

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. B.M., 2007 NSPC 56

**Date:** October 25, 2007

**Docket:** 1700949

**Registry:** Halifax

Her Majesty the Queen

v.

BM

**DECISION**  
**BAN ON PUBLICATION**

**Judge:** Jamie S. Campbell

**Heard:** July 13, August 17 and 30th, 2007

**Oral decision:** October 25, 2007

**Charges:** Criminal Code Section 271

**Counsel:** Crown - Rick Hartlen  
Defence - Brian Stephens

[1] BM is LD's uncle. He is 24 years old and she is now 13. Their family has been through a great deal. Their father and grandfather, AM, died of cancer in 2006 . While AM was near death his son BM was charged with sexually assaulting his granddaughter, and with touching person under the age of 14 for a sexual purpose, also relating to LD. The family has drawn up on opposite sides of the courtroom and the matter has sadly split apart a formerly close family.

[2] The opposing camps believe one of two distinct versions of the events. Those gathered around LD believe her. She has alleged that while staying at her grandmother's house, her uncle BM touched her in a sexual way about ten separate times. These events happened, in each instance, when she was lying down on the livingroom floor either sleeping or pretending to be asleep. They have heard LD's testimony and likely could not conceive of how anyone could doubt either sincerity or her truthfulness.

[3] BM adamantly denies that he did or ever would touch his niece in such a way. Those who support him, including his mother, can probably not imagine how he could not be believed.

[4] It is easy to see this matter as a contest or a weighing of the credibility of LD and BM. Some would say that one must be lying and that the other must be telling the truth. That may well be the case. They would see it as the court's role to decide who is telling the truth and who is lying. That works well for dramatic purposes, in movies and on television. The judge provides the needed resolution and the sought after certainty.

[5] The purpose of a criminal trial is not to decide whether the incidents happened or not, but to decide whether the charges have been proven beyond a reasonable doubt. I know that sounds technical, and a lot of this probably will. But another way to put it is that a court has to decide whether there is evidence that is of sufficient weight and that is logical enough and persuasive enough to make it safe to convict. That is not the same thing as deciding whether something happened.

[6] LD is no longer sees or speaks with her grandmother, LM. They were, until the late summer of 2006, particularly close. LD was seen as her grandmother's favourite. The two spent considerable periods of time together and LD was

always eager to stay with her grandmother. She stayed overnight with her grandmother regularly.

[7] LM lived with her husband AM, and her son, BM. Her grandchildren would visit them regularly and frequently would sleep over. The arrangements for sleeping appeared to be quite casual. Sometimes the children would sleep in a small bedroom and sometimes they would camp out on the floor of the living room, sleeping on cushions.

[8] LM would, as a habit, sleep on the couch in the livingroom. BM had his own room but would sometimes stay up and watch television while his mother and the grandchildren, his nieces and nephews, would sleep in the livingroom in front of the television.

[9] LD described incidents, beginning in the fall of 2005. They each involved BM in the livingroom where she and her grandmother were sleeping. During the first incident he lifted up her shirt. While she pretended to sleep, she opened one eye and saw who it was. She described BM as having been drinking that evening. The incident lasted about 30 seconds.

[10] The second incident happened less than a month later. It was longer and lasted a minute and a half. Once again she was sleeping on the cushions when he put his hand either up her shirt or down her shirt and fondled her breast. LD said that she tried to roll over and he left. While she did not see BM she identified him by what she described as his “snorting”.

[11] On the third and fourth incidents he lifted up her shirt and put his mouth on her nipple. She said that this was the first time he had done that. She thought that this might have been the time that he thought he had woken her and told her that she was breathing strangely because she was sleeping on her stomach.

[12] On the last occasion she saw her uncle walk out of the room and head to his room. That incident was different from the others because this time she had actually been asleep and was not simply pretending to be asleep. She also suggested that this time, BM was sober. She determined that if he could do this while she was sleeping there was no way to know what else he might do.

[13] She told her cousin LB what had been going on. LB reported it to her mother AB. AB, LD's aunt, then spoke with LD and her mother TM and the situation was then reported to the police.

