

CANADA / JUDGMENT

R. v. Bhoondpaul

2020 BCSC 2295

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bhoondpaul,

2020 BCSC 2295

Date: 20201113

Docket: 41642-2

Registry: Duncan

Regina

v.

Kamal Bhoondpaul

Restriction on publication: pursuant to s. 486.4(1) of the Criminal Code of Canada

Corrected Judgment: The text of the judgment was corrected at the front page on March 1, 2022.

Before: The Honourable Justice Mayer

Oral Reasons for Judgment

Counsel for the Crown

appearing by teleconference:

J. Blazina

Counsel for the Accused

appearing by teleconference:

B. Movassaghi

Place and Date of Trial/Hearing:

Duncan, B.C.

November 2-6, 2020

Place and Date of Judgment:

Duncan, B.C.

November 13, 2020

- [1] THE COURT: Kamal Bhoondpaul, the accused, is charged with a single count of touching a person under the age of 16, J.L., for a sexual purpose contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46. The offence is alleged to have been committed at or near the City of Duncan, British Columbia, on one occasion between January 1, 2018, and June 18, 2018, while J.L. was visiting at the family home of Mr. Bhoondpaul with her aunt, M.L. J.L. was nine years old at the time of the alleged incident and is currently 11.
- [2] With respect to the circumstances of the alleged incident, the Crown called J.L. as a witness at trial. She testified by video link and two video statements taken by the Duncan RCMP on July 18 and November 27, 2018, were introduced into evidence after a voir dire. In addition, the Crown called evidence from M.L. who until 2017 had been Mr. Bhoondpaul's girlfriend.
- [3] With respect to relevant background circumstances, the Crown called J.L.'s mother, Ms. L., as a witness at trial. In addition, the Crown called J.L.'s teacher, A.W., who provided evidence regarding the report made to her by J.L. of alleged sexual touching by Mr. Bhoondpaul. Finally, the Crown called members of the RCMP including Constable Wetzal-Eden who provided evidence regarding the statements taken by him from A.W. and Ms. L., and Constable Pam Bolton and Constable Brandy Rowbotham provided evidence regarding the video statements made by J.L. about the alleged incident. Finally, Mr. Bhoondpaul testified in his own defence at trial.
- [4] I will briefly summarize the evidence of the witnesses who provided evidence at trial starting with A.W.
- [5] A.W. was J.L.'s grade three teacher for the 2017/2018 school year. She gave evidence that during a class discussion on appropriate and inappropriate touching, which other evidence establishes took place on approximately June 17, 2018, she noticed that J.L. looked uncomfortable. The day after, just before lunch, J.L. approached A.W. and told her she had something she wanted to talk about. J.L. reported that she had been inappropriately touched by Mr. Bhoondpaul. A.W. then reported the alleged incident to the school principal and a report was subsequently made to the Ministry of Children and Family Development, who in turn reported the matter to the RCMP, who then carried out an investigation.

