says, is as a result of being cut on the old chair that she was lying on during the sexual assault.

[17] She says she confronted the appellant about the incident over a decade later, in April, 1980, while at her grandmother's house. She told him that she remembered what he had done and would kill him if he tried to assault her again.

[18] Ms. B. did not report the assault to the police until March, 2009, because she thought there was nothing the police could do about it.

[19] The appellant gave evidence on his own behalf. He testified that between 1965 and 1969 he lived in * returning to Nova Scotia in 1969.

[20] He and his wife drove from * for his brother's wedding, arriving in M. on July 21st, 1967. They stayed at his mother-in-law's house in T. that night, attended his brother's wedding, reception and dance on July 22nd, and then spent that night at * outside of T.. They left directly from there for the Cabot Trail the next day.

[21] The appellant testified that after leaving the dance on July 22, 1967, he did not return to * until the following Friday, just prior to leaving to return home to M.. He said he was not * on the day following the wedding when Ms. B. alleges he assaulted her there.

[22] He denied ever sexually assaulting Ms. B. and denied she ever confronted him about the incident.

[23] The defence called D. J.. In her statement to police, Ms. B. identified Mr. J. as the person who came along after the incident. She remembered talking to him while she was crying. Mr. J. testified that he was not at the wedding. The entire summer of 1967 he was in C. with the Canadian Armed Forces.

[24] The defence also called two of the appellant's sisters, F.W. and J.M. F.W. testified that she saw her brother at the wedding and reception on July 22nd. She testified that she stayed at her parents' house (next door to Ms. B.'s home) on the night of July 22nd. The next morning most of the people staying there and at the

house next door went to church, returned and had Sunday dinner. She did not recall the appellant being there at all that day.

[25] Like her sister, J.M. testified that she attended the wedding ceremony on July 22nd and saw the appellant there and at the early part of the dance that evening. She also stayed at her parents' home on July 22, 1967 with five of her siblings and their children. One of her other sisters lived across the road; Ms. B.'s mother, her sister, lived next door. Her evidence was similar to her sister's with respect to the activities on Sunday morning. However, she was very clear that the appellant was not at her parents' house on Sunday, July 23, 1967. During cross-examination by the Crown attorney she testified as follows:

> Q. ... the great event that weekend was the wedding on the Saturday. Is that correct?
>
> A. Correct.
>
> Q. Safe to say that your recollection of the wedding events would be greater than your recollections of the next day?
>
> A. I would say so, yes.
>
> . . .
>
> Q. Right. So when you say you don't remember seeing J. again until you … until he went home to M., are you saying you don't remember seeing him there that day or that he …
>
> A. Oh. He ...
>
> Q. … wasn't there?
>
> A. He wasn't there.
>
> Q. He wasn't there.
>
> A. No.
>
> Q. Okay. You actually have a clear recollection…

A. Yes.

Q. … of the fact that he wasn't there.

A. Yes.

[26] J. M. testified that she did not see her brother again after July 22, 1967, the day of the wedding, until she saw him in M. some time later in the year.

[27] As noted previously, the trial judge convicted the appellant of sexual assault. He did not accept the appellant's evidence nor was he left with a reasonable doubt by it; he was satisfied that, despite certain inconsistencies, Ms. B.'s evidence was credible; and, on the totality of the evidence, he was satisfied the Crown had proven all of the elements of the offence beyond a reasonable doubt.

Issues

[28] In his factum, the appellant lists six grounds of appeal. At the time of the oral hearing, the appellant withdrew one of the grounds of appeal and consolidated the remaining five into three grounds which may be summarized as follows:

1. whether the learned trial judge erred in law in making a finding of fact based on a material misapprehension of the evidence, which resulted in a miscarriage of justice;

2. whether the learned trial judge erred in law in finding that alibi evidence, to be given any weight, had to be independent; and

3. the trial judge erred in law in that he misinstructed himself as to the meaning and appreciation of alibi evidence and failed to properly apply the principles of **R. v. W.(D.)**, [1991] 1 S.C.R. 742, to the evidence.

[29] The grounds of appeal are inter-related and will be addressed together.

Standard of Review

[30] To succeed on an appeal alleging misapprehension of evidence, the appellant must show two things:

1. that the trial judge, in fact, misapprehended the evidence in that he failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to the evidence; and

2. that the trial judge's misapprehension was substantial, material and played an essential part in the decision to convict (**R. v. S.D.D.**, 2005 NSCA 71, ¶ 12).

