

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

S. M. L

Respondent

Restriction on Publication: By an Order of the Court made pursuant to section 486.4 of the *Criminal Code*, there is a ban on the publication or broadcast of any information that could disclose the identity of the complainant in this matter.

MEMORANDUM OF JUDGMENT

I) INTRODUCTION

[1] This Application concerns the review of a decision made by a Territorial Court Judge, after a preliminary hearing, discharging S. L. on a charge of invitation to sexual touching.

[2] The specific charge, as framed in the Information, was that S.L. did, for a sexual purpose, counsel E.L., a person under the age of 14, to touch her own body with her hand. The Crown's case consisted of a videotaped statement of an interview of E.L. Cst. Tracy Bednarczyk, the police officer who interviewed E.L., gave evidence at the hearing, but her testimony did not supplement the

videotaped interview in any material way. The preliminary hearing Judge concluded that the evidence was insufficient to justify a committal. The Crown seeks to have that decision quashed.

II) LEGAL FRAMEWORK

A. The test for committal at a preliminary hearing

[3] The test that a preliminary hearing judge must apply in deciding whether to commit an accused to stand trial is well established: it is whether there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. If so, the preliminary hearing judge must order that the accused stand trial. *United States of America v. Sheppard*, [1977] 2 S.C.R. 1067; *R. v. Dubois*, [1986] 1 S.C.R. 366, at para. 2; *R. v. Arcuri*, [2001] 2 S.C.R. 828, at para. 21; *R. v. Sazant*, [2004] 3 S.C.R. 635, at paras 14-16.

[4] Because of the nature of the test, the preliminary hearing judge's role in assessing the evidence is very limited, and in particular, excludes any assessment of the witnesses' credibility. As a result, if the Crown adduces direct evidence on all the elements of the offence, the preliminary hearing judge must commit the accused to stand trial. Where the Crown's case includes circumstantial evidence, the judge must engage in a limited weighing of the whole of the evidence to determine whether a reasonable jury, properly instructed, could return a verdict of guilty. *R. v. Arcuri*, *supra*, at para. 29.

B. The scope of review of a preliminary hearing judge's decision

[5] A preliminary hearing judge's decision is only subject to review by this Court on *certiorari* on the basis of jurisdictional grounds. This is so whether the decision under review is a decision committing the accused to stand trial or a decision discharging the accused. *R. v. Dubois*, *supra*, at paras 9-12.

[6] Errors in law, such as errors about admissibility of evidence, errors in allowing or disallowing questions, or even applying the wrong test for sufficiency of the evidence, are generally not considered jurisdictional errors. If, however, the preliminary hearing judge decides an issue reserved for another forum, that is an excess of jurisdiction and it is reviewable on *certiorari*. *R. v. Dubois*, *supra*, at paras 22-23.

III) WHETHER THE DISCHARGE OF S.L. CONSTITUTED AN EXCESS OF JURISDICTION

A. The Crown's position

[7] In its Factum, the Crown alleged a number of jurisdictional errors on the part of the preliminary hearing Judge, namely, that she decided an issue reserved for another forum; that she failed to consider the whole of the evidence; that she engaged in an assessment of the credibility and reliability of the evidence and failed to accord any favorable inferences to that evidence; and that she applied an incorrect standard of review to the evidence by engaging in a weighing of the evidence.

[8] At the hearing of the Application, Crown counsel advised that a number of the arguments set out in his Factum were no longer being pursued. I do not propose to address in any detail matters that were not argued in oral submissions. But in my view, the record shows that the preliminary hearing Judge considered the whole of the evidence in arriving at her decision. It also shows that she did not engage in an assessment of credibility; she specifically acknowledged that she should not do so. Finally, her Reasons demonstrate that she was aware of the test that she had to apply.

[9] What the Crown did argue at the hearing was that the preliminary hearing Judge exceeded her jurisdiction because there was direct evidence on every element of the offence, so she had no choice but to commit S.L. to stand trial. The Crown's alternative position is that even if some elements of the charge were established through circumstantial evidence, the preliminary hearing Judge still exceeded her jurisdiction because she failed to draw inferences that were favourable to the Crown, and were available on the evidence.

B. The evidence

[10] In the videotaped interview, E.L. appears to be a fairly talkative and animated little girl. She was able to provide a fair amount of detail about some of the things that she talked about with Cst. Bednarczyk, and less so on others. That is not surprising, considering her young age.

