NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. M.W.C.* ,2002 NSCA 161]

Date: 20021210
Docket: CA No. 181301
Registry: Halifax

(On Appeal and Cross Appeal from the Supreme Court of Nova Scotia)

Between:

Her Majesty The Queen

Appellant

v.

M. W. C.

Respondent

Restriction on publication: **Publishers of this case please take note that s. 486(3) of the *Criminal Code* applies and may require editing of this judgment or its heading before publication.**

Judges: Saunders, Chipman & Oland, JJ.A.

Appeal Heard: December 10, 1002

Written Judgment: December 12, 2002

Held: Appeal against convictions dismissed, leave to appeal sentence granted; appeal against sentence is dismissed; cross-appeal against acquittals is allowed, acquittals set aside, convictions entered and sentences imposed, adding another year to the offender's term of imprisonment, as per oral reasons for judgment of Saunders, J.A., Chipman and Oland, JJ.A. concurring.

Counsel: Mr. James Gumpert, Q.C., for the Appellant
Mr. Robert M. Gregan, for the Respondent, Appellant by Cross-Appeal

Reasons for judgment:

[1] The 60 year old appellant, father of the complainant, K.R.C., elected trial by judge alone on a five count indictment charging him with indecent assault, sexual assault, gross indecency and incest. The sexual molestation was alleged to have taken place over a period spanning approximately thirteen years from the time that K.R.C. was 3-16 years of age.

[2] The trial was held at Amherst before Supreme Court Justice Hilroy Nathanson. During the course of the trial the Crown withdrew the third count which had charged Mr. C. with the sexual assault of K.R.C. between January 1, 1974 and January 4, 1983.

[3] At trial the Crown called four witnesses, K.R.C., her mother and two police officers. The appellant testified in his own defence.

[4] The trial was completed in one day. Mr. C. was acquitted on the four remaining counts as charged, but was convicted of the included offence of attempted gross indecency and also the included offence of attempted sexual intercourse with his daughter.

[5] On July 22, 2002 Mr. C. appeared before Justice Nathanson and was sentenced to two years in penitentiary for attempted gross indecency. He was sentenced to an additional two years for attempted sexual intercourse with his daughter, to be served consecutively.

[6] The Crown appeals to this court from Mr. C.'s acquittals on the substantive charge of indecent assault, sexual assault and sexual intercourse with his daughter.

[7] Mr. C. appeals his convictions for attempted gross indecency and attempted sexual intercourse. He also appeals against the sentences imposed on each offence.

[8] I will deal first with Mr. C.'s appeals against his convictions and against the sentences imposed by the trial judge.

Mr. C.'s Appeals Against His Convictions and Sentences

[9] Mr. C. appeals his convictions for attempted gross indecency between 1974-1983 when K.R.C. was 3-12 years of age; and attempted sexual intercourse between 1982-1987 when K.R.C. was 12-17 years of age.

[10] He argues that the trial judge erred in law by not applying the proper legal test from ***R. v. W(D)*** [1991], 1 S.C.R. 742 when determining whether the essential elements of the offences charged were proven beyond a reasonable doubt in a case where the credibility of the appellant and the complainant were in issue; and for failing to give reasons for accepting the complainant's evidence and rejecting the appellant's evidence.

[11] We are unanimously of the opinion that there is no merit to either ground of appeal.

[12] The appellant contends that the trial judge's reasons are deficient in that they fail to meet the functional needs test as set out in ***R. v. Sheppard***, [2002] S.C.J. No. 30. See, as well, ***R. v. Braich***, [2002] S.C.J. No. 29.

[13] We disagree. It is clear that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. ***R. v. Theriault***, [2002] N.S.J. No. 268. While it may have been preferable for the trial judge to have provided more detailed reasons for accepting K.R.C.'s evidence and rejecting the appellant's, his failure to do so on the evidence in this case does not make his verdict unreasonable or constitute an error of law based on inadequate reasons. His decision makes it clear that he knew what was required of him and he did it without error.

[14] With respect to his assessment of credibility and the burden of proof, it is clear that the trial judge did not misapprehend the never shifting burden upon the Crown. He accepted the evidence of the complainant, did not accept the evidence of the appellant and found the facts alleged by the complainant to have been proven by the Crown beyond a reasonable doubt. We are satisfied that the trial judge looked beyond the "competing versions" offered by the complainant and her father and carefully considered the whole of the evidence from whatever source before convicting the appellant on the charges of attempted gross indecency and attempted sexual intercourse. In our view, his reasoning satisfied the requirements of ***R. v. W(D)***, supra. See, as well, the decision of this court in ***R. v. Mah***, [2002] N.S.J. No. 349.

