

CANADA / JUDGMENT

R. v. M.S.**2021 BCCA 378**

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 378 R. v. M.S. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. M.S., 2021 BCCA 378 Date: 20211008 Docket: CA18477 Between: Regina Respondent And M.S. Appellant Restriction on publication: A publication ban has been imposed under s. 486(3) and (4) of the Criminal Code (now s. 486.4) restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant. This publication ban applies indefinitely unless otherwise ordered. Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Tysoe The Honourable Mr. Justice Goepel On an application to reopen, and an application to quash the application to reopen: An order of the Court of Appeal for British Columbia, dated November 22, 1996 (R. v. M.S., Vancouver Docket CA018477). The Appellant, appearing in person: M.S. Counsel for the Respondent: D. Layton, Q.C. Written Submissions Received: April 23, 27, 29, 2021 May 10, 14, 17, 19, 21, 2021 Place and Date of Judgment: Vancouver, British Columbia October 8, 2021 Written Reasons of the Court Summary: The appellant applied to reopen his appeal from conviction of one count of incest on February 24, 1994. His appeal was dismissed by a division of this court on November 22, 1996, following a two-day hearing. The Crown applies to quash the application to reopen. Held: Application quashed. An application to reopen an appeal will only be granted where the appeal has not been heard on its merits and where the interests of justice favour reopening. The appellant's appeal was heard on the merits, rendering this court functus. Reasons for Judgment of the Court:

- [1] M.S. applies to reopen his appeal from conviction on February 24, 1994, in the Supreme Court of British Columbia on one count of incest contrary to s. 155(2) of the Criminal Code. His appeal from conviction was dismissed unanimously by this court on November 22, 1996, following a hearing on September 17 and 18, 1996, in which he was self-represented. Although counsel was appointed for M.S. under s. 684(1) of the Code, the reasons for judgment record that M.S. was self-represented and counsel appeared as *amicus curiae*. M.S.'s application for leave to appeal from this court's disposition to the Supreme Court of Canada was refused on March 6, 1997. At the request of M.S., we have proceeded by written submissions.

- [2] M.S. contends he should be allowed to reopen the appeal to advance the submission that the jury's verdict is invalid because it found him guilty of having sexual intercourse with his adult daughter, not an offence that comes within s. 155(1) of the Code: Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.
- [3] He also complains that the focus throughout the case was on the complainant's relationship to him as his biological daughter, rather than, as it should have been, her status as his child. We understand him to contend that the term "child" in s. 155 does not include an adult daughter.
- [4] The Crown, in response, applies to quash M.S.'s application to reopen on the basis this court is functus officio. The Crown says we lack jurisdiction to reopen the appeal because the appeal has been dismissed on its merits. It is convenient to resolve the Crown's application first.
- [5] The approach to an application to reopen an appeal was settled in *R. v. Blaker* (1983), 6 C.C.C. (3d) 385, 46 B.C.L.R. 344. Mr. Justice Craig, speaking for the majority, discussed the circumstances in which we may rescind an order dismissing a conviction appeal so as to permit a hearing on the merits. Relying upon *R. v. Danielson* (26 October 1982) Vancouver CA811221 (B.C.C.A.), *R. v. Jacobs*, [1971] S.C.R. 92, and *R. v. Watson* (1975), 23 C.C.C. (2d) 366, Justice Craig said at 391-92: In *R. v. Jacobs*, the Supreme Court upheld the right of the Quebec Court of Appeal to rescind its order dismissing an appeal because of the failure of counsel to appear and to make an order returning the case to the list for a hearing on the merits stating that Jacobs was entitled to this as a debt of justice. ... the Watson case and the Danielson case are authorities for the principle that an appellate court has jurisdiction to vary or to set aside an order disposing of an appeal in a criminal case if the order disposing of the appeal was made on a basis other than on the merits and if in all the circumstances the court thinks that the order should be varied or be set aside, that is, if it is in the interests of justice that the order should be varied or set aside. I hasten to add that the phrase "interests of justice" involves a consideration of several things, not simply the interests of the accused. It involves, also, the interest of the state in insuring that people who commit offences are duly convicted and punished and the interest of the state in having finality to a proceeding.
- [6] M.S. complains that a submission filed by him (his reply factum) at the conclusion of the hearing was not expressly addressed in either the majority reasons of Mr. Justice Donald or the concurring reasons of Madam Justice Southin. He contends that this left an outstanding issue that has not been resolved, with the result it cannot be said the court is functus.
- [7] *Blaker* sets two criteria for reopening a conviction appeal: that the merits of the appeal have not been reviewed by the Court of Appeal; and that the interests of justice favour varying or setting aside the order disposing of the appeal. *Jacobs* speaks of a hearing on the merits as a

debt of justice. In this case, M.S. has had a hearing on the merits and did not succeed. He does not meet the first criteria for reopening a conviction appeal that has been dismissed. Effectively, M.S. asks us to say a division of this court erred in dismissing his appeal. This we cannot do.

- [8] Although this is sufficient to dispose of the application to reopen, we should deal with what is, in our view, the erroneous submission of M.S. that the division hearing the appeal did not have in mind, and did not respond to, his proposition that s. 155(1) did not apply to his sexual intercourse with his biological adult daughter. Five of the six issues advanced on appeal concerned alleged violations of the Charter of Rights and Freedoms. Two of the six concerned the issue advanced here - whether "child" referred to in s. 155(1) of the Code includes an adult person. In answer to M.S.'s contention that s. 155(1) breached s. 7 of the Charter by placing no age limit on "child", Justice Donald said:
- [29] The appellant takes two positions:
1. fundamental justice requires a narrow interpretation of penal statutes with ambiguities resolved in favour of the accused. This interpretative principle requires that "child" be understood in terms of age (under 18 years) rather than relationship (father-daughter at any age); ...
- [30] I cannot find any ambiguity in the meaning of child as it appears in s. 155 of the Code. It was obviously Parliament's intention in using the word "child" to regulate behaviour within certain blood relationships, not to delimit the scope of liability by reference to age. [Emphasis added.]
- [9] Later, in answer to a submission that the definition of "child" in s. 155(1) was impermissibly vague, he said:
- [64] The appellant articulates this ground as follows: The learned trial judge erred by not holding that "child" in s. 155 is unconstitutionally vague and imprecise, violating fair notice requirements to the citizen when conduct is criminal and when it is not criminal.
- [65] The argument returns to the point discussed earlier that "child" in s. 155 could refer to either age (under 18) or relationship, but it examines the definition from a different angle. It was unclear from the appellant's submission whether he invoked the vagueness doctrine as a matter of fundamental justice under s. 7 or as a refutation of any s. 1 justification on the basis that a vague law cannot be "a limit prescribed by law".
- [66] In my view, neither course is available to him because s. 155 provides "an intelligible standard according to which the judiciary must do its work": *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 983.

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- [67] The fact that "child" is defined in other parts of the Code to refer to a person under 18 and that other statutes and international conventions do likewise, does not render s. 155 vague. For reasons expressed earlier, the object and purpose of s. 155 makes it plain that Parliament intended "child" to be understood in terms of relationship at any age. [Emphasis added.]
- [10] The court plainly rejected M.S.'s submission that s. 155(1) did not apply to sexual intercourse between adults who were parent and offspring.
- [11] In our view, the Crown is correct. We lack jurisdiction to rescind the previous order of this court, or in any fashion to reopen the appeal.
- [12] The application to reopen the appeal is quashed. "The Honourable Madam Justice Saunders" "The Honourable Mr. Justice Tysoe" "The Honourable Mr. Justice Goepel"
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