NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. R.B.*, 2018 NSCA 78

Date: 20181003
Docket: CAC 464683
Registry: Halifax

Between:

[R.C.B.]

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: pursuant to s. 486(1) of the Criminal Code of Canada, R.S.C. 1985, c. C-46

Editorial Notice: The electronic version of this judgment has been modified to remove identifying information.

Judges:	Fichaud, Farrar and Bourgeois, JJ.A.
Appeal Heard:	September 21, 2018, in Halifax, Nova Scotia
Held:	Motion to introduce fresh evidence denied; appeal dismissed per reasons for judgment of Farrar, J.A.; Fichaud and Bourgeois, JJ.A. concurring.
Counsel:	Jonathan T. Hughes, for the appellant Jennifer A. MacLellan, Q.C., for the respondent William Mahody, Q.C., for the Lawyers' Insurance Association of Nova Scotia (Brian Stephens)

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Reasons for judgment:

Overview

[1] M.M. was 11 years old when she was taken into foster care and placed in the home of her cousin, J.M. J.M.'s father, and M.M.'s uncle, [R.B.], was charged with sexually assaulting M.M. over a period of seven years from 2004 to 2011, when she was between the ages of 11 and 18.

[2] Mr. [B.] was tried before Provincial Court Judge Daniel MacRury. Evidence was heard on March 14, 2016, with final submissions taking place on April 12, 2016. Sentencing submissions occurred on May 11, 2017.

[3] M.M. was the only witness at trial. She testified to a number of incidents of sexual assault during the relevant period.

[4] In an oral decision dated August 15, 2016, Judge MacRury found Mr. [B.] guilty of sexual assault on M.M. contrary to s. 271(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

[5] Mr. [B.] appeals arguing that the trial judge's reasons were insufficient in their explanation of why he was convicted. He also argues the trial judge erred by failing to properly distinguish between credibility and reliability when assessing M.M.'s evidence. Finally, he moves to introduce fresh evidence on the appeal.

[6] For the reasons that follow I would deny the motion to introduce fresh evidence and dismiss the appeal.

Background

[7] M.M. went to live with her cousin, J.M., when she was 11 years old. J.M.'s home and Mr. [B.]'s home are located in the same small community in Nova Scotia. T.S. is M.M.'s cousin and Mr. [B.]'s granddaughter. She lived with Mr. [B.] and his wife. T.S. was the same age as M.M. and they were good friends. M.M. would often stay at the [B]. home overnight when visiting T.S. M.M.'s home and the [B.]'s residence were about 20 minutes walking distance from each other.

[8] M.M.'s evidence at trial with respect to the sexual advances was relatively brief and I will summarize it.

[R. B.]'s Camp

[9] S.K. (M.M.'s then boyfriend), Mr. [B.] and M.M. went camping at a lean-to in Enfield owned by Mr. [B.] M.M. testified that she and S.K. were sleeping in the lean-to and Mr. [B.] was outside. She woke up when she felt Mr. [B.] beside her attempting to get into her sleeping bag. She moved away from him but he kept moving closer. Mr. [B.] attempted numerous times to get into her sleeping bag but M.M. kicked him away. S.K. did not wake up. The incident happened when she was 17 or 18 years old.

Masturbation by Mr. [B.]

[10] M.M. was visiting T.S. at the [B.] home. She was asleep on the couch in the living room and awoke to find Mr. [B.] standing in front of her masturbating. She was 14 years old at the time of this incident.

Babysitting

[11] M.M. described an incident at J.M.'s home, where she believed Mr. [B.] was babysitting her. Mr. [B.] was the only adult in the home. Mr. [B.] came up behind M.M. in the vicinity of the washing machine and started to grind his erect penis on her backside. She pulled away from him and was able to escape.

[R. B.]'s Car

[12] M.M. spent a great deal of time at the [B.] home visiting T.S. She stayed over almost every weekend. Mr. [B.] would often drive M.M. home. When he was alone in the car with her, Mr. [B.] would feel her leg to the point she was uncomfortable. She had to ask him multiple times to stop. M.M. testified that there was a consistent refrain during these assaults: that he said he couldn't help himself. Sexual assaults happened multiple times on the drive from Mr. [B.]'s residence to M.M.'s home. M.M. said they occurred when she was between 13 and 17 years old.

