NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. S.H.P.***, 2003 NSCA 53

Date: 20030523
Docket: CAC 187227
Registry: Halifax

Between:

S.H.P-P.

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: s. 38(1) of the Young Offenders Act

Judges:	Saunders, Chipman, Hamilton, JJ.A.
Appeal Heard:	May 15, 2003, in Halifax, Nova Scotia
Written Judgment:	May 23, 2003
Held:	Appeal allowed and a new trial ordered as per reasons for judgment of Hamilton, J.A.; Chipman and Saunders, JJ.A. concurring; together with separate additional reasons for judgment of Saunders, J.A.; Chipman, J.A concurring.
Counsel:	Brian Stephens, for the appellant Peter Rosinski, for the respondent

Publishers of this case please take note that s. 38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> "38(1) No person shall publish by any means any report
>
> (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition, or appeal concerning a young person who committed or is alleged to have committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed."

Reasons for Judgment:

Hamilton, J.A.:

[1] This is an appeal from the decision of Judge Corrine E. Sparks, dated September 11, 2002, wherein she found the appellant guilty of sexual assault. The appeal is pursuant to s. 27 of the former **Young Offenders Act**, R.S. 1985, c. Y-1, which incorporates Part XXI of the **Criminal Code**, R.S. 1985, c. C-46. At the conclusion of argument it was indicated to counsel that we were unanimously of the view the appeal ought to be allowed and that reasons would follow. These are the reasons.

[2] The decision of the trial judge dismissing the application by the defence pursuant to s. 278.1 of the **Code** has not been appealed. This application was for disclosure of the record relating to the complainant and her daughter from the child protection agency that had dealt with an issue involving them. This decision was relevant to the appellant's first ground of appeal.

[3] While the trial was spread over five months due to a number of adjournments, only the complainant testified for the Crown, and the appellant and three other witnesses testified for the defence. A fourth witness, D.P., was called by the defence but her testimony was cut short when the Crown objected to her giving evidence. The questions asked of D.P. before the Crown objected to her evidence, focussed on her knowledge of the complainant from working in the complainant's home for five months on behalf of the child protection agency concerned with the complainant and her daughter.

[4] The discussion in court about the admissibility of D.P.'s evidence was unfocussed. The trial judge suggested her prior decision on the defence application under s. 278.1 precluded D.P. from testifying. The Crown indicated it was caught by surprise with this witness and generally objected to her evidence on the basis of confidentiality. Defence counsel argued that s. 278.1 did not apply to D.P.'s evidence because it was not part of the "record" covered by that section since D.P. had not kept written notes of her contact with the complainant. Defence counsel also indicated the purpose of calling D.P. as a witness was to give character evidence with respect to the truthfulness of the complainant. Defence counsel was not clear whether he only wanted to ask D.P. the two or three questions that a trial

judge may permit be put to a character witness about another witness's reputation for truthfulness in the community, namely:

> 1. Do you know the reputation of this witness as to truth and veracity in the community in which this witness resides?
>
> If the answer is "yes" the questioning proceeds.
>
> 2. Is that reputation good or bad?
>
> If the answer is "bad" a final question may be permitted.
>
> 3. From that reputation would you believe the witness under oath? (R. v. Clarke (1998), 129 C.C.C. (3d)1)

or if he was seeking to have D.P. testify on direct examination about specific examples of the untruthfulness of the complainant that D.P. may have known from first hand experience.

[5] The trial was adjourned to give both counsel an opportunity to submit written briefs on whether D.P. should be permitted to testify. The defence brief was not clear as to the type of character evidence it was seeking from D.P., evidence of reputation in the community or evidence of specific examples from her first hand experience with the complainant. The Crown's brief distinguished between the admissibility of these two types of character evidence. The Crown's position was that D.P. could testify to the complainant's reputation for truthfulness in the community, but could not testify about specific examples from first hand experience with the complainant.

[6] The trial judge ruled D.P. could not give any further evidence. She relied on s. 278.1 of the **Code** as preventing D.P. from testifying.

[7] The first ground of appeal was whether the trial judge erred in law in ruling that the testimony of D.P. was inadmissible.

[8] The appellant argued that the trial judge erred in law in relying on s. 278.1. He submitted s. 278.1 relates to document production, not the admissibility of evidence. He also argued the trial judge's ruling prevented the defence from

establishing a foundation upon which D.P. may have been permitted to give character evidence.

