NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Ross***, 2012 NSCA 56

Date: 20120531
Docket: CAC 356611
Registry: Halifax

Between:

Bradley Roderick Ross

Appellant

v.

Her Majesty the Queen

Respondent

- and -

Gary Jewett

Intervenor

Revised decision:	The text of the original decision has been corrected according to the erratum dated June 6, 2012. The text of the erratum is appended to this decision
Restriction on publication:	Pursuant to s. 486.4 of the *Criminal Code*
Judges:	Saunders, Oland and Bryson, JJ.A
Appeal Heard:	April 17, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed, conviction quashed and a new trial ordered, per reasons for judgment of Bryson, J.A., Saunders and Oland, JJ.A. concurring
Counsel:	Stanley W. MacDonald, Q.C., for the appellant Mark Scott, for the respondent William L. Mahody, for the intervenor

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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] This is an unusual case in which the incompetence of trial counsel caused a miscarriage of justice and a new trial must be ordered. After a four-day trial, Bradley Ross was convicted of sexual interference, contrary to s. 151 of the *Criminal Code*. Mr. Ross' defence could only succeed if the evidence showed he had a mistaken belief in the age of the complainant and took all reasonable steps to ascertain her age. But he did not testify. He called no evidence. His lawyer asked no questions of any witness. The trial judge did not know what Mr. Ross thought because she did not hear from him. She did not hear from him because his lawyer did not advise him to testify. That failure deprived Mr. Ross of any reasonable prospect of successfully defending himself.

Facts:

[2] The facts of this distressing case are largely uncontroversial. As Crown counsel Mr. Scott aptly observed, "in this case we have to set aside any assumptions about the innocence of youth."

[3] On June 12, 2009, 14-year-old M.A. was staying overnight at the home of her best friend, 13-year-old K.H. K.H. was in the care of her older sister because her parents were away for the night. M.A. was then attending Grade 9 at _____ High School. K.H. attended Grade 8 at _____ Junior High School.

[4] During the late afternoon, M.A. and Matt Pace were texting each other. They arranged that Mr. Pace would pick up the girls from K.H.'s home. M.A. understood that Mr. Pace was accompanied by Michael Hindler with whom she had had a prior sexual relationship.

[5] K.H. told her older sister that she and M.A. were going to see a film with M.A.'s boyfriend. They would be back at around 9:00. Mr. Pace and Mr. Hindler were both 18 and attended _____ High School. They both knew M.A.. They did not know K.H. K.H was excited about the prospect of going out with older boys.

[6] Mr. Pace picked up the girls in a van on K.H.'s street. He was accompanied by two other friends, Micah Wisen and the appellant, Bradley Ross.

[7] Shortly after entering the van, both girls engaged in consensual oral sex with Michael Hindler and Bradley Ross. Initially, K.H. performed oral sex on Mr.

Hindler. Later she did the same to Bradley Ross. M.A. had been performing oral sex on Bradley Ross and she and K.H. "switched up" and M.A. then performed oral sex on Mr. Hindler.

[8] Later Mr. Hindler asked K.H. to have sexual intercourse with him. She agreed, but insisted on a condom. The evidence conflicts on whether or not sexual intercourse occurred with K.H.. But she later became concerned that she might be pregnant and she disclosed what happened to a close friend of her mother's. Ultimately, the story came out and charges were laid.

Charges:

[9] Both Mr. Hindler and Mr. Ross were charged with sexual interference and sexual assault:

> **Sexual interference**
>
> **151.** Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or
>
> (*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.
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> **Sexual assault**
>
> **271.** (1) Every one who commits a sexual assault is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[10] After charges were laid, Mr. Hindler retained Joel Pink, Q.C. to defend him. With the assistance of his father, Jack Ross, Bradley Ross retained the intervenor, Gary Jewett.

[11] At the opening of trial, both Mr. Hindler and Mr. Ross acknowledged the sexual activity with K.H. On behalf of Mr. Ross, Mr. Jewett admitted the elements of the offence of sexual interference but not of sexual assault. Both Mr. Hindler and Mr. Ross defended on the basis of a mistaken belief in the age of K.H. That defence is available, arising out of s. 150.1(1) of the *Code*:

> **Consent no defence**
>
> **150.1** (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[12] But consent to sexual activity can be a defence if the complainant is 14 or 15 and if the accused is less than five years older than the complainant:

> **Exception - complainant aged 14 or 15**
>
> (2.1) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if
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> (*a*) the accused
>
> (i) is less than five years older than the complainant; and
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> (ii) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant; or
>
> (*b*) the accused is married to the complainant.

[13] A mistaken belief that the complainant is 14 can ground a defence if all reasonable steps have been taken to ascertain age:

> (6) An accused cannot raise a mistaken belief in the age of the complainant in order to invoke a defence under subsection (2) or (2.1) unless the accused took all reasonable steps to ascertain the age of the complainant.

The Trial Decision:

[14] In a thorough and thoughtful 90-page decision, Provincial Court Judge Alanna Murphy found Mr. Hindler and Mr. Ross guilty of sexual touching, contrary to s. 151 of the *Code*. She stayed the sexual assault charges.

