C.A.C. No. 103908

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Pugsley, JJ.A.

Cite as: R. v. Fickes, 1994 NSCA 107

BETWEEN:		
COLIN CHARLES FICKES	Appellant	Alan G. Ferrier for the Appellant
- and -		
HER MAJESTY THE QUEEN	Respondent	Robert E. Lutes, Q.C. for the Respondent
		Appeal Heard: June 20, 1994
	Judgment Delivered:	August 4, 1994

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: The conviction appeal is dismissed and leave to appeal the sentence is declined as per reasons for judgment of Chipman, J.A.; Matthews and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted in Provincial Court on a charge of sexual assault. The only witnesses who testified at the trial were the complainant and the appellant.

On June 27, 1993 the complainant met the appellant and one M. at [...], Lunenburg County. The appellant was driving his truck. In due course they went to [...] Beach. MacPherson left the truck and the appellant drove with the complainant in the direction of [...]on the [...] Road. While stopped at a four-way stop sign the complainant saw two friends in another vehicle. She said she tried to wave them down because she didn't want to be with the appellant. She said she did not like him. Her friends turned around but their vehicle did not follow the appellant's vehicle.

The appellant then turned out onto Highway [...], proceeded east to Exit [...], and then turned into a dirt road and thence to a place known as "the dump". The appellant stopped the truck and, according to the complainant, briefly had sexual intercourse with her despite her protests, holding both her hands above her head with one of his while he did so. She said she managed to withdraw quickly from him after which he told her to leave the truck. He then told her to get back in the truck and drove her to a turnoff at Highway 103. She called a friend, went to her house and told her what had happened. She then contacted the police.

The appellant maintains that when the complainant was in the truck with him she moved close to him and touched his leg. He invited her to have intercourse and she said "Yeah, later". They then proceeded to the four-way stop at [...]where they saw the complainant's friends in their vehicle. They drove to the dump where, following some necking and fondling, the appellant attempted intercourse. The complainant said she was a virgin whereupon she was invited and consented to perform oral sex upon the appellant. The appellant did not ejaculate. He then drove the complainant to [...] leaving her at [...].

Following argument of counsel, the Provincial Court judge gave a brief oral

decision convicting the appellant. The Court stated that it did not believe the appellant and did believe the complainant. The complainant was found to be a "very credible witness" whose evidence was accepted wherever it was in conflict with that of the appellant. The Court concluded:

> "Miss B's [the complainant's] demeanour on the witness stand and her actions later that day in immediately calling her friend and immediately complaining to the police convinced me that what she says happened, did happen."

The appellant was sentenced to thirty months incarceration.

This appeal is against both conviction and sentence.

As to the conviction appeal, nine issues have been raised:

1) It is submitted that the trial judge erred in not telling counsel for the Crown to refrain from cross-examining the appellant with respect to hypothetical testimony of two individuals who were not called to testify. The line of questioning suggested that if M. and one L. "were to say" that the parties met at [...] it would not be true to which the appellant agreed. The issue was a collateral one. Neither M. nor L. testified. Defence counsel at no time made objection to the fact that the two persons referred to did not testify. This of course does not make such a line of questioning proper. As Lamer, J. said in **R. v. Howard,** [1989] 1 S.C.R. 1337 at 1347:

> ". . . It is not open to the examiner or cross-examiner to put as a fact, or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence. On this ground alone, the question should have been denied."

The Court would surely realize that no weight should be attached to this improper assertion relating to a collateral matter. There is nothing in the record suggesting that such assertion had anything to do with the clear credibility findings which obviously determined the outcome.

2) It is submitted that the trial judge erred in not rebuking Crown counsel for

derogatory remarks he made in summation concerning the appellant's right to remain silent. Counsel merely commented on the fact that the appellant's counsel had a written statement of the complainant upon which to cross-examine whereas the Crown did not, the appellant not having chosen to give a statement.