M.M.'s Home – The Couch

[13] M.M. testified about an incident when she was 15 years old sitting on the couch watching television at her home. She said that Mr. [B.] came over to her and touched her leg and her vagina over her clothing. M.M. asked him to stop and he tried to force himself on her but she would not allow it.

[B.] Home – Living Room

[14] M.M. testified that there was a bed in the living room at the [B.] home where she was sleeping. She said that she woke up and found Mr. [B.] lying beside her, under the blanket, only wearing underwear. She stated that he "started molesting me" by putting his hands down her pants and on her vagina. His hand was under her pyjamas, but over her underwear. To get away from Mr. [B.], M.M. went to her cousin's room and slept there. She estimated that she was 13 years old at the time.

[15] M.M. also started to discuss another incident which occurred in the kitchen at the [B.] home but did not elaborate on the details of the incident.

Campfire

[16] M.M. recalled being at a campfire outside of the [B.] home with T.S. and Mr. [B.]. When T.S. went into the house, Mr. [B.] hugged M.M. from behind, grinding his penis on her. His penis was not erect. She believed that she was 15 years old when this incident occurred.

[17] This was M.M.'s evidence with respect to the sexual assaults.

Additional Evidence

[18] M.M. also testified that she believed she was 18 years old when the assaults finally ended. While attending a campfire outside of her sister's home, she noticed that Mr. [B.] was staring at her. She moved so that she was standing behind his chair where he would be unable to see her. Mr. [B.] tried to reach behind himself to try to touch her. She went over and sat on her sister's step, when she became overwhelmed by the years of abuse and started to cry. When her sister approached her, M.M. told her that "[R.] was … had been molesting me" . That was the last time M.M. said she was around Mr. [B.].

[19] After hearing the evidence and submissions of counsel, the trial judge convicted Mr. [B.] of sexual assault.

[20] After a number of adjournments, on May 11, 2017, the trial judge sentenced Mr. [B.] to 10 months in a provincial institution followed by two years probation as well as the usual ancillary orders.

[21] Mr. [B.] appeals his conviction.

Issues

[22] The issues raised in the appellant's factum may be summarized as follows:

1. Should Mr. [B.] be permitted to adduce fresh evidence on appeal;
2. Were the trial judge's reasons insufficient; and
3. Did the trial judge err in failing to properly distinguish between reliability and credibility when assessing M.M.'s evidence?

Issue #1 Should Mr. [B.] be permitted to adduce fresh evidence on appeal?

Test for Admission of Fresh Evidence

[23] In *R. v. Marriott*, 2014 NSCA 28, this Court discussed when fresh evidence may be admitted on appeal:

> [22] Fresh evidence may be received provided the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (S.C.C.) as modified by *R. c. Lévesque*, 2000 SCC 47 (S.C.C.) are satisfied. The evidence should generally not be admissible if, by due diligence, it could have been adduced at trial; however, this criteria will not be applied as strictly in criminal cases as in civil cases. The fresh evidence must be relevant and probative and, when taken with the other evidence adduced at trial, must be expected to have affected the result. …

[24] I will discuss *Palmer v. The* Queen, [1980] 1 S.C.R. 759, referred to in *Marriott*, when addressing the particulars of the evidence sought to be admitted.

Analysis

[25] To address the fresh evidence motion, further context is necessary. Mr. [B.] was represented by Brian Stephens at trial. Mr. [B.] did not testify at trial or call any evidence. He now seeks to introduce his own evidence, an affidavit from his daughter, J.M., and an affidavit of his granddaughter, T.S. Neither J.M. nor T.S. was a witness at trial. The following are the operative parts of the affidavits sought to be introduced:

> Affidavit of [R. B.]
>
> 4. In preparing for trial, I recall having a brief conversation with Mr. Stephens about calling defense witnesses. Specifically, I recall bringing up my daughter, [J.M.], with whom the complainant lived; my granddaughter, [T.S.]; and the complainant's boyfriend at the time, [S.K.].

5. I believe that Mr. Stephens may have been able to make contact with Mr. [K.], but do not specifically recall whether he was successful or not.

