SUPREME COURT OF NOVA SCOTIA
Citation: R. v. J.B., 2015 NSSC 126

Date: 20150417
Docket: CRANT. No. 411165
Registry: Antigonish

Between:

Her Majesty the Queen

v.

J.B.

Restriction on Publication: s. 486.4(1)
Decision

Judge:	The Honourable Justice Jamie Campbell
Heard:	April 13-17, 2015 in, Nova Scotia
Oral Decision:	April 17, 2015
Written Decision:	April 23, 2015
Counsel:	Darlene Oko for the Crown Robert Sutherland for the Defence

Campbell, J. (orally)

[1] This case involves allegations of what have been called historical sexual assaults. They go back to the period between November 1981 and November 1986, some 30 years ago. The references to the Criminal Code sections must then be to the provisions that applied during that time. The allegations involve indecent assault, gross indecency and sexual assault. The defences are also those that would be available under the law as it was at the time the offences are alleged to have taken place.

[2] The complainant is M.B. The accused is J.B. who is now 57 years old. These events are said to have taken place when J.B. was in his late 20's. The complainant was then between 13 and 18 ½.

[3] A Charter motion relating to lost evidence has been made on behalf of J.B. He has asserted that because the RCMP can no longer locate a written statement made by the complainant in 1987 and a video- taped statement given in 1997 his right to make full answer and defence has been breached.

Lost Evidence

[4] The RCMP approached M.B. after his name came up in the context of another allegation against J.B. He came in to the local detachment and gave a statement to the police on 6 February 2011. He said that he had made earlier statements to the police about incidents involving J.B. The first of those was made in 1987. He said that he reported incidents to Constable Brian Murray of the

RCMP. Cst. Murray is supposed to have made 3 or 4 foolscap pages of notes. M.B. said that nothing ever came of the meeting.

[5] He said that he gave another statement sometime around 1997. That was a video statement and was, once again, about the incidents that are the subject of these charges.

[6] He said in 2011that he had received money from J.B. relating directly to the allegations of sexual assault and had told the police about it in 1997. He said that in 1997 he signed something indicating that he didn't want to proceed with the charges because he didn't want to face a blackmail charge that the RCMP had warned him might be coming his way.

[7] The two statements that M.B. says he made, in 1987 and in 1997 are nowhere to be found. The police conducted a search after the 2011 statement to try to locate the earlier files. They were able to locate the two files from 1987 and 1997 dealing with complaints by J.B. The contents of the 1987 file had been transferred to a 1988 file. That file had little information in it. There was a reference in the file to M.B. being referred to the RCMP by a family doctor because he was "obsessing with molesting children and having fantasies that he is sexually abusing children."

[8] The 1997 file was found. It contained some information but the video-taped interview of J.B. was missing. That file contained information that M.B. had made a complaint against J.B. on 8 August 1997 when M.B. was incarcerated. He gave a recorded statement. Cst. Murray was assigned to do follow-up on it. Cst. Murray's reports in that file indicated that when he spoke with M.B. in 1997, M.B. raised the issue of the 1987 complaint. He wasn't happy with what he believed to be Cst.

Murray's failure to investigate the complaint against J.B. in 1987. Another member was assigned to investigate the 1997 complaint.

[9] The file was given to Cst. Head, now Inpsector Head. Cst. Head reviewed the 8 August 1997 video statement and made what he believed to be very comprehensive notes of it. The video-taped interview is no longer available. Inspector Head's notes were maintained and provided.

[10] Cst. Head spoke to M.B. He noted that the information that M.B. had received money from J.B. presented a problem. He gave M.B. the standard police warning and caution because of the potential for an extortion charge being laid against him. At that time M.B. refused to provide a further statement. He provided Cst. Head with a letter saying that he was withdrawing his charges against J.B. for "personal reasons." The file was concluded at that point. At that stage then, M.B. had made two complaints against J.B., ten years apart and relating to incidents that had taken place more than ten years before. He had overplayed his hand by trying to get money from J.B. and seemed to have spent enough time in jail to know he didn't want to go back on an extortion change. As far as he was concerned the matter was over.

[11] The issue then is whether the loss or destruction of that material is such that there has been a breach of J.B.'s section 7 Charter right to make full answer and defense. If so, the issue then becomes whether a stay proceedings should be issued.

Procedure

[12] The Crown case was presented in it's entirely during the course of the *voir dire* on the Charter issue. A great deal of that evidence would not be admissible in

the trial and counsel were requested to provide a detailed statement identifying what portions of that evidence would become evidence in the trial proper. Counsel agreed that evidence pertaining to the content, nature and extent of M.B.'s previous statements to the police which were significant for the *voir dire*, were not admissible in the trial proper. Police investigatory notes and the contents of RCMP files were not admissible. The transcript of the preliminary inquiry was not admissible. J.B.'s statement given to the police in 2011 was agreed to be admissible in the trial proper.

