
CANADA / JUDGMENT

R. v. J.(M.K.)

2002 BCSC 1862

COURT

Supreme Court of British Columbia

DECIDED

5 December 2002

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R. v. M.K.J.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Crawford

December 5, 2002

BETWEEN:

REGINA

RESPONDENT

AND:

M.K.J.

APPELLANT

BAN ON DISCLOSURE PURSUANT TO S. 486(3) C.C.C.

Counsel for the Appellant:

I. Lawson

Counsel for the Respondent:

C. Birnie

- [1] THE COURT: M.K.J. appeals his conviction, on the 17th of January 2002, by His Honour Judge Lawrence, of six counts: assault causing bodily harm, assault with a weapon, pointing a firearm, assault with a weapon, storing a firearm contrary to regulation, and uttering a threat.
- [2] All these events occurred in the early morning of the 25th of June 2000. M.K.J. was sentenced on the 13th of March 2002 to six months' incarceration on the first charge and concurrently on the remainder. He appeals the sentence, as well, as being harsh and excessive.
- [3] The complainant was J.. In a video statement to the police on the 25th of June 2000, she said she had been coerced into various sexual acts by her husband and his brother. The assaults on her as listed included the throwing of small dumbbells, which did not hit her, and the pointing of a rifle. These events occurred in the space of a few hours early the same day.
- [4] As the matter approached trial, there was some indication that J. was resiling from her statement. At the trial, J. plainly recanted from her videotaped statement. After voir dres, the trial judge allowed the videotaped statement, admitting it as evidence, and rejected J.'s oral evidence at trial. He convicted M.K.J. on all counts.
- [5] The appellant argues, firstly, the trial judge erred in allowing the video statement of the complainant in evidence when it was neither necessary nor reliable to do so; secondly, he erred in failing to declare the complainant to be an adverse witness pursuant to s. 9 of the Canada Evidence Act, and the complainant was not adverse to the Crown; thirdly, that the trial judge erred in rejecting the complainant's oral evidence at trial on a number of grounds; fourthly, that the trial judge erred in convicting on count six; fifthly, the trial judge failed to find a reasonable doubt on counts three and four; and last but not least, that the sentence was harsh and excessive.
- [6] I have now had the opportunity of reviewing the capable arguments of counsel, reviewing the transcripts of trial, and reading the case law.
- [7] The provisions of the Evidence Act are the statutory form of the old common-law judge's rules regarding evidence and how one might use a prior inconsistent statement to contradict the witness at trial. But the statements would not then be admissible as to their truth unless adopted as true by the witness. The prior statement could only be used to test the credibility of the witness.

- [8] That changed in 1993. In *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257, the Supreme Court of Canada altered that rule. They said if the prior inconsistent statement had sufficient guarantees of reliability, then the prior inconsistent statement should be admissible for its truth. The prior inconsistent statement, to be admissible, would be admitted if the statement would have been admissible as the witness' sole testimony. The court gave some criteria for testing reliability: firstly, is there something in the nature of an oath or a solemn vow; secondly, that the deponent or witness was aware of possible perjury; thirdly, that it might be videotaped; and fourth, that there was an opportunity for cross-examination.
- [9] Counsel also referred me to *F.J.U. v. The Queen* (1995), 101 C.C.C. (3d) 97 (S.C.C.). I found enlightening the comments of Provincial Court Judge Williams of the Nova Scotia Provincial Court in *R. v. Oakley*, [2001] NSPC 36, and the Honourable Judge Hyslop of the Newfoundland Provincial Court in *R. v. O'Keefe*, [1997] N.J. No. 314.
- [10] On this appeal, I am obliged to review, re-examine, and to some extent, re-weigh and consider the effect of the evidence. As it is put in s. 613(1)(a) of the Canadian Criminal Code, is the verdict unreasonable or the verdict not supported by the evidence.
- [11] The trial judge spent the better part of the trial hearing the evidence of J., her aunt, and the police officer who took a videotaped statement. He admitted the videotaped statement for the truth of its contents. He set out his reasons, and I think they bear repeating. He said:

It is important to the ruling of the court that the K.G.B. statement was not given immediately after the torrid events of the evening, but after the accused had been taken away by the police; the firearm had been secured by them; and the victim had a chance to shower and generally clean herself up; have a good look at her injuries; have an auntie over to talk to her, S.J.; visited with another aunt, M.; had Auntie S.J. over a second time; had some rest, although, she says she was unable to actually sleep, she was in a state, that Auntie S.J. describes, having known her for a lifetime, as calm but sad, when she went to give her statement. So that her statement was not given in the anxiety of the events. It was not given immediately following the events, at a time when a person would be extremely upset; perhaps angry; perhaps sad; perhaps a lot of things. She had time to get her thoughts together; to clean herself up; to examine her numerous injuries; to get some personal advice; to do some visiting; and she had to decide during that period of time, some probably sixteen or eighteen hours, whether or not to give a statement. And she did decide to give a statement by going to the police station with S.J. And she gave that statement in a calm, sad and somewhat embarrassed manner. Embarrassed understandably, considering some of the events described in the statement.

- [12] I would note the provincial court judge would have the benefit of seeing the video tape. He also found probative value in the photographs taken of J. at the time of the statement. He found J.'s statement the only truthful version of the events leading to the charges. He had no reasonable doubt as to the accused's guilt on all counts and he convicted.

- [13] With respect to the grounds of appeal, firstly, I find no error in admitting the videotaped statement. It was both necessary and it carried the guarantees of reliability that the Supreme Court of Canada has suggested. As well, J. admitted making the statement. Secondly, the procedure suggested by K.G.B. was followed. It does not require findings or rulings that the witness is adverse. Thirdly, the trial judge alone was able to weigh J.'s evidence at trial, and for reason rejected it. The other grounds were not seriously argued.
- [14] As to sentence, I cannot say that, in the circumstances as described by J., the sentence was harsh or excessive. I would, therefore, dismiss the appeal.
- [15] Thank you both.

"R. Crawford, J."

The Honourable Mr. Justice R. Crawford

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