S.C.C. No. 02675

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Roscoe and Freeman, JJ.A.
R. v. T.G.L., 1992 NSCA 53

BETWEEN:

T. G. L.	)	M. Joseph Rizzetto
	)	for the appellant
	)	
appellant	)	Kenneth W.F. Fiske
	)	for the respondent
- and -	)	
	)	Appeal Heard:
	)	November 24, 1992
HER MAJESTY THE QUEEN	)	
	)	Judgment Delivered:
respondent	)	December 10, 1992

Editorial Notice

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

THE COURT: Motion to adduce fresh evidence is dismissed and the appeal against the conviction is dismissed per reasons for judgment of Jones, J.A.; Roscoe and Freeman, JJ.A. concurring.

JONES, J.A.:

The appellant was convicted on a charge that he:

> "At or near [...] in the County of Cape Breton, province of Nova Scotia, between the 1st day of January, 1986, and the 11th day of May, 1990, did commit sexual assaults on T.L.W. contrary to section 271(1)(a) of the **Criminal Code**."

The complainant was the appellant's stepdaughter. At the time of the trial the complainant was 15 years of age. The appellant and the child's mother married in July, 1986. They lived in [...]. In August of that year an incident occurred while the girl was sleeping on the chesterfield. She awoke to find that her night clothes had been removed and she was naked. No action was taken on that complaint as she retracted her story.

In May of 1990 the family was living [...]. The complainant testified on the trial that on the evening of May 10th or 11th the appellant took his wife to the hospital at about 11 p.m. Between 1:00 and 1:30 a.m. the appellant came to the child's bedroom and asked her if she wanted to sleep with him in his bedroom. The child said no and he picked her up and took her to his bed. There was a television and VCR on in the bedroom. There was a pornographic film on the television. The appellant removed their clothes and had sexual intercourse with the child. The child said the appellant did not ejaculate. The child returned to her bedroom where she called her stepmother. The appellant returned to the bedroom and asked the child if she wanted to have a shower with him or go to bed with him and she said no.

The next morning the child did not go to school as she was tired. At 10:30 in the morning the appellant came into the room and got in bed with the child. He removed their clothes and had intercourse with the girl but ejaculated on her stomach. When he was finished he went to the bathroom to get the child a cloth to clean herself. The child took the top of her jewelry box from her dresser and scraped the semen from her body. She then hid the cover under the dresser. When he returned she took the cloth he gave her and wiped her stomach. She later put the cloth in the hamper and went to school.

When the child arrived home her mother was present. She told her mother that it happened again and that she had proof. She then showed her mother the cover of the jewelry box.

That evening the girl was taken to the [...] Police office where she gave a statement. She was taken to the hospital where she was examined. The police recovered the jewelry box cover and the cloth from the home. Subsequent examination disclosed the presence of male sperm on both items. The appellant was arrested and charged with sexual assault.

In June the family moved to [...]. The mother and daughter returned to Nova Scotia in July of 1990 for the preliminary. The appellant stayed at the motel and saw the mother the night before the preliminary. Before going to court the mother told the child and her brother that if they told the truth she would lose her social assistance for allowing the appellant to live with them and the family would break-up. The children agreed that they would lie.

On the preliminary the child denied that anything had taken place between herself and the appellant and the appellant was discharged. The present charge of sexual assault was subsequently laid.

The family returned to [...]. In October the complainant went to live with her father and stepmother in Cape Breton. In June of 1990 the complainant was seen by a psychiatrist, Dr. Rajkhowa at the Cape Breton Hospital. She was suffering from a great deal of emotional distress. On the trial the doctor described in detail his examination and treatment of the child. He stated that the child had symptoms of post traumatic stress disorder which was caused in his opinion by sexual abuse. He also stated that it was common for such victims to deny sexual abuse as a defensive mechanism.

Dr. Demont examined the complainant on May 10th, 1990 at the [...] Hospital. There was no evidence of lacerations in the vagina. There was no evidence of semen. There was evidence that the girl had intercourse at some point in the past.

