

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. A.P.L.*, 2024 NSCA 48

Date: 20240424

Docket: CAC 508678

Registry: Halifax

Between:

A.P.L.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge: The Honourable Justice Cindy A. Bourgeois
Appeal Heard: April 3, 2024, in Halifax, Nova Scotia
Subject: Criminal - Historic sexual offences; Sufficiency of reasons
Cases Considered: *R. v. Kienapple*, [1975] 1 S.C.R. 729; *R. v. G.F.*, 2021 SCC 20; *R. v. X.J.*, 2023 NSCA 52; *R. v. Kitch*, 2023 NSCA 33; *R. v. J.M.S.*, 2022 NSCA 71; *R. v. Preston*, 2022 NSCA 66; *R. v. Dinardo*, 2008 SCC 24.
Statute Considered: *Criminal Code of Canada*, R.S.C., 1985, c. C-46

Summary: The appellant was convicted of historic sexual offences against his former step-daughter when she was between the ages of 12 and 16. At trial the Crown adduced an audio recording made covertly by the complainant of a conversation between herself and the appellant. In the conversation, the appellant was heard acknowledging that he had engaged in sexual contact with the complainant, referring to it as “incest”. The Crown also adduced a Facebook message, appearing to be between the complainant and the appellant. In the message

they engaged in a sexually explicit text exchange and, the complainant, at his request, sent the appellant intimate photographs of herself.

The appellant testified and said he had not participated in the Facebook exchange, his counsel arguing it was fabricated by the complainant to assist in false allegations against him.

With respect to the recording, the appellant acknowledged the conversation had occurred, but said he was “playing along” with what the complainant was saying because he did not want to upset her. He denied absolutely the allegations of sexual impropriety.

The trial judge rejected the appellant’s explanation regarding the contents of the recording. He found it to be “tantamount to an admission” of sexual contact between the appellant and the complainant. He also found the Facebook message was not contrived, but rather was a legitimate exchange that had occurred between the complainant and the appellant.

The trial judge noted there had been inconsistencies in the complainant’s evidence regarding the sexual contact between herself and the appellant. In his reasons, he said that most were related to “peripheral matters”. Although he specifically noted some of the inconsistencies, he did not set out all of them, particularly those that were not “peripheral”. However, the trial judge concluded that in light of all of the evidence, the inconsistencies in the complainant’s evidence did not detract from her credibility.

On appeal, the appellant argued the trial judge’s failure to address in further depth the complainant’s inconsistencies made it impossible to assess how he reached his credibility conclusion.

Issue:

Were the trial judge’s reasons insufficient in that they precluded meaningful appellate review?

Result:

Appeal dismissed. A functional and contextual approach to the assessment of the trial judge’s reasons demonstrate why he reached the determinations he did. Specifically, given other key findings made by him particularly in relation to the audio-recorded conversation, his failure to provide an in-depth

analysis of the inconsistencies in the complainant's evidence,
did not render his reasons insufficient.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 11 pages.

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Judges: Bryson, Bourgeois and Derrick, JJ.A.

Appeal Heard: April 3, 2024, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Bryson and Derrick, JJ.A. concurring

Counsel: Zebedee Brown, for the appellant
Glenn Hubbard, for the respondent

Order restricting publication — sexual offences

- 486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim 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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
 - (ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
 - (b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

- (2)** In proceedings in respect of the offences referred to in paragraph (1)
 - (a)** or **(b)**, the presiding judge or justice shall
 - (a)** at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
 - (b)** on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

- (2.1)** Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Reasons for judgment:

[1] After a trial spanning 12 days spread over 11 months, the appellant was convicted of two historic sexual offences under the *Criminal Code*¹- sexual interference contrary to s. 151 and sexual exploitation contrary to s. 153(1)(a). The complainant was the appellant's stepdaughter. The trial judge, Justice Glen G. McDougall, found the sexual abuse commenced when the complainant was 12 years old and continued up to and after she turned 16.

[2] In a lengthy oral decision, later reported as 2021 NSSC 115, the trial judge set out his reasons for conviction. The appellant now appeals to this Court and asks for his convictions to be set aside. In his Further Amended Notice of Appeal, the appellant sets out a single ground of appeal:

1. The learned trial judge's reasons for conviction were inadequate and do not permit meaningful appellate review.

[3] For the reasons set out below, I would dismiss the appeal.

