NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Dow*, 2013 NSCA 111

Date: 20131011
Docket: CAC 414277
Registry: Halifax

Between:

Scott Vincent Dow

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judges:	Saunders, Hamilton and Bryson, JJ.A.
Appeal Heard:	October 1, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal sentence granted, but appeal against sentence dismissed; appeals against conviction dismissed, per reasons for judgment of Bryson, J.A.; Saunders and Hamilton, JJ.A. concurring
Counsel:	Eugene Y. S. Tan, for the appellant Timothy O'Leary, for the respondent

Section 486.4 of the *Criminal Code*

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(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 step-daughter), 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).

Reasons for judgment:

[1] Scott Vincent Dow appeals his convictions for committing an indecent act contrary to s. 173(1)(a) of the *Criminal Code* and for breach of s. 152 of the *Criminal Code* by inviting a young person under the age of 14 to touch him for a sexual purpose.

[2] Mr. Dow seeks leave to appeal and, if granted, appeals his sentence of five months' incarceration followed by two years of probation with ancillary terms and conditions.

[3] The uncontroverted facts are these: on New Year's day of 2010 two young girls were playing hide and seek outside their home. A vehicle stopped a few feet from them. A male driver looked at them and was masturbating. The car left. It returned a few minutes later. On this occasion the driver invited the girls to "touch it". The girls reported what transpired to the mother of one of the girls, who called 9-1-1. She gave the operator a description of the perpetrator and his vehicle – a grey Ford Freestyle.

[4] The police responded promptly and located a grey or silver Ford Freestyle about a block from where the offences occurred. They stopped the vehicle. Mr. Dow was driving it. He was 33 at the time and although there were some discrepancies, he generally matched the age and description provided to the 9-1-1 operator. The police noted that his pants were partially pulled down.

[5] Mr. Dow testified in his own defence, but to no avail. In a lengthy and thoughtful decision, Provincial Court Judge M. Alanna Murphy rejected Mr. Dow's evidence. She accepted the evidence of the young girls. Mr. Dow's evidence left her in no reasonable doubt. On the basis of the evidence that she did accept, she was convinced beyond a reasonable doubt that Mr. Dow was guilty.

[6] Mr. Dow says that the trial judge erred in law by treating allegedly exculpatory evidence as "confirmatory" evidence and in doing so also committed a palpable and overriding error of fact. He argues that the trial judge erred in law and in fact by preferring the recollection of witnesses to the evidence contained in the recorded 9-1-1 telephone call; that she made a palpable and overriding error of

fact with respect to the time between the commission of the offences and when Mr. Dow was taken into custody. He says she erred in her analysis of his credibility regarding his explanation of why he was in the vicinity of the girls' home on the day in question. He also says the sentence was excessive.

[7] In effect, Mr. Dow is arguing that the verdicts were unreasonable and that the sentence was unfit. He says that the trial judge erred in analyzing his evidence and, in particular, erred regarding his explanation of why he was driving around in a residential area on New Year's day. The trial judge correctly cited *R. v. W.(D.)*, [1991] 1 S.C.R. 742 and applied the test that *W.D.* requires. She found his explanation that he was en route to his brother's camp and made a wrong turn, simply unbelievable. Taking all the circumstances together, she rejected his evidence. Her finding of credibility is entitled to deference by this Court: *R. v. G.E.H.*, 2012 NSCA 69 at ¶15 and ¶24.

[8] The argument that the trial judge erred in not considering "exculpatory" evidence is really an argument that discrepancies in the evidence should have been resolved in favour of Mr. Dow. We are invited to re-examine and re-weigh the evidence and come to a different conclusion from the trial judge. That is not our function. In *R. v. Lee*, 2010 A.B.C.A. 1; 2010 S.C.C. 52, the Alberta Court of Appeal made this point:

> [38] The reference to the accused having his arm around the complainant's waist is only one piece of evidence. By indicating that this evidence was "initially troubling", the trial judge was only doing what she was required to do, namely examine the evidence separately and as a whole to see if there is a reasonable doubt on the record. ***The test in a criminal case is not whether the trial judge has any doubt on a first or superficial consideration of the case, or whether particular pieces of evidence are exculpatory. The test is whether the trial judge has a reasonable doubt after consideration of the arguments of counsel, and a careful analysis of all the evidence. It will be a rare criminal trial where all the evidence is entirely in support of the Crown's case***. It is not an error for the trial judge to observe that there are bits of evidence supporting the accused's case, but in concluding after analyzing the whole of the evidence that the exculpatory items of evidence are still not sufficient to raise a reasonable doubt. Indeed, for the trial judge to simply ignore any such evidence would be the real cause for concern.
>
> [Emphasis added]

[9] Mr. Dow also complains that more weight should have been given to the information provided to the 9-1-1 operator. The trial judge clearly took this evidence into account with all the other evidence. She was satisfied that Mr. Dow was the person described by the children on New Year's day 2010. There was ample evidence to support the trial judge's conclusion. She made no palpable and overriding error in doing so.

[10] Then Mr. Dow says that the trial judge made a palpable and overriding error concerning when he was stopped by police. After considering all of the evidence the trial judge concluded that there was a 15 minute gap between the time when the girls were approached and the time when Mr. Dow was detained by police. Mr. Dow says the evidence suggests a half-hour timeframe instead. While there was some discrepancy in the timelines on the evidence, the trial judge was entitled to accept the evidence of one of the constables who placed it at approximately 15 minutes. There was other evidence corroborating this timeline.

[11] Even so it is not clear that this timeline "error" by the trial judge was overriding or material. It does not leave the trial judge's reasoning on "unsteady ground", (*R. v. Sinclair*, 2011 S.C.C. 40 at ¶56).

[12] The fact is the trial judge did not fail to consider material evidence or mistake the substance of any evidence; nor did she fail to give proper effect to the evidence of the children. She simply did not agree with Mr. Dow's view of that evidence. It is not for us to re-visit her assessment and to "cherry pick" bits and pieces of evidence that may be favourable to the accused, but which were clearly weighed and considered by the trial judge in coming to her conclusion. A properly instructed jury, acting judicially, could reasonably have concluded Mr. Dow's guilt was the only rational conclusion to be reached from the whole of the evidence. No palpable and overriding error disturbs that conclusion, (*R. v. Muise*, 2013 NSCA 81 at ¶6; *R. v. Henderson*, 2012 NSCA 53 at ¶18; *R. v. Shea*, 2011 NSCA 107 at ¶35).

[13] The standard of review on sentencing is deferential. Absent an error in principle, a failure to consider a relevant factor, or an overemphasis of the appropriate factors, the Court of Appeal should only intervene to vary a sentence if it is demonstratively unfit (*R. v. M (C.A.)*, [1996] 1 S.C.R. 500 at ¶90; *R. v. E.M.W.* (No. 2), 2011 NSCA 87 at ¶6).

[14] In her decision, the trial judge noted that she had reviewed the pre-sentence report and updated pre-sentence report. She considered that the lack of any criminal record was "not an insignificant mitigating factor". She remarked on the prospects of rehabilitation. She noted the aggravating factor of premeditation. She characterized Mr. Dow's conduct as having a "predatory aspect". She recognized the need for specific and general deterrence which are primary considerations when imposing sentences involving abuse of children, (*E.M.W.* at ¶21). The trial judge appropriately exercised her discretion in sentencing Mr. Dow. It is not for us to interfere.

[15] Leave to appeal sentence should be granted, but the appeal of sentence should be dismissed. Similarly, the appeals against conviction should be dismissed.

Bryson, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.