S.C.C. 02711

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Chipman, Roscoe and Freeman, JJ.A.

Cite as: R. v. M.L.M., 1992 NSCA 30

B E T W E E N:

M. L. M.	**M. Jane McClure and Linda L. Zambolin**
appellant	
- and -	
HER MAJESTY THE QUEEN	**Robert C. Hagell for respondent**
	Appeal Heard: December 7, l992
	Judgment Delivered: December 21, l992

Editorial Notice

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

THE COURT: Appeal allowed from conviction for sexual assault when Crown failed to prove absence of consent per reason for judgment of Freeman, J.A.; Roscoe, J.A., concurring; Chipman, J.A., dissenting on grounds that absence of consent could be presumed from circumstances.

FREEMAN, J.A.:

The principal issue in this appeal is whether the Crown met its burden of proving that the appellant, charged with sexual assault for acts short of intercourse with his sixteen-year old stepdaughter, did not have her consent.

Given the age of the complainant and her relationship with the appellant the threshold was low for establishing lack of consent. However her evidence of her submissive reaction and lack of resistance to the alleged advances was consistent with consent. She was not questioned at the trial as to whether she had consented.

At trial the case was argued chiefly on the issue of credibility. The trial judge found the complainant to be credible; he found that the acts complained of had occurred. On the appeal, at the suggestion of this court after a review of the evidence, both parties submitted supplementary factums on the issue of consent.

The appellant was charged that he:

> ". . . between the 28th day of January, 1991, and the 31st day of January, 1991 . . . did commit a sexual assault on P.M. contrary to Section 271(a) of the **Criminal Code of Canada**."

S. 271 (a) provides:

> 271.(1) Every one who commits a sexual assault is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years;

It is well accepted that a sexual assault is an assault under s. 265(1) committed in circumstances of a sexual nature such as to violate the sexual integrity of the victim.

The following are the parts of S. 265 relevant to this appeal:

> 265. (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (2) This section applies to all forms of assault, including sexual assault . . .

> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority. . . . .

The Crown must prove the absence of consent as an element of assault. The complainant is an adult for purposes of s. 271; if she had been under fourteen, proof she did not consent would have been unnecessary because of the provisions of s. 150.1. Being under the age of eighteen, she would have been regarded as a "young person" if the charge had been laid under s. 153, which provides:

> 153. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who
>
> (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person . . .
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

If the appellant had been charged under s. 153 instead of s. 271 consent would not be an issue, and the complainant would be considered a young person and not an adult. Section 153 is not an included offence under s. 271. Ss. 271, 265 and 153 give statutory expression to principles long recognized. In **Regina v. Day** 9 Car. & P 722 Mr. Justice Coleridge, dealing with an incident in 1841, held:

> "There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere

> submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law."

Counsel agreed that s. 273.1 which contains recent amendments of the law relating to consent did not apply in the present case because it was proclaimed only on August 15, 1992, subsequent to the trial.

The complainant is a ward of the Nova Scotia Department of Community services. The appellant and the complainant's mother are married and have a six year old daughter and an infant son. In January of 1991 the complainant was part of this household. The appellant is a fisherman but was at home during the relevant period. Recent family life appears to have been normal until the alleged events occurred.

On Monday, January 28, 1991, the complainant stayed home from school with the flu and in the early evening she was in her nightgown and panties lying on the bed she shared with her six-year-old half-sister, who was bothering her. She called to the appellant and her mother, who were downstairs, to remove her sister, and when the appellant was on his way up the stairs the child hid under the bed.

" . . . he was yelling at her to get out," the complainant testified, "and then all of a sudden he started touching me . . ."

She was lying under a comforter. "He lifted that up and he started to touch me. He put his finger in my vagina and started moving it around. And he did that for a little while, and then when F.M. came out from under the bed, they both went out and she went downstairs and he went to his bedroom. And a little while later he came back in and he started licking me. And he did that for a while and then he started touching me again and then he left that night." Pressed to explain the latter occurrence, she described an act of cunnilingus.

Later the complainant got up to take a telephone call downstairs, and she says the appellant told her "I'll be up later." She returned to bed, where her half-sister was sleeping. " . . . and then

later that night he came up and he started touching me again. And then he lifted my nightdress and started sucking on my breasts. And he did that for a little while and then he left."

The next night, Tuesday January 29th, he went into her room and again touched her: " . . . he put his finger in my vagina, and he started moving it around . . ." He repeated this when he woke her around seven the next morning, stopping when the younger girl began to stir.

Later that day, Wednesday January 30th, her mother was out when the complainant arrived home. The appellant tried to grab her while she was talking on the telephone but she moved out of his way.

