IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Kennedy*, 2021 NLCA 42
Date: July 5, 2021
Docket Number: 202001H0057

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BETWEEN:

ROBERT KENNEDY — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Hoegg, O'Brien and Goodridge JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's

Appeal Heard: June 15, 2021
Judgment Rendered: July 5, 2021

Reasons for Judgment by: Goodridge J.A.
Concurred in by: Hoegg and O'Brien JJ.A.

Counsel for the Appellant: Brian D. Wentzell
Counsel for the Respondent: Dana Sullivan

Corrected decision: The text of the original judgment was corrected on July 8, 2021. A description of the correction is appended.

Authorities Cited:

CASES CITED: *R. v. Vokurka*, 2013 NLCA 51, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6; *R. v. Barton*, 2019 SCC 33; *R. v. Freake*, 2012 NLCA 10.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46, sections 271, 273.1(2)(b), 686(1)(a)(i), 687(1).

Goodridge J.A.:

[1] On March 4, 2020, the appellant, Robert Kennedy, age 45, was found guilty under section 271 of the *Criminal Code* of sexual assaulting, by vaginal intercourse and oral sex, a 24-year-old complainant. On October 27, 2020, he was sentenced to 42 months imprisonment, less time served. Mr. Kennedy appeals both the conviction and sentence.

[2] The appeal of conviction alleges that the trial judge made factual findings or inferences that cannot be supported by the evidence. The appeal of sentence alleges the sentence is unfit because it was based on sexual activity that was not proven.

CRIMINAL CODE PROVISIONS

[3] The conviction appeal engages subsection 686(1)(a)(i) of the *Criminal Code*:

> 686 (1) On the hearing of an appeal against a conviction …the court of appeal (a) may allow the appeal where it is of the opinion that (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence …

[4] The sentence appeal engages subsection 687(1) of the *Criminal Code*:

> 687 **(1)** Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence

> appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > **(b)** dismiss the appeal.

BACKGROUND

[5] On the evening of April 5, 2018, the complainant and friends had plans for a night in downtown St. John's. They started at 7 p.m. drinking wine and sharing a marihuana joint, at the home of one friend. The group left that home and went to a downtown bar around 10 p.m. They watched a drag show and continued drinking and socializing. At approximately 12:30 a.m., the group left that bar and went to a restaurant, but without the complainant: "[s]he wasn't in a state to go with us" (Transcript, at 121). One of the complainant's friends stayed with her, and he eventually (around 2 a.m.) took her to a late night bar, where drinking continued.

[6] The complainant met the appellant at that late night bar. He was the bartender. The two had not previously met.

[7] The complainant has some recollections of her time at that bar, but due to her alcohol and drug consumption, there are gaps. Her overall recollection after arrival is poor. A patron who was at the bar, K.M., testified that she saw the complainant snorting a powdery substance, possibly cocaine:

> I assumed it was cocaine. [Her pool partner] lifted up a key with cocaine, is what I figure it was, on the tip of it and then she plugged half of her nose and then sniffed it or snorted it.
>
> (Transcript, at 343)

[8] The friend who accompanied the complainant to the late night bar testified that the complainant was visibly intoxicated while at the bar, and had difficulty ascending and descending the stairs:

> She was tripping as she was going up the stairs … when going down the stairs, she fell but caught herself … [Her speech was] definitely slurred …
>
> (Transcript, at 205)

[9] The same friend, who had accompanied the complainant, departed and went home at 3:15 a.m. The complainant remained behind at the bar, and was still "visibly intoxicated" according to her departing friend (Transcript at 213-214).

[10] The complainant found herself with strangers when the bar closed around 5 a.m. She joined this small group of strangers and went with them by taxi to an apartment on Kings Bridge Road. The appellant arrived at the same Kings Bridge Road apartment in a separate taxi shortly after, around 5:30 or 5:45 a.m., according to the testimony of R.C.

