

**NOVA SCOTIA COURT OF APPEAL**

Citation: R. v. Riley-Zwicker, 2005 NSCA 125

**Date:** 20051005

**Docket:** CAC 243516

**Registry:** Halifax

**Between:**

Jason Wayne Riley-Zwicker

Appellant

v.

Her Majesty the Queen

Respondent

**Restriction on publication:** pursuant to s. 486(3) of the Criminal Code

**Judges:** Roscoe, Cromwell and Hamilton, J.J.A.

**Appeal Heard:** October 5, 2005, in Halifax, Nova Scotia

**Written Judgment:** October 7, 2005

**Held:** Appeal allowed, conviction set aside and a new trial ordered per oral reasons for judgment of Cromwell, J.A.; Roscoe and Hamilton, J.J.A. concurring

**Counsel:** Donald C. Fraser, for the appellant  
Kenneth W.F. Fiske, Q.C. and Lloyd Lombard, 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 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complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.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] This is an appeal from the appellant's conviction for sexual assault. There was no real dispute at trial that the appellant had gotten into bed with the 11 year old complainant, put his hand under her pyjama top and felt her breast. His evidence, however, was that he believed the complainant to be his 16 or 17 year old girlfriend with whom he had shared the same bed and had consensual sexual activity earlier that evening.

[2] In convicting the appellant, the trial judge found that there was no evidentiary basis for the appellant's belief the person in the bed was his girlfriend, stating that he made absolutely no effort whatsoever to determine who the person was and that he had not spoken the person's name.

[3] Notwithstanding Mr. Fiske's able argument, we are respectfully of the view that the trial judge misapprehended the evidence in a way that was substantial, material and played an essential part in her reasoning process. The judge did not mention in her reasons that the appellant and his girlfriend had been lying on the same bed and engaging in consensual sexual activity earlier in the evening. It was, therefore, not accurate to say, as the trial judge did, that there was no basis for his belief that she was the person in the bed. The judge's statement that the appellant did not speak his girlfriend's name ignores the appellant's trial evidence which the judge did not refer to or expressly reject, that he had spoken his girlfriend's name when first getting into the bed. These points are critical to the judge's conclusion and her misapprehension of the evidence with respect to them has, regrettably, given rise to a miscarriage of justice necessitating a new trial.

[4] Both counsel in this Court took the position that sections 150.1 and 273.2 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 have no application to the present case. We reach no conclusion on that and rest our judgment solely on the judge's misapprehension of the evidentiary basis for the appellant's claimed belief.

[5] The appeal is allowed, the conviction is set aside and a new trial is ordered.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.