NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Rouse*, 2020 NSCA 8

Date: 20200129
Docket: CAC 481450
Registry: Halifax

Between:

Darrin Phillip Rouse

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	The Honourable Justice Carole A. Beaton
Appeal Heard:	November 19, 2019, in Halifax, Nova Scotia
Subject:	**Criminal; Criminal – obtaining sexual services for consideration; Criminal – *Criminal Code*; Evidence – misapprehension; Evidence – unsustainable verdict.**
Legislation:	s. 286.1(1) of the *Criminal Code*
Cases Considered:	*R. v. Hicks*, 2013 NSCA 89; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Delorey*, 2010 NSCA 65 quoting *R. v. Peters*, 2008 BCCA 446; *R. v. Deviller*, 2005 NSCA 71; *R. v. Wolff*, 2019 SKCA 103; *R. v. Gill*, 2019 ONCA 902
Summary:	The appellant was convicted at trial of obtaining sexual services for consideration. He sought to have his conviction overturned and an acquittal entered on the basis the trial verdict was unsustainable on the facts presented. In the alternative, the appellant sought a new trial on the basis of misapprehension of evidence.

Issues: (1) Was the trial verdict sustainable on the facts presented?
(2) Did the trial judge misapprehend certain evidence?

Result: The trial judge's analysis based on the evidence before her was correct in law. There was no misapprehension of the evidence. The appeal was dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.

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Judges:	Beaton, Saunders, and Scanlan, JJ.A.
Appeal Heard:	November 19, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton, J.A.; Saunders and Scanlan, JJ.A. concurring
Counsel:	Roger A. Burrill, for the appellant James A. Gumpert, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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:

[1] The Honourable Justice Ann E. Smith of the Supreme Court of Nova Scotia convicted Mr. Rouse of obtaining sexual services for consideration, contrary to s. 286.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Mr. Rouse appeals the conviction on the basis that:

1. The verdict is unsustainable as s. 286.1 does not attract liability on the facts presented at trial;
2. The trial judge misapprehended certain evidence.

[3] Regarding the first ground, Mr. Rouse seeks to have an acquittal entered. In the alternative, he asks that a new trial be ordered on the second ground. For the reasons that follow, I would dismiss the appeal.

Issue No. 1 – Was the verdict unsustainable/unreasonable?

[4] Mr. Rouse argues the verdict of the trial judge was unsustainable on the facts found, because it rendered an absurd result upon consideration of the provisions of s. 286.1(1) of the *Code*. That section provides:

> Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of
>
> > **(a)** an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
> >
> > > **(i)** in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
> > >
> > > > **(A)** for a first offence, a fine of $2,000, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $4,000, or
> > >
> > > **(ii)** in any other case,
> > >
> > > > **(A)** for a first offence, a fine of $1,000, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $2,000;

[5] Mr. Rouse argues that the parties were first in a friendship and then in a relationship, and as he was a drug trafficker, it was as a corollary of their relationship that he came to provide drugs to the victim. Payment for the drugs was by cash or credit, or on two occasions, by engaging in sexual activity.

[6] Mr. Rouse asserts that while there is no doubt he provided drugs to the victim, there was no exploitation of the victim because she exercised her own agency in the methods used to pay for the drugs, within the confines of their friendship/relationship.

[7] Mr. Rouse further asserts that s. 286.1 is designed to criminalize those who would take advantage of people who engage in prostitution, distinct from a case such as this where the parties were confidants, who socialized regularly. Mr. Rouse argues the victim in the instant case was not the type of victim s. 286.1 was intended to protect, being that of the vulnerable street worker.

[8] The standard of review regarding the scope and interpretation of legislation, which is a question of law, is one of correctness (*R. v. Hicks*, 2013 NSCA 89 at para. 14).

[9] In my view, it is important to consider the trial judge's finding, not disputed, that the parties initially met and struck up their very first conversation in the context that Mr. Rouse informed the victim he could secure drugs for her.

[10] It is clear from the trial judge's decision that she recognized the malleable nature of the relationship between the parties over time in the course of reaching her ultimate conclusions.