Background

[4] The appellant was charged with four offences:

1. That between September, 2006 and August, 2015 he did unlawfully commit a sexual assault on the complainant contrary to s. 271 of the *Criminal Code*;
2. That between September, 2006 and July, 2010 he did for a sexual purpose touch the complainant, a person under the age of sixteen years, directly with a part of his body, contrary to s. 151 of the *Criminal Code*;
3. That between July 2010, and July, 2012 he did for a sexual purpose touch directly the body of the complainant, a young person, with a part of his body, contrary to s. 153(1)(a) of the *Criminal Code*; and

¹ R.S.C., 1985, c. C-46.

4. That between September, 2006 and August, 2015 being in a position of trust or authority towards the complainant, a person with a physical or mental disability, did without her consent for a sexual purpose counsel her to touch directly or indirectly with a part of her body, his body, contrary to s. 153.1(1)(a) of the *Criminal Code*.

[5] As noted at the outset, the appellant was convicted of Counts 2 and 3. He was found not guilty of Count 4, and Count 1 was stayed on the basis of the *Kienapple*² principle. It is only the trial judge's conclusions of guilt in relation to Counts 2 and 3 that are engaged in this appeal.

[6] At trial, the Crown marshalled its evidence through six witnesses: an expert witness, the complainant, the complainant's mother and three police witnesses. The appellant chose to testify, and was the only defence witness.

[7] It is not necessary to review in detail the evidence adduced at trial. A summary of key aspects will suffice.

[8] At the outset of trial, the expert witness, a medical geneticist, testified the complainant has a genetic condition which, in addition to a number of physical concerns, results in mild to moderate cognitive impairment³. She was diagnosed with this condition in late 2011.

[9] The complainant was 26 at the time of trial. She testified that at the age of 12, the appellant began sexually abusing her. She identified the location of the first assault as being the apartment where she, the appellant, her mother and brother resided. She was asked to describe that encounter. She said it involved the appellant tying her to her mother's bed and then engaging in vaginal intercourse with her. The complainant also testified sexual contact between herself and the appellant continued on a regular basis, at various locations, until she was 21 years of age.

[10] In her direct examination the complainant testified regarding two pieces of evidence introduced by the Crown: a recorded conversation between herself and the appellant, and a sexually explicit Facebook exchange that appeared to be between herself and the appellant.

² *R. v. Kienapple*, [1975] 1 S.C.R. 729.

³ The complainant's mother testified she demonstrated a moderate cognitive impairment – functioning at the level of a 12 to 15 year old.

[11] With respect to the recording, the complainant testified she had covertly recorded a conversation between herself and the appellant discussing their sexual relationship. She said she did this because she felt no one would believe her otherwise. The complainant said the recording was made when she was 16 years of age.

[12] The complainant further testified the Facebook exchange was between herself and the appellant and she had sent him photographs depicting her breasts and vagina as per his request. Based on the content of the messages, the complainant testified the exchange occurred sometime after September 2015.

[13] The complainant was thoroughly cross-examined. The appellant's counsel raised a number of purported inconsistencies between the complainant's trial evidence and other descriptions she had provided in relation to the first incident of sexual abuse. The complainant was challenged regarding her anger and jealousy towards the appellant and his new partner, and it was suggested she was making a false allegation against him. The complainant adamantly maintained her allegations of sexual abuse were true. The complainant was challenged about the timing in bringing her allegations to the police. She acknowledged she had initially made a complaint against the appellant in July 2012, but later went to the police to recant, and had changed her mind on several occasions about pursuing charges against him. She explained she was feeling threatened about bringing charges forward and was afraid of the impact it would have on her family.

[14] The complainant was also challenged about the Facebook message. Counsel suggested she had made up a fake account using the appellant's name and profile picture and had contrived the sexualized messages and sent the photos in order to create false evidence against him. The complainant denied making a false account and said the exchange had occurred between herself and the appellant. The complainant further maintained she had been sexually abused frequently by the appellant and it had continued for years.

[15] The appellant testified on his own behalf. He denied ever engaging in sexual contact with the complainant. He asserted he had not engaged in the Facebook messaging with the complainant, nor did he request or receive explicit photographs from her.

