IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Paul, 2003 NSSC 211

Date: 20031015
Docket: CR. SK-201272
Registry: Windsor

Between:

Her Majesty the Queen

Appellant

v.

John Wesley Paul

Respondent

D E C I S I O N

Judge:	The Honourable Justice Walter R. E. Goodfellow
Heard:	October 15th, 2003 in Windsor, Nova Scotia
Written Decision:	October 28th, 2003
Counsel:	Robert C. Hagell, for the Appellant David Mahoney, for the Respondent

By the Court:

[1] The appeal record here is very limited. I reviewed it at least twice. I have reviewed thorough briefs from both counsel. I have now heard the Crown and I am in a position to render a decision.

[2] John Wesley Paul was charged and found not guilty by Provincial Judge John G. MacDougall of the charge:

> that on the 10th day of September, 2002, at Indian Brook, he did commit an assault on Tamara Rose GooGoo, contrary to Section 266 of the *Criminal Code*.

[3] The Crown states in para. 30 of its submission:

> It is the submission of the Appellant that the two substantial issues in the present case are first the issue as to whether or not Tamara GooGoo was under the care of the Respondent when he kicked her and secondly, whether the kick was intended for the educational benefit of Tamara GooGoo, or was it motivated by arbitrariness, caprice, anger or bad humour?

[4] I agree with the Crown that standards have changed. However, s. 43 does provide a narrow scope for very, very limited reasonable physical discipline. Judge MacDougall applied s. 43 in acquitting Mr. Paul. The Crown says he erred in not addressing the issue of whether Tamara GooGoo was "under the care of" as stated in s. 43. I agree that the mere stating of the capacity of a school teacher, a

parent, a person in place of a parent such as a babysitter, alone would rarely meet this prerequisite of s. 43.

[5] I should note that this point was not raised by the Crown at trial. This does not relieve the requirement of "under the care of" as required by s. 43.

[6] The Crown had to contend with a most reluctant witness, the alleged victim. Clearly, the daughter's wish not to testify does no more than add a dimension of difficulty for the Crown. An alleged victim does not control the prosecution of criminal offences. Such is entirely within the determination of prosecutorial discretion.

[7] Whether or not the defence establishes the prerequisite of s. 43 is a factual determination which, as I said, the stating of parenthood does not, standing alone, necessarily establish this prerequisite. One must look at the context of what transpired. Clearly Miss GooGoo acknowleged Mr. Paul was her father.

> **Q.** No. Okay. So, it was just between him and you? Alright. You enjoy a good relationship with your father now?
>
> **A.** Yeah.

[8] Miss GooGoo went on to say that she went up to “my Gram’s”, Nancy GooGoo’s residence. Her mom was there and gave her some money. She left and later returned to Nancy GooGoo’s residence, Nancy GooGoo being her grandmother. Her dad was there and she wanted to go to Halifax with him. Her father left and came back for her. Tamara, his daughter, wanted more money off her mother and the father said to his daughter “No, she already gave money this morning.” The daughter got mad and the daughter used foul language, etc. In the end the father kicked from a sitting position the chair in which his daughter was sitting, berating her for non-respect of her elders.

[9] In this context it was a disciplinary exercise within s. 43 of the *Criminal Code*. Interestingly, during the Crown’s summation that there was no discipline involved. The learned trial judge said at pp. 49 and 50:

> **THE COURT:** Well, you...the evidence...to suggest there’s no evidence of the use of discipline, I don’t...you know, it’s one thing as to whether or not I believe Mr. Paul, but his testimony is that she was upset that she didn’t give...to get the money that she had been wanting. She wasn’t getting her way and was using foul language and arguing. Now, if I accept all of that, to get her attention to discipline her, to get her attention, to break up the vulgarity that is going on, he kicks at the chair. Now, the purpose...if I accept that there is evidence that it was for purposes...purposes of disciplining or correcting her behaviour. So, to say that there’s no evidence of parental guidance, I think, assumes that I’m not going to accept anything that he says at all and then look at the evidence of Tamara and, then based on her evidence, come to the conclusion that it was a kick out of the blue.

[10] I reviewed the cases referred to by the Crown and in particular *R. v. Ogg-Moss* 144 C.C.C. (3d) 116. I am of the view there was sufficient evidence for the trial judge's finding of the action of the father being one of discipline or correction. He viewed her conduct and foul language as non-respect for her elders which required discipline.

[11] As to the Crown's second submission as to the reasonableness - the intention, motivation of the father - this was canvassed thoroughly by the learned provincial judge in his decision, particularly at pp. 55 and 56. I do not think there is any necessity in reciting it. He had the benefit of observing the witnesses, the opportunity to assess their credibility and the evidence supports his findings. It is not my function to retry this matter. No error having been committed, the appeal stands dismissed.

J.