

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Calnen*, 2008 NSCA 6

Date: 20080117

Docket: CAC 282925

Registry: Halifax

Between:

Rodney Earl Calnen

Appellant

v.

Her Majesty the Queen

Respondent

Publication Ban: pursuant to s. 486.4 of the Criminal Code of Canada

Judges: Bateman, Saunders and Oland, JJ.A.

Appeal Heard: January 17, 2008, in Halifax, Nova Scotia

Written Judgment: January 18, 2008

Held: Appeal against conviction dismissed; leave to appeal sentence granted but appeal dismissed per oral reasons for judgment of Bateman, J.A.; Saunders and Oland, JJ.A.

Counsel: Donald C. Murray, for the appellant
William Delaney, for the respondent

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment: (Orally)

[1] Mr. Calnen has appealed his conviction on one count of sexual assault (s. 271(1)(a) **Criminal Code of Canada**, R.S.C. 1985, c. C-46). In the event his conviction appeal is unsuccessful, he seeks leave to appeal the sentence.

[2] We are of the unanimous view that the conviction appeal must be dismissed. While we would grant leave to appeal sentence, so too do we dismiss that appeal.

[3] As to conviction, we are not persuaded that the judge placed undue emphasis upon the emotional reaction of the victim to the touching by Mr. Calnen or the part of the victim's body touched, as is alleged by the appellant. She assessed Mr. Calnen's conduct, objectively, in the context of all the circumstances as is required to found a conviction for this general intent offence (**R. v. Chase**, [1987] 2 S.C.R. 293 at p. 302). Her reasons for judgment disclose neither error of law nor is the verdict unreasonable (s.686(1)(a)(i) and (ii) **Criminal Code**; **R. v. Biniaris**, [2000] 1 S.C.R. 381; **R. v. Beaudry**, [2007] 1 S.C.R. 190).

[4] Nor are we persuaded that the sentence reflects error in principle or is demonstrably unfit (**R. v. C.A.M.**, [1996] 1 S.C.R. 500 at para. 90). Reading the reasons for sentence as a whole, we do not find merit in the appellant's contention that the judge required Mr. Calnen to disprove sexual motivation in the offence. The four month conditional sentence, followed by 18 months probation, and consequent orders, is not outside the wide range for this offence and this offender. While this was a single incident of sexual assault and relatively non-intrusive, the victim here is a child and Mr. Calnen has prior convictions for gross indecency and sexual assault, albeit dated, but also involving child victims. Those prior convictions were properly characterized by the sentencing judge as a "related record". These are aggravating factors. This offence calls for a denunciative and deterrent sentence.

[5] In summary, the appeal is dismissed in all respects.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.