NOVA SCOTIA COURT OF APPEAL
Citation: R. v. W.J.T., 2003 NSCA 107

Date: 20031014
Docket: CA186193
Registry: Halifax

Between:

W. J. T.

Appellant

v.

Her Majesty The Queen

Respondent

Revised judgment:	The text of the judgment has been corrected according to the erratum dated October 21, 2003.
Judges:	Roscoe, Chipman and Freeman, J.J.A.
Appeal Heard:	October 6, 2003 in Halifax, Nova Scotia
Held:	Appeal is allowed per reasons for judgment of Roscoe, J.A.; Chipman and Freeman, JJ.A. concurring.
Counsel:	Coline Morrow, for the appellant Peter Rosinski, for the respondent

Reasons for judgment:

[1] The appellant was originally charged in one Information with 89 counts of assault, assault causing bodily harm, assault with a weapon, sexual touching, sexual assault, uttering threats, dangerous driving, pointing a firearm, and indecent assault. The offences were alleged to have occurred between 1973 and 1998. The six children and wives of the appellant from two marriages were the complainants on most of the counts. After the preliminary inquiry the appellant was committed to stand trial on 66 charges. A 75 count Indictment was presented for trial before Justice Frank Edwards sitting with a jury.

[2] As a result of a severance application by the appellant, Justice Edwards severed the Indictment into several parts. During the trial on a seven count Indictment, one count of which was further divided into five, making a total of 11 charges, the appellant was found guilty of five counts of assaulting two of his children with different weapons, a belt, a fly swatter, a beer bottle, a knife and a broom. For these offences he was sentenced to a total of four years incarceration.

[3] The appellant appeals from conviction and sentence and has raised grounds of appeal objecting to the method of severance of the first indictment and the further dividing of the charges at the close of the Crown's case. The Crown, in its factum, noted that the jury charge was inadequate in that the jury was not instructed on the issue of similar fact evidence, but submitted that the error was harmless. In subsequent submissions invited by the Court, the appellant agreed that the absence of instruction on the use of similar fact evidence was an error of law and argued that the curative provision contained in s. 686(1)(b)(iii) of the **Criminal Code** should not be applied.

[4] We agree that it was an error of law in the circumstances of this case not to instruct the jury on the limited use they could make of the similar fact evidence. See **R. v. Handy** 2002 SCC 56, **R. v. Shearing** 2002 SCC 58, and **R. v. C.B.** [2003] O.J. No 11 (Ont. C.A.).

[5] It is also our unanimous view, for the reasons pronounced in **R. v. B.(F.F.)**, [1993] 1 S.C.R. 697 that the Crown has not met the onerous burden of demonstrating that the curative provision should be applied.

[6] It is not necessary to consider the other grounds of appeal from conviction. The appeal is allowed, the convictions are set aside and a new trial is ordered. We make no comment about the appropriateness of the sentence.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.