Date:19971212 Docket: C.A.C. 134404

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Slauenwhite, 1997 NSCA 200

Freeman, J.A. Pugsley and Flinn, JJ.A.

BETWEEN:

CHRISTOPHER GERALD SLAUENWHITE	)	
	)	
	)	Warren K. Zimmer
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	November 28, 1997
	)	
	)	
	)	Judgment Delivered:
	)	December 16, 1997

Editorial Notice

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

THE COURT: Appeal of the conviction on the sexual assault charge is allowed, and an acquittal is entered; the appeal of the conviction on the charge of threatening is dismissed; leave to appeal sentence is granted and the appeal is dismissed, as per reasons for judgment of Freeman, J.A.; Pugsley and Flinn, JJ.A., concurring.

Freeman, J.A.

The appellant was convicted of a sexual assault on T.J.T. contrary to s. 271(1)(a) of the **Criminal Code**, and of uttering a threat to hunt him down and kill him contrary to s. 264.1(1)(a). His sentence of nine months' incarceration reflected a credit of a further nine months for time spent on remand awaiting trial. He has appealed from both convictions and seeks leave to appeal his sentence.

At the time of the alleged offences in August, 1995, T.J.T. was a troubled 14-year-old; nearly six feet tall and weighing 160 pounds, he was larger than the appellant. He was a client of Family and Children's Services of Lunenburg County, on the run from a foster home and essentially living on the streets. Christopher Slauenwhite, 32, the appellant, had spent some ten years in federal institutions for offences committed as an adult, most of them related to property. He was living in a one-bedroom apartment in Bridgewater, N.S. and had formed an association with the * in the country near Bridgewater. Following a Sunday night service the appellant was introduced to T.J.T. by church acquaintances at a doughnut shop and agreed he could stay briefly at

his apartment on a fold-out bed in the living room.

The following night T.J.T. testified that the appellant gave him vodka and he became drunk. He said the appellant asked him if he would like to make pornographic videos for an unidentified man in Halifax and he replied, “why not?” The appellant then called the Halifax contact; T.J.T. talked sex with him on the telephone for perhaps half an hour and the appellant informed him he had earned $24.00. The appellant then wanted to take nude pictures of him to determine his suitability for making videos so the complainant undressed and posed for him. Following this the appellant lay beside him on the bed, rubbed T.J.T.’s penis and took it in his mouth. T.J.T. pushed the appellant aside when he attempted anal intercourse and the appellant then lay on top of him and simulated an act of intercourse until he ejaculated. Later he uttered the threat to keep T.J.T. silent as to what had happened.

There was no evidence from telephone company records as to whether a call had been placed at the relevant time from the appellant’s

telephone to a Halifax number.

The appellant's defence at trial was denial of the sexual activity and the threat. On the appeal his focus was on whether the Crown had proved absence of consent on the sexual assault charge.

The trial judge did not accept the testimony of the accused but, after 'very close scrutiny", accepted that of the complainant as "totally reliable insofar as the alleged sexual activity with the accused is concerned." He similarly accepted T.J.T.'s evidence as to the threat. But he made no specific finding that he accepted T.J.T.'s evidence on the issue of consent. It is clear that he must in fact have disbelieved him at least in part, for T.J.T. had testified that he did not consent to any of the sexual activity. After reviewing the facts the trial judge

> . . .considered whether the Crown has established proof of non-consent beyond a reasonable doubt. It seems to me that in the earlier stages of the events that the complainant did consent or did not, at least, communicate his non-consent. As he was lying on the bed the accused approached him, fondled him and put his penis in his mouth, apparently without resistance by the complainant. The complainant acknowledged that when the picture taking was going on that he himself had an erection, as he said the accused did.
>
> That changed, however, when the accused apparently made some effort to insert his penis in [T.J.T.'s] rectum. At that point he said he pushed the accused away, that he objected and that the accused stopped. However, the accused did hold the complainant down and did continue with the sexual activity by placing his penis between the buttocks of the complainant while the complainant was in a position where he could not resist or could not move.
>
> I am satisfied that activity by the accused constituted a sexual assault as clearly, if the complainant had consented to any sexual activity, it was certainly withdrawn with the description of consent in Section 273.1(2)(e). I am, therefore, satisfied that the Crown has proved beyond a reasonable doubt that the accused sexually assaulted [T.J.T.] as alleged in the indictment.

The appellant argues that the following finding by Justice Hall that T.J.T. did not consent because the appellant held him down was unreasonable and not supported by the evidence. The appelant submits:

> . . . at no time did [T.J.T.] testify that Mr. Slauenwhite held him down. That is, there is no evidence of a deliberate act on the part of Mr. Slauenwhite to pin [T.J.T.] to the bed so that he could continue rubbing his penis on [T.J.T.]'s buttocks. There was no objection voiced and there was apparently no effort made to stop Mr. Slauenwhite in this activity.

The complainant had testified: “I really couldn’t move. . . . Because I was lying on my stomach and he was on top of me and I was drunk and I couldn’t move.”

Whether the appellant was lying on top of the complainant is a matter of fact. Whether the complainant was thereby prevented from voicing objections to the appellant is an inference to be drawn from the facts. This Court is as well positioned to draw an inference from established facts as the trial court. Moments earlier the complainant was in the same circumstances when he found no trouble in communicating his lack of consent for anal intercourse.

