Date: 20011126
Docket: CAC 171046

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. D.I.H., 2001 NSCA 169

Roscoe, Bateman and Hamilton, JJ.A.

BETWEEN:

D.I.H., a young offender

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Chandrashakhar Gosine for the appellant
Kenneth W.F. Fiske, Q.C. for the respondent

Appeal Heard: November 26, 2001

Judgment Delivered: November 26, 2001

THE COURT: Appeal dismissed per oral reasons for judgment of Bateman, J.A., Roscoe and Hamilton, JJ.A. concurring.

BATEMAN, J.A.: (Orally)

[1] D.I.H., a young offender, appeals from his conviction on two counts of assault with a weapon contrary to s.267(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. In finding the young offender guilty, the judge accepted that D.I.H. intentionally fired a pellet gun in the direction of two young victims.

[2] The appellant alleges, *inter alia*, that the verdict is unreasonable. He claims, as well, that the trial judge erred in permitting the child victims to give sworn testimony and improperly intervened by questioning Crown witnesses at trial.

[3] As directed in **R. v. Biniaris**, [2000] 1 S.C.R. 381; S.C.J. No. 16 (Q.L.)(S.C.C.), we have "analyse[d] and, within the limits of appellate disadvantage, weigh[ed] the evidence". We are satisfied that the verdict is one which a properly instructed trier of fact could reasonably have rendered (**R. v. Yebes**, [1987] 2 S.C.R. 168; S.C.J. No. 51 (Q.L.)(S.C.C.)). In particular we are not persuaded that the trial judge failed to address his mind to the requisite mental element of the offence. Section 265(1)(b) provides:

> 265(1) A person commits an assault when
>
> . . .
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose;
>
> . . .

[4] The judge accepted the evidence of the victims that D.I.H. pointed and fired the pellet gun in their direction. That the appellant had the intent required to constitute an assault within the meaning of s.265(1)(b) was a logical inference from this evidence. In this regard the judge did not err (**R. v. Nurse** (1993), 83 C.C.C. (3d) 546; O.J. No. 336 (Q.L.)(Ont.C.A.)).

[5] A more extensive examination of the two child witnesses about their understanding of the nature of an oath and the consequences of failing to tell the truth would have been preferable. However, we find the following statement from **R. v. K.(A.)** (1999), 137 C.C.C. (3d) 225; O.J. No. 3280 (Q.L.)(Ont.C.A.) instructive:

> [153] ... As stated in *R. v. Marquard*, at p. 220, "a large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify". Unless his discretion "is manifestly abused", it should not be interfered with.

[6] At trial, defence counsel raised no objection to either child giving sworn evidence. In the circumstances, we are satisfied that the inquiry was minimally adequate to satisfy the requirements of s.16 of the **Canada Evidence Act**, R.S.C. 1985, c. C-5.

[7] Finally, we are not persuaded that the judge's questioning of the child witnesses compromised the appellant's fair trial interests.

[8] Accordingly, the appeal is dismissed.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.