

CANADA / JUDGMENT

R. v. D.M.

2020 BCSC 1389

COURT

Supreme Court of British Columbia

DECIDED

23 July 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.M.,

2020 BCSC 1389

Date: 20200723

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Registry: Prince George

Regina

v.

D.M.

Restriction on publication:

Pursuant to ss. 486.4(1) and 486.4(2) of the C.C.C.

These Reasons have been anonymized for publication purposes.

Before: The Honourable Mr. Justice A. Mayer

Oral Reasons for Judgment

Counsel for the Crown:

E. Yao

Counsel for the Accused:

K. Jones

Place and Date of Trial/Hearing:

Prince George, B.C.

July 21, 22, 2020

Place and Date of Judgment:

Prince George, B.C.

July 23, 2020

Introduction

- [1] THE COURT: The defendant, D.M., stands charged under a two-count indictment sworn in October 2019 which sets out the offences of sexual exploitation and sexual assault of a young person contrary to, respectively, ss. 153(1)(a) and 271 of the Criminal Code, R.S.C. 1985 c. C-46.
- [2] The indictment charges that these offences took place between June 1, 2017, and June 30, 2018, in the City of Prince George. The female complainant, D.M.'s daughter ("L.M."), was 15 or 16 years old at the time of the alleged offences.
- [3] D.M. has pleaded not guilty to both charges.
- [4] The trial occurred before me on July 21 and 22, 2020, with judgment reserved to today, being July 23, 2020.
- [5] Three witnesses were called including Constable Ashton Phillips, the RCMP officer who took the original complaint made August 3, 2018; the complainant, L.M.; and the accused, D.M.

Witness Testimony

Constable Phillips

- [6] Constable Phillips' testimony was brief. His evidence can be summarized as follows:
- He was the lead investigator and took two statements from L.M., the first on the morning of August 2, 2018, and a follow-up statement the following January.
 - During one of his interviews with L.M., she alleged that D.M. had inappropriately touched her and had conversations with her of a sexual nature. With respect to the nature of the alleged inappropriate touching, that L.M. reported that this consisted of cupping her breast and patting one of her buttock cheeks.
 - He attempted to interview L.M.'s paternal grandparents on a couple occasions, but they declined to be interviewed. In addition, as was his right, D.M. declined to be interviewed by the RCMP.

The Complainant

- [7] L.M.'s evidence regarding background facts can be summarized as follows:
- a) L.M. lives in Prince George in rented accommodation. Prior to that, she lived with her maternal grandmother and uncle for approximately one year starting around July 2018. Prior to that, while she was still in high school, she lived with a friend for one month.
 - b) In the spring of 2018, before she moved in with a friend, L.M. had been hospitalized for one month after her family became concerned that she was contemplating suicide. In fact, L.M. had planned on committing suicide. While she was in hospital, she was diagnosed with depression and high-functioning autism.
 - c) At the time of her mother's death and until she was admitted to hospital, L.M. was living in the family home with D.M. and her younger brother. She was not working when she lived with D.M. and he was responsible for paying all the bills.
 - d) L.M.'s mother was killed in a hit and run accident in March of 2016. L.M. was very close to her mother and her mother's death was devastating for everyone in the family.
- [8] L.M.'s evidence regarding the facts relevant to the offences for which D.M. is charged can be summarized as follows:
- a) Within a few months of her mother's death in March 2016, D.M. started making comments to her of a sexual nature. These comments included regularly making comments about her breasts and nipples, which D.M. said were like her mother's. He told her that her breasts turned him on and that she had a nice bum, although it was big. He told her that if she was not his daughter, he would take her by the hand into the bedroom saying that she knew what happened between a man and a woman in a bedroom.
 - b) One evening, D.M. came into her bedroom. While L.M. was standing in front of a full-length mirror, D.M. cupped her right breast which he jiggled and told her that she had "nice boobs." She was not wearing a bra at the time. L.M. initially testified during her direct examination that this incident occurred in the summer of 2016 and later in direct testified that this incident occurred a few months before she moved out in 2018.
 - c) L.M. testified that D.M. would comment that because L.M. was not wearing a bra that he was going to touch her breasts. On one occasion when she was wearing a muscle shirt, D.M. criticized her for not wearing a bra and flicked her nipple with his hand. She told him that she did not have any bras that fit and D.M. subsequently took her to Walmart to buy a couple of bras. L.M. did not provide testimony with respect to when this event occurred.
 - d) During a trip to either Kelowna or Kamloops during spring break in 2017, D.M. rented a hotel room with only two beds and suggested that she sleep with him in his bed with her brother sleeping in the other. L.M. felt frightened that D.M. was going to touch her and ended up sleeping on the floor.

