NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Symonds*, 2018 NSCA 34

Date: 20180424
Docket: CAC 464147
Registry: Halifax

Between:

Markeit Symonds

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4(2) of the *Criminal Code*

Judges:	Bryson, Hamilton and Bourgeois, JJ.A.
Appeal Heard:	January 30 and 31, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Bryson and Hamilton, JJ.A. concurring
Counsel:	Luke A. Craggs, for the appellant Mark Scott, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Reasons for judgment:

[1] In the Provincial Court, counsel for the appellant Markeit Symonds entered a guilty plea on his behalf to procuring a person for sexual services. The appellant was subsequently sentenced to four years incarceration and subject to ancillary orders including a 20-year order under the *Sex Offender Information Registration Act* ("*SOIRA*").

[2] The appellant now challenges his conviction and seeks a new trial on the basis that his guilty plea was not valid and gives rise to a miscarriage of justice. He says his trial counsel's incompetence was the genesis of the miscarriage of justice, and moves to introduce fresh evidence.

[3] The Court received affidavit evidence from the appellant, his mother and brother, as well as videotape evidence depicting interaction between the appellant and his trial counsel in the Provincial Court holding cells on two dates. The respondent filed affidavits in response from the appellant's trial counsel, Mark Bailey, and Crown Prosecutor Carla Ball. *Viva voce* evidence was heard from the affiants.

[4] For the reasons that follow, I am satisfied the appellant's guilty plea was valid and no miscarriage of justice arises from his conviction.

PROCEDURAL BACKGROUND

[5] On March 16, 2017, the appellant appeared before Provincial Court Judge Michael Sherar. His counsel, Mr. Bailey, entered a guilty plea to a single count alleging that between August 3rd and 9th, 2016, the appellant did procure a person, B.S., to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1) of the *Criminal Code*, did recruit, hold, conceal or harbour B.S., or exercise control, direction or influence over her movements, contrary to subsection 286.3(1) of the *Code*. It is this guilty plea and resulting conviction that the appellant now challenges.

[6] To set the stage for the analysis to follow, it is helpful to canvass the history of the proceedings. The appellant was originally charged with a number of offences, all arising from events which occurred on August 7, 2016. The Information sworn in October 2016, alleged that the appellant

- Did procure a person under the age of 18 to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1) of the *Criminal Code*, did recruit, hold, conceal or harbour a person under the age of 18, or exercise control, direction or influence over her movements, contrary to subsection 286.3(1);

- Did knowingly advertise an offer to provide sexual services for consideration, contrary to section 286.4;

- Did receive a financial or other material benefit, knowing it was obtained or derived directly or indirectly from the commission of an offence under subsection 286.1(2), contrary to subsection 286.2(2);

- Did unlawfully receive a financial or other material benefit, knowing it that it resulted from the commission of an offence under subsection 279.011(1), contrary to section 279.02;

- Did recruit, transport, transfer, harbour or exercise control, direction or influence over the movements of a person under the age of 18, for the purpose of exploiting her or facilitating her exploitation, contrary to s. 279.011(1);

- Did unlawfully assault a person under the age of 18, contrary to section 266; and

- Did unlawfully utter a threat to a person under the age of 18, to cause bodily harm or death to said person, contrary to s. 264.1(1)(a).

[7] On October 7, 2016, the appellant made his first appearance in Provincial Court. He was represented at that time by Ms. Bevin who advised that Mr. Bailey had been retained and she was appearing at his request. The court was advised that the parties had reached agreement on satisfactory bail terms. After canvassing the release terms with the appellant, including a prohibition from having direct or indirect contact with any female between 10 and 18 years of age, the court granted bail upon the terms requested.

[8] Over the next several months, Mr. Bailey appeared before the court without the appellant in attendance. The appellant had signed a designation of counsel. No issue has been raised with respect to the appellant's absence from a number of appearances. Court transcripts show the following attendances

- On October 24, 2016, Mr. Bailey appeared and asked that election and plea be set over due to Crown disclosure not having been received;

- On December 5, 2016, Mr. Bailey again asked for the matter to be set over given that "apart from some initial preliminary disclosure", he hadn't received further disclosure from the Crown's office;

- On January 31, 2017, Mr. Bailey advised the court that additional disclosure had just been received. He entered an election for trial by Supreme Court judge alone, and requested a preliminary inquiry be set. The court set the preliminary inquiry for March 16, 2017, and a focus hearing for February 23, 2017;

- On February 23, 2017, Mr. Bailey asked that the focus hearing be set over, indicating to the court that he and Ms. Ball had been having discussions which "may affect the preliminary inquiry going forward";

- On March 2, 2017, Mr. Bailey requested that the focus hearing be set over again due to being unable to conclude discussions with the Crown;

- On March 9, 2017, the parties returned for a focus hearing. Mr. Bailey advised the court that he had been having ongoing discussions with the Crown. He further stated: "*I met with Mr. Symonds yesterday. He's considering his options at this point with respect to a potential resolution. I'm meeting with him either over the weekend or Monday morning. We'd like to return on Tuesday, the 14th of March . . .*";

- On March 14, 2017, the matter returned to court for a focus hearing. Mr. Bailey stated: "*I can confirm at this point we've reached a resolution. So the anticipated plan for Thursday will be a re-election will be done, a guilty plea will be entered to a certain count on the information, and then we'll be requesting a pre-sentence report.*"

[9] On the evening of March 14, 2017, the appellant was arrested and charged under s. 145 of the *Code* with failing to comply with the terms of his bail conditions. Specifically, it was alleged that police attended at the appellant's home that evening and discovered him to be in the presence of two females under the age of 18.

