THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. J. H., 2010 NSSC 218

Date: (20100422)
Docket: CR.AM.321782
Registry: Amherst

Between:

Her Majesty the Queen

Appellant

v.

J. H.

Respondent

Restriction on publication: Sexual assault on a Young Person

Editorial Notice

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

Judge: The Honourable Justice Simon J. MacDonald

Heard: Amherst, Nova Scotia on April 22, 2010

Counsel: Mary Ellen Nurse, for the Crown
Jim O'Neil, for the defendant

By the Court:

[1] The crown appeals a finding of not guilty in Provincial Court of J. H. on the 15th day of December, 2009 on the charges that:

> Between the 25th day of July, 2008 and the 10th day August 2008 at, or near *, Nova Scotia did for a sexual purpose invite J.M.T. a person under the age of sixteen years to touch directly with a part of his body to wit his genital region contrary to section 152 of the Criminal Code;
>
> AND FURTHERMORE at the same dates and place did for a sexual purpose touch J.M.T. a person under the age of sixteen years directly with a part of his body, to wit his hand contrary to section 151 of the Criminal Code.

[2] The crown's grounds of appeal are as follows:

> 1) By finding that a gesture (taking the complainants hand and placing it into his pants) did not constitute an invitation to sexually touch the accused and;
>
> 2) By failing to state in her decision the weight she accorded the evidence provided by a defence witness, who was improperly allowed to remain in the court room during the hearing of the appellant's case and;
>
> 3) By speculating with respect to the alleged defence of the accused and by interpreting medical evidence produced by the Respondent without supporting expert opinion and;

4) By misapprehending, or by giving insufficient or any weight to certain parts of the testimony of the appellant's witnesses;

5) By misapprehending, or by giving insufficient or any weight to the complainant's emotional suffering in relation to the respondent's actions;

6) By misapprehending, or by giving insufficient and or any weight to the evidence provided by all of the appellant's witnesses with respect to the date and time of the alleged assault;

7) By failing to provide the Appellant time to properly prepare submissions and respond to pre-trial submissions produced by the Respondent;

8) Such other grounds as may appear upon review of the transcript of the decision by the appellant's legal counsel.

[3] The Crown abandoned the 7th ground of appeal and made no argument on ground 8.

FACTS:

[4] The charges against J.H. allege the incidents occurred between the dates of July 25th, 2008 and August 10th, 2008. Before and during this time J.H. allowed the family of J.M.T. to use a cottage which he owned located at * Cumberland County, Province of Nova Scotia.

[5] J.H. and his wife, D.H. resided at another cottage which J.H. owned, located directly in front of the cottage J.M.T. and their family were using.

[6] J.M.T. was 11 years old. J.H. had known her since birth. J.H. resided in * and would travel to his summer cottage in *, Nova Scotia.

[7] When J.M.T. and her family would occupy the cottage in front of J.H., they would often visit back and forth. She and her sisters would go to J.H.'s cottage to watch T.V. and on occasion eat breakfast. The evidence indicated they would also watch T.V. in J.H's bedroom with him.

[8] In April, 2008 J.H. had bypass surgery in *. He also had treatment for other medical problems dealing with his spine. His left hand was rendered defective.

[9] At the time of the alleged incident J.H. used a recliner in his bedroom with pillows on the seat to help him get up from it. The evidence showed he sometimes required help from his wife to pull him up from the recliner. The evidence revealed that sitting on pillows also helped him to get up without any assistance.

[10] The alleged incident occurred while J.H. and J.M.T. were watching T.V. J.M.T. was seated on the foot of the bed. J.M.T. said J.H. suddenly got up from his recliner and while standing in front of her grabbed her hand and put it down his spandex shorts which were held up by an elastic waist band. She further stated at the same time he made a squeezing motion with his legs.

[11] J.M.T. said she immediately pulled away and walked out of the cottage and ran over to her family's cottage on the property.

[12] J.M.T. did not tell her parents about the incident. However, approximately two weeks after she claimed the incident happened, she said she told her friend T.S.P. that something had happened when she was with J.H. and J.H. was perverted. She made T.S.P. promise not to tell anybody.

[13] The Crown argued during the trial that J.H., by grabbing J.M.T.'s hand and putting it down his pants was inviting J.M.T. to touch his body for a sexual purpose and further, that he did touch her body for a sexual purpose.

[14] J.H. denied the events ever happened as described by J.M.T. He further argued he was not physically able to get up as quickly as suggested by J.M.T. because of his medical problems especially as they affected his ability to get out of the recliner.

