

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. C.G.F.*, 2003 NSCA 136

Date: 20031210

Docket: CAC 194257

Registry: Halifax

Between:

F. (C.G.)

Appellant

v.

Her Majesty the Queen

Respondent

JUDGE: Cromwell, J.A.

APPEAL HEARD: October 6, 2003

JUDGMENT DELIVERED: December 10, 2003

SUBJECT: **Criminal Law - *Kienapple* principle that one ought not to be punished twice for the same wrong**

Charter of Rights and Freedoms - Judicial Interim Release - Nature of inquiry before a justice who is asked by the prosecutor to remand the accused for the purpose of showing cause why the accused should be detained

SUMMARY: One sexual incident between the appellant and the 13 year old complainant led to his conviction on four charges: sexual touching, sexual assault and two counts of failing to be of good behaviour in

breach of two undertakings. The appellant appealed.

ISSUES:

1. Should all charges have been judicially stayed because the appellant was arbitrarily detained after his arrest?
2. Did the trial judge make errors in law concerning the elements of the offences and in finding that the record supported the convictions?
3. Does the *Kienapple* principle preclude conviction for both sexual touching and sexual assault arising out of the same sexual incident?
4. Could the breach of undertaking convictions stand on this record or in light of the *Kienapple* principle?

RESULT:

Appeal allowed in part.

1. The judge did not err by refusing to stay all charges on the basis of an infringement of the accused's right not to be arbitrarily detained. Pursuant to a request by the prosecutor, the justice of the peace remanded the accused for three days to permit the prosecutor a reasonable opportunity to show cause why he should be detained. The justice of the peace was obliged to grant the prosecutor this opportunity and the only issue before her was the length of the remand. There is no evidence that she failed to address this issue judicially and as a result the remand was lawful and there was no arbitrary detention.
2. The judge did not make any of the legal errors alleged concerning the elements of the offences.
3. The Crown conceded properly that the *Kienapple* principle applies to prevent conviction on both the sexual touching charge and the sexual assault charge arising from the same incident. The sexual touching conviction was set aside and in its place a conditional stay was entered.

4. The conviction for breaching the conditions of two separate undertakings entered into at different times and with respect to different sets of offences did not offend the *Kienapple* principle even though the same incident was relied on as a breach of both of the undertakings. However, the judge erred in law by failing to make a reasoned finding that the alleged breaches occurred while the undertakings were in force.

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 16 pages.