[15] Judge Murphy extensively reviewed the facts and case law regarding the defence of honest but mistaken belief. She acknowledged that if Messrs. Hindler and Ross honestly, reasonably but mistakenly believed that K.H. was at least 14 years old, they were entitled to an acquittal. At trial, Michael Hindler said he asked K.H. what school she attended and she replied "Prince Andrew High School". He then asked what grade she was in and she said Grade 10. Finally, he asked her her age and she said she was 15. Micah Wisen corroborated this testimony. This evidence was denied by K.H. and M.A. who said that the only conversation about age occurred after the sexual activity, when Mr. Hindler was told K.H. was 13 years old. The trial judge rejected the evidence of Michael Hindler and Micah Wisen. Judge Murphy concluded:

> I am satisfied beyond a reasonable doubt that K.H. never told Mr. Hindler she was 15 and M.A. nor anyone else was present for such a deception in the van. And I am further satisfied that if K.H. had told the males that she was 15, she would acknowledge it to the court, because she had no hesitation in admitting much more unfavourable information about herself, and she did not tend to attribute blame in her evidence.
>
> On the totality of all the evidence, I am satisfied that K.H. was a willing participant in the sexual activity in the van and that she was knowledgeable about sexual acts. ...
>
> . . .
>
> I am further satisfied beyond a reasonable doubt that neither accused took reasonable steps to ascertain the age of K.H. before they engaged in sexual touching or sexual acts with her, when the circumstances and context compelled them in law to make such inquiries.
>
> . . .
>
> There was very little time for Mr. Hindler or Mr. Ross to make all reasonable inquiries before they engaged in sexual activity with K.H. Mr. Hindler was engaging in sexual activity within minutes of first laying eyes on her. There is

> no evidence he asked M.A. or anybody else in the van what they knew about K.H. Likewise, there's no evidence that Bradley Ross asked K.H., M.A. or anyone else anything about K.H. I am satisfied beyond a reasonable doubt that not only were all reasonable steps not taken by either accused to ascertain the age of K.H. in these circumstances, but no steps were taken to ascertain the age of K.H. before any sexual acts took place, because their own sexual gratification was foremost on their minds when the girls first got in the van.
> . . .
>
> And for all the foregoing reasons, in respect to Mr. Ross, I find that on the totality of all the evidence the cases against him have been proven beyond a reasonable doubt in relation to both counts on the Information.

Grounds of Appeal:

[16] Mr. Ross appeals the trial judge's verdict on four grounds:

1. He did not receive effective assistance from his trial counsel such that the reliability of the judge's verdict was compromised and a miscarriage of justice resulted;

2. The trial judge erred by considering out of court statements made by the co-accused, Michael Hindler, as evidence to convict Mr. Ross;

3. The trial judge erred by excluding text message evidence between M.A. and Michael Hindler relevant to Mr. Ross' honest but mistaken belief as to the age of K.H.;

4. The trial judge erred by admitting text messages exchanged between K.H. and a third person not called as a witness at trial and then used those messages as prior consistent statements, thereby improperly bolstering K.H.'s credibility.

[17] For reasons that will become apparent later on in this decision, it will not be necessary to address grounds 2, 3 and 4.

Fresh Evidence Application:

[18] In support of his allegation of ineffective counsel, Mr. Ross moved to adduce fresh evidence. He filed affidavits from himself, his father, Jack Ross, and Mr.

Pink. Initially, Mr. Jewett declined to participate in the appeal even though his counselling of Bradley Ross was clearly challenged. But he did eventually seek and was granted intervenor status. He filed an affidavit in reply to the Ross affidavits. All four affiants were cross-examined.

[19] Bradley Ross, supported by his father, alleged that Mr. Jewett:

(1) advised him that the Crown's case of sexual assault was weak because no force was used by Mr. Ross in the alleged sexual assault;

(2) advised him that he had only been charged in order to pressure him to testify against Michael Hindler;

(3) never advised that he had a right to elect or re-elect; to have a preliminary inquiry; or to be tried by a judge and jury. Mr. Ross deposed that he would have asked for trial by judge and jury and would have proceeded with a preliminary inquiry;

(4) never advised that he could seek a separate trial from Michael Hindler;

(5) never advised whether or not he should testify;

(6) never advised of the risks to him if he did not testify;

(7) advised after the Crown closed its case that it was not necessary for him to testify because the Crown had not proven either offence beyond a reasonable doubt, and that Mr. Ross had "nothing to gain" by testifying;

(8) had no instructions to make any admissions at the opening of trial;

(9) failed to seek admission of evidence of text messages from M.A. to Mr. Hindler relevant to Mr. Ross' mistaken belief in K.H.'s age;

(10) made written, post-trial submissions that were wrong in law and ineffective.

[20] Bradley Ross also swore in his affidavit that he would have given evidence at trial regarding his background knowledge of M.A., his knowledge of her sexual experience, what he observed about K.H.'s appearance, demeanour, behaviour and the order of sexual activity in the van allegedly suggesting the considerable maturity of K.H. In particular, he would have testified that he understood M.A. and K.H. had been sexually aroused and engaged in sexual activity together before they were picked up by the boys in the van. He said M.A. and K.H. were kissing each other in the van before engaging in any sexual activity.