[14] The Crown's case is based primarily on the strength of LD's testimony. She is at that stage in her life when she is legally a child, and in many practical respects is not. Yet, she is not an adult either. It is a complicated and difficult stage in a person's life. Her evidence must be considered with that in mind. Evidence should be considered in the context of the age, mental development, understanding and ability of the person involved.

[15] LD is confident, well spoken, intelligent 13 year old. She showed remarkable insight into her own ability to recall events. When presented with inconsistencies between her testimony and the videotaped interview given to police two weeks after her disclosure, she said that she had noticed the inconsistencies herself. As to whether her memory was wrong on one occasion or the other she frankly said that she could have been wrong then, or she could have been wrong in court. Unlike many people she recognizes the subjective nature of observation and memory.

[16] LD was not a child witness who was easily confused or who was open to the power of suggestion in cross examination. She showed considerable maturity in acknowledging the defects in memory and yet, at appropriate times, in standing up to suggestions made to her. When it was suggested to her that she had made up a story to get her uncle out of the house, she replied that she would not have wanted to make trouble for her grandmother with her grandfather dying at the time and made her disclosure only when she could not take it anymore.

[17] In assessing her evidence it should not be held immune from scrutiny by virtue of her age yet that scrutiny should reflect, to some extent, the fact that she is not an adult and is recalling events that are alleged to have happened a year or more before. There are a number of incidents and not one discrete incident. It should not be entirely surprising that there would be some level of confusion in recalling the distinct details of each of the separate incidents. That confusion in the details cannot be entirely discounted and must be weighed with the other evidence.

[18] As alluded to earlier, her evidence at trial was not entirely consistent with the evidence she gave in a videotaped statement to the police. With regard to the first occurrence in her videotaped statement she said that he had put his mouth on her breast. In her testimony she made no mention of a mouth on her breast during that incident. Similarly, on the video she referred to BM placing his hand on her hip on this occasion. She made no mention of it in her testimony. In her testimony she said that the incident lasted 30 seconds. In the video statement she said that it had lasted 3 to 4 minutes. In her testimony she made no comment on any words being exchanged. In the video she said at first that there was no conversation and later that BM had made the comment about her sleeping on her belly.

[19] With regard to the second incident in her testimony LD said it lasted one and half minutes. In the video statement she said that it had lasted 15 minutes and that she thought it would last all night. Again, in the video she reference lips on her breast on the second occasion but in court made no mention of it. In her testimony once again, LD said that no words were said during the second incident. In the video she said that this time he had mentioned her sleeping on her stomach. In her testimony she said that she heard a snorting noise and had not looked but in the video she said that she had seen him.

[20] Some level of inconsistency in itself, in the versions of the events given by a young witness is neither remarkable nor indicative that the evidence is not reliable.

[21] When LD disclosed to her aunt AB, she made no mention of her breasts having been sucked. AB for her part, believed that a thorough conversation had been had. In the video statement LD said that she had forgotten to tell her aunt about that aspect. In her testimony she said that she had been too embarrassed to tell her aunt that detail.

[22] LD explained the timing of her disclosure by saying that on the last occasion she had been asleep and that if he would or could do this when she was asleep she no longer felt safe. This had been going on for some months. She was staying voluntarily at her grandmother's home and wanted to continue to stay there. She was under no requirement to be there and the defense asserts that she could have left at any time had she felt uncomfortable.

[23] Yet, a disclosure of this kind could and did have a devastating impact on this family. A person, in particular LD, would realize that she may not be believed. The fear, realized in part in these circumstances, was that she would not

be believed. While she could have stopped staying over at her grandmother's house, that would involve a change that she did not want to make. That reluctance to remove herself from the situation is likely more understandable in the 13 year old mind in the midst of the situation than in the adult mind considerably removed from it. Victims of sexual assault delay disclosure for many different reasons many of which may not withstand the scrutiny of sometimes cold logic, but that are when considered in their full context, understandable.

