

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. J.M.M., 2011 NSSC 153

Date: 20110419

Docket: Syd. No. 329940

Registry: Sydney

Between:

Her Majesty the Queen

v.

J. M. M.

Restriction on publication: 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 346 or 347,

...

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Editorial Notice

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

Judge: The Honourable Justice Frank Edwards

Heard: April 5 & 7, 2011 at Sydney, Nova Scotia

**Written Release of
Of Oral Decision:** April 19, 2011

Counsel: Diane McGrath, Q.C. for the Crown
Tony Mozvik, for the Defence

By the Court, Orally:

[1] This is my decision in the *Queen v. J. M. M.* who is charged in a five count Indictment. The Accused is charged that he: between the 1st day of April 1989 and the 30th day of April, 1999, at or near D., in the Province of Nova Scotia, did:

Count 1: Commit a sexual assault on J.M contrary to Section 271(1) of the *Criminal Code of Canada*;

Count 2: AND FURTHER did knowingly utter a threat to J.M. to cause death or bodily harm to J.V.M., contrary to Section 264.1(1) of the *Criminal Code of Canada*;

Count 3: AND FURTHER, without lawful authority confine J.M. contrary to Section 279(2) of the *Criminal Code of Canada*;

Count 4: AND FURTHER did assault J.M. contrary to Section 266 of the *Criminal Code of Canada*;

Count 5: AND FURTHER did for a sexual purpose touch J.M., a person under the age of fourteen years with a part of his body, to wit his hands and penis, contrary to Section 151 of the *Criminal Code of Canada*.

[2] ***The Allegation:*** The Complainant J.M. is now 27 years old (D.O.B. April *, 1983). She testified that the Accused committed various sexual acts upon her beginning when she was six and ending on her 16th birthday. The charges in the

Indictment are thus alleged to have occurred between the 1st day of April 1989 and the 30th day of April, 1999.

[3] J.M. says the first incident occurred when the Accused (D.O.B. February *, 1967) was living in an apartment in D.. She says he stuck his penis down her throat (Count #1). That night J.M. says she told her parents that he had stuck his “pink thing” down her throat. J.M.’s father confronted the Accused who denied having done anything. Apparently, the father accepted the denial because the Accused and J.M. continued to have contact.

[4] The next day, J.M. says that the Accused “hit me across the face” and pulled her hair (Count #4). She says he threatened to kill her father if she ever told again (Count #2). The Accused yelled at her and was “kicking me underneath the bed.”

[5] The Accused moved from the apartment to a mobile home in the *, D. on October 1, 1989 (Lease, Ex. #3). If the first incident occurred in the apartment while the Complainant was 6 yrs. old, it could have happened anytime between April *, 1989, her 6th birthday, and October 1, 1989.

[6] The Accused lived in the * from October, 1989 until just before Christmas, 1994 (Deed and the Building Permit, Ex #4 and Ex #6) when he moved into a new mobile home on *, D.. Apparently, the mobile home in * was old and dilapidated in contrast to that on *, which was new.

[7] J.M. says that there were 6 to 10 incidents in the * when she estimated she was between 8 - 10 yrs. old. She said that the Accused would grab the back of her hair and stick his penis in her mouth (Count #1). She says she would throw up after he ejaculated. The Accused would then make her clean it up.

[8] J.M. says one incident occurred in a brown baby barn next to the trailer. She says that he forced her to suck on his penis (Count #1). While that was in progress, J.M. says that the Accused's wife J. M. came outside and the Accused yelled for her to "fly to fuck back in the house." J.M. does not believe J. M. saw what was happening.

[9] J.M. says that when she was between the ages of 6 - 16 yrs. old, the Accused would often touch her breasts and/or her vagina. One incident stands out for her when the family budgie bird was dying. She was sitting at the kitchen table in her

parents' home. The Accused was seated also at the table near her, as was her younger brother, then aged approximately 6 years. Her father was downstairs and her mother had gone to the store. The Accused, she says, touched her breasts and her vagina. While his recollection is slightly different, J. M.'s father's evidence confirms that J.M. and the Accused were in the kitchen with no other adult during part of the budgie bird incident. (He testified that he and his wife had taken the injured budgie bird downstairs). J. M. thinks she was about 12 years old at the time. She says that when her mother returned, J.M. ran outside (Count #5).

