NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Deepak*, 2024 NSCA 12

Date: 20240125
Docket: CAC 517800
Registry: Halifax

Between:

Deepak Deepak

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 and 486.5 of the *Criminal Code of Canada*

Judge:	The Honourable Justice John E. (Ted) Scanlan
Appeal Heard:	November 28, 2023, in Halifax, Nova Scotia
Subject:	Appeal from conviction
Summary:	The appellant was convicted of sexually assaulting his neighbour. He asserts the trial judge made numerous errors and asks that the verdict be set aside.
Issues:	(1) Did the judge fail to test the complainant's evidence in the context of the rest of the evidence? (2) Did the judge incorrectly rule the complainant's evidence was credible because she had not embellished? (3) Did the judge misapprehend the evidence and therefore incorrectly find the accused's testimony was not credible?
Result:	On appeal the court was not satisfied the trial judge committed any errors. Appeal from conviction dismissed

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 49 paragraphs.

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Restriction on Publication: s. 486.4 and 486.5 of the *Criminal Code of Canada*

Judges:	Bryson, Scanlan, Derrick, JJ.A.
Appeal Heard:	December 7, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Scanlan, J.A.; Bryson and Derrick, JJ.A. concurring
Counsel:	Ian D. Hutchison, for the appellant Timothy O'Leary, for the respondent

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

[1] The appellant was tried before Provincial Court Judge Christopher Manning on a single count of sexual assault contrary to Section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The appellant was alleged to have sexually assaulted his friend and neighbour sometime during the month of October 2020. There were only two witnesses at the trial, the appellant and the complainant.

[2] I summarize the judges findings. The appellant lived with his family in an apartment, across the hall from the complainant. She lived alone. The complainant and the appellant's family visited back and forth from time to time, enjoying a good relationship. The complainant alleged that on a Friday night in October 2020 the appellant sent a text message asking if he could come to her apartment. She agreed.

[3] The appellant walked into the apartment, the complainant was wearing pajamas shorts, watching tv. He complains that his wife is not interested in sex. The complainant could smell alcohol from him and she placed the strength of alcohol smell at a 10 on a scale of 1-10.

[4] After some conversation he stripped naked and tried to climb on top of the complainant as she sat on a chair. He held her down by her arms. Repeatedly telling him "no", she pushed him off and he was then positioned in front of her on his knees. While on his knees he attempted to spread her legs and perform oral sex on her. As he did so she again tried to push him off. He continued demanding sex.

[5] She eventually got to her feet and tried to push the appellant out of her apartment. To get to the exit they would pass her bedroom door. At that junction the appellant pushed her into the bedroom. There he removed her pajama shorts and attempted to penetrate her vagina with his penis. He was only partially successful.

[6] The complainant repeatedly said "no" and eventually the appellant said, "Are you trying to say that I am raping you?" to which she replied, "You take it as it is." The appellant then returned to the living room, collected his clothes and left. She did not see him leave.

[7] The incident was not reported to the police until December 2020 or January 2021.

[8] The complainant testified that the day after the incident, the appellant contacted her over Facebook and asked her not to say anything, as he did not want his wife to know about the events of the previous night. She did not keep the text message where he asked to come over on the night of the incident nor did she keep the message where he asked her not to say anything. The trial judge did not accept the appellant's assertion that all messages exchanged were produced by him in Exhibit 3.

[9] The complainant was cross-examined, with counsel suggesting she concocted the story about the incident out of vindictiveness because, based on the appellant's complaints, her landlord had 'kicked her out'. She refuted that suggestion, saying she delayed going to the police as she had to muster the courage to make a report.

[10] The appellant denied sending any text messages asking if he could go over to the complainant's. He said the allegations were false, and motivated by a dispute over snow removal that occurred many months later. He said during that dispute the complainant threatened to report him to the police. A printout of a Facebook message confirmed that threat was made. She said the eventual reporting had nothing to do with any dispute over snow removal.

[11] The trial judge rejected the appellant's denial finding that, based on the entirety of the evidence, he was satisfied the appellant's guilt was proven beyond a reasonable doubt.

[12] On August 22, 2022 the appellant was sentenced to two years imprisonment for that offence.

