NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Keats*, 2018 NSCA 15

Date: 20180306
Docket: CAC 447080
Registry: Halifax

Between:

James Duncan Keats

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 Criminal Code

Judges:	Fichaud, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	September 25, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	James Keats, appellant in person Jennifer MacLellan, Q.C., for the respondent

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Reasons for judgment:

Introduction

[1] In December 2015, a jury convicted Mr. Keats of two counts of sexual assault. The assaults were committed while Mr. Keats was acting in his capacity as a paramedic. He appeals his convictions.

[2] For these offences, Mr. Keats was sentenced to thirty months' incarceration to be served concurrently with a four-year term he was serving for an earlier conviction for sexual assault, also committed during his duties as a paramedic.

[3] The Crown appealed against the 30-month concurrent sentence. Although the conviction and sentence appeals were filed separately, they were heard the same day by the same panel.

[4] I am of the view that there is no merit to Mr. Keats' conviction appeal. I would dismiss his appeal. My reasons for doing so follow.

[5] This Court's decision on the Crown's sentence appeal was released separately (see *R. v. Keats*, 2018 NSCA 16).

Issues

[6] Mr. Keats was self-represented on his conviction appeal, but represented by counsel in his sentence appeal. Although aware of his requirement to file a factum in support of his appeal, Mr. Keats failed to do so. However, the panel permitted him to make oral submissions respecting his complaints of error, which he did.

[7] The Crown filed a brief, anticipating from both Mr. Keats' Notice of Appeal and his unsuccessful application for state-funded counsel (*R. v. Keats*, 2017 NSCA 7) the grounds of appeal Mr. Keats intended to raise. The Crown's efforts are acknowledged and were helpful to the Court.

[8] The theme of Mr. Keats' complaints is that: 1) his lawyers did not present all the information he wanted presented to the jury; and, 2) the trial judge was biased and did not properly instruct the jury.

[9] I will set out the applicable standard of review for each issue under my analysis.

Background

[10] To understand Mr. Keats' complaints, it is not necessary to set out extensive background. However, some is helpful for context.

[11] At trial, Mr. Keats faced a charge of sexual assault contrary to s. 271(1)(a) of the *Criminal Code* against four female complainants. On December 5, 2015, the jury found Mr. Keats guilty on two counts. One involving complainant TH; the other ML. He was acquitted on the other two counts. He was sentenced on October 20, 2016.

[12] The incident involving TH happened in January 2013. She suffered a leg injury and was taken to a nearby rural hospital. Attending medical professionals referred her to Halifax for surgery. Transport by ambulance was required. Mr. Keats was one of two attending paramedics. He rode in the back of the ambulance with TH. The other paramedic drove.

[13] Shortly after transport got underway, Mr. Keats told TH he was going to check her vitals. She was strapped into a gurney. TH testified that Mr. Keats put his stethoscope under her shirt and moved it back and forth across her breasts. Then he put the stethoscope down her pants, inside her underwear and moved it across her pubic hair. TH said Mr. Keats assaulted her again in a similar manner just prior to their arrival in Halifax.

[14] While at the Halifax hospital, TH told her husband that she had been felt up or groped in the ambulance. TH had sent a text to a close friend also telling her what had happened.

[15] TH did not report the incidents to the police until some months later. She explained that it was her first time in an ambulance and she was not certain what was appropriate. What prompted her reporting to the police was reading about Mr. Keats' other criminal matters in the newspaper.

[16] The incident involving ML happened on April 21, 2013. ML had a history of mental and physical health challenges. She was in distress when a 911 call was made on April 21, 2013. Mr. Keats was one of two paramedics who responded to the 911 call. She was transported to the hospital by ambulance due to her mental health state. Mr. Keats was scheduled to drive the ambulance; however, he convinced his partner to swap roles on the pretext he had an interest in mental health and had recent training in this area. ML was reportedly expressing suicidal

ideation at the time and was in a vulnerable state. She also suffered from endometriosis and was holding her stomach due to pressure from this medical condition. She also told Mr. Keats she had a sore breast.

[17] While alone with ML in the back of the ambulance, Mr. Keats told her he wanted to check her breathing. She was on the gurney and strapped in. ML said Mr. Keats asked her to lift her bra and shirt, and he then fondled her breasts. He then asked about her abdominal pain and requested that she pull down her pants and underwear. She started to and he asked her to pull them down further. She did to the point her crotch area was completely exposed. She said he palpated her stomach and kept moving his hands downward until he touched her vagina. He was not wearing gloves. ML had not complained about her stomach pain extending to her vaginal area. She said this interaction left her humiliated, embarrassed and scared.