Analysis

[31] At p. 8 of his decision the trial judge concluded that he could neither accept the appellant's evidence nor was he left with a reasonable doubt by it. He continued:

> ... The reasoning process that has led me to that conclusion is based upon the following:
>
> 1. Mr. [J.]'s alibi evidence is obviously self-serving and is not backed up by any independent evidence other than the recollection of his 2 sisters.
>
> 2. His sisters can hardly be considered independent because, in my view, there is a danger that their testimony was colored by a desire to protect their brother from these charges, particularly after such an extended period of time. In fact, <u>Ms. [M.] admitted in cross examination that her recollection of the weekend in question was mostly about the day of the wedding itself.</u>

(My emphasis)

[32] As noted previously, J. M. was unequivocal in giving her evidence that the appellant was not at their parents' home on July 23, 1967 (¶ 25). The trial judge summarily dismissed the evidence of J. M. and her sister, F.W. as not being independent. He did not say that he did not accept their evidence or considered it to be untruthful. But rather, there was "danger" that it may be coloured by their desire to protect their brother.

[33] In **R. v. Morrissey**, [1995] O.. No. 639 (Q.L.)(C.A.), Doherty, J.A. characterized the requirements for a miscarriage of justice where misapprehension of evidence is alleged, including "a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence". ¶ 83. This characterization was quoted with approval by Cromwell, J.A. (as he then was) in **R. v. S.D.D.**, **supra** at ¶ 10.

[34] The trial judge failed to consider the evidence of F.W. and J. M. The evidence was relevant to a material issue; the appellant's alibi defence. As a result, it falls within the first category of misapprehended evidence referred to in **Morrisey, supra**. Obviously, by failing to consider it he also failed to give proper effect to it.

[35] I am satisfied the appellant has satisfied the first part of the test in **R. v. S.D.D.**, **supra**.

Was the Trial Judge's Failure to Consider the Evidence Substantial, Material and Essential to the Conviction?

Substantial

[36] The trial judge gave three reasons for rejecting the alibi evidence; the first being that it was self-serving on the part of the appellant; secondly, that the evidence of the sisters was not independent; and finally , J. M.'s recollection, in particular, was not clear.

[37] J. M. was very clear in her recollection about the events of July 23rd, 1967; the appellant was not at her parents' home. The trial judge was obviously mistaken in recalling this important evidence. In the result, he failed to consider evidence that was essential to the appellant's alibi defence, and in that sense, the misapprehension was substantial.

Material

[38] The cornerstone of the accused's defence was that he was not present * that day and so he could not have committed the offence. It was the principal issue at

trial and the evidence bearing on that issue was critical to the determination of the guilt of the accused. The failure to consider it was material.

Essential to the Conviction

[39] To address this factor it is necessary to look at the law as it relates to alibi evidence.

[40] With respect, the trial judge appears to have misunderstood or, at the very least, failed to properly apply the law relating to alibi evidence. The appellant did not need to prove his alibi; the evidence of his alibi need only raise a reasonable doubt that he committed the crime: **Lizotte v. The King**, [1951] S.C.R. 115.

[41] Further, the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (**R. v. Letourneau** , [1994] B.C.J. No. 265 (Q.L.)(C.A.), ¶ 61).

[42] Courts have long recognized, as well, that alibi evidence will frequently be given by relatives and friends of the accused. While this is a reality which may be considered, the evidence cannot be rejected on this ground alone: **Cloutier v. R.** (1960), 44 C.R. 60 (Que. C.A.) at ¶ 37:

> [37] ... There is no evidence that any of these were particularly friendly with appellant. It is almost inherent in a defence of alibi that it must be made through witnesses acquainted with the accused, and I do not consider that the defence can properly be rejected on this ground alone.

[43] Finally, alibi evidence by its very nature is self-serving. The accused is saying he was not present at the time the crime was committed. What could be more self-serving?

[44] Thus, the trial judge erred by summarily rejecting the defence evidence on the grounds that it was self-serving and not corroborated by independent evidence.

[45] In **R. v. Parrington** (1985), 20 C.C.C. (3d) 184 (Ont. C.A.), Cory, J.A. (as he then was) offered helpful advice as to how alibi evidence should be considered by a trier of fact:

1. if they believe the alibi testimony given, then they must acquit;

2. if they did not believe such testimony, but were left in reasonable doubt by it, again they must acquit the accused;

3. even if they were not left in reasonable doubt by his testimony, then, on the basis of all the evidence, they must determine whether they are convinced beyond reasonable doubt of the guilt of the accused (¶ 7).

[46] The trial judge failed to properly analyze the appellant's alibi evidence in the manner suggested in **Parrington**, **supra**. Such an approach would have focussed the trial judge on the ultimate issue as to whether the Crown had proven the charge beyond a reasonable doubt. The only reasonable conclusion is that the failure to consider the evidence in accordance with the principles set out above was a significant factor in the trial judge's rejection of the alibi defence and the ultimate conviction of the appellant. The error was essential to the conviction.

[47] In conclusion, I am satisfied that the trial judge erred in misapprehending the evidence and in his appreciation of the law with respect to alibi. The misapprehension of the evidence was substantial and material and played an essential part in the decision to convict.

[48] As a result, I would allow the appeal, quash the conviction and order a new trial, should the Crown wish to proceed further with this matter.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A