[15] After considering the entire record, the written and oral submissions of counsel and to the extent necessary having reviewed, analysed and within the limits of appellate disadvantage, weighed the evidence, we are satisfied that the judge's verdicts in convicting the appellant were ones that a reasonable jury, properly instructed and acting judicially could have reached. ***R. v. Yebes***, [1987] 2 S.C.R. 168 and ***R. v. Biniaris***, [2000] S.C.J. No. 16.

[16] For all of these reasons, Mr. C.'s appeals against his convictions for attempted gross indecency and attempted sexual intercourse are dismissed.

[17] We turn now to his appeal against the sentences imposed, two years imprisonment on each offence to be served consecutively.

[18] Mr. C. argues that the total sentence was unreasonable and excessive; that the trial judge applied wrong principles of sentencing; and that he misapprehended the evidence in the pre-sentence report and counsel's submissions.

[19] We are unanimously of the view that there is no merit to any of these grounds of appeal.

[20] A variation in sentence should only be made if the court of appeal is convinced that it is not fit; that is if the sentencing judge applied wrong principles or if the sentence is clearly or manifestly excessive. See, for example, ***R. v. Shropshire*** (1995), 102 C.C.C. (3d) 193 (SCC), following the approach taken by this court in a long line of cases including ***R. v. Pepin*** (1990), 57 C.C.C. (3d) 355 and ***R. v. Muise*** (1994), 94 C.C.C. (3d) 119; ***R. v. C.A.M.*** (1996), 105 C.C.C. (3d) 327 and ***R. v. Proulx***, [2000] 1 S.C.R. 61. The sentences imposed were well within the range for serious offences of this kind.

[21] There were many aggravating factors in this case. The offences involved a father and a daughter and reveal a terrible breach of trust. These crimes were committed on a young, vulnerable and defenceless young person. The offence of attempted incest did not advance to full intercourse only because of the severe pain felt by the complainant as her father tried to penetrate her and the fact that her hollering attracted the attention of her brothers. The offence of attempted gross indecency was only interrupted when the victim gagged and became ill after her father asked her to perform fellatio.

[22] As the victim impact statement discloses these offences have had a devastating impact upon K.R.C.'s life. The appellant has been imprisoned in Ontario for other sexual offences against young children. In the circumstances, one ought not to countenance the slightest suggestion that Mr. C.'s sentence totalling four years in prison was excessive or unfit.

[23] Finally, we are satisfied that the trial judge applied proper sentencing principles and did not err by misapprehending or misapplying the evidence contained in the pre-sentence report or advanced through submissions of counsel.

The Crown's Appeal Against Acquittals

[24] Grounds 3, 4 and 5B of the Crown's notice of appeal have been withdrawn. These grounds pertained to the Crown's initial view that the trial judge had erred in concluding that the Crown had failed to prove the substantive charge of incest beyond a reasonable doubt. The Crown now concedes in paragraph 61 of their factum:

> The complainant's evidence supports the trial judge's conclusion that while there were attempts at intercourse, there was no proof beyond a reasonable doubt that actual penetration occurred.

[25] Consequently, the Crown's appeal before this court is restricted to challenging the acquittals entered on the charges of indecent assault and sexual assault. The essence of the Crown's appeal is that the trial judge erred in dismissing these charges on the basis that no force or threat of force was used by Mr. C. in carrying out his actions. It is said the trial judge erred in supposing that an assault, in law, required that a degree of strength or power be exercised by an accused. We agree with the Crown's submission and are unanimously of the opinion that Mr. C.'s acquittals on these two charges ought to be set aside and convictions entered.

[26] K.R.C. is the natural daughter of M. W. C. and M. C.. She was born on November *, 1970. (* *editorial note- date removed to protect identity*) She is thirty-two years of age. When growing up she and her parents and siblings lived in Amherst. K.R.C.'s parents separated in 1977.

[27] The record before us clearly establishes that from the age of three or four until she was sixteen years of age, K.R.C. was subjected to increasingly intrusive

sexual molestation by the appellant. The acts began with the appellant touching her vaginal area, progressing to penetrating her vagina with his fingers, to having her masturbate his penis to ejaculation, to attempted sexual intercourse and attempted oral sex on him.

