Date: 19990609
Docket: CAC 153877

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. K.A.B., 1999 NSCA 182

Chipman, Roscoe, Bateman, JJ.A.

BETWEEN:

K. A. B. Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Craig M. Garson, Q.C. for the appellant Dana W. Giovannetti, Q.C. for the respondent Appeal Heard: June 3, 1999 Judgment Delivered: June 9, 1999

Editorial Notice

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

THE COURT: Appeal dismissed as per reasons for judgment of Bateman,J.A., Chipman and Roscoe, JJ.A., concurring.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4), where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245, or 246 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or,
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1998,
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> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

BATEMAN, J.A.:

[1] K. A. B. was tried before judge and jury on two counts of sexual assault (**s.151** and **s.271(1)(a)** of the **Criminal Code)**, Justice D. Merlin Nunn of the Supreme Court presiding. He was found guilty of both offences. In accordance with **R. v. Kienapple**, [1975] 1 S.C.R. 729, a conviction was entered on only one of the offences (**s.151**). Mr. B. appeals that conviction.

BACKGROUND:

[2] The complainant was 10 years old at the time of the offence. She lived with her parents who were neighbors of and socialized with the appellant and his common law wife. She alleged that Mr. B., "touched [her] boobie and rubbed his privates against [her] bum" when she was visiting him. The assault was said to have occurred when the two were alone in his garden.

GROUNDS OF APPEAL:

[3] The appellant says:

1. That the trial judge erred in law in refusing to allow the appellant to adduce the expert evidence of Dr. Joseph Gabriel at trial;
2. That the trial judge misdirected the jury in relation to the burden of proof.**:**

ANALYSIS

(i) Expert Evidence:

[4] The defence sought to tender expert evidence to the effect that the offence was one most likely to have been committed by a person with paedophilic or sexual deviant tendencies, which tendencies Mr. B. did not exhibit. Justice Nunn ruled that the evidence was inadmissible.

[5] In **R. v. Mohan**, (1994), 89 .C.C.C. (3d) 402 (S.C.C.) the Court exhaustively canvassed the principles guiding the receipt of expert evidence regarding the disposition of an accused. A decision on the admission of evidence of disposition engages the rules respecting the admissibility of expert evidence and those governing the admission of character evidence. **Sopinka, J.**, writing for the Court restated the general criteria applicable to the admission of expert opinion evidence:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule;

(d) a properly qualified expert.

[6] Relevance is a matter to be decided by the judge as a question of law and encompasses two concepts. Evidence is logically relevant if it tends to establish a fact in issue. Before admission, however, logically relevant evidence must be assessed on a “cost/benefit” analysis. This latter inquiry requires the trial judge to consider the impact of the evidence on the trial process:

> . . . Evidence that is otherwise logically relevant may be excluded . . . if its probative

> value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. (per Sopinka, J. at p.411)

[7] The Crown may not lead character evidence “unless it is relevant to an issue and not being used merely as evidence of disposition.” Where the evidence shows that the accused “shared a distinctive unusual behavioral trait with the perpetrator of the crime . . [a] trait sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator”, it is relevant to prove identity and therefore admissible. (**Mohan**, at p.415) An accused is not so constrained and is permitted to adduce character evidence. When tendered on behalf of the accused evidence of character is ordinarily limited to general reputation in the community although an accused may, through his own testimony, rely upon specific acts of good conduct. When an accused seeks to call expert evidence that by reason of his/her mental makeup or condition of the mind, he/she would not be disposed to commit the offence, a further exception to the general exclusionary rule applies. Sopinka, J., summarized the law as follows (at p.422):

> How should the criteria for the admission of this type of evidence be applied? I find the following statement of Professor Mewett, supra, [Alan W. Mewett, "*Character as a Fact in Issue in Criminal Cases*" (1984-85), 27 Crim. L.Q. 29] at p. 36, to be an apt characterization of the nature of the decision which the trial judge must make:
>
> > The categorization of crimes into the "ordinary" and the "extraordinary" is therefore a legal question to be determined by the judge, as is the "normality" or "abnormality" of the accused - to the despair, no doubt, of psychiatrists. But admissibility of evidence is a legal question and depends primarily upon relevance, that is, upon its assistance to the trier of fact in his inference-drawing process, and this is governed, not by expertise, but by common sense and experience; words like "ordinary", "extraordinary" or "abnormal" are not meant to be scientific expressions but assessments of relevance and are thus clearly within the domain of the judge.

