

**NOVA SCOTIA COURT OF APPEAL**

**[Cite as: R. v. A.C.G., 1999 NSCA 152]**

**Freeman, Pugsley and Bateman, JJ.A.**

**BETWEEN:**

A.C.G.	)	Allan F. Nicholson
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	James A. Gumpert, Q.C.
	)	for the respondent
Respondent	)	
	)	
	)	Appeal Heard:
	)	December 2, 1999
	)	
	)	Judgment Delivered:
	)	December 2, 1999
	)	
	)	

**Editorial Notice**

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

**THE COURT:** Leave to appeal granted and appeal dismissed, per oral reasons for judgment of Bateman, J.A.; Freeman and Pugsley, JJ.A. concurring.

**Publishers of this case please take note** that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

38(1) No person shall publish by any means any report

(a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or

(b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence

in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed."

The reasons for judgment of the Court were delivered orally by:

**BATEMAN, J.A.:**

[1] This is an application for leave and, if granted, an appeal from the decision of Judge David Ryan of the Provincial Court finding this young offender guilty of sexual assault (**Criminal Code** s.271(1)(a)).

[2] The appellant says that the verdict is perverse and unreasonable and that the judge erred in that he failed to consider the defences of honest but mistaken belief in consent and of drunkenness.

[3] There were only two witnesses at trial - the complainant and the appellant. It was the complainant's testimony that on the evening of December 24, 1995 she attended a party at the home of her friend, C. K.. The party extended into the early morning hours at which point only Ms. K., the appellant and the complainant remained. The complainant decided to stay the night. Ms. K. proceeded to bed first, leaving only the appellant and the complainant. A short while later the complainant went to bed. She awoke to find the appellant on top of her, having intercourse with her. She told him to get off. He replied ". . . just wait, I'm almost done . . .". Ultimately she pushed him off of her and he left the residence. She had consumed seven or eight pints of beer but could not say what amount the accused had to drink. The complainant did not report the assault until 1997.

[4] The appellant testified that, while he remembers being at Ms. K.'s residence

once, he could not say whether or not it was December 24, 1995. He did not recall being at a party where the complainant was also present. He denied ever having intercourse with her.

[5] In delivering his reasons the trial judge confirmed that the burden is upon the Crown to prove the accused's guilt beyond a reasonable doubt. He expressly noted, as well, that he must be mindful of the Court's instruction in **R. v. W. (D.)**, [1991] 1 S.C.R. 742, when weighing the accused's evidence. The judge stated that he believed the complainant "emphatically" and was satisfied beyond a reasonable doubt that the offence had occurred.

[6] There is no basis in the evidence of the complainant nor of the appellant to provide an air of reality to a defence of honest but mistaken belief in consent. The complainant's lack of resistance to the intercourse while asleep cannot be equated with perceived consent (**R. v. M.L.M.** (1994), 89 C.C.C. (3d) 96 (S.C.C.)) absent other equivocal action on her part. Nor is there any evidence to support the defence of drunkenness. The verdict is neither perverse nor unreasonable.

[7] This appeal is without merit. While leave is granted, the appeal is dismissed.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Pugsley, J.A.