IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. S.E.C., 2008 NSSC 161

Date: 20080523
Docket: SBW 290402
Registry: Bridgewater

Between:

S.E.C.

Appellant

and

Her Majesty the Queen

Respondent

Restriction on publication: Restricted Publication Pursuant to Section 486.4(1) of the Criminal Code.

Editorial Notice

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

Judge: The Honourable Justice Glen G. McDougall

Heard: May 8, 2008, in Bridgewater, Nova Scotia

Written Decision: May 29, 2008

Revised Decision: June 18, 2008 - the text of the judgment has been corrected and replaces the previously distributed judgment.

Counsel: Thomas J. Feindel, on behalf of the Appellant
C. Lloyd Tancock, on behalf of the Respondent

By the Court:

[1] This is an appeal by S.E.C. (the "appellant") from a conviction under section 271 and section 72(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 ("**Criminal Code**"). The appellant is not appealing his conviction on two counts of failing to comply with conditions of an undertaking contrary to s. 145(5.1) of the **Criminal Code**.

[2] The offences for which the appellant was convicted and from which he is now appealing are:

> (1) S.E.C. being an adult on or about the 20th day of July, A.D., 2006, at or near C., did commit a sexual assault on A.C. contrary to Section 271 of the Criminal Code of Canada;
>
> (2) And furthermore did commit forcible entry on the real property of A.C. contrary to Section 72(1) of the Criminal Code.

[3] The grounds of appeal as set out in the Notice of Appeal are as follows:

> 1. That the Learned Trial Judge erred in misapplying the credibility test as set out in **R.** v. **W.D.**, [1991] 1 S.C.R. 742.
>
> 2. That the Learned Trial Judge erred by making errors which were both palpable or overriding in that the Learned Trial Judge;
>
> (i) Has made a number of manifest errors based upon the evidence;
>
> (ii) Has misunderstood the evidence; or
>
> (iii) Has drawn erroneous conclusions from the evidence;
>
> 3. That the Learned Trial Judge erred in law in not fully addressing the inconsistencies raised by the Appellant in the Crown's evidence prior to coming to her conclusion;
>
> 4. That the Learned Trial Judge erred in law, in convicting the Appellant without finding that the Crown had proven its case beyond a reasonable doubt;

5. Such further or other grounds as the transcript of the trial shall reveal.

FACTUAL BACKGROUND

[4] The facts are as outlined in the brief submitted by the appellant's counsel. Counsel for the respondent, in his brief, indicated that "the Appellant's recital of the facts, while interspersed with commentary of witnesses' testimony, is not seriously challenged."

[5] In summary, the appellant was at large on an undertaking not to have any contact with his estranged wife. Despite this, he made contact with her by telephone on more than one occasion. He also spoke with her directly in the parking lot of a local shopping centre. The appellant admitted to being on the undertaking and did not deny that he had contact with her.

[6] Furthermore he admitted going to his estranged wife's place of residence on the night of July 19th, 2006 ostensibly to discuss issues of reconciliation with her. He showed up unannounced and without any prior invitation from her.

[7] His version of how he gained entry to the residence and what happened after he gained entry differ from that of the complainant. He testified that he knocked on the door and was invited inside by his wife.

[8] Mrs. C. testified that she had already retired for the evening and the house was in darkness. From her bedroom she heard a vehicle approach her house. She did not know whose vehicle it was. She said the doors to her residence had been locked. She heard a key in the lock and then the door being opened. She then noticed the hallway light come on. It is then that she recognized the appellant standing there.

[9] She further testified that she held out her hand to indicate to him not to come any closer to her. She said she asked him to leave several times.

[10] The appellant's testimony as to what happened after he says he was allowed to enter the residence differs from that of the complainant. He indicated that they talked for several hours about the state of their marriage. He wanted to attempt reconciliation and had even arranged for the intervention of a marriage counsellor to try to assist them in this regard.

[11] He stated that he was invited by the complainant to stay for the night. According to him they had consensual sexual relations which included oral sex and sexual intercourse.

[12] The complainant testified that she was forced without her consent to participate in various sexual activities. She tried to resist but out of fear for her personal well-being she put up less resistance than she might have otherwise liked to. Nonetheless she says she did not consent. She says that he carried her over his shoulder to one of the bedrooms, placed her on the bed and then sexually assaulted her. There was no evidence of any bruising or abrasions or any type of defensive injuries on her hands or anywhere else on her body. In her statement to the police she did not mention breaking a finger nail trying to prevent the appellant from carrying her to the bedroom. This was, however, part of her testimony at trial.