- [6] Ms. L gave evidence that on the afternoon of June 18, 2018, she received a telephone call from J.L.'s school principal and was told about J.L.'s report of inappropriate touching by Mr. Bhoondpaul. She picked J.L. up from school and they discussed what had happened. Approximately one year later, she was contacted by members of the RCMP who by this time were investigating after having received a report from the Ministry.
- [7] Ms. L. testified that in the months prior to June 18, 2018, J.L. had been over to Mr. Bhoondpaul's home a couple of times a month with her sister, M.L. Before that, J.L. visited Mr. Bhoondpaul's home regularly with M.L. from the time shortly after she was born until she was approximately eight years old. As far as Ms. L. knew, J.L. and Mr. Bhoondpaul got along well enough, although she did not see how they interacted. Prior to the report to A.W. on June 18, 2018, J.L. had never reported any incidents of sexual touching by Mr. Bhoondpaul, although at some point prior to that date, J.L. had told Ms. L. that she did not want to go to his home any longer.
- [8] During cross-examination, Ms. L. testified that she had spoken with J.L. about the alleged incident of sexual touching on many occasions after June 18, 2018, both before and after J.L. made her two statements to the RCMP. Ms. L. testified that she never told J.L. what to say, but only to tell the RCMP investigators what had happened. Ms. L. testified that she did not like Mr. Bhoondpaul. She said that she may have told J.L. that Mr. Bhoondpaul had been to jail for touching another person and that he suffered from a mental illness.
- [9] M.L. gave evidence that she had been Mr. Bhoondpaul's girlfriend for approximately 15 years prior to their break-up in the fall of 2017. M.L. helped raise J.L. and cared for her on a regular basis. She often took J.L. with her to Mr. Bhoondpaul's family home where he lived with his parents and brother. These visits started when J.L. was just a few months old and took place approximately three to four times per week, but reduced in frequency after Ms. L. and Mr. Bhoondpaul broke up.
- [10] M.L. testified that J.L. and Mr. Bhoondpaul got along well and were close. When J.L. was young, she would regularly stay over at Mr. Bhoondpaul's home with M.L. M.L. never observed anything untoward take place between J.L. and Mr. Bhoondpaul. M.L.'s evidence was that, when she and J.L. visited Mr. Bhoondpaul's house, they would watch TV, go to the park, prepare meals, or play games. Mr. Bhoondpaul's parents liked J.L., who they had known since she was a baby. M.L. testified that she and J.L. visited Mr. Bhoondpaul's house approximately three times in 2018.
- [11] M.L. gave evidence that, on one occasion in 2018, J.L. went down to the first floor of Mr. Bhoondpaul's home with him while M.L. remained upstairs washing dishes in the kitchen. J.L. and Mr. Bhoondpaul had gone downstairs to the laundry room which had a tile floor to play with slime, because they did not want to get the slime on the upstairs carpet. She could not see Mr. Bhoondpaul or J.L. from her location upstairs in the kitchen. She does not know who else was home at that time. After approximately five minutes, J.L. and Mr. Bhoondpaul came back upstairs. M.L. did not recall what happened when J.L. and Mr. Bhoondpaul came

back upstairs. She did not recall any changes in J.L.'s demeanour. She could not recall if she visited Mr. Bhoondpaul's house with J.L. after this visit.

- [12] M.L. testified that the visits to Mr. Bhoondpaul's house stopped after J.L. reported the incident of alleged sexual touching. M.L. testified that she thought she first learned about the incident in May 2018 when she was at the funeral of a friend's father, but it could have been later, perhaps in June of that year.
- [13] Constable Wetzel-Eden testified regarding his interviews of A.W. and Ms. L. in June 2018. Nothing of significance turns on his evidence.
- [14] Constable Pam Bolton testified that she took the first statement from J.L. on July 18, 2018, at the RCMP detachment in Duncan. She completed a Step-Wise interview designed to elicit reliable evidence from a youth in a manner which avoids causing additional trauma. As I have already said, the first interview was audio and video-recorded and the video recording was entered into evidence at trial.
- [15] Constable Brandy Rowbotham testified that she took a second statement from J.L. on November 27, 2018, at the RCMP detachment in Duncan. She also completed a Step-Wise interview and the second interview was also audio and video-recorded and the video recording was entered into evidence at trial.
- [16] J.L. testified that she had known Mr. Bhoondpaul her whole life and had been over to his home many times over the years. She testified that on one occasion when she was visiting Mr. Bhoondpaul's home with M.L., she and Mr. Bhoondpaul were in the laundry room playing with slime. She described the slime as a gooey substance like a stress ball that comes in different colours. It can be purchased and comes in a container or it can be made using various ingredients.
- [17] During her direct examination at trial, J.L. testified regarding her recollection of the alleged incident of sexual touching. She said that when she was in the laundry room with Mr. Bhoondpaul, who was originally standing behind her, that he came up behind her and grabbed onto her waist and pulled her towards him. She testified that his penis was touching her buttock. Both J.L. and Mr. Bhoondpaul were fully clothed. She felt uncomfortable and told him to stop. She could not recall if she told him to stop more than once, but eventually he let her go. She was unable to say how long Mr. Bhoondpaul held her before he released her.
- [18] During her cross-examination at trial, J.L. testified that she could not recall when the incident occurred. It might have occurred in the spring of her grade three year, therefore 2018. She remembers that it was sunny. She could not recall how much time had passed between the incident and the time that she told her teacher, A.W. She testified that she did not remember spraying Mr. Bhoondpaul while they were making slime, but does recall playing with shaving cream which they were using in making the slime.