6. I did not, and I do not believe that Mr. Stephens ever contacted [J.M.] or [T.S.] about giving evidence at my trial.

7. I did not contact any of the witnesses to testify at the trial <u>as I recalled discussing the matter with Mr. Stephens at which point we determined that we would not call those witnesses</u>.

[Emphasis added]

<u>Affidavit of J.M.</u>

3. During the trial of this matter, the complainant made references to times when my father would babysit her, and she alleged that some of the incidents that took place occurred while being watched by him between the ages of twelve to fifteen.

4. I can state that at no point was Mr. [B.] ever asked to babysit the complainant.

5. I have children of a similar age, and if babysitting was required, I would have had one of my children perform that duty.

6. Specifically, I can state that the only time that the complainant and Mr. [B.] would have been in my home at the same time would have been at family gatherings when there would have been many people present.

7. At no point was I approached to provide this evidence at Mr. [B.]'s trial.

<u>Affidavit of T.S.</u>

3. At the trial of this matter, the complainant alleged an incident took place at Mr. [B.]'s home around the time she would have been approximately fourteen years old, for which I was allegedly present.

4. I can indicate that to the best of my knowledge, there was never an incident during which I was present in the room that Mr. [B.] did, or attempted to touch the complainant in any sexual manner. I was never awoken by any sort of disturbance as the complainant described.

5. The complainant also alleged that Mr. [B.] would touch her on the car rides home from Mr. [B.]'s home back to [J.M.]'s home where she lived, and that I was rarely present for those car rides.

6. I can indicate that I almost always went in the car with the complainant and Mr. [B.] when he drove her home. Only on very rare occasions was I not present.

7. At no point was I approached to give this evidence at Mr. [B.]'s trial.

[26] In addition to the evidence sought to be introduced by way of affidavit, Mr. [B.]'s affidavit and factum identify S.K. as a potential witness. S.K. did not file an affidavit so there is no fresh evidence from him to be considered. However, the appellant, in his factum, refers to "whether her boyfriend was awakened by the struggle", as being a decisive issue. This is referring to the incident which occurred in the lean-to in Enfield when M.M. said Mr. [B.] tried to get into her sleeping bag.

[27] At the appeal hearing, all three affiants were cross-examined.

[28] A Court of Appeal has discretion to introduce fresh evidence on appeal under s. 683 of the *Criminal Code*. The introduction of fresh evidence is governed by the so-called *Palmer* criteria. In *Palmer* the Supreme Court of Canada held:

> 22 Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. . .. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. R.*
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[29] The first *Palmer* criteria, due diligence, is not a condition precedent to admissibility of fresh evidence in criminal appeals (see e.g., *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.)). In *R. v. Lévesque*, 2000 SCC 47, the Court reiterated the failure to satisfy the due diligence criteria is not fatal "if the evidence is compelling and it is in the interests of justice to admit it" (¶15). However, the Court went on to say that, while not a prerequisite for admissibility, the due diligence criteria cannot be ignored:

> 19. … While due diligence is not a necessary prerequisite for the admission of fresh evidence on appeal, it is an important factor that must be taken into account in determining whether it is in the interests of justice to admit or exclude fresh evidence. As Doherty J.A. said in *M. (P.S.), supra*, at p. 411:
>
> > While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen, supra*, at p. 148.
>
> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.
>
> [Emphasis added]

[30] The evidence sought to be introduced here was readily available at the time of the trial.

[31] Mr. [B.] says in his affidavit that he brought up J.M. and T.S. to Mr. Stephens as potential witnesses. He does not say what he told Mr. Stephens, if anything, would have been their evidence if they were called as witnesses. In cross-examination he said he does not recall if he told Mr. Stephens about the nature of the evidence J.M. and T.S. could give.

[32] Mr. Stephens, in his reply affidavit, says J.M. attended one or two pre-trial meetings with Mr. [B.] but gave no indication that she had anything to say about the factual aspects of the alleged incidents. J.M., in her cross-examination, said she attended a “half-dozen” meetings with Mr. Stephens. She also attended the preliminary inquiry and the trial. She acknowledged she was aware of the nature and details of the allegations.

