NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. N.C.B.*, 2024 NSCA 22

Date: 20240228
Docket: CAC 522317
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

N.C.B.

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	January 23, 2024, in Halifax, Nova Scotia
Statutes Considered:	*Criminal Code*, R.S.C. 1985, c. C-46
Cases Considered:	*R. v. Downey*, 2018 NSCA 33; *R. v. H. (J.M.)*, 2011 SCC 45; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555; *R. v. P.(M.B.)* (1992), 9 O.R. (3d) 424; *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2
Subject:	Amendment of Indictment; Identification evidence
Summary:	The respondent was charged with sexual assault and sexual interference contrary to ss. 271 and 151(a) of the *Criminal Code,* R.S.C. 1985, c. C-46. The complainant was the young daughter of the respondent's former girlfriend. The events were alleged to have taken place "between the 31st day of December, A.D., 2002 and the 1st day of February, 2004, at or near Glace Bay, Province of Nova Scotia". At trial the complainant testified she was around four or five years old when the touching which formed the subject matter of the offences took place. She described being in the

bathtub with her younger sibling on two occasions when the respondent touched her in a sexual manner. The complainant identified a particular house on a specific street where the alleged offences took place, and described the distinctive nature of the ceiling fixture in the bathroom. She later testified she was five years older than her younger sibling, and he/she were about a year old when the touching incidents occurred.

Following the end of her cross-examination, the Crown moved to amend the Indictment to correspond with the complainant's evidence regarding her age at the time of the touching. The respondent objected to an amendment. He argued it would impair his intended defence - that he did not own the house where the offence allegedly occurred until after the timeframe set out in the Indictment. He said the Crown's sought amendment would cause him irreparable prejudice.

The trial judge declined the Crown's request to amend the Indictment, finding to do so would give rise to irreparable prejudice to the defence.

At the conclusion of trial, the Crown again sought to amend the Indictment to comply with the evidence adduced at trial. That request was also denied by the trial judge.

The trial judge entered an acquittal. He found the time of the alleged offences had become material elements of the offences due to the respondent's alibi defence, and the Crown had failed to prove they had occurred in the time alleged in the Indictment. Further, the trial judge was left with a reasonable doubt as to the identity of the perpetrator.

The Crown appealed to this Court.

Issues:

(1) Did the trial judge err in law by refusing to amend the Indictment as sought by the Crown and did this have a material impact on the acquittal?

(2) Did the trial judge's consideration of the complainant's evidence regarding identity demonstrate a legal error and did this have a material impact on the acquittal?

Result: The appeal is granted. The acquittal is set aside. The Indictment shall be amended as requested by the Crown, and a new trial is ordered.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 18 pages.

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Appellant

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Respondent

Restriction on Publication:
ss. 486.4 and 486.5 of the *Criminal Code*

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	January 23, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Erica Koresawa, for the appellant David J. Iannetti, for the respondent

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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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).

. . .

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

[1] The respondent, N.B., was charged with sexual assault and sexual interference contrary to ss. 271 and 151(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The complainant was the young daughter of the respondent's former girlfriend. The events were alleged to have taken place "between the 31st day of December, A.D., 2002 and the 1st day of February, 2004, at or near Glace Bay, Province of Nova Scotia".[1]

[2] The trial commenced on October 19, 2021. The complainant testified she was around four or five years old when the touching which formed the subject matter of the offences took place. She described being in the bathtub with her younger sibling on two occasions when the respondent touched her in a sexual manner. The complainant identified a particular house on a specific street[2] where the alleged offences took place, and described the distinctive nature of the ceiling fixture in the bathroom. She later testified she was five years older than her younger sibling, and he/she were about a year old when the touching incidents occurred.

[3] Following the end of her cross-examination, the Crown moved to amend the Indictment to correspond with the complainant's evidence regarding her age at the time of the touching. The respondent objected to an amendment. He argued it would impair his intended defence - that he did not own the house where the offence allegedly occurred until after the timeframe set out in the Indictment. He said the Crown's sought amendment would cause him irreparable prejudice.

