NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Beck-Wentzell,* 2017 NSCA 11

Date: 20170127
Docket: CAC 451443
Registry: Halifax

Between:

Jared Peter Beck-Wentzell

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Bryson and Bourgeois, JJ.A.
Appeal Heard:	November 10, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Nicholaus Fitch, for the appellant Marian Fortune-Stone, QC, for the respondent

Reasons for judgment:

[1] On January 22, 2016, the appellant was convicted of one count of sexual assault contrary to s. 271 of the *Criminal Code*, against his common-law spouse. Prior to the hearing of this appeal, the victim made a motion to have the publication ban protecting her identity lifted. That request was granted on June 16, 2016, and, as such, her name, Shannon Graham, is used in this decision.

[2] The appellant challenges his conviction. He argues that the trial judge, Provincial Court Judge Paul Scovil, misapprehended a critical part of his evidence giving rise to an error justifying appellate intervention. He also submits that the trial judge failed to consider a defence he advanced at trial – honest but mistaken belief in consent.

Background

[3] The trial was not lengthy. The Crown called three witnesses, including Ms. Graham, and tendered a series of text message exchanges. The exchanges were between the appellant and Ms. Graham, as well as another Crown witness, and were sent shortly following the incident in question.

[4] Ms. Graham testified as to the nature of her interaction with the appellant on July 12, 2014. The appellant had arrived home in the early morning, having worked a backshift. She and the couple's infant son were still asleep together. Ms. Graham testified she awoke when the appellant entered the bedroom. He began to remove her sleepwear, indicating he wanted to have sex. She testified she told him she was not interested. According to Ms. Graham, the appellant did not stop, and despite her repeating "no" from "the beginning right 'till the end", he continued to engage in sexual intercourse with her.

[5] The appellant testified at trial and denied he sexually assaulted the complainant. Before this Court, the appellant submits that at trial, his evidence was that he did have sexual intercourse with Ms. Graham, but as soon as she said "no", he immediately stopped. The appellant says the trial judge was wrongly of the view that he had denied intercourse taking place. He submits this was a critical aspect of his evidence missed by the trial judge. In light of the statements contained in the text messages, the appellant says this led the trial judge to make an adverse credibility finding against him and directly led to his conviction.

Issues

[6] In his factum, the appellant sets out the issues as follows:

1. Did the learned trial judge err by misapprehending substantive evidence?
2. Did the learned trial judge err by not considering the defence of honest but mistaken belief in consent?

Analysis

[7] This Court's ability to allow an appeal of conviction is restrained by the powers conveyed in s. 686(1)(a) of the *Criminal Code* which provides:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

Did the learned trial judge err by misapprehending substantive evidence?

[8] Although the appellant submits that the trial judge's misapprehension of his testimony gave rise to a miscarriage of justice, in essence, he submits the conviction was unreasonable. In *R. v. Izzard*, 2013 NSCA 88, Beveridge, J.A. explained:

> [39] To test if a verdict is unreasonable or cannot be supported by the evidence, an appellate court must re-examine, and to some extent, re-weigh the evidence, and consider its effect. The question to be answered is: whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. An appellate court may also find a verdict unreasonable if a trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied upon by the judge in support of the inference or finding; or is shown to be incompatible with the evidence that is not contradicted or rejected by the trial judge (*R. v R.P.*, 2012 SCC 22 at para. 9).
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> [40] To obtain a remedy on appeal based on an allegation that a trial judge misapprehended the evidence, the appellant must show two things: first, that the

> trial judge, in fact, misapprehended the evidence – that is, she 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 evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in the decision to convict (see *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34).