[11] I am in agreement with the observation by Mr. Rouse's counsel that s. 286.1 criminalizes the purchase of sexual services and the commodification of sexual activity. While the facts before the trial judge did not concern provision of "sexual services" as popularly conjured in modern parlance – that of "johns" and "sex workers" – the commodification of the relationship between Mr. Rouse and the victim, through the provision of drugs – not money – for sex is captured by that section. I see nothing in the reading of s. 286.1 that confines its application to certain types of encounters, or that limits the contractual consideration for sexual services to only that of money.

[12] I reject Mr. Rouse's assertion that his case is not captured by s. 286.1 because the parties were in "a trusting and non-judgmental relationship between

friends where payment options were fluid and non-coercive" (para. 38, Appellant's Factum). That characterization avoids the context in which the relationship began, when Mr. Rouse made it clear to the victim he knew of her addiction and that he could supply drugs. Eventually the victim paid for the drugs on two occasions with sex as the currency, a payment method suggested by Mr. Rouse when the victim reported she had no money to pay for the drugs.

[13] The trial judge was best positioned to hear and assess the evidence. She recognized the relationship between the two parties may have had romantic tones from time to time and may have presented like a friendship at other times, but from the beginning, and throughout, the victim suffered a drug dependency. That dependency was twice exploited for sex.

[14] Mr. Rouse asserts the trial judge's analysis diminished to the point of nonexistence any agency in the victim as to how she interacted with him (para. 40, Appellant's Factum). With respect, I cannot agree. While the victim may not have engaged regularly in providing sexual services for consideration, when the parties met Mr. Rouse discussed with the victim his awareness of her habit and his ability to access her drug of choice. Theirs was a relationship predicated on the victim's dependency.

[15] The trial judge's conclusion that there was victimization by Mr. Rouse is justified on the evidence and the facts as she found them. Absent any palpable and overriding error, those findings are entitled to deference.

[16] Mr. Rouse maintains before this Court that the Crown's view of the facts would endorse an approach that the Crown need only prove (a) the receipt of sex (b) for any type of consideration. Again, I cannot agree. Accepting that s. 286.1 was meant to prohibit exploitive behaviour, on the facts as found by the trial judge, as supported by the evidence, an exploitation occurred. I agree with Mr. Rouse's argument that Parliament could not have intended that <u>any</u> sexual activity, in <u>any</u> relationship, in exchange for <u>any</u> benefit, would be prohibited by application of s. 286.1. However, that is not the conclusion reached by the trial judge, who gave context to Mr. Rouse's acts in her decision:

> CW testified that she was introduced to the accused by a neighbour. She said that this neighbour knew about her drug habit. The accused was visiting the neighbour in her back yard at some point in the April to June time period. CW's evidence was that she was in the back yard and the accused, who she had never met before, called her over to speak with him. The accused said that he had heard

that CW was sick and there was an exchange about the flu going around and the kind of sickness that CW had. CW testified that the accused grinned and there was a discussion that it was not that kind of sickness.

According to CW, that was when the accused started selling her drugs, i.e., Dilaudid. At first she would pay for them prior to receipt, but there were times when the accused fronted her, i.e., he provided her with drugs with the understanding that she would pay later. CW said that she received a weekly pay cheque at the time and would pay for drugs fronted once she received her next pay.

CW described the accused at this point in their relationship as friendly, nonjudgmental and helpful. Her evidence was that over the ensuing months their friendship grew. They visited each other's houses, which were a very short walk apart from each other. They called each other on the phone. At first this appeared to be CW calling the accused's landline, but by the fall of 2015 the evidence disclosed that they were exchanging text messages. Printouts of several of these text messages were introduced as evidence at trial.

Turning to the events giving rise to the charges: At some point, which CW said was approximately three or four months after she and the accused first met, she realized she didn't have the money to buy the drugs from the accused and there wouldn't be sufficient money in her next pay cheque to pay for them. CW said that this was in the November 2015 time period. When she made it known to the accused that she didn't have the money or money coming, CW says that he said that there were other ways to pay. CW said that this was almost a joke initially, "wink, wink." She testified that the joke went on for a bit and then she asked the accused if he was serious and he said, "Yes." CW asked him what he wanted. CW says he asked for a blow job. She said that was fine and she gave it to him for a pill or pills. The evidence was not clear on whether the accused provided her with one pill or more than one pill.

