NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Baker, 2004 NSCA 23*

Date: 20040211
Docket: CAC 202595
Registry: Halifax

Between:

Neil James Baker

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Section 486(3) of the *Criminal Code*.

Judge(s):	Glube, C.J.N.S.; Freeman and Oland, JJ.A.
Appeal Heard:	December 3, 2003
Held:	Appeal allowed; new trial ordered as per reasons for judgment of Oland, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.
Counsel:	Jill A. Lacey, for the appellant Peter Rosinski, for the respondent

Reasons for judgment:

[1] This is an appeal from conviction and sentence. The appellant was charged with commission of a sexual assault on M.H., contrary to s. 271(1)(a) of the *Criminal Code* and, while in a position of trust and authority towards M.H., a young person, for a sexual purpose, touching her body with a part of his body contrary to s. 153(1)(a) of the *Code*. A jury found him guilty of both sexual assault and sexual exploitation. Justice W.R.E. Goodfellow of the Supreme Court of Nova Scotia sentenced him to two years and six months imprisonment.

[2] The grounds of appeal are directed to the trial judge's response to a question from the jury, the reasonableness of the verdict, and the fitness of the sentence. For the reasons which follow, it is my respectful view that the trial judge erred in answering the jury's question as he did and I would allow the appeal against conviction.

[3] The presentation of the evidence at trial took two days. The witnesses included the complainant M.H., a family friend, four police officers, and the appellant. The appellant admitted that he had had a sexual relationship with his step-daughter M.H. but testified that there had been only two incidents and these had been consensual and while she was 17. M.H. testified that there had been several non-consensual incidents while she was between the ages of 14 and 18.

[4] On the third day of the trial, counsel delivered their closing addresses to the jury. The trial judge's charge ended mid-afternoon. The jury returned with one question that day. It was "Can someone who is found guilty of sexual exploitation be acquitted from charges of sexual assault based on consent? Please clarify 273.1(2)." After discussions with counsel, the trial judge simply answered the question in the affirmative.

[5] The next day court resumed at 9:30 a.m. Shortly after 10:00 a.m., the trial judge advised counsel he had received two requests. The jury asked for a transcript or tape of M.H. under cross-examination and for a "stronger definition of 'position of power' or 'trust'". Following discussions with counsel, the judge answered the question and had the two hour tape of all of the evidence of M.H. played. No objection is taken to his dealings with the first three matters raised by the jury.

[6] The fourth and last question from the jury was received at 14:58 p.m. that same day. It read:

> The 'position of trust' is established. Is it automatically an abuse of trust if the accused induces the complainant to engage in the activity?

Following the trial judge's response the jury retired. It returned with a verdict of guilty on both charges within two hours.

[7] The grounds of appeal are as follows:

1. Whether the trial judge erred in failing to give a full and proper response to questions from the jury.

2. Whether he misdirected the jury on questions of law.

3. Whether he erred in failing to seek clarification where the jurors' questions were ambiguous.

4. Whether the verdicts are unreasonable.

5. Whether there was a miscarriage of justice.

6. Whether the sentence imposed is unfit having regard to the circumstances of the offences and the offender.

The first three grounds are directed to the answer given to the last jury question.

[8] At the beginning of his charge, the trial judge had provided the jury with copies of s. 271, 265, 273.1 and 153 of the *Code*. It would be helpful to set out the portions relevant to this appeal:

> 153. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

> (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person,
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> . . .
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> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
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> (2) In this section, “young person” means a person fourteen years of age or more but under the age of eighteen years.
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> 271. (1) Every one who commits a sexual assault is guilty of
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> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years;
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> . . .
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> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
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> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
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> . . .
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; . . .

[9] It is apparent from the transcript that the judge and both counsel found the jury’s last question to be an ambiguous one. They discussed at some length whether it pertained to s. 153 or to s. 273.1. The judge was of the view that the jury was concerned with the former. After obtaining the agreement of counsel as to his proposed response, he had the jury brought in and, after repeating their question, commenced:

> Okay. I'm not 100 percent sure what the question really means and I don't want to get into a full address but I will be available for whatever further direction. What I'm going to do is to give you an answer to it and get some indication from you whether that does, in fact, answer what your inquiry is because I'm not 100 percent sure.

