

**IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R. v. D.A.B., 2002 NSPC 35)**

HER MAJESTY THE QUEEN

vs.

D. A. B.

DECISION

Editorial Notice

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

Judge: The Honourable Judge C.H.F. Williams, JPC

Decision: Delivered orally November 1st, 2002

**Counsel: Mr Paul Carver, Crown Attorney
Mr. Brad Sarson, Defence Attorney**

Introduction

The complainant, V. L. P., told her grandmother that the accused, D. A. B., twice touched her inappropriately. She asserted that on one occurrence she was asleep and awoke when the accused pulled off her shorts and kissed her once on her vagina. On the other occasion, while bathing her, with the bathroom door closed, she asserted that the accused dropped the soap in the tub and began to rub her vagina. After an investigation, the police charged the accused with committing a sexual

assault on the complainant.

Summary of the Evidence and Relevant Finding of Facts

The evidence for the Crown showed that the complainant, at trial age ten years, at the time of the allegations was seven years old. Her father and mother were separated but, on agreement, she and her younger brother, at the material times, stayed at her mother's apartment, at two different locations every second weekends. The alleged incidents each occurred separately at one and the other location. The accused, whom she called "uncle D.," is her mother's cousin and, at the material times, also resided at the apartments.

On the few occasions that the children visited their mother she was ordinarily present as she did not work outside the home. However, she would leave for short periods to do shopping and she would ask the accused to watch out for the children. There was, however, one evening when she was away from the apartment and requested the accused to babysit the children as he got on very well with them. Concerning the children's personal care, the mother related, that the complainant, since age five years, would bathe herself without any assistance. Generally, either the mother or the grandmother would run the bath and the complainant would, without any assistance, fully bathe herself. However, as her hair would become tangled, she would call someone, usually her mother, when she was at her mother's place, to shampoo her hair. I accept these facts and find accordingly.

It would appear, but it was not clear when, that both her grandmother and mother spoke with the complainant about inappropriate touching. The grandmother had a particular interest in this topic as she was allegedly the victim of abuse that had a significant impact upon her life.

The complainant related that the time when the accused put his lips on her vagina her mother was at work or out on a date with her boyfriend. It was daytime and she and the accused were lying on the bed in her mother's room under the bed covers. Her brother was outside the room playing with his toys. She was wearing only shorts which the accused removed rendering her naked. It was dark under the covers. Before and after the event the accused said nothing to her. Two hours after this occurrence her mother returned home, but being afraid, she said nothing to her mother.

With respect to the touching in the bath tub, the complainant testified that the accused was responsible for bathing her at the time although she could bathe herself and he had never bathed her before this allegation. Her mother was at home but busy. They locked the bathroom door. While the accused was bathing her, he, without saying anything to her, was rubbing her vagina with a bar of soap that slipped out of his hand. When the soap slipped out of his hand, he continued to rub her vagina with his hand for a short time. She told him to stop and left the bathroom after he did. This incident occurred in the afternoon but she habitually had a bath before going to bed at 2030 hours.

The accused testified and denied that he ever kissed the complainant's vagina. He does not recall babysitting the complainant and only had, at the material times, limited contact with her. He had a good relationship with the children and does not recall ever bathing the complainant. Admitting that he might have run the water for the bath he affirmed that bathing the complainant was her mother's responsibility. Whenever the complainant had a bath, she would keep the bathroom door

open so that he mother could hear her.

Analysis

First, I should say that I recognize and agree that sexual abuse of children is a repugnant crime and that all efforts ought to be made to apprehend, convict and punish perpetrators. On the other hand, I also recognize that it would be a profound and significant injustice should an innocent person be convicted of so heinous an offence. Galligan J.A. alluded to a similar danger in **R. v. F.E.J.** (1990), 53 C.C.C. (3d) 64 (Ont. C.A.), at pp. 67-68:

While there is no scale upon which conflicting evils can be weighed, it should be remembered that, revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For that reason, I think the courts must be vigilant to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent.

Second, bearing the presumption of innocence in mind and the onerous burden on the Crown to prove guilt beyond a reasonable doubt, here, I am mindful of the words of Finlayson J.A. in **R. v. W.S.**, (1994) 9 C.R. (4th) 143, 90 C.C.C. (3d) 242 (Ont. C.A.), at p. 250 (C.C.C.) (Leave to appeal to S.C.C., refused 93 C.C.C. (3d) vi).

We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record.