The complainant was extensively cross-examined on the trial. She acknowledged that she lied on the preliminary as a result of what her mother and brother had told her. The complainant was asked about other complaints of sexual abuse which she denied.

She was then asked about her father. She testified as follows:

> "Q. And you are saying never in the past have you ever suggested that he made sexual advances to you in any way?
>
> A. No.
>
> Q. You never made those allegations?
>
> A. No."

The appellant testified on the trial. He denied having any sexual relations with the complainant.

The appellant was convicted and has appealed from his conviction. While a number of grounds were raised in the notice only three were argued on the appeal. The first relates to the following comments of the trial judge in his charge with respect to Dr. Rajkhowa's evidence:

> "So he has given you from his expertise an indication of a particular disorder and he has given you the symptoms of that disorder and the things that are seen - that take place where this disorder has occurred. Now that part of his evidence was to give you a more academic or scholarly treatise as to this particular condition, it doesn't means that, that condition existed. It is then up to the Crown to prove by other evidence that these symptoms occurred in the complainant and then his evidence becomes important; because if you are satisfied that all of these symptoms, or a number of these symptoms occurred then you can then say, well obviously this child is suffering from sexual abuse."

These comments were made in the context of a lengthy review of the expert's evidence. Counsel argued that the effect of these comments was to take away "the jury's ultimate role of finding, as a fact whether sexual abuse did take place". When the charge is read as a whole I think it was made clear to the jury that inferences of fact were matters for the jury. The word used was "can" not "must". It was indeed open to the jury to infer that the child was sexually abused if they accepted the expert's evidence and were satisfied that she suffered from symptoms of sexual abuse. That did not prove that the appellant committed the assaults but merely confirmed her evidence that she had been sexually abused. There is no merit in this ground of appeal.

The second ground relates to the following instruction by the trial judge:

> "Now in that regard, I don't think it would be fair for me to just drop it there - in that regard you have to look at the circumstances that existed at that time and the reasons that the complainant gave for changing or indicating it didn't happen at the Preliminary in 1990. She says that on the morning of the Preliminary Inquiry, after the accused had come and spent the night at the motel that they were in, the mother asked she and the brother, the younger brother, what they would say, and asked them if they were going to lie. She says that she asked why and the mother said - if they told the truth she would lose her Social Assistance because of G. living in the house. I can only point out to you that is one of the rules of the social welfare system that we have. She said then that she would probably lose them (the children) because of this and that they would be put in foster homes, so she said 'okay I will, I will lie'. You have to assess that evidence very carefully as to whether or not you accept that this was the state of mind under which the child operated on that particular day. It is not a matter whether determining or not whether the mother actually said this, it's whether you believe the child that words were said which operated on her mind, and caused her to tell that nothing happened that morning."

The passage followed a very strong warning from the trial judge on the danger of accepting the complainant's evidence in view of her denials under oath on the preliminary.

Counsel submitted that the trial judge erred in telling the jury that there was a rule of the welfare system in existence when in fact there was no such evidence presented to that effect and where it may not be true. There was evidence that the mother so advised the witness. It did not matter whether it was correct, if the child accepted the mother's warning and it motivated her to lie. While the judge's remarks may have left the impression that the statement was correct I fail to see how it had any adverse effect on the appellant. I would dismiss this ground of appeal.

The third and main ground relates to an application by the appellant to adduce fresh evidence on the appeal. On May 21, 1992, the complainant gave a statement to the [...] Police Department containing allegations of sexual assault against her father. She complained of an assault that she alleged had taken place a few days before the interview. She also referred to an incident that happened when she was twelve. The investigating officer asked the following questions:

> "Q.21 Is there any reason why you did not tell anyone about this until now (3) years later?
>
> A. I did tell someone.
>
> Q. 22 Who did you tell?
>
> A.22 My mother and grandmother, H. L. and P. M. of[...]."