[33] J.M. provided a letter to Mr. Stephens during trial preparation. The letter focused on Mr. [B.]'s character and questioned why an abuse victim would return to the home of her abuser. J.M., in the letter, says she "never had the impression" that the complainant was an abuse victim. The letter did not address any potential defences to the alleged offences. Mr. Stephens did not view J.M. as a relevant witness. In his affidavit he says:

> 10. I did not view [J.M.] as a relevant witness since all the information she provided was either opinion or related to the character of Mr. [B.] and the complainant. It was also my understanding that Ms. [J.M.] had not been present for any of the alleged incidents.

[34] Based upon the information he had, Mr. Stephens' view is well-founded. J.M.'s view of how child sexual abuse victims should behave or appear was irrelevant.

[35] J.M. also attempts to blame the fact that she did not provide evidence at trial on counsel. She stated in her affidavit: "[a]t no point was I approached to provide this evidence at Mr. [B.]'s trial".

[36] Mr. [B.] and J.M. were well aware of the evidence that was going to be adduced at trial. If J.M. had relevant evidence along the lines she now claims to have, the meetings with counsel or the correspondence to him would have been the time to raise it.

[37] Further, Mr. [B.] does not argue that it was the fault of counsel for not approaching J.M. to testify. He does not make an allegation of ineffective counsel. To the contrary, he says he discussed the potential witnesses with Mr. Stephens and he agreed with Mr. Stephens not to call J.M. or T.S.

[38] With respect to T.S., Mr. Stephens in his affidavit says she was only identified to him as a potential motive for M.M. to have lied because she was jealous of T.S. This theory was advanced on cross-examination. However, Mr. Stephens considered the possibility of calling her as a witness. In his affidavit he says:

> 12. During our pre-trial discussions, Mr. [B.] and I did discuss Ms. [S.] as a potential motivation for the complainant to lie (i.e., jealousy). Mr. [B.] and I also discussed the complainant had indicated that Ms. [S.] was present during two alleged incidents. I did not view Ms. [S.] as a relevant witness because the incidents that Ms. [S.] was allegedly present for were very brief and one did not involve actual touching. It was therefore

> entirely possible that Ms. [S.], although present, would not have noticed anything untoward.

[39] Mr. Stephens did not consider T.S. to be a relevant witness and on that basis decided did not call her.

[40] Finally, I will address the decision not to call S.K. as a witness.

[41] S.K. did not file an affidavit so there is no fresh evidence from him to be considered. However, as I pointed out earlier, the appellant, in his factum, referred to "whether her boyfriend was awoken by a struggle" as being relevant to a decisive issue.

[42] It is unclear what the evidence of S.K. would be, however, Mr. Stephens, in his affidavit, says that S.K. was identified as a potential witness and that he had prepared a subpoena for him and spoke with him. After speaking with S.K., Mr. Stephens formed the view that this evidence could hurt the defence more than it could help. In his affidavit he says the following:

> 15. During our telephone discussion of March 10, 2016, [S.K.] indicated that he recalled the one-day camping trip that included a 10 km hike through the woods. [S.K.] also confirmed the sleeping arrangements: [S.K.] in the back of the lean-to, the complainant in the middle and Mr. [B.] outside. Regarding the complainant's allegation, [S.K.] stated that he "thinks he would have noticed" if the incident had occurred. Also during this telephone conversation, [S.K.] volunteered that the complainant had told Mr. [S.K.] about stuff in the past (i.e. Mr. [B.] having abused her). When asked, [S.K.] said that it was probably a week or so after the camping trip that the complainant told him, but she did not provide any detail.
>
> 16. I assessed [S.K.]'s evidence as relevant, but its value was outweighed by the potential prejudice of the complainant having told [S.K.] that she had been abused by Mr. [B.]. In that regard, [S.K.]'s recollection of being told a week or so after the camping trip was consistent with the complainant's earlier statement that she had told [S.K.] the day after the camping trip. It was my view that the potential prejudicial effect of his confirmation of the complainant having told S.K.] about previous abuse, especially so close in time to the alleged camping incident, could potentially undermine the defence of fabrication.
>
> 17. Prior to my telephone discussion with [S.K.], I prepared a subpoena and had it issued to secure his attendance. Following our telephone discussion, I reviewed with Mr. [B.] what [S.K.] had said and the risks associated with calling him to testify, and it was agreed that [S.K.] would not be called as a witness at trial.