[13] Counsel went through description of the evidence of each witness and agreed on what evidence would be admissible from each. For each of the police witnesses the basic investigative information was admissible. Statements taken at various times from other witnesses were not admissible. M.B.'s testimony was largely admissible though evidence comparing the contents of his previous statements to police would not be to the extent that they are prior consistent statements. The testimony would be admitted to the extent that it showed inconsistencies.

[14] Yesterday morning, 16 April 2015, the defence elected to call J.B. on the *voir dire* portion. His evidence related to a call he said that he received from M.B. in 1987seeking money. He said that M.B. threatened to cause some kind of undisclosed trouble for him if he refused to pay. That evidence was admissible for the *voir dire* and for the trial proper.

[15] Once the Crown evidence in the form agreed was made part of the trial proper the defence elected not to call evidence in the trial. The decision on both the Charter *voir dire* and the trial was reserved until today, 17 April, at 11:00am.

[16] That process follows the observation of the Ontario Court of Appeal in *R. v. Scott*[1].

> The trial judge properly waited until the end of the trial to decide the abuse of process application. However, he ruled on that application before addressing the merits of the case. He should have dealt with the merits first and proceeded then to the question of whether the proceedings should be stayed. There are at least two advantages to this approach. If the Crown had not proved the case against the respondents they were entitled to an acquittal, and not just a stay of proceedings. Secondly, by deciding the merits of the case and then the merits of the abuse of process application, the parties could have brought all appeals to this court at the same time and we could have brought an end to this matter.

[17] That process is also consistent with the direction of the Supreme Court of Canada in *R. v. La*[2].

> The appropriateness of a stay of proceedings depends on the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit.

[18] In this case, the violation is not so patent and clear that the trial simply could not go ahead. The *voir dire* portion of the hearing included all of the Crown evidence on the main body of the trial. Adjourning for decision on the *voir dire* would mean returning some time later to resume the trial if the stay were not granted. As it turned out, no evidence was called in addition to that heard on the *voir dire.*

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[1] [2002] O.J. No.2180, para. 7., see also *R. v. Bradford* [2001] O.J. No. 107, para .10

[2] [1997] 2 S.C.R. 680, para.27

[19] The exercise of discretion is not based on considerations of administrative convenience. Separating the trial from the *voir dire* in these circumstances would just serve no real purpose. If, for example, the granting of the stay would serve the purpose of potentially saving significant court time or saving a vulnerable witness from being required to testify it might be appropriate to adjourn for decision on the *voir dire.*

[20] In this case avoiding the delay by proceeding with the trial proper would in no way prejudice the defence position on the Charter motion or the trial.

Trial Decision

[21] M.B. says that he was sexually assaulted by J.B. over a period of years in the 1980's when he was between 13 ½ and 18 ½. J.B. was involved in an on again off again relationship with M.B.'s mother who also happened to be his first cousin. He lived down the road and M.B. had known J.B. pretty much all his life. The relationship with M.B.'s mother began when he was 13.

[22] At the time he saw J.B. as sort of a father figure though he called him just by his first name. J.B. doesn't seem to have taken on much of a fatherly role but he was an adult, he was a male and he was around. His relationship with J.B. was good. Even as a young teenager M.B. used to get beer, cigarettes and junk food from J.B. Sadly, for M.B. that appears to have been the measure of a good relationship because he really couldn't identify anything else that made it positive.

[23] M.B. said that he remembered the first sexual incident happening when he was around 13 ½. J.B. and his mother had been in a relationship for about a half a year. He remembered being between Grade 7 and Grade 8.

[24] He recalled J.B. coming home from work on a Friday. He recalled him showering and having a beer. J.B. offered one to M.B. He offered to take him to the [local] convenience store in his car. They got to a woods road and J.B. asked him if he wanted another beer. He says that J.B. asked him if he masturbated. After being asked repeatedly, he says that he told J.B. that he did. J.B., he says, asked if they could masturbate together. He eventually gave in and they did. He said that he knew there were not going to leave until J.B. got what he wanted.

[25] There was no touching at that time. He recalled that they were both in the front seat of a car with a bench seat. He couldn't remember which of J.B.'s two cars it was. They drank some more beer, went to the convenience store and then went home.

[26] It really isn't unusual that he might not be able to recount the exact number of beers that he consumed, whether they were consumed in the car before or after the event and the colour of the car. The beer was not the memorable aspect of what happened. The colour of the car wasn't either.