[18] After her arrival at the hospital, ML shared what happened with others. However, like TH she did not report the incident to the police until some months later when she heard about Mr. Keats' other offences in the news.

[19] The evidence of TH's and ML's earlier disclosures was used by the Crown as narrative and to rebut the allegation of recent fabrication due to media attention. In his jury charge, the judge properly instructed the jury on the limits of this evidence.

[20] The Crown called expert evidence in standards of paramedic care. There is no need, in my view, to set this out. Suffice to say, the tenor of the expert evidence was that aspects of Mr. Keats' interventions in the ambulance were not in keeping with appropriate standards.

Analysis

Ineffective assistance of counsel

[21] First, I will address Mr. Keats' complaint that his trial counsel did not present all the information he wanted presented to the jury. Put another way, Mr. Keats claims ineffective assistance of counsel.

[22] For good reason, appellate courts approach claims of ineffective representation with caution. Appeals are not intended to serve as a forensic assessment of a defence counsel's trial performance. There is a presumption that

counsel's conduct falls within a wide range of professional assistance, and allegations of incompetence are determined by a reasonableness standard. To succeed on this ground, Mr. Keats must establish that (1) the acts or omissions of counsel constituted incompetence and, (2) a miscarriage of justice resulted (see *R. v. Fraser*, 2011 NSCA 70; *R. v. Ross*, 2012 NSCA 56).

[23] As noted, Mr. Keats did not file a factum. He did not seek to introduce any fresh evidence. His oral submissions were brief and not persuasive.

[24] He contended there were some "bits" of information he wanted his defence counsel to focus on, which he said they did not. For example: a diagram of the stretcher (gurney) in the back of the ambulance depicting where the straps/restraints were located. In his view, although unexplained how, this could demonstrate it was physically impossible to put his hands where the complainants said he did.

[25] On appeal and at trial, Mr. Keats maintained that his touching of TH and ML was for a medical purpose—not for a sexual purpose. He thought his defence counsel did not do enough at trial to emphasize this point, including in their cross-examination of Crown witnesses. Apart from this general complaint, nothing of any substance was offered by Mr. Keats.

[26] Having reviewed the record, I agree with the Crown—there is nothing in the record to indicate incompetence by defence counsel or a miscarriage of justice based on their conduct. I would dismiss this ground of appeal.

Bias and improper instruction to the jury

[27] Mr. Keats contends that the trial judge, Justice Felix A. Cacchione, was biased against him, and, further, he did not properly instruct the jury. I will deal with these complaints together as Mr. Keats seemed to mesh the two. First, I will set out the applicable legal principles.

[28] Judges are presumed impartial. The test for bias was recently reviewed in *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24. Saunders, J.A. wrote:

> [39] First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of

> proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.
>
> [40] The "test" regarding what constitutes a reasonable apprehension of bias appears in the oft-quoted dissenting judgment of de Grandpré, J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at ¶40:
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> > …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, that test is "what would an informed person, viewing the matter realistically and practically—…conclude? …

[29] When assessing the sufficiency of a trial judge's instruction to a jury, an appellate court takes a functional and contextual approach. The instructions are to be reviewed as a whole, not minutely dissected. They are to be reviewed in the broader context of the evidence, live issues at trial, and submissions from counsel. Substance prevails over form (see *R. v. Daley*, 2007 SCC 53 and *R. v. Araya*, 2015 SCC 11).

[30] Mr. Keats was entitled to a properly instructed jury. Instructions need to be adequate, not perfect. The way a trial judge instructs the jury and relates the evidence to the law is discretionary; however, the instructions must equip the jury such that the evidence is left with them in a way which allows them to fully appreciate the issues and defences advanced (see *Daley* and *R. v. Melvin*, 2016 NSCA 52).

[31] Mr. Keats' ill-founded complaints of bias and improper instruction are rooted in his impression that when instructing the jury, the trial judge gave his own opinion and painted Mr. Keats in an unnecessarily bad light. Mr. Keats points to nothing in the record that supports this contention. In my view, he cannot. There is simply no basis to suggest either bias or an error in instruction.

[32] The trial judge gave thorough and proper instruction to the jury. He carefully reviewed the evidence and instructed them on the law. He related the evidence to the issues the jury had to decide. He fulfilled his obligation to equip the jury such that the evidence was left with them in a way which allowed them to fully appreciate the issues and defences advanced.

[33] Seeing no merit to these complaints, I would also dismiss this ground of appeal.

Conclusion

[34] I would dismiss the appeal against conviction.

Van den Eynden, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.