[43] Although Mr. Stephen's assessed S.K.'s evidence as relevant, it was outweighed by the potential prejudice of M.M. having told him she had been abused by Mr. [B.]. In Mr. Stephens' view, this would undermine the defence of fabrication. As a result, he made an informed and strategic decision not to call S.K.

[44] All three potential witnesses were considered by the defence and the decision was made not to call them.

[45] *R. v. Maciel*, 2007 ONCA 196 discusses how an appellate court should consider the due diligence criteria for fresh evidence when a tactical decision is made not to call the evidence:

> [50] If the evidence could have been led at trial, but for tactical reasons it was not, some added degree of cogency is necessary before the admission of the evidence on appeal can be said to be in the interests of justice. Otherwise, the due diligence consideration would become irrelevant. An accused who did not testify at trial could secure a new trial by advancing an explanation on appeal that was reasonably capable of belief. It would not serve the interests of justice to routinely order new trials to give an accused an opportunity to reconsider his or her decision not to testify at the initial trial.
>
> [51] Exactly where on the continuum between evidence that is sufficiently probative to meet the preconditions to the admissibility of evidence on appeal and evidence that is so probative as to warrant an acquittal, evidence will become "compelling" must depend on the totality of the circumstances. Where the proffered evidence was not led at trial because of a calculated decision made by an accused, the integrity of the criminal justice system will suffer if the evidence is received on appeal and a new trial is ordered. That harm can only be justified if the proffered evidence gives strong reason to doubt the factual accuracy of the verdict.
>
> [Emphasis added]

[46] In circumstances such as here, where the defence makes a tactical decision not to call evidence, the evidence would only be introduced if it would give me strong reason to doubt the factual accuracy of the verdict. As I will now explain, the evidence proffered in the fresh evidence motion does not call into doubt the factual accuracy of the verdict.

J.M.'s Affidavit

[47] In her affidavit, J.M. addresses the opportunity her father would have had to molest M.M. She questioned M.M.'s recollection that Mr. [B.] had babysat her on occasions between the age of 12 and 15. J.M. states: "at no point was Mr. [B.] ever asked to babysit the complainant".

[48] She also says that the only time M.M. and Mr. [B.] would have been at her house at the same time would have been at family gatherings where there would have been many people present.

[49] On cross-examination, both Mr. [B.] and M.M. acknowledged there were times when he would be babysitting his grandchildren at J.M.'s house.

[50] M.M. only testified to one incident which occurred while Mr. [B.] was babysitting.

[51] While the babysitting was specifically for his granddaughter, as opposed to M.M., Mr. [B.] would have been the only adult babysitting in J.M.'s household and would have had the opportunity to commit the act as testified to by M.M.

[52] If J.M. was of the view there was no opportunity for her father to assault M.M. at her home, one has to question why J.M. did not raise the issue when she attended the meetings with her father and his trial counsel.

[53] This assertion is also contradicted by Mr. Stephens' affidavit. He swears in his affidavit that Mr. [B.] had told him that he had on occasion babysat at J.M.'s residence.

T.S.'s Affidavit

[54] In her affidavit, T.S. says that M.M. alleged an incident took place at Mr. [B.]'s home when M.M. was 14 years old and for which T.S. was present. She then goes on to say that she was never present for any incident where Mr. [B.] attempted to touch the complainant in any sexual manner. She also says she was never awakened by any sort of disturbance as the complainant described.

[55] On cross-examination, T.S. said she read M.M.'s evidence in a document she saw at the [B.] home. However, she could not identify what she was reading or when. She also could not identify the nature of the incident she was referring to in her affidavit.

[56] I have reviewed the record in some detail, I can find no reference where M.M., in giving her testimony, refers to an incident where T.S. was present or could have been potentially awakened by Mr. [B.]'s actions.

[57] The only reference to incidents where T.S. may have been present appears in the affidavit of Mr. Stephens which I have referred to above. However, that evidence does not appear in the evidence at trial.