[11] To address the arguments advanced by the Crown, it is necessary to examine in detail the portions of E.L.'s statement that relate to the allegations against S.L. The first relevant excerpt arose as Cst. Bednarczyk was asking questions to establish how E.L. learned to touch herself:

TB: Oh goodness. Wow. Hm. And how did you know to do that?

EL: My daddy teached me how.

TB: He did. Can he tell me how he taught you how? How did he do that?

EL: He layed it like he layed it like this and then he put he putted his hand in his bum and then he he go like this and then that and that looks like touching your bum.

TB: So he touched his bum.

EL: Yes.

TB: Oh.

EL: And he wanted to teach me how

TB: Mhm.

EL: He wanted to teach me how.

TB: Mhm.

EL: He wanted to teach me how.

TB: Mhm.

EL: But mommy doesn't want me to touch my bum.

TB: Okay.

EL: And so she puts hot sauce on my fingers.

TB: Yeah.

EL: And

TB: So where where did where did your daddy teach you? Where were you?

EL: I was in my room. And he layed on my and I got off he layed on my floor in my bedroom and then I turned on the lamp so I could see.

TB: Mhm.

EL: (inaudible) was on my little light shelf.

TB: Oh yeah.

EL: That with all my books.

TB: M. And what did he say.

EL: He said here I'll give you chance. And he did what he wanted to say to me.

TB: What did he say?

EL: He (inaudible) you you can touch your bum if you'd like and I said no way.

TB: Mhm.

EL: And mom just wanted to me to not. So she putted hot sauce on my bum.

[12] Shortly after this exchange, Cst. Bednarczyk attempted to clarify what time of the day this happened. In her answers, E.L. again makes mention of S.L. “giving her a chance”:

EL: M, yeah. When it was morning time he got in my bedroom and then he he said I'll give you a chance to touch your bum so I said no way and he said uh oh okay I won't give you a chance anymore but he got out of my bedroom and then I said wait and he turned around and looked at me

TB: Mhm.

EL: And then he got in my bedroom and he said do you want me to give you a chance and I said no way I (inaudible) and I said what and I gived your I said what and then then he got me another chance if he would like me to touch my bum more and he did ask me and he did want me to he wanted me to cuz he did and I didn't touch my bum because mommy didn't want me to.

TB: Okay.

[13] Later on in the statement, Cst. Bednarczyk asked E.L. if S.L. ever touched her. In her answers, E.L. again referred to S.L. “giving her chances”, but this time it appeared to be related to having breakfast:

TB: Mhm. Emma did daddy ever touch your bum?

EL: No I did. Oh k. But he asked me another chance.

TB: Another chance.

EL: A brukfast.

TB: Another chance to come for breakfast?

EL: Yes. He asked me to colour before breakfast but I didn't want to because I was late for breakfast.

TB: M.

EL: And so daddy asked me another chance.

TB: Mhm.

EL: And he said do you want more chances and I said no and he's like like going what you are gonna be late for school by breakfast.

[14] Cst. Bednarczyk attempted to elicit further details about what happened when S.L. came into E.L.'s bedroom and laid on the floor:

TB: Mhm. Can you tell me about when your dad layed on the ground again. What did he do?

EL: He touched his bum.

TB: Oh did you see him do that?
EL: Yeah. I put on my lamp and I just layed in my bed.
TB: M.
EL: And yawned and yawned.
TB: What did he say when he was touching his bum?
EL: He said you can come with me (inaudible) no thanks I'm sleeping. Oh you're gonna be late for breakfast.
TB: You can come with me where?
EL: On the floor he he just asked me thousand hundred ones.
TB: Mhm.
EL: And I didn't like it because he he didn't want me to.
TB: Mhm.
EL: But I (inaudible) I mean I h he wanted me to touch my bum and I didn't (inaudible).
TB: Why did he want you to touch your bum?
EL: Because he he liked it when you touched his bum.
TB: Mhm

(...)

