NOVA SCOTIA COURT OF APPEAL
Citation: R. v. B.W., 2012 NSCA 13

Date: 20120131
Docket: CAC 346509
Registry: Halifax

Between:

B. W.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

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

Restriction on publication: Pursuant to 486.4 of the *Criminal Code.*

Judges: Saunders, Beveridge and Bryson, JJ.A.

Appeal Heard: January 24, 2012, in Halifax, Nova Scotia

Held: Appeals from conviction allowed and a new trial ordered, per reasons for judgment of Beveridge, J.A.; Saunders and Bryson, JJ.A. concurring.

Counsel: Alex Embree, for the appellant
William D. Delaney, Q.C., for the respondent

Restriction on publication: Pursuant to 486.4 of the *Criminal Code*.

Order restricting publication – sexual offences

486.4 (1) 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 step-daughter), 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:

INTRODUCTION

[1] The appellant was convicted of sexual assault and unlawful confinement of his ex-girlfriend and sentenced to three and one-half years incarceration. He appeals from conviction and sentence.

[2] The Crown conceded in its factum that the conviction for sexual assault was tainted by error and could not be sustained, but argued that the conviction for unlawful confinement could be upheld. At the conclusion of the oral hearing we announced that the Court was unanimously of the view that the appeals from conviction were allowed and a new trial ordered with reasons to follow. These are our reasons.

FACTS

[3] To understand the errors committed by the trial judge some factual background is necessary. What follows is an outline of the basic facts.

[4] The alleged offences relate to the events of Saturday, November 27 and the early morning hours of November 28, 2010. The appellant and the complainant had lived together for approximately one year. They separated in October 2010. The complainant was pregnant. The appellant was the father.

[5] Relations after separation were apparently amicable. The evidence was that they were together on the Thursday night before November 27 at the appellant's residence, located in the basement of his parents' home in S.. They shopped together after work on Friday. Arrangements were made on Saturday to 'hang out'.

[6] On Saturday November 27, 2010 the appellant wanted the complainant to stay overnight at his parent's home. She declined, but did agree to drive the appellant to his father's cottage in * , a drive of approximately 75 minutes. The one thing she insisted – there would be no overnight stay at the cottage. To ensure she would live up to the agreed upon drive, the appellant removed the keys from

the ignition while he went inside his parents' home. On his return, they left for the cottage. Both agreed the drive to the cottage was pleasant.

[7] On arrival the complainant willingly went into the cottage and spent the evening there. They watched a movie. Beer, pizza, marijuana and deep fried egg rolls were consumed. Sexual intercourse occurred, but the appellant and complainant gave completely different versions about that event. They also gave differing accounts about how much alcohol the complainant consumed.

[8] Some things are not disputed. They are: the appellant looked at text messages on the complainant's phone; she was upset he had done so; he was upset at what he saw; she wanted to leave; he did not want her to leave; while partially clothed, the complainant crawled out through the bathroom window and went to her car; he saw her, and against her will, used some measure of force to bring her back inside the cottage where she remained till morning.

[9] The next morning, they drove to his parents' home where the complainant had breakfast with the appellant and his mother. The complainant kissed the appellant good-bye and left. On Monday morning the complainant went to the police and complained of being physically and sexually assaulted and unlawfully confined. Charges were laid. The Crown proceeded by indictment.

[10] The trial was held on February 8, 2011 in the Supreme Court of Nova Scotia before the Honourable Justice Charles Haliburton. Haliburton J. delivered oral reasons for judgment the same day, convicting on the charges of sexual assault and unlawful confinement, but acquitting the appellant of common assault on the basis that the charge was incidental to the sexual assault. Sentencing occurred on February 18, 2011. The appellant has been in custody since.

ANALYSIS

[11] There are a number of troubling aspects to the reasons given by the trial judge. Despite finding it likely that the complainant was having irrational thoughts the night of the incident at the cottage, the trial judge said:

> I accept in the main the evidence of Ms. [A] where the two of them are in conflict. I find that the bulk of the evidence given by Mr. [W] after that which I've just recited is irrelevant to the issues that I have to decide.