[58] Further, M.M., in direct examination, was asked specifically about the incidents Mr. [B.]'s house:

> Q. Did it happen more at the house on [street name deleted] or at Mr. [B.]'s house on [street name deleted]?
>
> A. It happened more at his house on [street name deleted].
>
> Q. Do you know about how often it happened there?
>
> A. It would happen every time he had the chance when we was alone.
>
> Q. Did it ever happen in front of anyone else?
>
> A. No.

[Emphasis added]

[59] It is unclear what is being referred to by T.S. because M.M.'s evidence was that no one was ever present when Mr. [B.] touched her when at his residence.

[60] T.S.'s evidence on this issue does not bear upon a decisive or potentially decisive issue at trial nor, if believed, could it reasonably be expected to affect the result (*Palmer* criteria, #2 and #4). Simply put, it does not contradict M.M.'s trial evidence because she gave no such evidence.

[61] Mr. [B.] also attempts to introduce as fresh evidence T.S.'s recollection that she was "almost always" accompanied M.M. and Mr. [B.] when M.M. was driven home from the [B.] home. First, "almost always" is not always. Secondly, M.M. was cross-examined on the frequency of her being alone with Mr. [B.] while being driven home. Trial counsel was alive to the frequency with which T.S. would be with M.M. when she was being driven home by Mr. [B.]. In cross-examination he referred her to her testimony at the preliminary inquiry:

> Q. You remember testifying at a Preliminary . . . testifying here before I guess in court about this, right?
>
> A. Yes.

> Q. Okay. This would have been September of 2014. September 29th. I'm going to show this to you right here. So at the bottom of page 27:
>
> Question: How were you able to get up to his place initially?
>
> Well, he'd be at my place and I would just go home with my cousin or I wouldn't want to walk home so I'd get a drive.
>
> Page 28.
>
> Okay. And sometimes [T.] would go with you on the drive or …
>
> Yeah, sometimes not. Mostly she did.
>
> Mostly she did, okay. So it was not … not common for him to drive you by yourself home?
>
> No.
>
> So again, there you would say that you actually weren't in the car alone with Mr. [B.] very often compared with [T.]?
>
> A. On a scale from one to ten she was probably there five … about five percent of the time. And if she was there nothing would happen.
>
> Q. Mm-hmm.
>
> A. But if I went and got a drive with him by myself then that's when it would happen. And most times I would ask her to come with me because I wouldn't want it to happen.
>
> [Emphasis added]

[62] M.M., in giving her evidence, vacillated on how often she would be in the car alone with Mr. [B.]. However, she did testify that most occasions when she was being driven home by Mr. [B.] she would ask T.S. to go with her.

[63] T.S.'s evidence does nothing to call into question the factual accuracy of the verdict. M.M. was clear in her evidence that the touching in the car would not occur when T.S. was present.

[64] To justify the introduction of the evidence in this case, I would have to be satisfied that the proffered evidence would give me strong reason to doubt the accuracy of the verdict. It does not.

[65] The evidence contained in the affidavits falls far short of meeting this test. Even if the evidence was capable of belief, taken with the evidence of the trial, I am not satisfied that it would have affected the result.

[66] I would dismiss the motion to introduce fresh evidence.

Issue #2 Were the trial judge's reasons insufficient?

Standard of Review

[67] In *R. v. R.E.M.*, 2008 SCC 51, the Supreme Court of Canada set out the approach appellate courts are to follow when reviewing a trial judge's reasons for sufficiency. *R.E.M.*, like the matter before this Court, considered the adequacy of reasons in the context of a credibility argument. The Supreme Court stated:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at para. 28).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerge during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to paragraph 55 of *Sheppard* for a more comprehensive list of the key principles.

Analysis

[68] This was not a complicated trial. The only witness to give evidence was M.M., who testified to a series of events occurring over a seven year period. The defence approach was to attempt to discredit M.M. through cross-examination. Defence counsel tried to do this by pointing to a number of discrepancies in M.M.'s testimony. The submissions of defence counsel at the conclusion of trial were very simplistic. He argued:

> It is not a question of what may or may not have happened, it's a question of whether or not Ms. [M.]'s testimony was reliable. I would suggest that she was not reliable and that she was inconsistent in many aspects of what she says happened, that she was unable to explain those inconsistencies but at the end of

> the day it would be very difficult for the Court, I submit, to determine what … what exactly allegedly happened from Ms. [M.]'s perspective.

