NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. D.W.S.***, 2007 NSCA 16

Date: 20070207
Docket: CAC 267735
Registry: Halifax

Between:

D.W.S.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: pursuant to s. 486(3) [now s. 486.4(1)] of the **Criminal Code**

Judges: Roscoe, Bateman and Fichaud, JJ.A.

Appeal Heard: January 18, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Fichaud, JJ.A. concurring.

Counsel: Luke Craggs, for the appellant
William Delaney, for the respondent

<u>Publishers of this case please take note</u> that Section 486(3) [now s. 486.4(1)]of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
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> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
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> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] On November 8, 2005, after a trial before Justice Arthur W.D. Pickup, sitting without a jury, D.W.S. was convicted of sexually assaulting his young daughter (s. 271 **Criminal Code of Canada**, R.S.C. 1985, c. C-46). He appeals that conviction.

[2] The indictment charged that the offence occurred between January 1, 2002 and April 1, 2004. The victim, K., who was seven years old at the time of trial, testified on a promise to tell the truth.

[3] During the period in question the victim's parents were not living together. She visited her father on weekends at her grandparent's house where he was then living. D.W.S. occupied a bedroom, bathroom and livingroom in the basement of that residence. This is where the assault was said to have occurred. While D.W.S. was convicted of a single count of sexual assault, K. testified about two separate incidents. On the first occasion she said her father "put his finger in her butt hole". The next assault involved him putting his penis in her mouth having covered her eyes with taped-over swim goggles.

[4] K. told her mother about the first incident in late December 2003 or early January 2004. As a result the mother called D.W.S., telling him what K. had said. She accepted his assurance that it had not happened.

[5] K. divulged the second assault later in January 2004 when, prompted by a television show on the topic, the mother was talking to K. about good and bad touches. As a result of that disclosure, the mother took K. to the family doctor where she recounted essentially the same event. The doctor contacted Family and Children's Services. Ultimately, D.W.S. was charged with sexual assault.

[6] K.'s allegations were recorded in a videotaped interview conducted by Det. Sgt. Donald Moser and social worker Lisa Richardson on March 5, 2004. That videotape, which was the centrepiece of the Crown's case, was admitted into evidence pursuant to s. 715.1(1) of the **Criminal Code**:

> 715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged

> offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

[7] There was no objection to the admissibility of the videotape, K. having adopted it at trial.

[8] Although there were peripheral witnesses, as with most sexual assaults, this was essentially a two witness case. The judge heard evidence over two days - October 31 and November 1, 2005, reserving his decision which he delivered orally on November 8.

ISSUES:

[9] The appellant alleges that the judge erred in three ways:

- by failing to give adequate reasons for disbelieving the appellant;
- by failing to properly apply the principles set out in **R. v. W.(D.)**, [1991] 1 S.C.R. 742; and
- by misapprehending the evidence such that a miscarriage of justice occurred.

ANALYSIS:

[10] The allegations of misapprehension of the burden of proof (**W.(D.)**, **supra**) and inadequate reasons for judgment are presented by the appellant as related issues. Both stem from the fact that the judge did not provide reasons for rejecting the appellant's evidence denying the assaults.

[11] A trial judge's duty to give reasons is addressed in **R. v. Sheppard**, [2002] 1 S.C.R. 869. A lack of reasons is not, by itself, a basis for appellate intervention. As Cromwell, J.A. wrote for this Court in **R. v. D.S.C.** (2004), 228 N.S.R. (2d) 81; N.S.J. No. 432 (Q.L.)(C.A.):

> 32 Deficiency of reasons is not a free-standing ground of appeal. As Binnie, J. put it in **Sheppard**, an appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Instead,

a functional test is to be applied which requires the appellant to show not only that the reasons are deficient, but also that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case: **Sheppard** at paras. 26 and 33.

33 The application of this functional test depends on all of the circumstances of the particular case. As Binnie, J., said in **Sheppard** at para. 46:

> 46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.
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> (Original emphasis omitted)

34 Important considerations in applying the functional test are whether there are difficult points of law on which no conclusion is expressed or critical factual findings on confused or contradictory evidence which are unexplained and which are not otherwise intelligible from the record: **Sheppard** at paras. 39-46.

. . .

> 40 The Court in **Sheppard** made it clear that not every failure by a trial judge to fully explain the pathway taken to the result reached will constitute an error of law. Binnie, J., said at para. 60 that "... in the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it.
> (My emphasis added)

[12] D.W.S.'s testimony denying the assaults was straightforward and uncomplicated. The judge said simply: "I do not believe the accused nor am I left in doubt on the basis of the evidence he has given." The appellant says the judge's dismissal of D.W.S.'s evidence without elaboration demonstrates that he did not properly apply the principles set out by the Supreme Court of Canada in **W.(D.)**, **supra**. I would disagree.

