PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. J.M.S.*, 2014 NSPC 32

Date: 2014-06-12
Docket: 2655108, 2655109
Registry: Pictou

Between:

Her Majesty the Queen

v.

J.M.S.

Restriction on Publication: Pursuant to s. 486.4 of the Criminal Code, any information that could identify the complainant in this proceeding shall not be published in any document or broadcast or transmitted in any way.

VERDICT

Judge: The Honourable Judge Del W. Atwood

Heard: 28-29 May 2014, in Pictou, Nova Scotia

Decision: 12 June 2014

Charges: Sections 151 and 271 of the Criminal Code

Counsel: Patrick Young, for the Nova Scotia Public Prosecution Service
Rob Sutherland, for J.M.S.

By the Court:

[1] J.M.S. is charged with one count of sexual assault and one count of sexual interference. The alleged victim in each count is A.B.; A.B. is the granddaughter of J.M.S.'s common-law partner. The prosecution proceeded indictably, and J.M.S. elected to have his trial in Provincial Court. I heard evidence on 28 and 29 May 2014. I reserved my verdict until today.

[2] The theory of the prosecution is that J.M.S. molested A.B. when she was around four or five years of age by touching her in her genital area on one occasion. It happened while A.B. was visiting her maternal grandmother in Pictou County, having traveled to Nova Scotia with her mother from their home in [redacted]. The defence theory is that A.B. fabricated her allegation to get back at J.M.S. because of the so-called "Rabbit Wars"; this was a game played by A.B. and J.M.S. that involved the hiding of A.B.'s cherished plush toy.

[3] The key item of evidence in support of the prosecution's theory is Exhibit 1: an audio-and-video-recorded statement given by A.B. to Cst. Tara St. Denis at the RCMP detachment in [redacted]. Following an admissibility *voir dire*, this

recording was admitted, with defence consent, in proof of the truth of its contents in accordance with section 715.1 of the *Criminal Code*. A.B., who is now eight years of age, testified after making a promise to tell the truth. A.B. adopted what she had told Cst. St. Denis; she was cross examined by defence counsel, but in a manner wholly inappropriate for a child witness, so as to leave her evidence as essentially unchallenged.

[4] A.B.'s mother gave evidence describing how her daughter came to tell her what had happened; A.B.'s mother acted quickly and notified police straightaway.

[5] Cst. St. Denis was tasked with interviewing A.B. and did her work in a highly professional manner. The audio and video channels of the recording were of very high quality; the constable established a good rapport with A.B., and allowed her to talk about what had happened without unnecessary coaching or leading. Significantly, Cst. St. Denis took notes during the interview, which assisted her in answering questions on direct and cross without the video recording having to be played and replayed to refresh her memory. Concurrent note-taking is a particularly useful police-operations practice. This one is a case in point, as the first attempt at doing a video recording ran into a technical glitch; fortunately, Cst. St. Denis had her notes, which avoided her having to start again from scratch.

[6] A key finding of the investigation is this: whatever happened to A.B. occurred at least a year and four months before she told her mother about it and before she was interviewed by police. This was not A.B.'s fault. In fact, she had told someone the very day of the incident. Tragically, the person whom she told chose to lower the cone of silence.

[7] Defence evidence—which included the testimony of the accused—appeared to be focussed almost entirely on developing the implausible "Rabbit-Wars" theory rather than addressing the clearly pivotal issue of whether the prosecution had proven *mens rea*.

[8] I say that *mens rea* is the pivotal issue, as there is no doubt in my mind that J.M.S. touched A.B. as she described it. A.B. testimony was unshaken. Her evidence was supported circumstantially in many important respects: first, it is uncontested that A.B. spent unsupervised time with J.M.S. during the summers of 2010 and 2011 while visiting her maternal grandmother. J.M.S. admitted coming into physical contact with A.B. in the course of cleaning her up after she has soiled herself. Finally—and this is of key importance—A.B. told her maternal grandmother right away about what had happened to her. And so it is that this verdict comes down to an evaluation of intent.