[11] The complainant has no memory of taking a taxi to the Kings Bridge Road apartment, or being in that apartment. One of the guests at the apartment, R.C., observed that the complainant was intoxicated but owing to his own intoxication, he was uncertain of the degree:

> … the general conversation that she had … [was] all over the place and somewhat erratic … I could tell that she was intoxicated, I just couldn't tell exactly how intoxicated …
>
> (Transcript, at 299–300)

[12] R.C. and K.M. observed that the complainant and the appellant were "making out" on a couch in the apartment at one point during those early morning hours. R.C. drifted off to sleep but woke around 7:00 a.m. to discover that the appellant and the complainant had departed from that Kings Bridge Road apartment: "I don't really know when they left … [but] I know that they were gone by 7 a.m." (Transcript, at 299 and 303).

[13] The complainant's first memory after leaving the late night bar was in the appellant's bed, at his Golf Avenue apartment, while the alleged sexual assault was in progress. The complainant's version of events (the appellant did not testify) recalled memories of a dark bedroom and the appellant assaulting her, by oral sex and vaginal intercourse:

> Q. When does your memory pick up from that evening?
> A. In the middle of the assault… I remember being on my back and completely naked and I didn't, like everything was dark around me.
> Q. Do you know where you are during this memory? …
> …
> A. Robert's bedroom.
> Q. And how do you know that?
> A. Because he was there and I remember the next morning when I woke up that's where I knew I was.

Q. Okay. So, you are at Robert's house, you are in Robert's bedroom and you said that you were on your back. If you can just tell us everything with as much details as you can remember.
A. And he put his penis in my mouth. And I still really didn't understand what was happening. And then he gave me oral.
Q. Okay, so what part of his body is touching your body for that term?
A. His mouth on my vagina. And then I was in pain and I remember specifically saying "ouch" and "no". And then he was like let me try again. And then I remember his penis in my hand and I felt like I had no control over my body, like it was like I was just like a rag doll. And then I remember he put his, my legs were like up to my shoulders.
Q. You said he put, so what was he using to put your legs by your shoulders?
A. His hands assume, I just remember my legs up against my shoulders.
Q. So you don't remember where his hands were?
A. No. But then he put his penis in my vagina and I remember like the pain just like burst through my whole entire body. And I don't know what I said, I believe I said no because I could feel that in my throat. But I don't know, like I was like out of body because it was like who, where am I.
Q. Do you remember saying yes?
A. No.
Q. Were you asked any questions before this happened?
A. No.
Q. Did you want this to happen?
A. No.
…
Q. Do you know what time of night it was?
A. No. I know that it was still dark.
Q. Still Dark? And do you remember whether there were windows in the room you were in?
A. There were windows.
Q. And [do] you know whether they were opened or closed, the blinds?
A. I don't know.
Q. Okay, but the room is dark?
A. Yes.
…
Q. What's the last memory you had that evening like before you went to sleep?
…
A. Exactly that I remember him like on top of me and I just felt, I didn't know who this person was and why I was there. That is the last thing I remembered.

(Transcript, at 27-30)

[14] The complainant testified that her last memory of the alleged assault, before she fell back asleep, was of the appellant on top of her. She next woke late

morning or early afternoon on the same day (April 6, 2018), naked, and still in the appellant's bed in his bedroom. The complainant's breasts, hips and back were sore when she woke, and there were aches and pains throughout her body. The complainant testified that she was "freaking out." She asked the appellant the address of where she was, and who he was. The appellant replied, according to the complainant, "[w]e met last night and you were at [K.M.'s King Bridge Road apartment] and you were all over me" (Transcript, at 31).

[15] The complainant called a friend, gave her the address, and requested pick-up. The friend picked up the complainant and took her directly to the hospital where she was seen by two sexual assault nurse examiners. The report from those nurse examiners indicated that the vaginal opening was very tender on assessment, there was inflammation of the interior walls of the vagina, and there was bruising on the left and right thighs.

