S.C.C. Nos. 02727 & 02796

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Chipman, Roscoe and Freeman, JJ.A.

Cite as: R. v. D.E.B., 1993 NSCA 46

BETWEEN:		)
		)
D. E. B.		) Stanley W. MacDonald
		) for the Appellant
	Appellant	)
		)
- and -		)
		)
HER MAJESTY THE QUEEN		) William D. Delaney
		) for the Respondent
	Respondent	)
		)
		)
		)
		) Appeal Heard:
		) January 29, 1993
		)
		)
		) Judgment Delivered:
		) January 29, 1993

Editorial Notice

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

THE COURT: The appeal against conviction is dismissed; leave is granted to the Crown to appeal the sentence; and the sentence appeal is dismissed as per oral reasons for judgment of Chipman, J.A.; Roscoe and Freeman, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant was convicted by a judge of the Trial Division sitting without a jury

on a charge of sexual assault on his former common-law wife. He appeals his conviction and the Crown seeks leave and if granted, appeals from the sentence of 42 months incarceration imposed by the trial judge.

On August 19, 1991, the appellant was released on day parole from the Halifax County Correctional Centre. The following morning at about 8:00 a.m. he arrived at the home of the victim. The victim was in bed with two of her young children. The appellant said he came for his clothes. The victim told him to get them and leave. The appellant woke the children and after they left the room, he proposed to the victim that they engage in sexual intercourse. She refused whereupon, according to her testimony, the appellant had forced sexual intercourse with her. He told her that if she cried out he would break her jaw. When asked on cross-examination if the appellant ejaculated, the victim said "he started to" when one of her children entered the room. The appellant then withdrew and jumped off the victim. The victim later went to the bathroom and wiped off the outside area of her vagina with a washcloth and water.

The victim, accompanied by a friend, went to the Cole Harbour Detachment of the R.C.M.P. shortly after noon on August 20, 1991, and reported the matter on a complaint form. This friend testified that when she came to the victim's home she found her highly emotional and upset. Constable E. J. Hubbard of the detachment went to the victim's residence shortly after 9:00 p.m. on August 20 and drove her to the Dartmouth General Hospital at 9:38 p.m. She was examined by a physician and released, following which the constable took a statement and returned her to her home.

The Crown called the physician who examined the victim at the hospital some 12 to 13 hours after the event. The physician noted that the victim appeared emotionally traumatized. She was timid and tearful. An examination of the vagina was essentially negative, swabs and fluid were taken from the vagina and made available to the R.C.M.P. Crime Lab, together with some items of the victim's clothing.

The defence called an expert hair and fibre analyst from the R.C.M.P. who examined the victim's underclothing and other items of clothing which revealed no evidence of cuts or tears and no pubic hairs consistent with having originating from the appellant. Hair combing supplied by

the appellant revealed no pubic hairs consistent with that of the victim. Hair samples from the clothing of the victim did not match any of the samples from the appellant. On cross-examination the expert agreed that only in a minority of cases did he encounter intermingled scalp and pubic hairs on persons following sexual intercourse.

The defence also called a serologist from the R.C.M.P. Lab who testified that no sperm or seminal fluid was found on the swabs and washings from the vagina taken some 12 or 13 hours after the alleged sexual assault. As well, there was no sperm or seminal fluid on the pubic hair of the victim or on her underwear. If there had been no ejaculation, no evidence of sperm would be found and if there was a little bit of pre-ejaculate, there would probably not be enough to detect. The normal time span for finding sperm is 12 to 24 hours after intercourse, 24 hours being generally the outside limit. If a male had had a vasectomy or a low sperm count or did not ejaculate, one would not expect to find evidence of spermatozoa. If the female had an active vaginal drainage, none might be found. As well, in about 50% of the cases examined in the lab, no evidence of sexual intercourse is found. Negative findings for sperm or seminal fluid some 13 hours later do not justify the assumption that intercourse did not take place.

The appellant did not testify.

Following argument, the trial judge rendered an oral judgment in which he found the appellant guilty.

Three grounds of appeal are advanced:

(1) that the trial judge improperly interfered with the cross-examination of the complainant by appellant's counsel;

(2) that the trial judge erred by commenting on the appellant's failure to testify, thereby placing an onus upon him to prove his innocence; and,

(3) that the trial judge failed to appreciate, or disregarded, relevant evidence called on the appellant's behalf.

We are satisfied that there is no merit in any of these points.

As to the first ground, the learned trial judge did, on occasion, interrupt the cross-examination. Notwithstanding a testy exchange between the judge and counsel, the court did not preclude counsel from exploring any proper topic and the cross-examination continued until counsel stated that he had no further questions.

The right of cross-examination is a component of the right to make full answer and defence. Generally a very wide latitude is given to counsel for the accused. That was done here, albeit somewhat grudgingly. It is preferable for the trial judge to refrain, as far as possible, from interrupting a cross-examination.