"And then when I got off the phone, he was back downstairs and he was in the living room arch way, and he had his pants . . . zipper and stuff down, his pants down, and he wanted me to touch his penis, but I wouldn't. I pushed him away and I went in and watched t.v. And then a few minutes later, my mother came home."

That night she stayed with a friend and told what had happened. The friend's mother called the authorities and the complainant's caseworker removed her from the appellant's home.

The complainant testified that during the encounters described above neither she nor the appellant spoke a word to each other. Most, if not all, of the events took place while the younger half-sister was in the same bed, and the mother present in the home. There is no evidence of any objection by the complainant, either by word or gesture. On the one occasion when she objected, in the living room while her mother was out of the house, the appellant did not press matters. Without the complainant's silence, indeed, her apparent complicity, the incidents could not have happened as they did. She explained her silence by saying she was "scared" but it was not clear she was afraid of the appellant or anything he might do. There was no evidence of threats or fear of the application of further force. There was no evidence the complainant was so afraid of the appellant that she dared not say "no" or "stop". She might have moved aside or removed his hand or cried out; she might have run downstairs. She did nothing, she said nothing to indicate that the appellant's advances were unwelcome. When the child emerged from under the bed on the first occasion, and

when she began to stir on one of the later ones, the appellant's advances stopped.

Between the first event and the complainant's leaving for her girlfriend's house on the Wednesday, she discovered on her windowsill two coarsely worded notes scrawled on small squares of paper from her note pad. These appeared to refer to the sexual contacts between the appellant and the complainant, and to invite further involvement. A handwriting expert ascribed them to the appellant with a high degree of probability. I would agree with the trial judge that these had a probative value outweighing their prejudice to the appellant. They were written contemporaneously with the other incidents and they were properly admissible as *res gestae*, as the trial judge found.

The appellant argues that the trial judge was wrong to admit the notes as part of the *res gestae*. **Cross on Evidence**, sixth edition, Butterworths 1985, at p. 264 describes the term *res gestae* as "a blanket phrase when applied to the admissibility of statements, and may roughly be said to denote relevance through contemporaniety--part of the story."

At p. 581 the author says:

> "Unlike most of the principles of the law of evidence, the doctrine of *res gestae* is inclusionary. Under it evidence may be received although it infringes the rule against hearsay, the opinion rule or the rule which generally prohibits evidence of bad disposition on the part of one of the parties, and there may be other exclusionary rules which are mitigated by the operation of the doctrine."

The notes are corroborative proof of the events, but they do not relate to the question of consent, except to suggest the appellant may have been encouraged to write them by the complainant's responses.

The appellant did not testify. He has not alleged a belief in the complainant's consent, and his state of mind is not in issue. The issue is whether the Crown has met its onus of proving an absence of consent on the part of the complainant as an element of the offence.

Section 265(3) of the **Criminal Code**, referred to above, states that "no consent is obtained where the complainant submits or does not resist by reason of" four enumerated factors. Submission or lack of resistance is therefore equated with consent in the absence of one or more

of these factors: force, threats or fear of the application of force, fraud or the exercise of authority. In the circumstances of the present case the application of force constituting the assault under s. 265(1)(a) was not the application of force that could vitiate consent under s. 265(3)(a) It is true the complainant said she was scared, but the evidence does not relate her fears to any of the relevant factors.. There is no evidence of threats or fear of the application of force. Fraud is not in issue. Only the exercise of authority is a possibility.

The evidence suggests abuse of the appellant's relationship with the complainant rather than exercise of his authority, if indeed he was possessed of any authority. He was the complainant's mother's husband, but the complainant was a ward of the Department of Community Services. The appellant had no actual legal authority over her. The Crown has suggested that cases decided under S. 153 are helpful with respect to the exercise of authority, but I cannot agree. That section refers to a person who is "in a **position** of trust or authority towards a young person, or is a person with whom the young person is in a **relationship** of dependency." For consent expressed by submission or lack of resistance to be vitiated under s. 265(3)(d) there must be evidence not merely of the position or relationship of the parties with respect to one another, but of the **exercise** of authority. In the absence of evidence that the complainant submitted as the result of an exercise of authority by the appellant, it cannot be said that the exercise of his authority vitiated her consent.

In my opinion, Parliament has not gone so far as to have legislated a presumption that all sexual overtures between adults carry criminal consequences. In the absence of the four vitiating factors listed in s. 265(3), the complainant must be shown to have offered some minimal word or gesture of objection. Otherwise submission or lack of resistance must be equated with consent. A sexual assault is an extremely serious offence; the elements giving rise to it must have an air of objective reality. The Crown's burden is to prove those elements beyond a reasonable doubt by evidence, not by speculation. In my view it did not discharge that burden.