[4] The trial judge, Justice Patrick J. Murray, declined the Crown's request to amend the Indictment, finding to do so would give rise to irreparable prejudice to the defence.

[5] At the conclusion of trial, the Crown again sought to amend the Indictment to comply with the evidence adduced at trial. That request was also denied by the trial judge.

[6] The trial judge entered an acquittal. He found the time of the alleged offences had become material elements of the offences due to the respondent's alibi defence, and the Crown had failed to prove they had occurred in the time

[1] Indictment dated August 17, 2020.
[2] To maintain anonymity, I will refer to the location of the alleged offences as "X Street".

alleged in the Indictment. Further, the trial judge was left with a reasonable doubt as to the identity of the perpetrator.

[7] The Crown appeals to this Court. It says the trial judge's reasons declining the requests for amendment disclose errors of law, and he further applied the wrong legal principles to the assessment of the complainant's evidence regarding the perpetrator of the offences.

[8] For the reasons to follow, I would allow the appeal. I am satisfied the trial judge's failure to amend the Indictment was based on legal error. I am further satisfied the trial judge's conclusion regarding the identification of the perpetrator was similarly flawed.

Background

[9] To put the analysis to follow in context, a review of how the trial unfolded will be helpful.

[10] The Crown's first witness was the investigating officer. He testified he was responsible for laying the information against the respondent. The officer explained the "between date", used in framing the charges, was based on the complainant's statement that she was five years old at the time of the alleged offences and when her mother was in a relationship with the respondent.

[11] The Crown's next witness was the complainant. She testified she was born in October, 1998 and was presently 23 years of age. The complainant said she was sexually assaulted by her younger sibling's father, the respondent, when she was between four and five years old. She explained her mother had lived with the respondent for a couple of years when she was around four years of age. She testified there was a five year age difference between herself and her younger sibling.

[12] The complainant described the house and was able to name the street where she had lived with the respondent, her mother, her younger sibling, a family member and her family member's girlfriend. She described the basement bathroom where the alleged sexual touching had taken place, including that it had a chandelier-type light fixture.

[13] The complainant could recall two occasions when she was touched by the respondent in the basement bathroom. She testified:

> So I was getting a bath with my younger [sibling], [he/she] was one year's old at the time, and after I would get out of the bath, [N.] would wrap me up in a towel and he'd ask me if I wanted to look up at the ceiling light. It was like a stained glass chandelier. And I would say yes and then he would pick me up by my waist above his head and lift me up to the light and when he did that, I'd feel him touching my vagina. And there was a time that I didn't look because I didn't understand what he was doing but there was also another time that it happened where I did look down and I seen that he was actually using his tongue to lick my vagina and then he would put me down and I don't remember anything else that happened after that.

[14] On cross-examination, the complainant acknowledged that in her statement to police, she had said she was five years of age when the sexual touching occurred and she was in grade primary. On cross-examination, defence counsel presented to the complainant a warranty deed purporting to show the respondent was not transferred title to the house in question until July, 2004. When counsel suggested the respondent had not owned the house where the alleged touching occurred until after the dates specified in the Indictment, the complainant indicated she "definitely could have got the dates wrong because it was so long ago".

[15] At the conclusion of the complainant's cross-examination, the Crown made a motion for an adjournment. It asserted the proposed introduction of the warranty deed for the purpose of establishing the respondent could not have committed the offence at the property in question, fell into the category of alibi, and as such, it ought to have been disclosed by the defence. As it had not been, an adjournment was sought to permit the Crown to consider the alibi being advanced.

[16] The trial judge recessed over night to consider the request. The following day, the trial judge found the defence's intention to rely on the timing of the warranty deed was "in the nature of an alibi", and an adjournment would be granted to permit the Crown time to investigate.

