IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Mebrate, 2006 NSPC 35

Date: 2006/07/17
Docket: 1480534
1480535
Registry: Halifax

Her Majesty the Queen

v.

Elias Woubet Mebrate

Restriction on publication:	A ban on publication and broadcasts as provided by s. 486(3) and s.539 of the Criminal Code.
Judge:	The Honourable Judge Castor H. Williams
Oral decision:	July 17, 2006
Charge:	Section 271(1)(a) Criminal Code Section 151 Criminal Code
Counsel:	Ron Lacey for the Crown Daphne Williamson, for the Defence

By the Court:

Introduction:

[1] The police have charged Elias Woubet Mebrate, the accused, with sexual assault and, with his hands, for a sexual purpose, touched BD, a person under the age of fourteen years. The charges arose from an alleged incident that occurred in the Halifax Regional Municipality on August 27, 2004.

[2] Essentially, BD who is now fourteen years old, alleges that the accused, with whom she, her sister and some friends had an earlier interaction, lured her into his workplace by giving her a wooden whistle and representing that he was the manager of the business. Subsequently, he invited her to look at some beds that she liked. When doing so, he stood uncomfortably close to her, played with her hair and, expressing words of affection and infatuation, placed one hand on her breast and, with the other, felt her vagina.

[3] The accused does not recall being at this workplace on the day in question but does not doubt that he could have been there. In any event, he does not recall the event and denies that he saw, spoke with or touched BD. He does not doubt that the event, as described by BD, did take place but declared that he was not the individual involved. He suggested that it must have been another employee.

Issue

[4] By his ambivalent assertion that he may not have been there at the store location on the day in question, the accused has raised the issues of identity and credibility. He has also asserted that even if he were at the store location, again as an issue of identity, the time frames as declared by the complainant when the allegation occurred when combined with other independent evidence would clear his involvement in any misconduct as alleged. Thus, this case also touches on the test to be applied concerning the reliability and credibility of the evidence of children.

Summary of Relevant Evidence

[5] The questionable conduct occurred on August 27, 2004. The complainant BD, who was then thirteen years old, along with her sister and two friends, was driven by her mother to a Shopping Mall located in the Halifax Regional Municipality. Their plan for the day was that the mother would go to work at her office in the Mall and that the girls would either wait for her in the vehicle or go to the movies.

[6] Assigned a location in the Mall was a furniture store where the accused worked as a casual employee. His normal duty as an outdoor worker, was to remove furniture from a storage container and place them on display near the business. It would also appear that inside the store was a bed that caught

the girls' fancy and that they, at some time in the morning, entered the store to check it out. Even so, while they were loafing around the Mall for things to do, they saw the accused placing some chairs near the business and, having purchased some pizza for lunch at about 1100 hours, they went and sat on the chairs to eat.

[7] The accused came and spoke to them. He represented that he was the manager of the business and the conversation, at first, was about their ages and addresses but eventually, in their opinion, became less desirable and inappropriate. They discontinued the conversation and left the area. However, BD's sister cautioned her not to return to the store location.

[8] August 27, 2004 was an exceptionally busy day for the accused's employer. She had an outside business appointment that unexpectedly took up her time practically all day. Her staff scheduling was such that her continuing absence became a concern. The morning staff person shift ended at 1300 hours with no scheduled relief and the only person that was available was the accused as he was on the spot and could temporarily look after the business. However, it would appear that he had no keys for the business nor was he aware of the security code. Nonetheless, arrangements were made for him to mind the business with the hope that the owner would still be able to complete her meeting in time for him to go to a second job site at 1645 hours.

[9] Even so, from 1300 hours onward, the accused was minding the business and he was the only employee present. The accused, however,

does not recall whether he was in fact at this work location but he was prepared to admit and adopt the possibility that he was there because of the testimony of other witnesses and his reference to some out of court evidence. Notwithstanding his lack of location recall the store owner was adamant that he was at work that day and that he had made several urgent telephone calls to her when she was at her meeting concerning the time that he had to go to his second job. Likewise, a customer was sure that when she was in the store for ten minutes, between 1600 hours and 1615 hours, and purchased some items, it was the accused who attended to her, and he was the only person whom she saw in the store.