Section 153 was intended by Parliament to cover situations such as the present one. It describes a criminal offence of which the appellant might have been found guilty on the evidence

before us. The appellant was surely in a position of trust, if not actual authority, toward the complainant, and the complainant, living in his home, was in all likelihood in a relationship of dependency toward him. His acts, as described by the complainant, were reprehensible. If the complainant was the victim of a criminal act, however, it was not, on the evidence, the criminal act with which the appellant was charged.

The appellant applied for the admission of fresh evidence consisting essentially of a handwritten letter by the complainant to police attempting to retract her evidence given at the trial, and the *viva voce* evidence of the complainant, who testified that the letter was written under pressure from her stepfather. She had returned to the home to live, despite a requirement of the appellant's recognizance that he have no contact with her pending his appeal. I would assume these incidents may be the subject of further investigation. Applying **Stolar v. R.** (1988), 62 C.R. (3d) 313, 40 C.C.C. (3d) 1 (S.C.C.) we reserved judgment on the new evidence until the appeal was heard. Applying **Palmer v. R.** (1980), 14 C.R.22. 50 C.C.C. (2d) 194 (S.C.C.) I would dismiss the application on the ground that the handwritten note lacked credibility and the *viva voce* evidence could not have affected the result.

Section 686(1)(a)(i) authorizes a court of appeal to set aside a verdict on the ground that it is unreasonable or cannot be supported by the evidence. The method to be followed in applying that section is set out in **R. v. Yebes** (1987), 59 C.R. (3d) 108. McIntyre, J., stated at p. 120:

> "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. The process is the same whether the case is based on circumstantial or direct evidence."

I have reweighed the evidence and considered the effect of it as a whole. In my opinion a

properly instructed jury, acting judicially, would have been left with a reasonable doubt on the essential element of consent. I would allow the appeal, set aside the conviction, and enter an acquittal.

Freeman, J.A.

Concurred in: Roscoe, J.A.

CHIPMAN, J.A.: (Dissenting)

The appellant was convicted in the County Court Judges' Criminal Court of having committed a sexual assault on his stepdaughter between the 28th and the 31st of January, 1991. The facts are set out in the reasons of Freeman, J.A.

Originally, the appellant's sole argument was that the trial judge erred in admitting in evidence handwritten notes which the complainant said she discovered in her bedroom and in her jacket pocket. When the appeal came on for hearing, the appellant was granted an adjournment to call the complainant in support of an application to the court to admit fresh evidence. On granting the adjournment, the court indicated to counsel that it had concerns whether the Crown had established beyond a reasonable doubt that the sexual acts complained of were without the consent of the complainant. Counsel furnished the court with supplementary written argument and further oral argument was directed to this issue at the adjourned hearing. At the same time, the application to admit fresh evidence was made, supported by an affidavit of the appellant's counsel and oral evidence of the complainant. Applying **R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.), the court reserved judgment on the motion to admit fresh evidence and heard the appeal. At the conclusion of the hearing judgment was reserved.

FRESH EVIDENCE

I agree with Mr. Justice Freeman that the fresh evidence could not reasonably, when taken with the other evidence adduced at the trial, be expected to have affected the result. I agree that the motion to receive this evidence should be dismissed.

ADMISSIBILITY OF THE NOTES

These notes were in handwriting which bore a marked similarity to samples of handwriting of the appellant. The handwriting expert who examined these samples, as well as

samples of the handwriting of the complainant and her mother, testified that there was a high degree of probability that the notes were written by the appellant. The trial judge concluded that the appellant was the author of the notes, and I am satisfied that he did not err in so finding.

I agree with Mr. Justice Freeman that the notes are admissible as part of the **res gestae**. Moreover, the first note contains an unequivocal admission of an act of cunnilingus upon the person for whom the note appears to have been intended, coupled with an invitation to further involvement. The trial judge concluded that the note was intended for the complainant. It constituted a clear admission of one of the acts alleged by her against the appellant. I also agree with Mr. Justice Freeman that these notes had a probative value outweighing their prejudice to the appellant and were properly admissible. They prove one of the events in issue, but as Mr. Justice Freeman points out they do not relate to the issue of consent.

ISSUE OF CONSENT

Turning to s. 265(3) of the **Code**, while submission or lack of resistance is there equated with consent in the absence of four enumerated factors, I am not prepared to infer from this that Parliament intended "consent" in s. 265(1)(a) to be equated with submission or lack or resistance. Section 265(3) merely details four situations where submission or failure to resist cannot amount to consent. Consent is surely a question of fact in each case. If, for example, sexual acts were practiced upon a sleeping, unconscious, intoxicated, or mentally incompetent person, could it be said that merely because there was no resistance or submission that there was consent?