[10] The trial judge then reviewed the requisite elements of s. 153, emphasizing that the real key is the position of trust and authority and stating that "If you're in a position of trust or authority, you cannot touch somebody sexually." At the end of his recharge, he asked whether he had essentially answered their question, the foreman gave a response shown on the record as "inaudible," and the trial judge then continued:

> Okay. If you have any reservations, I'm here. We try and be as helpful as we can. And I'm not sure what - - I don't want to read in any communication - - some are nodding yes or no, I'm not sure which. So it - - if that hasn't helped you, if there's something else, try and make the question perhaps a little clearer and I'll revisit it if you want.

His concluding words before the jury retired were:

> In any event, I hope I've been of some assistance to you. I'll be available to you if there's anything further I can assist you on. Thank you, Mr. Foreman.

[11] The significance and importance of questions from the jury was described in *R. v. W.D.S.*, [1994] S.C.J. No. 91. The appellant there had been charged with sexual assault and as the only evidence at trial was that of the complainant and the appellant, the case turned on credibility. The jury's question read: "The jury is hung up and there has been no change in the vote. We would like an explanation of the guideline on the jury's duty regarding evidence and reasonable doubt." After hearing from the judge, the jury deliberated another four and one-half hours before reaching a verdict.

[12] In finding that the trial judge's recharge was incorrect in that it did not follow the outline in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, Cory, J. for the majority stated:

¶18 There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.

. . .

¶19 . . . When the jury submits a question it must be assumed that the jurors have forgotten the original instructions or are in a state of confusion on the issue. Their subsequent deliberations will be based on the answer given to their question. That is why the recharge must be correct and why a faultless original charge cannot as a rule rectify a significant mistake made on the recharge.

¶20 To this I would add that obviously the greater the passage of time that has elapsed between the main charge and the question from the jury, the more imperative it is that a correct and comprehensive answer be given. Here, four hours had elapsed between the main charge and the question submitted from the jury. It was therefore essential the response be correct and comprehensive. . . .

[13] Cory, J. provided the following summary at ¶ 34:

The manner in which questions from the jury should be handled may be summarized in this way:

1. All questions received from the jury must be considered to be of significance and important.

2. Counsel must be advised of the question and their submissions heard as to the nature and content of the response.

3. The answer to the question must be correct and comprehensive. Even if the issue was covered in the original charge it must, in its essence, be repeated even if this seems to be repetitious.

4. No precise formula need be used but the response to the question must always be accurate and complete.

5. The longer the delay the more important it will be that the recharge be correct and comprehensive. As a general rule an error

> in the recharge on the question presented will not be saved by a correct charge which was given earlier. The question indicates the concern or confusion of the jury. It is that concern or confusion which must be correctly addressed on the recharge.

[14] That a trial judge should obtain clarification before formulating a response to an ambiguous question is supported by several appellate court decisions, including in *R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.) and *R. v. Fleiner* (1985), 23 C.C.C. (3d) 415 (Ont. C.A.). In *Mohamed*, the failure of the trial judge to do so led to an acquittal on appeal. There the accused had been charged with attempted murder. The judge charged the jury the afternoon of the sixth day. That evening the jury asked two questions which related to the included offence of aggravated assault, the second being "If a person is convicted of aggravated assault is he considered to be one hundred per cent at fault?" The judge, who received scant assistance from counsel in regard to the jury questions, responded by summarizing his earlier instructions on self-defence. The jury reached a verdict within five minutes of continuing its deliberations.