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.
> (Emphasis added)

[8] Justice Nunn's reason for excluding the evidence was twofold. He found that the proposed evidence did not satisfy the **Mohan** cost/benefit analysis. In addition he said:

> I'm not satisfied that it has been shown that this is a situation where the crime alleged is one that was committed by a person who is part of a group possessing distinct and identifiable behavioural characteristics. I think that to be admissible the expert has to be able to indicate that this crime is - can only be committed or is only committed by someone with these unusual and distinct characteristics and I'm not satisfied that this is the situation here. (Emphasis added)

[9] The appellant says that Justice Nunn expressed the test too narrowly - that the expert need not testify that the crime can only be committed by someone with unusual and distinct characteristics. Sopinka, J., in **Mohan**, said at p.420:

> A useful summary of the principles that emerge from the cases is made by Alan W. Mewett, *"Character as a Fact in Issue in Criminal Cases"* (1984-85), 27 Crim. L.Q. 29, at pp. 35-36, of his article where he points out the various contexts in which an accused can tender character evidence by way of an expert:
>
> > There are thus three basic requirements that must be met before such psychiatric evidence can even be considered as potentially admissible. First, it must be relevant to an issue. Second, it must be of appreciable assistance to the trier of fact and third, it must be evidence that would otherwise be unavailable to the

> ordinary layman without specialized training, but these requirements only set forth the general requirements for the admissibility of expert testimony.
>
> Once these hurdles have been passed, a number of different scenarios may be postulated. The crime may be an "ordinary" one (which I take to mean a crime for which no special mental characteristics on the part of the perpetrator would be required) and the accused is an "ordinary" person; the crime may be an "ordinary" one, but the accused an "extraordinary" person (i.e., having some peculiar mental make-up that would tend to show that he would not commit that "ordinary" crime); the crime may be "extraordinary", but the accused "ordinary"; or the crime may be "extraordinary" and the accused "extraordinary", in a different direction.
>
> In the first scenario, the evidence is irrelevant because it is simply not probative of anything. In the second it is probative and admissible but only if the extraordinary characteristic of the accused tends to show that he would not commit an ordinary crime of that nature (such as a homosexual being charged with a heterosexual offence). In the third, if it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess, it would be admissible. In the last scenario, the situation is the same provided that the difference in the abnormalities tends to exclude the accused from the probable group of perpetrators.

(Emphasis added)

[10] Summarizing, the accused must satisfy the Court (i) that the crime is one where the scientific community has developed a standard profile for the offender who commits this type of crime and (ii) that there is such a distinctiveness that the comparison of the offender to the perpetrator profile will be of material assistance in determining innocence or guilt.

[11] The burden of establishing the admissibility of the expert evidence was upon the defence. It was a question of law to be decided by the Judge. In the absence of the jury, Mr. Scaravelli, trial counsel for Mr. B., advised the Court that he intended to call Dr. Joe Gabriel whom he described as a forensic psychologist. The Crown

objected to the admission of this evidence, not knowing what area of specialization the defence was putting forward for the witness nor what opinion was sought to be tendered. In response to the objection Mr. Scaravelli advised the Court that Dr. Gabriel had tested Mr. B. and would testify that he was neither a sexual deviant nor a paedophile. In addition, Dr. Gabriel would say "that a person has to have certain characteristics to commit the offense. . ." and that Mr. B. does not have those characteristics. Lengthy discussion ensued between counsel and Justice Nunn as to the test to be met for the admission of the proposed evidence.

[12] The defence did not call Dr. Gabriel to testify on the *voir dire* nor file an expert's report, relying instead upon the "will say" submissions of counsel. Missing from the "will say" was any information upon which the Court could conclude that Dr. Gabriel had an accepted scientific basis for the proposition that this offence was most likely, or probably, or more frequently committed by a person with distinctive characteristics. In the language of Sopinka, J. it was unclear ". . . whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group". This is an issue that, in the usual case, requires evidence.

[13] Justice Nunn's comments to counsel during the *voir dire* reveal his concern in this regard: "But the problem that still presents itself is how do you get to the fact that this offence is characteristic of persons with a disposition that is abnormal . . . But we have hundreds and hundreds of cases where uncles or fathers and grandfathers have

been having sexual activity with young children from the time they're two, three and four years of age and they're not necessarily a paedophile as a psychiatrist would describe them." In response the solicitor for the defence offered only generalities: "He [Dr. Gabriel] will say that . . . it takes a person with certain characteristics to commit this offence. Mr. B. doesn't have these characteristics." The defence did not offer any evidence or assurance that Dr. Gabriel would testify that the scientific community has developed a standard profile for the offender who commits this type of crime.