[13] After the sexual assault took place the complainant went to the bathroom, locked the door and remained there until the appellant unlocked the door from the outside using a butter knife.

[14] The complainant then made her way past the appellant and telephoned 9-1-1. Before the police arrived the appellant left the premises in his vehicle. He was subsequently apprehended by the B. Police and handed over to the RCMP who were dispatched to investigate the allegation. Before being placed in custody the appellant's keys were taken from him. A key which the complainant identified at trial as being a key to her house was seized from the appellant's key ring by one of the investigating police officers.

[15] In addition to hearing from the complainant the Crown also called as witnesses two RCMP officers who were involved in the investigation.

[16] The defence called the complainant to testify along with Sergeant O'Quinn of the B. Police. It was Sergeant O'Quinn, assisted by Constable Graves, who apprehended the appellant after the incident. Constable Graves delivered the appellant to the RCMP while Sergeant O'Quinn took the appellant's dog which had been with him in his vehicle at the time he was stopped and delivered the dog to the appellant's house.

ROLE OF THE SUMMARY CONVICTION APPEAL COURT

[17] Sub-section 822(1) of the **Criminal Code** provides that in a summary conviction appeal pursuant to section 813, sections 683 to 689 apply excepting however, sub-sections 683(3) and 686(5). In particular section 686(1)(a)(i) states:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

Paragraph (b)(ii) of sub-section (1) of section 686 states:

> (b) may dismiss the appeal where
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

[18] In the case of **R.** v. **Nickerson** (1999), 178 N.S.R. (2d) 189, (N.S.C.A.), Cromwell, J.A., stated at paragraph 6:

> 6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and R. v. Gillis (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in R. v. Burns, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[19] This passage makes it clear that the Summary Conviction Appeal Court is entitled to review the evidence at trial and to re-examine and re-weigh it but only for

the purpose of determining whether it is reasonably capable of supporting the Trial Judge's conclusions.

ANALYSIS

Issue No. 1: That the Learned Trial Judge erred in misapplying the credibility test as set out in **R.** v. **W.(D.)**, [1991] 1 S.C.R. 742.

[20] The appellant argues that the Trial Judge erred in law by failing to properly apply the test set out in **R.** v. **W.(D.)**. In that case, Cory, J., writing for the majority, considered the manner in which a Trial Judge is required to address a jury with respect to the burden of proof. The **W.(D.)** analysis also applies to a judge sitting alone. (See **R.** v. **Garland**, 2006 N.S.C.A. 39). Justice Cory stated:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole.

In the context of a jury trial the jury should be instructed along these lines:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

A Trial Judge is not required to formally recite the **W.(D.)** language. In **R.** v. **Lake (P.E.)** (2005), 240 N.S.R. (2d) 40 (C.A.), Fichaud, J.A., said, for the Court:

> [14] ... It is fundamental that, when the verdict turns on the accused's credibility, the trial judge's reasons should disclose whether she believes or disbelieves the accused.

> [15] *D.W.* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from D.W., follow the D.W. chronology or even cite D.W. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the D.W. instruction...

[21] In **Lake** the Trial Judge did not expressly reject the evidence of the accused, but did expressly accept certain evidence of the Crown witnesses: (See **Lake** at para. 7). The Court of Appeal allowed the appeal and ordered a new trial, stating that the Trial Judge "did not expressly or impliedly answer the first **D.W.** question. The accused's credibility is a basic trial issue which should not be assessed for the first time in the Court of Appeal" (para. 29). Similarly, in **R.** v. **D.D.S.** (2006), 242 N.S.R. (2d) 235 (C.A.), the Court of Appeal allowed the appeal in part because "the Trial Judge never said he rejected the appellant's evidence. One ought not to infer that he did so by necessary implication" (para. 44).

[22] There can be little doubt that the case of **R.** v. **W.(D.)** was very much in the mind of the Trial Judge. Defence counsel began and ended his summation before the Trial Judge by making reference to the case.

[23] Crown counsel did not specifically mention the case of **R.** v. **W.(D.)** in his final summation but he did urge the court to discount or to totally disregard the evidence of the accused where it conflicted with the evidence of the complainant.