[16] The following day, April 7, 2018, the complainant spoke to police and arranged a time to give a formal statement by video.

[17] Expert evidence accepted by the trial judge, and based on samples of urine and blood taken from the complainant at 1:53 p.m. on April 6, 2018, indicated the presence of alcohol, cocaine and fluoxetine. The alcohol concentration of the blood sample was 74 milligrams per hundred milliliters of blood. Most persons eliminate alcohol at the rate of 10-20 milligrams per hundred milliliters of blood, per hour.

[18] DNA testing of a body swab, taken from skin surface above the left breast by one of the sexual assault nurse examiners, matched the appellant's DNA. A vaginal swab taken at the same time, and tested using Y-STR technology, also matched with the appellant's DNA. Dr. Greg Litzenberger testified that the match on the vaginal swab (unlike the swab taken above the left breast) did not conclusively establish that the appellant was the source, as it is possible that the same swab could match others within the appellant's paternal lineage:

> … [T]he Y-STR DNA profile obtained from exhibits SAL007 [vaginal swab] matched that of the known sample, exhibit SAL012, which was taken from Robert Kennedy.
>
> … [T]he main limitation with these Y-STR profiles is that they are inherited intact along a male lineage. So this male profile that was obtained would be expected to be the same profile as any of this man's [appellant] paternal male relatives …
>
> (Transcript, at 743)

STANDARD OF REVIEW

[19] The grounds of appeal, on conviction, allege that the trial judge made factual findings or inferences that cannot be supported by the evidence. A deferential standard of review, i.e. deference to the trial judge's findings, is applicable when appellate courts are addressing factual findings and inferences. Deference is owed unless the trial judge is shown to have committed a palpable and overriding error (i.e. an error that is plainly identifiable and affected the result) or made factual finding or inferences that are clearly wrong, unreasonable or unsupported by the evidence. Hoegg J.A., writing for the majority in *R. v. Vokurka*, 2013 NLCA 51, aff'd 2014 SCC 22, [2014] 1 S.C.R. 498, discussed the standard of review for factual inferences:

> [24] The standard of review for factual inferences made by trial judges is expressed by Fish J. in *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 (para. 9):
>
> > ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm ...

[20] Sentencing decisions, like factual findings and inferences, also attract a high level of deference. Except where a sentencing judge makes an error of law or principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit, see *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11 and 44.

ANALYSIS

[21] The factual findings or inferences that the appellant says cannot be supported by the evidence include: (1) the appellant engaged in sexual activity, including oral sex and vaginal intercourse, with the complainant; (2) the complainant did not consent to the sexual activity; and (3) the complainant was intoxicated at the relevant time.

[22] I am satisfied, for the reasons set out below, that the trial judge's factual findings and inferences were reasonably supported by the evidence.

Sexual Activity

[23] The trial judge made a finding of fact that there was oral sex and vaginal intercourse. This finding was consistent with the complainant's testimony that "he put his penis in my mouth [and] … then he put his penis in my vagina" (Transcript, at 28–29). As noted above, the appellant did not testify. The trial judge was satisfied that the complainant's testimony was "truthful with respect to the sexual activity she described as having occurred at the accused's residence" (trial judge's reasons, at para. 281). The complainant's testimony of the sexual activity was not contradicted by any other evidence, and was corroborated, to some extent.