[10] On another occasion, not long after the budgie bird incident, J.M. says that she was at home sick. She was lying on the couch under a blanket. Her father was downstairs and her mother was in the kitchen. She says the Accused came in and sat on the couch and put his hand under the blanket. J.M. went to say something and the Accused squeezed her breast "really hard" outside her clothing (Count #5).

[11] J.M. says the Accused had sexual intercourse with her on two occasions. On the first occasion, she believes she would have been 13 years old. On the second occasion she thinks she was 14 or 15 years old. That would date the first occasion at approximately 1996 and the second in 1997 or 1998. The problem is that she

alleges that both rapes occurred in the * when, by that time, the Accused resided in the * Trailer. I will say more about that later.

[12] J.M. says that on the first occasion (the first rape) she just remembers going into the bedroom - maybe to see the cockatoos which were kept in a cage there. She described the bed as having a headboard with a ½ moon design and also a footboard. J.M. says that the Accused tied her hands to the headboard and her feet to the footboard. “I was kicking and screaming and crying” she says. She says the Accused then got on top of her, stuck his penis in her vagina and ejaculated. Afterward, he threatened her mother and father if she told and untied her. She put her clothes back on and went to her grandmother’s (Count #1).

[13] On the second occasion, J.M. says the Accused held her down (did not tie her on the second occasion) - her body was on the bed and her legs on the floor. He ejaculated and then let her go. She got dressed and went to her grandmothers. She did not tell anyone (Count #1 and Count #3 - see comment p. 16, para.34).

[14] Finally, on her 16th birthday, J.M. was at her grandmother’s. The Accused met her in the porch and “grabbed my breasts really hard.” After that, J.M.

avoided being alone with the Accused and there were no further incidents (Count #5).

[15] J.M. says she did not tell an adult until she was 25 or 26 years of age. At that time she claims that she told her aunt, the Accused's sister, M.A.D. (M.A.D., who testified for the Defence, denied this disclosure). The matter came to the attention of the police after J.M. disclosed to her dad's girlfriend's daughter. When the father heard he went to police.

[16] ***The Defence Evidence:*** The Defence called M.A.D. (sister of both the Complainant's father and the Accused). As noted, M.A.D. contradicted the Complainant's evidence that she had disclosed to her Aunt M.A.D.. M.A.D. also testified that the Accused did not own the bed with the headboard described by J.M. In fact, M.A.D. stated that J.M.'s father owned such a bed. (J. V. M., the Complainant's father denied that he owned such a bed). She also gave evidence about the construction of the Accused's bed (Ex #7 photo) which construction predated the alleged sexual assaults. That bed has no headboard or footboard and rests on the floor with no way to get under that bed without actually lifting it up.

[17] M. D., J. B. and K. M. gave similar evidence relating to the construction of the Accused's bed, each saying the construction date was in the late 80's or early 90's. Robert B. gave evidence relating to a picture of a white baby barn (Ex. #7) taken by him in the late 80's or early 90's. The baby barn was the one located outside the * trailer (J.M. had said it was brown).

[18] The last Defence witness was J. M., wife of the Accused. She gave evidence regarding the dates and locations of the residences she and the Accused occupied during 25 years of marriage. She also testified that the doorknobs to her bathroom had no peephole (contrary to what J.M. had said). Her most significant evidence was that the Accused would never have had a single occasion to be alone in their residence with J.M. She testified that not once in 25 years (even to go for groceries) did she ever leave the family home unless the Accused accompanied her.

[19] **Issue:** Whether Crown has proven each of the charges beyond a reasonable doubt.