Also instructive here are the words of Rowles J.A., in **R. v. R.W.B.** [1993] B.C.J. No. 758 (B.C.C.A.), at para. 28:

It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether the witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered. Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all the other evidence presented.

Here, I think that we should also remind ourselves that evidence of a complaint of sexual assault is never evidence of the facts complained of as the complaint cannot support the complainant's testimony. From this proposition I think that the best that the prosecution can expect is that I accept the complainant's prior statement only as part of her narrative and nothing more. **R. v. Ay** (1994) 93 C.C.C. (3d) 456 (B.C.C.A.), **R. v. O.B.** [1995] N.S.J. No. 499 (C.A.).

On the evidence before me, and on my observation of the witnesses as they testified and my assessment of their testimonies, I concluded that the complainant had testimonial competence but I was concerned about her capacity to recollect and to relate coherently and consistently her recollection. Further, although she appeared willing to relate the essence of what was alleged, in my view, she appeared somewhat scripted and lacked background details such as bodily sensations as one might expect from someone, even of her tender years, who experienced the ordeal would know about. I was also concerned about the independence of her revelation, on contentious points, without suggestive questions. Despite her age and immaturity, and, although I do not expect her to perform in the same manner as an adult, the complainant's testimony however is not subjected to a lower level of scrutiny than that of an adult, *R. v. Stewart*, (1994) 90 C.C.C. (3d) 242 (C.A.), *R. v. R.W.*, (1992) 74 C.C.C. (3d) 134 (S.C.C.). See also: *R. v. A.W.E.*, (1993) 83 C.C.C. (3d) 462 (S.C.C.).

In my view, there was evidentiary basis upon which I could reasonably infer that the complainant's evidence, considering the total evidence, may be unreliable. There were conflicts in her testimony and the testimony of other witnesses and her narration of events did not remain consistent. Further, in my view, her cross-examination revealed obvious errors that were never corrected to rehabilitate her credit. I noted that at the location where the kissing of her vagina allegedly happened, her mother testified that she, the mother, at the material times, did not work and was at home always except to do grocery and run quick errands. The complainant also testified that her mother was "home all times when he, [the accused] bothered me." Further, at the location where the bath incident allegedly occurred her own testimony and that of her mother, grandmother and the accused was that the complainant could bathe herself. The routine was that someone would run the water, the complainant would bathe herself, and she would call someone, usually her mother to shampoo her hair. This routine would habitually take place in the evenings before bedtime. Having a bath during the daytime was an atypical event that was not impressed on the memory of anyone but the complainant. The accused denied ever bathing the complainant and this aspect of his testimony found some support in the mother's testimony.

In assessing the complainant's testimony, I considered my observations of her as she testified and my impressions of her testimony. I also considered her age and immaturity, the relative spontaneity of her responses to questions asked, at trial, and on her videotaped interview. In addition, I considered the passage of time between her disclosure and the described events and the circumstances surrounding the disclosure. Further, I considered the details of the incidents as she described them, both in direct and on cross-examination, concerning time, places and circumstances. In the end, I concluded that there were elements of her testimony that diminished its reliability considering the total evidence. I should however note that, in my view, the minor inconsistencies in the complainant's testimony did not diminish unduly her credibility. However, it was the series of inconsistencies, on critical issues, that became quite significant and caused me to have reasonable doubt about the reliability of her testimony. When I considered the entire evidence in assessing and weighing her reliability, although I do not require corroboration of her testimony, as a matter of common sense, I looked for supporting evidence on the central issues and found that such evidence was either lacking or unpersuasive. *R. v. Marquard* [1993] 4 S.C.R. 223 at paras 19 and 20, *R. v.*

F.C., (1996) 104 C.C.C. (3d) 461 (Ont. C.A.), *R. v. M. (W.H.)*, [1992] 1 S.C.R. 984.

Conclusion

When I considered all the evidence and considering the cited authorities doubts arise in my mind on the essential elements of the offence and the reliability of the complainant's testimony. Further, I am left in doubt by the testimony of the accused. His testimony when weighed with the total evidence was in harmony with other testimonies and was consistent with the probabilities that surrounded the existing framework of circumstances as disclosed by the total evidence.

I am therefore of the opinion that reasonable doubts exist. I could not find a solid foundation for a verdict of guilt beyond a reasonable doubt. In the result, I am not satisfied beyond a reasonable doubt that the Crown has proved all the essential elements of the offence charged. In short, the evidence was not sufficiently reliable to support the foundation for me to conclude beyond a reasonable doubt that the accused is guilty as charged. I find him not guilty as charged and I will enter an acquittal on the record.