[17] At the conclusion of the trial judge's oral reasons, the Crown then brought a motion to amend the Indictment, to conform with the complainant's evidence. The Crown sought to amend the time specified to include up to the day before her sixth birthday, October *, 2004. The amendment was opposed by the respondent. The

matter was adjourned to permit the respondent to prepare a more thorough response.

[18] After receiving submissions, on March 9, 2022, the trial judge rendered an oral decision on the motion to amend. The trial judge declined to amend the Indictment, finding that the loss of the alibi defence would cause the respondent irreparable harm. The trial continued.

[19] The Crown advised it did not wish to re-examine the complainant. The next witness called was the complainant's mother.

[20] The mother testified the complainant was born on October *, 1998, and her younger child, was born on January *, 2003. She testified she had been in a relationship with the respondent, who was the father of her younger child. In 2004 the respondent had purchased a home on "X Street" in Glace Bay. They moved in during the spring of that year and lived there until her relationship with the respondent ended in 2005. The mother said her family member and her family member's girlfriend also lived in the house with them. She described the layout of the home, including the downstairs bathroom which had a chandelier-type light fixture.

[21] The mother testified the complainant would have been five years old when they first moved to the house on "X Street", had started primary that September, and would have turned six in October. She testified there were occasions when the respondent would have assisted with bathing the children, including on his own.

[22] The Crown next called the complainant's family member. They testified the respondent had been in a relationship with the complainant's mother, and was the father of the mother's younger child. They further stated that they and their former girlfriend had lived with the complaint's mother, the respondent and the children in 2004 in a house on "X Street". They believed they had moved into the house in the springtime.

[23] The family member described the layout of the house, including the downstairs bathroom. They said the bathroom had a chandelier-type light fixture. The family member testified the respondent was very good with the children, and would help out with the bedtime routine, including bathtime.

[24] The Crown's final witness, a real estate agent, testified as to the sale of the "X Street" property to the respondent.

[25] The respondent's first witness was the Registrar of Deeds and Land Titles, Eastern Region. She identified a certified copy of a warranty deed dated July *, 2004 naming the respondent as the grantee of property located on "X Street".

[26] The respondent's final witness was the original owner of the house at "X Street". He testified he had sold the property to the respondent in July, 2004. On cross-examination, the witness acknowledged he had told police he had sold the property in 2003, but had since discussed the details of the transaction with his lawyer.

[27] The parties made closing submissions. The sole argument advanced by the respondent was that the time of the alleged offences was material, and because he did not own the house described by the complainant until after the timeframe specified in the Indictment, he could not be found guilty.

[28] The Crown argued time was not material to the offence, and further requested the trial judge exercise his discretion to amend the Indictment to include the timeframe up to the complainant's sixth birthday.

[29] The trial judge provided oral reasons, later issued in writing in which he declined to amend the Indictment, and found the Crown had not proven the respondent's guilt beyond a reasonable doubt.

Issues

[30] In its Notice of Appeal filed on March 22, 2023, the Crown sets out the following grounds of appeal:

1. That the learned Trial Judge erred in law by failing to consider the whole of the evidence related to identity;

2. That the learned Trial Judge erred in law by piecemealing the evidence;

3. That the learned Trial Judge erred in law and/or created an injustice by refusing the Crown motions to amend the dates on the Indictment to conform with the evidence;

4. Such other grounds of appeal as may appear from a review of the record under appeal.

[31] After having considered the record and the written and oral submissions of counsel, I would re-state the issues to be resolved on appeal as:

1. Did the trial judge err in law by refusing to amend the Indictment as sought by the Crown and did this have a material impact on the acquittal?

2. Did the trial judge's consideration of the complainant's evidence regarding identity demonstrate a legal error and did this have a material impact on the acquittal?