While I do not condone this particular oratory, in a trial by judge alone the Court must be taken to be fully familiar with the principle that an accused is not required to make any statement and that failure to do so gives rise to no adverse inference. There is nothing in the decision to indicate that this comment bore any weight with the trial judge.

3) It is submitted that Crown counsel made inflammatory remarks to the effect that on the day in question the appellant had found the female that he had been looking for all afternoon and that it was known what he had in mind. It is said that the trial judge adopted such remarks in the decision by saying "he was, on his own evidence, out looking for an available female and he thought he found her in (the complainant) . . ."

I fail to see the remarks of the Crown in the circumstances as inflammatory, nor do I consider the trial judge's characterization of the appellant's behaviour as inconsistent with the evidence.

4) It is submitted the Court should have rebuked Crown counsel for saying:

> "There is obviously no medical evidence because the penetration such as it was was short-term. It was very brief. She withdrew her body. She said: 'I moved my butt'. "

Counsel for the defence in summation made the statement that the complainant went to the doctor but there was no medical evidence before the court. That is indeed the case. Whether there might have been medical evidence available is of no consequence. There was, in fact, none before the Court.

5) It is said that the appellant was denied the right to full answer and defence when his counsel was cut off in rebuttal submission by the Court saying "Mr. Allen that's enough. I've heard enough. I'll make my decision now."

There can be no question that if a court refuses to hear counsel's submission

there would be a violation of the accused's ss. 7 and 11(d) **Charter** rights. Nothing is more important than that there be, and appear to be, an independent and impartial tribunal. A trial judge must listen fully and fairly to all of the evidence and all relevant submissions by or on behalf of the parties.

On reviewing the record of the argument however it appears that the Court heard a full and complete submission from the defence. It was a competent submission covering all of the points that could be asserted in the appellant's favour. The Crown then made its submission. In rebuttal, counsel attempted to repeat one of the same points already made. It was at this point when he was interrupted by the Court.

The purpose of rebuttal is not to merely repeat that which was said before or should have been said before. It is to make reply to points made by the opposing party. While a more patient judge might have permitted more latitude, the Court was entitled to terminate argument when nothing new was being raised but only a re-argument. The decision of this Court in **R. v. Colley** (1991), 105 N.S.R. (2d) 178 is distinguishable because there the Court refused a request by defence counsel to make a submission.

I am of the view that the appellant was not denied in any way the right to make full answer and defence.

6) It is submitted that the trial judge erred in relying on the complainant's self-serving testimony that she immediately called her friend and then complained to the police when the Crown had not called the friend or the police to confirm such testimony. It is said that the Court, in effect, relied on out-of-court statements to boost the credibility of the complainant.

In her direct examination, the complainant testified that she left the truck, called her friend to pick her up but then went to the friend's house instead. There can be no exception taken to this testimony. In cross-examination, the defence raised the issue of the complainant giving a statement to the police after she had left the appellant and after she had confided in her friend. This line of questioning was obviously and quite properly an attempt to discredit the complainant. The Crown re-examined on the subject.

There was no error on the part of the trial judge in accepting the

complainant's unchallenged evidence respecting these matters.

It is clear from the cross-examination that the Crown made full disclosure to the defence of statements made by the complainant to the police. The defence knew about the complainant's friend. If the defence wished to make a point based on what these witnesses might have had to say, the defence could have called them or asked the Crown to do so.

7) It is submitted that the trial judge showed unnatural bias in favour of the Crown in the conduct of the trial throughout. I have reviewed the record which, in my opinion, does not disclose this to be the case. I have already dealt with the major points advanced by the appellant in support of this argument. Another point relied on is the fact that in the decision the Court referred to the fact that defence counsel "did his very level best to trip Miss B. [the complainant] up and to make mountains out of molehills in any discrepancies, any small discrepancies, there might have been between her testimony today on the witness stand and her statements that she have to police. As I have said all he was able to do was make mountains out of molehills."

It is true that the cross-examiner made no mileage with the complainant on any substantial point. It is true that a number of minutiae were explored at length. The trial judge's comments would not raise in the mind of a reasonable person the apprehension of bias or unfairness.