The second occasion when CW says that the accused traded her drugs for sex occurred about two weeks after the first. This time CW says that the accused offered drugs for a blow job but she didn't want that, and instead they engaged in sexual intercourse and he gave her the drugs. [. . .]

[17] And later the trial judge concluded:

There may have been elements of a romantic relationship and even genuine friendship between the accused and CW at times, but that must be considered against the backdrop of CW's chemical dependence. As CW testified, when she didn't have money to buy the drugs, the accused fronted her. He knew that she'd be back. She was addicted to opioids. The accused was selling drugs to a young woman with a child with a drug habit costing $80 per day.

[Emphasis added]

[18] I agree s. 286.1 was "meant to target exploitive behaviour outside of a mutually friendly, and ongoing, relationship" (para. 35, Appellant's Factum). That said, it is clear from the trial judge's decision she did not accept, on the evidence before her, that the relationship of Mr. Rouse and the victim could be so characterized.

[19] The approach to modern statutory interpretation discussed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, that the words in an *Act* are read in their entire context and their grammatical and ordinary sense, cannot lead to the conclusion here that a proper reading of s. 286.1 would necessarily exclude events of exploitation which take place outside of the sex trade worker and john context.

[20] As between Mr. Rouse and the victim, theirs was, on the analysis conducted by the trial judge, a relationship that began predicated on her addiction. That exploitation continued, eventually leading to the provision of sex for drugs. Clearly the trial judge was satisfied there existed a vulnerability which was exploited by Mr. Rouse.

[21] The evidence put before the trial judge caused her to conclude the victim received the drugs in specific transactions between two parties who, as it happened, had a more positive relationship than many who might find themselves in such an exchange. During that time, drugs were being supplied for various payments in return. On two occasions the payment was the provision of sex. There was no blurring of the lines or confusion regarding the purpose or reason for which the parties engaged in sexual activity. The trial judge was satisfied that the provision of drugs was introduced first, between a supplier and a user. It was not a case where the parties were already in a relationship and Mr. Rouse then introduced to the victim the provision of drugs.

[22] Counsel for Mr. Rouse asserts that the legislative scheme of s. 286.1, to reduce the exploitive impact of prostitution, was illustrated in the comments found in a Department of Justice Technical Paper: Bill C-36, *Protection of Communities and Exploited Person Act*:

> In short, whether a particular service meets the test outlined … is a factual determination to be made by a court. Applicable jurisprudence provides flexibility in addressing new ways of effecting prostitution, while also limiting the scope of such offences to acts related to prostitution, consistent with its objective of reducing demand for sexual services.
>
> (para. 49, Appellant's Factum)

[23] This passage recognizes that whether any proffered service fits within s. 286.1 is a factual determination. On the record before us, I am satisfied the trial judge reached a factual conclusion which is supported by the evidence put before her.

[24] I do not accept the appellant's argument that the facts as the trial judge found them do not fit within the parameters of s. 286.1.

Issue No. 2 – Did the trial judge misapprehend the evidence?

[25] The standard of review for the second ground of appeal is whether there was a material misapprehension of the evidence that informed the reasoning of the judge, including the reasoning process (*R. v. Delorey*, 2010 NSCA 65 quoting *R. v. Peters*, 2008 BCCA 446). Mr. Rouse's argument concerning misapprehension of evidence centers around the trial judge's findings of credibility of the victim, the Crown's lone witness.

[26] Mr. Rouse argues the trial judge misapprehended "pivotal" evidence when making credibility conclusions and those misapprehensions impacted the integrity of the verdict so that a new trial is needed.

[27] Mr. Rouse maintains that because the credibility of the victim was central to the trial judge's reasoning, and the trial judge misunderstood evidence reported to have been provided by the victim at the preliminary inquiry, a miscarriage of justice arises. He relies on this Court's decision in *R. v. Deviller*, 2005 NSCA 71, wherein Cromwell, J.A. (as he then was) stated as follows:

> [10] What is a misapprehension of the evidence? It may consist of "... a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence ...": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an "unsupportable inference" from the evidence or characterizes a witness's evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: *Morrissey* at p. 217; *R. v. C.(J.)* (2000), 145 C.C.C. (3d) 197 (Ont. C.A.) at para. 11. [. . .]
>
> [11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. ***A conviction is a miscarriage of justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction***:

> see *Morrissey, supra* at 221; *R. v. Lohrer*, [2004] 3 S.C.R. 732; S.C.J. No. 76 (Q.L.) at paras. 1-2.
>
> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that 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 her decision to convict.
>
> [Emphasis added]

[28] Mr. Rouse's argument concerns a line of questioning put to the victim regarding the frequency of the provision of oral sex in exchange for pills. He asserts the trial judge mistakenly resolved an apparent contradiction between the evidence at preliminary inquiry and that at trial by characterizing the contradiction as arising from an "imprecision" in questioning at the preliminary inquiry. Specifically, at the preliminary inquiry the victim said that "it" – oral sex – was provided "more than once" whereas at trial she said "it" was provided only once.

[29] The record is clear that at trial the victim was questioned about what she had said at preliminary inquiry regarding the number of times she engaged in oral sex with Mr. Rouse. The trial judge, recognizing the credibility of the victim was central to her analysis of the evidence, properly explained the exercise of assessing credibility, and then embarked on a thorough assessment of the asserted contradiction:

> This court may reject or accept some or all of a witness's testimony, taking into account many factors, including but certainly not limited to the witness's ability to recall, motivation, probability or plausibility, and internal or external inconsistencies. Other factors include the circumstances of the witness's observations and whether the evidence is inherently reasonable.
>
> In determining whether a witness is credible, this court should apply common sense, logic and its own knowledge and experience of human behaviour when deciding issues of credibility.
>
> So I now turn to the credibility of CW. Counsel for the accused points to what he alleges are inconsistencies on two key aspects of CW's evidence.
>
> CW testified at a preliminary inquiry in this matter. Counsel for the accused put to CW that at the preliminary inquiry her evidence was that the exchange of the pills for sex with the accused happened ten times. CW said, "No," at trial, that she did not recall saying that. CW was then asked in cross-examination at trial whether at the preliminary inquiry her evidence was that she

had traded oral sex for pills with the accused up to nine times. Her answer at trial was, "No."

Portions of the transcript of the preliminary inquiry were then put to CW in cross-examination. CW was asked at the preliminary inquiry by defence counsel whether:

> In terms of the oral sex, you say that may have happened, I suppose, up to nine times?

The answer at the inquiry was, "Uh-huh." The next question posed to CW at preliminary inquiry was:

> And one time for sexual intercourse. Can you give us a better estimate of how often you traded oral sex with Darrin Rouse for pills?

The answer was, "Sorry." The next question was:

> How many times did you trade oral sex for a pill?

The answer given was:

> No more than ten times. It wasn't like a consistent, regular thing.

The next question at the preliminary inquiry was:

> Okay. It may have been just one time, is it fair to say?

Answer given, "No." The next question was, "It may have been just a single occasion?" Answer given, "No."

At trial CW admitted giving those answers, saying that she may not have answered correctly with respect to the specific number. She maintained, however, that it was twice and that she was certain of that. She testified that once was pills in exchange for oral sex and once was pills in exchange for sexual intercourse.

Counsel for the accused says that CW's evidence at trial as to the number of times sex was exchanged for pills is materially inconsistent with her evidence at the preliminary inquiry, and on that basis, this court should conclude that she is an unreliable witness and her evidence is not credible. I do not agree. CW's evidence before this court that sex was exchanged with the accused for pills on two occasions is not inconsistent with her evidence at the preliminary inquiry that she traded oral sex for pills no more than ten times. Once is no more than ten.

As to CW's evidence at the preliminary inquiry with respect to whether "it" was a single occasion, she said, "No." She was asked whether "it" my (*sic*) have been a single occasion. Again, she said, "No." Before this court, her evidence was that "it" happened twice.