[24] Her explanation for the timing her disclosure is still curious. She said that she was concerned that if he would touch her while her was sober and she was asleep, there was no way to know what else he might do. As she describe the incidents, BM believed that she was asleep on the other occasions. Her concern may then have been that if she were asleep she would not have been able to protect herself. Yet, if she were asleep during the last incident, she would have at best an imperfect recollection of it and it would be difficult to understand how she would have known it had taken place at all.

[25] These things, the inconsistencies in the versions of events given on direct examination and in a videotaped statement, and not in the confusion of cross examination, the failure to disclose a significant aspect to her aunt and the different reasons for not making that seemingly important disclosure, as well as her explanation of the timing of her disclosure, cannot be ignored or entirely rationalized away. LD's evidence must be subjected to scrutiny as any evidence should be. Part of that scrutiny however should include an understanding that the evidence has been given by not only a 13 year old, but by this 13 year old, with her particular level of maturity and her particular abilities. That must go into the weighing of that evidence and the extent to which its reliability is compromised by those inconsistencies.

[26] The Crown's case is based largely but not exclusively on LD's evidence. BM made two statements which the Crown asserted showed a "consciousness of guilt." After LD told AB what had happened, AB confronted her brother. Her approach was not aggressive. She asked BM whether he had masturbated in the living room while LD and his mother were asleep, and suggested to him that he might have "been giving himself a little treat". His answer was "maybe". BM acknowledged having said that, but strongly denied having ever done such a thing.

[27] The conversation was described as being “light”, but it is difficult to imagine how it could have been anything but the kind of light conversation that takes place to mask highly charged emotions. BM was facing serious allegations and he knew it. Regardless of whether criminal charges were involved, BM was aware that he was facing potentially very serious consequences. Yet, he gave an answer that is difficult to explain.

[28] Defense counsel argued that nothing in that statement could be interpreted as an admission of guilt. In that regard he is quite correct. It does however raise the issue of why a young adult would engage in sexual behavior in the presence of his mother and niece, even if they were asleep.

[29] TM is LD’s mother. She had never had a good relationship with her brother BM. After the allegations were made, he spoke and said “Sorry”. In the context, the Crown argues, BM was apologizing to his sister for what he had done. While not an admission it is close to being one.

[30] On the other hand, it was argued that this could also be an acknowledgment of what the family was going through at the time. BM was facing serious charges, AM was dying, and the family was in a state of crisis. BM was, on this interpretation commiserating with his sister. He was sorry for what was happening, but was not saying that he was sorry for what he had done.

[31] That word, “sorry” can carry a multitude of meanings. They can range for sincere feelings for another’s pain or sorrow, to an apology to a flippant offhand comment, to a sarcastic remark. Much is determined by the context.

[32] The context in this case, involves both the circumstances and person making the statement. BM is well spoken and insofar as anyone can tell from a few hours of testimony, intelligent. Yet, until recently, he remained at home with his parents, with limited plans for an independent future. His girlfriend when he was 19 or 20 years old was a girl of 13 or 14. That relationship ended. His father wanted him out of the house and on his own. BM did not seem to be keen to leave the supportive environment that his mother had created for him. He had an income through social assistance. He could drink, go out with friends, see his girlfriend, play on his computer or watch television late into the night. He could become

frustrated with his nieces and nephews and at times lash out at them. He could even lash out at his mother. What this lifestyle lacked in fulfillment, for BM at least, it seems to have made up for in the security of sameness and the indulgence of his mother.

[33] BM does not appear to be a man who deals with emotional issues in a straightforward way. While he is not a child, his evidence must also be weighed and considered having regard to his qualities and characteristics. He is an intelligent, yet somewhat emotionally immature man. His response about masturbating could have been a true statement or, even in light of the seriousness of the allegation, could have been a flippant remark. The potential to shock or annoy, in his case, could overwhelm the sense of caution that might govern the actions of a more mature person. His saying “sorry” to LD’s mother, TM, could have been an expression of remorse, could have been a statement of regret for what the family was going through or could have been a way to avoid dealing directly with the allegations.