[15] The Appellant is asking the court to set aside the dismissal of count #1 and the acquittal from count #2 and order a new trial on both counts in this matter.

THE LAW:

[16] Section 151 of the Criminal Code states as follows:

> Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> > (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

[17] Section 152 of the Criminal Code provides as follows:

> Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of the person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,
>
> > (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

[18] The Crown proceeded by way of summary conviction on both charges.

[19] The trial was heard by Judge Carole Beaton. The appellant urges the court to find the verdict as rendered by the trial judge was unreasonable or unsupported by the evidence. She also argued in her appeal there was insufficiency of reasons stated by the trial judge. She further argued the trial judge applied the reasoning set forth in **R. v. W.D.** [1991] [1] S.C.R. 742 incorrectly.

[20] The standard of review of a summary conviction appeal court is that established for appellate courts by the Supreme Court of Canada in **R. v. Yebes,** [1987] 2 S.C.R. 168 (S.C.C.), where Mr. Justice MacIntyre dealt with the issue of whether a conviction may be set aside on the ground it is unreasonable or cannot be supported by the evidence. He states at p. 186:

> ...The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence..

The test in determining whether a verdict is unreasonable is stated in **R. v. Matthews** 2008 NSCA. 34:

> 34. [13] On an appeal where it is alleged that the verdict is unreasonable, our role is to determine whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge and whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. See: the analysis of **R. v. Beaudry,** [2007] 1 S.C.R. 190 in **R. v. Abourached,** 2007 NSCA 109, paras, 24-29.

[21] The Appellant Counsel, Ms. Nurse argued the action of the accused in taking the complainant's hand and putting it down his pants in his private area of his body constitutes proof of a violation of s.152 of the Criminal Code. Ms. Nurse argued it was the taking of the complainant's hand as he did, that violated the provisions of s.152 of the Criminal Code.

[22] Section 152 was designed to prevent the sexual exploitation of and the interference of young children and it covers not only the invitation, counselling and inciting of a person to touch someone but the wording is so broad as to cover not

only actual touching but also indirect touching See: C.R.V. Fong [1994] C.C.C. (3d) (171) Alta.CA.

[23] In the context of Section 152 it is contemplated the child will be the actual or the potential touchor. It would cover a situation where the accused could not only be the person who has the physical contact with the child but as well, the situation where there has been no touching but merely a suggestion or invitation for such contact. This must be done for a sexual purpose.

[24] The essence of the offence under s.152 is inviting, counselling, or inciting a young person to have sexual contact with either the accused or a third party. In this case there must be some positive act, invitation, counselling and/or inciting of J.M.T. on the part of J.H. to cause J.M.T. to engage in sexual activity.

[25] On page 6 of her decision, Judge Carol Beaton stated:

> "I did not hear any evidence whatsoever of any manner or type of communication between J.H. and the alleged victim that could in any way, in my view, be characterized as any kind of invitation, or a counseling or an inciting of the alleged victim. The evidence of the complainant herself with respect to any verbalization between her and the accused, was that J.H. did not say anything, or invited, counseled or incited in any way, or caused young J.M.T. to receive an invitation, incitement or counseling to do anything with a part of her body, with a

> part of his body, or with any object, much less that it might be for a sexual purpose."

[26] **R. v. Sears** (1990)(50) C.C.C. (3d) 62 (MAN.) C.A. is authority for the principle that the offence is made out when the invitation, counselling or inciting occurs, not when the touching occurs, if at all. The action of J.H. in grabbing the hand of J.M.T. and putting it down his spandex shorts would be part of the actus reus for an offence under s.151 of the Criminal Code.

[27] A review of the transcript of the proceedings confirms to me the trial judge's conclusion there were no words of invitation or counselling, nor for that matter, any form of actions that would fall within the perview s.152. Thus, her finding of a not guilty is confirmed and I would dismiss the appeal on Count #1.

[28] The trial judge did not stop there in her ruling on Count #1 but went further to say that if her finding was incorrect then her remarks with respect to the burden of proof and analysis on count #2 would apply equally to Count #1. Thus, her finding on proof beyond a reasonable doubt and the application of **R. v. W. D.** (Supra) would be applicable to both Count #1 and Count #2.

GROUNDS TWO, THREE, FOUR, FIVE AND SIX

[29] In these Grounds of Appeal the appellant argues the trial judge failed to draw her mind to certain facts presented by the crown during the trial. This applied to both counts.

[30] Crown counsel agreed at the hearing, her arguments in this regard deal with the sufficiency of reasons of the trial judge in rendering her verdict. She also argued Judge Beaton applied the test in **R. v. W.D.** (supra) incorrectly and that she failed to properly assess and weigh all the evidence presented by the crown.