[24] In her oral decision, given shortly after hearing from the witnesses and receiving the final summations of counsel, the Trial Judge stated:

> In regard to the counts of forcible entry and sexual assault, credibility is the main issue as the defence states and the test in the Crown against W.(D.) governs.

She then goes on to say:

> Here I do not believe the defendant nor does his evidence leave me in any reasonable doubt for the following reasons....

After stating her reasons and making findings of fact she says:

> As stated above, I do not believe the defendant's version of events, nor does it leave me in reasonable doubt.

If she had not said anything beyond this, then I would agree with the appellant's first ground of appeal. But she did not stop there. She went on to say:

> I find that looking at the remainder of the evidence, mainly the evidence of the complainant, I believe Ms. C. when she says that she told the defendant no, that she shoved his head when he went down on her, as she puts it, that she struggled. I believe her when she says she's now sorry that she did not resist more strenuously but at the time, she was afraid of the consequences if she did based on other incidents with the defendant; ...

The Trial Judge made it perfectly clear that she disbelieved the accused thus satisfying the requirement spelled out in **R.** v. **Lake**, *supra*.

[25] Furthermore, she indicated that after "looking at the remainder of the evidence..." she finds the defendant guilty of sexual assault and forcible entry. Not surprisingly, she indicated that she relied mainly on the evidence of the complainant. In cases of sexual assault there are usually no independent witnesses to the event. It often comes down to a determination of the facts based on an assessment of credibility and only after considering all of the evidence tendered at trial.

[26] The court must not, however, fall into the trap of simply choosing between the two conflicting versions of the incident and then deciding guilt or innocence based on that outcome. All of the evidence must be considered. If, after considering all the accepted evidence, a reasonable doubt exists, then the accused must be given the benefit of that reasonable doubt in the form of an acquittal. If the court is satisfied that the Crown has met the burden of proof beyond a reasonable doubt, then a conviction will follow.

[27] I am satisfied that the Trial Judge not only understood the requirements of **R.** v. **W.(D.)** but that she properly applied them in this case. I, therefore, dismiss this ground of appeal.

Issue No. 2: That the Learned Trial Judge erred by making errors which were both palpable or overriding in that the Learned Trial Judge:

(i) Has made a number of manifest errors based upon the evidence;

(ii) Has misunderstood the evidence; or
(iii) Has drawn erroneous conclusions from the evidence;

[28] Under this ground of appeal, the appellant argues that the Trial Judge erred in making certain factual findings that were not supported by the evidence or that she misunderstood the evidence. He goes on to suggest that these errors were palpable and when taken together they have the cumulative effect of making the errors overriding in nature. He points to the conflicting testimony regarding the timing of the various events that make up the incident. He also points to the lack of physical injuries save for the revelation by Mrs. C. at trial that she had broken a finger nail while trying to prevent Mr. C. from carrying her down the hallway to the bedroom. The investigating officer who looked for bruises or abrasions on Mrs. C.'s hands did not note any sign of defensive type injuries nor was the broken finger nail pointed out to her by Mrs. C.

[29] The appellant also raises the differences in the testimony surrounding the presence of Mr. C.'s dog. Mr. C. testified that he had his dog with him when he went to his wife's residence. He says that he left the dog in the van and later, after being invited to stay for the night by Mrs. C., he let the dog out to do her business then brought her inside where she remained until Mr. C. left the residence later that morning. Mrs. C. testified that she was not aware of the dog's presence and could not have known if it was even in Mr. C.'s van. She also had to be reminded of the dog's name even though Mr. C. testified that the dog had lived in the residence for several months prior to their separation. One would think that she would have recalled the animal's name but one must also remember the trial took place some 17 months after the separation and approximately 15 months after the incident that resulted in the charges against Mr. C. When Mr. C. was arrested by the B. Police on the morning after the incident took place his dog was found in the van that he was driving.

[30] The appellant also raises the issue of new evidence revealed by Mrs. C. for the first time at trial. At trial she gave evidence that had not been included in the statement she gave to police when they first questioned her at the hospital. The investigating officer testified that when she interviewed Mrs. C., she found her to be quite upset. Given what she had just experienced this is not surprising. The officer testified that she sensed that Mrs. C. did not want to get Mr. C. in any trouble. The officer had intended to get a more detailed statement later but unfortunately she just did not get around to it.