- e) During the summer of 2017 when L.M. was bent over loading the dishwasher at home, D.M. came up behind her and patted her bum for a few seconds using the palm of his hand. She stood up and asked him why he had done that and D.M. stated that it was because "she was in trouble".
- f) On three successive evenings in the summer of 2017, D.M. offered to and did give backrubs to her when she was sick in bed. On the first two evenings, he sat beside her on her bed where she lay on her stomach and rubbed her back. On the third evening, D.M. sat on her legs straddling her legs with his knees on either side and proceeded to massage her back under her pyjama top. She was again lying on her bed on her stomach and was wearing pyjamas and underwear and was not wearing a bra.
- g) During the third massage, as D.M. massaged her back moving his hands from just above her buttock to her upper back, L.M. could feel his whole body move upward rubbing against her body. She felt what she thought was his penis contact the edge of her buttock. She thought he was probably wearing his usual clothes consisting of jeans and a t-shirt at the time. L.M. described the contact between her buttock and D.M.'s penis as a poke and that she felt pressure on her buttock. When she felt D.M.'s penis, she became uncomfortable and asked D.M. to get off which he did and he then left the room.
- h) The final incident occurred in January of 2018 when L.M. was sitting cross-legged on a chair in the family kitchen. L.M. testified that she was joking about self-identifying as a boy at the time. She testified that D.M. said, "You are not a boy," and that he could prove it and proceeded to put his hand between her thighs close to her vagina. He did not touch her, but she could feel the warmth of his hand through her pyjama bottoms and was afraid that he was going to do so and swatted his hand away.
- i) In 2018, when she was staying with her grandparents after being discharged from hospital, L.M. told them that she did not want to go back to D.M.'s house and that she was scared to do so. She told her grandparents about the events involving D.M. which occurred before she was admitted to hospital. L.M. subsequently reported these events to a social worker who told her that if she did not report this to the police that the social worker would do so. Her step-grandfather drove her to the RCMP detachment on August 3, 2018, the date that she made her first statement.

The Accused

[9] D.M.'s evidence regarding background facts can be summarized as follows:

- a) D.M. is 61 years old. He was born on Vancouver Island and has lived in Prince George since 1968. He completed two months of grade eight and has no other formal education. He started working in the logging industry at 18 years of age and married L.M.'s mother in 1999. Up until the age of seven, L.M. was a playful girl, but started to develop suicidal tendencies at around that age. D.M. had seen a suicide note she wrote when she was seven years old and another suicide note written some time before his wife's death in 2016.