[13] In **W.(D.)**, **supra**, at p.758 Cory, J. suggests the following jury instruction on the question of credibility:

> First, if you believe the evidence of the accused, obviously you must acquit.
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> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
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> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[14] In **R. v. P.S.B.** (2004), 222 N.S.R. (2d) 26; N.S.J. No. 49 (Q.L.), Cromwell, J.A. writing for this Court , explained the significance of the **W.(D.)** instruction in this way:

> [56] **W.(D.)** is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies. In brief, the trier must remember that the issue is not whether he or she believes the accused, but whether the evidence as a whole convinces the trier of fact of the accused's guilt beyond a reasonable doubt. If the trier of fact believes the exculpatory evidence of the accused, an acquittal must follow. However, even if the trier does not believe that evidence, the trier must ask him or herself if it nonetheless gives rise to a reasonable doubt. Finally, if the trier does not believe the accused and is not left in doubt on the basis of that evidence, the trier must still address and resolve

> the most critical, in fact, the only question in every criminal case: Does the evidence as a whole convince the trier of guilt beyond a reasonable doubt?

[15] **W.(D.)** prohibits a trier of fact from treating the standard of proof as a simple credibility contest - in other words, discounting the evidence of the accused merely because it is inconsistent with that of the complainant, which evidence he prefers. This does not mean, however, that a witness's credibility is assessed in isolation from the rest of the evidence. In conducting that assessment it is unavoidable that the evidence of witnesses be compared. (**R. v. Hull** [2006] O.J. No. 3177 (Q.L.) (C.A.)). In that process, the evidence of the accused may be disbelieved. That evidence may nevertheless create a reasonable doubt about the persuasiveness of the Crown's evidence, in this case, that of the complainant. In other words, the reasoning process is not complete with the rejection of the evidence of the accused.

[16] Only where the absence of reasons for disbelieving the accused's evidence leads to an inference that the judge has misapplied the burden of proof is it reversible error. As Fichaud, J.A. wrote for this Court in **R. v. Lake** (2005), 203 C.C.C. (3d) 316:

> [21] . . . The trial judge may discount the accused's testimony just because she has believed the Crown witnesses. The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W. (D.)*'s first question.
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> [22] The analysis of both the accused's testimony and the Crown's evidence is done with full knowledge of all the evidence that has been adduced at the trial. The first *W. (D.)* question does not vacuum seal the accused's testimony for analysis. In *W. (D.)*, p. 757, Justice Cory cited *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193, which, at pp. 354-55, 357-58, rejected the piecemeal analysis of individual segments of evidence for reasonable doubt. The point of *W. (D.)*'s first question is not to isolate the accused's testimony for assessment, but to ensure that the trier of fact actually assesses the accused's credibility, instead of marginalizing it as a lockstep effect of believing Crown witnesses.

[17] The reasons here demonstrate that the judge conducted the proper analysis. Opening with a detailed reference to **W.(D.)**, **supra**, he further illustrated his understanding of the principles by quoting the above passage from **P.S.B., supra** (see para.14, above). He followed with a thorough summary of the testimony of each witness including express references to portions of K.'s evidence from the videotaped interview. He considered that evidence, referring again to **W.(D.)**. He summarized the testimony of D.W.S. denying the assaults. The judge disbelieved that evidence and found that it did not create a reasonable doubt. He then carefully scrutinized the remaining evidence, primarily that of K. and was satisfied that the Crown had met the burden of proof. The single issue in this case, as in many sexual assaults, was credibility. There were no difficult points of law or unexplained critical factual findings on confused or contradictory evidence (see **R. v. C.S.B.** (2005), 237 N.S.R. (2d) 334; N.S.J. No. 402 (Q.L.)(C.A.)).

[18] On a reading of the reasons for judgment as a whole, the appellant could not be left in doubt as to why he was found guilty. K.'s evidence was accepted by the trial judge. In the context of the whole of the evidence, D.W.S.'s denial was not believed, nor did it raise reasonable doubt. The reasons are not inadequate and permit meaningful appellate review. The judge did not misapply the burden of proof.

[19] The appellant says the judge erred, as well, by overlooking significant material inconsistencies in K.'s evidence which should have raised a reasonable doubt. Again, I would disagree. This complaint flows in part from the fact that the judge did not refer, in detail, to the inconsistencies in his reasons for judgment.

[20] A similar complaint had been made of the trial judge's reasons in **R. v. Braich** when it was appealed to the British Columbia Court of Appeal ((2000), 145 C.C.C. (3d) 446 (B.C.C.A.)). That Court allowed the appeal. On further appeal, the Supreme Court of Canada restored the conviction ([2002 1 S.C.R. 903). **Braich** is a companion case to **Sheppard**, **supra**.

