C.A.C. No. 101178

NOVA SCOTIA COURT OF APPEAL
**Cite as: R. v. S.L.J., 1994 NSCA 157**

**Hallett, Chipman and Roscoe, JJ.A.**

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| **BETWEEN:** | | |
| S. L. J. | | David F. English for the Appellant |
| | Appellant | |
| **- and -** | | |
| HER MAJESTY THE QUEEN | | Stephanie A. Cleary for the Respondent |
| | Respondent | |
| | | Appeal Heard: September 15, 1994 |
| | | Judgment Delivered: September 22, 1994 |

Editorial Notice

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

**THE COURT:** The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Hallett and Chipman, JJ.A., concurring.

**ROSCOE, J.A.:**

The appellant was convicted by a jury of two counts of sexual interference

(s. 151) involving his two step daughters, aged 18 and 14 at the time of the trial held in June, 1994. A. testified that in December, 1988 the appellant came into her bedroom, laid down on her bed and placed his hand inside her nightgown on her breast. J. testified that in 1991 and 1992, the appellant touched her breasts inside and outside her clothing several times and on other occasions put his finger in her vagina. Neither child disclosed the incidents until specifically questioned by their mother after she and the appellant separated in March, 1992.

Dr. Joan Wenning, a pediatric gynaecologist, testified that J. had scar tissue on her hymen that was consistent with her having an injury caused by digital penetration.

The appellant testified that the incident with A. did happen but that he touched her breast accidentally. He admitted touching the breasts of J. outside her clothing, but said it was meant to tease her, and not for a sexual purpose. He denied touching J.'s vaginal area.

At the commencement of the trial, appellant's counsel sought an adjournment so that he could present expert evidence of Sharon Cruikshank, a child psychologist who had been appointed by the Family Court to do a custody assessment respecting a younger child in the family. The trial judge denied the adjournment request. The written report of Ms. Cruikshank which was completed a few weeks after the trial offers the opinion that the girls may have fabricated their accusations in order to help their mother win the custody dispute with their stepfather.

The issues raised on the appeal are as follows:

1. Whether the expert report of Sharon Cruikshank should be admitted as new evidence on the appeal?

2. Whether the trial judge erred in refusing to grant the adjournment?

3. Were there errors in the charge to the jury:

(a) was it impartial in its assessment of the evidence?

(b) was the explanation of reasonable doubt correct ?

4. Was the verdict unreasonable or unsupported by the evidence?

**FIRST ISSUE:**

The powers of a court of appeal in an application to receive fresh evidence are set forth in s. 683 of the **Criminal Code of Canada**, R.S.C. 1985, Chapter C-46 as follows:

> "683(1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> (a) order the production of any writing, exhibit, or other thing connected with the proceedings;
>
> (b) order any witness who could have been a compellable witness at the trial, whether or not he was called at the trial,
>
> (i) to attend and be examined before the court of appeal, or
>
> (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
>
> (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;"

The Supreme Court of Canada in **Palmer and Palmer v. The Queen** (1980), 50 C.C.C. (2d) 193 interpreted this section as follows at p. 204:

> "Parliament has given the Court of Appeal a broad discretion ... 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. Applications of this nature have been frequent and Courts of Appeal in various Provinces have pronounced upon them: see for example **R. v. Stewart** (1972), 8 C. C.C. (2d) 137 (B.C.C.A.); **R. v. Foster** (1978), 8 A.R. 1 (Alta. C.A.); **R. v. McDonald**, [1970] 3 C.C.C. 426, [1970] 2 O.R. 114, 9 C.R.N.S. 202 (Ont. C.A.); **R. v. Demeter** (1975), 25 C.C.C. (2d) 417, 10 O.R. (2d) 321 (Ont. C.A.) [affirmed 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, [1978] 1 S.C.R. 538]. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
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> (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. The Queen**, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (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."

In **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.) McIntyre J., in delivering the judgment of the Supreme Court of Canada stated at p. 10:

> "The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case,

> the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier of fact."

