Date: 19981116 **Docket**: C.A.C. 145389

NOVA SCOTIA COURT OF APPEAL

Cite as: R.v. G.W.M., 1998 NSCA 231

Glube, C.J.N.S.; Hallett and Bateman, JJ.A.

BETWEEN:

G. W. M.	)	Appellant in Person
	)	
Appellant	)	
- and -	)	
	)	Kenneth W. F. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 16, 1998
	)	
	)	
	)	Judgment Delivered:
	)	November 25, 1998
	)	

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal dismissed, per reasons for judgment of Glube, C.J.N.S.; Hallett and Bateman, JJ.A. concurring,

GLUBE, C.J.N.S.:

On November 18, 1996, G. W. M. was convicted of sexual touching, namely, that he, between September 15, 1996 and October 1, 1996,

> "...did for a sexual purpose touch [D.L.S.], a person under the age of fourteen years directly with a part of his body, to wit: his hand, contrary to section 151 of the **Criminal Code**."

He was also convicted of sexual assault (s. 271(1)(a)) of D.L.S. This charge was stayed based on the law against multiple convictions. (**Kienapple v. R.**, [1975] 1 S.C.R. 729.) The appellant was acquitted of uttering a threat and possession of a weapon for a purpose dangerous to the public.

Mr. M.'s sentencing took place on January 15, 1998. After a full hearing, he was found to be a dangerous offender and was sentenced to an indeterminate period of incarceration as provided in s. 753 of the **Code**.

The notice of appeal filed by Mr. M. on February 11, 1998 was against both conviction and sentence. However, all the issues raised by Mr. M. relate to his conviction and not to the sentence.

The following are the facts.

In September 1996, Mr. M. met two young boys, R.M. and G.C. A few days later, D.L.S., the complainant, age seven, became friends with R.M. and G.C. who introduced D.L.S. to Mr. M.. Over the period of a week and a half, the three young people met Mr. M. after school and they went with him into a wooded area off Barrington Street, where the group was building a structure or lean-to they called their “fort”. On at least one occasion, D.L.S. was alone with Mr.M..

At that time, the appellant was residing in the home of R. P. and was assisting Ms. P. in her secondhand clothing store. Ms. P. became suspicious of Mr. M.’s activities with the three young persons. He was giving them candy, toys and some money. Ms. P. asked D.L.S. whether Mr. M. had ever touched him in an inappropriate way. D.L.S. denied any contact, but after he was asked the same question by G.C., D.L.S. disclosed that Mr. M. touched him in his “private parts”.

At the trial, the appellant did not testify and offered no evidence. At the conclusion of the evidence and following submissions by counsel, Judge Sherar of the Provincial Court entered convictions on the charge of sexual touching and sexual assault, but stayed the latter charge.

After the conviction was entered, the Crown advised that an application was being brought under Part XXIV of the **Criminal Code,** to have Mr. M. declared

a dangerous offender and sentenced to an indeterminate period of incarceration. The hearing was held on December 9, 1997, and Judge Sherar rendered his decision on January 15, 1998.

Although Mr. M. listed a number of statements as to why he believes his conviction should be overturned, they can be summarized under the following headings:

1. The guilty verdict is unreasonable taking into consideration the issues of credibility and fabrication by witnesses.

2. Fresh evidence should be allowed, namely, the testimonies of two adults whom Mr. M. said “were not called at the first trial”.

3. Sentence Appeal.

1. Credibility and Fabrication by Witnesses

Mr. M. submits the trial judge should not have accepted the evidence of the civilian witnesses as credible, therefore, the verdict is unreasonable or not supported by the evidence (s. 686(1)(a)(i) **Criminal Code**).

Credibility is a question of fact and is appropriately determined by the trial judge who has the opportunity to see and hear the witnesses while they testify. The role of the Court of Appeal is to decide whether the verdict is one which a properly instructed jury, acting impartially, could have reached. (**Corbett v. The Queen**, [1975] 2 S.C.R. 275.) In determining whether or not a verdict is reasonable, McLachlin, J. in **R. v. Francois**, [1994] 2 S.C.R. 827, after referring to **Corbett**, states at p. 835:

> This statement was affirmed in **R. v. Yebes**, [1987] 2 S.C.R. 168, which went on to say that in order to apply the test the court of appeal "must re-examine and to some extent reweigh and consider the effect of the evidence" (p. 186). <u>This rule also applies to cases where the objection to the conviction is based on credibility - where it is suggested that testimony which the jury must have believed to render its verdict is so incredible that a verdict founded upon it must be unreasonable.</u> This was confirmed by this Court in **R. v. W. (R.)**, [1992] 2 S.C.R. 122.
>
> [emphasis added]

The Court of Appeal must show deference to a trial judge when dealing

with credibility. In assessing whether or not the verdict was reasonable, the Court of Appeal must to some extent re-examine, reweigh and consider the effect of all of the evidence. In **R. v. W. (R.)**, ***supra***, Justice McLachlin makes the following comments at pp. 131-132:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: [citations deleted]. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering

> all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

The defence had full opportunity to cross-examine D.L.S. as well as all of the witnesses. In reviewing the evidence, the trial judge, in his decision, examined the contradictions and inconsistencies in the evidence of D.L.S.

