

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. I.E.B.*, 2013 NSCA 98

Date: 20130910

Docket: CAC 369580

Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

I.E.B.

Respondent

**Restriction on Publication:
Pursuant to s. 486 of the Criminal Code of Canada**

Judge: The Honourable Justice Linda Lee Oland

Appeal Heard: May 27, 2013, in Halifax, Nova Scotia

Subject: Jurisdiction – *Criminal Code* s. 676(1)(a) – Sexual Assault – Consent – Honest but Mistaken Belief in Consent – *Criminal Code* s. 273.2

Summary: The trial judge found that the complainant did not consent to the sexual activity, but was not satisfied beyond a reasonable doubt that the respondent knew that the complainant was not consenting or that he was reckless about it. He entered an acquittal. The Crown appeals. The respondent argues that the Crown has no right to appeal and, alternatively, the judge committed no error.

Issues: Whether the Crown can appeal from acquittal where the judge had a reasonable doubt on *mens rea*.

Whether the judge erred in law: (a) in giving effect to the defence of honest but mistaken belief in consent in the absence of evidence giving the defence an air or reality, and (b) in his interpretation of consent under s. 273.2 of the *Criminal Code*.

Result: Appeal allowed and new trial ordered.

The Crown may appeal against an acquittal on any ground that involves a question of law alone: s. 676(1)(a). A trial judge's determination that he has a reasonable doubt does not entirely preclude an appeal. In certain circumstances, his or her conclusion regarding reasonable doubt becomes a question of law subject to appellate review.

The judge's decision to acquit relied on the defence of honest but mistaken belief in consent, even though it was not specifically argued. It is not necessary to decide if there was an air of reality to this defence. Even assuming that, based on the evidence before him, an air of reality existed, the judge erred in law. He failed to consider the limitation in s. 273.2 and to conduct the required reasonable steps analysis.

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 15 pages.