While the presence of any of the factors enumerated in s. 265(3) can be relied on to negative consent in a given case, that is not the only way that it can be negatived. I refer to the passage quoted by Mr. Justice Freeman from the case of **R. v. Day** 9 Can. & P. 722. To paraphrase, every consent involves a submission or lack of resistance, but it does not follow that every submission or lack of resistance means consent. The lack of maturity and vulnerability of the complainant and the extent to which the accused must be taken to be aware of these traits are all elements to be considered.

I also agree with Mr. Justice Freeman that none of the four factors enumerated in s. 265(3) can be inferred from the evidence here. It is necessary, therefore, to examine the evidence to see whether it was open to the trial judge to conclude, as he did, that a sexual assault took place. Our function in so doing is stated by McIntyre, J. in **R. v. Yebes** (1987), 59 C.R. (3d) 108 at p. 120:

> "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. The process is the same whether the case is based on circumstantial or direct evidence."

In re-examining, reweighing and considering the effect of the evidence, I keep in mind that at no time during the argument before the trial judge did appellant's counsel submit that the sexual acts alleged were consensual. His position was that the testimony of the complainant was unreliable. This position was developed in cross-examination of the complainant and in the testimony of the solicitor who spoke of a previous occasion when the complainant recanted allegations of sexual acts practiced upon her by the appellant. The defence counsel's submission was that the complainant was an unreliable witness. He concluded:

> "She had a real reason to concoct this story and I would submit that that's exactly what it is, . . ."

The trial judge referred to s. 271(a) of the **Code** and observed at the outset that the onus was on the Crown to prove its case beyond a reasonable doubt. He acknowledged the position of the defence which was that the issue was the complainant's credibility. He reviewed the evidence and found that he accepted the complainant's testimony. The issue of consent was not expressly raised. As I have said, the appellant did not testify. The trial judge, who can be taken to know the law, was obviously satisfied that the Crown had established beyond reasonable doubt that the acts were performed upon the complainant without her consent. He referred to her as a troubled young lady. He also referred to her as being not mature for her age.

The circumstances under which the activity commenced were hardly characteristic of consensual sexual activity. The complainant was just 16 years of age. The appellant was a grown man, married to her mother. The complainant and her sister were having a disagreement. She called downstairs to her mother and stepfather to resolve the matter. Her stepfather, the appellant, came upstairs to do so. He was exercising authority in the household generally, even if not specifically directed to the complainant. The sister hid under the bed. The appellant was yelling at her to get out. The complainant's testimony continued: "Then all of a sudden he started touching me".

The acts proceeded. Nothing was said by the complainant. When asked by counsel for the Crown why she said nothing she said:

"I was scared of him. I was scared to say anything."

She reiterated this on cross-examination. Then she said that she pretended to be asleep. She continued this pretense when the appellant returned and performed cunnilingus on her. She said that she did not tell her mother because she was scared. She also testified that she was afraid of the appellant and that she did not like him. They had argued in the past. She also testified that she was afraid that her half-sister would be put in a foster home. She testified about her accusations in February of 1987 that the appellant had sexually abused her. She was removed at that time from the appellant's home by the Department of Community Services officials. She testified that she recanted her allegations of sexual abuse because she did not want to be separated from her younger sister. When questioned about other allegations that the appellant had previously abused her sexually, she said that she had recanted those because "I'm just scared of him period."

The social worker who saw the complainant two days after the incidents said that she was upset and tearful. She had her placed in a foster home immediately.

The actions of the appellant in abruptly initiating sexual activity with his 16 year old stepdaughter, in the circumstances outlined, are on their face inconsistent with consensual sex. The failure to resist is clearly explained by the complainant. All of the evidence suggests that had counsel for the Crown asked the complainant whether she consented, the answer would have been in the

negative. Such a question and answer would undoubtedly be desirable but the circumstances of this case speak just as loudly as any such response to the formal question. The appellant did not testify, and there is no question arising about any honest belief on his part that he had this girl's consent. The appellant can be taken to know that she was immature and vulnerable. Particularly in view of the earlier complaints of molestation, the only inference to be drawn is that this girl did not consent.

An examination and reweighing of the evidence satisfies me that it was open to the trial judge to convict. A properly instructed jury acting judicially could reasonably conclude that the Crown had established beyond a reasonable doubt that these actions were without the consent of this girl.

I would dismiss the appeal.

J.A.