Date: 19981216 Docket: C.A.C. 147262

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. L.J.R., 1998 NSCA 236

Chipman, Freeman, Pugsley, JJ.A.

BETWEEN:

L. J. R.	)	
	)	Appellant
Appellant	)	(In Person)
	)	
- and -	)	
	)	James A. Gumpert, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	December 10, 1998
	)	
	)	
	)	Judgment Delivered:
	)	December 18, 1998

Editorial Notice

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

THE COURT: Appeal dismissed per reasons for judgment of Freeman, J.A.; Chipman and Pugsley, JJ.A., concurring.

FREEMAN, J.A.:

The appellant was convicted on ten out of fourteen counts of sexual offences involving two females, commencing when one of them was a pre-school child. He is serving sentences totalling six years and one month imposed by Judge Brian Gibson after his conviction in Provincial Court.

He has appealed from conviction only, asserting he was living in [...] in 1987 during the time span when some of the offences were alleged to have been committed. At the close of the hearing, Judge Gibson permitted the amendment of the time spans involved in three of the counts to make them conform with the evidence. The defence offered no objection to the amendments. The appellant was represented by counsel at the trial but not on the appeal.

He was convicted of the following offences with respect to his former wife's niece who was born April [...], 1975 :

1. Indecent assault, s. 149 Criminal Code, between January 1, 1979, and September 15, 1980;
2. Indecent assault, s. 149, September 15, 1980--January 4, 1984;
3. Gross indecency, s. 157, September 15, 1980--December 31, 1984;
4. Sexual assault, s. 246.1, January 4, 1983--December 31, 1984;
5. Sexual assault, s. 246.1, January 1, 1984--April 26, 1990;
6. Gross Indecency, s. 157, January 1, 1984--January 1, 1988;
7. Sexual assault, s. 246.1, January, 1986--January 1, 1988.

The second complainant was a friend of the appellant's former wife's family who was born December [...], 1967. The appellant was convicted of the following offences related to her:

1. Indecent assault, s. 149, December 17, 1978--January 4, 1983;
2. Indecent assault, s. 149, January 1, 1980--January 4, 1983;

3. Sexual assault, s. 246.1, January 4, 1983--December 17, 1984.

The counts were obviously drafted to give a wide latitude as to dates, for the evidence of the young complainants was clear as to the events alleged, but less specific as to time.

The complainants were frequent visitors to their home while the appellant and his wife were living in the Halifax area. The wife said she and the appellant met in the summer of 1978 and he moved into her parent's home in [...], Nova Scotia later that year. The appellant said he came from [...] to Halifax in 1979 and met his wife that summer but otherwise agreed with the sequence of events. They agreed they moved to a house in [...] in 1980, where they lived until 1984, according to the wife, or 1985, according to the appellant. They moved to [...], Nova Scotia where they remained until the appellant moved back to [...] in 1987, by the wife's evidence, or 1988, by the appellant's evidence, to operate a taxi business with his brother.

They married in December, 1985, and separated when the wife was two months pregnant with their child in April, 1986. She was born November [...], 1986, and about three months later they reunited. During the period of reconciliation, which proved temporary, the husband made his move back to [...] and his wife followed.

Prior to the hearing of the appeal, the appellant wrote to the Crown requesting an opportunity to call his brother and sister and their spouses, as witnesses to testify that he returned to [...] in 1985 and continued to live there until 1990. The Crown provided copies to the panel. The appellant pursued this request at the hearing, and his appeal was based on his allegation that evidence of dates

before the trial judge was mistaken.

The panel made all due allowance for the fact that the appellant was an unrepresented inmate who had not filed a factum, and considered his appeal on the basis he requested to determine if grounds existed for ordering that new evidence be heard and/or a new trial ordered.

The appellant's new assertions contradict portions of his testimony at trial, which appeared to be detailed, specific and even forceful. He disagreed with his wife on some specific dates but in general their evidence was mutually supportive as to their meeting, cohabitation, marriage, the birth of their child, their separation and reconciliation, his employment with [...] and, to a lesser degree, even to his return to [...]. He says his evidence at trial should be discounted because he was a drug addict at that time, but now is drug-free. He offered no evidence in this regard.

In his submissions on appeal he said he was in [...] from 1985 to 1990, but then acknowledged his marriage in December, 1985, his separation in the spring of 1986, the birth of the child in November, 1986, and the reconciliation, all of which occurred while he and his wife were living in the Halifax area. He explained that he returned to [...] during 1986 but then came back to Halifax for a relatively short period.

The appellant says his sister was readily available as a witness at his trial but was not called by his counsel. It appears however that he suggested to his lawyer that she would be a character witness and not an alibi witness.

There is little likelihood the new evidence could pass any of the branches of the test in **R. v. Palmer and Palmer** (1979), 30 N.R. 181; 50 C.C.C. (2d) 193 (S.C.C.), which provides:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In my view, the fourth ground is the most crucial to the appellant. Even if his revised version of events is accepted at face value he was not absent for the whole of any of the periods during which it was alleged the offences were committed. He was in the Halifax area for the entirety of each of the periods alleged with respect to the second, third and fourth counts related to the first complainant and the second and third counts related to the second complainant. With respect to the remaining five counts, he was in the area for not less than an uninterrupted year within the time frame alleged in each one, plus comings and goings in 1985 and later. His proposed new evidence cannot establish an alibi on any of the counts of which he was convicted. The offences alleged could have occurred within the periods alleged while the appellant was residing in Nova Scotia, as the complainants testified.

At his trial the appellant's defence was not alibi but denial that the events alleged by the two complainants ever occurred. Credibility thus became the central issue. Before proceeding with a

detailed examination of the evidence Judge Gibson correctly instructed himself as follows:

> . . . if I believe the evidence of the accused then I must acquit him. If I do not believe his testimony but am left in a reasonable doubt by his testimony in the context of the evidence as a whole, then I must acquit as well. And third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether on the basis of the evidence which I have heard and which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The well-known statement of the duty of an appeal court with respect to the evidence in criminal appeals in **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 was more recently expressed in **R. v. Burns**, [1994] 1 S.C.R. 656 where at p. 663 McLachlin, J. said:

> 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 (**Yebes** citation omitted). 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 persuade it to order a new trial.

To the extent required, I have re-examined and re-weighed the evidence adduced at the trial at which the appellant was convicted and find it reasonably capable of supporting Judge Gibson's conclusions. I am not satisfied that he erred. I would dismiss the appeal.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.