[10] On March 16, 2017, the appellant and Mr. Bailey appeared in court. A guilty plea was entered to the s. 145 charge. Its validity is not being challenged on appeal. After the first count on the original Information was amended to remove

reference to the victim being under the age of 18, Mr. Bailey stated: "*And I do have instructions to tender a guilty plea to that amended count number 1. I reviewed 606 with Mr. Symonds. He's confirmed to me that he's making this plea voluntarily, and in doing so he understands he's giving up his right to a trial, that he's admitting the essential elements of the amended offence, and that Your Honour is not bound to any joint recommendations as to sentencing*."

[11] Neither Mr. Bailey nor the judge invited the appellant to confirm the guilty plea or the representations made. The appellant said nothing. A conviction was entered. The Crown did not proceed with the remaining counts on the Information.

[12] The matter was adjourned to March 22, 2017 for sentencing. The Crown read an agreed statement of facts. After doing so, Mr. Bailey indicated there was "no dispute" as to the facts alleged. Neither Mr. Bailey nor the judge asked the appellant to confirm his agreement with the facts as stated by the Crown prosecutor. The agreed facts as conveyed by the Crown included

- B.S. was a ward of the Department of Community Services and had just turned 16 years of age;
- On August 4, 2016, B.S was placed at Sullivan House, a residential placement for girls in the temporary or permanent care of the Department. She met G.W., another resident, who was 15 years of age;
- G.W. introduced B.S. to her 20-year-old boyfriend, the appellant. He lived nearby;
- On August 6, 2016, B.S. went with the appellant to his house. He offered her marijuana and they got high. They had consensual vaginal and oral sex. The appellant recorded the encounter on his cellphone;
- On the evening of August 7, 2016, the appellant and two friends went to Sullivan House. He showed his girlfriend G.W. the video of him and B.S. having sex. She was angry;
- G.W. approached B.S. and told her the appellant wanted her to leave with him. B.S. did not want to go, but was afraid G.W. would beat her up;
- B.S. left with the appellant. G.W. had packed B.S.'s bag with a number of items, including a knife, lingerie, clothing and a toothbrush. B.S. was told to wear high heel shoes;

- Surveillance captured B.S. leaving Sullivan House with the appellant and his two friends;
- The appellant took B.S. to his home, and then to a hotel. He placed an escort ad on the website "Backpages" advertising the sale of B.S.'s sexual services;
- At the hotel, the appellant and B.S. went directly to a room. There was another female there, and they were then joined by two different men. Everyone took pills;
- The appellant took B.S into the bathroom and took photos of her on his cellphone. She was wearing a bra and thong;
- The appellant received a number of calls in response to the ad. B.S. was passed the phone to talk to prospective clients. After an hour, the appellant told B.S. she had a job;
- The appellant explained to B.S. that the job would be an hour or hour and a half and she would charge $250 an hour. She was told to get the money upfront, and give it to him when she was done;
- The appellant and B.S. left for the job in a taxi, but could not find the address. They walked back to the hotel. The appellant was angry and smashed B.S. across the face with his cellphone, punched her in the back and pushed her. He called B.S. various names and grabbed her neck. She was crying;
- At the hotel, B.S. said she wanted to go home. The appellant tried to arrange more calls;
- At about 5:30 a.m., B.S., the appellant and the other female went outside for a cigarette. Police officers were present and recognized B.S. as being the 16-year-old girl reported missing from Sullivan House. She told them she wanted to go home. The police returned her to Sullivan House; and
- At about 7:30 a.m., surveillance showed the appellant going to Sullivan House. Staff told him to leave the property.

[13] The court then proceeded to sentencing. Counsel advised that they were jointly recommending a four-year custodial sentence. It is worthy of note that the amendment to the procurement charge to remove reference to the victim being under the age of 18 avoided a mandatory minimum sentence of five years, see s.

286.3(2). The judge heard submissions from both the Crown and Mr. Bailey and, prior to imposing sentence, offered the appellant an opportunity to address the court. The appellant took the opportunity and said: "*I'm sorry for everything I have done, and hopefully this changes my life. And it is. Jail sucks. So that's it*".

[14] The court imposed the recommended term of incarceration of four years. Several ancillary orders were made including a 10-year firearms prohibition, a DNA order and a 20-year *SOIRA* order placing the appellant on the sex offender registry.