[9] The biggest obstacle in making that evaluation is that the forensic-evidence gathering in this case took place over a year and a half after the incident had happened. The person primarily responsible for that delay is A.B's maternal grandmother. A.B. told her grandmother immediately about what had happened to her; her grandmother's response was to surround A.B. with other family members and confront her. Not surprisingly, this small child recanted and told her grandmother it had been a joke. The grandmother testified that she had told A.B.'s mother about all this. I do not believe that for a moment. A.B.'s mother is a conscientious and proactive parent; had she been told right away, she would have called for help from police right away. As it was, she was left in the dark.

[10] Well over a year later, after her common-law partner had been arrested, the grandmother got A.B. alone in her car, and confronted her again. Again, not surprisingly, A.B. was intimidated into recanting.

[11] This is the sort of thing the court is required to confront intermittently: a small but determined number of family members who take it upon themselves to conduct interrogations and, occasionally, probing physical examinations of children who have made allegations of sexual abuse. Sometimes well intended, always misguided, these amateur investigations run the risk of being misprisions of

felonies, unfortunately no longer a crime in Canada;[1] they are almost a form of child abuse. The responsibility of an adult—any adult—who is informed that a child might have been abused is clear: there is a responsibility to protect and a responsibility to inform. This is laid out clearly in s. 23 of the Children and Family Services Act, S.N.S. 1990, c. 5.

[12] The irony here is that, had A.B.'s grandmother notified the authorities right away, a thorough and timely investigation might have led to a decision not to lay a charge against J.M.S.

[13] As it is, the court is confronted with much uncertainty. There is no evidence before the court of grooming behaviour; nor is there evidence of a pattern of abuse. There is no evidence that J.M.S. enticed A.B. to enter the bedroom where the incident happened; rather, A.B. entered on her own, while J.M.S. was resting on the bed. A.B. told Cst. St. Clair that, just before J.M.S. touched her, she had climbed on top of a "thingy" in the bedroom in order to reach a portable gaming device that had been placed on top of a piano or some other item of furniture. A.B. could not recall what clothes she had on at the time, but did tell the officer that she had just come from swimming. Intent will be inferred generally from the

[1] See *R. v. Johnston*, [1988] M.J. No. 410 (C.A.).

surrounding circumstances; sometimes, it will be a nice issue, not settled easily by the principle that a person may be taken to have intended the natural and probable consequences of his or her voluntary actions. Yes, the circumstances described by A.B. would be consistent with J.M.S. intentionally touching her for a sexual purpose, or in a way that interfered with her sexual integrity. But they admit also of an inference of an adult being suddenly awakened, seeing a child using a piece of furniture as a ladder, and then grabbing hold of the child to keep her steady. What furniture was situated in the room? If police had been told promptly, the investigator could have obtained a general warrant to do scene photography, which is often of great assistance in the fact-finding process; but with the police finding out fully a year and a half later, such an investigative step would have been of little use, given the risk of scene alteration. What was the clothing worn by A.B. at the time? What were A.B.'s exact words when she told her grandmother what had happened? Words are especially important, because the first utterance made spontaneously by a child in the aftermath of an incident of alleged abuse might constitute highly probative evidence.[2] Immediate interviewing of A.B. would have revealed much about her vocabulary, fluency and articulation, and much more of what she remembered while the event was still very fresh in her mind.

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[2] See, e.g., R. v. Khan, [1990] S.C.J. No. 81

[14] Had A.B.'s grandmother done what she ought to have done and contacted the Department of Community Services or the police right away, more of these uncertainties might have been resolved. That evidence was not gathered immediately is not the fault of the police or the prosecution. Indeed, the police acted most promptly. Rather, questions remain because of the conscious decision of an adult to try to "keep a lid on it". I repeat: this is not the fault of the prosecution. However, in a criminal trial, the benefit of the doubt goes to the accused.

[15] Being left in a reasonable doubt about the essential element of criminal intent, I find J.M.S. not guilty of both counts. The charges are dismissed, and J.M.S.'s bail conditions come to an end. J.M.S., your obligation to the court is concluded, and you are free to go. Thank you very much, sir.

JPC.