Date: 19991213
Docket: C.A.C. 153873

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. C.A.L., 1999 NSCA 157]

Freeman, Pugsley, and Bateman, JJ.A.

BETWEEN:

C.A.L. (Young Offender) Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Allan J. Nicholson for the appellant James A. Gumpert, Q.C. for the respondent Appeal Heard: December 2, 1999 Judgment Delivered: December 13, 1999

THE COURT: Leave granted and appeal dismissed per reasons for judgment of Freeman, J.A.; Pugsley and Bateman, 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 or 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."

FREEMAN, J.A.:

[1] The appellant has appealed on a question of law alone and with leave of the court, which is hereby granted, on grounds of fact and mixed fact and law, from his conviction on a charge of criminal assault contrary to s. 271 (1)(a) of the **Criminal Code**.

[2] Both the appellant and the complainant agreed that they were alone at her home on her sixteenth birthday and went from the living room to her bedroom. The appellant testified the complainant invited him to take a condom from the top drawer of her bureau and while he was putting it on in the bathroom she undressed and awaited him under the covers of her bed, where they had intercourse. He asked her if it hurt and she said "just a little bit." She did not object nor ask him to stop. He thought she was consenting.

[3] The complainant testified that the appellant did not use a condom and she denied having one. She did not object to his removal of her shirt and bra while they were on her bed, but became scared when he asked her for oral sex and intercourse and tried to remove her shorts and panties. She said the last time he asked her she "was very scared and just kept quiet." She zipped up her shorts once after he had opened them, then acquiesced in their removal because she was frightened.

[4] He lay on top of her and started to force himself inside. She began asking him to stop because it was hurting her. "I just kept begging him to stop because of the pain." He continued while she repeated the request seven to ten times before finally stopping.

When he did he said “oops!” and asked where the bathroom was. She subsequently discovered she was bleeding.

[5] The trial judge, Judge David Ryan in Provincial Youth Court, referred to s. 273 of the **Criminal Code** which provides in part:

> No consent is obtained, for the purposes of s. 271 . . . where
>
> (e) the complainant, having consented to engage in sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity.

[6] The key issue was credibility. Judge Ryan acknowledged inconsistencies in the evidence of both parties. But when he focused on the “crucial element” he accepted that of the complainant and rejected that of the appellant where they conflicted. He recognized that even if he did not believe the appellant he had a duty to acquit if the evidence as a whole left a reasonable doubt as to his guilt.

[7] On the first ground of appeal, that the verdict is perverse and unreasonable, the appellant has provided a detailed analysis of alleged discrepancies in the complainant’s evidence. He notes variations among her versions of events in two statements she gave police and her direct and cross-examination, mainly with respect to peripheral events. The trial judge did not specifically refer to these points, but they were before him to be weighed in assessing credibility. On the crucial question whether the complainant told the appellant to stop after intercourse was under way, I am not persuaded that her answers on cross-examination significantly detracted from her clear testimony on direct. The trial judge

obviously did not think so either.

[8] In **R. v. Burns**, [1994] 1 S.C.R. 656 McLachlin, J. said at p. 663:

> In the proceeding under s. 686(1)(a)(i), the Court of Appeal is entitled to review the evidence, re-examining it and reweighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judges 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), 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424, [1987] 2 S.C.R. 168; **R. v. W.(R.)** (1992), 74 C.C.C. (3d) 134, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257. 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.

[9] Our function as a court of appeal is therefore not to reweigh the evidence to determine if we agree with the conclusions of the trial judge. The appellant must show that the evidence of the complainant, after rejection of the evidence of the appellant which was rejected, is not reasonably capable of supporting the verdict. This is a deferential standard, and the deference to be shown a trial judge in matters of credibility is still greater. See **Keating et al. v. Bragg et al.** (1997), 160 N.S.R. (2d) 363 (C.A.). A properly instructed jury, acting judicially, could reasonably have believed the Crown evidence and found the appellant guilty.

[10] The second ground of appeal is that the trial judge failed to consider the defence of an honest belief in consent. The rejection by the trial judge of the appellant's evidence leaves this ground of appeal without an evidentiary basis giving it an air of reality. The remainder of the evidence does not support such a defence. The trial judge did not commit reversible error in finding no reasonable doubt on this basis.

[11] I would dismiss the appeal.

Freeman. J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.