- [19] During her first interview with the RCMP, J.L.'s description of the alleged incident was very brief. She reported that the incident took place perhaps in June, although it is apparent from her interview that she was uncertain exactly when it had occurred. She reported that Mr. Bhoondpaul had come up behind her and rubbed against her buttock, that she felt uncomfortable and told him to stop.
- [20] During her second interview, J.L. provided more detail with respect to the incident. She reported that when the incident occurred, she and Mr. Bhoondpaul were making slime downstairs on the washer or dryer in the laundry room while her aunt, M.L., was upstairs. She reported that Mr. Bhoondpaul came up behind her, held her waist, and was following behind her and that she could not get away. She reported that Mr. Bhoondpaul had his "private body part" against her, she was uncomfortable, it felt weird, she told him to stop, and he eventually let her go. After they finished playing with the slime, they went upstairs and watched some shows.
- [21] During the portion of her interview when J.L. was describing the incident of alleged sexual touching, Constable Rowbotham showed J.L. a paper gingerbread man. The video evidence shows that when Constable Rowbotham asked J.L. to confirm what part of Mr. Bhoondpaul's body touched her that J.L. pointed to the penis area on the gingerbread man.
- [22] During his direct examination, Mr. Bhoondpaul testified that he has known J.L. since she was a baby and that she would visit with M.L. regularly up to three to four times a week from the time that she was four months old. They would do activities together including watching YouTube videos, colouring, playing cellphone games, and horseplay, including J.L. riding on his back. This occurred when she was younger. Mr. Bhoondpaul testified that he had made slime a couple of times with J.L., and the last time was either in mid-November 2017 or mid-February 2018.
- [23] Mr. Bhoondpaul testified that on the day in question, M.L. and J.L. had purchased pre-made slime from a store and were using shaving cream by mixing it in with the slime. He and J.L. were in the laundry room playing with slime on the washing machine or dryer. To begin with, J.L. was standing to his right. She may have been standing on a stool, but Mr. Bhoondpaul is not sure. At some point, J.L. put shaving cream on his arm in a fun way and he in turn put some shaving cream on her face. Mr. Bhoondpaul testified that at one point he moved to his right behind J.L. and picked her up with his right arm. He said that it is possible that his crotch made contact with J.L.'s buttock when he picked her up, but that this was not intentional. He estimated that they were in the laundry room for between seven and ten minutes. Afterwards, they went upstairs and cleaned up as both had slime or shaving cream on their clothes. Mr. Bhoondpaul changed his shirt and went downstairs to clean up the laundry room.
- [24] During his cross-examination, Mr. Bhoondpaul testified that he and J.L. were making slime on top of the washing machine. He testified that, while they were mixing shaving cream into the slime, J.L. put some slime or shaving cream on him and he put some on her. He testified

that J.L. was misbehaving by trying to spray shaving cream on him and that he moved to his right and picked her up around her waist with his right arm while trying to get the shaving cream away from her with his left hand. He denied that he put both his arms around J.L. or pulled her toward his crotch, but conceded that it is possible his crotch area came into contact with J.L.'s buttock. His testimony suggested that at the time of the incident, he and J.L. were, in effect, playing and he testified that during this time, J.L. was giggling.

- [25] I am now going to provide my analysis with respect to the charge. Mr. Bhoondpaul does not deny that he and J.L. were playing with slime in the laundry room of his family home in Duncan sometime between November 2017 and June 2018 in Duncan, British Columbia. Further, he concedes that, on this occasion, he touched J.L. who was under 16 years of age at the time. Therefore, there is no dispute that the physical touching required for a conviction under s. 151 of the Criminal Code has been demonstrated. Mr. Bhoondpaul denies that he touched J.L. for a sexual purpose. He says that the touching that occurred was essentially horseplay. Therefore, he contends the specific intent required for a conviction under s. 151 has not been made out.
- [26] First, I wish to comment on the evidence of J.L. I found her to be an intelligent and articulate young person. During the trial, the relevant portions of J.L.'s video interviews were played in court. In my view, during both interviews, J.L. did her best to answer uncomfortable questions regarding the nature of the alleged sexual touching. Although the video interviews displayed some reluctance on her part to provide details regarding the nature of this touching in any significant detail, I do not find this surprising given that she was nine years old when the interviews were carried out. In addition, I was impressed by J.L.'s evidence at trial. She was clearly engaged and paid attention when the video interviews were played. I consider that she testified honestly and made an effort to answer the questions put to her as best as she could. It is not surprising that she did not recall certain details of the incident which to an adult are significant, including the approximate time of the year in 2018 when the incident occurred, or how long Mr. Bhoondpaul held her around the waist.
- [27] In summary, I believed J.L.'s testimony at trial and the evidence contained within her recorded statements regarding the event that occurred in Mr. Bhoondpaul's laundry room in 2018. In particular, I believe that at some point when she and Mr. Bhoondpaul were playing with slime that Mr. Bhoondpaul put one or more arms around her waist and pulled her towards him so that her buttock contacted his crotch area which probably included his penis. I believe that she thought this touching was weird and that it did not feel right to her. Finally, I believe that she said stop and tried to wriggle free, and that Mr. Bhoondpaul eventually released her.

