C.A.C. No. 110023

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Farmer,1995 NSCA 84

Hallett, Jones and Freeman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - SHAWN STEVEN FARMER Respondent	)	Denise Smith for the Appellant Roger Burrill for the Respondent Appeal Heard: April 12, 1995 Judgment Delivered: April 26, 1995

THE COURT: The appeal is dismissed per reasons of Freeman, J.A.; Jones and Hallett, JJ.A. concurring.

Freeman, J.A.:

The respondent was acquitted at trial on four charges related to an incident of alleged sexual assault because the trial judge was not convinced of his guilt beyond a reasonable doubt. The Crown has appealed.

The alleged offences occurred in the respondent's parked vehicle near an industrial park in Dartmouth, N.S. during the evening of October 26, 1993. The respondent was charged with causing bodily harm during a sexual assault, contrary to s. 272(c) of the **Criminal Code**; unlawful confinement, s. 279(2); anal intercourse, s. 159; and attempted choking, s. 246(a) to assist an indictable offence.

The respondent acknowledged that sexual incidents took place, but he said the complainant consented. The complainant denied that she had consented and the issues turned on credibility. After a lengthy consideration of the evidence, the trial judge, His Honour R. B. Kimball of Provincial Court, concluded that while he preferred the evidence of the complainant the Crown had not proved absence of consent beyond a reasonable doubt. He was also left with a reasonable doubt as to the choking and bodily harm as well as to essential elements of the anal intercourse charge.

The Crown has raised three specific grounds of appeal: that the trial judge erred in his interpretation of s. 273.1 of the **Criminal Code** regarding consent; that he considered factors relevant to the defence of mistaken belief in consent which was not in issue; and that he failed to direct himself to all the relevant evidence on the issue of consent.

The Crown asserts that the trial judge took into account the following factors irrelevant to the issue of consent in fact and which only have relevancy as a result of "stereotypical reasoning:"

> (a) she (the complainant) struck up a conversation with a complete stranger;

(b) she gave him her phone number when she didn't know his last name or marital status;

(c) she got in a car with this man; and stayed there after dark;

(d) she sat in a parked vehicle with him.

The Crown relies on the judgment of Wilson J. in **R. v. B(G.)** (1990) 56 C.C.C. (3d) 192 (S.C.C.) in which she attempts to open new approaches for finding error of law in appeals from acquittals. She stated:

> Indeed, both the Crown and the Court of Appeal acknowledge that it is not open to an appellate court to overturn an acquittal on the ground that it was unreasonable. There are, however, other questions of law arising in a case which will confer jurisdiction on an appellate tribunal. Aside from clearly established questions of law such as the admissibility of evidence, the interpretation of a statute, or whether evidence is capable of being corroborative, this court has recognized appellate jurisdiction where the question of law originates from the trial judge's conclusion that he or she is not convinced of the guilt of the accused beyond a reasonable doubt because of an erroneous approach to, or treatment of, the evidence adduced at trial.
>
> . . . .
>
> An acquittal based on an erroneous conclusion of reasonable doubt constitutes a question of law where the trial judge has erred as to the legal effect of undisputed or found facts rather than the inferences to be drawn from such facts.

The Crown urged that the four statements shown above were undisputed facts and the trial judge had erred as to their legal effect. It is not necessary to elaborate upon the contrary view that the trial judge merely drew inferences from those facts related to credibility, because the approach of Wilson J. in **R. v. B(G.)** was specifically disavowed by Sopinka J. writing for a unanimous court in **R. v. Morin** (1992) 16 C.R. (4th) 291 at p. 298:

> **R. v. B. (G.)**, supra, proceeded on the basis (conceded by the Crown at p. 72 [S.C.R.]) that failure by the trial judge to direct himself to all the evidence is only a question of law if based on a legal misdirection. In this regard, reliance on **R. v. Harpe**r, [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193, 133 D.L.R. (3d) 546, 40 N.R. 255, must be treated with caution. In that case the appeal was from conviction and the trial judge treated as

> irrelevant the evidence of several witnesses without an adverse finding with respect to their credibility. This was held to be an error of law by this court. See Estey J. at p. 14 [S.C.R.]. That decision must be applied in light of the principle that in an appeal from conviction, the Court of Appeal has the duty of reviewing the evidence in order to determine whether the conviction is unreasonable and cannot be supported by the evidence. In an appeal from acquittal, the Court of Appeal has no such power. See **Sunbeam Corp. (Canada) v. R.,** [1969] S.C.R. 221, 56 C.P.R. 242, [1969] 2 C.C.C. 189, 1 D.L.R. (3d) 161.
>
> Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle. Any statement to the contrary in **R. v. B.(G.)** must be considered in light of the assumption made by Wilson J. that the statement to this effect by Marshall J.A. in **R. v. Roman** (1987), 66 Nfld. & P.E.I.R. 319, 204 A.P.R. 319, 38 C.C.C. (3d) 385 (Nfld. C.A.) was correct. That assumption was incorrect by reason of the fact that this court, differently constituted, had reversed **Roman** prior to the decision in **R. v. B(G.).** See [1989] 1 S.C.R. 230, 92 N.R. 322, 46 C.C.C. (3d) 321, 73 Nfld. & P.E.I.R. 148, 229 A.P.R. 148. Nevertheless, **R. v. B. (G.)** was correctly decided on the basis of a misdirection in law. As pointed out in the concurring reasons of McLachlin J., the trial judge erred in law in respect of the issue of time. This error affected his overall assessment of the evidence. This error was noted as well by Wilson J. and *must be taken as the basis for her judgment.* (Emphasis added.)

The position of the respondent, who cites **Morin**, is that none of the grounds of appeal raise an issue of law alone as required by s. 676(1)(a) of the **Criminal Code**:

> 676(1)(a) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.

The Respondent also quotes the comments of Major J. in **R. v. Kent** (1994), 92 C.C.C. (3d) 344 at 352:

> The question of whether the proper inference has been drawn by a trial judge from the facts established in evidence is a question of fact: **Lampard v. The Queen** [1969] 3 C.C.C. 249, 4 D.L.R. (3d) 98, [1969] S.C.R. 373 (S.C.C.). Evidentiary sufficiency is also a question of fact.

The trial judge set out the evidence at length and does not appear to have failed to mention a significant fact; I am satisfied that he considered the totality of the evidence. A careful perusal of his reasons for judgment does not disclose any misapprehension of the law nor the application of any wrong principle: he did not legally misdirect himself. He drew inferences from the evidence as he was entitled to do; if his inferences or conclusions were wrong, that would be a matter of fact with which this court cannot interfere on an appeal from an acquittal.

It is significant that on the issue of credibility, to which the points raised by the Crown ultimately relate, the trial judge preferred the evidence of the complainant to that of the respondent, finding only that he was not persuaded beyond a reasonable doubt. It is immaterial whether this court would have found itself with a reasonable doubt on the same evidence: in an appeal from an acquittal we are without jurisdiction in the absence of an error of law or misdirection. After reviewing the submissions of the parties, the authorities cited, the evidence and the decision of the trial judge, I have not been satisfied that the trial judge erred in his understanding of consent in light of s. 273.1, that he applied factors relevant to the defence of mistaken belief in consent, nor that he failed to direct himself to all the relevant evidence. That is, the Crown has not demonstrated a ground of appeal that is on a question of law alone. I would therefore dismiss the appeal.

Freeman, J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.

C.A.C. No. 110023

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - SHAWN STEVEN FARMER Respondent	REASONS FOR JUDGMENT BY: FREEMAN, J.A.