[21] For his part, Mr. Jewett filed an affidavit outlining his legal background and his representation of Mr. Ross in this case. Mr. Jewett denied failing to advise about the right of election or admitting the elements of sexual interference without instructions at the opening of trial. He acknowledged that he advised Bradley Ross that sexual assault required the application of force. He now admits that he was wrong in law in this respect, although he maintained that error throughout the trial and repeated that error in his closing submissions to the trial judge. He conceded that the key defence was an honest but mistaken belief regarding the age of K.H. But he did not prepare Bradley Ross as a witness because he did not anticipate calling him. He left the decision to testify with Bradley Ross alone. He gave him no advice about whether or not to testify, nor of the risks of not testifying.

[22] Despite testifying that he prepared for trial, there were no notes in Mr. Jewett's file of any proposed questions or lines of questioning for any of the witnesses. Although he sent his bills to Mr. Ross by fax, there is no correspondence or memoranda from Mr. Jewett recording his pre-trial preparation. There is no correspondence to Bradley Ross providing advice or offering any opinions to him for his consideration. There are no memoranda confirming any instructions from Mr. Ross.

Fresh Evidence Law:

[23] Section 683(1)(d) authorizes the Court of Appeal to receive fresh evidence in the "interests of justice". In *R. v. Palmer*, [1980] 1 S.C.R. 759, the Supreme Court said the following criteria should govern the admissibility of fresh evidence on appeal:

(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;

(3) The evidence must be credible in the sense that it is reasonably capable of belief;

(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.

[24] In *R. v. Wolkins*, [2005] N.S.J. No. 2 at para. 61, Justice Cromwell discusses the *Palmer* test in the context of an alleged miscarriage of justice:

> [61] The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see **R. v. Taillefer**; **R. v. Duguay**, [2003] 3 S.C.R. 307 at paras. 73 - 77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at paras. 43 - 46. ***Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted***: see **R. v. G.D.B.**, **supra**. [Emphasis added]

[25] The evidence that Mr. Ross seeks to adduce is of two kinds. First, he says he had evidence to give on the merits of his defence which the trial judge did not hear. He says that the incompetence of counsel was the reason why his evidence was not heard. Second, he says that counsel's advice to him, as well as his trial preparation, strategy and conduct, were all below a reasonable standard of professional judgment, resulting in a miscarriage of justice. Thus both *Palmer* and *Wolkins* apply.

[26] When assessing admission of fresh evidence of counsel's ineffectiveness, the court should receive the evidence if the court could conclude that a miscarriage of justice occurred. Otherwise, there would be no way of considering this issue in context. Subject to admissibility and reliability, such evidence should be received "in the interests of justice" (*R. v. Strauss*, [1995] B.C.J. No. 1461 (C.A.); *R. v. Joanisse*, [1995] O.J. No. 2883 (C.A.); *R. v. Widdifield*, [1995], 25 O.R. (3d) 161 (C.A.); *R. v. Gumbly* (1996), 155 N.S.R. (2d) 117 (C.A.); *Wolkins*, para. 67).

[27] In *R. v. Appelton*, 149 O.A.C. 148 (Ont. C.A.), Charron J.A., as she then was, explains the interrelation of the *Palmer* test for fresh evidence and an allegation of miscarriage of justice founded upon ineffective assistance of counsel, resulting in an unreliable verdict:

> **23** In my view, it follows from the principles set out in *B.(G.D.)* that the due diligence criterion will be met when the proposed fresh evidence was not led at trial due to the incompetence of trial counsel. This court has expressly so stated in *R. v. Wang*, [2001] O.J. No. 1491 (C.A.) at para. 58. Of course, the incompetent decision of counsel, in and of itself, will not result in a new trial. ***It is incumbent upon the appellant to also show that the failure to call the evidence resulted in a miscarriage of justice in order to satisfy the "prejudice component" of the test for ineffective assistance of counsel. This additional requirement is also necessary under the remaining three Palmer criteria for the admission of fresh evidence. The inquiry at this stage is essentially the same under either test***. Indeed, in *B.(G.D.)*, Major J., after determining that the claim of incompetence had not been made out, concluded that the due diligence criterion had not been met, and proceeded to inquire whether the failure to use the evidence in question occasioned a miscarriage of justice. He did so by considering the remaining *Palmer* criteria - reliability, credibility, and the reasonable likelihood that the evidence might have affected the verdict at trial.
>
> **24** In summary, on any application to introduce fresh evidence, the applicant must meet the *Palmer* criteria. Where the applicant claims that the proposed evidence was not introduced at trial due to the ineffective assistance of his or her counsel, this claim is properly addressed under the first *Palmer* criterion of due diligence. If the applicant satisfies the court that trial counsel was incompetent (the "performance component" of the test for ineffective assistance), the due diligence criterion will have been met. ***The applicant must then satisfy the court that counsel's incompetence in failing to introduce the evidence has resulted in a miscarriage of justice. This inquiry leads to a consideration of the remaining three Palmer criteria***. [Emphasis added]

[28] A caveat to Justice Charron's summary is this: it applies where the court is considering the effect of counsel's incompetence on the verdict at trial. But it is not applicable where ineffective counsel results in a miscarriage of justice founded upon an unfair trial process: *Wolkins*, para. 63. In *R. v Assoun*, 2006 NSCA 47, our Court summarized the principles:

> [316] As stated in **Wolkins**, an appeal court may, without regard to the **Palmer** criteria, accept fresh evidence in support of a ground of appeal that the accused was denied a fair trial. See also: **R. v. Taillefer**, [2003] 3 S.C.R. 307 at ¶ 75-78; **R. v. W.W.** (1995), 100 C.C.C. (3d) 225 (O.C.A.) at 232-33; **R. v. Peepeetch**, 2003 SKCA 76 at ¶ 4. In **R. v. Phillips**, [2003] A.J. No. 14 (A.C.A.), affirmed [2003] 2 S.C.R. 623, Fruman, J.A. for the majority stated:
>
> > 27 The record may, by itself, demonstrate that the accused's ability to defend his case was compromised by the action or inaction of the trial judge. But it may not. Although the concept of trial fairness is flexible, there must be some air of reality to a potential defence. Therefore, an appellant may also apply to adduce additional evidence at the appeal stage to substantiate a claim that the trial was unfair. For example, an appellant might provide evidence to show that he would have done things differently, had he received particular advice: **Criminal Code** s. 683(1); **Hardy** (C.A.), *supra* at 363. Because such evidence is not directed at a finding made at trial, but challenges the validity of the trial process, admission of the evidence is not dependent on meeting the fresh evidence requirements set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759: R. v. W. (W.) (1995), 100 C.C.C. (3d) 225 at 232 (Ont. C.A.). See also **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at 636.

[29] The balance of the *Palmer* criteria relating to an unreliable verdict will be addressed at para. 51 below. Miscarriage of justice founded on an unfair trial process follows at para. 58.

Miscarriage of Justice:

[30] The Court of Appeal may allow an appeal if there has been a "miscarriage of justice" (s. 686(1)(a)(iii) of the *Code*). In *Wolkins*, Justice Cromwell asks the rhetorical question "what is a miscarriage of justice?" He describes two broad categories:

> [89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples

> than a definition; there can be no "strict formula .. to determine whether a miscarriage of justice has occurred": **R. v. Khan**, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, ***the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact***. A conviction entered after an unfair trial is in general a miscarriage of justice: **Fanjoy supra**; **R. v. Morrissey** (1995), C.C.C. (3d) 193 (Ont. C.A.) at 220 - 221. ***The second is concerned with the integrity of the administration of justice***. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: **R. v. Cameron** (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x. [Emphasis added]

[31] Accordingly, unfairness creating a miscarriage of justice can be unfair in fact or in appearance; sometimes both. The fairness of a trial is contextual and depends on the active issues and facts of each case:

> [85] The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific, binding guidelines as to what that advice and assistance ought to consist of. ***The fairness of a trial is a matter of fact in each case. The question on appeal is the fairness of the trial and that must be determined in light of the specific facts of each case***: **Romanowicz** at paras. 36 - 41; **R. v. Hardy** (1991), 69 C.C.C. (3d) 190 (Alta. C.A.) *per* Major, J.A. (as he then was) at 191; **R. v. Landry** (2003), 174 C.C.C. (3d) 326 (N.S.C.A.) at para. 39; and, **R. v. Phillips** (2003), 172 C.C.C. (3d) 2985; A.J. No. 14 (Q.L.)(C.A.) at para. 26. [Emphasis added]

[32] In this case, ineffectiveness of counsel is a central complaint. In *R. v. G.D.B.*, 2000 SCC 22, the court emphasized the vital importance of effective counsel to fundamental justice:

> 24 Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code of Canada* and ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.
>
> 25 The value of effective assistance of counsel is apparent, but was fully explained by Doherty J.A. in *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57:

> The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by "partisan advocacy on both sides of the case": *U.S. v. Cronic*, 104 S. Ct. 2039 (1984), *per* Stevens J. at p. 2045. Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.
>
> Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.

Ineffective counsel - law:

[33] Ineffectiveness of counsel can both taint the outcome and a fair process (*R. v. J.B.*, 2011 ONCA 404):

> **6** The purpose of appellate inquiry is not to grade counsel's performance. The appellant has shown that the acts or omissions of his trial counsel could not have been the result of reasonable professional judgment. The appellant was entitled to competent legal representation at his trial, because effective representation by counsel enhances the reliability of the outcome of the adversarial trial process. In this case, ***the cumulative effect of the failures of counsel undermined the reliability of the verdict and resulted in a miscarriage of justice. Further, the appearance of a fair trial was undermined by trial counsel's failure to advocate for her client by pressing for the rejection of the complainant's evidence***.
>
> [Emphasis added]

Also see *G.D.B.* at para. 28 and *Joanisse* at para. 65.

[34] In *R. v. Gogan*, 2011 NSCA 105, Justice Saunders described the burden on an appellant who alleges ineffective assistance of counsel:

> [29] Mr. Gogan bears the burden of demonstrating that his lawyer's acts or omissions amounted to incompetence. Incompetence is measured against a reasonableness standard. The appellant must demonstrate that counsel's ineffective representation caused a miscarriage of justice. A miscarriage of justice occurs if we are satisfied that counsel's ineffective representation undermined trial fairness, or the reliability of the verdict. **R. v. Fraser**, 2011 NSCA 70. On the facts of this case, Mr. Gogan bears the onus of demonstrating that his trial counsel acted independently of, and contrary to, his instructions in order to displace the strong presumption of competence in favour of counsel.