ISSUE

[15] In his Notice of Appeal, the appellant sets out the following grounds of appeal:

> 1.The Appellant's conviction was a miscarriage of justice caused by the ineffective representation of his trial counsel, including but not limited to the following misconduct:
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> (a) Undertaking plea bargaining without instructions from the Appellant;
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> (b) Failing to provide the Appellant with the disclosure materials necessary to properly understand the nature of the jeopardy he faced;
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> (c) Signing a Statement of Admissions pursuant to s. 655 of the *Criminal Code* without the Appellant's instructions or authorization;
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> (d) Entering a guilty plea on behalf of the Appellant without instructions and without properly apprising him of the significance of a guilty plea, the crown's burden of proof, possible defences to the charges and doing so in a manner that was hasty and did not permit the Appellant to properly understand the jeopardy he faced;
>
> (e) Failing to advise the Appellant of the full jeopardy he faced, including failing to advise of a mandatory order that the Appellant register as a sex offender pursuant to the *Sex Offender Information Registration Act*.

[16] In his factum, the appellant restates the issue before the Court as follows:

> Mr. Symonds alleges his conviction is a miscarriage of justice that was caused by Mr. Bailey's ineffective assistance. He carries the burden of proof on the balance of probabilities. He must establish both Mr. Bailey's incompetence and a causal link between this incompetence and a miscarriage of justice.

[17] This Court's ability to intervene in the face of a miscarriage of justice is found in s. 686(1)(a) of the *Code*. That section provides:

> s. 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
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> (iii) on any ground there was a miscarriage of justice.

[18] An invalid plea, caused by the incompetence of trial counsel or otherwise, will give rise to a miscarriage of justice. As such, the central issue for this Court to determine is whether the guilty plea accepted by the court below was valid. In doing so, we must assess whether the plea was unequivocal, voluntary and informed.

GENERAL PRINCIPLES

[19] There does not appear to be disagreement with respect to a number of foundational principles. It is helpful to set them out before delving into the more specific issues that arise in this matter.

Guilty pleas

[20] In *R. v. Henneberry*, 2017 NSCA 71, this Court recently re-iterated a number of general principles relating to guilty pleas in the context of an appellant's request to have her plea set aside. In paragraphs 12 through 20, Justice Beveridge noted

- A guilty plea in open court is a formal admission of the essential elements of an offence;
- A trial judge can, but need not, conduct an inquiry regarding the validity of a guilty plea prior to acceptance. Although s. 606 of the *Code* encourages inquiry, failure to do so does not invalidate the plea;
- Before sentence is passed, a trial judge has a discretion to permit an accused to withdraw a guilty plea;
- An appellate court can, for "valid grounds", permit an appellant to withdraw a guilty plea. The circumstances which may give rise to valid

grounds are broad, but absent a legal error in a withdrawal application before a trial judge, the power of an appeal court to permit withdrawal is tied to a prevention of a miscarriage of justice (s. 686(1)(a)(iii) of the *Code*);

- The onus is on the appellant to demonstrate on a balance of probabilities that their plea was invalid. To be valid, a plea must be voluntary, informed and unequivocal. In *R. v. T.(R.)*. (1992), 10 O.R. (3d) 514, Justice Doherty of the Ontario Court of Appeal wrote:

> [14] To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea: *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 371, 37 C.C.C. (3d) 1 at p. 52; Law Reform Commission of Canada Working Paper No. 63, "Double Jeopardy Pleas and Verdicts" (1991) at p. 30.
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> …
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> [16] I will first address the voluntariness of the appellant's guilty pleas. A voluntary plea refers to the conscious volitional decision of the accused to plead guilty for reasons which he or she regards as appropriate: *R. v. Rosen*, [1980] 1 S.C.R. 961 at p. 974, 51 C.C.C. (2d) 65 at p. 75. A guilty plea entered in open court will be presumed to be voluntary unless the contrary is shown: Fitzgerald, The Guilty Plea and Summary Justice, supra, at p. 71.
>
> [17] Several factors may affect the voluntariness of a guilty plea. None are present in this case. The appellant was not pressured in any way to enter guilty pleas. Quite the contrary, he was urged by duty counsel not to plead but to accept an adjournment. No person in authority coerced or oppressed the appellant. He was not offered a "plea bargain" or any other inducement. He was not under the effect of any drug. There is no evidence of any mental disorder which could have impaired his decision-making processes. He is not a person of limited intelligence.
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> [18] In his affidavit the appellant asserts that he was anxious and felt himself under pressure when he entered his pleas. No doubt most accused faced with serious charges and the prospect of a substantial jail term have those same feelings. Absent credible and competent testimony that those emotions reached a level where they impaired the appellant's ability to make a conscious volitional choice, the mere presence of these emotions does not render the pleas involuntary. (Emphasis added)

- A voluntary plea is also one that is not coerced, rather arrived at by the accused's free will. It is a plea untainted by improper threats, bullying or any improper inducement to plead guilty.

[21] It is further uncontested that to be informed, a guilty plea must be based upon the accused understanding the nature of the charges faced, the legal effect of a guilty plea and the consequences arising therefrom.

Ineffective assistance of counsel

[22] The principles relating to claims of ineffective assistance of counsel are also not in dispute. These were set out by Saunders, J.A. in *R. v. West*, 2010 NSCA 16:

> [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.
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> [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. (Emphasis added)

See also *R. v. Fraser*, 2011 NSCA 70, *R. v. Gogan*, 2011 NSCA 105, *R. v. G.K.N.* 2016 NSCA 29.