[34] In summary the case against BM is built on the testimony of LD and on his own after the fact statements. It is a strong case. There is much that points to his guilt.

[35] On BM's behalf it was argued that LD had a motive to lie about these allegations. LD wanted to live with her grandmother LM on a more or less permanent basis. Her being able to do that depended on BM's moving out to make room.

[36] AM was dying of cancer. He wanted his son out on his own before he died and wanted his daughter in the house with her children. Arrangements were being made to find another home for BM. By July a plan was tentatively in place, and by August BM appears to have been having second thoughts about moving. The Crown asserted that everyone in the house was aware that BM was moving out, so there was indeed no motive for fabrication of a story.

[37] The defense maintained that the plan was one that existed mostly in the minds of AM and AB and that it was not clear at all that BM was going to be moving out.

[38] The issue, as it relates to motive, is whether LD knew that BM was going to be leaving soon. On cross examination she was asked about the plan for her to move in with LM. She said that it didn't happen earlier in the summer partially because BM was there. She appeared to be generally unaware of any plans for his imminent departure in the summer of 2006. Even if she were aware of such plans, they were not for the immediate short term and were not clear and concrete.

[39] LM gave evidence to add weight to the suggestion of a motive. She said that LD had asked what it would take to get BM out of the house. She replied that he would have to abuse one of the children or something like that. While such a statement is possible it has some of the appearance of being contrived. While the question is one that a child in those circumstance might ask, the reference to her son abusing one of her grandchildren, as an example, appears to be so extreme and yet so convenient in these circumstances that it is difficult to accept.

[40] She testified that LD wanted BM out of the house and been very forceful in expressing that view. LM said that LD had said that she had to get rid of BM after an altercation that occurred between LM and her son. BM had been drinking and had become quite angry and aggressive. LD told her grandmother that she had to

get rid of him because he was going to kill her, LM. At that point LM told LD that it was she who would have to go home.

[41] LM described LD as having a look of total rage on her face at that point. She immediately went out of the house, took her cousin LB up in a field and made the allegations. LD could not recall that exchange with her grandmother.

[42] LM was eager to help her son. She accepted his version of events almost immediately. She characterized LD as being troublesome and inclined to tell tales to get the other children in trouble. At a number of points in cross examination she offered evidence that would tend to exonerate her son. She maintained that she “always” waited for BM to go to sleep before she went to sleep and would sometimes pretend to be asleep, no one could “pull the wool over her eyes”. That evidence again, had much of the appearance of being contrived. She gave no example of what kind of behaviour she was intending to monitor or prevent by staying awake.

[43] When LM spoke to the police, in October 2006, she gave a statement. That statement did not include the reference to her having told LD that she would be the one who would have to leave and LD's immediately going to talk with L. That would appear to be relevant information. LM chose not to tell the police about it. She maintained that she was upset and was only answering specific questions. Yet, in the context of a trial, an equally upsetting experience, she showed herself to be quite capable of making her point undeterred by specific questions.

[44] The evidence of motive is present. LM's efforts to bolster that evidence were not convincing, but notwithstanding that, the evidence of there being a motive is there. There may be some question as to whether BM would be leaving in the late summer of 2006 and whether LD knew of that. Clearly she wanted him gone. Motive to lie is not proof of a lie. Many people with strong motives to lie, quite simply do not. LM's efforts to bolster the evidence of a motive, while not convincing, should not be used against her son to discount the presence of such a motive.

[45] The issue of motive is also to some extent a double edged sword. While there was a motive to lie there was also a motive to keep any situation hidden. LD

knew that any disclosure would have dramatic repercussions. She would run the risk of not being believed. She would create further stress for her entire family while her grandfather was dying. She would have to go through a process that would not be an easy one. If getting rid of BM was her goal this would have been an explosive and high risk means to achieve it.

