NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. P.M.***, 2007 NSCA 61

Date: 20070517
Docket: CAC 273599
Registry: Halifax

Between:

P.M.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as am.

Judge(s): Bateman, Saunders & Oland, JJ.A.

Appeal Heard: May 10, 2007, in Halifax, Nova Scotia

Held: Appeal dismissed, as per reasons for judgment of Saunders, J.A.; Bateman & Oland, JJ.A. concurring

Counsel: Brian Smith, Q.C., for the appellant
Daniel A. MacRury, Q.C., for the respondent

Publication Ban: Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as am.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] The appellant and Ms. V.P. - mother of the complainant J.P. - were married and lived together for approximately six years. They did not have any children from that marriage but V.P. had two daughters from a previous relationship, J.P. and a second younger daughter.

[2] The appellant was charged on a two count Information with committing a sexual assault upon his step-daughter J.P., and sexually touching her, contrary to s. 271 and s. 153 of the **Criminal Code**, respectively. These crimes were said to have occurred between April, 2002 and December, 2003 when the complainant was between 14 and $15^{1/2}$ years of age.

[3] Introduced into evidence was a diary J.P. kept in which she recorded significant events in her life. Those diary entries covered the time frame stipulated in the Information.

[4] Concerned about her daughter's belligerent behaviour, their deteriorating relationship, and her plummeting grades at school, V.P. "went snooping to find out what was going on." She came across her daughter's diary and was shocked to read a particular entry which included the words (referring to the appellant):

> . . . I hate P.(full name appears in original but deleted here). He gets mad all the time and he tries to touch me.

[5] V.P. confronted her daughter. She later kicked her husband out of the home and called the police. Charges were eventually laid. In prosecuting the case the Crown alleged five separate incidents had occurred. From the record the following brief synopsis appears:

First Incident

Livingroom	While sitting on a couch watching a movie, the appellant tried to touch her chest over her clothing.

Second Incident

Pool Table	The complainant was sitting on a pool table talking with the appellant . . . he leaned over and started breathing in her ear and tried to put his hands up her top.
Third Incident	
Tickling Incident	The appellant was downstairs in the basement. He came upstairs and was tickling C. (another child). He leaned over like he was tickling J.P., only he tried to put his hands on her chest again and she pushed him off.
Fourth Incident	
Mother's Bedroom	In her mother's bed, while her mother was sleeping there, J.P. felt the appellant's hand on her vagina.
Fifth Incident	
Mother's Bedroom	In her mother's bed, and while her mother was sleeping there, J.P. felt the appellant's penis "on her butt."

[6] The appellant was tried in the Provincial Court before Judge D. William MacDonald. It was a short trial. J. P. and her mother testified for the Crown, and the appellant took the stand in his own defence. After hearing final submissions Judge MacDonald took a short recess. He then returned to court and delivered an oral decision convicting the appellant of the first count, that being sexual assault contrary to s. 271(1) of the **Criminal Code** for <u>some</u> of the alleged incidents. Although it is not entirely clear, it would appear from the transcript that no conviction was entered on the second count (touching for a sexual purpose) with Crown counsel and the judge citing **R. v. Kineapple**, [1975] 1 S.C.R. 729.

[7] The appellant does not advance his appeal on the basis of unreasonable verdict. Rather, he raises two grounds of appeal alleging error on the part of the trial judge:

(i) in his application of the doctrine of reasonable doubt to the facts in evidence, and

(ii) in mis-instructing himself with respect to the evidence at trial and how the evidence should be applied to the doctrine of reasonable doubt.

[8] I will address these two complaints as one. After reviewing the entire trial record as well as the submissions of counsel, I would dismiss the appeal for the brief reasons that follow.

[9] In a commendably thorough and accurate rendition of the evidence, Judge MacDonald carefully considered each of the important issues that had to be resolved. He recognized that credibility was a key feature of the case, but that deciding guilt was neither a contest between the complainant's accusations and the appellant's denials, nor a matter of resolving which version he preferred. The trial judge was alive to the strong submissions made by the defence that the complainant had a motive to lie, or that her diary entries and what had not been recorded was hardly consistent with her testimony that she had been sexually assaulted by the appellant.

[10] The trial judge carefully scrutinized the appellant's own evidence, identifying certain remarks that he was not prepared to accept.

[11] Judge MacDonald reviewed each of the alleged incidents, and explained why he was not convinced beyond a reasonable doubt that certain of those particular events had been proved to the required criminal standard.

[12] Finally, in convicting the appellant for those incidents which he found had occurred (the fourth and fifth incidents described at [5] supra), Judge MacDonald correctly applied the proper legal principles in his analysis of the evidence and the elements of the offence.

[13] I would agree with Mr. Smith's assertion at the hearing before us that there are certain aspects of the complainant's testimony which, when taken in isolation, seem curious or even puzzling. An example would be the fact that after certain of these incidents were said to have occurred J.P. expressed in her diary the hope that the appellant would "adopt" her, while in another entry describing him as "a pervert." Yet in cross-examination at trial, J.P. was challenged by defence counsel with this and similar evidence which at the very least called for an explanation.

These pointed questions and the responses she gave were squarely before the trial judge. He was in the advantageous position of hearing the testimony and assessing the demeanour of the people who testified. In my respectful opinion the many rhetorical questions which Judge MacDonald asked himself confirm that he was - conceptually - checking off those points he found bothersome. It is not my role to second guess his conclusions, or substitute whatever view I may take, for his own.

[14] While it is true that the trial judge did not structure the dispositive portions of his oral decision using the three step process of **R. v. W.(D.)**, [1991] 1 S.C.R. 742, a careful reading of his reasons as a whole satisfies me that he understood and met those requirements. That is to say he did not accept the appellant's denials; the appellant's own testimony did not raise a reasonable doubt; nor on the whole of the case was he left with any reasonable doubt. See the judgment of Charron, J., writing for the majority in **R. v. Beaudry**, [2007] S.C.J. No. 5, at ¶ 13.

[15] At the end of the day, I am satisfied that criminal guilt was established after all of the evidence was properly assessed with the requisite careful eye and intellectual rigour.

[16] Accordingly there is no reason for this court to intervene. I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.