Receipt of Fresh Evidence

[23] Typically, when an appellant makes an allegation of ineffective assistance of trial counsel, it is accompanied by a motion to adduce fresh evidence. The test for the admission of fresh evidence is well-known. Section 683(1) of the *Code* allows this Court to accept fresh evidence "where it considers it in the interests of justice" to do so. In *R. v. Palmer*, [1980] 1 S.C.R. 759 the Supreme Court set out four factors which govern that analysis:

> 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.
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> 3. The evidence must be credible in the sense that it is reasonably capable of belief.
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> 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] It is also well-established that where an appellant's complaints are focused on the fairness of the trial process itself, that fresh evidence may be accepted for that purpose. This was explained by the Ontario Court of Appeal in *Truscott (Re)*, 2007 ONCA 575:

> [85] The second category of fresh evidence that may be tendered on appeal is not directed at re-litigating factual findings made at trial, but instead is directed at the fairness of the process that produced those findings. Where an appellant proffers this kind of evidence on appeal, he or she attempts to demonstrate that something happened in the trial process that materially interfered with his or her ability to make full answer and defence. An appellant claims that the verdict is rendered unreliable because the unfairness of the process denied the appellant the opportunity to fully and effectively present a defence and to challenge the Crown's case. When this kind of fresh evidence is received and acted on in the court of appeal, the conviction is quashed as a miscarriage of justice. The miscarriage of justice lies in the unreliability of a verdict produced by a fatally flawed process.

See also *R. v. Assoun*, 2006 NSCA 47 and *R. v. Ross*, 2012 NSCA 56.

[25] It is this second category in which the fresh evidence adduced on this appeal falls.

POSITION OF THE PARTIES

The appellant

[26] The appellant has launched a multi-pronged attack on the validity of the guilty plea. He submits it was neither unequivocal, voluntary nor informed and, as such, gives rise to a miscarriage of justice. He says the miscarriage arose due to the incompetence of Mr. Bailey in the course of his representation.

[27] The appellant says the plea was not unequivocal as he never intended, nor wanted to admit guilt. He says he continued to assert his innocence and told his counsel he wanted to proceed to the preliminary inquiry. It is asserted Mr. Bailey negotiated the plea bargain, entered a guilty plea and agreed to facts for sentencing purposes without the appellant's instructions and contrary to his stated wishes.

[28] Key to the appellant's argument that Mr. Bailey acted without his instruction was the videotape evidence from March 16th (the date of the guilty plea) and March 22nd (the sentencing hearing). Both videos are approximately four minutes in length. The appellant asserts that the contents speak for themselves, and demonstrate, given their brevity, that he did not give instructions to plead guilty or agree to the facts submitted to the sentencing judge.

[29] The appellant couples this argument with the affidavit evidence provided by Mr. Bailey. He points out that Mr. Bailey's original affidavit filed in response to the motion for fresh evidence differs substantially from an amended affidavit filed on the eve of the appeal hearing (the appellant consented to the late admission of the second affidavit). In the original affidavit, Mr. Bailey asserted that during his final office meeting with the appellant on March 13th, his client had not yet finalized his decision to plead guilty. They planned to meet on March 15th, the day prior to the preliminary inquiry. In the amended affidavit, Mr. Bailey asserts that "*during the March 13, 2017 meeting, I received clear and unequivocal instructions from Mr. Symonds that he wished to change his plea to guilty and proceed to sentencing*".

[30] The appellant argues that Mr. Bailey's evidence should be viewed with skepticism given the changes made to his sworn evidence. He asserts Mr. Bailey modified his evidence surrounding the receipt of instructions after the video evidence demonstrated that the receipt of instructions while in cells was implausible given the briefness of their exchange.

[31] The appellant also argues the plea, if found to be validly given by him, was not voluntary. In his factum, the appellant says he was influenced by threats of additional charges being laid against him. The Court heard evidence surrounding the plea negotiations. In the course of email exchanges, the Crown Prosecutor advised that there were two potential "statutory rape" charges that could emerge if evidence was presented at the preliminary inquiry. This related to the appellant's sexual interactions with B.S and his girlfriend G.W. Counsel explains this in the appellant's factum:

> 68. It is already established that Mr. Bailey and Ms. Ball discussed resolving the matter with a guilty [plea] in the latter part of February 2017. On March 3, 2017 Ms. Ball emailed the Crown's position should Mr. Symonds plead guilty. She says in this email ". . .there are 2 statutory rapes that emerge on the facts that he would get committed on after a prelim if all the facts come out according to the Crown's file".
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> 69. Ms. Ball's use of the term "statutory rape" is presumably colloquial for a sexual interference or sexual assault premised on the assumption that Ms. [S], the complainant, and Ms. [W], Mr. Symonds's 15-year-old girlfriend would have testified to having sex with Mr. Symonds when they were too young to consent.
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> 70. These comments in Ms. Ball's email appears to have made it into the meetings that Mr. Bailey had with Mr. Symonds and his family in the following days. …
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> 71. In other words, Ms. Ball's email assertion that she would seek committal for two counts of "statutory rape" scared Mr. Symonds into considering pleading guilty to the charges that were currently before the court. Mr. Symonds' fear of being committed to stand trial on "statutory rape" charges was Mr. Bailey's cue to tell the crown and court Mr. Symonds was pleading guilty.