Standard of Review

[32] The Crown has brought the appeal pursuant to s. 676(1)(a) of the *Criminal Code*, which states:

> **Right of Attorney General to appeal**
> **676 (1)** The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> **(a)** against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

[33] In *R. v. Downey*, 2018 NSCA 33, Saunders, J.A. described the relevant standard of review as follows:

> **Standard of Review**
>
> [46] This is a Crown appeal from acquittal. Therefore, the Crown is limited in its right to appeal to questions of law alone. . .
>
> [47] Of course, in order to succeed in any remedy sought, the Crown's task is not limited to identifying legal error. Rather, the Crown must demonstrate that the legal error(s) "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on acquittal" (*R. v. Graveline*, 2006 SCC 16).

[34] With respect to the first issue, s. 601(6) of the *Criminal Code* provides "[t]he question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law".

[35] Further, I am satisfied the concerns raised by the Crown in relation to the trial judge's assessment of the issue of identity give rise to questions of law, and are to be assessed on a standard of correctness (*R. v. H. (J.M.)*, 2011 SCC 45 at para. 24).

Analysis

> *ISSUE 1 – Did the trial judge err in law by refusing to amend the Indictment as sought by the Crown and did this have a material impact on the acquittal?*

[36] It is not an uncommon occurrence for a trial judge to be asked to amend an indictment to conform with evidence adduced at trial. The relevant provisions of the *Criminal Code* are:

> **Amending defective indictment or count**
>
> **601** **(2)** Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
>
> **(a)** a count in the indictment as preferred;[3]
>
> . . .
>
> **(3)** Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
>
> . . .
>
> **(b)** that the indictment or a count thereof
>
> . . .

[3] Here, the Indictment had been preferred.

(iii) is in any way defective in substance, and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or

. . .

Matters to be considered by the court

(4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider

(a) the matters disclosed by the evidence taken on the preliminary inquiry;

(b) the evidence taken on the trial, if any;

(c) the circumstances of the case;

(d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and

(e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

Variance not material

(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to

(a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or

. . .

Adjournment if accused prejudiced

(5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

[37] During the course of the complainant's evidence, it became apparent she could not have been between four and five years of age when the alleged incidents had taken place, given the presence of her younger sibling in the tub, and the difference in their ages. The Crown, at its earliest opportunity, sought to amend the Indictment to extend the alleged timeframe of the offences up to the day before the complainant's sixth birthday.

[38] Crown counsel suggested that in response to the amendment, the respondent should be provided an adjournment to recalibrate his defence, and further, ought to be given the opportunity to re-examine the complainant and the investigating officer. The Crown provided the trial judge with the relevant legal authorities supporting its request for an amendment, including the reasons of the Supreme Court of Canada in *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555. Given both the Crown and defence counsel relied on this decision in their submissions on the motion to amend, a review is useful.

[39] In *P. (M.B.)*, the accused was charged with sexual offences against his niece. The information sworn on the day of the accused's arrest alleged the offences occurred between January 1, 1980 and January 1, 1981. After the preliminary inquiry, the information was amended, on consent, to allege a timeframe of January 1, 1982 and January 1, 1983.

[40] At trial, the complainant testified the offences occurred in 1982. Her mother testified the accused had lived in their home during the summer of 1982 and babysat the complainant while she was away. The Crown closed its case. Prior to the matter being adjourned, defence counsel stated he would be calling three witnesses, including an alibi witness.

[41] Upon the trial resuming, the Crown immediately sought to re-open its case in order to recall the complainant's mother to provide new evidence relevant to the timing of the offences. Over the objections of the defence, the Crown was permitted to re-open its case. The complainant's mother testified she had been mistaken in her prior testimony regarding when the accused had babysat. She said it was not the summer of 1982, but rather the summer of 1983.

[42] The Crown then sought to amend the indictment to cover the year 1983. The accused objected, arguing to do so would severely erode his intended alibi – that he

had been hospitalized in the summer of 1982, and couldn't have committed the offences. The trial judge granted the amendment, and the accused was convicted.