This Court reserved judgment on the motion and heard the appeal. Applying the principles in **Palmer**, the report should not be admitted as fresh evidence on the appeal. The evidence is not admissible in any event since it is not information outside the experience and knowledge of the jury, and goes to the ultimate question for the jury to decide, that is the credibility of the complainants. See **R. v. Beland and Phillips** (1988), 36 C.C.C.(3d) 481 (S.C.C.) and **R. v. Mohan** (1994), 166 N.R. 245 (S.C.C.). Nothing in the report sought to be admitted concerns the complainants' ability to tell the truth, or remember the past.

In our opinion the evidence of Ms. Cruikshank, even if admitted, could not reasonably be expected to have altered the result. Many of the inconsistencies in the girls' descriptions of the incidents which concerned Ms. Cruikshank were before the jury and the girls were each vigorously cross-examined on inconsistencies between their evidence at the preliminary, their various statements and their trial evidence. The defence ensured that the evidence of the custody dispute was also before the jury and the theory that the stories were fabricated was fully addressed. Another factor is that with respect to two of the acts complained of, the appellant admitted that they happened, so the issue for the jury was not whether the incidents happened, but whether the appellant had the requisite intent involving sexual gratification. Additionally, with respect to the vaginal touching, there was corroborative medical evidence. The evidence fails, in our view, to meet the **Palmer** test and we would therefore dismiss the application to admit the fresh evidence.

**SECOND ISSUE:**

The appellant submits that it was an error in law for the trial judge to refuse to grant the adjournment so that the evidence and written report of Ms. Cruikshank could be tendered. It is suggested that the trial judge was overly concerned with delays and gave little consideration to the rights of the accused to have a fair trial. A review of the discussion between counsel and the trial judge and the decision regarding the request for an adjournment reveals that it is improper to characterize the judge as being overly concerned with court delays. Her main concerns were whether the evidence was admissible, and if so why couldn't it be presented at that time. Counsel for the appellant was not able to demonstrate in response to the Court's questions just what admissible evidence the witness could provide.

In **R. v. Beals (E.W.)** (1993), 126 N.S.R. (2d) 130 (N.S.C.A.), Justice Hallett extensively reviewed the case law respecting applications for adjournments, beginning with **Barrett v. R.**, [1977] 2 S.C.R. 121 where Pigeon, J. said at p. 125:

> "It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law. This right of review is especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings."

Although **Beals** concerned the situation in which an accused was not granted an adjournment in order to retain new counsel, and the conclusions of Justice Hallett address the effect of the refusal to adjourn, his last proposition is generally applicable: (p. 142)

> "9. The scope of review by an Appeal Court of a refusal, notwithstanding it involves the review of the exercise of a discretionary power, is wide as the consequences of a refusal are to deprive an accused of his right to be represented by counsel. On appeal the appellant must show that in refusing the adjournment the trial judge deprived the appellant of his right to make full answer and defence and

> thus made an error in principle which constituted a miscarriage of justice. (**R. v. Barrette and R. v. Manhas**, supra)."

In **Darville v. R.** ( 1956), 116 C.C.C. 113 (S.C.C.) Cartwright J., at p. 117, set out what a court should consider when a party has requested an adjournment in order to procure an absent witness:

> "There was no disagreement before us as to what conditions must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:
>
> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off trial. "

The decision on whether to grant the adjournment was within the discretion of the trial judge and it appears, on review, that the discretion was exercised judicially. In any event, the evidence was not admissible. There was no error in law in the denial of the adjournment.

**THIRD ISSUE:**

The appellant submits that the trial judge in her charge to the jury gave more favourable treatment to the evidence of J. than she did to that of the accused, specifically regarding the prior inconsistent statements. In the charge, after giving a general direction about the use of prior inconsistent statements in assessing credibility of a witness, the trial judge gave three specific examples of prior inconsistent statements of J. She then said:

> "You must consider whether these examples are inconsistencies, and if you find that it is an inconsistency, whether in your opinion, it is minor or significant, and what

> weight, if any, you should attach to it. In respect of [J.], it is for you to determine if there were any inconsistencies either in respect to statements given at the earlier hearing or to the Guidance Counsellor, or with respect to her testimony on direct as opposed to cross-examination, and to consider the explanation, if any, provided by the witness, and the weight or effect, if any, you wish to attach to it."

The trial judge then referred to four examples of inconsistencies between the appellant's evidence and his police statement. The explanations offered by the appellant were also cited. There is no difference in the manner of dealing with the evidence of the appellant and that of the complainants. The review of the evidence is accurate, complete and evenhanded.

