

**IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R v. M. M., 2002 NSPC 37)**

HER MAJESTY THE QUEEN

vs

M. M.

DECISION

Editorial Notice

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

Decision: Delivered orally July 5th, 2002

**Counsel: Mr. D. MacRury, Crown Attorney
Mr. R. Burrill, Defence Attorney**

Introduction

M. M., the accused, is a sixty-two-year-old refugee from *. He lived with his younger wife, F. and their children, A. and A., in an apartment complex in the Halifax Regional Municipality. Also living in the complex was L. W., an unemployed single mother and her children T. and S.. S., age nine and A., age eight, for the two years that the families resided in the complex, became very close friends. They visited each other's apartments regularly and frequently. F. and L. also became very close confidential friends. The families were as one. The only exception to this close friendship was M. who had poor English language skills. Although she had no worries concerning S. visiting A.'s apartment, L. concluded, without any basis other than his age and marriage to a younger F., that M. "was creepy and looked like a child molester." She expressed explicitly these sentiments to her

twelve-year-old son, T..

It was the afternoon of May 19, 2001. F. went to L.'s apartment for her usual visit while S. went to A.'s apartment to play. M. was at home watching television. Sometime later in the afternoon, A. went to L.'s apartment and commented that S. had been on M.'s lap and that had made her jealous. Soon after S. arrived and reported to her mother that M. had taken her into his bedroom, placed her on his lap and kissed her left breast. Following ambiguous discussions with M. and F., L. notified the police of the reported incident. The police subsequently charged M. with sexually assaulting S. and sexual interference with a person under the age of fourteen.

Issue

1. Did the accused, in the circumstances presented, touch S. for a sexual purpose?

Findings of facts

Here, after hearing the witnesses and assessing their testimonies and in the light of the total evidence I find that the essential and relevant facts are:

1. The M. and W. families were close neighbours and friends with no obvious difficulties with the young women mutually visiting each other apartments to play.
2. Both S. and A. were articulate and impressive witnesses.
3. S. and A. were playing "make up" in A.'s room while M. was watching television in the living room
4. The young women were arguing over the use of a small mirror in A.'s room and M. entered to assess what was happening. A. requested that he should bring her a bigger mirror from his bedroom. When he returned with the mirror, he gave it to S.. A. became upset and, in a jealous fit, left her bedroom, entered the nearby bathroom and stood on a chair to view herself in its big mirror.
5. A.'s mood affected S. who became saddened and felt partly responsible as she, instead of A. who had made the request, had received the mirror from M..
6. Observing the young women's change of mood and feeling that his intervention with the bigger mirror was the trigger, M., to cheer her up, asked S. whether she wanted to see herself in a bigger mirror that was in the master bedroom.
7. On their own volition they entered the bedroom with the door partly ajar. Meanwhile, A. was pacing in the hallway and looking into the bedroom and could see what was happening

inside. S. was still in a saddened mood and briefly looked in the mirror. Sensing that she may still be fazed by the earlier incident with A., M. sat on the bed facing the mirror. He asked her to sit on his lap. She did so for a few seconds, still facing the mirror and, to assure and comfort her, he momentarily kissed her on her shoulder.

8. The kiss made S. feel ill at ease, as to her, M. was a stranger. She, however, did not feel threatened as she immediately left the bedroom and for ten minutes continued to play, in a normal manner, with A..

Analysis

Credibility, in particular, of the child witnesses is an issue. I am mindful of the words of McLachlan J. (as she then was) in *R.v. Marquard* [1993] 4 S.C.R. 223 at paras 19 and 20:

¶ 19 With children as with adults, there can be no fixed and precise formula to be followed in warning a jury about potential problems with a witness's evidence: *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. As Dickson J. (as he then was) stated in that case, at p. 831:

Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. [Emphasis added.]

¶ 20 In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, this Court warned against applying negative stereotypes to the evidence of children. At the same time, it emphasized at p. 134 that the trier of fact must be cognizant of the weaknesses of a particular piece of evidence:

Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes [in the way the courts look at evidence of children] do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

In my view, S.'s version of the event lacked contextual enhancements. When I assessed her testimony with the total evidence I was cautious in fully embracing it as the whole truth of what did happen. She denied that she and A. were playing "make up" but did put her visit to A. into a context that a practical and informed person would readily recognize as reasonable and probable in the circumstances given the interactions between her and A.. Some of her comments, however, in my view, were not age appropriate and she lacked a comprehension of the meaning of the critical word "lick" that she used to described the action of the accused when he touched her. In short, I was concerned about the coherency of her testimony.

