

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Rideout*, 2003 NSCA 54

Date: 20030520

Docket: CAC 177529

Registry: Halifax

Between:

Kyle L. Rideout

Appellant

v.

Her Majesty the Queen

Respondent

Publication Ban: **Publication Ban pursuant s. 486(3) of the Criminal Code**

Judges: Cromwell, Saunders and Oland, JJ.A.

Appeal Heard: May 20, 2003, in Halifax, Nova Scotia

Written Judgment: May 21, 2003

Held: **Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Saunders and Oland, JJ.A. concurring.**

Counsel: Rickcola Slawter, for the appellant
William D. Delaney, for the respondent

Publishers of this case please take note that Section 486(3) of the Criminal Code applies and may require editing of this judgment or its heading before publication. The subsection provides:

(3) Order restricting publication - Subject to subsection (4) where an accused is charged with

(a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,

(b) an offence under section 144, 145, 149, 156, 245 or 246 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] The appellant was convicted after trial by Ross, P.C.J. of breaking and entering a dwelling with intent to commit an indictable offence (**Criminal Code of Canada**, R.S.C. 1985, c. C-46, s. 348(1)(a), sexual assault of R. L. R. (s. 271) and breach of probation (s. 733.1). He appeals these convictions.

[2] The Crown evidence, in brief, was that the appellant, while subject to a probation order prohibiting contact with R. L. R., broke into her apartment through a basement window and a locked basement door and sexually assaulted her. The incident ended when R.L.R. ran screaming to her upstairs neighbour and was taken in while the appellant ran off. The neighbour testified as to her emotional state and to the damaged condition of the basement door.

[3] The appellant's evidence, which was not believed by the trial judge, was that he entered R. L. R.'s apartment through a basement window by prearrangement with her, that they talked for a while and parted on good terms. He claimed that he simply opened the basement door and, when confronted with photographs of the broken door casing, had no explanation other than that perhaps someone had deliberately removed it after he had left.

[4] The appellant submits that he was prejudiced at trial by the ineffective assistance of his then counsel, that the judge erred in allowing the Crown to cross-examine him in relation to a possible alibi and that the verdict is unreasonable. In our view, none of these points has any merit and the appeal must be dismissed.

[5] The verdict is not unreasonable. There was ample evidence on which the judge, acting judicially, could convict.

[6] The appellant says that the judge erred in permitting cross-examination by the Crown concerning whether the accused had advanced as an alibi that he had been at his aunt's house at the time of the alleged offence. That was a position different than the one taken during his testimony at trial. The accused denied that he had advanced such an alibi, no evidence to the contrary was offered by the Crown at trial and, during a *voir dire*, the Crown abandoned its attempt to lead evidence that the accused had advanced a concocted alibi. The judge disregarded the *voir dire* evidence and noted that it was not evidence at the trial and did not refer to the cross-examination on this issue in his reasons.

[7] The appellant's objections to the cross-examination are that it was irrelevant and inappropriately affected his credibility. We do not agree. As the appellant himself notes in his factum, evidence that the accused has concocted an alibi (as opposed to simply having advanced an alibi that is disbelieved) may support an inference of guilt. The evidence sought, but not obtained by the Crown in cross-examination was therefore not irrelevant. Moreover, in light of the accused's denial, the absence of evidence to the contrary and the judge's disregard of the entire matter, this cross-examination could not and, we are satisfied, did not play any part whatever in the judge's decision to convict the accused.

[8] Finally, the appellant submits that he was prejudiced by the ineffective assistance of trial counsel. He advances no evidence to support this submission apart from the trial record itself.

[9] In our view, this submission has no basis in fact or merit in law. We have the unanswered affidavit of trial counsel, which we find admissible as fresh evidence, that fully answers the appellant's unsupported allegations of inadequate preparation. This affidavit also satisfactorily addresses the tactical decision, made on apparently sound grounds, not to place certain cell phone records and social assistance cheques in evidence. As for the submission that additional witnesses were available and ought to have been called, no evidence was put before us as to their identity, proposed testimony or likely impact on the verdict. We do have the uncontradicted evidence of trial counsel that the appellant was twice asked in writing whether he had witnesses to call and that no response to these inquiries was given by the appellant. We note that there was no request to cross-examine trial counsel who was present for the hearing of the appeal.

[10] The appellant urges us to find that the complainant lied about contact between them prior to the alleged offence and that effective trial counsel would have demonstrated this. However, as is clear from the judge's reasons, he disbelieved the complainant's evidence on this subject but nonetheless accepted her testimony on the circumstances of the offence.

[11] The appellant has not discharged his burden of showing either that his trial counsel acted other than in accordance with reasonable professional judgment or that he suffered any prejudice as a result of his trial counsel's conduct of the case.

[12] The appeal is dismissed.

Cromwell, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.