[32] It was acknowledged to this Court that given his age, and the ages of B.S. and G.W., that both girls were capable of consenting to sexual activity, and charges of "statutory rape" could not arise. In his factum, Counsel for the appellant concluded:

> 79. Even if the court operates on the premise that Mr. Symonds did instruct his lawyer to plead guilty and the guilty plea and sentencing on March 22, 2017 was done with Mr. Symonds understanding what he was admitting and its gravity, this court cannot escape the glaring misapprehension about the age of Ms. [S] and Ms. [W] and the jeopardy (or lack thereof) it created.
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> . . .
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> 81. Mr. Symonds relied on Mr. Bailey to provide him with accurate information about the Crown's case and the law. On the issue of Mr. Symonds' jeopardy of being committed to stand trial on "statutory rape" Mr. Bailey's information and advice was factually and legally wrong.

[33] Finally, the appellant says his plea was not informed. He asserts he did not have the opportunity to review any of the Crown disclosure and, in particular, the video statement taken from the complainant. He further says that he was not informed by Mr. Bailey of the mandatory 20-year *SOIRA* order arising from his conviction.

The respondent

[34] The respondent says the burden to set aside the guilty plea rests with the appellant and it has not been discharged. The plea was unequivocal, voluntary and informed.

[35] The respondent argues that to accept the appellant's assertions would mean that Mr. Bailey was not only incompetent, but was brazenly dishonest with the court on multiple occasions. This Court is asked to consider the implausibility of that assertion in light of the fresh evidence adduced and the record of the proceedings below.

[36] The respondent further submits that there is no credence to the appellant's claim that he did not understand the nature of the charges he faced or the resulting jeopardy.

[37] Finally, even if there were an error made regarding the potential for additional charges against the appellant in terms of his sexual encounters with B.S. and G.W., the respondent says this is immaterial. There is no evidence before the Court that the error influenced the appellant to accept the plea bargain. In sum, the respondent says there is no basis for this Court to find a miscarriage of justice and the appeal should be dismissed.

ANALYSIS

[38] As a preliminary matter, I am satisfied that it is appropriate to provisionally admit the fresh evidence offered by both parties. Given the allegations made, it is necessary to determine whether the appellant's conviction constitutes a miscarriage of justice. I turn now to the validity of the plea.

Was the guilty plea unequivocal?

[39] The appellant says that he did not instruct Mr. Bailey to enter a guilty plea on his behalf. He also says that he suffers from a learning disability and had difficulty understanding what was taking place during the critical court appearances.

[40] After considering the record and the evidence adduced before this Court, I conclude that the appellant did instruct his counsel to enter a guilty plea on his behalf. I found the appellant's *viva voce* evidence to be variable and unconvincing.

He first asserted that when he arrived in Court on March 22nd, he was surprised that it was a sentencing hearing, as he did not realize Mr. Bailey had entered a guilty plea on the 16th. Later, he testified that during the meeting in cells on the morning of the 16th, Mr. Bailey told him he would be entering a guilty plea that day; that he then heard Mr. Bailey enter the plea in the courtroom, and he was angry with him for doing so. The appellant's evidence concluded with an assertion that he may have told Mr. Bailey to plead guilty on March 16th, but he could not recall their conversation.

[41] I also have concerns with respect to certain aspects of Mr. Bailey's evidence. It is disconcerting that counsel swore an affidavit in which he asserted to the veracity of certain facts, only to make subsequent amendments on one of the critical aspects of this appeal – the nature and timing of instructions given to him by the appellant. The appellant's suggestions that Mr. Bailey ought to have known the seriousness of the allegations and ensured factual accuracy is not lost on me. That being said, Mr. Bailey's affidavit and *viva voce* evidence has remained consistent in asserting that he received clear instructions from his client to enter a guilty plea.

[42] Although whether that instruction was unequivocally given during the March 13th office meeting varied, other evidence remained unshaken. In particular, Mr. Bailey's evidence regarding his interaction with the appellant on March 15th, the day before the guilty plea, did not vary. In both affidavits he swore:

> 20. On Wednesday March 15, 2017, I appeared with Mr. Symonds in relation to the breach charge that he was arrested for on March 14, 2017. I spoke at length with Ms. Symonds and Mr. Justin Symonds at Halifax Provincial Court on March 15, 2017 before meeting with Mr. Symonds in cells. Both Ms. Symonds and Mr. Justin Symonds indicated to me that they understood that the new charges against Mr. Symonds would likely mean that he would not be in a position to obtain his release from custody pending the determination of his outstanding matters.
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> 21. I spoke with Mr. Symonds in cells on March 15, 2017. I previously discussed Mr. Symonds' matter with Ms. Ball and her position was that the Crown was opposed to his release. Given that the breach charges involved being in the presence of girls under the age of 18, the Crown would not be willing to release Mr. Symonds and would be seeking to revoke his existing bail.
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> 22. Mr. Symonds instructed me to consent to his remand until the following day which was intended to be the commencement of the preliminary inquiry. In addition, Mr. Symonds specifically instructed me to proceed with a guilty plea as previously discussed at the earliest opportunity. Mr. Symonds was expressing

> concerns about his incarceration at the Nova Scotia Correctional Facility and indicated to me that he wanted to start serving his sentence at the earliest opportunity. (Emphasis added)

[43] The only guilty plea which had been "previously discussed" was to the procurement charge. The appellant did not adduce evidence as to his discussion on March 15th with Mr. Bailey. There is no videotape of their interaction in cells. Other than his wavering evidence that he never instructed Mr. Bailey to enter a guilty plea, the appellant does not dispute Mr. Bailey's evidence that in addition to any instructions that may have been given on March 13th, confirmation was provided on the 15th.