I do not find inconsistencies between the answers given by CW before this court and the evidence that she gave at the preliminary inquiry. The question at the preliminary inquiry was not whether oral sex occurred more than once in exchange for pills, but whether "it" occurred more than once. Given the

> imprecision of the question asked, I do not find inconsistency between the answer given and the evidence given by CW at trial.
>
> I also do not find any material inconsistency between CW's evidence before this court where she denied giving evidence at the preliminary inquiry that she exchanged sex for pills with the accused up to nine times in her evidence at the preliminary inquiry. The question posed to her at the preliminary inquiry by defence counsel was:
>
> > The oral sex, you say that my (*sic*) have happened, I suppose, up to nine times?
>
> The answer given was "Uh-huh." The answer is vague. The questions and CW's answers which followed at the preliminary inquiry were that oral sex for drugs was no more than ten times and "it," the word used in questioning to her by defence counsel, was not a single occasion.

[30] Later in the trial judge's decision she found:

> I have considered all of CW's evidence, including the inconsistent evidence she gave in her police statement and at trial as to when the events occurred. These inconsistencies have not altered my view that CW was telling the truth when she testified before this court that the accused provided her with drugs in exchange for sex on two occasions [. . .]

[31] The record reflects the trial judge analyzed the inconsistencies and was satisfied any distinctions that might have existed in the evidence between the preliminary inquiry and the trial were without a difference. She appropriately addressed the impact of any inconsistencies found in the evidence, and I see no basis to interfere with her findings. The trial judge was best positioned to consider and resolve any inconsistencies leading to her credibility determination. She was clearly satisfied the inconsistency did not go to substance, but instead to detail, and was not material.

[32] As discussed by the Saskatchewan Court of Appeal in *R. v. Wolff*, 2019 SKCA 103:

> [40] Credibility findings involve questions of fact, not law: *R v Boyer*, 2018 SKCA 6 at para 56, [2018] 6 WWR 322; *R v W.H.*, 2013 SCC 22 at 33–34, [2013] 2 SCR 180. As such, assessments of credibility are subject to a highly deferential standard of review. An appellate court cannot interfere with a trial judge's assessment of credibility unless it is established that such assessment cannot be supported on any reasonable view of the evidence: *Boyer* at para 58; *Burke* at para 7; *R v R.P.*, 2012 SCC 22 at para 10, [2012] 1 SCR 746 [*R.P.*]; *R v Piapot*, 2017 SKCA 69 at para 40, 15 MVR (7th) 1. Findings of reliability are also factual

> determinations and subject to the same deferential standard of review: *R v Schaff*, 2017 SKCA 103 at para 44; *R v Murphy*, 2019 SKCA 8 at para 17, [2019] 6 WWR 216.
>
> [41] This is not to say that an error in a trial judge's assessment of the evidence can never amount to a legal error. When a trial judge's assessment of the evidence is based on a wrong legal principle, it will constitute an error of law: *Boyer* at para 56; *R v J.M.H.*, 2011 SCC 45 at para 29, [2011] 3 SCR 197 [*J.M.H.*]. A legal error made in the assessment of credibility may displace the deference usually afforded to a trial judge's credibility assessment and may require appellate intervention: *R v A.M.*, 2014 ONCA 769 at para 19, 123 OR (3d) 536.

[33] I am satisfied the trial judge dealt appropriately with what was argued at trial to be an inconsistency. The trial judge's assessment of credibility and her determinations flowing from the evidence are entitled to deference. I am unable to conclude her assessments of the victim's credibility could not be supported on any reasonable view of the evidence.

[34] As stated by the Ontario Court of Appeal in *R. v. Gill*, 2019 ONCA 902:

> [10] The standard applied when misapprehension of evidence is said to warrant reversal of a conviction is a stringent one. The misapprehension of the evidence must relate to the substance of the evidence, not simply a matter of detail. It must be material, rather than peripheral to the reasoning of the judge. But that is not all. The errors alleged must also play an essential part, not just in the narrative of the judgment, but in the reasoning process resulting in the conviction: *R. v. Lohrer*, 2004 SCC 80, at para. 2. Misapprehensions of evidence amount to a miscarriage of justice only if striking the misapprehension from the judgment would leave the judge's reasoning on unsteady ground: *R. v. Sinclair*, 2011 SCC 40, at para. 56.

Conclusion

[35] In summary, I am satisfied the trial judge's interpretation of the law and its application to the facts as she found them was correct. Furthermore, there was no material misapprehension of the evidence. For these reasons, I would dismiss the appeal.

Beaton, J.A.

Concurred in:

Saunders, J.A.

Scanlan, J.A.