The appellant is also critical of a portion of the charge where the trial judge deals with assessing the credibility of children as follows: (p. 366)

> "For the purposes of giving evidence under oath, [A.], at age eighteen and [J.], at age fourteen, are considered adults. The dividing line in the **Evidence Act** is fourteen years and a person fourteen years or older is presumed to be capable of testifying under oath. On the other hand, they testified about events which are alleged to have occurred when [A.] was thirteen years of age, some five years ago, and [J.] was eleven and twelve years of age, or between eleven and twelve years of age some two years ago. When assessing the evidence of an adult to testifying to events as a child, you should make allowances for the fact that children do not necessarily see the world as adults do. They are more likely not to notice or remember with clarity details such as time and place. This is not to say that children's credibility is not important, but it means that we should not necessarily approach a child's perception of events using rigid stereotypes. You must use your common sense in assessing their credibility, keeping in mind their age at the time of the alleged incidents."

This charge complies with the direction of the Supreme Court of Canada in **R. v. W. (R.)**, [1992] 2 S.C.R. 122 where McLachlin, J. said at page 133:

> " The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity

to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in **R. v. B. (G.)**, [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that

> ... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

As Wilson J. emphasized in **B. (G.)**, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into

> account the strengths and weaknesses which characterize the evidence offered in the particular case.
>
> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying. "

The appellant also submits that the trial judge erred in the instructions regarding reasonable doubt and may have left the jury with the impression that they had to choose between the evidence of the complainant and that of the accused. It is submitted that the third alternative, that is even if they do not accept the evidence of the accused, that they may still be left with a reasonable doubt, was not left with the jury as was the case in **R. v. Saulnier** (1989), 89 N.S.R. (2d) 208 (N.S.C.A.). We disagree. In this case, near the beginning of the charge, the concept of reasonable doubt was introduced and properly explained (p. 360 - 364). Later, when dealing with the evidence of the accused, the trial judge said:

> "In this case, Mr. S. J., the accused, gave evidence. You have had the opportunity to observe and hear him. You should approach his evidence in the same way you approach the evidence of any other witness, bearing in mind what I told you about the credibility of witnesses. Remember, it is up to you, whether you accept all of his testimony, none of his testimony, or part of his testimony. It is not a question of whether or not you believe Mr. J.'s testimony. The question you must ask yourself, is whether his evidence raises a reasonable doubt in your minds about his guilt and, if it does, you must return a verdict of not

guilty."

After explaining the elements of the offences that the Crown had to prove beyond a reasonable doubt, and after a complete review of the evidence the trial judge said: (p. 409)

> ". . . It is for you, the jury, to determine whether on all the evidence, including the Crown's and the Defence's, you are satisfied beyond a reasonable doubt at any time during the period described in the Indictment and places described, Mr. J. touched [J.] for a sexual purpose and similarly for [A.].
>
> This is some of the evidence that I have noted but I must caution you again that it is your recollection of the evidence on which you must base your verdicts. Just because I did not deal with a particular piece of evidence does not mean that it is not important. The facts of this case must not be examined by you separately and in isolation. You must consider the evidence as a whole to determine whether the guilt of the accused is established by the Crown beyond a reasonable doubt. Each element of the offence must be proved beyond a reasonable doubt.
>
> I want to just speak briefly with the law relating to contradictory evidence. There is contradictory evidence in this case on the essential matters as to whether that which [J.] described as Mr. J.'s actions of touching her vagina and her breast in the bedroom and in the living room happened and as to whether that which [A.] described as Mr. J.'s actions of touching her breast happened as she described or was unintentional as indicated by Mr. J..
>
> It should be obvious to you that evidence favouring the Crown and that favouring the accused on these matters cannot stand together. Each version is at odds with the other. Since each version cannot be factually true, you must assess the credibility of the witnesses supporting each version. I direct you that you must consider these essential matters on the following basis only after having first assessed all of the evidence relating to these matters. First, if you accept the evidence favouring the accused, including his testimony on this matter, and find it to be factually true when weighed against the contradictory evidence, you must acquit the accused. Second, even if you do not find as fact that the evidence favouring the accused on these matters is true, but have a reasonable doubt as a result of it, you must also acquit the accused. Third, even if you do not have a reasonable doubt on these matters as a result of the evidence favouring the accused because you reject the

