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NOVA SCOTIA COURT OF APPEAL
Cite as: R.v. D,J.H., 1997 NSCA 159

Clarke, C.J.N.S., Freeman and Pugsley JJ.A.

BETWEEN:

D. J. H.	)	Duncan R. Beveridge, Q.C. for the Appellant
Appellant	)	
- and -	)	
	)	Denise Smith for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard: September 30, 1997
	)	Judgment Delivered: October 14, 1997

Editorial Notice

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

THE COURT: Appeal dismissed per reason for judgment of Freeman, J.A.; Clarke, C.J.N.S. and Pugsley, J.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) Subject to subsection (3.1.), where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347, 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complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

FREEMAN, J.A.

This is an appeal from conviction on a charge that the appellant, then twenty-three, committed sexual assaults on a thirteen-year-old complainant, A.D.K., over a period of several weeks during the 1994 Christmas season, contrary to s. 271(1)(a) of the **Criminal Code.**

The complainant testified to three separate incidents while on overnight visits to the home of her friend S.L.F., also thirteen. The appellant, a friend of S.L.F.'s mother, was also a frequent visitor to the home. S.L.F. also complained of three similar incidents during the same period. After carefully weighing the evidence of the two girls the trial judge, Justice Kelly of the Supreme Court of Nova Scotia, found that he was left with a reasonable doubt as to the guilt of the appellant with respect to the charge arising from S.L.F.'s complaint.

The appeal is brought on the grounds that in convicting on the other count the trial judge erred in law in that he misapprehended the evidence, misapplied the burden of proof and misapplied s. 275 of the **Criminal Code** which abrogates rules relating to evidence of recent complaint.

A.D.K. told of two incidents about two weeks apart when she was awakened by the appellant pulling her by the hair while she was sleeping with S.L.F. The first time she resisted by clinging to the mattress and the appellant left. The second

time he succeeded in pulling her out of bed and took her into the bathroom, where she managed to break away from him. A third incident occurred the following day while A.D.K. was still staying with S.L.F. The appellant followed her to the bedroom where she had gone to change her clothes, seized her and touched her. He released her when S.L.F. called out from another part of the house.

The Crown was obliged to prove there was an assault, and that it was of a sexual nature. A.D.K.'s evidence, if believed, proved both elements. Some of the details related by A.D.K. varied from her statement to police and her evidence at the preliminary inquiry; there were some discrepancies between the versions of the two girls. The trial judge called them "sorry collaborators." They did not report the incidents for about a month, each explaining that she thought she could "handle it" herself.

The trial judge said that while he did not reject all of S.L.F.'s evidence, which in many respects "has the ring of truth to it," there were discrepancies and other factors which left him with a reasonable doubt as to D. H.'s guilt on the charge relating to S.L.F. He stated:

> I have found considerably less conflict on the more relevant aspects of [A.D.K.]'s evidence.

The appellant argues that this finding was in error because there were fourteen inconsistencies in A.D.K.'s evidence and only seven comparable ones in

S.L.F.'s. While it was not known what the trial judge considered "the more relevant aspects," the appellant suggested a reasonable standard would apply.

These inconsistencies included the following:

* Whether A.D.K.'s hair was loose or in a pony tail when the appellant seized her by the hair in the first alleged incident.

* Whether the appellant had drawn A.D.K.'s lips to his penis in the first incident or demanded oral sex in the later ones.

* Whether A.D.K.'s wrists had been held crossed above her head and whether the appellant's hands went under her shirt in the bathroom incident.

* Whether S.L.F. had awakened, or had spoken, or had been asked to move in the bed incidents.

* Whether the incidents occurred before or after Christmas, and when the complainants discussed the incidents between themselves.

* Where S.L.F's family members were located in the house.

* When A.D.K. had mentioned bleeding from vaginal tissue she said

was torn by the appellant's finger during the third incident.

These points were made to the trial judge by the appellant's counsel during oral submissions at trial. The trial judge was aware that the complainant was thirteen years old at the time of the alleged incidents, that she had been "scared", and that she was testifying more than two years after the events. No evidence was called by the appellant; he did not testify. A.D.K.'s evidence was uncontradicted.

The trial judge found:

> That [A.D.K.] was uncertain on some of the peripheral evidence was generally not to the detriment of her credibility. I found the core of her evidence regarding the facts relating to the three allegations of sexual assault to be credible. Where she recounted somewhat different facts on other occasions they were in the area of the event where the pressure of a strange legal environment and the traumatic nature of the event could explain such a result. In addition to finding [A.D.K.] on the whole a reliable witness, I have also noted that some of her testimony has been supported or corroborated by reliable evidence from S.L.F. Although they are inconsistent in some areas of testimony such as when they told each other of the incidents, I do accept [A.D.K.'s] and [S.L.F.'s] in other areas, particularly in relation to their evidence regarding the bathroom incident and the change of clothing incident. In these two incidents I find that their evidence is significantly consistent.

In my view the trial judge did not err in accepting explanations for discrepancies in [A.D.K's] evidence, in finding her uncertainties as to some of the peripheral evidence to be "generally not to the detriment of her credibility," and in finding "the core of her evidence regarding the facts relating to the three allegations of sexual assault to be credible."

The "core" of the matter required only that the judge be satisfied beyond a

reasonable doubt that on at least one of the three alleged occasions the appellant applied force to the complainant without her consent in a sexual context.

He stated:

> After considering the totality of the facts and circumstances, I am satisfied beyond a reasonable doubt that the assault was committed in circumstances of a sexual nature.

The careful analysis in the appellant's factum of perceived flaws in the evidence of the two girls is an invitation to this court to retry the case. That is not the function of this court. The guide for an appeal court reviewing a verdict on the basis of credibility is stated in **R.v. Francois** (1994), 91 C.C.C. (3d) 289 (S.C.C) citing **R. v. C.(R.)**, [1993] 2 S.C.R. 226:

> Credibility is, of course, a question of fact and it cannot be determined by fixed rules. Ultimately, it is a matter that must be left to the common sense of the trier of fact, in this case the trial judge: **White v. The King** (1947), 89 C.C.C. 148, [1947] S.C.R. 268, 3 C.R. 232. Unless the record reveals an error of law or in principle or a clear and manifest error in the appreciation of the evidence, a Court of Appeal should not interfere in that determination.

We have re-weighed and considered the evidence as required by **Yebes v. R.** (1987), 36 C.C.C. (3d) 417 (S.C.C.) at p. 430, and we are satisfied that the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. The appeal is dismissed.

Freeman, J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.