8) It is said that counsel for the defence (not the same counsel appearing on this appeal) was incompetent. My review of the record shows nothing to displace the presumption which I think should in the first instance lie to the effect that counsel appearing before the courts is competent. It is not therefore necessary to address the second obstacle faced by the appellant which would be to show that any demonstrated incompetence might reasonably be expected to have affected the result.

9) Raised during the argument in this appeal was the question whether the Court misdirected itself by asking not whether the Crown had proved the case beyond a reasonable doubt, but which "story" - ie. that of the complainant or of the appellant - was true. Reference was made to **R. v. W. [D.]** (1991), 1 S.C.R. 742 and to the recent decisions in this Court of **R. v. Gushue** (1992), 117 N.S.R. (2d) 152 and **R. v. Brown**

(1994), as yet unreported, C.A.C. No. 02968.

Here the trial judge, in a brief oral decision immediately following argument in which both counsel mentioned the Crown's burden to prove the case beyond a reasonable doubt, did not make specific reference to that burden. It is not necessary for a trial judge to do so. One can presume that trial judges are aware of this golden thread which runs throughout the criminal law and which, as I have said, was mentioned by both counsel in argument immediately preceding the decision.

Great care must of course be taken by a judge directing a jury to not only refer to the principle of reasonable doubt but where there is conflicting evidence, to make clear that it is not a matter of choice between the inconsistent versions. The correct application of the burden of proof in a case of conflicting evidence requires that the accused be found not guilty if his or her evidence is believed or, if not believed, there is still a reasonable doubt as to guilt considering the evidence as a whole.

As I have said it is not necessary for a judge sitting alone to verbalize this basic analysis. However, in cases such as **Gushue** and **Brown** new trials were ordered, not because the judge failed to state the correct formula. New trials resulted not because of what the judge did not say but because of what the judge did say. This Court was concerned in each case that the Court had asked itself the wrong question, that is to say, which version was correct. A further distinction between those cases and this is that here there were only two witnesses and no additional evidence for the Court to weigh.

Obviously in each case a careful review of the trial judge's reasoning is warranted. A new trial will result if it appears that the trial court put to itself the wrong question. It will not result simply because the trial court did not mention reasonable doubt or simply because the trial court made a very clear credibility finding in favour of the Crown's witness or witnesses against the defence witness or witnesses.

An analysis of the trial judge's reasons here leads to the conclusion that the judge did not put the wrong question. The judge simply made a decision. The evidence of the complainant was accepted and that of the appellant rejected. There was no doubt. As the Court said, that which the complainant said happened, did happen. A finding in those terms made by a judge who has just heard argument from both counsel about

reasonable doubt and who is presumed to know the law cannot here be faulted.

This decision leaves no such concern as did the decisions in **Gushue** and **Brown.**

For all these reasons, I would dismiss the conviction appeal.

As to the application for leave to appeal sentence, the appellant's position is that the trial judge's disposition of two and one-half years on a federal institution was excessive.

Dealing briefly with the offender, the presentence report was not favourable. It revealed an unhappy family background, limited education and an unsatisfactory employment history. The appellant has a criminal record including several break and enter matters while a young offender. There was probation at first but on his last conviction he was, on June 3, 1992, given a term of one year secure custody in the Nova Scotia Youth Centre, Waterville, to be followed by two years probation. He was thus on probation when the subject offence was committed.

As to the offence, about the only point that can be made for the appellant is that it was of short duration. The trial judge reviewed three cases where sentences of three and one-half years and three years imprisonment were imposed for sexual assaults.

The appellant has been convicted of a very serious offence. He is not a first time offender. The trial judge observed that there was an absence of remorse. While there was no formal impact statement from the victim she stated in evidence during the trial that the appellant "hurt me in a mental way".

I see no error in principle by the trial judge. Nor is the sentence so manifestly

excessive as to be clearly erroneous. I would decline to grant leave to appeal the sentence.

Chipman, J.A.

Concurred in:

Matthews, J.A.

Pugsley, J.A.