[9] The appellant says the trial judge believed, wrongly, that he had denied having sexual intercourse with the victim. He says this critical error in the trial judge's decision is demonstrated in the following paragraph:

> [14] In relation to the evidence of the accused I find it incredible. I don't accept his evidence in relation to that, particularly in relation to what he has indicated took place. At first of his evidence was simply that not much was going on, that they had . . .he had come home and kissed them, they were making up [sic] and she said no, and that was it for him. There is no rationale in that scenario for the descriptions that we see of the text messages. Why, if that was the case, would he have said, "Why is that . . why are. . .do you think that's what I meant to do was rape you?", and that he was sorry. It makes no sense in that situation for him to say, "I was trying to get you in a better mood. By the time a realized what I had done it was already done. Baby, I'm sorry." And it would also make no sense for him to say in reply to Lisa Selig's text, "I never meant to go that far. I didn't mean for any of this, and I understand if you guys hate me." His descriptions of what the events took place in the context of everything else, and in particular in relation to what he had said to Lisa Selig, although that was not put to him by either the Crown or his lawyer, just simply does not make sense. I cannot accept his evidence. I find him incredible and I reject it.

[10] In support of his view that the trial judge misunderstood the evidence, the appellant points to a brief exchange between the court and defence counsel:

> **MR. FITCH**: I believe Mr. Beck-Wentzell's evidence was that he had asked her if she wished to continue having sex, not that no sex had occurred, and then when she said no that time that's when he …
>
> **THE COURT**: Well, I think he said that they were making out on the bed.
>
> **MR. FITCH**: Hm..mm.
>
> **THE COURT**: That's . . .depends on your definition, but certainly that would've been. . .if there was no consent to that, that would be a sexual assault, right?
>
> **MR. FITCH**: Hm..mm …

[11] This is not a case where the accused clearly and equivocally stated that sexual intercourse had taken place, and the trial judge equivocally found that he denied it occurring. Here, the trial judge did not misapprehend the evidence. Rather, he did what he could to assess the appellant's vague and contradictory testimony. In his direct evidence, the appellant made no reference to engaging in sexual intercourse, rather he and the victim had been "making out" and "getting into it". It was only during cross-examination, again after repeating they had been "kissing" and "got close", did he utter the single line "I asked her if she wanted to keep having intercourse".

[12] What was consistent in the appellant's testimony, however, was that once Ms. Graham uttered the word "No", that their sexual interaction stopped. In his submissions to the court below, defence counsel highlighted the appellant's evidence saying "Mr. Beck-Wentzell has suggested that no was only said the one time and once it was said it was stopped …". Counsel does not articulate what "it" was.

[13] In my view, the central issue for the trial judge to determine was not the type of sexual activity which was occurring, but whether it continued once Ms. Graham expressed her unwillingness to participate. She testified it continued. The appellant testified that it stopped immediately. That was the essential issue which necessitated an assessment of credibility.

[14] The passage cited above reflects the trial judge's attempt to reconcile the competing evidence. I read it as the trial judge concluding that the text messages from the appellant make no sense if, as he testified, everything had come to a halt after she said "No". With respect, it has nothing to do with what type of sexual activity had taken place. As alluded to by the trial judge in his exchange with counsel, the critical determination he had to make was whether sexual activity continued after Ms. Graham said "No". The trial judge accepted Ms. Graham's evidence on that point and rejected that of the appellant. It is not our role to reconsider that determination absent a clear error.

[15] The appellant has not demonstrated that the trial judge misapprehended the evidence. Nor is the verdict unreasonable. There was ample evidence that non-consensual sexual activity took place, laying the foundation for a conviction under s. 271. I would dismiss this ground of appeal.

Did the trial judge err by not considering the defence of honest but mistaken belief in consent?

[16] The appellant relies on two of the text messages he sent to Ms. Graham as being relevant to the defence of honest but mistaken belief in consent. In the factum, his Counsel explains:

> 13. The air of reality in the defence can be seen in the exhibit showing the text messages between the complainant and the Appellant. On page 88 of the transcript I explain the position.
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> > "Mr. Fitch: . . . and just above that message is Jarrett's, Do you think that's what I meant to do was rape you? And then on the following page, I didn't mean to, I was trying to get you in a better mood. These are both messages that go to the *mens rea* necessary to convict Mr. Beck-Wentzell …"
>
> 14. The messages go to the *mens rea* of the accused which is a necessary element for conviction. The defence clearly has an air of reality and should have been considered.

[17] The core of the appellant's argument is that because his intention was to put Ms. Graham in a better mood, not sexually assault her, that he did not have the necessary *mens rea* to support a conviction. This, he says, gives rise to the defence of honest but mistaken belief in consent.