- b) The family was devastated by the death of his wife. He said that afterwards L.M. became distant.
 - c) With respect to the circumstances of L.M.'s admission to the psychiatric ward at the hospital for one month in 2018, she was admitted after she called her aunt and told her that she was suicidal. He went to visit her after she had been in the hospital for approximately one week and again near the end of her stay.
 - d) Prior to L.M.'s discharge from hospital in 2018, either she or the doctors advised that L.M., who now self-identified as a male, wanted to be referred to as J. He found it hard to accept that his daughter identified as a male and refused to refer to her as J. or using male pronouns.
- [10] D.M.'s evidence regarding the alleged incidents of a sexual nature to which L.M. testified is summarized as follows.
- a) He never cupped or fondled L.M.'s breast. He said that on a couple occasions he told L.M. that he considered that wearing a muscle shirt without a bra was inappropriate and that she needed to dress properly.
- [11] I am just going to pause for a moment. I am referring to L.M.'s shirt in these situations as a "muscle shirt." I appreciate that different language was used during testimony, but I consider that the particular term used is inappropriate and I decline to use it. I trust counsel know what I mean and understand why.
- [12] MR. JONES: Yes, I know what you are talking about.
- [13] THE COURT: All right.
- b) D.M. admitted that on one of these occasions he flicked L.M.'s nipple with his finger. He says that this incident occurred in the afternoon just prior to L.M.'s driving lesson and that, after her driving lesson, he took her to Walmart to buy bras.
 - c) He denied that he ever patted L.M.'s buttock.
 - d) He testified that he had a conversation with L.M. during which she said she did not want to go to school and would do anything he wanted so that she would not have to go. He testified that, as a way to cheer her up, he told her that she was an attractive young lady and, if he was not related to her, he would take her to bed. He testified that this was not a sexual comment.
 - e) With respect to the massage incident, D.M. testified that it was L.M. who requested a massage. He says that he straddled L.M. rather than sitting at her side as he had the previous two evenings because his back was aching and it was more comfortable to do so. He denies that he had an erection during the third massage or that he rubbed his body against L.M.

- f) With respect to the occasion at a hotel on the way to Kamloops or Kelowna, D.M. testified that he initially suggested that L.M. sleep with her brother and that she refused. He testified that he then suggested that they sleep in the same bed with two pillows in between them and that is what they did.

Legal Principles

- [14] In order to convict D.M. for the offences with which he is charged, the Crown is required to prove each element of the particular offence beyond a reasonable doubt.
- [15] With respect to the charge of sexual exploitation under s. 153(1)(a) of the Criminal Code, the Crown must prove that:
- a) L.M. is a young person older than 16 and younger than 18 years of age;
 - b) D.M. touched any part of L.M.'s body directly or indirectly with a part of his body or with an object;
 - c) The touching was for a sexual purpose;
 - d) That at the time the acts in question were committed D.M. was in a position of trust or authority towards L.M. or that L.M. was in a relationship of trust with him.
- [16] The Crown must show that D.M. had the requisite mens rea required for each element of the offence. "Mens rea" means "guilty mind".
- [17] Proof that D.M. actually exploited a position of trust or authority is not required. In addition, it is irrelevant whether the sexual activity was consensual.
- [18] With respect to the charge of sexual assault under s. 271 of the Criminal Code, the Crown must prove that:
- a) D.M. made physical contact with L.M.;
 - b) The contact was sexual in nature;
 - c) The contact occurred without L.M.'s consent;
 - d) The contact was intentional on the part of D.M.; and
 - e) D.M. was reckless or wilfully blind to the lack of consent.

Submissions of the Crown and Defence

- [19] With respect to the charge of sexual exploitation, D.M. concedes that L.M. is a young person and that she was in a relationship of dependency with him. D.M. says that the issue is whether the touching was for a sexual purpose.
- [20] As I have already stated, D.M. denies that he ever cupped L.M.'s breast or patted her buttock.

- [21] D.M. concedes the massage incident occurred as described by L.M., but denies that he had an erection and that the massage was for a sexual purpose.
- [22] His counsel submits that the nipple-flipping incident involved trifling contact and was an attempt to discipline L.M. for not dressing appropriately and was not for a sexual purpose. He contends that this constitutes correction of a child by force and is therefore justified under s. 43 of the Criminal Code.
- [23] D.M.'s counsel submits that the discussion with L.M. during which D.M. told her that he would take her to his bedroom if he was not her father was made in the context of L.M.'s mental health condition at the time and that he made this comment, in effect, to boost her self-esteem and to make her feel better.
- [24] D.M.'s counsel submits, in essence, that L.M. is not credible and, in evaluating her credibility, the court should consider her mental state resulting from factors including the trauma of her mother's tragic death, her struggles with gender identity, and the resulting suicidal ideations.
- [25] With respect to the charge of sexual exploitation, the Crown submits that four incidents, the cupping and jiggling of L.M.'s breast, the nipple-flicking incident, the buttock-patting incident, and the third massage with penile contact, were all done for a sexual purpose.
- [26] The Crown further submits that evidence of a sexualized environment can be taken into consideration in determining whether a sexual purpose has been made out in respect of the specific events at issue.
- [27] The Crown submits with respect to the massage incident that the fact that this occurred in L.M.'s bedroom away from others is a factor that can be taken into consideration in determining whether a sexual purpose existed.
- [28] The Crown submits that it is only necessary to prove that touching be for a sexual purpose and it is not necessary to show that D.M. touched L.M. for his own sexual gratification.
- [29] Further, the Crown submits that the nature of the contact is not solely defined by the area of the body touched, but rather the sexual nature of the touching.
- [30] With respect to defence counsel's submission suggesting that L.M. fabricated the allegations against D.M. because she was angry with him for reasons including her emotional problems, unresolved trauma, and his failure to accept her gender identity, the Crown submits that this is pure speculation and that such propositions were not put to L.M. during her cross-examination.