[35] In *R. v. Fraser*, 2011 NSCA 70, Justice Saunders again described the applicable principles:

> [53] Here again the law is well-settled. As this Court said in **West, supra**:
>
> > [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**, **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
> >
> > [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.)**, **supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

[36] In *G.D.B.*, the Supreme Court commented on counsel's obligation to advise on whether to testify:

> 34 Where, in the course of a trial, counsel makes a decision in good faith and in the best interests of his client, a court should not look behind it save only to prevent a miscarriage of justice. While it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as ***whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions. The failure to do so may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice.***
> [Emphasis added]

Ineffective counsel - application to the facts:

[37] Mr. Jewett's failure to advise Mr. Ross whether to testify must be assessed against the factual and legal issues raised by his defence.

[38] To maintain a defence of honest but reasonable mistake, the burden, as always, is on the Crown. But there is an evidentiary onus on the accused whose knowledge is in issue as the following emphasized passages illustrate:

> **19** I conclude from these cases that where the defence of honest but mistaken belief in the complainant's age arises in circumstances where s. 150.1(4) applies, the Crown must prove beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant's age, or that he did not have an honest belief that her age was fourteen years or more. For the defence to succeed, it must point to evidence which gives rise to a reasonable doubt that the accused held the requisite belief, and in addition, evidence which gives rise to a reasonable doubt that the accused took all reasonable steps to ascertain the complainant's age.
>
> **20** In considering whether the Crown has proven beyond a reasonable doubt that the accused has not taken all reasonable steps to ascertain the complainant's age, the Court must ask what steps would have been reasonable for the accused to take in the circumstances. As suggested in *R. v. Hayes, supra*, sometimes a visual observation alone may suffice. ***Whether further steps would be reasonable would depend upon the apparent indicia of the complainant's age, and the accused's knowledge of same, including: the accused's knowledge of the complainant's physical appearance and behaviour***; the ages and appearance of others in whose company the complainant is found; the activities engaged in either by the complainant individually, or as part of a group; and the times, places, and other

circumstances in which the complainant and her conduct are observed by the accused. The Court should ask whether, looking at those indicia, a reasonable person would believe that the complainant was fourteen years of age or more without further inquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her age. **Evidence as to the accused's subjective state of mind is relevant but not conclusive** because, as pointed out in *R. v. Hayes* at p.11, "[a]n accused may believe that he or she has taken all reasonable steps only to find that the trial judge or jury may find differently". [Emphasis added]

(*R. v. L.T.P.*, [1997] 86 B.C.A.C. 20.)

[39] Similarly, in *R. v. Osborne*, [1992] N.J. No. 312; 102 Nfld. & P.E.I.R. 194:

All that s. 150.1(4) requires is that there is evidence which, if true, would entitle the accused to an acquittal. As noted above, it is not necessary that the facts be true. It is only necessary that the evidence raise a reasonable doubt.

A cautionary note should be expressed for those who seek to establish such a defence. The evidentiary onus is to show evidence that establishes that the accused took all reasonable steps to ascertain the age of the complainant. The common law defence of honest belief has thereby been restricted to those entertaining an honest belief who have taken all reasonable steps to ascertain the true age. The word "all" is important and, while it is only necessary for an accused to create a reasonable doubt, the evidence which he uses to establish such doubt must be directed to the word "all" as much as to any other part of the subsection.

. . .

Parliament has decided that a person engaging another who is more than two years younger and under 14 in a sexual encounter is guilty of a crime, notwithstanding that the encounter may be consensual. The only defence is a belief that the younger [person] is 14 years of age or more. Parliament requires more than an honest belief; it requires a belief resulting from the taking of "all reasonable steps to ascertain the age of the complainant". Parliament made the act a crime and expects of citizens engaging in sexual activity with young people to make a reasonable effort to ascertain the age of prospective partners. It is more than a casual requirement. There must be an earnest enquiry or some other compelling factor that obviates the need for an enquiry. ***An accused person can only discharge the requirement by showing what steps he took and that these steps were all that could be reasonably required of him in the circumstances***. It is not sufficient, for example, to state that further enquiries were not made because they would open the accused to ridicule, embarrassment or rejection. [Emphasis added]

[40] In this case, where the defence and therefore the verdict depended on honest but mistaken belief, it was crucial that the very grave risks of not testifying be discussed with Bradley Ross so that his decision whether to testify be an informed one. But as earlier indicated, Mr. Jewett gave Bradley Ross no advice about the danger of not testifying, even though he was well aware of the risks involved. The need for advice in order to make an informed choice is well settled: *R. v. Moore*, 2002 SKCA 30 at para. 51; *R. v. Chrispen*, 2009 SKCA 63 at para. 17; *R. v. Archer*, [2005] 203 O.A.C. 56 at para. 139; *Sankar, infra.*

[41] During cross-examination on his affidavit, Mr. Jewett acknowledged that his research into the defence of honest and mistaken belief turned up the Saskatchewan Court of Appeal decision of *R. v. Slater*, 2005 SKCA 87. Incredibly, Mr. Jewett admitted he never discussed *Slater* with the Rosses or its significance for Mr. Ross' potential defence.