[44] I am satisfied that the appellant gave Mr. Bailey instructions to enter a guilty plea prior to him doing so on March 16th. That does not, however, end the inquiry as to whether the plea was unequivocal in these circumstances.

[45] The question of whether the appellant sufficiently understood the process and the significance of instructing his counsel to plead guilty arises from two statements in his affidavit. He swore:

> 4. I have been diagnosed with a learning disorder and sometimes I have difficulty understanding things and need them to be re-stated or explained to me by someone I know in language I understand.

And

> 19. My court appearance that day (March 16, 2017) was in one of the large court rooms on the second floor of Halifax Provincial Court on Spring Garden Road. I sat on the prisoner's bench near the door to the lobby, Mr. Bailey was on the opposite side of the courtroom, and the prosecutor sat between us. I had difficulty hearing what Mr. Bailey and the prosecutor said. They both spoke quickly and the bits that I could hear I didn't understand. The only person I could hear clearly was the judge.

[46] The evidence elicited before this Court does not support a finding that the appellant, either due to disability or other reason, was adrift in the legal proceedings. He testified

- He recalled being arrested on October 5, 2016. He understood his *Charter* rights when read to him. He recalls an officer taking a statement from him; that she explained the charges; gave him some facts surrounding the alleged offences; and that he understood they were serious;

- He understood the bail conditions and terms of his recognizance when stated in court on October 7, 2016;
- He understood he had been charged with breaching his recognizance arising from the events of March 14, 2016, and understood the alleged facts giving rise to the charge;
- He understood Mr. Bailey would, on his instruction, enter a guilty plea on the breach charge on March 16, 2017 and recalls him doing so in court;
- He recalls the Crown prosecutor reading facts relating to the procurement charge to the court on March 22, 2017, and although he didn't agree, he understood what was being alleged; and
- He had no difficulty in understanding the contents of his affidavit filed with this Court.

[47] In light of the above, and in the absence of any independent evidence to support the existence and extent of a learning disorder or other disability impacting upon his level of comprehension, I reject the assertion that the appellant lacked sufficient comprehension to admit guilt, or was overwhelmed by the court process when the plea was entered.

Was the guilty plea voluntary?

[48] The appellant advanced two alternative arguments in the event this Court found that he did instruct counsel to enter a guilty plea. He says the plea was neither voluntary, nor informed.

[49] Two sources of concern give rise to the claim of involuntariness – the appellant felt pressured by his counsel to plead guilty; and he was induced to plead guilty on the basis of faulty information regarding the prospect of additional criminal charges if he did not do so.

[50] There is a presumption that the appellant's guilty plea, entered in open court and in his presence, is voluntary. However, it is rebuttable. As stated in *T.(R.), supra*, undue pressure exerted by counsel (or others) can lead to a plea being found to be involuntary. However, the feelings of pressure and emotional upheaval must have been sufficient to have impaired the appellant's ability to make a "conscious volitional choice". The mere presence of such emotions do not render a plea

involuntary unless credible and competent evidence establishes the pressure exerted overcame the appellant's free will.

[51] Further, the existence of plea bargaining does not automatically render a plea invalid. More is required to rebut the presumption of voluntariness. In *R. v. Barwick*, [2005] O.J. No. 5400, the Ontario Superior Court of Justice explained:

> 35 The plea must also be voluntary, in the sense that it is a conscious volitional decision of the accused to plead guilty for those reasons which he or she regards as appropriate. Ordinarily, a plea of guilty involves certain inherent and external pressures. Plea negotiations in which the prosecution pursues a plea of guilt in exchange for foregoing legal avenues open to it, or agrees not to pursue certain charges, do not render the subsequent plea involuntary. What is unacceptable is coercive or oppressive conduct of others or any circumstance personal to the individual that unfairly deprives the accused of free choice in the decision not to go to trial.

See also *R. v. King* [2004] O.J. No. 717 (C.A.) and *R. v. Meadus*, 2014 ONCA 445.

[52] It is important to note however, that a guilty plea may be found to be involuntary where an appellant was induced or motivated to plead guilty on the basis of inaccurate legal advice, particularly in the course of plea negotiations.

[53] In *R. v. Armstrong*, [1997] O.J. No 45, the appellant plead guilty on the mistaken belief she could receive a conditional discharge and thereby avoid a criminal record. Satisfied the plea was a result of faulty information conveyed by her counsel, it was vacated by the court. In *R. v. Hansen* (1977), 37 C.C.C. (2d) 371, the Manitoba Court of Appeal struck the appellant's guilty plea to second degree murder based on being satisfied incorrect advice from counsel constituted an improper inducement. See also *R. v. Venne*, 2015 SKQB 252, where the accused was permitted to withdraw her plea after the Crown sought a custodial sentence. The trial court accepted her evidence that her plea had been based on her lawyer's assurances she would receive a non-custodial sentence.