Grounds of Appeal

[13] In his amended notice of appeal and factum, the appellant asserts there were numerous errors made by the trial judge:

1. Did the trial judge fail to properly test the complainant's testimony in the context of the rest of the evidence?
2. Did the trial judge incorrectly rule the complainant's evidence was credible because she had not embellished?
3. Did the trial judge misapprehend the evidence and therefore incorrectly find the accused's testimony was not credible?

[14] The respondent argues there were no errors which would justify setting aside the conviction.

Standard of Review

[15] I will address the standard of review to be applied to each issue.

Issue number 1:

Did the trial judge fail to properly test the complainant's testimony in the context of the rest of the evidence?

[16] This ground of appeal stems from the fact the trial judge, in delivering his decision, first reviewed the complainant's evidence. Before turning to Mr. Deepak's evidence, the judge said:

> …Overall, while Ms. M[…][1] may not be a particularly sophisticated individual, her evidence was clear, consistent, not embellished, nor exaggerated, and I found her to be both credible and reliable. She became upset at times, emotional at other times, but I did not find it to affect her overall credibility.

[17] The appellant says in reaching that conclusion, the trial judge did not properly consider the entirety of the evidence when finding the appellant had committed the offence as charged.

[18] The parties agree that, on this issue, the standard of review in the application of the law in credibility and reliability assessments, is one of correctness, However considerable deference is owed to a trial judge's credibility and reliability findings. As was set out by Justice Hamilton in *R. Gerrard*, 2021 NSCA 59 at para. 44, citing *R. v. S.S.S.*, 2020 BCCA 180:

> [24] It is important to emphasize that while an appellate court is tasked with scrutinizing the reasons given by the trial judge, considerable deference is owed to the trial judge on issues of fact-finding and credibility assessment.

[19] The parties acknowledged at trial this case turned on the credibility and reliability assessments. The appellant now complains that the trial judge erred by dealing with the complainant's evidence in isolation, resulting in him choosing

[1] Throughout this decision I use "Ms. M…" to identify the complainant due to the publication ban in place.

between the evidence of the complainant and the appellant without considering the evidence as a whole.

[20] In *Gerrard* Justice Hamilton reminded herself that an appellate court must bear in mind the significant advantage enjoyed by trial judges who have listened to the witnesses instead of having only a lifeless transcript on appeal.

[21] Recent Supreme Court of Canada cases serve to remind appellate courts that considerable deference is owed to trial judges and that credibility findings are not to be overturned absent a palpable and overriding error (See *R. v. Langan*, 2020 SCC 33; *R. v. Kishayinew*, 2020 SCC 34; *R. v. Slatter*, 2020 SCC 36; *R. v. Delmas*, 2020 SCC 39; *R. v. Mehari*, 2020 SCC 40; *R. v. W.M.*, 2020 SCC 42 and *R. v. Cortes Rivera*, 2020 SCC 44).

[22] A trial judge's reasons must be read as a whole, and in the context of the entire record. It is not enough for an appellant to point to some ambiguous aspect of a trial judge's decision (*R. v. G.F.*, 2021 SCC 20) and say the trial judge may have erred. Where there are ambiguities in a trial judge's reasons which are open to multiple interpretations, those that are consistent with the presumption of a correct application of the law must be preferred over those that suggest error (*R. v. C.L.Y*, 2008 SCC 2).

[23] Here the trial judge thoroughly reviewed the appellant's evidence, explaining why he did not find the appellant to be credible. Although he started with a review of the complainant's evidence, he did more than simply choose between the two witnesses. He did an analysis of the testimony of both witnesses, at times comparing, and at times interweaving the testimony of both witnesses. He noted internal inconsistencies in Mr. Deepak's evidence:

> I previously mentioned the fact that he testified he doesn't ever get intoxicated, he doesn't know the layout of her apartment, or where the bedroom door is. He is unaware she's got a La-Z-Boy recliner or a television. He was reluctant to say that he'd been in the apartment of Ms. M… except on such a limited basis. He was adamant that he was never in the apartment alone with her, which is not in keeping with the general evidence of a good relationship and him helping her from time to time with small jobs.

[24] The trial judge then immediately said:

> Applying the test in **R. v. W.D.**, I reject the blanket denial of Mr. Deepak.
>
> …

> …I do not believe it, and in my view, it does not raise a reasonable doubt.
>
> After considering all the evidence in this case, I find the Crown has proved the charge […] and I find Deepak Deepak guilty as charged.

