NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Cavanaugh*, 2022 NSCA 11

Date: 20220127
Docket: CAC 506079
Registry: Halifax

Between:

Clifford Darryl Cavanaugh

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Farrar and Bourgeois JJ.A.
Appeal Heard:	January 27, 2022, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge J.A.; Farrar and Bourgeois JJ.A. concurring
Counsel:	David Iannetti, for the appellant Glenn Hubbard, for the respondent

Reasons for judgment (orally):

[1] Mr. Hubbard, there is no need to hear from you, sir.

[2] The panel is unanimously of the view this appeal is completely without merit. It is based on a misapprehension by counsel about the rule against multiple convictions based on the same wrong (the so-called *Kienapple* principle).

[3] A jury convicted the appellant, Clifford Darryl Cavanaugh, of one count sexual assault, contrary to s. 271(1)(a) of the *Criminal Code*. The police originally laid two charges, the 271 count and that he had touched the complainant, a person under the age of fourteen years with his penis for a sexual purpose, contrary to s. 151(a) of the *Criminal Code*.

[4] There was no preliminary inquiry. At trial, the Crown adduced no evidence the appellant had touched or had attempted to touch the complainant with his penis.

[5] The complainant testified that at various times the appellant had exposed himself in his car and masturbated in her presence. This conduct was not the subject of any criminal allegation, but tendered by the Crown to show the appellant's grooming behaviour.

[6] The crucial allegation centered on one night. The complainant slept over at the appellant's home. She had gone to bed on the sofa, but woke to see the appellant standing over her, masturbating. She did not see his face. The appellant ejaculated. With his fingers, he rubbed semen on the complainant's breast and proceeded to lick it off. The appellant also pulled the complainant's pants down and placed his mouth on her pubic bone and sucked. When she squirmed, he returned to putting ejaculate on her breast and licking it off.

[7] At the end of the Crown's case, appellant's counsel moved for a directed verdict on the s. 151(a) count because was no evidence the appellant had touched or even tried to touch the complainant with his penis. The trial judge granted the motion.

[8] The appellant did not testify, but his girlfriend did. She corroborated the complainant's evidence that she had been at their home for a sleepover in the

timeframe covered by the indictment. She also swore the appellant never owned the type or style of clothing the complainant described her assailant was wearing.

[9] Counsel and the trial judge had lengthy pre-charge discussions. The appellant's trial position was twofold. The Crown had failed to establish the appellant's identity as the perpetrator and had not met its burden due to inconsistencies in the complainant's evidence.

[10] The judge charged the jury. The appellant had no objections. The Crown pointed out a minor error by the trial judge's description of the complainant's mother as the appellant's girlfriend. The judge corrected the slip. Within three hours the jury returned their unanimous verdict.

[11] The appellant now suggests the trial judge erred in his jury charge. He argues that because the appellant had been acquitted of touching the complainant with his penis, the jury could not convict him of sexual assault based on having licked semen off the complainant. As an alternative submission, he says the trial judge should have granted a directed verdict on the sexual assault count.

[12] The rule against multiple convictions (see *R. v. Kienapple*, [1975] 1 S.C.R. 729) was irrelevant to the motion for directed verdict. It remains irrelevant. There were no multiple convictions for the same wrong. The second count of sexual interference alleged the appellant had touched the complainant with his penis. There was no evidence the appellant had touched the complainant with his penis. The judge was right to grant the motion for a directed verdict on that count.

[13] There was ample direct evidence from the complainant the appellant had intentionally touched her in circumstances of a sexual nature. Appellant's counsel did not seek a directed verdict on that count. One would not have been available if requested.

[14] The directed verdict on the second count was irrelevant to the viability of the first count. Appellant's counsel never requested the trial judge direct the jury the way he now says was mandatory. If requested, it would have been wrong to do so.

[15] At the hearing of this appeal, appellant's counsel acknowledges his complaint is more appropriately cast as an attempt to invoke the principle of issue estoppel. The attempt cannot succeed. The acquittal on the charge of having touched the complainant with his penis decided no issue in his favour relevant to

the allegation of sexual assault by touching the complainant in various ways in circumstances of a sexual nature.

[16] The appeal is dismissed.

Beveridge, J.A.

Concurred in:

Farrar, J.A.
Bourgeois, J.A.