[42] Paragraph 26 of *Slater* was read to Mr. Jewett:

> **26** In light of *Westman*, I do not think it is either appropriate or necessary to speak in terms of a burden on the accused as the Court did in *Beals*. Nonetheless, where the accused does not lead any evidence other than through the Crown's case, his or her ability to obtain an acquittal based on s. 150.1(5) may be compromised.

Mr. Jewett agreed that he understood from this passage that failing to call Bradley Ross could compromise his ability to obtain an acquittal. He then admitted that he did not tell Bradley Ross or his father that not testifying could compromise his ability to secure an acquittal.

[43] There is not a single case that counsel has located where a defence of honest but mistaken belief has succeeded when the accused did not testify. Indeed, in the only similar case identified by all counsel where the accused did not testify, he was convicted (*R. v. Beals (M.D.)*, (1994) 136 N.S.R. (2d) 321 (N.S.C.A.)). Mr. Jewett did not discuss *Beals* with Bradley Ross or his father.

[44] Mr. Jewett agreed that he had left it up to Bradley Ross to decide whether to testify and that his expectation was that Bradley Ross or his father would initiate a request to testify. Moreover, he did not revisit the decision not to testify after he had heard the Crown's case and there was an adjournment of a couple of months before the defence opened its case. He had ample time to reflect on the Crown's evidence in light of the applicable law.

[45] Although he expressed concern that Bradley Ross would "give ground" on cross-examination, Mr. Jewett never prepared him to testify and never did a mock cross-examination of him, so it is not clear how he came to that conclusion. He said he thought Mr. Ross would not be credible and that it was difficult eliciting information from him. But these challenges are common with many witnesses who are less articulate than counsel might like. They can be substantially mitigated by appropriate preparation. Moreover, properly advised of the risks of his silence, Mr. Ross should have been motivated to present well as a witness. There was no other "downside" to Mr. Ross not testifying. Mr. Ross had no criminal record. This was his first encounter with the law.

[46] Mr. Jewett said he was content with the Crown's evidence and the cross-examination by Mr. Pink. He repeated that explanation regarding his failure to ask any questions of Michael Hindler, and Micah Wisen, who were called by Mr. Pink. But Mr. Pink was there to defend Michael Hindler, not Bradley Ross. There was no evidence of a coordinated or planned joint strategy of Messrs. Jewett and Pink. The danger of Mr. Jewett's "strategy" can be illustrated by one example. During closing argument at trial, Mr. Jewett relied upon the alleged Hindler-K.H. conversation about her age to argue that Mr. Ross could rely on that evidence for the reasonable belief that K.H. was 15 years old. At para. 202 of his factum, Mr. Ross demolishes this approach:

- There was no evidence elicited at trial by Mr. Jewett or anyone else that the Appellant heard K.H. tell these things to Mr. Hindler;
- There was no evidence from the Appellant at trial that he believed this evidence, even if he heard it;
- There was no evidence from the Appellant at trial as to the steps that he took to ascertain the age of K.H.;
- There was no evidence from the Appellant or anyone else at trial that he made observations of K.H. and M.A. in the van, as to their appearance and behaviour, and used those observations to come to conclusions about the age of K.H.;
- They invited the Court to speculate as to evidence critical to the Appellant's defence;

- They were contrary to the Appellant's instructions to Mr. Jewett in September of 2009 that he did not hear K.H. tell Mr. Hindler that she was 15 and attended High School.

[47] Mr. Jewett said he thought that evidence of mistaken belief would have come out through other witnesses. But he called no evidence and, when he made that decision, he did not know whether Mr. Pink was calling any. Not having asked any questions himself nor having led any evidence himself, it is not apparent how Mr. Jewett expected to maintain the defence of honest but mistaken belief on behalf of Mr. Ross. When pressed he said that honest but mistaken belief in K.H.'s age could be established through her evidence and that of M.A. But he did not question them so as to elicit information of what Mr. Ross knew, saw, heard, said or did that might support his defence.

[48] The Crown argues by analogy to some of the self-defence cases which show that in certain circumstances the subjective belief of an accused can be inferred from a variety of sources and it is not always necessary for the accused to testify to give that defence an air of reality (ie., *R. v. Craig*, 2011 ONCA 142; *R. v. LaKing*, [2004] 185 O.A.C. 242 (Ont. C.A.); *R. v. Chan*, 2005 NSCA 61). Even so, depending on the facts, that strategy has considerable risks which should be discussed with the client who can provide counsel with informed instructions. In *Sankar v. State of Trinidad and Tobago*, [1995] 1 All ER 236. At p. 241, Lord Woolf, speaking for the Privy Council, commented on the effect of counsel's failure to advise in similar circumstances:

> Faced with this evidence, Mr, Knox, on behalf of the state, in the course of his submissions, felt compelled to accept that there had been in the event a miscarriage of justice. The appellant had been deprived in reality of deciding whether or not he should give evidence or at least make a statement from the dock. ***It had never been explained to him how important his evidence would be to the outcome of the trial and that, without that evidence, in practice there was no defence***. These were things he should most certainly have been told.
>
> [Emphasis added]

Sankar was a murder case in which the accused was arguing self defence. But he did not testify. The failure to advise him of the risk of not doing so resulted in a miscarriage of justice.