> evidence as untrue or insufficient you must still determine whether the Crown has convinced you of the guilt of the accused beyond a reasonable doubt on the basis the evidence which you do accept and find to be factually true. Keep in mind that you are not compelled to choose between the evidence favouring the Crown and the evidence favouring the accused on the essential matters, particularly, if versions appear to be credible in the sense that you are unable, after reasonable and thorough deliberations to determine which witnesses are telling the truth. Remember the Crown bears the burden of proving the accused's guilt beyond a reasonable doubt."

This direction is entirely in accordance with **R. v. W. (D.),** [1991] 1 S.C.R. 742. There is no error in this respect.

**FOURTH ISSUE:**

The appellant submits that the verdict is perverse and unsupported by the evidence. In a case, such as this, where the verdict is based on credibility of the witnesses the words of McLachlin, J. in **R. v. Francois**, unreported, July 14, 1994, S.C.C. No. 23677 must be considered:

> " In **Corbett**, Pigeon J., speaking for the majority, described the Court's function on review for unreasonableness as follows (at p. 282):
>
> > [T]he question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.
>
> This statement was affirmed in **R. v. Yebes**, [1987] 2 S.C.R. 168, which went on to say that in order to apply the test the court of appeal "must re-examine and to some extent reweigh and consider the effect of the evidence" (p. 186). This rule also applies to cases where the objection to the conviction is based on credibility -- where it is suggested that testimony which the jury must have believed to render its verdict is so incredible that a verdict founded upon it must be unreasonable. This was confirmed by this Court in **R. v. W. (R.)**, [1992] 2 S.C.R. 122. However, the Court recognized the special difficulties posed by such a contention. I stated (at pp. 131-32):

> ... 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 ... 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.

Review for credibility may involve consideration of the basis for conclusions which the witness has drawn. For example, a witness may say, "that is the man who hit me". If other evidence indicates that the witness was unable to see the person who hit him at the time of the assault, the witness's identification might be considered unreasonable and a verdict dependant solely upon it overturned under s.686(1)(a)(i). This sort of challenge for credibility is not much different in practice than the challenge on other grounds in **Corbett** and **Yebes**. More problematic is a challenge to credibility based on the witness's alleged lack of truthfulness and sincerity, the problem posed in this appeal. The reasoning here is that the witness may not have been telling the truth for a variety of reasons, whether because of inconsistencies in the witness's stories at different times, because certain facts may have been suggested to her, or because she may have had reason to concoct her accusations. In the end, the jury must decide whether, despite such factors, it believes the witness's story, in whole or in part. That determination turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The latter domain is the "advantage" possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable: **R. v. W. (R.)**, **supra.**

In considering the reasonableness of the jury's verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness's evidence in its entirety. Or

> the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable. A verdict of guilty based on such evidence may very well be both reasonable and lawful.
>
> A final factor which the court of appeal reviewing for unreasonableness must keep in mind, is that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share. This most certainly applies to sexual offences. As de Grandpré J. of this Court stated in **Warkentin v. The Queen**, [1977] 2 S.C.R. 355, at p. 381:
>
> > Rape is particularly a crime for which juries are the proper forum. It is the type of offence the examination of which turns on an infinite number of small details related to the credibility of the witnesses, the community in which the actors and the jurors live, the standards of conduct in that area, etc.
>
> See also **R. v. Darnell and Newstead** (1978), 40 C.C.C. (2d) 220 (Ont. C.A.), at pp. 221-22.
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> At the end of the day, the following words of Rothman J.A. in **R. v. Chevrier** (1992), 49 Q.A.C. 37, at p. 42, approved by this Court in **R. v. C. (R.)**, [1993] 2 S.C.R. 226, remain a useful guide for an appellate court reviewing a jury verdict on the basis of credibility:
>
> 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 (**R. v. White,** [1947] S.C.R. 268). 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 intervene in that determination."

Using these principles and those of **R. v. Yebes, supra**, we have re-examined and reweighed the evidence, found that the jury instruction was proper and conclude that the verdict is supported by the evidence and is reasonable.

Accordingly, we dismiss the appeal.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.