[43] On appeal, the Ontario Court of Appeal found the trial judge had erred in permitting the Crown to re-open its case and then amend the timeframe as set out in the indictment.[4] In particular, Justice Finlayson, writing for the Court, found the amendment eroded the accused's alibi defence and gave rise to irreparable prejudice. In setting aside the conviction, he wrote at pp. 431-32:

> I do not wish to place this opinion on too narrow a basis. My objections are to the reopening of the Crown's case and to the amendment of the indictment. My reasons in both cases relate to prejudice. I do not see how the Crown can be permitted to recast its case when faced with an alibi, the accuracy of which it was not prepared to dispute. The defence went into a trial where the Crown had originally alleged offences in the year 1980. The year was changed to 1982. The [respondent's] defence was a denial bolstered by an alibi which the defence could establish independently of the [respondent's] evidence. Consequently, once the time frame was changed to include the year 1983, an adjournment could not have assisted the [respondent]. He had lost the ability to put forward an independent assertion of his innocence to the charge as contained in the indictment. In charges of sexual assault against very young children, the accused is often reduced to his own denial as a defence. The loss of an independent alibi is, therefore, a very serious loss indeed.

[44] The Crown appealed to the Supreme Court of Canada on two grounds. First, it alleged the Court of Appeal had erred in finding the trial judge had improperly permitted the Crown to re-open its case. Additionally, the Crown submitted the Court of Appeal's determination that the trial judge had erred in amending the indictment was flawed.

[45] A majority of the Supreme Court dismissed the appeal, upholding the Court of Appeal's determination regarding the re-opening of the case. However, it was not prepared to endorse Justice Finlayson's reasoning regarding the amendment, notably that the loss of an alibi gave rise to irreparable prejudice. Indeed, Chief Justice Lamer, writing for the majority, stated (at p. 566):

> This case is, fundamentally, about the reopening of the Crown's case and not about the amendment to the indictment. **I am not convinced that the respondent suffered any irreparable prejudice by the mere fact of the amendment to the dates specified in the indictment.** However, the respondent

[4] *R. v. P. (M.B.)* (1992), 9 O.R. (3d) 424.

> was prejudiced by the trial judge's decision to allow the Crown's case to be reopened after the respondent had begun to answer the case against him by revealing that he would be calling three witnesses. Therefore, I am satisfied that the trial judge committed a reversible error at the reopening stage, before the Crown moved to amend the indictment.
>
> (Emphasis added)

[46] Additional comments from the Chief Justice demonstrate the majority's distancing from Justice Finlayson's views regarding the import of an alibi defence in considering a motion to amend (at pp. 567-568):

> The reason it was **not the amendment** in itself but the reopening **which created the injustice is that, on the facts as found by the trial judge, the respondent knew what was alleged against him from the outset.** He had been made aware at the time of his arrest that the relevant period during which he was alleged to have sexually assaulted the complainant was when he was living at her parents' house. **I am inclined to think that, up until the point when the Crown closed its case, the dates in the indictment could have been amended so as to make them conform with the period during which the respondent was living with the complainant's family.** In this regard, I would simply note that courts, including this one, have accepted that, in cases involving offences and particularly sexual offences against young children, absolute precision with respect to the timing of an alleged offence will often be unrealistic and unnecessary: *B. (G.), supra*, at p. 53; also see *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 132-34, and *Re Regina and R.I.C. (1986), 32 C.C.C. (3d) 399* (Ont. C.A.), at p. 403.
>
> The fact that an accused may have an alibi for the period (or part of the period) described in an indictment does not necessarily or automatically "freeze" the dates specified in that indictment. **That is to say, there is no vested right to a given alibi**. **Alibi evidence must respond to the case as presented by the Crown, and not the other way around.** Section 601(4) of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly s. 529(4)), directs a trial judge to consider certain factors in deciding whether to allow an indictment to be amended, including whether an accused has been misled or prejudiced and whether an injustice might result.
>
> . . .
>
> **Nowhere does s. 601(4) say that inability to rely on a particular defence is co-extensive with irreparable "prejudice" or "injustice", and nor can this be inferred from the language of the provision.** Rather, such matters are properly left to the trial judge to consider in the particular circumstances of a case.
>
> (Emphasis added)