[21] In **Braich**, the Court cautioned against holding a trial judge to an unjustifiable standard of perfection:

> 38 The insistence on a "demonstration" of a competent weighing of the frailties elevates the alleged insufficiency of reasons to a stand-alone ground of appeal divorced from the functional test, a broad proposition rejected in *Sheppard*. The

> factual issues in this case do not approach the difficulty that led to appellate intervention in *R. (D.), supra*, nor is there the "uncritical reliance on the unorthodox identification evidence" cited in *Burke, supra*, at para. 53, or the internal contradictions in the trial reasons noted in *R. v. Feeney*, [1997] 2 S.C.R. 13. I do not suggest at all that the decision presented to the trial judge was straightforward or easy, but there is no doubt what he decided and why he decided it.
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> . . .
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> 41 This is not a case of boilerplate reasons or a generic "one size fits all" judicial disposition as was found in *Sheppard, supra*, released concurrently. The trial judge's decision was perfectly intelligible to the respondents, even though they considered it to be erroneous. It was also clear to the British Columbia Court of Appeal. "Inadequate reasons" is not an all-purpose ground of appeal that can serve to mask what is in fact a disagreement between the trial judge and a majority of members of the appeal court on an issue which the law allocates to the trial court for decision.
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> . . .
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> 42 The trial judge provided an intelligible pathway through his reasons to his conclusion. The appeal Court was not called upon to provide its own explanation of the conviction. The trial reasons did not fail the functional test. In my view, with respect, no error of law was committed.

See also **R. v. L.G.**, [2006] 1 S.C.R. 621 at paras. 14 and 23

[22] I am not persuaded that the so-called inconsistencies referred to by the appellant precluded a finding that K.'s evidence was credible and reliable. K. was unable to pinpoint when the events happened. Not surprising in a child of her age (between 31/2 years and 5 years old at the time of the assaults, age 7 at trial). Her evidence was not confused or contradictory on the central allegations of abuse. As the judge pointed out, the substance of the allegations remained constant throughout her evidence.

[23] The appellant says a careful reading of the transcript reveals that K. acknowledged at trial that she did not have a "current" memory of the assaults. I would disagree. While the portion of the transcript to which the appellant refers is open to interpretation, it does not clearly indicate that she had no present memory

of the events. Significantly, this suggestion was not made to the trial judge. In fact, defence counsel at trial acknowledged that K.'s memory was revived by the videotape. In any event, the video tape, which K. adopted, clearly set out the allegations. Acceptance of her evidence was not contingent upon her having a current memory at trial.

[24] Nor am I persuaded that the judge was unaware of the inconsistencies in K.'s testimony. During the defence summation, the trial judge had several exchanges with counsel which demonstrate that he was alive to the alleged inconsistencies and the need to carefully seriously scrutinize K.'s evidence. On the difficult issue of assessing a child's evidence he referred to **R. v. R.W.**, [1992] 2 S.C.R. 122 and **R. v. B.(G.)**, [1990] 2 S.C.R. 3; 56 C.C.C. (3d) 200. In **R.W.**, **supra**, McLachlin, J., as she then was, for the Court, emphasized the need for sensitivity to the perspectives of children when evaluating credibility at pp. 133-34:

> The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B.(G.)*, [1990] 2 S.C.R. 30 at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that
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> > ... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the

> strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.
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> As Wilson J. emphasized in *B.(G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

[25] The judge was aware that K. was unable to provide a particular date or detail as to the day, week or time frame within which the assaults occurred. In her testimony she sometimes confused the number of times each event occurred. Notwithstanding these inconsistencies or vagueness on peripheral issues, the judge carefully detailed his reasons for accepting K.'s evidence. Summarizing:

- at trial K. confirmed the evidence recorded in her videotaped statement;
- K. complained twice to her mother about the assaults;
- there was no evidence to support the suggestion that the mother had initiated the complaints;
- K. provided a substantial amount of detail about the assaults displaying a knowledge of sexual acts that would be unusual for a child five years old;
- K.’s description of the first assault included a demonstration of how she was positioned on her father’s bed when assaulted;

- the language used by K. (bum, peanut (penis), butt, snake (penis) and pee) were consistent with those used by a child not those of an adult;

- in describing the incident of oral sex, when asked what she said at the time, she responded that she could not speak because her father's "peanut" was in her mouth;

- on an occasion when she had been untruthful with her father about her mother's mistreatment of her, when confronted she readily admitted the lie;

- it would be difficult for a child of her age to fabricate and maintain a story with so much detail from the first interview through to cross-examination at trial;

- the level of detail also made coaching unlikely;

- D.W.S. had the opportunity to commit the assaults;

- the evidence did not support the defence theory that the allegations were borne of conflict between the parents. Although separated, they co-operated on parenting issues and did not have a history of conflict over access.

DISPOSITION:

[26] In my view, the appeal is without merit and must be dismissed.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.