Analysis and Decision

- [31] Credibility is an issue in this case, but not all evidence is in conflict and certain evidence is not disputed. I find that the Crown has proven beyond a reasonable doubt the following:

- a) That within a few months of the death of L.M.'s mother in March 2016 and through until approximately three months before she moved out of the family home in June 2018, D.M. started making comments to L.M. of a sexual nature including comments about her breasts and buttocks.
 - b) At some point, D.M. told L.M. that if she was not his daughter, he would take her by the hand into the bedroom, suggesting that they would have sex. Although there was no clear testimony regarding when this comment was made, I am satisfied that it occurred after the death of L.M.'s mother in March 2016 and prior to her moving out of the home in June 2018.
 - c) Further, I find that the Crown has proven beyond a reasonable doubt that on more than occasion D.M. would make comments about L.M.'s breasts when she was wearing a muscle shirt without a bra and that on one such occasion flicked her nipple with his hand. Again, although there was no clear testimony regarding when these comments were made and the nipple-flicking incident occurred, I am satisfied that they occurred after the death of L.M.'s mother in March 2016 and prior to her moving out of the home in June 2018.
 - d) Further, I find that in the summer of 2017, D.M. offered to and did give L.M. a backrub in her bedroom while she was lying face-down on her bed wearing pyjamas without a bra. During this backrub, D.M. sat on the back of L.M.'s legs straddling her legs with his legs and proceeded to massage her back under her pyjama top.
 - e) That in January 2018 during a discussion about L.M.'s gender identity, when L.M. was sitting cross-legged on a chair in the family kitchen, D.M. placed his hands between L.M.'s thighs close to her vagina.
- [32] The key disputed sexual conduct includes the breast cupping/jiggling incident and the buttocks-patting incident and whether D.M. pushed his penis into L.M.'s buttock during the massage, all of which is denied by D.M. I am therefore required to weigh all of the evidence as a whole and consider whether L.M.'s version has been proven beyond a reasonable doubt.
- [33] I am conscious of the formatted analysis set out in the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Under that analysis, and considering credibility, the following analysis should be carried out:
- a) first, if the evidence of an accused is believed, the accused must be acquitted;
 - b) second, if the evidence of an accused is not believed, but I am left with a reasonable doubt by it, the accused must be acquitted; and
 - c) third, even if I am not left in doubt by the evidence of the accused, 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 the guilt of the accused.

[34] With respect to assessing credibility, I agree and rely upon the following summary of the law involved in such an assessment as set out at paras. 48 and 49 of the decision of Justice Kent in *R. v. Swain*, 2019 BCSC 1300. Under para. 48:

[48] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:

- internal consistency of the witness's account of events;
- consistency with other evidence afforded by witnesses, documents or physical evidence;
- whether the evidence is reliably corroborated or contradicted by other evidence (although in sexual assault cases no corroboration is required for a conviction: s. 274 of the Code);
- the witness's ability/opportunity to observe or experience the events in question and to reliably recall/communicate same;
- the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration (making all appropriate allowances for the witness's experience and circumstances);
- whether the witness has any interest in the trial outcome or has any motive to fabricate;
- whether (based on properly admissible evidence) the witness has "poor character for truthfulness"; and
- the inherent plausibility of the evidence in the context of the case as a whole.