[47] The four dissenting judges parted ways with the majority in relation to the Crown's ability to reopen the case, but agreed the amendment of the indictment did not give rise to irreparable prejudice. The dissenting judgments stressed the importance of recognizing children may be unable to precisely identify the time of an alleged offence, and for judges to avoid permitting technicalities to hamper the administration of justice, particularly where the accused has not been prejudiced.

[48] Returning to the matter before us, in her submissions to the trial judge, Crown counsel argued the decision in *P. (M.B.)* supported the granting of the amendment. She asserted the respondent had no vested right in any particular defence, including his proposed alibi. She noted the request for an amendment was brought early in the proceedings, and the respondent had ample time to recalibrate his response to the Crown's case. Further, the dates were not material to the offences, and given the other particulars contained in the Indictment, the respondent was not misled about the allegations made against him. In short, the amendment sought would not give rise to irreparable prejudice to the respondent.

[49] Defence counsel put forward a different interpretation of *R. v. P. (M.B.)*. He impressed upon the trial judge the importance of the alibi defence it proposed to call, and that its loss by virtue of the amendment being sought by the Crown was a critical consideration. He relied on Justice Finlayson's reasons, quoting that "[t]he loss of an independent alibi is, therefore, a very serious loss indeed".

[50] Defence counsel concluded his discussion of the import of *P. (M.B.)* with the following assertion:

> *R. v. M.B.P. supra,* was appealed to the Supreme Court of Canada and the Crown Appeal was dismissed. The Supreme Court of Canada basically agreed to the reasoning of the Ontario Court of Appeal.

[51] As the case review above demonstrates, defence counsel's description of the Supreme Court's reasons is not entirely accurate, and indeed, may have contributed to the trial judge going astray. I turn to his reasons for declining the amendment.

[52] At the outset, the trial judge correctly identified "irreparable prejudice" as being the central consideration. He noted the respondent intended to advance an alibi-type defence anchored by the warranty deed, which demonstrated he could not have committed the offences during the timeframe alleged in the Indictment. The trial judge said:

> . . .[T]he defence's position is that if this amendment is granted, then that strategy, or the defence itself, to the offence alleged would be removed, in effect, and no longer available to [Mr. B]. And in doing so, the defence relies on the Ontario Court of Appeal in **R. v. P. (M.B.)**.

[53] After quoting from Justice Finlayson's reasons, the trial judge continues:

> It has been held that absolute precision in sexual offences against children will often be unrealistic and unnecessary. The fact that an accused may have an alibi for part of the period in the indictment does not necessarily or automatically freeze the dates in the indictment.
>
> The complainant has given evidence that she could be off with the dates, or words to that effect. The alibi evidence must respond to the case presented by the Crown. On the other hand, the Court must consider whether the accused will be prejudiced in his or her defence by the proposed amendment, or misled. **The availability of an alibi is a significant factor to consider in assessing prejudice when an amendment is sought to the date of an offence, where it would deprive, or remove, a denial or assertion of innocence**.
>
> (Emphasis added)

[54] The trial judge considered the Crown's argument:

> In this case, there are a number of factors that support the Crown's request. There is a basis in the evidence for it. The **Code** permits it. It is not uncommon in the course of the trial to request it. It is being made early in the proceeding.
>
> The Crown submits there is no irreparable prejudice to the accused. He has not been misled and should not be surprised if the evidence does not come out . . . does not come out exactly as alleged. Such motions are common and are commonly granted.
>
> The real question is whether the accused has been misled or prejudiced by any variance, error, or omission, and if so, can any misleading or prejudice be removed by an adjournment to a specified day . . . to a specified day or a sitting of the Court?
>
> I find here that the accused has been prejudiced and, to some degree, misled in his defence by the dates being proposed in the amendment and by the dates in the indictment.