A valuable discussion of the role of the trial judge, the effect of interruptions on his part, and the extent to which they can be considered acceptable is found in **R. v. Valley** (1986), 26 C.C.C. (3d) 207 (Ont. C.A.).

At p. 230 Martin J.A., speaking for the Ontario Court of Appeal, said:

> "The judge's role in a criminal trial is a very demanding one, sometimes requiring a delicate balancing of the interests that he is required to protect. The judge presides over the trial and is responsible for ensuring that it is conducted in a seemly and orderly manner according to the rules of procedure governing the conduct of criminal trials and that only admissible evidence is introduced. A criminal trial is, in the main, an adversarial process, not an investigation by the judge of the charge against the accused, and, accordingly, the examination and cross-examination of witnesses are primarily the responsibility of counsel. The judge, however, is not required to remain silent. He may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague or, indeed, he may put questions which should have been put to bring out some relevant matter, but which have been omitted. Generally speaking, the authorities recommend that questions by the judge should be put after counsel has completed his examination, and the witnesses should not be cross-examined by the judge during their examination-in-chief. Further, I do not doubt that the judge has a duty to intervene to clear the innocent. The judge has the duty to ensure that the accused is afforded the right to make full answer and defence, but he has the right and the duty to prevent the trial from being unnecessarily protracted by questions directed to irrelevant matters. This power must be exercised with caution so as to leave unfettered the right of an accused through his counsel to subject any witness's testimony to the test of cross-examination. The judge must not improperly curtail cross-examination that is relevant to the issues or the credibility of witnesses, but he has power to

> protect a witness from harassment by questions that are repetitious or are irrelevant to the issues in the case or to the credibility of the witness: see *R. v. Bradbury* (1973), 14 C.C.C. (2d) 139 at pp. 140-1, 23 C.R.N.S. 293 (Ont. C.A.); *R. v. Kalia* (1974), 60 Cr. App. R. 200 at pp. 209-11."
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> At p. 231 he continued:
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> "An examination of the authorities reveals that the principal types of interventions by trial judges which have resulted in the quashing of convictions are these:
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> . . .
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> II Where the interventions have made it really impossible for counsel for the defence to do his or her duty in presenting the defence, for example, where the interruptions of the trial judge during cross-examination divert counsel from the line of topic of his questions or break the sequence of questions and answers and thereby prevent counsel from properly testing the evidence of the witness: see *R. v. Matthews* (1983), 78 Cr. App. R. 23 at p. 31; *Jones v. National Coal Board*, [1957] 2 Q.B. 55 at p. 65."

The interruptions here, while more than desirable, were not such as to create the appearance of an unfair trial in the mind of a reasonable person.

As to the second point, the trial judge correctly pointed out that the comments prohibited by s. 4(6) of the **Canada Evidence Act** are those made in the presence of a jury. The subject of not giving evidence was mentioned by Crown counsel in the oral argument. The trial judge abruptly interjected that the accused did not have to give evidence and that Crown counsel knew that. In his decision, he addressed this subject further, quoting from McWilliams on Criminal Evidence, a correct summary of the law on this subject. The trial judge concluded:

> "I listened carefully to the complainant during her examination and her cross-examination. Her evidence had the ring of truth; to me it was convincing. It was supported by her immediate actions and it stands as it was. I found the proof beyond a reasonable doubt in these circumstances and; therefore, I find the accused guilty as charged."

We are unable to infer from his reasons or otherwise that the trial judge improperly placed any onus upon the appellant. On the contrary, he made it clear that the accused was presumed innocent until proven guilty beyond a reasonable doubt.

As to the third ground, the mere fact that the trial judge referred to the expert evidence called on behalf of the appellant as producing negative results does not indicate that he failed to appreciate or that he disregarded such evidence. The following passage from p. 185 makes clear that he considered such evidence, but found that it did not contradict that of the victim.

> "The defence called a number of expert witnesses. These witnesses who had examined a number of exhibits taken from both the accused and the complainant produced, as I recall the evidence, negative results. On the evidence as I heard it, these exhibits failed to create any corroborative evidence in support of the complainant. I know corroborative evidence is not required under our laws as it is today. But at the same time I did not find that these negative results in any way contradicts the evidence of Ms. W.. In other words, no evidence. "

The victim's evidence was not contradicted by testimony from the appellant, a fact which we are entitled to take into consideration in evaluating and re-weighing the evidence to the extent that we are permitted. The expert evidence was negative in the sense that it did not specifically contradict that of the victim and could easily stand along with her testimony. At best it could be said that such testimony failed to corroborate the victim's evidence. There is no merit in this ground.

We dismiss the appeal from conviction.

As to the sentence appeal, the trial judge has imposed a substantial period of incarceration - 42 months - for this very serious offence. Although it is at the low end of the range, we are unable to say that it was unfit by reason of being manifestly inadequate. We grant leave to the Crown to appeal but dismiss the appeal against the sentence imposed.

J.A.

Concurred in:

Roscoe, J.A.

Freeman, J.A.