[27] M.B. said that J.B. kept asking him if he'd keep quiet. He agreed that he would. M.B. told no one at the time. He said that he didn't think anyone would believe him anyway and that he was embarrassed and ashamed. For a person of his age at the time that reaction is entirely understandable.

[28] Very soon afterward, perhaps the very next weekend, something very much the same happened. He said that almost all of the incidents after that followed the same pattern. It was hard to distinguish one from the other. He suggested that there might have been over 100 of them. In the later incidents, which might have been as early as the second or as late as the fourth, they masturbated each other. Once

again, it is hardly unusual that 30 years later M.B. would not be able to distinguish between the occurrences or to say exactly on which of those the touching began.

[29] M.B. said that he was reluctant to engage in the touching then gave in. He didn't know why. J.B. kept saying "come on" and he finally relented. J.B. asked M.B. to masturbate him with his hand and he complied. J.B. didn't force him, threaten him or intimidate him. He just softened him up with beer and cigarettes and wore him down with persistence. M.B. was, after all, a 13 ½ year old kid.

[30] M.B. recalled having difficulty maintaining an erection during the event. He said that he felt very uncomfortable. He said that when he would ejaculate J.B. would put his mouth on his penis.

[31] So, on his evidence, from the time he was 13 ½ on, these kinds of incidents happened regularly. Each one was pretty much the same as the one before.

[32] He was asked if there were any times that were different. On one occasion, when he was 15, he was fishing from the shore with some friends and two of his brothers. J.B. came along in his fishing boat and asked M.B. to join him. He did. He gave the boy some beer and they beached the boat up the river in the woods. J.B. gave him some more beer. He then asked if M.B. would "go down on him" meaning that the boy would perform oral sex on him. M.B. said no. J.B. took M.B.'s head and tried to push his mouth onto his penis. He stopped when M.B. started to gag. They both masturbated and the episode lasted about 20 minutes.

[33] That was the only event in which M.B. described any physical force being used. In all of the others he was, as a teenaged boy, a somewhat willing but also reluctant participant. That was a difficult thing for him to relate. He said that at

some points in his life he questioned his sexual orientation because of his participation in the sexual activity with J.B.

[34] He recalled an incident in a hotel room in PEI when the family was there on vacation. He believed he was about 14 years old. J.B. wanted to masturbate and M.B.'s mother was in the next room. It ended fast because both realized how risky it was.

[35] He recalled another incident in which J.B. masturbated the family dog. He said that he was disgusted but wasn't asked to do anything with the dog himself. He was 14 at the time.

[36] The sexual abuse stopped, he said, when he was 17 or 18. He was asked by J.B. to masturbate and he said no and refused to relent. J.B. never asked again. M.B. said that he told him he wasn't going to do that anymore. He was never asked again.

M.B.'s Evidence

[37] M.B. is clearly a very troubled man. He was a labourer but is now on disability. He looks much older than his age.

[38] He was able to give his testimony in a way that did not suggest either fabrication or exaggeration. He didn't suggest that there were any physical threats made to him or any force used except on one occasion. At that time, J.B. stopped when M.B.'s physical discomfort was obvious. He could very easily have embellished his story to avoid some embarrassment by suggesting force or coercion. Instead, he told of what for him as an adult, creates considerable discomfort. He had an unclear understanding of his own sexual identity. He was

convinced to participate but seems to have gone into the pattern of behaviour as a young teenager who really didn't know what he should be doing to express his sexuality. At a time when a boy would be reaching sexual maturity, though not emotional maturity and certainty not maturity of judgement capacity, this boy was masturbating in a car with his mother's boyfriend. During his later teenage years he received some psychological counselling. It's little wonder.

[39] His narrative hung together in way that was consistent with a memory being related 30 years after the event. Some images are crystal clear while others a vague. Some details can be recalled and some just can't. Human memory is a frail thing. It plays tricks. People can fervently believe that their memory of an event is accurate and be proven wildly wrong. But it can't be discounted entirely. Our personal identity depends on it. Separating false memory from real memory, and reliable accounts from unreliable ones is a challenge. And a person's confidence in the memory is a notoriously bad way of assessing it.

[40] M.B. provided a version of events that is plausible to begin with. Nothing in it was the kind of thing that just simply couldn't have happened in the real world. Even though he had free rein to add details that put J.B. is the worst possible light he didn't. He offered a version in which there was no force used, except once, and in which as a teenaged boy he participated.

[41] Yet, as a witness M.B. comes with baggage.