[49] Mr. Jewett admitted a *prima facie* case against his client, Bradley Ross. There was no jurisprudence supporting silence as a credible approach where honest but mistaken belief was the defence.

[50] The failure of Mr. Jewett to call Mr. Ross as a witness inevitably led to the Crown's submission at trial that no evidence supported Mr. Ross' defence. Mr. Ross quotes the Crown submission in his factum at para. 153:

> My Friend Mr. Jewett did not call evidence on behalf of Mr. Ross, and he did not question any of the witnesses, whether called by the Crown or by his co-accused Mr. Hindler. Instead, he argues in his brief that because his client "raised the defence [found in s.150.1(6) C.C.] at the outset of the trial, ... the Crown had the duty to disprove it beyond a reasonable doubt." (See para. 13, page 3 of Ross brief.) With respect, a defence cannot arise on the evidence merely by defence counsel announcing that it is his client's defence. There must be an evidentiary foundation for the defence even to be considered by the Court. Such a foundation must include, at the minimum, evidence that Mr. Ross honestly believed the complainant to be 14 or older, and that Mr. Ross took all reasonable steps in the circumstances to ascertain the age of the complainant.
>
> It is respectfully submitted that there is no evidence on the record indicating what Mr. Ross believed to be the age of the complainant. Both the complainant and M.A. testified that while in the van with both accused the complainant told Mr. Hindler she was 13. However there was no evidence Mr. Ross heard this. Both Michael Hindler and Micah Wisen testified that while in the van with both accused the complainant told Mr. Hindler she was 15. However there was no evidence Mr. Ross heard this either, or that, hearing it, he believed it. And there was no evidence from any witness that Mr. Ross took any steps to ascertain the age of the complainant.
>
> Mr. Jewett points out testimony given during the trial which he submits can be relied upon to give rise to the defence of mistake of age. Areas of testimony include the alleged questioning by Mr. Hindler of the complainant's age, school, school acquaintances; the clothing and makeup the complainant was wearing during the incident; and the apparent knowledge she held in sexual matters and utilized during the incident. Despite the testimony in these areas, there was no evidence Bradley Ross heard these discussions, and noted her appearance and behaviour, and from these came to a belief that the complainant was over 13. There was also no evidence he took any steps at all in ascertaining her age. The submissions made by My Friend Mr. Jewett on page 6 of his brief - that various factors "would have led Bradley Ross to believe that [the complainant] was 14

> years of age or older", that the complainant's behaviour in the van "further indicated to my client that [the complainant] was of a mature age" - are invitations to This Court to speculate on Mr. Ross's belief when no evidence as to his actual belief can be found in any of the evidence. With the greatest of respect to My Friend, such speculation would be improper.

[51] Counsel's performance is to be judged against a reasonableness standard (*G.B.D.* at para. 27; *Fraser* at para. 80). Unfortunately for Mr. Ross, Mr. Jewett's performance as trial counsel was lamentably inadequate and fell below any reasonable standard one might apply. The failure to advise on whether to testify was an abject abdication of counsel's fundamental responsibility that was compounded in these circumstances by the failure to positively recommend that Mr. Ross should testify. Ineffectiveness of counsel has been more than established and that ineffectiveness prevented the trial court from hearing Mr. Ross' evidence. That returns us to the *Palmer* test (*Appelton*, *supra*).

[52] With respect to what Mr. Ross would have said in his own defence, the 2nd, 3rd and 4th factors of the *Palmer* test are readily met. The evidence of Bradley Ross is relevant to his defence of honest but mistaken belief in K.H.'s age, because it describes what he believed and why he believed it. The evidence is credible in the sense that it is reasonably capable of belief. If believed it could, taken with the other evidence at trial, reasonably be expected to have affected the result.

[53] The Crown takes issue with the last factor because the defence of mistaken belief requires that the accused take "...all reasonable steps to ascertain the age of the complainant." (*Code* s. 150.1(6))

[54] The Crown argues forcefully that the evidence offered by Mr. Ross does not address the "objective" aspect of the defence. Mr. Ross may have believed K.H. to be 14 or 15 – but his evidence really adds nothing to what the trial judge had already heard regarding the need to make inquiry concerning K.H.'s age. The Crown submits that the fresh evidence would have no material effect on the outcome of trial.

[55] There are two responses to the Crown's submissions here. First, the court did not hear evidence of sexual activity between M.A. and K.H. prior to their being picked up by the boys. Nor did the court hear evidence of their kissing one another upon entry into the van. Moreover, Mr. Ross would have offered evidence that K.H. was more physically developed and in that sense looked older than 14-year-old

M.A. This evidence, together with Mr. Ross' expressed belief, presents a reasonable prospect that the outcome of trial could have been otherwise, (*McMartin v. The Queen*, [1964] S.C.R. 484 at 491; *G.B.D.* at para. 19).