TB: K, when you said that in your room in Yellowknife daddy came in and he was laying of the floor -
EL: Yep.
TB: And he touched his bum.
EL: Mhm.
TB: Where are you talking what part of his body are you talking about.
EL: M, this part.
TB: Okay. His belly?
EL: Nooo.
TB: How do you know he touched your bum his bum?
EL: Because I did.
TB: Did you see it?
EL: Yes.
TB: Okay what did he do?
EL: He did some funny tricks and then he touched his bum and (inaudible)
TB: Whats what the silly tricks.
EL: Uh, I'll show you. It's like this. Watch.
TB: Do it right here.
EL: Okay.
TB: And come closer so I can see you better and stand right there and do it.
EL: Like this.
TB: Oh my goodness.
EL: Like that.

TB: He's like an acrobat.
EL: Yeah.
TB: Goodness me. Did daddy have his clothes on when he was laying on your floor?
EL: Ahhm nooo no he was naked.
TB: He was naked?
EL: Yeah. And I and I saw his boobs.
TB: You saw his boobs?
EL: Yeah

[15] It is apparent from the statement that E.L. got up and did something that prompted Cst. Bednarczyk to comment that S.L. was “like an acrobat”, but E.L.’s gestures were not caught by the camera. In her testimony Cst. Bednarczyk was unable to recall and describe what E.L. did.

[16] More generally, both counsel agreed during oral submissions that none of the gestures that E.L. made during the interview added anything significant or material to her spoken words.

[17] As I have already mentioned, the Crown’s first line of argument is that E.L.’s statement provided direct evidence of every element of the charge. For the purposes of this Application the most contentious elements were that S.L. had counselled E.L. to touch a part of her body with her hand, and that this was for a sexual purpose. In my respectful view, the evidence did not provide direct evidence on either of these elements.

[18] E.L. did say, when asked how she knew how to “touch her bum”, “my daddy taught me how”. But when the police officer’s attempt to elicit more information about how this “teaching” occurred, E.L.’s answers were unclear. Similarly, there was no direct evidence on the element of “sexual purpose”. There was evidence about S.L. having laid down on the floor in E.L.’s bedroom and “touching his bum”, but the questions attempting to establish a link between that event and S.L. “teaching” something to E.L. gave rise to unclear, and at times contradictory answers.

[19] I agree with the Defence’s position, therefore, that some key elements of the Crown’s case against S.L. were based on circumstantial evidence, not direct evidence.

That being the case, the preliminary hearing Judge was required to engage in a limited weighing of the evidence, not from the point of view of assessing credibility, but from the point of view of deciding whether that evidence was reasonably capable of supporting the inferences that the Crown was suggesting should be drawn. In so doing, the preliminary hearing Judge could not simply carve out portions of E.L.'s statement and ignore others; she had to assess whether the evidence as a whole was reasonably capable of supporting the inferences the Crown sought to rely on.

[20] The Crown argues that the preliminary hearing Judge exceeded her jurisdiction because if there were several possible inferences arising from the evidence, she was required, for the purpose of her decision, to accept those favorable to the Crown and order committal.

[21] The problem with that submission is that the preliminary hearing Judge did not, in discharging S.L., choose between various inferences and pick those unfavourable to the Crown: rather, she concluded that the evidence was insufficient to form the basis for the inferences that the Crown was seeking to rely on.

[22] The preliminary hearing Judge recognized that the child, because of her young age, could not be expected to provide the same level of detail as an older child might. But she found that even making allowances for that, the child's account was, in some respects, simply too vague to amount to some evidence on each element of the offence. For example, the Crown was suggesting that there was evidence that S.L. counselled her to touch herself because of what the child said about S.L. "giving her chances". But the preliminary hearing Judge noted that while the child had talked about this and, at one point, referred to it being a chance to "touch her bum", at another point, she related this to being given a chance to have breakfast.

[23] The preliminary hearing Judge also noted that by contrast, when talking about other topics, E.L. had been able to be quite precise and specific: for example, she was able to describe clearly and consistently how her mother did not want her to "touch her bum" and what she did to prevent it.

[24] In my opinion, what the preliminary hearing Judge did was assess the sufficiency of the evidence and decide whether the inferences that the Crown

sought to rely on could reasonably be supported by that evidence. This was well within the scope of her jurisdiction. In fact, it is at the very heart of the function of a preliminary hearing judge when the Crown relies, in part or in whole, on circumstantial evidence.

[25] In my view, the record of these proceedings does not disclose any jurisdictional error on the part of the preliminary hearing Judge.

[26] The Application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
10th day of November, 2011

Counsel for the Applicant: Glen Boyd
Counsel for Respondent: Caroline Wawzonek

S-1-CR-2011000083

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