[9] The Crown agreed the trial judge erred in not permitting D.P. to testify as to the complainant's general reputation for truthfulness in the community, but argued the appeal should be dismissed nonetheless since this error did not deny the appellant a fair trial, and at most the error was "harmless" as defined by Justice Arbour in **Queen v. Khan**, [2001] 3 S.C.R. 823. It argued that this error of law is such that it was in a category "where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused" - **Khan**, supra, para. 29 and 30.

[10] The Crown argued that the trial judge's refusal to allow D.P. to testify was harmless since if the complainant had a reputation for untruthfulness in the community, then D.P. would not be the only person in the community who would be able to testify to this. It argued that once the defence became aware that D.P. could not testify as a result of the trial judge's ruling on June 26, 2002, it could have sought out and produced other witnesses to testify as to the complainant's reputation for truthfulness in the community, before the continuation of the trial on July 3, 2002 and then again before the continuation and conclusion of the trial on September 11, 2002.

[11] I am satisfied the trial judge erred in refusing to allow D.P. to further testify to see if a foundation could be laid that would allow her to give evidence of the complainant's general reputation for truthfulness in the community. She erroneously relied on s.278.1 of the **Code** as preventing D.P. from further testifying. This section relates to production of documents, not admissibility of evidence, and has no application to the admissibility of D.P.'s character evidence. **R v. Shearing** (2001), 165 C.C.C. (3d) 225 (S.C.C.) (¶'s 94-95)

[12] I am not satisfied this error was so harmless or so minor as to not have had any effect on the verdict in this case, or that it would not have caused prejudice to the appellant.

[13] The standard of proof in this case was proof beyond a reasonable doubt. If D.P. had been allowed to testify about the complainant's reputation for truthfulness in the community it is certainly possible her evidence may have raised a reasonable doubt in the trial judge's mind. By not allowing D.P. to

testify the appellant may have been prejudiced. It is no answer to say, as the Crown does, that the wrongful exclusion of this witness occasioned no harm because the defence could have found other witnesses to testify to the same effect.

[14] Accordingly, I would allow the appeal and order a new trial before a different judge on the basis of the first ground of appeal.

[15] Given my decision on the first ground of appeal, it is not necessary for me to consider the other grounds of appeal.

Hamilton, J.A.

Concurred in:

Chipman, J.A.

Saunders, J.A.

Concurring Reasons for Judgment:

Saunders, J.A.:

[16] I agree with Justice Hamilton's disposition and her basis for ordering a new trial. There is, however, another equally compelling reason to allow the appeal. In my respectful opinion the trial judge erred by raising s. 9 of the **Canada Evidence Act** during the cross-examination of a Crown witness by defence counsel. The intervention had the effect of curtailing the appellant's cross-examination of the complainant and violated his fair trial interests. Each of these two points undermines my confidence in the safety of this conviction and requires us to intervene.

[17] During his cross-examination of M.S., the complainant, counsel for the appellant had her acknowledge that she had met with the investigating RCMP officer the day after the alleged assault and provided a statement. As is customary during a cross-examination, defence counsel, from time to time, read out portions of the transcribed statement and invited comment from the complainant with respect to that which had been recorded by the RCMP officer. Judging by the types of questions asked, this part of the cross-examination was designed to raise doubts about the complainant's credibility and reliability by, for example, testing memory, showing that she was a frequent drug user, that there were inconsistencies between her testimony at trial and what she had told the investigating police officer, and that she may have been motivated to fabricate her complaint believing that the appellant had stolen a VCR from her house on an earlier occasion. The Youth Court judge interrupted defence counsel's cross-examination of the complainant and this exchange occurred, beginning at p. 106 of the Appeal Book:

> THE COURT Now I haven't said anything, Mr. Stephens, and Mr. Hagell hasn't said anything, but you're using a prior inconsistent statement.
>
> MR. STEPHENS Uh - huh.
>
> THE COURT Does KGB come into play here? Should there be a voir dire? I guess, as the trier of fact, I have to control the proceedings and I don't know if you've addressed your mind to these prior inconsistent statements and the proper procedure into KGB. You can't use prior inconsistent statements to simply impeach the credibility of a witness. There's a protocol involved in line with the KGB case. I'm not trying to tell you how to conduct your case, I notice the

Crown hasn't said anything, but it has to be in compliance with the rules, and I didn't say anything at first, but I see you keep going back to the statement, I want - - I guess I have to understand - -

MR. STEPHENS I understand, Your Honour.