[56] Commenting on the potential effect of fresh evidence on the verdict at trial, the Alberta Court of Appeal said in *R. v. Carr*, 2010 ABCA 386:

> **47** What measurement or standard is to be applied by this Court in determining whether or not the fresh evidence might reasonably be expected to have affected the verdict? In *M.(P.S.)*, Doherty J.A. for the court stated at 422:
>
> > The limits of the question posed by this criterion are important. It is not for the appellate court to retry the case with the "fresh" evidence factored into the rest of the evidence adduced at trial. Nor is it for this court to decide the admissibility of this "fresh" evidence based on this court's assessment of the credibility of Ms. T.'s evidence given before this court. Our function is a more limited one.
>
> **48** In that case, the court admitted evidence that was "potentially significant" and could "reasonably affect" the determination of a central issue in the case (at 425).

[57] It is not for this Court to retry the case with fresh evidence "factored in". But because Mr. Ross' fresh evidence could reasonably lead a trier of fact to reach a different result, the verdict here was unreliable, and should be set aside.

Miscarriage - unfair process:

[58] Generally, counsel's failure to advise his client is assessed against the reliability of the verdict (ie., *Moore*, para. 55; *Joanisse*, para. 76). The verdict here can be doubted for the reasons already given. But in the extraordinary circumstances of this case, the process was also unfair. Those circumstances included:

- Providing negligent advice that sexual assault required an application of force and conducting the trial and making submissions on that basis;

- Failing to provide any advice to Mr. Ross on whether to testify;

- Specifically failing to advise Mr. Ross of the grave consequences of silence, particularly in light of the admission of a *prima facie* case, and the absence of any supporting jurisprudence (*ie., Slater*).

- Failing to question any witness or lead any evidence to try and establish what Mr. Ross might have seen or heard relevant to his understanding of K.H.'s age that differed from or augmented, the evidence of other witnesses;

- Failing to prepare himself and Mr. Ross for testimony by Mr. Ross;

- Failing to prepare himself for cross-examination of any witness other than "marking up" the Crown's disclosure materials;

- Making a decision to call no evidence before knowing whether the co-accused, Mr. Hindler, would be testifying or calling any evidence;

- Making submissions to the trial judge on honest but mistaken belief of Mr. Ross without calling Mr. Ross;

- Relying on the alleged evidence of K.H.'s age without establishing that Mr. Ross heard that evidence.

In the face of evidence which the trial judge found compelling, Mr. Jewett literally did nothing.

[59] Ineffective counsel leading to unfair process involves the actual or constructive denial of the assistance of counsel (*Joanisse*, para. 78). Examples include representing co-accused where a real conflict of interest arises: *R. v. Widdifield*, [1995] 25 O.R. (3d) 161; where counsel was impaired throughout the trial: *R. v. Cook* (1980), 53 C.C.C. (2d) 217 (Ont. C.A.); failure to advocate for the client by pressing for rejection of the complainant's evidence: *R. v. J.B.* at para 6. In such cases, it is not necessary to demonstrate that, but for the ineffective representation by counsel, the outcome could have been different (*R. v. Widdifield*. at p. 173; *Joanisse* at para. 76; *R. v. Prebtani*, 2008 ONCA 735 at para. 140.)

[60] In this instance, counsel's errors and omissions prevented Mr. Ross from making full answer and defence to the Crown's case. For that reason, Mr. Ross did

not receive a fair trial. That is not to say that any one of the circumstances listed in paragraph 58 would suffice to impugn a conviction. It is the combination of factual circumstances, legal issues, as well as the errors and omissions of counsel that produced an unfair trial.

[61] In the result, Mr. Jewett's representation of Mr. Ross was ineffective, resulting in a miscarriage of justice. That miscarriage went both to the reliability of the verdict and the fairness of the trial.

[62] Relying on s. 686(5)(a) of the *Code*, Mr. Ross' counsel asks that this Court order a new trial by judge and jury. Being satisfied that a miscarriage of justice has occurred, I would so order, should the Crown be inclined to proceed with a renewed prosecution of Mr. Ross.

Conclusion:

[63] Accordingly, I would:

1. Admit the fresh evidence of Mr. Ross;

2. Find that a miscarriage of justice has occurred owing to ineffectiveness of counsel;

3. Find that the miscarriage of justice also produced an unfair trial, owing to the ineffectiveness of counsel;

4. Allow the appeal, quash the conviction and order a new trial, if the Crown were intent on proceeding with the prosecution.

[64] I would continue the present terms of Mr. Ross' recognizance until such time as Mr. Ross enters a plea in the Supreme Court.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Ross***, 2012 NSCA 56

Date: 20120605
Docket: CAC 356611
Registry: Halifax

Between:

Bradley Roderick Ross

Appellant

v.

Her Majesty the Queen

Respondent

- and -

Gary Jewitt

Intervenor

Revised decision: **The text of the original decision has been corrected according to the erratum dated June 6, 2012. The text of the erratum is appended to this decision**

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

Judges: Saunders, Oland and Bryson, JJ.A

Appeal Heard: April 17, 2012, in Halifax, Nova Scotia

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

Counsel: Stanley W. MacDonald, Q.C., for the appellant
Mark Scott, for the respondent
William L. Mahody, for the intervenor

Erratum::

[65] Page 3, paragraph 5, second line, where it reads “M.H.’s boyfriend”, it should read “M.A.’s boyfriend”.