[24] Two witnesses observed the complainant, in an intoxicated state, with the appellant shortly before the time of the alleged assault. The complainant woke up, naked, in the appellant's bed at his apartment on Golf Avenue, later on the morning or early afternoon of the alleged assault. Two sexual assault nurse examiners who saw the complainant on the afternoon of the same day observed inflammation inside the vaginal canal and general tenderness:

> There was inflammation, so swelling, to the inner walls of the vagina.
> …
> That is us observing inflammation inside the vaginal canal.
> …
> The thighs were very tender to touch. The whole area was tender.
>
> (Transcript, at 505, 540, and 568)

[25] Testimony from an expert witness confirmed that DNA on a body swab and a vaginal swab taken from the complainant matched the appellant's DNA. The source of the DNA on the body swab was the appellant. The vaginal swab was matched using Y-STR technology, which looks at the DNA profile of the Y chromosome. The expert could not say with certainty that the source of the DNA on the vaginal swab was the appellant, but the source would be the appellant or others within his paternal lineage. The expert testified:

> [T]his profile is expected to be shared between members of [the appellant's] paternal lineage. So it is not a profile that is unique to him, but it is not expected that … random individuals or people unrelated to Robert Kennedy non-paternally would be expected to share this result.
>
> (Transcript, at 746-747)

[26] The trial judge noted this limitation with the Y-STR technology in his reasons, at paragraph 164, "[t]he DNA profile [from the vaginal swab] was not unique to the accused but also was not a random match" (para. 164). Despite this acknowledged limitation, the DNA profile match, when considered with all the other evidence, was sufficient to allow the trial judge to infer, as he did, that the appellant was the source of the DNA profile on the vaginal swab. There was no evidence suggesting any other members of the appellant's paternal lineage had contact with the complainant.

[27] The appellant argued, in the alternative, that there was a reasonable doubt as to the nature of the sexual activity, specifically as to whether there was vaginal intercourse. In his view, the DNA match on the vaginal swab could also be consistent with digital penetration, and that this Court could make that alternate finding of fact. At paragraphs 229-230 and 239 of his reasons the trial judge acknowledged this argument:

> Mr. Wentzell submits that the inflammation of the vagina could be as a result of digital penetration.
>
> He submits that BK's tenderness could be explained otherwise than by forced intercourse.
>
> …
>
> At the very least, he submits that there should be a reasonable doubt that sexual activity [intercourse] occurred at the accused's residence.

[28] It is not the role of this Court to determine whether there is a reasonable doubt respecting whether there was vaginal intercourse. The issue for this Court is whether the trial judge made an error of law or fact in his application of the principle of reasonable doubt. At paragraph 24 of *Vokurka*, Hoegg J.A. (quoting Fish J. in *Clark*) noted that appellate courts may not interfere with factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. There was no error made by the trial judge in his application of the principle of reasonable doubt, and no error in inferring that there was oral sex and vaginal intercourse. Those inferences were reasonably supported by the evidence.

[29] There was testimony of possible digital penetration from a witness who observed the complainant "making out" with the appellant while at the Kings Bridge Road apartment. The trial judge discussed that testimony, and the testimony of a second witness at that apartment, and concluded neither witness

observed any sexual contact, and specifically, did not observe any contact inside the complainant's clothing.

[30] The trial judge then discussed and accepted (at paras. 271-272) the evidence of the complainant that there had been oral sex and vaginal intercourse later that morning while at the Golf Avenue apartment:

> The complainant testified that when she woke up at the accused's residence she was naked. She says she recalls being on her back and her legs were by her shoulders. She recalls the accused put his penis in her mouth; put his mouth on her vagina and performed oral sex on her; she said "ow"; she recalled his penis in her hand; that she had no control over her body; that he put his penis in her vagina; and she felt pain.
>
> With respect to her state of mind, she testified that she did not want sexual activity with the accused to happen. I accept this as being true.

[31] The finding that there was vaginal intercourse was supported by the above testimony and corroborative testimony (describing inflammation and tenderness) of the two nurse examiners. The trial judge noted the requirement for proof beyond a reasonable doubt of all elements of the charge (para. 248); he accepted the complainant's testimony that there was vaginal intercourse (paras. 271-272); and he found that "the Crown has proven all elements of the charge beyond a reasonable doubt" (para. 285). The reasons overall illustrate that the trial judge clearly understood that the burden of proof was on the Crown to prove the offence beyond a reasonable doubt and that he correctly applied the law to the facts in concluding that the burden was met regarding the *actus reus* of oral sex and vaginal intercourse.