[10] In any event, at about 1230 hours, the group of girls separated and all, except BD, departed the area to go to the cinema. BD remained at the vehicle and at about 1530 hours she saw her aunt going shopping and joined her for a period of time when her aunt purchased and gave her an ice cream on a stick.

[11] However, with time to spare before she would rejoin her mother, BD returned to the store area as the bed was still an attraction to her. As she was walking past the store's entrance the accused appeared and invited her in. He gave her a wooden whistle and prompted her to look at the bed that she liked. They walked to the back of the store and looked at one bed. BD went to look at another bed. The accused came up close behind her, placed a hand on her shoulder and touched and commented on the colour of her hair. He also remarked that he was infatuated with pretty girls like her. He gradually moved his right hand downwards and placed it on her breast and for

fifteen to twenty seconds applied some pressure. He was saying: “I like you girls.” Then, with his left hand, for fifteen to twenty seconds, he grasped her vagina. Feeling perturbed and scared, BD told him that she had to leave in order to meet with her mother. She hurriedly left the store and went to her mother’s work place where her mother observed that she was red-faced, as if she were crying, and that she remained in an irritable and angry mood.

Theory of the Defence

[12] The Defence presented a two-dimensional approach to the problem. First, because of his busy employment schedule where he was holding down several part time jobs, the accused could not recall, if in fact he was at the specified store location on the day in question. He, however, does recall going to his regular part time job where he had to sign in at 1645 hours.

[13] Second, when faced with credible and trustworthy evidence that he was in fact at the store location, he conceded, somewhat grudgingly, that he could have been there. However, he posited that assuming that BD was correct about the allegation, even if he were there, the time frames as she presented when compared with those stated by the adult witnesses would make it impossible for him to be the person involved. Additionally, the girls gave various descriptions of the man with whom they had interacted and thus BD could be confused concerning the identity of the perpetrator as he was not the man.

Theory of the Crown

[14] Essentially the Crown's theory was that the accused was the perpetrator. Notwithstanding the various physical descriptions that the girls gave, there was the common description that he was dark skinned, tall, thin, had an accent and that he was the only male that they saw that was working at the furniture store on the day in question. The accused was that person. However, he has tried, in vain, to deflect culpability by feigning lack of recall of where he was on that day. His faulty memory was contrived to place him in a position of denial. But, his employer was adamant that he was indeed working because she knew that he made several urgent telephone calls to her at her meeting. He did so because she was absent from the store, she had no other employee scheduled to relieve him and he was concerned about being late for his evening job. Furthermore, a customer could also place him at the location. Therefore, his denials rang hollow and have affected adversely his total creditworthiness. Put succinctly, the accused was not telling the truth.

Findings of Facts and Analysis

[15] Having heard the witnesses and observed them as they testified I conclude and find that credibility was the paramount issue. There was also

the sub-issue of identification. However, I think that once the issue of credibility is resolved, any doubts as to identity, without a doubt, would be resolved satisfactorily. With respect to the assessment of credibility this Court observed in ***R.v. Killen,*** [2005] N.S.J. No.41, 2005 NSPC4 at paras. 19 and 20:

> 19. ... that in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in R. v. Vetrovec, [1982] 1 S.C.R. 811, and R. v. W.(D.), [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue. See also R. v. O.J.M., [1998] N.S.J. No. 362 at para. 35.
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> 20. Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, and by Cory J., in W.(D.) at p. 747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in my view, "it is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

[16] Here, I also have the testimony of a young girl who is described by her mother as immature for her age but friendly. Although she expresses herself well there was some hint of a speech hesitancy, which could support her mother's observation concerning her development. As to how I should view her testimony I am mindful of the words of McLachlin 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:
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> > 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.]
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> 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.

[17] I am also mindful that although these types of crimes are deplorable and must be condemned it would also be shocking if an innocent person is convicted of it. See: ***R.v. J.(F.E.)*** (1990), 53 C.C.C. (3d) 64 (Ont. C.A.), at paras. 7-9. Here, counsel for the accused does not doubt that someone inappropriately touched BD. The disagreement was, who did it? To exonerate himself the accused denied that he was present. But, when confronted with credible and trustworthy evidence that he was in fact present he attempted to shield himself from liability by presenting that the timing of the event, as stated by BD, would make it improbable that he was the culprit.

