Date: 20011203
Docket: CAC169841

NOVA SCOTIA COURT OF APPEAL

[Cite as: *R. v. C.D.C.*, 2001 NSCA 175]

Saunders, Chipman and Oland, JJ.A.

BETWEEN:

C. D. C.
Appellant

- and -

HER MAJESTY THE QUEEN
Respondent

REASONS FOR JUDGMENT

Editorial Notice

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

Counsel: Kim Richardson for the appellant
Peter Rosinski for the respondent

Appeal Heard: November 29, 2001

Judgment Delivered: December 3, 2001

THE COURT: Appeal dismissed per reasons for judgment given by Saunders, J.A,; Chipman and Oland, JJ.A. concurring.

Saunders, J.A.:

[1] After a trial in the Provincial Court before Judge R. Kimball, the appellant was convicted of sexual assault upon C. I. contrary to s. 271(1)(a) of the **Criminal Code** and acquitted on a charge of having committed a common assault upon her contrary to s. 266(a). He now appeals his conviction and seeks leave to present fresh evidence, complaining that ineffective trial counsel violated his constitutional right to make full answer and defence; that the trial judge misapprehended the evidence resulting in a miscarriage of justice; and that the trial judge's verdict was unreasonable.

[2] After carefully reviewing the entire record and considering the written and oral submissions of counsel, we are unanimously of the view that the application to introduce fresh evidence ought to be denied and the appeal should be dismissed.

[3] The evidence reveals that the appellant and C. S. I., the complainant, were "engaged" for about eight months. On October 13, 2000, the appellant was released on a recognisance for various alleged offences. Among other terms of the recognisance, Mr. C. was obliged to have no contact or communication, directly or indirectly, with the complainant.

[4] On February 1, 2001, Mr. C. pleaded guilty to the charge of breach of recognisance, acknowledging that he had violated the provision prohibiting any contact with C. I.. His trial began on the charges of sexual assault and common assault.

[5] The Crown called four witnesses: the complainant, C. I.; Dr. M. McLaughlin, who examined Ms. I. at the Dartmouth General Hospital and completed a sexual assault kit; Mr. S. D., a friend of both the accused and the complainant, who had intervened during a physical disturbance between the two earlier that day; and police officers Barry Johnston and Anthony Blencowe.

[6] At the end of the Crown's case, Mr. C.' defence lawyer informed the trial judge that the defence had elected to call evidence which would be "fairly lengthy". Because of the lateness of the day, the judge adjourned the trial to February 6. When the trial resumed on February 6, Mr. C.' trial lawyer informed the court that she had:

> ...had further occasion to speak to my client and although I would indicate this on the record when he comes up, the Defence has since reassessed and decided not to call evidence.

Counsel for the appellant and the Crown then made detailed oral submissions. Judge Kimball adjourned for two days in order to review his notes and listen to the tapes of the witnesses' testimony. He returned to court on February 8 and in an oral decision acquitted Mr. C. on the charge of common assault but convicted him of sexual assault.

[7] The Crown's case against Mr. C. was based on the testimony provided by Ms. I.. She is an admitted alcoholic and binge drinker. She testified that on December 16, 2000, she had consumed about six ounces of vodka while visiting one B. H. at his apartment. She was then invited by Mr. C. back to his apartment along with S. D. for dinner and drinks. At some point, Mr. D. left. Ms. I. said that she and Mr. C. got into an argument which escalated to a point where S. D. returned and intervened. After Mr. D.'s eye was blackened from a punch thrown by Mr. C., he left. As soon as he did, Ms. I. said that she was sexually assaulted by Mr. C.. She said he pinned her to the floor, covered her nose and mouth to prevent her from crying out, forcibly removed her clothes and had full sexual intercourse without her consent, eventually ejaculating onto her face and hair. During the struggle Ms. I. said that she managed to leave a long scratch on his right cheek. When Mr. C. went to the bathroom to clean up, she hurried back to B. H.'s apartment, whereupon a woman living next door eventually summoned the police and an ambulance. Other peripheral information describing their contact with Ms. I. was provided by Dr. McLaughlin, Mr. D. and the two police officers.

[8] Counsel now representing Mr. C. on appeal - not his lawyer at trial - seeks leave to "introduce" 23 pages of documentation in the form of hospital records and the "sexual assault kit" completed by nursing staff and Dr. McLaughlin following Ms. I.' admission to the Dartmouth General Hospital at approximately 2:00 a.m. on December 17, 2000. While cast as an application to adduce fresh evidence, all of this documentation was in the hands of counsel at trial. The complaint seems to be that the appellant's trial counsel failed to make use of the documentation when cross-examining Dr. McLaughlin. This, so it is alleged, missed an opportunity to discredit Ms. I. by pointing out inconsistencies between her testimony and that which was

recorded during the hours she spent in hospital. Counsel for the appellant on this appeal makes the point in his factum:

> Although Defence counsel at trial was in possession of the material contained in the Appendix at Tab 7 of the Appeal Book, . . . Dr. McLaughlin was not questioned on the contents even though they contradict the complainant in several fundamental respects.

[9] To accept the appellant's argument is to assume that his trial lawyer "forgot" or otherwise neglected to use the hospital records to discredit the complainant. While there were discrepancies between the complainant's testimony and certain information logged in the hospital records, there is nothing to suggest that these points were critical to an attack upon the complainant's credibility.