[12] The trial judge referred to none of the evidence of the appellant about the seemingly consensual sexual relations that he said occurred. However, the trial judge said he accepted the evidence of the appellant that the complainant was inebriated by the consumption of beer and marijuana, something the complainant had vehemently denied. With respect to the unlawful confinement and sexual assault offences, the trial judge reasoned:

> The pivotal bit of evidence in my mind was her evidence that before the consumption of any beer or marijuana or whatever, when she drove Mr. W. down to S. and when he removed the keys from the car and did not permit her to go home at that point which was her intention, that was the point at which the detention commenced and continued.
>
> Whether she verbally refused to have sexual intercourse, whether she indicated her refusal in any other way, or whether in the end she consented or appeared to consent is academic in my view because a person who is being held against their will, is unlawfully confined, cannot properly be said to have given consent to the sexual activity.

[13] The judge found he was "obliged to convict". The Crown rightly concedes that the trial judge misapprehended the evidence. The complainant at no time testified that she felt confined when they were in S. and continuously thereafter. In fact, her evidence was to the contrary. She testified that she willingly drove the appellant to the cottage and willingly stayed.

[14] She consistently said she did not want to stay the night. But it was not until later in the night, after sexual intercourse, and the argument over the contents of her cell phone, that she said she wanted to leave but could not because the appellant had her car keys and phone. The appellant testified the only reason he prevented her from leaving was because she was intoxicated and he needed to stop her from driving in her condition.

[15] The trial judge failed to carry out any analysis of the conflicting evidence between the complainant and the appellant about the sexual contact. Instead he adopted a shortcut which he said made such an analysis "academic". It may very well be correct that if a person is actually unlawfully confined, that any apparent consent he or she may give to sexual conduct may not be true consent, but the complainant did not clearly testify to being unlawfully confined until after sexual

intercourse had occurred. Nor did the trial judge examine the evidence to determine if the conduct of the appellant preventing her from driving a motor vehicle while her ability to do was impaired was unlawful.

[16] The respondent acknowledges that in these circumstances the appellant was denied a fair trial on the charge of sexual assault and concedes a new trial must be ordered on that charge. With respect to the offence of unlawful confinement, the Crown originally contended that the events at S., which were not denied by the appellant, could constitute an unlawful confinement and, if the conviction for that conduct were upheld, the appeal from sentence should be allowed to one of time served.

[17] The complainant did not testify that she felt confined by the removal of keys from the ignition by the appellant in S.. Moreover, the appellant was never charged with unlawful confinement at S., but only with respect to the events at the cottage. I have considerable doubt whether the events at S. as described could amount to an unlawful confinement, let alone one that would permit us to uphold a conviction for unlawful confinement at that location.

[18] The appellant requests that we quash the convictions and enter acquittals on the basis that the verdicts were unreasonable or not supported by the evidence. Like many criminal trials, the outcome here depended on the assessment of the credibility and reliability of the complainant in light of all the evidence. Verdicts based on such an assessment are not immune from appellate review for reasonableness, whether the trial was by jury or judge alone (*R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Burke*, [1996] 1 S.C.R. 474).

[19] The traditional test is well known. The function of a court of appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed judge or jury, acting judicially, could reasonably have rendered. The court of appeal must not merely substitute its view for that of the trial judge or jury, but to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence (see *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381).

[20] An expanded scope to review a verdict under s. 613(1)(a) by a trial judge for reasonableness was first articulated by the dissenting reasons of Fish J. in *R. v. Beaudry*, 2007 SCC 5. The existence of such a scope was recently confirmed by the Supreme Court of Canada in *R. v. Sinclair*, 2011 SCC 40. In a nut shell, illogical or irrational reasoning can also render verdicts unreasonable under s. 686(1)(a)(i) of the *Code*, but the remedy may well be different. If a verdict is unreasonable on the basis that a reasonable trier, properly instructed and acting reasonably could not have reached it, an acquittal is entered. If an appellate court finds a trial judge's verdict to be unreasonable on the *Beaudry* criteria, the remedy is a new trial if there is evidence reasonably capable of supporting a conviction (*Sinclair*, para. 23).

[21] I am not persuaded by the appellant that the evidence is so wanting that a properly instructed trier, acting judicially, could not reasonably convict. There was evidence at trial reasonably capable of supporting a conviction. The complainant testified that she did not consent to sexual conduct with the appellant and told him so. She also denied being impaired and said she was confined against her will. Accordingly the appropriate remedy is to quash the convictions and order a new trial on all of the counts in the Indictment, including that of common assault, should the Crown be so disposed to proceed again.

[22] The appellant moved to admit fresh evidence in the form of a transcript of evidence given by the complainant in other proceedings. At the outset of the hearing, we provisionally admitted that evidence. In light of our view as to the merits of the appeal quite apart from the proffered fresh evidence, it is unnecessary to consider it.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.