[42] Before addressing the issues with his evidence, of which there certainly are some, it's important to identify what the scope of really disputable evidence is. I noted earlier that nothing in J.B.'s evidence is the kind of thing that doesn't happen in the real world. The young teenager masturbating in the car with his mother's

boyfriend would be seen by some, had M.B. told them that in 1983 or so, as just so improbable as to be incapable of being believed. But that seemingly improbable part of the story is most certainly true. M.B. has spent the last 30 years struggling with the issue that he was not believed and now, 30 years later, J.B. admits that he was regularly taking advantage of an adolescent boy in a sexual way.

[43] In his statement given to the police J.B. admitted to having had a most unusual and entirely inappropriate relationship with M.B. He of course didn't describe it that way. His counsel suggested that it was within the broad scope of sexual experimentation between young people and adults that would be permissible under the law in the 1980's. J.B. did admit that he and M.B. who was then a boy, of between 13 ½ and 17 would masturbate together.

[44] As bizarre as it sounds, he said that it was at the boy's insistence. He was adamant that they never touched each other's penises. So, in J.B.'s version his girlfriend's son somehow managed to convince him to engage in a form of sexual play by which they masturbated together for the sexual gratification of the boy. And, that wasn't in a moment of weakness. It wasn't a single event in which J.B. was overcome by obscenely bad judgment or the alcohol that's so often its partner in crime.

[45] He said that they would very frequently, in the range of 50 or 60 times, be alone together masturbating. On his evidence, his girlfriend's son, managed to convince him to do this at least 50 times.

[46] So, the real issue is then not whether M.B. and J.B. were together, masturbating as adult and teenaged boy, but whether there was any physical contact. When in his police statement J.B. disingenuously pondered aloud why

M.B. would suggest that anything at all had happened, he knew full well what had happened. He thought he could lie about it and convince someone again that M.B. was a lying drug addict who was bribing an innocent man.

[47] That puts the rest of the evidence in a context. There is agreement that at least some of what M.B. says is true. The issue is whether the touching can be established beyond a reasonable doubt. M.B. and J.B. appear to be in agreement that there were frequent occurrences of masturbation in the company of each other. The issue is whether they physically touched. If M.B. did indeed create a story it was not from whole cloth but was based on circumstances that bore a striking resemblance to the less serious but still disturbing narrative from J.B.

[48] Which is where the issues with M.B.'s testimony arise. He has a criminal record. It's not just a criminal record but one that includes forgery. He was, at least at that time prepared to commit a fraud. He has been involved with drugs, impaired driving and break and enter offences. That record has to be considered. It would however be entirely unfair to discount the evidence of a person with a criminal record in a sexual assault only because of that record. It should be a factor but it should not be an overwhelmingly important one. People with criminal records are sometimes victimized. Sometimes, part of the reason for the criminal record is that they were victimized, sexually or otherwise in their past. They should not be marginalized by making them voiceless victims. At the same time, their credibility must be assessed having regard to the criminal record.

[49] M.B. is not only a person with a criminal record but also someone who tried to extort money from J.B. He told J.B. that he would report the abuse unless he gave him money. M.B. said that he just wanted compensation for the abuse and

planned to report J.B. even after he was paid what he asked. He got about $600 from J.B. but when he asked for $2000 J.B. refused. That brought M.B. to the police. It is very difficult to accept that he was doing anything other than shaking down J.B. for money. He was in financial distress and based on his criminal record he was not morally above extorting some money. He thought J.B. owed him.

[50] Just because he tried to get money from J.B. doesn't mean he made the whole thing up. We happened to know that he didn't make the whole thing up. J.B. was engaged in activities with M.B. so the whole thing indeed wasn't made up. But just because M.B. tried to get money from J.B. that is not evidence that the events didn't happen just as M.B. described them.

[51] That piece of evidence cuts both ways. J.B. paid M.B. as part of that. It could be argued that the payment is evidence of an admission. It has been argued that a person who had done nothing illegal wouldn't make the payment. But perhaps he might. He would if he was concerned about the masturbation story itself being disclosed to his family. He might even if the threat of a false allegation were made.

[52] Neither the attempt to get the payment nor the payment itself are particular probative of anything in the unique circumstances of this case.

[53] M.B. was subject to vigorous cross examination. He admitted the substance of his criminal record to the extent that he could recall it. He admitted that when he made complaints in 1997 he was in financial difficulty. Once again, it is not unreasonable to assume, based on his personal circumstances, that the sexual activity with J.B. might have been seen as an opportunity to get some money years later.