[10] The transcript reveals that Mr. C.' trial counsel conducted a detailed cross-examination of Ms. I. designed to impugn her credit; to challenge her ability to recall events; and to set the stage for a defence of consensual sex between the two.

[11] Among the hospital records, at p. 116 of the appeal book, is found a report from Police Constable Barry Johnston requesting a crime lab analysis of the sexual assault kit and the victim's clothing. In Cst. Johnston's report is found the following:

> . . . victim stated that the accused forced sexual intercourse with her. also during the assault she stated that she scatched (sic) his face. When the Accused was arrested he admitted to consenual (sic) intercourse with the victim and had a large scatch (sic) on his face.

[12] Further, for example, at p. 69 of the transcript one sees a series of questions put to Ms. I. during her cross-examination by Mr. C.' trial lawyer raising, in specific terms, the defence position that she willingly returned to Mr. C.' apartment for dinner and a movie, that they danced, that she took off her clothes and that they enjoyed consensual sex together.

[13] There is nothing in the record on appeal to dissuade us from the view that Mr. C.' trial lawyer deliberately chose <u>not</u> to make use of the hospital records in either her cross-examination of the complainant or the attending physician, Dr. McLaughlin. It seems to us that the entire strategy of the defence was <u>not</u> to deny any sexual activity between the two, but rather to defend on the basis that the sex between Ms. I. and Mr. C. that evening was consensual. This would explain why defence counsel deliberately chose to

avoid cross-examining Dr. McLaughlin on the content of the "rape kit". Further, since the Crown attorney on direct examination of the doctor avoided any substantive questions, there was little reason for defence counsel to pursue it.

[14] Such a tactic was certainly consistent with the strategy of having already attacked the complainant's credit worthiness and the defence's intention, expressed to the trial judge, that they would call evidence. What prompted the appellant to change his mind and instruct his trial counsel, two days later, to advise the judge that they had reassessed their position and decided not to call evidence, is not before us, nor something about which we ought to speculate.

[15] In our opinion, the extracts from the hospital records now highlighted by Mr. C. on appeal do not qualify as "fresh evidence" as set out in such cases as **R. v. Palmer,** [1980] 1 S.C.R. 759; or **R. v. Warsing** (1998), 130 C.C.C. (3d) 259 (SCC). Having regard to all of the circumstances, we are not persuaded that their content could reasonably be expected to have affected the result. For these reasons, the application to adduce fresh evidence is denied.

[16] The legal principles engaged when a violation is alleged of one's constitutional right to effective legal counsel were reviewed by this court in its recent judgment in **R. v. L.E.B.**, [2001] N.S.J. No. 386. After carefully considering the record here we are satisfied that the appellant was represented in a competent manner by his counsel. Her cross-examination of the complainant and the other Crown witnesses established contradictions in the evidence. Trial counsel's final submission to the judge highlighted that Ms. I. is an alcoholic, well accustomed to long binges lasting months at a time, perhaps accounting for the significant gaps in her recollection of time and events. Counsel thoroughly reviewed the important inconsistencies and discrepancies between the complainant's testimony and the evidence of other witnesses, in a vigorous and persuasive attempt to raise a reasonable doubt in the mind of the trial judge.

[17] The cases relied upon by the appellant - for example, **R. v. R.(P.)** , (1998) 132 C.C.C. (3d) 72 (Que. C.A.) and **R. v. L.(C.)** (1999**),** 138 C.C.C. (3d) 356 (Ont. C.A.) - are distinguishable in that in those cases reference is made to the practice of providing an affidavit sworn by trial counsel giving some explanation for the alleged deficiencies. Here no such affidavit has been produced by the appellant from the lawyer representing him at trial. The

appellant has failed to persuade us either that his trial lawyer was ineffective or that her inadequacies resulted in a miscarriage of justice.

[18] There is no merit to the submission that the trial judge misapprehended the evidence resulting in a miscarriage of justice. Having reviewed the trial judge's decision, we note that he reserved judgment in order to thoroughly review the proceedings and we are satisfied that his decision reflects a concise yet thorough appreciation of the material evidence as it applied to the legal principles and issues that arose in the case.

[19] Finally, the appellant has challenged the verdict as being unreasonable and not supported by the evidence. Applying **R. v. Binaris**, [2000] 1 S.C.R. 381, we have reviewed, re-examined and reweighed the evidence at trial and have satisfied ourselves that it is reasonably capable of supporting the trial judge's conclusion, recognizing as we do the considerable deference owed to findings of fact and credibility made by the trial judge, **R. v. Francis** (2001), 190 N.S.R. (2d) 138 (NSCA).

[20] In acquitting the appellant on the charge of common assault the trial judge preferred the account given by S.March 17, 2009 D., finding that the altercation in which he intervened did not constitute a criminal assault for which Mr. C. could be found guilty. The sexual assault occurred when Mr. D. left the residence. After taking into account the circumstances which required that the complainant's testimony be subjected to a most careful scrutiny, the trial judge was satisfied that the appellant's guilt had been established beyond a reasonable doubt. In our view the evidence fully supported the trial judge's conclusion and there was nothing inconsistent in the verdicts.

[21] For all of these reasons, we would deny leave to introduce fresh evidence and dismiss the appeal.

Saunders, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.