[55] Having found the respondent would be prejudiced by the proposed amendment, the trial judge then determined if that prejudice could be alleviated. He decided:

> Finally, in regard to whether the prejudice can be removed, I have given that due consideration under 601(5) and find, in these circumstances, **that such a defence is either available or it is not, and I don't see where an adjournment would assist in alleviating any prejudice or misleading**.
>
> I acknowledge the Crown has stated the defence would be entitled to a further cross-examination and allow the defence, following an adjournment . . . and allow the defence, following an adjournment, to prepare it, based on the new amendment. With great respect, I don't think it's as simple as that, even though the amendment was sought out at an early stage. I, therefore, find that the prejudice to Mr. [B.] is irreparable.
>
> (Emphasis added)

[56] A finding of irreparable prejudice should not be interfered with lightly,[5] however, I am satisfied the trial judge's conclusion is marred by legal error.

[57] The trial judge's analysis appears to blend a statement of principles from both the Supreme Court and Court of Appeal reasons in *P. (M.B.)*. Notably, he quotes from Justice Finlayson's reasons. It appears the trial judge failed to recognize the Supreme Court did not adopt those reasons, and indeed, stated it would not have found the amendment to be problematic.

[58] The portions of the trial judge's reasons bolded earlier, demonstrate he was of the view that the existence of an alibi was a significant factor in the analysis of irreparable prejudice. Clearly, the Supreme Court directed a different approach. Contrary to the Court of Appeal, the majority noted there is no vested right in a particular alibi. The majority further said the loss of a particular defence did not equate to irreparable prejudice. Relying on the approach endorsed by Justice Finlayson, the trial judge incorrectly viewed the respondent's alibi as critical, and its loss a significant blow. This misplaced reliance caused the trial judge to focus on preserving the respondent's defence as his primary consideration.

[59] I am satisfied the trial judge also erred in his consideration of whether the respondent was misled by the Indictment. The trial judge found the respondent

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[5] *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2 at p. 29.

was misled, but did not explain why this was the case, or how it impacted on his ability to appreciate the allegations being made.

[60] It is clear from the record that prior to his arrest, the respondent was advised by police of the nature of the charges being laid against him. It is also evident the respondent was provided with the complainant's statement. He had sufficient knowledge of the nature of the charges against him that he was able to understand where the offences had allegedly been committed and embark upon investigating when he obtained title to the property. The trial judge did not consider this factual context. If he had, it would have been clear the respondent had not been misled in any material way.

[61] I am satisfied a proper application of the legal principles in the circumstances before the trial judge should have resulted in the sought amendment being granted. The trial judge's conclusion the respondent would be irreparably prejudiced by the sought amendment was flawed. I am further satisfied this error had a material impact on the eventual acquittal given the trial judge found the Crown had failed to prove beyond a reasonable doubt the offences occurred within the timeframe set out in the Indictment.

[62] It is not necessary to address the Crown's arguments regarding the second amendment request.

> *ISSUE 2 – Did the trial judge's consideration of the complainant's evidence regarding identity demonstrate a legal error and did this have a material impact on the acquittal?*

[63] In acquitting the respondent, the trial judge was not satisfied the Crown proved, beyond a reasonable doubt, N.B. was the perpetrator. He reasoned:

> [68] [The complainant] gave detailed evidence about being picked up by the waist as a child by the Accused while being bathed with her [younger sibling]. She recalled [the Accused] touching her vagina with his tongue. There were two occasions, she was unsure how far apart they had occurred, but both were at the home on […].
>
> [69] In giving her evidence she was certain about the events. She drew a diagram of the bathroom on the lower level where she testified this happened. Other witnesses provided diagrams of the upper and lower levels of the house including her […] and […]. The drawings were all basically the same with some