[69] The "live issue at this trial" was clearly the credibility and reliability of M.M. The trial judge was aware that the theory of the defence was that M.M.'s evidence was so unreliable that it would be dangerous to convict. He spent some time reviewing the evidence and pointing out the inconsistencies the defence had raised during its cross-examination. The trial judge identified the issue he had to decide in his decision:

> Most criminal trials involve the assessment of reliability and credibility of witnesses. This case is no exception. Indeed in the present case, the Crown is wholly dependent upon the testimony of the complainant. Therefore, it is essential that credibility and reliability of the complainant's evidence be considered.(Reasons, pp. 16-17)

[70] He then turned to the defence argument saying:

> In the present case, the Defence has challenged the trustworthiness of the complainant by raising a number of issues surrounding her reliability. … (Reasons, p. 17)

[71] The trial judge continued:

> The evidence of M.M. is determinative in this case. If I conclude that I believe her evidence regarding the allegations beyond a reasonable doubt, after considering all of the evidence, then Mr. [B.] must be found guilty. (Reasons, p. 20)

[72] He then set out and considered the inconsistencies raised by defence counsel (Reasons, pp. 20-21) and concluded:

> In conclusion, in reviewing M.M.'s evidence and applying experience and common sense and being aware, that as a trial judge I may accept all, some, or none of the evidence of any witness. I am satisfied that M.M.'s evidence is believable in all respects and that I am satisfied beyond a reasonable doubt that M.M.'s evidence is credible and trustworthy as to the core allegations in this case and that the Crown has proven all the essential elements of the charge beyond a reasonable doubt.(Reasons, p. 22)
>
> [Emphasis added]

[73] The only issue, as the trial judge correctly pointed out, was whether M.M.'s evidence was believable and reliable. If it was, Mr. [B.] would be found guilty. The trial judge believed M.M. and convicted the appellant.

[74] There is nothing lacking in the trial judge's reasoning. Mr. [B.] should not be left in any doubt as to why he was convicted (*R. v. Sheppard*, 2002 SCC 26, ¶55).

[75] I would dismiss this ground of appeal.

Issue #3 Did the trial judge err in failing to properly distinguish between reliability and credibility when assessing M.M.'s evidence?

Standard of Review

[76] In *R. v. W.(R.)*, [1992] 2 S.C.R. 122, the Court set out the approach that appellate courts should take when determining whether the trier of fact could reasonably have reached the conclusion that the accused was guilty beyond a reasonable doubt:

> 20 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: *White v. The King*, [1947] S.C.R. 268, at p. 272; *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, at pp. 465-66. 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.
>
> [Emphasis added]

Analysis

[77] The appellant says the trial judge properly instructed himself on the law as it pertains to the distinction between credibility and reliability – acknowledging that

he properly noted that credibility addresses a witness' veracity and honesty and that reliability addresses a witness' accuracy.

[78] However, the appellant says that the trial judge made a finding of reliability based on his finding that she was being honest. Since the reliability of a witness does not flow from credibility, the trial judge fell into error. The appellant submits the inconsistencies in M.M.'s testimony renders her unreliable.

[79] With respect, I disagree. It is readily apparent that the trial judge found M.M.'s evidence to be believable in all respects and found her to be trustworthy. This is a specific finding on credibility (that she was believable) and also reliability (that she was trustworthy).

[80] He found her evidence contained details that tended to establish internal consistency overall. He acknowledged that there were inconsistencies between her police statement, preliminary hearing evidence, and trial evidence but that the inconsistencies went to peripheral matters and not to the core allegations.

[81] I am satisfied that a judge or jury, properly instructed and acting reasonably could have convicted on this evidence. We must show great deference to findings of credibility and reliability made at trial. I see no error in the trial judge's recitation of the law or his approach to assessing M.M.'s evidence. I would dismiss this ground of appeal.

Conclusion

[82] I would dismiss the appeal.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.