[16] The appellant did acknowledge the recording was a conversation that took place between himself and the complainant. He agreed it contained an apparent acknowledgement of them having engaged in sexual activity together. However, the appellant said there was an innocent explanation for what appeared to be very damning comments and that the recording did not capture the entirety of the conversation.

[17] The appellant explained he had simply played along with the complainant and did not disagree with her when she suggested they had engaged in sex because he did not want to upset her. He recounted an earlier occasion where the complainant had tried to record him, and when he refused to acknowledge they had engaged in a sexual relationship, the complainant became very upset and threw her phone. To avoid upsetting the complainant again, the appellant said he went along with what she was saying, and that perhaps he had “laid it on a bit thick” in the recorded conversation.

[18] The appellant acknowledged the conversation had taken place at the apartment the complainant shared with her mother, and that his purpose for going there was to discuss concerns he had about threats being made against his girlfriend DK.

[19] A more thorough review of the evidence was set out by the trial judge in his reasons. He noted in significant detail the evidence given by each witness in both direct and cross-examination.

[20] The trial judge then set out the legal principles which governed his analysis. The appellant has not taken issue with the trial judge’s identification of the relevant legal principles. The trial judge then turned to an assessment of the complainant’s credibility and that of the appellant. As will be discussed further below, he ultimately found the complainant to be credible and rejected the appellant’s denial.

[21] As noted earlier, the appellant’s sole ground of appeal relates to the sufficiency of the trial judge’s reasons. The appellant says the reasons do not adequately explain why he was found guilty in light of the evidence adduced at trial. Before engaging in my analysis, it will be useful to canvass the legal principles relating to an allegation of insufficiency of reasons.

Legal principles

[22] There is no shortage of decisions from the Supreme Court of Canada articulating the principles relating to assessing the sufficiency of reasons. Those principles were summarized and re-affirmed in *R. v. G.F.*, 2021 SCC 20:

[68] The importance of trial reasons should not be understated. It is through reasoned decisions that judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case . . . However, this Court in *Sheppard*⁴ emphasized that, for the purposes of appellate review, **“the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability”**: para. 42. On appeal, the issue is whether there is reversible error. What is required are reasons that are sufficient in the context of the case for which they were given.

[69] **This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge’s reasons when those reasons are alleged to be insufficient** . . . Appellate courts must not finely parse the trial judge’s reasons in a search for error . . . **Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.** As McLachlin C.J. put it in *R.E.M.*⁵, **“[t]he 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”**: para. 17. And as Charron J. stated in *Dinardo*⁶, **“the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case’s live issues”**: para. 31.

[70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge’s reasons. This is because “bad reasons” are not an independent ground of appeal. **If the trial reasons do not explain the “what” and the “why”, but the answers to those questions are clear in the record, there will be no error:** *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.

(Emphasis added, citations omitted)

[23] As explained in *G.F.*, an appellate court must assess whether the challenged reasons are both factually and legally sufficient:

⁴ *R. v. Sheppard*, 2002 SCC 26.

⁵ *R. v. R.E.M.*, 2008 SCC 51.

⁶ *R. v. Dinardo*, 2008 SCC 24.

[71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. **Even if the trial judge expresses themselves poorly, an appellate court that understands the “what” and the “why” from the record may explain the factual basis of the finding to the aggrieved party:** para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge’s findings: paras. 50 and 52.

...

[74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. **Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them.** This stems from the presumption of correct application — the presumption that “the trial judge understands the basic principles of criminal law at issue in the trial”: *R.E.M.*, at para. 45. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, “[t]rial judges are presumed to know the law with which they work day in and day out”: see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.

[75] Conversely, legal sufficiency may require more where the trial judge is called upon to settle a controversial point of law. In those cases, cursory reasons may obscure potential legal errors and not permit an appellate court to follow the trial judge’s chain of reasoning: *Sheppard*, at para. 40, citing *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27. **While trial judges do not need to provide detailed maps for well-trod paths, more is required when they are called upon to chart new territory. However, if the legal basis of the decision can nonetheless be discerned from the record, in the context of the live issues at trial, then the reasons will be legally sufficient.**

(Emphasis added)

[24] The above principles have been applied consistently by this Court, including recently in *R. v. X.J.*, 2023 NSCA 52; *R. v. Kitch*, 2023 NSCA 33; *R. v. J.M.S.*, 2020 NSCA 71, and *R. v. Preston*, 2022 NSCA 66.