[20] **Analysis:** At the outset I want to emphasize an observation I made when we adjourned on Tuesday: allegations of so-called "historical" sexual assaults are

among the most difficult cases a judge or a jury is called upon to decide. That does not mean that such cases are incapable of being proven beyond a reasonable doubt. It does mean that careful analysis is required.

[21] In this case, a 27 year old is testifying about what she says occurred when she was between the ages of six and sixteen. The passage of time invariably has some impact upon the accuracy of one's memory. Peripheral details may become vague, or forgotten, or inaccurately recalled. But one can usually recall the extraordinary or the traumatic.

[22] When an adult is testifying about what occurred when she was a child, there is an additional difficulty. The impression made on what is now an adult memory, was made initially upon the mind of a child - in this case, a child as young as six years old. That fact has to be kept in mind when assessing the evidence of such a witness.

[23] An adult witness testifying about events that occurred while she was an adult can be expected to be able to recall a certain amount of peripheral detail. Such a witness could be expected to be able to recall, for example, whether certain events

occurred in a new trailer or an old trailer. An adult witness will normally recall the color of the room, the floor covering, the number of windows, if any, or other detail relating to a room where certain events are alleged to have occurred. Even an adult, however, may often be unable to recall, or recall inaccurately, such detail when overwhelmed by the psychological or physical trauma of the situation.

[24] A child, on the other hand, may not differentiate between a new trailer and an old trailer. Of course, I am referring here to the * trailer, which was the old trailer, and the * trailer, which was the new trailer. A child may not have taken note of the color of the paint on the walls or the type of floor covering, or the location of windows. An adult, with any experience in home decoration, is more likely to note such features.

[25] These are some of the considerations I have to keep in mind when I assess the evidence of J.M. Her memory, though that of an adult, is recalling events she says occurred years ago when she was a child.

[26] I therefore attach little significance to J.M.'s evidence that some events occurred in the * trailer when clearly, if they did occur, they occurred in the *

trailer. Indeed, some of the events she places in the * trailer could have occurred in her own home if only she and the Accused were present. The passage of time and the impressions of a child may have clouded the exact location of the events while the events themselves may have made an indelible impression. That probably explains why she placed the first incident in the Accused's apartment while, at the Preliminary Inquiry, she testified that it occurred in her home. (Prelim. p.4/17).

[27] J.M. testified at the Preliminary (p. 43) that the Accused had allowed her to see his wife naked as she got out of the shower. She said that the lock had a peephole in it. Defence evidence suggests that the lock/knob mechanism for their bathroom never had a peephole. I find this evidence unhelpful in assessing J.M.s credibility. Maybe there was a peephole at the time (though J. M. insists otherwise) - or the peephole was in the apartment bathroom and not in either of the trailers. J.M. is convincing on this point and describes the peephole in some detail. There is no advantage for her in making it up.

[28] Similarly, at the preliminary, she testified that she could not remember whether the Accused had any scars on his body. Exhibit #7, photo #6 shows that the Accused does in fact have a vertical scar from his sternum to his navel. Now

she says she knows of the scar. But, more importantly, at the time she says the Accused did not undress. At the time she would not have had the opportunity to note the scar.

[29] I also find it insignificant that a six year old, or an 8 - 10 year old, or even, in the circumstances described here, a 14 - 15 year old, would be unable to say whether or not the Accused was circumcised. The best opportunity to make that observation would have been when J.M. was forced to perform oral sex on the Accused. I highly doubt whether a person 10 years old or younger would notice whether or not the penis was circumcised.

[30] I want to digress briefly to deal with the evidence of J. M. (the Accused's wife). As the Crown argued, her insistence that she never once in twenty-five years left the home without the Accused is incredible. It demonstrates the extent to which she was prepared to go to try and convince the Court that the Accused would have had no opportunity to be alone with J.M.. I do not believe any of her evidence - she obviously will say anything to protect her husband. I have no doubt but that she is afraid of him and is totally under his control.