[54] There were some inconsistencies that came to light. In the notes of the 1997 statement there is a reference to his having said that J.B. asked to have anal sex and he refused. In his testimony he said that there was no discussion of any other sexual acts. That is not the same kind of inconsistency as saying that there was anal sex then saying that there wasn't. It was a difference in what had been said that in the context of the years involved could simply be a faulty or imperfect recollection.

[55] M.B. gave somewhat different estimates of how many times the acts occurred. At trial he said 100 or more and in the 1997 statement he appears to have said 50 to 60 times "or more". There is an inconsistency but the reference to "or more" makes it far less serious. He was recalling something that took place regularly. J.B. himself says that it took place regularly. When the events are similar it is difficult to account for how many there would have been 30 years later.

[56] In his testimony at the trial M.B. made note of an incident involving the family dog. The notes of the 1997 interview make no reference to any such incident and given what Inspector Head said, it is reasonable to assume that had any such statement been made, he would have recorded it. Assuming that it was not mentioned in that interview that is not a significant issue. It is a remarkably bizarre behaviour that would certainly be memorable but M.B. was being asked in 1997 about sexual contact between himself and J.B. He was not being asked to provide a general recitation of J.B.'s perverse sexual behaviours.

[57] It was noted that in the 1997 interview he made no reference to the fishing trip which was the only time that he was physically forced to do anything and the only time he had his mouth on J.B.'s penis. That is a notable omission. It is not a total omission though. He was asked if he had given J.B. a "blowjob' and the notes

of the interview record that he said "once". He was not asked to follow up with details about when that happened, but in his testimony he said that it had happened once, during that fishing trip. The inconsistency is only in the failure to add that it was forced on that occasion.

[58] M.B. is a person with a criminal record who attempted to extort money from the person he accuses of having abused him and who has an imperfect recollection. None of those are presumptive reasons not to believe him. In this context, they are not factors that weigh greatly in the assessment of his evidence.

[59] This is not a credibility contest between M.B. and J.B. whose evidence came through his police statement. The issue is whether the Crown has proven the essential elements of the case beyond a reasonable doubt. The issue is not whether I believe M.B. more than I believe J.B. or vice versa. It is whether after all of the evidence has been tested, weighed, considered and synthesized, those elements have been proven to that standard. Even if I find J.B.'s police statement to be a tissue of lies and believe little or none of what he said to Cst. Jessome the police interviewer, he cannot be found guilty unless the case against him has been proven to that standard. He's not charged with lying in a police interview.

[60] As far as that goes however, much of what J.B. said cannot be accepted as representing any kind of reliable narrative. In his police statement he was very cautious to the point of saying that he and M.B. used to go fishing and that kind of thing but "no, nothing whatsoever with him". He said "there was nothing said, nothing done, nothing". Well, as it turns out, "nothing" was at the very least masturbating with a teenaged boy. He claimed throughout that he never touched M.B. and says …. "But M., I don't know what got into his head…." He is

essentially wondering how M.B. could have come up with such an outrageous fabrication.

[61] When asked about the allegations he says "bullshit". "You know when kids want money. Money, money, money, money, money. They can have a story a mile long. I don't know. Maybe not. But it's bullshit."

[62] Well, not quite.

[63] He was asked by Cst. Jessome, who was a persistent interviewer, if he ever talked about masturbation with M.B. "No, he never…no, not really, he didn't." He then says that maybe M.B. wanted to. When asked again if there was something he persisted…."No, not really, but there's…not really."

[64] He then admitted that they talked about it. He said that the boy M.B. asked him about masturbating. And they did.

[65] He went from saying nothing was happening and speculating aloud that it was about money, to saying that the boy asked him, an adult to masturbate with him and he did. He adamantly denies any physical contact over the course of many many occasions. He shifts the blame for the activity to the child.

[66] While being adamant, he lapses a few times into saying that he wouldn't have touched the boy unless he was very drunk but was still sure that he hadn't.

[67] It is difficult to accept that the 13 ½ year old boy convinced his mother's boyfriend to masturbate with him on repeated occasions apparently for his sexual gratification while the adult simply complied for reasons that are not at all clear.

[68] M.B. says that he was touched in a sexual way by J.B. when he was a young teenager. His evidence was both credible and reliable. J.B. denied the touching though he admitted to thoroughly inappropriate behaviour in his police statement. His evidence from that statement is not credible enough to be believed and more importantly is not credible enough to raise a reasonable doubt as to his guilt.

[69] Based on all of the evidence I find that the Crown has proven beyond a reasonable doubt that J.B. did participate in the activities as described by M.B. I accept M.B.'s evidence that the incidents began to happen when he was 13 ½ years old about 6 months after J.B. began his relationship with his mother. That date was not seriously challenged.