[25] I am satisfied that on a full reading of the trial judge's decision, it is clear he did not consider the complaint's evidence in isolation. Although the trial judge dealt first with the complainant's evidence his reasons reveal he considered her testimony in the context of the entirety of the evidence just as he considered the evidence of the appellant in the context of the entirety of the testimony at trial.

[26] A full reading of the decision shows the judge considered the evidence as a whole. It also shows that he applied the *W.D.* formula when deciding on the guilt of the appellant. The three-step process as set out in *W.D.* is not an incantation that prescribes the order in which the evidence at trial must be considered.

[27] I am satisfied the judge did not simply choose the evidence of one witness over the other. He did a complete analysis of the evidence without setting up silos or watertight compartments of evidence.

[28] The appellant's denial of any touching was diametrically opposed to the complainant's evidence. The appellant says the incident simply did not happen. While the trial judge first set out the complainant's evidence and commented on her credibility, it is clear his analysis did not stop there. The judge continued with an analysis of the appellant's evidence and the totality of the evidence as required to complete a *W.D.* assessment.

[29] There was no error.

Issue number 2:

Did the trial judge incorrectly rule the complainant's evidence was credible because she had not embellished?

[30] The standard of review on this issue is set out in *R. v. Kiss*, 2018 ONCA 184 at paras. 52 and 53.

> [52] The trial judge would have erred if he treated the absence of embellishment as adding to the credibility of K.S.'s testimony. It is wrong to reason that because an allegation could have been worse, it is more likely to be true: *R. v. G. (G.)* (1997), 115 C.C.C. (3d) 1, at p. 10 (Ont. C.A.); *R. v. L.L.*, 2014 ONCA 892, at para.2; *R. v. R.A.G.*, 2008 ONCA 829, at para. 20. While identified exaggeration

> or embellishment is evidence of incredibility, the apparent absence of exaggeration or embellishment is not proof of credibility. This is because both truthful and dishonest accounts can appear to be without exaggeration or embellishment.
>
> …
>
> [53] On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible.

[31] Lack of embellishment cannot be used to bolster a witness' credibility, it simply does not weigh against credibility. It may be considered as a factor in assessing whether the witness had a motive to lie (*R. v. Gerrard*, 2022 SCC 13 para. 5).

[32] On plain reading of the decision, it does not appear the trial judge made any such mistake. He is presumed to know the law. The judge's comments included the following:

> … Overall, while Ms. M… may not be a particularly sophisticated individual, her evidence was clear, consistent, not embellished, nor exaggerated, and I found her to be both credible and reliable. […]

[33] His presumed knowledge of the law would permit him to comment on the lack of embellishment to the extent there was no embellishment nor exaggeration to detract from the witness' credibility. He certainly did not say lack of embellishment or exaggeration enhanced the witness' credibility.

[34] There was no error.

Issue number 3:

Did the trial judge misapprehend the evidence and therefore incorrectly find the accused's testimony was not credible?

[35] The standard of review is as set out in *R. v. K.J.C.*, 2021 NSCA 5 at para. 30, citing *R. v. Dim*, 2017 NSCA 80 at para. 62. Did the trial judge make a

mistake as to the substance of the evidence, fail to consider evidence relevant to a material issue, or fail to give proper effect to the evidence? To constitute a reversible error the misapprehension must have played an essential part in the reasoning process that led to conviction, and not simply be a part of the peripheral reasoning.

[36] Care must be taken to ensure not to confuse misapprehension with a different interpretation of the evidence. Intervention is only justified where a trial judge has made an egregious error by failing to recognize or misinterpreting important and relevant evidence or by reaching an erroneous conclusion that has a material effect.

[37] The appellant argues the judge only found him not credible because he misapprehended the evidence.