[18] There is no merit to this argument. In *R. v. Davis*, [1999] 3 S.C.R. 759, Chief Justice Lamer described the defence of honest but mistaken belief in consent as follows:

> **81** Before the defence can be considered, there must be sufficient evidence for a reasonable trier of fact to conclude that (1) the complainant did not consent to the sexual touching, and (2) the accused nevertheless honestly but mistakenly believed that the complainant consented: see *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 648, per McLachlin J. In other words, given the evidence, it must be possible for a reasonable trier of fact to conclude that the *actus reus* is made out but the *mens rea* is not. In these circumstances, the defence is said to have an "air of reality", and the trier of fact, whether a judge or jury, must consider it. Conversely, where there is no air of reality to the defence, it should not be considered, as no reasonable trier of fact could acquit on that basis: see *R. v. Park*, [1995] 2 S.C.R. 836, at para. 11.
>
> **82** In determining whether there is an air of reality to the defence, the trial judge should consider the totality of the evidence: see *Osolin*, *supra*, at p. 683, per Cory J.; *Park*, *supra*, at para. 16. The role of the judge in making this

determination was set out by Major J. in *Ewanchuk*, *supra*, at para. 57. He held that the judge should make "no attempt to weigh the evidence". The sole concern is "with the facial plausibility of the defence", and the judge should "avoid the risk of turning the air of reality test into a substantive evaluation of the merits of the defence". Care should be taken not to usurp the role of the trier of fact. Whenever there is a possibility that a reasonable trier of fact could acquit on the basis of the defence, it must be considered.

83 It is not necessary for the accused to specifically assert a belief that the complainant consented. By simply asserting that the complainant consented, either directly under oath or through counsel, the accused is also asserting a belief that the complainant consented: see *Park*, *supra*, at para. 17. However, the accused's mere assertion will not give the defence an air of reality: see *R. v. Bulmer*, [1987] 1 S.C.R. 782, at p. 790.

84 While this is evidence of a belief in consent, it is not sufficient evidence of an honest but mistaken belief in consent. Sexual assault is not a crime that is generally committed by accident: see *Pappajohn*, at p. 155, per Dickson J.; *Osolin*, at pp. 685-86, per Cory J. In most cases, the issue will be simply one of "consent or no consent", and there will be only one of two possibilities. The first is that the complainant consented, in which case there is no *actus reus*. The second is that the complainant did not consent, and the accused had subjective knowledge of this fact. Here, the *actus reus* is made out, and the *mens rea* follows straightforwardly.

. . .

86 Although the accused's mere assertion that the complainant consented will not be sufficient evidence to raise the defence, the requisite evidence may nevertheless come from the accused: see *Park*, *supra*, at paras. 19-20, per L'Heureux-Dubé J.; *Osolin*, *supra*, at pp. 686-87, per Cory J., and pp. 649-50, per McLachlin J. It may also come from the complainant, other sources, or a combination thereof. In *R. v. Esau*, [1997] 2 S.C.R. 777. McLachlin J., dissenting in the result, accurately conveyed the nature of this evidence at para. 63:

> **There must be evidence not only of non-consent and belief in consent, but in addition evidence capable of explaining how the accused could honestly have mistaken the complainant's lack of consent as consent. Otherwise, the defence cannot reasonably arise. There must, in short, be evidence of a situation of ambiguity in which the accused could honestly have misapprehended that the complainant was consenting to the sexual activity in question.** (emphasis added)

[19] I have carefully reviewed the record. At no time in his evidence did the appellant allege that he believed Ms. Graham was consenting to sexual activity.

Nor was there an explanation offered as to how the situation was sufficiently ambiguous that the appellant held the honest belief Ms. Graham was in agreement with the sexual contact continuing. The appellant's subjective hope that having sex with Ms. Graham would put her in a better mood has nothing to do with her actual consent, or his reasonable belief that she was consenting.

[20] Given the evidence and submissions before him, the trial judge did not err in failing to consider the defence of honest but mistaken belief in consent. I would dismiss this ground of appeal.

Conclusion

[21] For the reasons above, I would dismiss the appeal.

Bourgeois, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.