[35] At para. 49, Justice Kent said:

[49] In assessing the inherent plausibility of evidence or, indeed, in making any determination of fact, the court is expected to apply "common sense" derived from life experience. At the same time, however, the court must recognize that "myths and stereotypes do indeed pervade perceptions of sexual assault" (*R. v. Find*, 2001 SCC 32 at para. 68) and that "the use of a common-sense approach to credibility assessment is fraught with danger for it can mask reliance on stereotypical assumptions" (*R. v. Cepic*, 2019 ONCA 541 at para. 13). It is critical that unsupported stereotypical reasoning and speculation regarding human behaviour not affect a trial judge's assessment of the evidence (*R. v. Kodwat*, 2017 YKCA 11 at paras. 36-37). In this case, I find that the relevant factors in respect of L.M.'s testimony include the internal consistency of her account of the events, her demeanour including how she answered questions, and the inherent plausibility of her evidence in the context of the case as a whole.

[36] In my view, there were no internal inconsistencies with L.M.'s testimony with one exception, being the date on which the incident in front of the mirror during which she alleges that D.M. cupped and jiggled her breasts. As I have said already, L.M. first testified that this occurred within a few months of her mother's death in 2016 and later testified that

this occurred in approximately June or July of 2018. In my view, L.M. was likely referring to, in respect of one of these occasions, the nipple-flicking incident which, as I have said, has effectively been admitted.

- [37] L.M. is young and soft-spoken, but in my view, presented as an externally confident young woman. I consider that she was frank and forthright during her direct and cross-examination and answered the questions put to her without evasion, speculation, or exaggeration.
- [38] L.M.'s version of the disputed sexual conduct is, in my view, plausible in the context of the case as a whole. Again, it is not in dispute that D.M. made inappropriate comments of a sexual nature on a number of occasions concerning L.M.'s breasts and buttock. It is also not in dispute that D.M. straddled her legs while she lay in bed and proceeded to massage her back under her pyjama shirt. It is not in dispute that D.M. told L.M. that he would have sex with her if she was not his daughter. The disputed sexual conduct is consistent with an escalation of this behaviour and, in my view, is therefore plausible.
- [39] I do not find that D.M.'s evidence that he told L.M. that he would take her into the bedroom for sex if she was not his daughter in order to help her self-esteem to be plausible. It is my view far more likely that this was a sexualized comment consistent with other comments regarding L.M.'s body.
- [40] In addition, D.M.'s evidence that he straddled L.M.'s legs during the third massage because his back was aching lacks the ring of truth. D.M. had provided two backrubs on two previous nights while sitting beside L.M. on her bed. There is no evidence that he complained of back pain on those occasions. Further, I find it implausible that D.M.'s penis or certainly the area of his groin would not have contacted L.M.'s buttock when he was sitting on her knees and straddling her legs given that he would have had to have reached forward in order to rub her upper back.
- [41] Again, in the context of the extremely sexualized environment created by D.M. in the family home, it is more plausible that he straddled his teenaged daughter's legs and began to massage her bare back, rubbing against her as he did so, as an escalation of his other sexualized behaviour.
- [42] For these reasons, I do not find D.M.'s testimony with respect to the disputed sexual conduct to be credible and I accept L.M.'s evidence with respect to this conduct. In this respect, in addition to the factual findings I have already made, I find that the Crown has proven beyond a reasonable doubt that:
- a) During the massage which occurred in the summer of 2017, D.M.'s erect penis rubbed against L.M.'s buttock as he massaged her;

- b) That either during the summer of 2016 or a few months prior to L.M. moving out of the family home in 2018, D.M. cupped and jiggled L.M.'s breasts while she stood in front of the mirror in her bedroom;
- c) That during the summer of 2017, D.M. patted L.M.'s buttock as she was bending over loading the dishwasher; and
- d) That L.M. did not consent to any of this touching. I pause to note that consent is only relevant to the charge under s. 271.