[31] I am satisfied that at least some of the incidents occurred while J. M. was not in the home, or as noted, some occurred in J.M.'s parents' home. I am also satisfied that some of the incidents occurred while J. M. was in the home. She was either unaware of what was happening (which is almost inconceivable), or was wilfully blind to what was happening.

[32] I therefore believe J.M. when she says, for example, that she vomited and the Accused made her clean it up with a facecloth. I have no doubt that the Accused could be entirely confident that his wife would not make an issue of any lingering evidence.

[33] J.M. was closely questioned about why, when she was beaten after the first incident, she did not show her parents the marks. No doubt she was terrified to tell her parents anything from then on. As well, there is no evidence that the slap in the face made a mark. J.M. said as well that she was "kicked under the bed". I am satisfied that that could have occurred while the Accused's bed was still on a metal frame (that was the situation before he built the bed shown in Ex #7).

[34] Defence Counsel insisted that J.M.'s description of the bed is crucial to her version of events, that is the bed with the headboard and footboard. That overstates the evidence. Arguably, the exact bed or the bed with the headboard and the footboard is crucial to J.M.'s account of having her hands and feet tied to the headboard and footboard during what she described as the first rape. The possibility exists that she was describing an incident that occurred in a different bedroom or at a different location.

[35] If that were the only incident, I would have a reasonable doubt. I am mindful also that she did not mention her legs being tied either in her police statement or at the Preliminary Inquiry. She said so for the first time during her direct testimony in this trial. If he had been charged with that one incident, (not that I disbelieve her on it, but that's not the test), I would have a reasonable doubt and the Accused would get the benefit. But that is not the only incident. Just because I may have a reasonable doubt about one aspect of the Complainant's evidence, it does not follow that her evidence falls like a house of cards. Whether the bed had a headboard or footboard is irrelevant to all the other incidents she described.

[36] Nor does the evidence of M.A.D. cause me any difficulty. I have no difficulty accepting the evidence of J.M. over that of M.A.D. M.A.D. was clearly doing what she could to protect her brother, the Accused. It is not plausible that J.M. would have said she disclosed to M.A.D. if she had not.

[37] Nor am I bothered by the fact that, as an adult, J.M. moved to an apartment near the Accused's home. By that time she had no need to fear him. She still had not disclosed, and she needed a place to live. Further, Defence Counsel, in his submission, made reference to his perception that the evidence of the Complainant seemed to have been affected by medication, which she had acknowledged taking. She did acknowledge that she took an Adivan before she came to Court to calm her down. She also acknowledged that she has suffered from depression and has taken Prozac for that reason. Unlike Defence Counsel, I did not have the impression that the accuracy of her evidence was affected by the taking of those medications.

[38] In short, I am satisfied that J.M. is a truthful witness. On the whole of the evidence, I am satisfied that the Crown has proven its case beyond a reasonable doubt.

[39] When I gave my oral decision, I found the Accused guilty on all five counts in the Indictment. The only evidence supporting Count #3 (unlawful confinement) is J.M.'s statement that the Accused held her down while he committed, what she called the second rape (paragraph 12 above). Holding her down is part of the sexual assault; it does not constitute a separate offence when there is no temporal separation between the confinement and the sexual act. I am therefore entering a finding of not guilty on Count #3.

[40] Count #5 alleges touching for a sexual purpose with his "hands and penis". The evidence supporting this charge is outlined above in paragraph 8, 9 and 13. In each instance, the touching is with the hands only. I am therefore amending Count #5 to conform with the evidence; I am deleting the words "and penis" from Count #5. The incidents of forced oral sex described in paragraphs 6 and 7 are sexual assaults and are therefore covered in Count #1.

[41] Finally, Counsel asked for clarification of my findings regarding the "first rape" (paras. 12, 34, 35). As I said, I have a reasonable doubt whether that event

occurred as J.M. described. For sentencing purposes, I will therefore ignore evidence of the alleged “first rape”.

J.

Sydney, Nova Scotia