THE COURT - - what you're trying to do. And I have to try to make sure that KGB is being followed. And in order for KGB to be followed doesn't there have to be a voir dire and necessity - - I just want to understand where you're going.

MR. STEPHENS I appreciate that. What I have is basically a transcript of a statement that was done by Constable Knockwood. The transcript itself - -

THE COURT Is it a sworn statement?

MR. STEPHENS - - is not signed or sworn.

THE COURT All right.

MR. STEPHENS It was a statement taken again by Constable Knockwood.

THE COURT Well, is it really a statement if it's not sworn, I don't know, but - -

MR. STEPHENS All right, well let me - -

THE COURT I don't necessarily want to see it but I'd be interested in the Crown's comments - -

MR. STEPHENS I appreciate that.

THE COURT - - I just want to make sure that the evidence is flowing the way it should be.

MR. STEPHENS I can point out some comments at the end of page 19, and if my friend has any comments. This is page 19, Ms. Sylliboy. I appreciate your statement, and I apologize for that. Page 19, Constable Knockwood.

Yeah, okay, is this statement true and the best to your knowledge and as you recall it, so help you god? Yes, so help me God.

And then, What would you like to see happen?

So, do you remember saying that?

A. It's written down.

Q. And there's also, I guess, again Constable Knockwood.

Okay, are you willing or to repeat the same evidence, I guess, the same information you told me today in court?

Yourself. Yes, yeah.

And then Constable Knockwood. Okay, I'm going to conclude this statement now at 5:16

A. At the time to me it was clear as day. Since I've been in treatment there's a lot of things that I have put aside. I started to remember things when I was five years old. But now today, when this happened to me, it was clear as day. When I was hurt, I blocked it. I didn't want to feel that kind of resentment, that fear. I didn't want to be laying on that bed with his penis inside me. I said no, and I put that aside. I pressed charges. And I try to go on every day, not as a victim, but as a human being and to survive this. And I don't understand how a child could do this to me. I am a woman and people look and me and say, Oh, she's a big woman, she can handle herself. When you're a victim and a man grabs you, or a child, and forces himself on you, you are so terrified that you can't do nothing. I couldn't do nothing that night - -

Q. Okay, let's just stop right there - -

A. - - but you keep going back to the statement - -

Q. Let's just stop right there and get back to what - -

A. No, you keep going back to the statement saying I said this, I told you I might have said it yes, I said it, but I blocked it.

THE COURT Mr. Hagell?

MR. STEPHENS If Mr. Hagell has any comments about the statement.

MR. HAGELL Your Honour, as far as the statement, assuming, I mean there is a procedure in Milgaard, this is not a sworn statement, there's a Milgaard - -

> THE COURT It's not sworn, okay.
>
> MR. HAGELL No, so it's a Milgaard under the Canada Evidence Act, to be quite - - I mean I don't really see really any inconsistency. There's - - the only so-called inconsistency that my friend has brought out is, you know, there is this reference to some other people being at her house for some period of time, there is about her not mentioning medications, but I was going to bring that up on re-direct, in fact she does mention medication later on in the statement.
>
> THE COURT Okay, well that's fine, as long as we understand where we're going.
>
> . . .

[18] With respect, and within the context of this case, the trial judge was mistaken in her reference to s. 9 of the **Canada Evidence Act**. Taking into account the entire record, I do not consider her intervention to have been intended as a question, so much as a direction to be followed. While interruptions by trial judges of cross-examination rarely warrant appellate intervention, in my opinion her error led to a denial of a fair trial for S.H.P-P., thus properly characterized as a miscarriage of justice **R. v. Khan**, [2001] 2 S.C.R. 823.

[19] The case of **R. v. B (K.G.)** (1993), 79 C.C.C. (3d) 257 deals with the procedure to be followed when a party producing a witness seeks to contradict that witness by reference to an earlier recorded statement that is inconsistent with the witnesses' present testimony, and was mainly concerned with the use of the prior statement as evidence of its truth. Such a procedure was not relevant to the appellant's counsel's attempt to cross-examine M.S., the complainant and Crown's only witness.

[20] A review of the record suggests that the submissions of counsel and exchanges with the court were often unfocussed. It is unfortunate that counsel were not more helpful to the trial judge in identifying and exploring the issues and evidentiary principles that arose here.