Position of the parties

[25] The appellant’s concerns relating to the trial judge’s reasons were concisely explained in his written submissions as follows:

1. The Appellant was convicted of historical sexual assaults involving his stepdaughter. Over the course of ten days of trial, he built an extensive defence based on the evidence which included numerous relevant examples of inconsistency on the part of the complainant and evidence of a motive to fabricate.
2. In convicting the Appellant, the trial judge made virtually no comment on the issues advanced by the defence. He acknowledged in general terms that there were inconsistencies, but swept them all aside with only a general remark to the effect that some were more important than others and none detracted from the complainant's truthfulness.
3. It cannot be discerned how the trial judge resolved the problematic aspects of the Crown case that were highlighted and relied upon by the Appellant; or even whether he did so. Meaningful review of the trial judge's decision is frustrated, and as such the trial judge's reasons are insufficient.

[26] In his oral submissions, the appellant identified the three "live issues" he advanced at trial, but which the trial judge failed to adequately address:

1. The alleged collusion of the complainant and her mother in bringing false allegations against him;
2. The allegation that the Facebook messages between him and the complainant were fabricated; and
3. His innocent explanation for the contents of the recorded conversation.

[27] The appellant submits that notwithstanding the length of the trial judge's reasons, his analysis of the issues was a mere four pages in length in which he failed to explain how he reached his conclusions and notably his finding of guilt. Relying on *R. v. Dinardo*, 2008 SCC 24, the appellant says this Court cannot now fill those gaps by inserting our own reasons. He points to the following passage:

[32] This Court emphasized in *Sheppard* that no error will be found where the basis for the trial judge's conclusion is "apparent from the record, even without being articulated" (para. 55). If the trial judge's reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record. This exercise is not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge. Where the trial judge's reasoning is not apparent from the reasons

or the record, as in the instant case, the appeal court ought not to substitute its own analysis for that of the trial judge (*Sheppard*, at paras. 52 and 55).

[33] In my view, the majority's reassessment of the complainant's credibility went beyond the approach advocated in *Sheppard* and is inconsistent with the standard of review of credibility findings (*R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131). Rather than asking whether the reasons for conviction were obvious from a review of the record, the majority satisfied itself that the trial judge did not fall into error by engaging in its own analysis of the evidence, including the complainant's evidence about inventing stories. The majority examined the troubling testimony, which Rochon J.A. referred to as [TRANSLATION] "surprising comments" (para. 70), as well as the trial judge's follow-up questions to the complainant at the end of her testimony. The majority held that the trial judge's questions [TRANSLATION] "helped clarify some of the victim's answers that might at first glance seem troubling" (para. 73), and concluded that meaningful appellate review was possible on the record.

[28] The respondent counters by submitting it is clear from a reading of the reasons in their entirety that the trial judge was attuned to the issues being advanced by the defence, and adequately addressed them. The trial judge addressed each of the "live issues" identified by the appellant.

[29] Further, the evidentiary record and the submissions of counsel assist in explaining why the trial judge reached the conclusions he did. The respondent says the significance of the inconsistencies raised by the defence regarding the complainant's testimony were, in the context of this particular matter, lessened by the recorded conversation. The trial judge was clearly aware of inconsistencies, but in light of his finding the recording constituted an admission by the appellant of sexual activity with the complainant, the respondent submits he did not need to address them in a detailed fashion.

[30] The respondent says it is abundantly clear why the appellant was convicted: the trial judge found that in the recorded conversation he had admitted to having had sex with the complainant; the "sexting" between the complainant and the appellant on Facebook had not been fabricated, but had indeed been exchanged between them; the trial judge in light of the entirety of the evidence, believed the complainant; and the trial judge rejected the appellant's denial. In light of these findings, the respondent asserts the trial judge's conclusion of guilt beyond a reasonable doubt was not only well-grounded in the evidentiary record, but also entirely understandable.

Analysis

[31] In short, I agree with the respondent.

[32] The trial judge's reasons demonstrate he was alive to the issues raised by the defence and the challenges being made to the Crown's case. Taking a functional and contextual approach to the trial judge's reasons, it is clear why the appellant was convicted, and why the inconsistencies in the complainant's evidence in the context of this case, were found not to be sufficient to raise a reasonable doubt. This Court does not have to fill in any gaps in the reasoning process.