[18] Nonetheless, I accept and find that BD, her sister and her friends were at the furniture store on the day in question. I do not doubt that they spoke to a male person whom they thought, because of the nature of the conversation, was a person whom they should treat with caution. I also accept and find that the owner of the furniture store had a business meeting that absented her from the business for practically the whole day and that

the accused was scheduled to work at the store.

[19] Likewise, I accept and find that the accused was, in fact, working at the store that day. I say so because I accept and find that the customer who entered the store and made a purchase could speak to his unfamiliarity with processing her transaction which eventually did not go through her bank account. This piece of evidence is supported by the owner's testimony that the business transaction records for the day showed an error in the amount of the customer's purchase. The customer also testified that her bank statement also did not reflect the transaction as it was not processed.

[20] Furthermore, the owner testified that she had discussions with the accused concerning him financially reimbursing the store for the error. All this body of evidence stands uncontradicted. Significantly, the accused did not deny this critical piece of evidence but has admitted that he did not know how to operate or process store transactions. His testimony, in my view, supports that of the owner and the customer that he did indeed attempt to process a transaction that resulted in an error.

[21] Also, in my opinion, the total evidence, when properly assessed, does not support the accused's assertion that he was not present at the store. First, as I observed him as he testified I formed the impression that he was evasive, inconsistent, unresponsive to the questions asked and was ambivalent. Moreover, when I assessed his testimony with the total evidence, I had reasonable doubt about his truthfulness and, in my opinion,

his testimonial credit was not restored either by belief or supportive evidence.

[22] Second, he asserted that he could not recall whether he was at the store location. However, I find and conclude that the day's events were not typical. His employer was absent at a meeting and he was alone minding the store which was not his usual employment duty. Additionally, he had to go to another job which was important to him and he did not want to be late. Further, to ensure that his employer knew the urgency of the situation he made several calls to her at her meeting to remind her. Significantly, he does not deny these facts.

[23] Therefore, I find and conclude that his general statement that he was not there but with the caveat that he could have been there, given the credible and trustworthy testimony of his employer and the customer, displaced his credit and his testimony became unreliable and untrustworthy. Furthermore, I find and conclude that it did not have any probative value in determining the issue of his presence at the store location. Thus, in my view, with respect to his testimony, the accused remained discredited.

[24] However, on the total evidence, has the Crown proved beyond a reasonable doubt that he was the perpetrator? I do not doubt, on the evidence that I accept, that BD, her sister and her friends saw and spoke with the accused. In addition, I say so because I accept and find that the general physical description of the accused, who was born in Ethiopia, would be consistent with the girls' basic description of a dark-skinned

man, possibly an East Indian, who spoke with an accent.

[25] However, I must point out and it should be absolutely clear that such a vague description generally would not be sufficient to establish any positive identification. But, when this piece of evidence is added to the other established circumstances and proven facts such as the accused was the only male person working that day; the store's casual labourers, like the accused, were generally new immigrants to Canada; the accused is a new immigrant to Canada; the accused task was to remove furniture from a container and that was what he was doing on the day in question; the girls saw, spoke with and interacted with the man who was removing furniture from the container; BD was invited into the store by the same man who was earlier moving the furniture; the man gave her a store item, a whistle, tendered as Exhibit 1, these factors when added together, are consistent with the fact that the accused was the only male employee present and inconsistent with any other rational conclusion that he was not the person with whom BD interacted.

[26] In my opinion it is significant to note that the accused has not challenged the fact that BD was inappropriately touched. However, in some contortive manner he has denied that he was the one who did it either because he was not at work at the store or that, even if he were at work, because of the time frames presented by BD he would have had no opportunity to do so.

[27] Despite his denials, as I have found, I do not believe him when he said that he was not working at the store on the day in question. On the evidence that I accept, I conclude and find that he was in fact at the store. Furthermore, again on the evidence that I accept, I conclude and find that he did in fact interact with the girls when they sat on the chairs to eat their lunch.

[28] Thus, in assessing the accused's testimony in the light of the total evidence, I think that he appears to have evoked obliquely, although not specifically pleaded, some elements or overtones of an alibi that, of necessity, is linked to the theory that he did not have the opportunity to do the deed. In that way, it seems to me that he has raised the issue of the lack of opportunity as a fall back line of defence as, without doubt, his identity and presence have been established.

