S.C.C. No. 02730

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Chipman and Pugsley, JJ.A.

Cite as: R. v. E.C.K., 1993 NSCA 48

BETWEEN:

E. C. K.	)	R. Stephen Melnick
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Gordon S. Gale, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	February 18, 1993
	)	
	)	
	)	Judgment Delivered:
	)	February 18, 1993
	)	

Editorial Notice

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

THE COURT: Appeal dismissed from conviction for sexual assault contrary to section 271(a) of the **Criminal Code**, per oral reasons for judgment of Clarke, C.J.N.S., Chipman and Pugsley, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The appellant appeals from his conviction by His Honour Judge Matheson who, on April 30, 1992, found him guilty of sexual assault on C.S., contrary to **s. 271(a)** of the **Criminal Code**.

The appellant contends in his several grounds that the conviction is contrary to the evidence at trial. More particularly he alleges that the trial judge erred in law by convicting the appellant on insufficient and unsubstantiated evidence that contained inconsistencies. All of this, he submits, resulted in the Crown not having proved its case beyond a reasonable doubt and the verdict being perverse.

C.S. said that when he was 13 and 14 years old the appellant, his uncle, engaged him against his will in several sexual acts including anal intercourse. These incidents occurred in the appellant's apartment when the two of them were alone. C.S. was 17 at the time of trial.

The appellant denied the allegations of C.S.. He adduced evidence intended to show that the appellant did not reside in the apartment at the times alleged by C.S. and thus to establish a lack of opportunity.

The trial judge's review of the evidence indicates that he appreciated and understood that which was called by both the Crown and the defence.

He concluded:

> "I was impressed with the evidence of C.S.. Notwithstanding the fact that he was not able to recall the specific dates upon which these assaults were committed but from observing his demeanour on the stand and listening to the evidence of Mr. M. how the complaint originated, I suggest the crying and nervousness, being greatly upset, being frightened, being nervous is consistent with one who has had such an experience as the information alleges and who has also spent sometime trying to conceal it as a secret by himself. I was not impressed with the relevance of a lot of the defence evidence and I think the time factors to which I have alluded and to which the defence have alluded is accountable by reason of the fact that C. is a young boy and was quite

upset about this whole thing as it happened.

Upon the whole of the evidence I am satisfied, beyond a reasonable doubt, that a sexual assault was committed on C.S. by the accused . . ."

Section 686(1)(a) of the **Criminal Code** provides that a court of appeal may allow an appeal against conviction where:

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

The test to determine whether the verdict is reasonable in such a case as this was stated by the Supreme Court of Canada in the recent decision of **R. v. W. (R.)**, [1992] 2 S.C.R. 122. Justice McLachlin wrote at p. 131:

> "In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test. See *R. v. Yebes*, [1987] 2 S.C.R. 168.
>
> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White v. The King*,

> [1947] S.C.R. 268, at p. 272; *R. v. M.(S.H.)*, [1989] 2 S.C.R. 446, at pp. 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses."

After carefully reviewing, re-examining and reweighing the record, including the transcript of evidence, and after considering the written and oral submissions of counsel, it is our unanimous opinion that the verdict is reasonable and supported by the evidence. It is a verdict that the trial judge could reasonably have reached. We are also satisfied that Judge Matheson made no wrong decisions on questions of law or fact of such a nature that they are reversible on appeal.

Accordingly, the appeal against conviction is dismissed.

C.J.N.S.

Concurred in:

Chipman, J.A.

Pugsley, J.A.