C.A.C. No. 02805

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. B.L.M., 1993 NSCA 127

Hallett, Chipman and Roscoe, JJ.A.

BETWEEN:

B. L. M.	)	Michael S. Taylor
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Dana W. Giovannetti
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	May 13, 1993
	)	
	)	
	)	Judgment Delivered:
	)	May 17, 1993
	)	

Editorial Notice

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

THE COURT: Appeal from conviction and sentence dismissed per reasons for judgment of Hallett, J.A.; Chipman and Roscoe, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from the conviction on October 13, 1992, of the appellant of having sexual intercourse between 1968 and 1972 with his 13-year old daughter contrary to **s. 150(2)** of the **Criminal Code**. The Information was sworn on the 14th of May, 1991. When the matter was first investigated in the early 1970s, the Crown decided it was in the best interest of the family not to prosecute. The appellant received psychiatric treatment and was separated from his daughter. He continues to receive medical treatment and has rehabilitated himself. On November 28, 1990, his daughter made a fresh complaint to the R.C.M.P. respecting these events of years ago. The R.C.M.P. re-investigated. On January 18, 1991, the appellant gave the R.C.M.P. a written statement acknowledging having had sexual intercourse with his daughter on two occasions between 1968 and 1972.

Following conviction, Judge Kennedy sentenced the appellant to incarceration in a provincial institution for a period of two years less a day. The appellant appeals the sentence as being excessive.

The appellant asserts that the learned trial judge misdirected himself as to the purpose of the *voir dire* dealing with the admissibility of the confession. A reading of Judge Kennedy's decision, as a whole, satisfies us that Judge Kennedy applied the correct tests in determining that the confession should be admitted.

The appellant further asserts that the learned trial judge erred in determining that the investigating officer was not required to give a secondary caution. The evidence discloses that the appellant had admitted at the time of the initial investigation that he had sexual intercourse with his daughter. The learned trial judge in his decision observed that the appellant believed the investigating officer had knowledge of the previous confession and the appellant was thus

motivated to make another statement. Counsel argues that the appellant should have been advised by the police, that notwithstanding having incriminated himself by giving a statement at the time of the initial investigation, he need not have made another statement.

In **Boudreau v. The King** (1949), 94 C.C.C. 1 (S.C.C.) Justice Kerwin stated at p. 3:

> " ...The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement."

Further, Justice Kerwin stated at p. 24 as follows:

> " I do not subscribe to the view pressed by counsel for the appellant that the warning necessarily should have included such words as would have informed the appellant that, notwithstanding that he had already made one statement, no matter what it contained he need not now make another or any statement. Had such words been included they, of course, would have been a factor. It is not, however, desirable that separate and distinct requirements should be specified designed to cover specific situations; rather the issue to be determined should remain in all cases, was the confession freely and voluntarily made."

The evidence supports the learned trial judge's conclusion that the confession was freely and voluntarily given. The appellant had been given the standard caution and his **Charter** rights. There is no evidence of any inproprieties by the police at the time he made his original confession some 20 years ago. In our opinion the learned trial judge did not err in concluding that a secondary caution was not necessary.

The appellant in the fifth and sixth grounds of appeal raises the following issues:

> " 5. THAT the learned trial Judge erred in law in not ordering that the charge be stayed and finding that the defendant had not been prejudiced, after hearing evidence from the Crown witnesses that the original R.C.M.P. documents, together with the documents in the hands of the Attorney General's Department had all been destroyed after the initial

investigaiton into this matter in 1972;

6. THAT the learned trial Judge erred in law in not staying the charges against the accused when evidence was presented to the effect that the Attorney General's office made the determination of 1972 that charges would not be laid in this matter."

We accept as an accurate statement of the law the following passage from the respondent's factum:

" A stay should be granted where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency or where the proceedings are oppressive or vexatious (**R. v. Keyowski**, [1988] 1 S.C.R. 657). Justice L'Heureux-Dubé has recently stated that, 'where the affront to fair play and decency is disproportionate to societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings' (**R. v. Conway**, [1989] 1 S.C.R. 1659). A stay is tantamount to an acquittal. It should be ordered only in the clearest of cases. The burden, on a balance of probabilities, is on the accused."

In ruling on the motion for a stay the learned trial judge stated:

" . . . The explanation given by Sergeant Brogan as to why the matter did not proceed in the early '70's was clear. A reasonable explanation was subject to the ability to cross-examine Sergeant Brogan (or Sheriff Brogan) on that issue. Explanation given was that notwithstanding the fact that they had the evidence at that time, they decided not to proceed. It was his recommendation at least that they not proceed because of what they considered to be the consequences to the family and to the child at that time. Time has passed, the child is now an adult and she in fact is the complainant in relation to this matter. She has chosen to proceed and would refer to it as an adult decision.

. . .

. . . the explanation for why the matters were not proceeded with in the early '70's was before this court, the defendant was able to

> testify as to what may have transpired back then to the best of his memory and clearly, he has some memory of the situation. I do not find this to be an appropriate situation for the staying of a proceeding."

In essence, the learned trial judge concluded that neither the passage of time nor the destruction of the 1972 Crown file prejudiced the appellant's fair trial interest and that the explanation as to why there was not a prosecution some 20 years ago satisfied him that there was a reason not to proceed then that did not relate to any deficiency in the Crown's case at the time. The passage of time alone in charging the appellant is not in itself a reason to stay proceedings. (**R. v. L. (W.K.)** (1991), 6 C.R. (4th) 1 (S.C.C.)) There is no evidence that there was a deal made with the accused not to prosecute at the time of the initial investigation.

There is no evidence that the appellant compromised his position at that time. We would not interfere with the trial judge's decision refusing to stay proceedings; there is no evidence of an abuse of process in proceeding with the charges against the appellant.

SENTENCE APPEAL

We have reviewed the remarks of the learned trial judge in imposing sentence. While we agree with the appellant that retribution is not a proper consideration in passing sentence, in our opinion, the sentence is fit considering the offence and the circumstances of the offender.

The appeal from conviction and sentence imposed is dismissed.

J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.