[15] At p. 15 (Q.L.) Wood, J.A. speaking for the court stated:

> The question asked by the jury, at around midnight on November 28th, ought to have been clarified by the trial judge before he embarked upon an answer. Given the confusing nature of that question, I can find little comfort in the foreman's assertion that it was answered to their satisfaction. The confusion with which the question abounds, and the lack of any evidence that such confusion was removed, at least from the mind of its author, renders the verdict of the jury unsatisfactory. I would allow the appeal on this ground alone.
>
> The response made by the trial judge, standing by itself, did not contain any serious misdirection, but I cannot be sure it was responsive to the question asked. If the jury's confusion did centre around the legal requirements of the defence of self-defence, I would have thought that what was needed was an accurate description of those legal requirements, together with explanations and illustrations based on the evidence in the trial. Thus, even though there was no serious misdirection, the response made by the trial judge was not, in my view, an adequate instruction, given the fact that it was delivered late in the day, when the jury were less likely to comprehend all of its terms, and that it was essentially a repeat of what had twice previously failed to clarify the issues of law for them. In

> summary, the nature of the trial judge's response contributed to the unsatisfactory verdict in this case. (Emphasis added)

[16] In *Fleiner*, supra the accused had been charged with criminal negligence in the operation of a motor vehicle. In response to a question which was not altogether clear, the trial judge gave a categorical answer. After determining that he may have inadvertently withdrawn a defence available to the appellant by diverting the jury from a consideration of an included offence and in ordering a new trial, Finlayson, J.A. for the court stated at p. 420-421:

> In my respectful view, the learned trial judge should have requested clarification of the question before dealing with it. It is very difficult to understand the question and answer as recorded and in the spirit of *Bigaouette v. The King* (1926), 47 C.C.C. 271, [1927] 1 D.L.R. 1147, [1927] S.C.R. 112, it is my opinion that the court should not be obliged to speculate as to what was concerning the jury. Duff J. in speaking for the Supreme Court of Canada in *Bigaoutte* stated at p. 272 C.C.C., p. 114 S.C.R.:
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> > The law, in our opinion, is correctly stated in the judgment of Stuart, J.A. in *Rex v. Gallagher* (1922), 63 D.L.R. 629, at p. 63, 37 Can. C.C. 83 at p. 84, 17 Alta. L.R. 519, in these words:–"It is not what the Judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal. (Emphasis added)

[17] *Mohamed*, supra and *Fleiner*, supra were cited by O'Neill, J.A. in his dissenting decision in *R. v. Allen* (2002), 208 Nfld. & P.E.I.R. 250, [2002] N.J. No. 11. On appeal (*R. v. Allen*, [2003] S.C.J. No. 16) the Supreme Court of Canada concluded, substantially for the reasons set out in that dissent that the trial judge had not answered the jury's question with the requisite clarity and comprehensiveness, thus allowing the possibility that the appellant was convicted by a jury that did not have an adequate understanding of the law on parties. The conviction was set aside and a new trial ordered.

[18] In that case the appellant Allen and another person had been charged with second degree murder. The defence position was that the appellant was neither principal nor a party to the murder. The trial judge instructed as to the effect of s. 21 of the *Criminal Code* and the meaning of "aiding and abetting." During the third day of deliberations, the jury asked the trial judge:

> Please clarify further (in layman's language and examples) what is meant by involvement in murder.
>
> We are aware of primary, aiding and abetting but would appreciate more clarification or examples.

[19] In his dissenting judgment O'Neill, J.A. found that the trial judge had not properly instructed the jury with respect to s. 21 and that the error arose from the use of the words "involved" and "involvement" by Crown counsel and by the trial judge in addressing the jury. He stated at ¶106 and 107:

> It is important to note that here, the question from the jury came after it had been deliberating for approximately 14 hours, over the period from May 10 to May 12, 2000.
>
> It is obvious from the discussion among the judge, Crown counsel and defence counsel, following the jury's question that there was no clear understanding as to what information or guidance the jury was specifically looking for. When a jury comes back with a question it is a clear indication that they are concerned and that they are not sure what the rule or principle is with respect to a particular matter. In my view, the jury was in that "state of confusion" referred to by Cory J. [in *R. v. S. (W.D.)* supra] with respect to the issue of the appellant's "involvement".