[70] I accept his evidence that on one occasion when he was 15 years old J.B. physically forced him to perform fellatio.

The Applicable Law.

[71] J.B. has been charged with three offences. The first is that he committed indecent assault, contrary to s .156 of the Criminal Code between November 21 1981, when M.B. turned 13, and January 4th 1983. The latter date is the date upon which the section was repealed.

[72] The second charge is that between 21 November 1981 and 21 November 1986, in other words between when M.B. turned 13 and when he turned 18, J.B. committed an act of gross indecency contrary to s. 157 of the Criminal Code.

[73] The third is that between 4 January, 1983 and 21 November 1986 he committed sexual assault contrary to s. 264.1 of the Criminal Code. The first date

is when the section came into force and the second, once again is when M.B. turned 18.

[74] The Criminal Code provisions at that time have to be applied. The defence of consent has to be considered as well, based on the law of consent that was then in force.

[75] A conviction of indecent assault under s. 156, from November 1981 to January 1983, would require that the Crown prove beyond a reasonable doubt a number of essential elements. The section read,

> Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years.

[76] Each person must be male. There must be an assault proven. There must be the intent to commit buggery or the assault must be "indecent". J.B. touched M.B. for his own sexual gratification between the dates in the charge on the indictment.

[77] The issue of consent was dealt with under s. 140 of the criminal Code at the time. That section provided that where an accused was charged with an offence under s. 156, in respect of a person under the age of 14, the fact that the person consented was not a defence. The Crown has proven beyond a reasonable doubt that physical touching took place during the incidents that took place when M.B. was 13 ½ and had not yet turned 14. That touching was of a 13 year old boy by an adult male. It was very clearly sexual, very clearly indecent and M.B. as an adolescent boy under the age of 14 did not have the capacity to consent to it.

[78] I find J.B. guilty of that charge.

[79] The second charge is of gross indecency contrary to s. 157. That section applied through the entire time period to which the trial related. It required the Crown to prove that J.B. committed an act of gross indecency with another person. Section 158 provided that the section did not apply to consensual acts between husband and wife and acts between two persons, each of whom was over 21 years old.

[80] The issue of consent could be used to determine whether the act that was committed was an act of gross indecency. The consent of the complainant, along with the complaint's age were relevant considerations. [3] What a 20 year old consenting couple might do at the time might be largely up to them. What an adult might do to or with a teenager would be another.

[81] The definition of gross indecency was not set out in the Criminal Code but was to be found in the case law. It was described as "a very marked departure from the decent conduct expected of an average Canadian in the circumstances."[4] Standards of decency change. That is particularly true in matters of sexual behaviour. Behaviours that were considered by many to be scandalous or immoral in the 1980's are common place in 2015. Public displays of affection by same sex couples don't draw a second look from anyone but would have be offensive to some 30 years ago. Yet, at the same time, sexist language that is offensive today was more or less commonplace 30 years ago.

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[3] *R. v. St. Pierre* (1974) 17 C.C.C. (2d) 489, 3 O.R. (2d) 642

[4] Ibid.

[82] Nova Scotia in the 1980s however was not ancient Greece. Pederasty was not regarded as normal, healthy, pure, experimental or legal. An adult male sitting in a car masturbating with a 14 year old adolescent boy would not be regarded today as reflecting a healthy erotic expression. It was not considered to have been anything other than grossly indecent in the 1980's. Having regard to the circumstances here, where the young person was plied with beer and cigarettes by a person who was his mother's boyfriend, someone to whom he should have been able to look for some kind of adult guidance or support, and where the sexual activity was more or less unrelenting over years, there is no question that it was grossly indecent now and grossly indecent then.

[83] J.B. is guilty of having committed gross indecency. That would be the case even without the physical touching that I have found took place. Sitting in a car masturbating with the 14 year old child of his girlfriend, after giving the boy beer and cigarettes, is and was an act of gross indecency.

[84] The third charge is of sexual assault contrary to section 246.1 between 1983 and 1986 or during the time when M.B. had just turned 14 years old until he turned 18. Sexual assault was as it is defined now. The age of consent at that time was different. Today a young person cannot consent to sexual activity of any kind with an adult until he or she is 16 years old. Then, consent could be given at 14.

[85] Furthermore, at that time there was a differently worded limitation with respect to consent to an authority figure. Today there is no consent if it is purported to have been induced by the abuse of a position of trust, power or authority. In this case, consent could not have been given under the current law until M.B. was 16. To the extent it was given, it was induced by the abuse of the position of trust.

[86] As the law existed at the time however, consent was vitiated by the application of force, threats or force, fraud or the "exercise of authority". J.B. did not exercise his authority over M.B. He groomed him, cajoled him, and abused his position of trust, but he did not exercise authority over him.