> minor differences. They depicted the little window above the toilet and the chandelier that the witnesses said was a distinctive feature in the house. [The complainant] described looking up at this light fixture during one of the incidents.
>
> [70] In direct, [the complainant] identified [the Accused], stating that at the time she saw his eyes. Apart from that she said he had scruff on his face and said that was the extent of what she remembered. [The complainant] would have still been very young when they left the residence sometime in 2005.
>
> [71] **Evidence of identification must be approached with extreme caution**, especially for events that are alleged almost two decades ago. I had earlier referred to the jurisprudence cautioning that a Court must be mindful of the fact that, as here, the Complainant is an adult testifying to events that they allege occurred when they were a child. **This is a feature the Court must consider, in addition to being alive to the human frailties that are known to exist when identification evidence is being assessed**.
>
> (Emphasis added)

[64] In reaching his conclusion, the trial judge noted:

> [102] She did acknowledge she had difficulties in remembering, which is understandable, **and her evidence on the identity of [Mr. B.] is concerning, and arguably amounts to a man with stubble on his face**. The surrounding circumstances, that it was at [Mr. B.'s] house, in the bathroom, as drawn by and testified to by the other Crown witnesses, bolster, her testimony.
>
> . . .
>
> [104] The Crown wishes to ensure that technicalities do not impair the truth seeking function in the Court applying the burden of proof as does the Court. I find on all of the evidence however, that the Crown has not met its burden of establishing the offences occurred as have been alleged.
>
> [105] Even if time had not been a crucial or material element to be proven, the burden is a significant one. **The consideration of all the evidence leaves me with a reasonable doubt, including the evidence as to the identity of the Accused.**
>
> (Emphasis added)

[65] On appeal the Crown submits the trial judge misdirected himself on the law of identification, and as a result, subjected the complainant's evidence to an unduly high standard. In its factum, the Crown explains:

> [69] The trial judge treated the complainant's description of the Respondent as though she had been trying to describe a stranger. He failed to appreciate that the

> complainant was familiar with the Respondent. The complainant knew the perpetrator was the Respondent and also described one feature about him: his scruff. Erroneously examining the complainant's description from the perspective of "eyewitness identification", the trial judge marginalized the value of her identification and description of the Respondent.

[66] I agree. In *R. v. Downey*, 2018 NSCA 33, this Court determined there is a distinction between "identification evidence" and "recognition evidence" and a trial judge's failure to recognize the difference can give rise to legal error. Justice Saunders explained:

> [51] Before turning to the specific errors which tainted the trial judge's decision-making in this case, I will start by explaining the proper legal principles that ought to be applied in an "identification" case such as this. Moreover, it is important to emphasize that the circumstances surrounding this tragic home invasion and attempted murder are more properly characterized as a "recognition" case, which tends to be treated as a separate, sub-set of the broader commentaries seen in the identification jurisprudence. This is an important distinction and one which appears to have been overlooked by the trial judge in his analysis.
>
> [52] Ordinarily, "identification evidence" is used to describe the kind of evidence offered by eyewitnesses who are strangers to an accused but who later testify that the person on trial is the individual they observed at the scene of the crime, and which eyewitness reporting is perhaps later confirmed after pointing out that same individual in a police photo line-up during the course of the investigation.
>
> [53] That kind of eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of the accused from *recognizing* the voice and/or appearance of the accused based on their familiarity and interaction one with the other.

[67] The complainant testified she knew who had touched her – the respondent. She was not attempting to identify someone she did not know, or even a person she may recognize from prior contact. The alleged perpetrator was someone she lived with. The trial judge's error, treating the complainant's testimony as being merely "identification evidence", had a clear impact on the outcome.

Disposition

[68] For the reasons above, I would allow the appeal, permit an amendment to the Indictment as originally sought by the Crown, and order a new trial.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.