[20] After stating at ¶ 124 that the re-instruction could not be responsive as there was no clear understanding as to the basis for the question and what specifically was troubling the jury, O'Neill, J.A. continued at ¶ 127:

> Here, on receiving the question from the jury, and there being no clear understanding by him following his discussion with counsel as to the exact nature of the problem the jury was having, the trial judge should have questioned the foreman of the jury and then, having satisfied himself as to exactly what the jury's problem was, have re-instructed. If, as mentioned earlier, the concern was with

> respect to "involvement", it was incumbent on the trial judge to instruct the jury with references to those parts of the evidence which, if believed, could lead the jury to conclude beyond a reasonable doubt that the appellant was guilty. Equally, the trial judge was under an obligation to point to those areas of the evidence which, if believed, might indicate that the appellant was merely an innocent bystander. He failed to do so.

[21] In the case here under appeal, no objection has been taken to the trial judge's original charge. The trial judge also proceeded correctly upon receiving each of the jury's questions. He advised counsel and discussed the question and the nature and content of the response with them in the absence of the jury. He obtained the approval of both counsel and gave his response in accordance with their discussion.

[22] However, a faultless original charge cannot save a significant mistake on the recharge: see *W.(D).*, supra at ¶ 19. It is undisputed that the last question was an ambiguous one. It is apparent from the record that the judge and counsel were uncertain as to what it might be directed. The case law reviewed above makes it clear that it would have been preferable had the trial judge eliminated any ambiguity in that question by seeking clarification before responding. He could have had the jury return to the jury room and re-draft the question. He could have obtained clarification from the foreperson in open court. Counsel went along with the trial judge who thought that his response should be directed to s. 153. In my view, this cannot cure any error or omission in his answer. It remains the trial judge's responsibility to ensure that his response addresses the jury's concern.

[23] It is noteworthy that while the trial judge responded as if the jury question concerned s. 153, it would appear from its wording that it likely pertained to s. 273.1(2)(c) on vitiated consent which relates to the charge of sexual assault under s. 271. For convenience I will repeat the question and that provision here:

> The 'position of trust' is established. Is it automatically an abuse of trust if the accused induces the complainant to engage in the activity?

> 273.1 (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

. . .

> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; . . .

While the offence of sexual exploitation under s. 153 also refers to a person in a position of trust or authority, it does not contain specific wording as to inducement or abuse of that position.

[24] The trial judge's response to the jury question dealt only with s. 153 and the elements of sexual exploitation. No mention was made of the second charge of sexual assault, consent or, if the jury found consent, vitiated consent.

[25] I am conscious that in giving his recharge the trial judge went to great lengths to make it clear to the jury that if he had misunderstood the question or his recharge was not helpful, he would respond further if they so indicated. At the outset he told the jury that he was uncertain what their question meant. On several occasions thereafter he stated that if he had not answered their inquiry they should so indicate and that he was available to provide further direction.

[26] The jury did not seek any further explanation before reach ing a verdict. The readiness of this jury to return with questions is demonstrated by its having returned with four questions within the first four hours of deliberations. However, while there is some case law where the failure of a jury to ask for further explanation or clarification was taken to indicate satisfaction with the judge's answer, this has not been accepted as determinative where the question was an ambiguous one. See for example *R. v. Laporte* (1994), 89 C.C.C. (3d) 486, 61 W.A.C. 279 (Man. C.A.), affirmed without reference to this point [1995] 1 S.C.R. 442, 94 C.C.C. (3d) 480, 91 W.A.C. 295 where the trial judge failed to reiterate a defence in responding to an unambiguous question and *R. v. Livermore* (1994), 89 C.C.C. (3d) 425, 18 O.R. (3d) 221 (C.A.), overturned on appeal in [1995] 102 C.C.C. (3d) 212 (S.C.C.) where the trial judge responded to a request to have evidence repeated by asking the jury to see if it could sort it out and, if not, then to come back.