The appellant submitted that the statement constituted fresh evidence and directly contradicted the complainant's testimony on the trial that she had not complained to anyone regarding her father's conduct. The Crown contended that the evidence was available at the trial, as the mother could have been called to give evidence as to the complaint.

There is an issue as to whether the testimony on the trial was collateral and therefore her answer could not be contradicted. See MacWilliams, **Canadian Criminal Evidence**, 3rd ed. par.37:20540. In any event, because of the importance of the issue of credibility on the trial it may very well be that the trial judge would have had a discretion to admit the evidence in the interests of ensuring a fair trial.

In **Palmer and Palmer** v. **The Queen**, 50 C.C.C. (2d) 193, McIntyre J., in delivering the judgment of the Supreme Court of Canada in dealing with the admissibility of fresh evidence stated at p. 295:

> "(1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin** v. **The Queen**, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
>
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and

> (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

And at p. 206:

> "Because the evidence was not available at trial and because it bears on a decisive issue, the inquiry in this case is limited to two questions. First, is the evidence possessed of sufficient credibility that it might reasonably have been believed by the trier of fact? If the answer is no that ends the matter but if yes the second question presents itself in this form. If presented to the trier of fact and believed, would the evidence possess such strength of probative force that it might, taken with the other evidence adduced, have affected the result? If the answer to the second question is yes, the motion to adduce new evidence would have to succeed and a new trial be directed at which the evidence could be introduced."

In **R.** v. **Stolar**, 40 C.C.C. (3d) 1 McIntyre J., in delivering the judgment of the Supreme Court of Canada stated at p. 10:

> "The procedure which should be followed when an application is made to the Court of Appeal for the admission of fresh evidence is that the motion should be heard and, if not dismissed, judgment should be reserved and the appeal heard. In this way, the Court of Appeal has the opportunity to consider the question of fresh evidence against the whole background of the case and all the other evidence in the case. It is then in a position where it can decide realistically whether the proffered evidence could reasonably have been expected to affect the result of the case. If, then, having heard the appeal, the court should be of the opinion that the evidence could not reasonably have affected the result, it would dismiss the application for the introduction of fresh evidence and proceed to a disposition of the appeal. On the other hand, if it should be of the view that the fresh evidence is of such nature and effect that, taken with the other evidence, it would be conclusive of the issues in the case, the Court of Appeal could dispose of the matter then and there. Where, however, the fresh evidence does not possess that decisive character which would allow an immediate disposition of the appeal but, nevertheless, has sufficient weight or probative force that if accepted by the trier of fact, when considered with the other evidence in the case, it might have altered the result at trial, the Court of Appeal should admit the proffered evidence and direct a new trial where the evidence could be heard and the issues determined by the trier

of fact."

This Court reserved judgment on the motion and heard the appeal. Applying the principles in **Palmer** it may be that the evidence of the mother was available on the trial to contradict the complainant. The only thing that is fresh is the complainant's post trial statement which is not conclusive. The statement while not directly relevant to the main issue, had a bearing on a decisive issue namely, the credibility of the girl. While there may be an issue as to whether the statement is credible it is reasonably capable of belief, because it comes from the child's mouth. However, in applying the fourth test, in my view, it is not admissible as the evidence does not possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result.

There was clearly an issue on the trial as to the complainant's credibility. As I have noted the trial judge gave a strong warning to the jury on the acceptance of the complainant's testimony. However, the remaining evidence regarding the semen, the call to the stepmother, the rental of the film and the condition of the complainant physically and emotionally was conclusive to show that the incidents as she described them, took place on May 9th and 10th. The appellant did not contradict the girl's testimony that he was in the home with her on that night or suggest that any other adult male was present. On the evidence there was only one reasonable explanation for the sperm and the jury accepted that explanation. Evidence of other complaints could not shake her testimony on that issue.

In the result I would dismiss both the motion to adduce fresh evidence and the appeal against the conviction.

J.A.

Concurred in:

Roscoe, J.A.

Freeman, J.A.