[31] The appellant pointed to various aspects of the witnesses she called and parts of the evidence she called to show inconsistencies or omissions in the decision of the trial judge.

[32] It is clear from the trial transcript and arguments on appeal one of the main, if not the main issue was credibility.

[33] The trial judge stated at paras. 10 and 11 in her decision about the weighing of evidence and credibility as follows:

> 10. "The court's task is to weigh all of the evidence, and following the complete weighing and the complete exercise of analysis, then the court must ask whether the crown has proved the alleged offence beyond a reasonable doubt, and that is different than a search for the truth.
>
> 11. In this particular case, the weighing of the evidence which is before me, both through the crown witnesses and the defence witnesses, does require that the court make an assessment of credibility. And in that respect, the framework for analysis set out in **R. v. W.(D.)** [1991] 1 S.C.R. 742, by the Supreme Court of Canada does come into play. I'll talk more about the **W.D.** framework in a moment, but I am mindful of the caution of Justice Cromwell, as he then was, of the Nova Scotia Court of Appeal, in **R. v. Mah** 2002 NSCA 99, who reminded trial judges that the exercise is not simply limited to the **W.D.** analysis. The exercise means that an assessment of credibility, including any analysis conducted under **R. v. W.(D.)** is only part of the broader exercise of the weighing of <u>all</u> of the evidence, which then allows the court to come to a determination on the question of the burden of proof that is on the crown".

[34] At paragraph 14 the trial judge stated:

> 14. "I know counsel are familiar with the test in **W.(D.)** (Supra). If I believe the evidence of the accused, I must acquit. If I do not accept the evidence of the accused, but I am left in doubt by it, I must acquit. Finally, I have to ask myself, if I do not accept the evidence of the accused, then on the basis of the whole of the evidence which I do accept, whether a conviction can enter, that is whether the crown has proved the elements of the offence to the standard of proof beyond a reasonable doubt. If course I'm paraphrasing, but that's essentially the three part test."

[34] I am satisfied she properly followed **R. v. W.D.** (Supra) and concluded as follows in paragraph 38 of her decision:

> 38. "So when I look at all the evidence, and I look at the evidence of J.H., his evidence is evidence which, in my view, I must accept, and evidence which must be believed, and evidence which raises a reasonable doubt as to, not whether J.H. couldn't commit the offence, but rather that his physical condition at the time leaves a very large question as to whether that man could get up off a chair, take someone's right hand and put it down his pants in a very quick fashion, in the quick fashion that J.M.T. said these events occurred. I don't see that the whole of the evidence before me can permit me to reject, for any reason, any particular aspect of the evidence of J.H."

[35] In **R. v. R.E.M.** [2008] 3 S.C.R. 3 on behalf of the Supreme Court of Canada McLachlin, C.J. discussed the test for sufficient reasons beginning at p.7 in paragraphs 15, 16, 17 and 18.

> 15. This Court in Sheppard and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

> 16. It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see Sheppard, at paras. 46 and 50; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), at p. 524).

17. These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision. The decision of the Ontario Court of Appeal in Morrissey predates the decision of this Court establishing a duty to give reasons in Sheppard. But the description in Morrissey of the object of a trial judge's reasons is apt. Doherty J.A. in Morrissey, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

18. Explaining the "why" and its logical link to the "what" does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. Doherty J.A. in Morrissey, at p. 525, states:

> “A trial judge's reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.” [Emphasis added.]

[36] And at para. 35 she summarized the matter as follows:

35. In summary, the cases confirm:

> (1)Appellate courts are to take a functional, substantive approach to **sufficency reasons**, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of [page 19] the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).
>
> (2)The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
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> (3)In determining whether the local connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
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> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles."

[37] In a heading under Findings of Credibility Chief Justice McLachlin further addressed the sufficiency of reasons in the context of credibility beginning at para. 48:

> 48. "The **sufficiency of reasons** on findings of credibility - the issue in this case – merits specific comment. The Court tackled this issue in **Gagnon**, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella J.J., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge" to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile

> the various versions of events", and warned against appellant courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's
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> 49. While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness' evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
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> 50. What constitutes sufficient reasons on issues of credibility may be deducted from *Dinardo,* where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para.23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* [para.24] makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility...the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para.23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo,* at para. 30.
>
> 51. The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors."