[21] It was a further error for the trial judge to focus on whether the statement was sworn or not, when the document to which defence counsel referred was simply a transcript of an oral statement voluntarily provided by the complainant to

the RCMP. Hers was a statement reduced to writing as contemplated by s. 10 of the **Canada Evidence Act**.

[22] While the respondent acknowledges that the trial judge was mistaken, the Crown does not concede that her actions had a "significant impact on the right of the Appellant to full answer and defence." I disagree.

[23] In my view, the effect of this interference in the cross-examination of the complainant and the misapplication of the laws of evidence impacted significantly on the appellant's right to make full answer and defence. The interruption occurred at a crucial stage in the cross-examination, when the complainant was being cross-examined on inconsistencies and other important features relevant to her reliability as a witness. Attacking the complainant's credibility as a way to raise a reasonable doubt concerning S.H.P-P.'s guilt was central to his defence.

[24] Before concluding these concurring reasons, I also wish to comment upon the Youth Court Judge's treatment of matters relating to credibility.

[25] The trial judge recognized that an assessment of credibility would be a necessary step in deciding the guilt of the appellant. She appreciated that the analysis was much more than a "contest" between the testimony of the complainant and that of the appellant and that more was required than simply comparing their conflicting versions of the incident. She said:

> I am aware that in a case such as this credibility is a key issue, but it is more than credibility with which the Court must be concerned: the Court must be convinced, beyond a reasonable doubt, that all the elements of the offence before the Court have been proved by the Crown.

The trial judge then highlighted what to her seemed to be the most important features of the evidence given by witnesses called for the Crown and the defence.

[26] She rejected the evidence given by the appellant, S.H.P-P., as well as the evidence given by his friends, H.M. and M.T., as to what they were doing together. S.H.P-P. denied sexually assaulting the complainant and said that at the time of the alleged incident he was bicycling in the neighbourhood with those two friends.

H.M. and M.T. were vague in their recollection and in the opinion of the trial judge, offered nothing to assist the appellant in his defence. Of H.M. she said:

> The evidence of H.M. was supposed to help the accused. This witness was an extremely poor witness. He didn't seem to understand the nature of an oath . . . In fact, this witness wasn't even sure of his own date of birth. He was extremely inarticulate, unhelpful and of no assistance to the Court. He was a poor witness and, in my view, he did not add any clarity in terms of the events which occurred on the night in question.

[27] She was similarly critical of M.T.'s evidence. She pointed to certain inconsistencies in his testimony and said:

> . . . I have had the benefit of observing his demeanour on the witness stand and I can only say his demeanour, in my opinion, is very negative . . .
>
> His evidence is unconvincing . . . Plus, I have (sic) the advantage of observing this witness on the stand and I can only say that his mimicking of the women that he was "bumming money" from on the night in question (by his own admission) and I believe he referred to them as "ho's", which used by him in street vernacular means "whores", this was very, very negative and very detrimental. He has no credibility in this Court and I do not believe his evidence. I believe it, rather, to be a form of fabrication to exonerate his friend. His evidence was confusing and unreliable.

[28] What is somewhat troubling is the trial judge's persistent reference to the "demeanour" of witnesses as an indicator of their credibility. While demeanour is a legitimate marker in the assessment of the veracity and reliability of someone taking the stand, it is not the only measure and must, I respectfully suggest, always be approached with caution.

[29] One is not judging character. The obligation is to ascertain the truthfulness and reliability of a person's testimony. Appearances alone may be very deceptive. A most reprehensible witness may well be telling the truth. A polished, well-mannered individual may prove to be a consummate liar.

[30] Reasons of intelligence, upbringing, education, race, culture, social status and a host of other factors may adversely affect a witness's demeanour and yet may have little bearing on that person's truthfulness. Consequently, quite apart from that witness's appearance or mood, his or her testimony must be carefully

considered for its consistency or inconsistency with all of the other evidence presented at trial before any decision can be made concerning its acceptance, in whole or in part, or the weight to be attached to it. The trial judge's reference to M.T. "mimicking . . . women" and referring to them in derogatory language as "ho's" may well lead the trier of fact to conclude that the witness is rude, ill-mannered and disrespectful of women. However, such behaviour ought not to detract from the critical question, namely whether the trial judge found the individual to be a credible and reliable witness and then whether that person's testimony or any other evidence left her with any reasonable doubt about the guilt of the accused.

Saunders, J.A.

Concurred in:

Chipman, J.A.