[31] Although it is always good to get a statement as near to the event as is reasonably possible that is not always doable. Mrs. C.'s testimony at trial did not contradict what she had provided to the police officer in her statement. It simply provided further details all under oath and subject to cross-examination by the appellant's counsel.

[32] It was then open to the trier-of-fact to accept, reject or discount it based on her assessment of the witness's credibility. The Trial Judge is in the best position to determine credibility. In the case before me this is exactly what the Trial Judge did. In doing so she found the appellant's credibility to be lacking. She disbelieved his version of events. In her oral decision she stated:

> Here I do not believe the defendant nor does his evidence leave me in any reasonable doubt for the following reasons.

She then goes on to give reasons.

[33] Further on in her decision the Trial Judge stated:

> Once again, given all of the foregoing, I cannot believe the defendant's testimony that the complainant agreed to sexual intercourse. It simply does not fit the dynamics of the relationship between them at that point nor, if the defence is raising it, which is not at all clear, do I believe that he was reasonable in mistakenly believing in her consent.

[34] Finally, she goes on to say:

> As stated above, I do not believe the defendant's version of events, nor does it leave me in reasonable doubt.

[35] One has to bear in mind that the decision of the Trial Judge was rendered orally after only a short break following the summations of counsel. It did not contain an exhaustive review of the evidence nor did it attempt to deal with each and every piece of conflicting testimony.

[36] "As stated by the Supreme Court of Canada in **R.** v. **Burns**, *supra*, the [Summary Conviction] appeal court is entitled to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the Trial Judge's conclusions." (Reference **R.** v.

Nickerson,, *supra*). In reviewing the transcript of the evidence tendered at trial and given the Trial Judge's assessment of credibility there was sufficient evidence reasonably capable of supporting her conclusions for both the sexual assault and the forcible entry offences.

[37] In the case of **R.** v. **Shepherd**, [2002] 1 S.C.R. 869 (S.C.C.), Binnie, J., writing for the court set out several principles pertaining to the duty of a Trial Judge to give reasons for his/her decision. These principles can be found at pp. 896-898 of the written decision. Justice Binnie indicated that the list was intended to be helpful rather than exhaustive. The principles which Justice Binnie formulated are as follows:

> 1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
>
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
>
> 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
>
> 4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.
>
> 5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.
>
> 6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, [page898] unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

> 7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
>
> 8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
>
> 9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.
>
> 10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

[38] The Trial Judge's reasons though not exhaustive are, however, sufficiently detailed to be understandable to the parties and to provide for meaningful appellate review. I, therefore, dismiss this ground of appeal.

[39] The appellant's counsel, in his brief, indicated that appeal issues 3, 4 and 5 are covered in the arguments advanced for issues 1 and 2. I will only specifically comment on issue # 4 leaving my reasons for dismissing the first two grounds of appeal to satisfy issues # 3 and 5.

[40] **Issue No. 4:** That the Learned Trial Judge erred in law, in convicting the Appellant without finding that the Crown has proven its case beyond a reasonable doubt.

[41] Although it is true that the Trial Judge did not say "I find or I am satisfied that the Crown has proved each and every element of the various offences beyond a reasonable doubt" she does state on two separate occasions that the evidence does not "leave me in any reasonable doubt" or "nor does it leave me in reasonable doubt."

These comments by the Trial Judge were said in the context of both offences of sexual assault and forcible entry.

[42] The Trial Judge is a very experienced and very capable jurist. Once can safely assume that she is well aware of the burden of proof in criminal matters. Indeed, she makes this perfectly clear when she speaks of not being left with any reasonable doubt as to the accused's guilt. I, therefore, dismiss this ground of appeal as well.

[43] The appellant's Notice of Appeal was against conviction and sentence. The arguments focussed solely on conviction. Nothing was presented to this court in relation to the sentence imposed by the Trial Judge. My only comment before dismissing this aspect of the appeal is that the conditional sentence of 18 months followed by 12 months probation, concurrent for each charge, along with the 10-year SOIRA order and the DNA order are within the range and are reasonable under the circumstances and facts of this case.

[44] The appeal is dismissed. The convictions and sentence imposed by the Learned Trial Judge are upheld and affirmed.

McDougall, J.