[43] In respect of the charge under s. 153(1)(a), given my finding that the touching occurred, the next issue to be decided is whether this touching was for a sexual purpose. As was stated by the British Columbia Court of Appeal at para. 28 of *R. v. G.B.*, 2009 BCCA 88:

The determination of whether the touching is for a sexual purpose will be disclosed by the proven circumstances.

[44] As I have already stated, the touching occurred in the context of a highly sexualized climate which I find was created by D.M. This included his repeated comments regarding L.M.'s body, including her breasts and buttocks, and his suggestion that he would take her by the hand into his bedroom to have sex with her if she was not his daughter. In my view, there is no plausible non-sexual purpose for these comments.

[45] Given this context, with respect to the incidents of cupping and jiggling of L.M.'s breasts and patting of her buttock, this touching could only have been for a sexual purpose.

[46] With respect to the massage, even absent consideration of whether or not D.M.'s erect penis touched L.M.'s buttock, I consider that the circumstances under which the massage was given suggest sexual intimacy and lead to a finding beyond a reasonable doubt that the massage had a sexual purpose. These circumstances include the following:

- a) The massage took place on L.M.'s bed with no one else in the room other than D.M. and L.M.
- b) L.M. was lying on her stomach and not, for example, sitting up in a chair.
- c) D.M. was behind L.M. straddling her legs with his legs which, in my view, is an intimate position.
- d) D.M. reached under L.M.'s shirt and was massaging her bare skin. She was not wearing a bra.

[47] I found that L.M.'s penis was erect and that it poked into L.M.'s buttock during the massage. In my view, this adds to the basis for a finding that the massage was for a sexual purpose.

[48] With respect to the nipple-flicking incident, I reject D.M.'s admission that this contact is authorized pursuant to s. 43 of the Criminal Code. That section provides, amongst other things, that a parent is justified in using force by way of correction toward a child under his care if the force is reasonable in the circumstances. In my view, there is insufficient

evidence to allow me to conclude that D.M. flicked L.M.'s nipple to correct bad behaviour, being as I understand the submission, the wearing of a sexually suggestive muscle shirt without a bra. Even if I was to find that this was D.M.'s intention, which I do not, I would not find that the manner of touching was objectively reasonable in the circumstances.

- [49] I find that in the context of the sexualized nature of D.M.'s interactions with L.M. concerning her breasts that the flicking of her nipple, an invasive act, could only have been for a sexual purpose.
- [50] In conclusion, I find that the Crown has proven the elements of the offence of sexual exploitation under s. 153(1)(a) beyond a reasonable doubt as follows:
- a) L.M. is a young person older than 16 and younger than 18 years of age, or was at the time of the offences;
 - b) D.M. intentionally touched parts of L.M.'s body directly or indirectly with a part of his body. This touching consisted of four discrete incidents including the cupping and jiggling of L.M.'s breasts, the flicking of her nipple, the patting of her buttock, and giving her an intimate massage during which his erect penis poked against her buttock;
 - c) That in each of these incidents, the touching was for a sexual purpose; and
 - d) That at the time the acts in question were committed, D.M. was in a position of trust or authority towards L.M. or that L.M. was in a relationship of trust with him.
- [51] With respect to the charge of sexual assault under s. 271 of the Criminal Code, I find that the Crown has proven the elements of this offence beyond a reasonable doubt as follows:
- a) D.M. made physical contact with L.M. which included cupping and jiggling of her breast and flicking her nipple and patting her buttock;
 - b) The contact was sexual in nature;
 - c) The contact occurred without L.M.'s consent;
 - d) The contact was intentional on the part of D.M.; and
 - e) D.M. was reckless or wilfully blind with respect to the lack of consent.
- [52] D.M., please stand:
- a) In respect of Count 1, I find that between March 2016 and June 2018, while being in a position of trust or authority towards L.M. you did for a sexual purpose directly or indirectly on the four occasions described above touch her with a part of your body contrary to s. 153(1)(a) of the Criminal Code.
 - b) In respect of Count 2, I find that between March 2016 and June 2018, on the three occasions described above, you did sexually assault L.M. contrary to s. 271 of the Criminal Code.

[53] Those are my reasons.

"Mayer J."

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