[87] M.B.'s willingness to go along was a function of his age. That's precisely why the law no longer permits adults to take advantage of young people in that way. He was taken advantage of at a point in his life when he was vulnerable, as an adolescent boy. It was however, consent, as that concept was understood at the time. He understood what he was doing, to the extent that a 14 year old could really appreciate the full consequences. He did know that what they were doing was sexual in nature. He was bribed with alcohol and cigarettes but that would not vitiate consent.

[88] He didn't consent to every incident of inappropriate sexual touching. M.B. gave evidence of one occasion when he was 15 when physical force was used to force him to perform fellatio on J.B. He did not consent to that activity and find that the Crown has proven the elements of that offence beyond a reasonable doubt.

Charter Motion

[89] That doesn't end the matter. The important issue of the Charter motion remains.

[90] Since *R. v. Stinchcome*[5] there has been a clear obligation on the part of the Crown in a criminal prosecution to disclose all relevant information in its

[5] [1991] 3 S.C.R. 326

possession. It doesn't matter if that information is incriminating or exculpatory or whether the Crown intends to rely on it or not. The logical extension of that obligation is that the Crown is also obliged to preserve evidence that is relevant. Of course it can't avoid disclosure by destroying the evidence. It would be a hollow right if that were that case. But even beyond that it has a positive obligation to preserve relevant evidence. [6]

[91] The Crown can only produce what is in its possession or control. If evidence is missing however the Crown has an obligation to explain its absence and account for it in some way. That obligation to offer an explanation arises from the duty of the Crown and the police to preserve the fruits of the investigation. The "unfortunate fact"[7] is that despite the best efforts of the police, the frailties of human nature are such that occasionally evidence will be lost. The issue then is whether the loss was a result of "unacceptable negligence".

[92] Unacceptable negligence is an interest turn of phrase. The familiar legal term gross negligence is not used. But, it would appear as though basic negligence, falling below the reasonable standard of a police force, will not be sufficient either. In *R. v. Chaplin*, the court provided some explanation. The first consideration is whether the Crown or the police took reasonable steps to preserve the evidence for disclosure. The relevance that the information was seen as having at the time has to be taken into account. Obviously, the police are not required to preserve every piece of information that comes into their hands in every investigation that they do, on the off chance that it might at some future time be relevant to that matter or to

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[6] *R. v. Egger* [1993] 2 S.C.R. 451

[7] *R. v. Chaplin* [1995] 1 S.C.R. 727, para. 20

something else. Even if the information is relevant the conduct of the police has to be assessed on the standard of reasonableness. As the relevance of the evidence increases, so does the degree of care that is expected of the police with regard to its preservation. Unacceptable negligence involves a contextual sliding scale. If the actions of the police violate the fundamental principles that underlie the community's sense of decency and fair play, the conduct will amount to an abuse of process.

[93] Even if there is no finding of negligence an abuse of process can be found when the loss of evidence was so prejudicial to the accused person that his or her right to full answer and defence has been fundamentally impaired. That has been described by the Supreme Court of Canada as an extraordinary situation. But, even if the police actions are entirely reasonable a person should not be deprived of the right to a fundamentally fair trial because evidence has been lost or destroyed.

[94] There are a number of factors that go into determining the degree of prejudice to the accused person's right to make full answer and defense. The court in assessing those factors has to consider not just what's missing but what evidence is actually there. Where the missing information is a statement the relevant factors could include, whether a missing video-taped statement has been transcribed verbatim or otherwise, whether the officer who took the statement or made the recording is available, whether the complainant made other statements that could be used to assess credibility, whether the complainant at the time of trial has an independent recollection of the events, and whether there are discrepancies in the evidence at trial and the complainant's other statements.

[95] The possibility of discrepancies which tend to support or accentuate inconsistencies falls "far short" of establishing a serous impairment.[8] There is a potential that in any two statements there will be discrepancies in details that might assist the defence in establishing a lack of credibility or reliability in the testimony. That isn't enough. If it were, every lost statement would justify a stay.

[96] The fact that lost evidence could have provided additional information relevant to the defense was not enough to justify a stay in *R. v. Scott*[9]. The court has to assess the impact of the lost evidence in the context of all of the evidence and in the context of the position taken by the defence. Actual prejudice occurs when the accused person in unable to put forward his or her defense due to the lost evidence not merely that putting forward the defense is made more difficult.

[97] What happened here is unfortunate. It isn't unacceptable negligence and it doesn't reach a standard by which a stay should be granted to preserve the integrity of the system. Accused people have a right to fair trial not to a perfect one. The loss of material did not deprive J.B. of his right to a fundamentally fair trial.