In my opinion and, as I observed her as she testified, she appeared to be scripted and lacked background details such as bodily sensations as one might expect that someone, even of her tender years, who experienced the event would know about. Further, her cross-examination, revealed obvious errors that were never corrected to rehabilitate her credit. Her lack of recall and or her recollection of crucial pieces of evidence and her self contradictions and inconsistencies with the testimony of other witnesses made me cautious. A critical aspect of her testimony, in my view, was when she described the reported act and manner of the accused kissing her left breast.

In cross-examination, I think that she readily recognized the improbability of the physical mechanics and that her testimony was flawed. Consequently, she became evasive and, to her credit, experienced I think, a moral crisis that manifested itself in a breakdown of her composure and confidence. This, in my view, adversely affected her testimonial credit and reliability that they never rehabilitated. In addition, her narrative appeared to focus on an objective and framed to contain enough details to accomplish that purpose. Furthermore, to her telling the truth was apparently important. Therefore, I think that her inconsistency was either a sign of poor memory or fabrication. I decided, however, from her demeanour and persistence of having a good memory that it was difficult to conclude that she had forgotten or had a poor memory. In short, she appeared to be sincere but in the end I doubted her reliability.

On the other hand, I think that A.'s version of events put the whole incident into a perspective that provided a basis of understanding and assessing contextually the conduct of the accused which a practical and informed person would readily recognize as reasonable and probable in the circumstances. Accordingly, the young women were playing make up and a dispute arose between them concerning the use of a small mirror in A.'s room. Hearing the dispute the accused entered the room and A. asked him to get her a bigger mirror from his bedroom. When she did not receive the mirror from her father, A. became upset and left the room to look at herself in a larger mirror in the bathroom. S. was morose. Perceiving that he may have created a problem, the accused tried to rectify it by inviting a crestfallen S. to view herself also in a larger mirror in his bedroom. In the bedroom the accused in his familial cultural perception of children tried to console S. by asking her to sit on his lap facing the mirror further and kissing her briefly on her shoulder.

The accused and S. were aware of and saw A. pacing outside the bedroom and looking inside. However, when S. left the master bedroom she returned to A.'s room where they remained playing for ten minutes. The accused returned to the living room and continued watching television. Nonetheless, A. did see S. on her father's lap and that also made her jealous and she reported this

fact, without context, to her mother who was upstairs conversing with L.. Thus, L. was aware of S. sitting on the accused lap before S. told her about it. Nevertheless, according to F., which I accept as a fact, when L. heard this information her “face turned red.” S., who was present, and I accept that fact, did not appear to be worried or acting other than normal. But, when F. asked S. to return downstairs to play with A., although she wanted to do so, L. told her that she could not then do so. I also accept and find that fact.

It seems to me, on the facts that I accept, L. had an unconscious bias against the accused. She had a stereotypical view of him as a child molester. When she heard that her daughter was in his lap alone in a bedroom her reaction, as observed, betrayed her emotion that was confirmed by her not allowing S. to return downstairs to play with A.. I do not doubt that S. told her mother that the accused had kissed her when she was on his lap. However, what was new to L. was the fact that the accused had kissed S..

I accept that S. was nervous when she disclosed to her mother that the accused had also kissed her. I accept also that sitting on the accused lap and receiving a kiss on her shoulder made S. felt uncomfortable. However, on the evidence that I accept, I conclude, that given L.’s unsupported and subjective view of the accused as a child molester, in the circumstances, she concluded that there was more to the accused touching of her daughter. Further, when L. expressed her concerns to F., they disagreed on the purpose and intent of the touching by the accused. The accused himself attempted to explain and to apologise for any misunderstanding. However, L. rejected any reasonable explanations and took the position that, she L., “could be a bitch.” She felt that what the accused did was “not right” and that she had to take a stand for her daughter.

The testimony of the accused impressed me. He appeared at times to be confused but testified in a forthright manner. He impressed me as an individual shaped by his cultural upbringing to protect and express love and compassion for children in a universal sense. His reaction to the suggestion of child abuse, I think, was strong, spontaneous and not feigned. He expressed the view that in his culture a person accused of inappropriate conduct with children would be summarily dealt with by the aggrieved parent, and community and the issue would not end in the courts.

Conclusion

Upon hearing the accused and applying the principles stated in *R v. W(D)* [1991] 1 S.C.R. 742, I believe him. I accept and find that he did kiss S. W. on her shoulder. However, I find that this touching was consistent with affection and sympathy, rather than in the circumstances, preying upon a vulnerable child. I accept and find that his touching S. W. with his mouth was not for a sexual purpose. I further find that all the physical contacts that he had with S. W. was also not for a sexual purpose. This includes her momentarily sitting on his lap.

Consequently, on the analysis that I have made, I am not satisfied that the Crown has proved beyond a reasonable doubt all the elements of the offences charged on the Information tried before me. I therefore find the accused not guilty as charged and will enter acquittals on the record.

J.