T.J.T. had testified that he “had no idea what to do or how to react” at that stage.” The appellant suggests that does not indicate a state of mind opposed to the continuing activities of the appellant, particularly when viewed in light of the previous activities. Those activities must be considered in determining the scope of the consent withdrawn by the complainant.

The trial judge found that “in the earlier stages of the events that the complainant did consent or did not, at least, communicate his non-consent.” Evidence is abundant that the complainant consented to the earlier activity: he voluntarily removed his clothes, posed for pictures with an erection, earned $24.00 by telephone sex, and lay unresisting while the appellant rubbed his penis and took it in his mouth.

He declined anal intercourse by pushing the appellant away. The appellant did not persist. I would agree with the appellant that the approach was tentative, invitational only, and when the appellant immediately desisted no assault was committed. The question is whether the continuing sexual activity between the complainant and the appellant, the simulated intercourse without penetration, constituted an assault. It is reasonable inference that the entire episode which clearly began with the complainant's consent continued through to its onclusion by consent, interrupted only by sufficient communication to exclude anal intercourse. The circumstances were consistent with continuing consensual sexual activity and are distinguishable on that basis from those in **R. v. M.L.M.** (1993) 78 C.C.C.(3d) 318 (N.S.C.A.);

(1994) 89 C.C.C.(3d) 96 (S.C.C.). Against the background of what had previously occurred, the suggestion that the complainant had withdrawn consent from all further sexual activity lacks an air of reality.

The standard of review on appeal from conviction under s. 686(1)(a)(i) of the **Criminal Code** is as set out by the Supreme Court of Canada in **R. v. Burns**, [1994] 1 S.C.R. 656 where McLachlin, J. said at p. 663:

> In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes,** [1987] S.C.R. 1968; R.v. W.(R), [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to pursuade it to order a new trial.

In my view, with respect, the evidence before the trial judge does not reasonably support a conclusion that the sexual activity between the appellant and the complainant following the abandonment of the invitation to anal intercourse continued without the complainant's consent. The verdict is therefore unsafe.

The third ground of appeal relating to the appellant's criminal record in the context of credibility is therefore moot as to the appeal of the sexual assault conviction, which was allowed on the Crown's evidence and not the evidence of the appellant. It must however be examined with respect to the threatening charge under s. 264.1(1)(a). The criminal record of the appellant, which Justice Hall was obliged to consider both as to credibility and sentencing, included a conviction for obstructing justice pursuant to s. 139(2) of the **Criminal Code**.

Both the fact of the conviction and the circumstances of it were referred to repeatedly in the trial court, because the obstruction charge alleged threats by the accused directed toward young girls who were to testify at the fraud trial of the appellant's best friend, who was a witness in the present case. The conviction was set aside and an acquittal entered on appeal--see **Slauenwhite v. R.** (1997), CanRepNS 29, 158 N.S.R. (2d) 159, 466 A.P.R. 159. We have noted the record of that case and the Crown has not objected to our considering it. The appellant did not specifically deny

threatening the complainant, although that would be included in his general denial of the complainant's version of events. The trial judge had a duty to consider the record as it existed at the time of trial, so error of law on that point is not an issue. A review of the record and the submissions of counsel does not satisfy me there was a miscarriage of justice. The obstruction of justice charge, though relevant, merely added weight to the trial judge's conclusions as to credibility, which were based on having heard both the complainant and the appellant, the appellant's entire criminal record, and what the trial judge considered inconsistencies in his evidence. I would dismiss this ground of appeal, and dismiss the appeal on the charge of threatening.

The appellant has also applied for leave to appeal his sentence, which has now been served. Justice Hall's sentence of eighteen months less nine months for time spent on remand on the sexual assault charge was not disproportionate at the time it was imposed. A sentence of six months for the threatening conviction was to be served concurrently. Mr. Slauenwhite was arrested on

February 14, 1996, and, following several court appearances and a bail hearing, was remanded pending the outcome of the case. He was sentenced on December 16, 1996 after ten months of incarceration. During that period he served his three month sentence on the obstruction of justice offence for which he was acquitted on appeal. In calculating Mr. Slauenwhite's credit for dead time Justice Hall allowed three months for the period before he was sentenced on the obstruction charge and two and a half months after it had been served, which he rounded to six months in total. He followed his usual practice of allowing three months credit for each two months of dead time, arriving at nine months' credit.

Applying the three for two factor to the full ten months served by the appellant awaiting disposition the appellant would have been entitled to 15 months' credit. His counsel argued that a more appropriate factor for calculating dead time credit would be two for one, which would have resulted in 20 months' credit. If the sentence appeal on the sexual assault charge were not moot I would grant leave to appeal, allow the appeal, and, with the benefit of hindsight

respecting time served on the overturned obstruction of justice conviction, impose a sentence of time already served as of the time of sentencing. In the circumstances only the six months' sentence for threatening remains to be considered. That was a fit sentence which has already been served and I would not disturb it.

I would therefore allow the appeal on the sexual assault charge and, in all the circumstances, enter an acquittal. I would dismiss the appeal as to the charge of threatening, grant leave to appeal the sentence on that charge and dismiss the appeal.

Freeman, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.