[46] If the evidence in this case were to be considered by weighing the two sides on some metaphorical scale LD's evidence on one side would be powerful, despite some inconsistencies. To that would be added BM's statements made to his sister, that he was sorry. While perhaps not an admission of guilt, it could be interpreted as such. There is also his statement that he might have masturbated while his mother and niece were in the room, asleep. Again, while not an admission of guilt it is somewhat of an admission that he was willing to engage in sexual behavior in a situation that was clearly inappropriate.

[47] On the other side of the scale would be BM's testimony. His denial was unequivocal and unshaken. In addition to the inconsistencies in LD's evidence, he pointed to a potential motive. His mother LM added that she had told LD to leave the home and that she immediately went to her cousin and told the story of the

which lead to the charges against BM. As a witness she was prepared to advocate for her son. The story of the circumstances of LD's departure and the timing of her disclosure was made less believable by the fact that LM made no mention of that seemingly very significant exchange when she gave a statement to the police.

[48] In weighing this evidence the Crown has the stronger case.

[49] LD is a thoughtful, intelligent and articulate young teenager.

[50] BM is a somewhat immature and self indulgent 24 year old. He is a less sympathetic character.

[51] As witnesses, LD is the more believable of the two.

[52] That however is not the test. This is not an issue of weighing the evidence to decide which witness I believe more. And, it is not an issue of weighing all of the evidence and deciding whether I prefer the Crown's case over the case presented by the defense.

[53] The issue is whether, having heard the evidence, the court is left with a reasonable doubt. It is not the way that people are accustomed to making decisions. In everyday life decisions are made based on weighing the options and deciding which one is best. We are used to making choices between or among imperfect options. We use a mental scale to weigh the evidence and decide what action to take, or whether we will believe something based on the tipping of the scale. In everyday life we believe something if it is more likely than not that it happened. Often we erase any elements of residual doubt.

[54] Belief almost always involves some degree of doubt. Belief and doubt are not inconsistent. They are opposite sides of the same coin. Few if any things are for certain. Belief by definition involves a lack of absolute certainty. In normal daily activity, we say that we believe things or believe people without being absolutely certain. The person may be sincere but mistaken. They may actually be lying. But, we have put our faith in the truth of their statement, based on our best observations and experience. That may be based on our knowledge of the person's truthfulness in the past. It may be based on the consistency of the statement with the other information we have and with common sense. Yet, with all that, there are many things that we believe, yet that we do not know.

[55] It is that degree of uncertainty that is important to the law. A judge may be satisfied based on a weighing of evidence that something happened. In a criminal trial the judge cannot stop there. Once it is acknowledged that few things are certain, some element of doubt is almost always there. The judge has to examine that doubt to determine whether it is a reasonable one. It is in many ways, a different way of thinking.

[56] That concept of reasonable doubt is fundamental to our system of criminal justice. In *Woolmington v. D.P.P.* [1935] AC 462, the House of Lords set aside a conviction of a man sentenced to hang for the murder of his wife. Reg Woolmington had gone to the home of his estranged wife with a sawed off shotgun under his coat. She let him in. Moments later she was dead. There were no witnesses. Woolmington said it had been an accident and that he had brought the gun just to scare her.

[57] The trial judge told the jury that once the fact of killing had been proven by the prosecution it was up to the *Mr.* Woolmington to prove that it was an accident.

He was convicted. Just before Reg Woolmington was to hang, his case came before the House of Lords. There, Viscount Sankey spoke words that have been quoted probably as often as any from the House of Lords.

“ Throughout the web of the English Criminal Law one golden thread is always to be seen, that is that it is the duty of the prosecution to prove the prisoner’s guilt, ... If, at the end of and on the whole of the case, there is a reasonable doubt, created by either the prosecution or the prisoner,... the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

[58] That concept of the golden thread through the common law has been cited and recited to affirm the importance of the reasonable doubt and to affirm that in criminal courts decisions are not made the way they are in everyday life. The golden thread can be seen as forming part of a web or part of the fabric of the law suggesting that it is somehow integral to the system.

[59] It may be that Lord Sankey’s metaphor meant something more. The “golden thread” to which he was referring may well have been the golden thread of

Ariadne. In Greek mythology Ariadne was the daughter of King Midos of Crete. She helped Theseus slay the half -man half -bull monster the Minotaur. She gave him a ball of magical golden thread to help him find his way out of the labyrinth where the monster lived.