[38] A closer look at what the appellant says occurred is warranted. For this I look to the appellant's factum on this issue:

> 39. The trial judge found that the Facebook messages recorded the Appellant telling the complainant not to say anything. This was not the case. The messages read "do not spoil my life."
>
> 40. The Trial judge confused the message January 3,2021, that read "do not spoil my life" as being a message the complainant testified the Appellant sent her the day after the alleged incident.
>
> 41. The trial Judge found the Appellant testified that he never got intoxicated. The trial Judge rejected this evidence. The cause of the trial Judge rejecting this evidence was a misunderstanding as to what was recorded in the Facebook message.
>
> 42. The trial Judge found the messages read:
>
> > This was a clear indication from Ms. M… that Mr. Deepak tried to have sex with her when he was drinking and she told him "no". It goes on to capture so, the comment "So you call this rape", and he told her not to say anything. **And his response was, "I don't remember it happened. I drink so many times."** This is clearly at odds with his evidence. In his evidence, he was adamant that he did not go to her apartment on a Friday night. He was, he was clear that he was not intoxicated by alcohol. He said her complaint is false and it didn't happen, not that he didn't remember.
>
> 43. The Facebook message did not read: And his response to this was, "I don't remember it happened. I drink so many times." Rather the message read:

> I am not complaining any one.(sic) I am searching of another apartment. You are not loss (sic) anything. And things you're talking I don't remember it happen (sic). **I drink so many time** (sic)**with Derk to**(sic)**.** Don't spoil anyone life blame me like this(sic).
>
> (Emphasis in appellant factum)

[39] It is not for this Court to parse through each individual piece of evidence and critique every word uttered in a judge's decision, asking whether there was any contra-evidence, or if there was any deficiency in the parsed particles. This Court does not operate at a microscopic level of analysis as urged by the appellant. Instead, it is for this Court to do an analysis considering the entirety of the record.

[40] I am not convinced the trial judge misapprehended the evidence. First, he accepted the complainant's testimony that the appellant had texted asking if he could come over. Also, the judge said:

> The next day she received a Facebook message from Mr. Deepak saying he didn't want anything said about what had happened, and he didn't want his wife to know. She believed she answered "okay", and the matter was not discussed between them again for some time. Okay. She was not asked about a message exchange that appears in exhibit three.

[41] The judge accepted the complainant's evidence that the appellant told her not to say anything as he did not want his wife to find out. This was a message the complainant testified she had not saved.

[42] Clearly the appellant disagrees with the inferences drawn by the trial judge. In his decision the judge accurately read some text messages into the record then said:

> This was a clear indication from Ms. M.[…] that Mr. Deepak tried to have sex with her when he was drinking and she told him "no". It goes on to capture so, the comment[s], "So you call this rape", and he told her not to say anything. And his response to this was, "I don't remember it happened. I drink so many times." This is clearly at odds with his evidence. In his evidence, he was adamant that he did not go to her apartment on a Friday night. He was, he was clear that he was not intoxicated by alcohol. He said her complaint is false and it didn't happen, not that he didn't remember.

[43] The trial judge also left out some words as the quote should have read: "I don't remember it happened. I drink so many times with Derek to."

[44] It was open to the judge to infer that the appellant admits drinking alcohol and to consider this along with the complainant's evidence that on the night of the incident the strength of the smell of alcohol on the appellant was at a 10 on a scale of 1-10.

[45] The trial judge discussed the case of *R. v. Langan*, 2019 BCCA 467 just prior to discussing the texts. He quoted the dissenting opinion in *Langan*, wherein Chief Justice Bauman observed that had the accused:

> "responded with bewilderment or confusion to the complainant's texts about the assault, rather than admissions, this would have presented a much different picture for the trier of the fact." (*Langan* at para. 61).

[46] On appeal to the Supreme Court of Canada, a majority allowed the appeal for the reasons of Chief Justice Bauman (*R. v. Langan*, 2020 SCC 33).

[47] I am satisfied the trial judge's reference to *Langan*, was making the point that, when confronted by the complainant with allegations of the incident, there was no bewilderment, confusion, or denial. It was more about 'don't ruin my life'.

[48] There was ample evidence in addition to the texts referred to that cast doubt on the appellant's credibility. For example, in spite of a long friendship where the complainant and the appellant's family visited back and forth, the appellant refused to acknowledge familiarity with the layout or furnishings in her apartment. He did small jobs for her from time to time and they had a positive relationship yet he denied ever being alone with her in her apartment. All of this supports what the judge reasonably viewed as internal inconsistencies within the appellant's evidence.

Conclusion

[49] I would dismiss the appeal from conviction.

Scanlan, J.A.

Concurred in:

Bryson, J.A.

Derrick, J.A.