[27] While this is not a case where the question was identified as pivotal (as in *W.(D.)*, supra where the question itself described the jury as being hung) or where the jury returned with a verdict very shortly after the response (as in *Mohamed*,

supra and *Livermore*, supra), all questions from a jury are important and must be answered correctly and comprehensively. As O'Neill, J.A. indicated in his dissenting opinion in *Allen*, supra it is difficult to see how an answer could be fully responsive when an understanding as to the basis for the question and what specifically was troubling the jury is lacking.

[28] Moreover, as earlier pointed out, it appears that the trial judge directed his response to the wrong provision of the *Code* and dealt with the charge of sexual exploitation rather than vitiated consent in relation to the charge of assault. The first question the jury had raised concerned consent in relation to exploitation and sexual assault and specifically identified s. 273.1(2). The last question read: "The position of trust is established. Is it automatically an abuse of trust if the accused induces the complainant to engage in the activity?" If it also pertained to consent and vitiated consent under s. 273.1(2), it could mean that the jury remained in "a state of confusion" in that regard. A complete and comprehensive response might have included an explanation of consent, inducement, and vitiated consent, perhaps such as recounted by Finlayson, J.A. in *R. v. Hogg* (2000), 148 C.C.C. (3d) 86 (Ont.C.A.) at p. 93:

> . . . if the Crown was relying upon s. 273.1(2)(c) to vitiate the complainant's consent to the sexual assault under s. 271 of the *Code*, the onus was upon the Crown to establish the factual underpinning to the section, namely that the appellant was in a position of trust, power or authority with respect to the complainant which reduced her to a state of dependency upon him such that he was able to misuse his dominant position to extract her consent to a sexual assault.

Such a response might also have addressed how the evidence related to this provision.

[29] Furthermore, if the last question pertained to s. 273.1, the answer given by the trial judge to the jury was quite misleading in relation to the charge of sexual assault. The trial judge stated that the real key was the position of trust or authority and that a person in such a position cannot touch someone sexually. He then emphasized that the jury must be satisfied beyond a reasonable doubt that a position of trust or authority had been established. His omission of any review of the elements of sexual assault or any mention of consent and vitiated consent may have misled the jury. It might have understood that a determination that the

appellant was in such a position in relation to M.H. was all that was necessary to find him guilty of sexual assault and that no deliberations as to consent or vitiated consent were necessary.

[30] The Crown submits that having indicated in its question that "the position of trust is established," it was "no great leap" for the jury to have concluded that the appellant had induced M.H. to engage in activities by abusing that position, thus vitiating any consent. Even though the trial judge failed to have the jury question clarified before responding and his instruction did not deal explicitly with sexual assault, consent or vitiated consent, the Crown says that the verdicts would not have been different and this court need not intervene. It also suggested that it could be inferred that the jury was satisfied with the judge's response either when given or thereafter, or that the jury had been able to resolve whatever its concern was by itself. With respect, I am unable to agree.

[31] Although a finding of a position of trust is necessary before s. 273.1(2) can come into play, the definition of vitiated consent requires more than that determination alone. It also calls for the finder of fact to decide on the evidence if the alleged victim had consented and, if so, if that consent had been induced by an abuse of the position of trust by the accused. The trial judge's response did not deal with those additional aspects. To agree with the Crown's "no great leap" argument, I would have to speculate that the jury addressed these criteria in its deliberations even though the trial judge did not mention them in his answer.

[32] As to the Crown's further submissions in this regard, they are grounded on the premise that the jury's failure to return for further elaboration must mean it was satisfied with the judge's response. This position has been rejected. I would also note that jurisprudence indicates that a foreman's confirmation that the jury's concern has been answered is insufficient: see *Mohamed,* supra at p. 15. Here not only is the record unclear as to what the foreman said, but the trial judge stated that some jurors nodded yes or no to his response and inquiry whether he had essentially answered its question.

[33] Having regard to the circumstances of the case under appeal, it is my respectful view that the trial judge failed to provide a complete and comprehensive response to the jury's last question and that in so doing he erred in law. It is not necessary that I deal with the remaining grounds of appeal. I would order a new trial.

Oland, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.