[32] In summary, the trial judge did not err by inferring that the appellant's DNA was present in two places on the complainant's body, and did not err in finding that the sexual activity, including both vaginal intercourse and oral sex, had occurred.

Consent to the Sexual Activity

[33] The appellant's argument that the trial judge made erroneous factual findings on the consent issue, relates to events while the complainant was at the Kings Bridge Road apartment. In effect, the argument is that the complainant's behavior in "making out" with the appellant while at the King s Bridge Road apartment communicates consent to the subsequent sexual activity that occurred at the Golf Avenue apartment. The specific finding of the trial judge, now challenged by the appellant, was that there was no evidence that the complainant

initiated sexual activity with the appellant while at the Kings Bridge Road apartment.

[34] As noted above, R.C. and K.M. observed that the complainant and the appellant were “making out” on a couch in the Kings Bridge Road apartment at one point during the early morning hours of April 6, 2018. This activity, even if initiated by the complainant, cannot support consent for the vaginal intercourse and the oral sex that occurred later that same morning at the appellant’s apartment on Golf Avenue. I add that the trial judge made a separate finding, well supported by the evidence, that the complainant was incapable of giving her consent due to intoxication or disassociated state while at the Kings Bridge Road apartment (trial judge’s reasons, at para. 265). Pursuant to section 273.1(2)(b) of the *Criminal Code*, where the complainant is incapable of giving her consent, there can be no finding of fact that the complainant voluntarily agreed to the sexual activity in question.

[35] In the circumstances, nothing that occurred at the Kings Bridge Road apartment has any relevance to the appellant’s argument on the consent issue, or on his alternate argument advanced at trial of honest but mistaken belief in communicated consent.

[36] In *R. v. Barton*, 2019 SCC 33, Moldaver J., writing for the majority, repeated the established principle that consent for sexual activity must exist at the time of the sexual activity in question and must be linked to the specific sexual activity in question:

> [88] "Consent" is defined in s. 273.1(1) of the *Code* as "the voluntary agreement of the complainant to engage in the sexual activity in question". It is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*J.A.)*, at para. 31), and it must be freely given (see *Ewanchuk,* at para. 36). This consent must exist at the time the sexual activity in question occurs *J.A* , at para. 34, citing *Ewanchuk* , at para. 26), and it can be revoked at any time (see *Code*, s. 273.1(2)(e); *J.A.* , at paras. 40 and 43). Further, as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner" …

[37] Despite issues with the complainant's memory blackouts preceding the sexual activity, the trial judge accepted the complainant’s evidence of what she could recall, and specifically, her recall that she did not want the sexual activity

to occur. The relevant testimony from the complainant, accepted by the trial judge, includes:

> Q. Do you remember saying yes?
> A. No.
> Q. Were you asked any questions before this happened?
> A. No.
> Q. Did you want this to happen?
> A. No.
>
> (Transcript, at 29)

> Q. How did you feel in the morning, that Friday morning when you woke up?
> A. Incredibly confused and scared. I was terrified. I had no idea why I was naked with this person. And, I didn't know where I was and yeah I was terrified.
>
> (Transcript, at 45-46)

[38] The trial judge accepted this evidence as truthful (trial judge's reasons, at para. 272) and added that there was "no evidence" that the appellant took any steps to ascertain whether the complainant was consenting to the sexual activity (trial judge's reasons, at para. 276).

[39] The evidence from the complainant that the sexual activity was nonconsensual, and absence of any evidence that the appellant took steps to ascertain consent, supports the trial judge's findings that "the complainant did not consent to the sexual activity with the accused at his residence [and there is] … no evidence to support any submission by the accused that he had an honest but mistaken belief in communicated consent" (trial judge's reasons, at paras. 282-283).

