S.C.C. No. 02699

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION
R. v. S.N.G., 1992 NSCA 9

Hallett, Chipman and Roscoe, JJ.A.

BETWEEN:	)	
	)	
S. N. G.	)	Stanley W. MacDonald
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Gordon S. Gale, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	November 12, 1992
	)	
	)	
	)	Judgment Delivered:
	)	November 12, 1992

Editorial Notice

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

THE COURT: The appeal is allowed, the conviction is set aside and a new trial is ordered as per oral reasons for judgment of Chipman, J.A.; Hallett and Roscoe, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

The appellant was charged that on July 1, 1991 he did, for a sexual purpose, counsel a female under the age of 14 years to touch his body with a part of hers, contrary to s. 152 of the **Criminal Code**. He was convicted on this charge following a trial in the County Court Judges' Criminal Court. He appeals to this Court contending that the trial judge erred in law by simply choosing between the evidence tendered by the Crown and that of the defence, thereby reducing the burden of proof.

At the trial the complainant, age nine, testified that the appellant, her uncle, persuaded her to put her hand on his private parts. Her mother and a next door neighbour testified that following her complaint, the complainant was emotionally upset. The mother had seen the appellant and the complainant together earlier that afternoon in a bedroom at her home, at which time the appellant was lying on a bed, the complainant rubbing his back. The appellant denied the allegations of the complainant and denied that he lay on the bed or that the complainant rubbed his back.

In a brief oral decision, the trial judge stated at the outset that the matter "revolves around the issue of credibility". The trial judge observed that the complainant was a captivating nine year old and that the two versions - hers and that of the appellant respectively - were irreconcilable and could not both be accepted. The trial judge also observed that the evidence of the complainant's mother regarding the back rubbing was irreconcilable with that of the appellant and that to reject it would lead to the conclusion that she was lying to bolster her daughter's allegation. The decision concludes:

> "I find the evidence of [the complainant] compelling and I accept that at [the appellant's] urging she touched him for a sexual purpose."

A review of the record and of this decision persuades us that the trial judge clearly regarded the case as a matter of choice between the evidence of the complainant and her mother on the one hand and that of the appellant on the other. No reference was made in the decision to the obvious fact that the burden was on the Crown to prove the charge beyond a reasonable doubt. While we are satisfied that the trial judge must have been well aware of this requirement, the failure to refer to the third alternative in the credibility contest - namely that without believing the appellant,

the court might be left with a reasonable doubt - is in these circumstances fatal to the conviction. There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt. See R. v. Cooke (1988), 83 N.S.R. (2d) 274 (N.S.C.A.); R. v. Nadeau (1984), 2 S.C.R. 570 (S.C.C.); R. v. K. (F.) (1990), 73 O.R. (2d) 480 (Ont. C.A.); R. v. N. (J.G.) (1992), 73 C.C.C. (3d) 381 (Man. C.A.); R. v. K. (V.) (1991), 68 C.C.C. (3d) 18 (B.C.C.A.).

We allow the appeal, set aside the conviction and order a new trial.

J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.