[54] As noted earlier, there is no doubt that Mr. Bailey and Ms. Ball were under the mistaken belief that his sexual activity with B.S. and G.W. was prohibited by law. In his factum, the appellant's counsel says this mistake was pivotal to the appellant's decision to plead guilty. However, the appellant himself provided no such evidence to support that assertion. In my view, that is fatal to the appellant's attack on the voluntariness of the plea. I will explain.

[55] As we know, the appellant's primary assertion was that he never instructed Mr. Bailey to enter a guilty plea. That being the case, it is perhaps not surprising that his evidence did not address his mental state or thought processes leading up to instructing his counsel. However, he still carries the burden of proof.

[56] Courts have consistently held that an accused has to demonstrate on a balance of probabilities that their plea was involuntary. Bald assertions that the accused's will was overcome by pressure by counsel or otherwise will not suffice. See *R. v. Sunshine*, 2016 SKCA 104; *R v. Garnier*, 2015 ABPC 195, and *R. v. Shaw*, 2015 ABCA 25, leave to appeal ref'd [2015] S.C.C.A. No. 108.

[57] The need for an appellant to adduce evidence also applies when he alleges he was improperly induced to plead guilty. In *R. v. Williams*, 2012 BCCA 314, the appellant sought to withdraw his guilty plea on the basis he was induced into improper plea negotiations. He provided no evidentiary basis to support his allegation. In rejecting his appeal, the court noted:

> 53 I am prepared to accept that Mr. Williams felt frustrated with aspects of how his cases were being handled. However, he has failed to establish one critical fact, namely, that it was that frustration that drove his decision to initiate plea discussions with the Crown, discussions that resulted in his pleading guilty to some charges in exchange for the Crown staying others and agreeing to seek a sentence that would result in Mr. Williams's immediate release.
>
> 54 Although the transcripts show that Mr. Williams expressed frustration and dissatisfaction with how his cases were being handled, I am not prepared to infer from those transcripts that his ultimate decision was the product of unintentional coercion or duress. In that regard, the lack of an affidavit from Mr. Williams is telling. It brings to mind the dictum of Lord Mansfield in *Blatch v. Archer* (1774), 1 Cowp. 63 at 65 (K.B.):
>
> > It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.
>
> See also: *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751 at paras. 25, 26.
>
> 55 There is no explanation as to why Mr. Williams, on whom the onus lies, has not provided an affidavit explaining why he entered into the plea agreement. His state of mind at the time he pleaded guilty is something particularly within his knowledge. I can only infer that he chose not to provide an affidavit because his evidence would not support the factual finding he seeks to have inferred.

[58] The appellant has provided no evidence that he plead guilty because he felt pressured by his lawyer. Further, and more critically in my view, the appellant has not provided any evidence to support the assertion that he only plead guilty because he was afraid of being charged with the sexual assault of two minor girls. Counsel asks this Court to draw that inference based on the record. I decline to do so.

[59] Firstly, the appellant bears the burden of establishing his plea was involuntary. He was in the best position to provide the necessary evidence as to his state of mind. He did not. Secondly, on this record, it is difficult to see how the misinformation pushed the appellant into a "bad deal". The plea bargain resulted in a four-year sentence on the amended count, avoiding the certainty of a minimum five-year sentence, or more, if convicted based on the original charge (under 18). The appellant, in accepting the plea bargain, further avoided the risk of conviction on the remaining six counts.

[60] The appellant has not met the burden of establishing his plea was involuntary.

Was the plea informed?

[61] The appellant says his plea was not informed for a number of reasons, including he did not know or agree to the facts upon which the plea was based, he had not received Crown disclosure, in particular the videotaped statement given by the complainant, and he was not aware of the mandatory *SOIRA* order. He lays these alleged failings at the feet of Mr. Bailey.

[62] It is important to note that this is not an instance where the Crown has failed to provide required disclosure. The appellant makes no such allegation. He says his counsel never provided him with disclosure, nor discussed with him the contents thereof. Mr. Bailey asserts otherwise. He says he discussed the contents of the Crown's disclosure with the appellant, and gave him the opportunity to review it, including a transcript of B.S.'s statement to police. Mr. Bailey acknowledges that the appellant repeatedly asserted B.S. was lying, but conversely repeatedly acknowledged his involvement in the charged offences. Mr. Bailey does acknowledge the appellant did not view the videotape of B.S.'s statement.

[63] In my view, the appellant's evidence in support of his claims is lacking. At best, they are bald assertions with no evidentiary foundation. Nowhere in his evidence does the appellant assert that he was unaware of the nature of the charges

laid against him. Nor does he assert that had he known the facts to be read into the record at sentencing, he would not have plead guilty. Similarly, he does not assert that had he known of the mandatory *SOIRA* order, he would have instructed his counsel differently.

[64] The appellant's evidence is silent as to what difference, if any, reviewing the videotape of B.S.'s statement would have made to his decision to plead guilty. Although he still asserts B.S. was lying, he does not elaborate about what, or how, that would have impacted on his decision.