[38] In **R. v. Ginnish** (2009) N.S.J. 24 of the Nova Scotia Court of Appeal referred to and adopted the principles set forth in **R. v. R.E.M.** Supra and L.L. Oland, J.A. stated at para. 30:

30. Insufficiency of reasons is not a free-standing ground of appeal. Rather, whether a judge's reasons were deficient is determined by the functional test set out in *Sheppard* and reiterated in *R.E.M.* as follows:

> "[57] Appellate courts must ask themselves the critical question set out in *Sheppard*: do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record, as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinard*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law."

[39] The trial judge's failure to express in her decision the fact D.H. had been privy to the crown's evidence while she sat in the court room against a court order had to be considered in the context of the record, as a whole. The record reveals defence counsel, before he called any evidence told the court and crown attorney about the situation of D.H. being in the court room erroneously. He also told the court her attendance would go to what weight the trial judge was prepared to put on it given the fact the D.H. was in the court room.

[40] In his closing remarks Mr. O'Neil again referred to and emphasized the fact of D.H. being in the court room. He told Judge Beaton she should consider this when weighing D.H.'s evidence.

[41] The trial judge, after hearing arguments broke for a period of time, prepared her decision, came in and issued an oral decision from the bench. Her decision given a short time after the closing addresses, as an experienced trial judge, I conclude she would have been aware of that fact in arriving at her decision.

[42] Although the appellant might wish Judge Beaton discussed the fact D.H. was in the court room during the crown's evidence in her decision, I do not find it constitutes error when one considers the whole of the evidence and her decision.

[43] The appellant also argued that the trial judge failed to weigh or turn her mind to the evidence of D.T., mother of J.M.T. with respect to the abrupt change in attitude towards J.H. near the end of the summer of 1982.

[44] The defence raised the issue in argument before the trial judge as can be seen on pages 132 and 133 of the transcript. The defence argued at page 133, a number

of items which could have caused a personality change, things like boys and insulting them, etc. This was put forward as possible reasons for the trial judge to consider for D.T.'s mother noting a change in D.H.'s attitude.

[45] The appellant argued the trial judge failed to turn her mind and/or misapprehended evidence of all the witnesses with respect to the timing of the alleged incident. She said Judge Beaton placed too much weight on the minor confusion with respect to the timing of the event presented by J.M.T..

[46] Cst. Bouchere in his evidence clearly indicated the date of the interview was July, 2009 with J.M.T. On page 13 of her decision she referred to J.M.T.'s evidence the incident happened one month prior to the interview. She looked at that evidence as indicating the event would have happened the summer of 2009 according to J.M.T.. She concluded this would be a discrepancy in her earlier evidence when J.M.T. complained it occurred in 2008. The trial judge concluded this would be of some concern to her but that in and of itself was not, in her view, fatal.

[47] She also concluded there were discrepancies in the evidence between J.M.T.'s reply when asked if she told anyone. T.S.P. was the friend at the beach she said she told. T.S.P., in direct and cross-examination said J.M.T. didn't talk to her "about any touching incident or anything like that." Also, on cross examination she said J.M.T. didn't ask her to "promise not to tell anybody" as J.M.T. in evidence said she did.

[48] The appellant argued in the different grounds of appeal the trial judge didn't give proper weight to the evidence of various witnesses. She argued she should have believed crown witnesses over defence witnesses. She further argued there should have been expert evidence called and not just a reliance on the evidence of the accused about his medical condition.

[49] In the matter before me I find the trial judge's reasons provide an overview of the factual situation, they correctly identified the issue as to whether or not the activity occurred as alleged. One of the main issues before the trial judge was credibility in relation to the conflicting evidence of the witnesses. She made a determination on the whole of the evidence, which evidence was acceptable to her. That was her task.

[50] The question is whether the reasons, considering the context of the record and live issues at trial failed to disclose a logical connection between the evidence and the verdict sufficient to permit meaningful appeal.

[51] She looked at the contradictions in the crown's evidence, the evidence of the accused and on the whole of the evidence she found there was not sufficient evidence to overcome the burden of proof beyond a reasonable doubt. When the record is considered as a whole the basis for the verdict is evident.

[52] As I read the transcript again, in light of the arguments by the appellant and respondent counsel, I find the appellant has not identified any essential findings in the decision made by the Judge Beaton which are demonstrably incompatible with evidence that was neither contradicted by other evidence nor rejected by the trial judge.

[53] The appellant has not persuaded me the verdict of not guilty is not one that a properly instructed jury, acting judicially, could reasonably have rendered. In my view, the verdict the trial judge reached is not an unreasonable one.

[54] For all the above reasons, the appeal is dismissed.