[14] The ruling on admissibility is for the judge as a matter of law and involves an assessment of the sufficiency of the evidence. I would agree with Justice Nunn that the defence failed to meet the burden. The comments of Sopinka, J. in **Mohan** (at p.423) are instructive:

> I take the findings of the trial judge to be that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover, the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. Moreover, there was no material in the record to support a finding that the profile of a pedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential for misleading or diverting the jury. Given these findings and applying the principles referred to above, I must conclude that the trial judge was right in deciding as a matter of law that the evidence was inadmissible. (Emphasis added)

[15] The appellant says that defence counsel must have concluded, having heard

the Trial Judge state that the defence must establish that the offence could only have been committed by a person with distinctive characteristics, that it would be futile to require Dr. Gabriel to testify on the *voir dire*. In other words, that the failure of the defence to satisfy the burden on admissibility was induced by error on the part of the Trial Judge. I would reject this submission. Even if it is accepted that Justice Nunn mis-stated the test, the error was not material. In the circumstances of this case, the Trial Judge did not err in refusing to allow the expert to testify. There was no evidence from which he could conclude, as a matter of law, that the proposed evidence was admissible, nor was such a conclusion warranted on the "will say" information placed before the Court.

(ii) Instruction on the Burden of Proof:

[16] The appellant acknowledges that the judge's initial instruction to the jury on the burden of proof was correct and in accord with that recommended by the Supreme Court of Canada in **R. v. W.(D.),** [1991] 1 S.C.R. 742. The appellant submits, however, that Justice Nunn erroneously instructed on this topic at a later point in his charge. He refers to the following passage.

> Now, the second count or the -- it's the first count in the charge is the charge that he did touch [her], a person under the age of 14 years, directly with a part of his body, his hands and his pelvis, contrary to *Section 151(a)* of the *Criminal Code*. And *151(a)* of the *Criminal Code* reads that:
>
> > "Every person who, for a sexual purpose, touches directly or indirectly with a part of the body or with an object any part of the body of a person under the age of 14 years is guilty of an indictable offense."
>
> Now, the elements of that are, again, the identity and the time and the place. No problem. The fact of the child being under the age of 14 years, I don't think you have any problem with that. You heard her mother testify as to her age and you also saw

her and heard her testify and you know how old she was at the time of testifying, and this happened in August of 1997. So for the Crown to succeed in this case, you're going to have to look at whether they've satisfied you that the touching was for a sexual purpose and that there was an intention to touch the body of [her] for a sexual purpose. As far as touching is concerned, that simply means to bring your hand or some other part of your body into contact with someone else. It doesn't require any force, so in determining whether the touching has been proved, you should review the evidence of [her] and also the evidence of Mr. B.. You have to realize that the key elements of these offenses are dealt with in the evidence primarily of [her] and Mr. B.. Nobody else was present and that is usually the circumstance in these matters and so you have to review their evidence carefully. If you believe the evidence of [her] and accept her evidence and, of course, she had indicated that she was touched. If you -- and you then have to go on to determine whether that touching was for a sexual purpose, which I'll cover in a minute. You have the evidence of Mr. B. where he denies that he touched the boobies and denies that he rubbed his pelvis against her and he also gave an explanation of what was going on at the time and indicated that he had a boat key in his pocket and suggested that that may have been what she thought touched her. And if you accept his evidence then either you accept his denial as it never happened or you accept his explanation of this one about rubbing the -- touching her bum with his private parts. So that's with regard to the touching because touching can be explained, then. It can be explained in such a way that any intent to touch is explained and any intent that it be for a sexual purpose is explained. But the next -- so the next element is the -- the Crown has to satisfy you that that touching was for a sexual purpose. And again, you would think back to what I've said before about sexual assault. You should determine whether the sexual -- it's an objective test to some degree. You should determine whether the sexual integrity of the victim is violated. Would that be visible to a reasonable observer if you were standing on the street and you looked in, viewed in all the light of the circumstances, including the parts of the body touched, whether any touching was done under the clothing, the nature of the physical contact, the situation in which it occurred and the words and gestures accompanying the act. You must determine whether the purpose of the touching was in order to gratify a particular sexual appetite and you should consider, when you decide whether or not the touching was for sexual purposes. [Her] evidence of reaching under her shirt and touching her boobies and the touching of her bum with his privates. You should also look at the evidence of Mr. B. as to what -- his explanation of what he says happened and what his explanation was. As far as intent is concerned, you must find an intent to do it but the previous remarks I've made on intent apply, that you can infer

> that a sane and sober person would normally intend the natural consequences of his acts. And you look at all of the surrounding circumstances.
> (Emphasis added)

[17] The appellant says that the portion of the direction, which I have underlined above, tainted the charge: "And if you accept his evidence, then either you accept his denial as it never happened or you accept his explanation of this one about rubbing the -- touching her bum with his private parts." I do not agree. Justice Nunn was simply reviewing the appellant's explanation that the touching did not occur at all or that it may have occurred in an inadvertent and non-sexual way. He was not providing a direction on the overall burden of proof. Reading the charge as a whole, I am satisfied that the jury was properly instructed and would not have been left with the impression that this was a credibility contest between the complainant and the accused.

DISPOSITION:

[18] I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.