- [28] Although I find J.L.'s evidence to be credible, the law does not allow me to convict Mr. Bhoondpaul on the basis of her testimony alone. In this case, because there was no evidence either from J.L. or from any other objective evidence regarding whether Mr. Bhoondpaul touched J.L. for a sexual purpose, I must consider his evidence and the circumstantial evidence adduced at trial.
- [29] Crown and counsel for Mr. Bhoondpaul agree that the principles set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, in dealing with conflicting testimony and issues of credibility apply in the circumstances of this case. Justice Cory stated as follows at 757:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole.

- [30] Although I am the sole trier of fact in this case, I must take the same principles into consideration in evaluating Mr. Bhoondpaul's evidence. The process of reasoning described by Justice Cory at 758 of the decision in *W.(D.)* applied to the circumstances of this case are as follows: first, if I believe the testimony of Mr. Bhoondpaul that he picked J.L. up to stop her from spraying shaving cream and not for a sexual purpose, I must acquit; second, if I do not believe this testimony, but am left in a reasonable doubt by it, I must acquit; third, even if I am not left in a reasonable doubt by Mr. Bhoondpaul's testimony, I must ask myself whether on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of his guilt. Ultimately, if after careful consideration of all the evidence, I am unable to decide whom to believe, I must acquit.
- [31] Some of Mr. Bhoondpaul's evidence is corroborated by that of J.L. He and J.L. were in the downstairs laundry room playing with slime for a brief period of time, perhaps between seven and ten minutes. They went to the laundry room to play with slime because it was a gooey messy substance. Some of Mr. Bhoondpaul's evidence has not been contradicted by any other evidence called at trial. He had known J.L. for a long time, they had played together on many occasions, and he had physically touched J.L. before, including carrying her on his shoulders and on his back. They had made slime before, which was a messy gooey endeavour.
- [32] For the day in question, there is nothing to contradict his evidence that he and J.L. had put shaving cream on each other playfully and that he picked her up and held her to try to get the shaving cream away from her. In addition, there is no evidence contradicting his testimony that, after he and J.L. left the laundry room, he had to change his shirt. Taken on its own, this testimony provides an explanation why he picked up J.L., that is, it is possible given that he and J.L. were playing with slime in the laundry room that when he picked her

up, he did so as a continuation of horseplay that started while they were mixing shaving cream with slime. I am conscious of the fact that Mr. Bhoondpaul has a reason to lie in this case and that it is possible he was fabricating this explanation, but this is not simply a contest of Mr. Bhoondpaul's credibility against that of J.L. The Crown's burden is to prove that Mr. Bhoondpaul touched J.L. for a sexual purpose.

[33] Considering all of the evidence, I am not sure whether or not I believe Mr. Bhoondpaul's testimony, and therefore, I am left with a reasonable doubt whether he picked up J.L. and held her against his crotch for a sexual purpose. For this reason, I do not find that the Crown has established the necessary specific intent that Mr. Bhoondpaul touched J.L. for a sexual purpose supporting a conviction under s. 151 of the Criminal Code. I wish to be clear again. This is not because I disbelieve J.L.'s evidence, but because the evidence does not allow me to determine beyond a reasonable doubt that Mr. Bhoondpaul committed the crime he was charged with. I therefore acquit Mr. Bhoondpaul of the charge set out in the Indictment.

"Mayer J."

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