[29] However, in my view his opportunity or lack thereof could be supported by other circumstances or facts that may amount to corroboration of culpability particularly if he gave evidence that I considered to be false and concocted. In such a case, his falsehood together with other circumstances may provide proof of opportunity to commit the offence and it is a factor from which, reasonably I could infer corroboration of culpability particularly when I consider BD's uncontradicted, credible and trustworthy testimony. Likewise, I think that his falsehood could reasonably establish his state of mind and could be supportive evidence to imply his culpability. See: ***R.v. Michaud,*** [1996] 2 S.C.R. 458, ***R.v. Rapin,*** [1999] N.S.J. 219 (Prov. Ct.).

[30] Furthermore, when I carefully assess the times as recalled and presented by the various witnesses there was a gap between 1300 hours and 1545 hours that remained open. All the same, I think that there can be no assumption that BD's testimony is less reliable than that of the adults with respect to the time. See: ***R.v. R.W.*** (1992), 74 C.C.C. (3d) 134 (S.C.C.)

[31] The fact remains and it can reasonably be inferred from the evidence, and I do infer, that there was a period of time when the accused was alone at the store. I do not doubt that BD went to the store. Further, I do not doubt that the male person present at the store, gave her a whistle that was embossed with the store's name, now tendered as Exhibit 1. This piece of evidence is not contradicted and I accept and find it to be credible and trustworthy.

[32] Therefore, in my view, the time stated by BD, given her age and maturity, may not have been precise, but significantly it is consistent with the fact that at a material time she was at the store, received a whistle from the same man with whom she and her friends had spoken to earlier and that the same man was alone and invited her into the store. Thus, it seems to me that BD's uncontradicted testimony and giving my earlier finding that the accused was in fact the person present at the store, supports my finding that the accused had the opportunity to interact alone with BD. I so find.

[33] Consequently, on the evidence that I accept, I conclude and find

that the accused had an interest in the girls. I say so when I consider the conversation that occurred when the girls were seated on the chairs. Moreover, I accept and find that the accused enquired about their ages, addresses and whether they attended nightclubs. Further, I accept and find that to demonstrate his importance he represented that he was the manager of the business.

[34] Furthermore, I find that this air of assumed authority was still present when, as I have found, he gave BD a wooden whistle from the store. Likewise, it seems to me, and I can reasonably infer from the evidence, that his interest continued when he invited BD inside to look at beds in the back of the store. From the words that I accept and find that he uttered when combined with the quizzical touching of her hair suggested that he was infatuated with girls like BD and, as a result, I find that his state of mind was to satisfy, on the evidence that I accept, what I think was perhaps a stereotypical adolescent attraction to BD by touching her breast and vagina.

Conclusion

[35] Consequently, on the total evidence and on my above analysis, I conclude and find that the testimony of the accused was false and concocted. In short, I did not believe him. I conclude and find that credible and trustworthy evidence placed him at the store location on the day in question. Moreover, I conclude and find that he was ambivalent and

inconsistent concerning critical pieces of evidence and that his testimonial credit was never rehabilitated either by supportive evidence of by belief.

[36] On the same basis, and in my view, his falsehood and initial denials were “consistent with the conduct expected of a guilty person trying to avoid liability and inconsistent with the conduct of an innocent person.” ***Rapin***, para.14. As a result, I conclude and find that he did, for a sexual purpose, touch BD, with his hand, on her breast and on her vagina. Additionally, I conclude and find that BD, at the time of the touching, was under the age of fourteen.

[37] Therefore, on the total evidence, I am satisfied that the Crown has proved beyond a reasonable doubt the elements of the offences as charged. However, when I consider the Kienapple rule in ***R.v. Kienapple,*** [1975] 1 S.C.R. 729, I will enter a conviction on the charge pursuant to the **Criminal Code**, s.271 and will enter a conditional stay on the charge under the **Criminal Code,** s.151. Accordingly, I find the accused guilty of the offence that “he did commit a sexual assault on BD, contrary to Section 271 of the **Criminal Code**.” A conviction will be entered on the record.

J.