[28] The evidence of the complainant's mother and to a certain extent the evidence of the appellant, corroborated the appellant's opportunity to have committed these offences.

[29] During his testimony the appellant denied having committed the offences.

[30] The trial judge accepted the evidence of the complainant, rejected the evidence of the appellant and concluded that he had no doubt the appellant did most of what the Crown alleged that he had done. In acquitting Mr. C. on the charge of indecent assault, the trial judge said this:

> I have no doubt that the acts alleged were indecent. My problem is with the word "assault". An assault is defined in law as the application of force . . . without the consent of that other person, and in the case of indecent assault the assault must have a circumstance of indecency about it. I am not concerned about consent or the lack of consent. Here we have an infant, a child, a daughter of the accused person. There can be no issue of consent in such circumstances. But I would question whether there are any indications of the use of force. I have reviewed the evidence and I can find no proof that force was used. . . . at no time did she testify that he forced her to do something. There is no evidence of the application or use of force. There is no evidence of the threat of force. There is no indication that she feared the use of force. Therefore, I am led to conclude that the Crown has not proved beyond a reasonable doubt that there was an assault. The acts alleged were indecent, but not an assault.

[31] In acquitting Mr. C. on the charge of sexual assault, the trial judge said:

> Once again, an assault requires proof of the use or the threat of use or the fear of use - "apprehension" I suppose would be a more accurate word - of force. I found nothing in the evidence to indicate that any of those were present. . . . in summary, I would say that I have no doubt that the accused did most of the acts alleged, but I find that the acts which he did do, do not amount to his having broken the law . . . In

> light of those comments, I have no choice but to find the accused not guilty . . .

[32] After concluding that the indecent touching, rubbing, masturbation, penetration of the complainant's vagina by her father's fingers and placing of his penis between her legs all occurred without K.R.C.'s consent, the judge proceeded to acquit the appellant of these charges upon the implicit and erroneous premise that because no degree of power or strength was exercised in committing these acts, no "force" was used and therefore an "assault" had not occurred.

[33] In ***R. v. Burden*** (1981), 25 C.R. (3d) 283, 64 C.C.C. (2d) 68, the British Columbia Court of Appeal overturned a decision at trial where the judge had held that in order to constitute an assault there must be a degree of strength or power exerted beyond mere casual touching. ***Burden***, supra, was referred to with approval by the Ontario Court of Appeal in ***R. v. A.Z.***, [200] O.J. No. 4080, where at ¶ 6 the court said:

> The "force" required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. In the context of the definition of assault, "force" does not necessarily connote some minimum level of violence or any animus toward the complainant by the perpetrator: R. v. Burden (1981), 64 C.C.C. (2d) 68 (B.C.C.A.); R. v. Cadden (1989), 49 C.C.C. (3d) 122 (B.C.C.A.). A friendly but unwanted kiss may be an assault.

See also ***R. v. Cuerrier*** (1998), 127 C.C.C. (3d) 1 (S.C.C.) and in particular the remarks of L'Heureux-Dubé. J. in separate concurring reasons at pages 14 and 15.

[34] In our opinion it is clear that the actions of Mr. C. amounted to assault even though there may not have been any degree of strength or power applied. He repeatedly violated her sexual integrity even if, on occasion, their contact was "mere" touching. Accordingly he ought to have been found guilty of both indecent assault and of sexual assault and we substitute a verdict of guilty on each count respectively.

[35] We agree with the Crown's submission that this is an appropriate case for us to exercise our authority under s. 686(4)(b)(ii) of the ***Criminal Code*** and impose an appropriate sentence. Having regard to all the circumstances we sentence Mr. C. to

one year on each offence, concurrent to each other, but consecutive to the aggregate of four years, making a total period of imprisonment of five years.

Disposition

[36] In conclusion we uphold Mr. C.'s convictions for attempted gross indecency and attempted sexual intercourse. While we grant leave to appeal sentence, we dismiss the appeal. We allow the Crown's appeal, set aside Mr. C.'s acquittals on the substantive charge of indecent assault and of sexual assault, enter convictions for both offences and sentence Mr. C. to one year on each offence concurrent to each other, but consecutive to the original four year sentence, resulting in a total period of imprisonment of five years.

Saunders, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.