Intoxication

[40] The appellant's argument that the trial judge made erroneous factual findings on the degree of intoxication, relates to urine and blood samples taken at 1:53 p.m. on the day of the alleged assault. Three alleged errors are identified: (1) the complainant's blood alcohol level "when read back or extrapolated to 7 a.m. would have been between 143 and 213 mg % …" (trial judge's reasons, at para. 261), (2) the "blood alcohol concentration in [the complainant's] urine sample was 213 mg. %" (trial judge's reasons, at para. 169), and (3) "Mr. Keddy conducted multiple calculations with a view to determining [the complainant's]

BAC at 7:00 a.m. [and] these were all based on hypotheticals" (trial judge's reasons, at para. 171).

[41] The inference of fact made by the trial judge, extrapolating the 1:53 p.m. blood sample back to infer blood alcohol concentration at 7 a.m., is consistent with the expert's testimony at trial. Christopher Keddy testified that alcohol is eliminated from the body at the rate of approximately 10 to 20 milligrams per hundred milliliters of blood, per hour; and he testified that extrapolating the 1:53 p.m. blood sample backwards "comes to a range of 143 to 212 milligrams percent at 7 a.m." (Transcript, at 692). The evidence of Mr. Keddy supports the inference made by the judge even though the top of the range referenced in the decision was 213 instead of 212. That difference, possibly a typographical error, is not significant or relevant.

[42] The trial judge did err in referring to alcohol concentration in the urine sample as "blood alcohol concentration"; however, it is a misstatement of a term that has no impact on the verdict.

[43] The trial judge did not err in his statement that "Mr. Keddy conducted multiple calculations with a view to determining [the complainant's] BAC at 7:00 a.m. [and] these were all based on hypotheticals" (trial judge's reasons, at para. 171). It is true that most of the hypotheticals put to Mr. Keddy during his testimony were for purposes of determining blood alcohol concentration at midnight; however, the determination of the 7 a.m. blood alcohol level was also put to him and was based on a hypothetical. The hypothetical was that no alcohol was consumed after 7 a.m., or during the 30 preceding minutes. Mr. Keddy did conduct multiple calculations, and, based on certain assumptions, gave an opinion on blood alcohol level as of 7 a.m.

[44] The trial decision was based on absence of consent, and not lack of capacity to consent. Accordingly, an error on the factual findings and inferences relating to degree of intoxication is not directly relevant in any case.

Sentence appeal

[45] The appeal of sentence alleges the sentence is unfit because it was based on sexual activity that was not proven. I have determined that the trial judge made no errors in his factual findings and inferences, including his finding that the sexual activity included oral sex and vaginal intercourse. The sentence, based on those findings, was not demonstrably unfit.

[46] In *R. v. Freake*, 2012 NLCA 10, the offender, a former boyfriend, was staying with the complainant at her apartment. He admitted engaging in sexual intercourse, but testified it was consensual. The trial judge accepted the complainant's evidence that it was nonconsensual and that during the sexual intercourse the offender held his hand over her mouth. A sentence of four years was imposed. This Court upheld that four-year sentence and stated, at paragraph 23, "The range of sentence for sexual assault involving intercourse in circumstances such as this would be three to five years."

[47] This general range indicates that the three-year six-month sentence imposed in the appellant's circumstances was a reasonable sentence and deference is owed.

CONCLUSION

[48] The trial judge's findings of fact, inferences drawn from those facts, and the finding of guilt were reasonable. His inferences were reasonably supported by the evidence. I would dismiss the appeal of conviction and the appeal of sentence.

_____

W. H. Goodridge J.A.

I concur: _____

L. R. Hoegg J.A.

I concur: _____

F. P. O'Brien J.A.

Correction Notice

Correction made on July 8, 2021:

1. On page 5, paragraph 14, "appellant" was replaced with "complainant".