Judge Sherar stated in his decision:

> As Defence counsel has fairly pointed out, corroboration - there need not to be corroborated evidence in the circumstances of an allegation with regards to the unsworn testimony of an accuser who is the age of seven years. But one must be cautious in weighing and evaluating the testimony in this case of a young person who human nature may ask one - the trier of fact to evaluate, may be subject to unconscioned or unconscionable pressures in arriving at - providing an answer that may be favourable to those persons who are asking the questions. One must weigh entirely the circumstances as described by such a witness, weigh and test the credibility of their answers in all the circumstances in the both matters that are tested and uncontested, in arriving at a conclusion as to whether the person is a credible witness.
>
> There was sworn testimony by two other persons of the age of thirteen years, who described some of the circumstances as earlier described by the - by D.[L.]S. as to his contact with the Accused, G. W. M., and in some instances, those facts which the other two young witnesses testified to, confirm or go along with the evidence which D.[L.].S. has told the Court. He appeared as a forthright young person, who testified in all

> the circumstances as to what he believed happened. One must be conscious that on at least one occasion he gave an answer in direct contraction [sic] to a question put to him as to whether the actions of Mr. M., what actions Mr. M. had upon his person, when first confronted by a member of the public and also for some consideration, when later asked by the police to provide a video taped statement of - confirming or denying his earlier statement to them presumably, he refused to go along with providing such a video taped statement. Those are matters to be considered and are not determinative of the matter in total as to determining his credibility but must be weighed in all the circumstances of the situation.

I find Judge Sherar cautioned himself correctly on evaluating the child's evidence and, in the end, accepted the evidence of D.L.S.

I would not interfere with the trial judge's findings of credibility.

Mr. M. raised some specific areas which I will deal with here on the issue of whether the verdict was unreasonable. I will comment briefly on some but not all of the questions he raised.

(a) "Can the police state that the sexual [touching] occurred sometime between September 15th and September 30th - don't they need to be more specific?"

There is no requirement to have the charge be more specific than a range of dates as contained in the current information before the court.

(b) “They didn’t question R. and D. (the two adults who called the police and initiated the sexual assault charges in court?”

If he is referring to the police before the charges were laid, that is not a ground of appeal. If he is referring to the evidence in court, R. P. did testify and was subject to cross-examination. D. did not testify, but there is no obligation on the Crown to call every person who might be a witness.

(c) “No statement was taken from me regarding the sexual assault.”

The police are not obliged to take a statement from an accused person.

(d) “I was never put on the witness stand.”

Mr. M. was represented by experienced counsel. It is the choice of the accused person and his counsel as to whether or not he testifies at his trial. He has a right to remain silent. However, on an appeal under s. 686(1)(a)(i) of the **Code**, the fact that the appellant did not testify at the trial may be considered as a factor by the Court of Appeal in disposing of an appeal on the basis that the

verdict was reasonable. (**R. v. Noble**, [1997] 1 S.C.R.874 at p. 936.)

(e) "There was no warrant provided for my arrest, I agreed to go with the police voluntarily?

I had a knife when I was arrested and I gave this knife to the police. The officer gave this knife back to me and it remained in my possession until 9:30 the next morning when I give it to a guard."

The lack of a warrant for his arrest or his having a knife when he was arrested which was left with him for many hours, has no bearing on the verdict.

(f) "I was held in a room from 6:00 p.m. until 4:15 a.m. During this time no right were read to me, my request to call a lawyer was denied."

As Mr. M. did not give a statement to the police, any failure to warn him of his rights has no bearing on the credibility of the witnesses or the outcome of the trial. Any issue of failing to provide him with a lawyer should have been raised at the time of the trial.

Although this written decision does not deal with all of the issues raised by Mr. M., each and every one has been considered. None of the questions he raised would have altered the verdict on this ground of appeal.

I would dismiss the first ground of appeal.

2. Fresh Evidence

All of the other statements of Mr. M. in his notice of appeal appear to come under the heading of fresh evidence.

It appears Mr. M. wished to apply to introduce fresh evidence under s.683(1)(d) of the **Code,** to have two individuals testify who did not testify at the trial.

In the notice of appeal and the follow up letter from the appellant and on the hearing, he gave no details as to the identification of these individuals nor is there any information as to what they might say.

Special grounds must be shown to justify a decision by a court of appeal to admit new evidence. (**Palmer and Palmer v. The Queen**, [1980] 1 S.C.R. 759.)

Without any indication of what the evidence might be, the Court cannot evaluate its relevance, whether it is capable of belief and whether it could have affected the outcome of the trial. These are all factors which the Court is obliged to consider before granting a motion to allow fresh evidence.

Allegations in the notice of appeal of forcing D.L.S. to lie or of someone forcing the three boys to give evidence which was false, without any evidence to back up these statements, does not provide grounds for the admission of fresh evidence.

I would dismiss this ground of appeal.

3. **Appeal from Sentence**

Excluding the 1996 offence under appeal, from 1979 to 1996 Mr. M. has twelve offences involving young males. Six of the offences related to breach of probation orders where he had been ordered not to associate with young persons under age 16. The other six offences included two indecent assaults and convictions for gross indecency, sexual assault, unlawful possession of a weapon and an assault with a weapon. All twelve of these charges involved young males age 16 and under.

As stated by Judge Sherar in his decision which held Mr. M. was a dangerous offender:

> From a review of the prior record of convictions, the predicate offence and the personal history of G. W. M., it is clear that he has been involved in a pattern of repetitive behaviour involving the illegal use and manipulation of young children, especially young male

children, for his sexual gratification over many years.

The two medical evaluations found among other things that Mr. M. is a homosexual paedophile who fits the statutory criteria of the **Code** of a dangerous offender.

After hearing the evidence, the decision of Judge Sherar was thorough and comprehensive and contains no error in procedure, nor any error in law.

Mr. M. has offered no basis and made no argument from which the sentence could be considered to be in error.

I would dismiss the appeal from sentence.

In conclusion, there is no basis to introduce fresh evidence and the appeal from conviction and sentence is dismissed.

C.J.N.S.

Concurred in:

Hallett, J.A.

Bateman, J.A.