[98] There was no evidence whatsoever here of intentional destruction of evidence to thwart disclosure. There wasn't any evidence of a cavalier approach to the retention of evidence.

[99] M.B. made his complaint in 1987. That was the initial date on his file. It was transferred to a 1988 file. That was the date that would govern what would happen to the file for retention purposes. The 1987 -1988 file was reactivated when

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[8] *R. v. La* [1997] 2 S.C.R. 680 para.33

[9] [2002] O.J. No. 2180 Para 4-5

M.B. came forward again in 1997. The 1997 interview was indexed based on the 1988 file date. A new file is not opened each time new evidence is found about an existing complaint.

[100] That action was not negligent. It followed the established police practise at the time and from a practical point of view it is difficult to imagine how files could be organized based on some kind of rolling system by which their retention periods would change with each new piece of information that is placed in them. Would each phone call to a witness push the retention date forward? Presumably not.

[101] The file was kept in secure storage within a locker at the detachment. There was a system in place for tracking materials and keeping them secure. There was nothing shoddy about the process itself.

[102] Human error intervened. The file was purged in February 2000. It should have been retained until 2008, 20 years after the file was opened. That meant that the video statement taken only three years before but pertaining to a 12 or 13 year old file was placed in the video-box. It wasn't destroyed but was placed in a box containing other videos. There was no real reason at that point to destroy it. It stayed there until at least 2002, and after that no one seems to know what became of it.

[103] According to the RCMP document retention policies at the time the 1988 file should have been kept until 2008. In effect that means that the file could have been destroyed three years before the complaint was subject to investigation once again in 2011. Purging the file in 2000 was an error.

[104] How serious that error was depends on the circumstances. The 1987-1988 file notes were retained for 12 years. They were not lost immediately. There were processes in place for tracking file material. The 1997 tape was of considerable importance and was known to be of significance at the time. It would be of value if the matter were to proceed in the future. It was however not clearly exculpatory evidence that needed to be preserved to protect an innocent person. If M.B. wanted to reactivate his complaint he could give another statement, which he did. In fact, as of 1997 M.B. had given a written statement saying that he didn't want to proceed with the case. There was evidence that he had been blackmailing J.B. and it was assumed that the file was closed. It would have remained that way had M.B.'s name not come up in the context of another investigation involving J.B.

[105] As the Crown noted, this was not a case of a file just being thrown under someone desk and lost. What happened here was an error but does not amount to unacceptable negligence.

[106] The impact on the ability to mount a defence was not such that it would amount to an abuse of process. It is not clear what the 1987 notes contained. They have been destroyed and the only evidence is what M.B. said about them. The 1997 video-tape has been lost or destroyed. There were notes of the interview made by then Cst. Head. Those notes were not a verbatim transcript and as noted it took only about 10 minutes to read in the summary of a 40 minute long interview. Details were missed.

[107] M.B. was asked to speculate on how similar his in court statement would have been to the 1997 interview. Unless he had a spectacularly good recollection of the 1997 interview to compare it to his in court testimony he wouldn't really be

capable of making a comparison that made much sense. If he did have such a recollection, one might assume that the two statements would be extremely similar.

[108] The argument on behalf of J.B. was that the defence was deprived of the opportunity to put to M.B. the inconsistencies between his testimony and the 1997 interview and between his testimony and the 1987 interview with Cst. Murray. As to the former, there are notes taken by Cst. Head. Those notes are not complete but they did give counsel and opportunity to cross examine M.B. on the number of incidents he reported, the issue of whether oral sex took place in the first incident, the absence of any reference to the fishing trip incident, and the absence of any reference to the incident with the family dog.

[109] As to the latter, it could be presumed that there might be some inconsistencies. Counsel would not have had a chance to cross examine on those.

[110] It is significant however that while the 1997 tape and the 1987 notes were lost, there was available the notes from 1997, M.B.'s interview given in this investigation in 2011, M.B.'s preliminary inquiry testimony and his evidence at trial. With regard to those various statements that are available, the inconsistencies that could be pointed out have been noted. There just aren't that many significant ones. For purposes of the *voir dire* alone, that is a significant piece of information. M.B. has not given substantially different stories that would suggest that his 1987 statement or the 1997 notes would open up a series of opportunities for the defence.

[111] J.B. was able to put forward his defence. He has not been deprived of the full opportunity to do that.

[112] The Charter motion is denied.

[113] The guilty finding will enter on all counts in the indictment. Counsel will address the application of the *Kienapple* rule at the time of sentencing.

J.