[65] In *R. v. Riley*, 2011 NSCA 52, this Court was asked to set aside an appellant's guilty plea to a charge of producing marijuana on the basis that his trial counsel had failed to advise him of a mandatory firearms prohibition. In dismissing the appeal, the Court considered the direction of the Supreme Court in *R. v. Taillefer*, 2003 SCC 70, an instance of Crown non-disclosure. Beveridge, J.A. wrote:

> [34] … A voluntary and apparently informed plea was also struck in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70 where the Crown failed to fulfill its disclosure obligation. Taillefer and Duguay were jointly charged and convicted of first degree murder. The Quebec Court of Appeal upheld the conviction of Taillefer but ordered a new trial for Duguay on a charge of second degree murder. Prior to the retrial, Duguay negotiated a plea to the lesser and included offence of manslaughter and was sentenced to 12 years imprisonment. Some years later an investigation into the activities of the Sûréte du Québec revealed that the Crown had failed to disclose a considerable amount of relevant and material evidence to the defence.
>
> [35] Both Taillefer and Duguay appealed. Duguay sought leave to withdraw his guilty plea on the basis that he would never have pled guilty had he been aware of the undisclosed evidence. He filed his own affidavit to that effect and deposed that he had not participated in any way in the acts that caused the death of the victim. This sworn evidence was supported by the affidavits of his trial counsel and his counsel on his first appeal, affirming Duguay's claim of innocence and explaining that the reason he had pled guilty to manslaughter was Duguay's inability to go through a second trial and the risk of a murder conviction -- not because he admitted involvement in the death of the victim. The Quebec Court of Appeal did not believe Duguay or his lawyers -- instead concluding Duguay had pled guilty because he was guilty and simply afraid of being convicted of murder.
>
> [36] LeBel J. wrote the unanimous reasons for judgment of the Supreme Court. He reasoned that the Court of Appeal had incorrectly applied a subjective test in determining what the appellant would have done. Relying on the approach

articulated in *R. v. Dixon*, about how to assess the potential impact of a failure to disclose evidence discovered post conviction, LeBel J. wrote:

> 90 In my opinion, those decisions adopt an accurate statement of the *Dixon* test, adapted to the context of the impact of the breach of the duty to disclose on the validity of a guilty plea. In the context of a guilty plea, the two separate steps in the analysis required by *Dixon* must be merged, however. In that situation, it is impossible to separate them, because the entire analysis of the breach must bear on the accused's decision to enter the guilty plea that he or she now wishes to be allowed to withdraw. The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known. Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been in possession of that information or those new avenues of investigation, leave must be given to withdraw the plea.

[37] In applying this test to the facts before the Court, he found the test had been met:

> 111 ... In the circumstances of this case, having regard to the volume, weight and relevance of the undisclosed evidence and the new possibilities that the opportunity to use that evidence would have offered, it is not unreasonable to think that an accused, armed with a more solid defence than at his first trial, at which the jury deliberations had lasted fourteen days, would have hesitated to admit his guilt or would have had more confidence about standing trial a second time.
>
> 112 Without reiterating all of the facts previously analyzed in the Taillefer case, I would just reiterate that the fresh evidence would have enabled the appellant Duguay to impeach the credibility of a number of witnesses, and undermine the plausibility of the prosecution theory. In addition, it would have opened new avenues for investigation, which could have led to the discovery of new witnesses. In this context, the Crown's breach of its duty to disclose all of the relevant evidence led to a serious infringement of the appellant's right to make full answer and defence. That breach cast doubt on the validity of the appellant's admission of guilt and the waiver of the presumption of innocence that pleading guilty involved.

> [38] In the case at bar, the appellant does not frame his prayer for relief as a breach of his rights, but instead argues that he should now be permitted to withdraw his guilty plea because he was not fully informed in terms of what the sentencing court was required by law to do. In my opinion, a purely subjective test does not seem appropriate. Nonetheless, there should be at least some evidence from an appellant that had he been fully informed, he would not have pled guilty. A bald assertion by an appellant is not likely to be sufficient. There must be some objective basis to convince the Court there is a reasonable possibility that a reasonable person in those circumstances would have made a different decision.
>
> [39] Here there is absolutely no evidence that had the appellant known of the mandatory firearms prohibition order, he would not have pled guilty. He filed two affidavits with this Court. His affidavits are silent on this point. Nor is there any evidence to suggest any reasonable possibility that a reasonable person in the circumstances of the appellant would have decided differently. There is no suggestion in the affidavits, nor was there in argument, of even a glimmer of a potential *Charter* motion, an affirmative defence, or any prospect of being able to raise a reasonable doubt on the charge of production of marijuana. (Emphasis added)

[66] In the present case, there is nothing to suggest on either an objective or subjective basis that the information the appellant says was unknown to him, would have made a difference in his decision to plead guilty. He has failed to show his plea was uninformed.

Disposition

[67] For the reasons above, I am satisfied the appellant's guilty plea was valid. He has not demonstrated a miscarriage of justice by virtue of his counsel's representation or otherwise.

[68] I would dismiss the appeal.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Hamilton, J.A.