[33] With respect to the complainant's credibility, the trial judge stated:

[268] Defence counsel was thorough in pointing out the various inconsistencies in [the complainant's] testimony at trial when compared to things she previously said in police statements or at the Preliminary Inquiry. Some of these inconsistencies were more significant than others but most related to peripheral things such as the sequence of events involving the removal of clothing or whether the cords [the complainant] said [the appellant] used when she was sexually assaulted for the first time bound her feet and hands or ankles and wrists. The fact that the witness was not always consistent in her recall of these events does not significantly detract from her overall truthfulness or the reliability of her testimony. Nor does the fact that she waffled on proceeding with the charges on several occasions.

[269] I accept her explanation that she became scared and was concerned about the impact these charges could have on her and her family in general. It is not uncommon for victims of such crimes to back away, given the tremendous pressure they must be under and the potential devastation such allegations can have, not just on them as victims, but also on the person accused of the crime and the other members of the family, where as here, the allegation is made by one member of a family against another.

[34] The appellant complains the trial judge did not delve into the nature of the inconsistencies and argues their significance obligated him to explain why the complainant's credibility remained intact. Although the failure of a trial judge to address significant inconsistencies in a complainant's evidence may give rise to valid concerns regarding the sufficiency of their reasons, context is always critical.

[35] The trial judge could have offered a more in-depth description of the various inconsistencies and a more substantial explanation of why they did not impair the complainant's credibility or raise a reasonable doubt as to the appellant's guilt.

However, in the present circumstances, his failure to do so did not render his reasons insufficient.

[36] In the evidentiary context of this case, the recorded conversation was critical. The appellant acknowledged in his submissions before this Court the content of the conversation was damning. The trial judge reached the same conclusion and explained why in his reasons:

[272] In assessing [the appellant's] credibility, I have considered his entire testimony including his reasons for engaging in the conversation with [the complainant] (the one that was secretly recorded by her on her cell phone). His explanation that he simply wanted to help smooth things over between [the complainant] and her former friend, DK, as laudable as it was, simply put, it lacks credibility. When one listens to the recording (reproduced to the thumb-drive) DK's name is hardly mentioned. And when it is, [the appellant] says things about her that are much more critical than anything [the complainant] said about her.

[273] [The appellant's] further explanation that he took the approach that he did to avoid upsetting [the complainant] to prevent her from becoming angry like he says she was a few days earlier when they were sitting together in his truck, similarly lacks credibility.

[274] When [the complainant] testified that this incident of her getting angry and, as he said, biffing her cell phone against the windshield causing it to bounce off striking her, did not happen. I accept this. I reject [the appellant's] version of this and I further reject the explanations he gave both on direct examination and during cross examination of what he meant when he said what is captured on the covertly recorded conversation. I also reject his suggestion that the recording fails to capture their entire conversation.

[275] What was captured severely undermines his credibility. It is tantamount to an admission of guilt. He does not deny having had sexual relations with his former step-daughter as far back as when she was in Grade Six, she was twelve years old at that time, like he did at trial.

[276] He was the one who said to [the complainant] that if it ever gets out it would likely mean he could no longer come around. He was the one who raised the issue of incest, even though he said during his time on the witness stand, that he could not recall saying it. One just has to listen to the recording to conclude otherwise.

[37] It was entirely open to the trial judge to reach the conclusion he did regarding the import of the recorded conversation. It was also open to the trial judge to conclude as he did the Facebook exchange had not been falsely created by

the complainant, but rather it documented a legitimate series of messages between her and the appellant. That exchange was sexually explicit and included the appellant requesting the complainant to send him photographs of her breasts and vagina.

[38] The above findings cannot be divorced from the trial judge's credibility analysis in relation to the complainant (or the appellant). Simply put, the trial judge had found the appellant had admitted to sexual contact with the complainant when she was a child. The trial judge further determined the sexually explicit Facebook exchange was legitimate. The significance of the inconsistencies in the complainant's evidence was overshadowed by these conclusions.

[39] In this context, it was not necessary for the trial judge to address in any greater degree than he did, why the inconsistencies in the complainant's evidence were not problematic in relation to her credibility.

[40] The trial judge's reasons, read in light of the evidence and submissions at trial, are legally and factually sufficient.

Disposition

[41] For the reasons above, I would dismiss the appeal.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Derrick, J.A.