[60] The golden thread of Ariadne, the concept of the reasonable doubt, is more than simply being part of the web or woven into the fabric of the common law. It is the thread that should be used to make a route through the winding labyrinth of evidence.

[61] The Supreme Court of Canada in *R. v. W.(D.)*, [1991]1 S.C.R. 742 set out how a judge should deal with that issue of reasonable doubt when the accused person testifies. To take the analogy further, the Supreme Court of Canada instructed judges not to let go of that golden thread and wander off in the labyrinth. They must not lose sight of the one question they must answer. It is not the question of whether the judge believes the accused or any other witness. It is not the question of whose evidence the judge prefers. It is not a “credibility contest”, as the Nova Scotia Court of Appeal said in *D.W.S. v. The Queen* 2007 NSCA 16.

[62] Holding on to the golden thread means not allowing the “normal” thought process of weighing imperfect options or weighing probabilities to take over. It means assessing the evidence with a view to that one question of whether a reasonable doubt remains.

[63] In this case that means that preferring the evidence of LD over BM is not enough. It means that finding her to be a credible witness is not enough. It means that believing, in the way that we believe people in everyday life, is not enough.

[64] The impact on a young person who makes such a disclosure and is not believed could be devastating. That potential consequence might be a consideration in other circumstances, and could have the affect of changing that one fundamental question. The golden thread means that a judge cannot be distracted by it.

[65] In this case, I believe LD, yet my belief, like any, is tempered by some degree of doubt. The issue is whether that doubt is enough that it is not safe to convict BM of the crimes of which he has been accused.

[66] LD's testimony contained a number of inconsistencies with her earlier statement. Some of them are explainable by her age and the fact that more than one incident was involved. Yet, she was not a confused child who was open to suggestion. These inconsistencies arose, not in cross examination but between a taped statement and her direct examination.

[67] To those must be added the fact that she did not mention to her aunt that her breast had been sucked. That was a significant fact, that she would know was significant.

[68] She said that she had forgotten to tell her aunt, then at trial said that she had been too embarrassed to tell.

[69] Her version of why she disclosed when she did, involving her concern about what he might be doing when she was "really" asleep might well be true. It might also be seen as an unusual explanation. It leaves open the question of how she knew what he had been doing if she had been asleep.

[70] The issue of a motive, while not evidence of fabrication of a story, is present. LM's testimony of her telling LD she had to leave immediately before the disclosure was made, was suspiciously convenient, and not disclosed in her interview with the police. Her evidence did not add to the credibility of the existence of a motive. Yet, the evidence was there that Leeanna wanted BM gone from the home and was far from sure that arrangements had been put in place to insure that.

[71] BM's statements that he was "sorry", while providing some inference of guilt, is also reasonably capable of being interpreted as a more general statement of regret. His admission to his sister that he might have masturbated with his mother and niece asleep in the room could, in light of his particular lack of emotional maturity been a flippant and thoughtless statement that he would be capable of making. In any event it would not amount to an admission of guilt.

[72] There are inconsistencies combined with a motive and a reasonably plausible explanation for statements that, while not confessions, could be seen as being very damaging.

[73] Again, I do not entirely believe BM's denial. To the extent that I believe LD, that belief is, of course, not absolute. It does not have to be absolute. I am troubled with enough doubt that it would not be safe to convict BM of the crimes of which he has been accused. That doubt is not founded on suspicion or on a series of suspicions. It is not a troubling sense that cannot be articulated. It is based on a review of the evidence as a whole.

[74] I find BM not guilty.

[75] This process is not one that is designed to bring peace or healing to a family that has been broken apart. I am sad to say that this decision will do nothing to help in that. If they seek vindication or perhaps better, simply closure or a final resolution, I am sorry to say that they have not found it here. I hope that they are able to find peace somewhere after what has been a horrible time for all of them.

Jamie S. Campbell

Judge of the Provincial Court

