
CANADA / JUDGMENT

R. v. N.S.

2000 BCCA 190

COURT

British Columbia Court of Appeal

DECIDED

13 March 2000

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Citation:

R. v. N.S.

Date: 20000313

2000 BCCA 190

Docket:

CA025417

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Cumming

March 13, 2000

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

N.S.

APPELLANT

A. Zipp

appearing for the Appellant

M. Brown

appearing for the (Crown) Respondent

FACTS

- [1] CUMMING, J.A.: This is an appeal from the order of Judge P.A. Hyde of the Provincial (Youth) Court of British Columbia at Chiswick, pronounced 24 September 1998, convicting the appellant of sexual assault of a female under the age of 14 years contrary to s. 271 of the Criminal Code and the provisions of the Young Offenders Act.
- [2] The complainant in this matter was M.H., who was born on 4 May 1989. After M.'s parents separated in February 1994, she and her older brother A. lived with their father T.H., aged 35, in his house in Chilliwack. They lived there until January 1997.
- [3] M.'s mother, L.H., aged 32, lived in Abbotsford. M. and A. had access visits with her approximately three weekends per month. She picked them up and dropped them off at T.H.'s house.
- [4] Witnesses who lived at or visited T.H.'s house testified that there were many adults and youths visiting there. Various individuals lived there for short periods of time, including the appellant. One witness likened it to a "drop in centre".
- [5] In about November of 1994 the appellant, who was almost sixteen at the time, was away from his parent's home and was beaten up in a fight. He phoned T.H., who was a friend of the appellant's family, and went to stay at T.H.'s house. T.H. and the appellant eventually engaged in a sexual relationship with each other. They used drugs, marijuana and cocaine, and consumed hard liquor or beer on a daily basis.
- [6] From about February 1995 onward, T.H. and the appellant occupied a master bedroom upstairs. M. and her older brother occupied two other bedrooms separately. K.D., T.H.'s sister, moved into the house and occupied a room in the basement. D.'s two adult sons later joined her. The appellant testified that when D. moved into the house, M. had to give up "her" room, and she then shared her brother's room. Later, after the appellant stopped sleeping with T.H., the appellant moved into what was called "M.'s room", while M. stayed in her brother's room. After D. moved out, the appellant moved to a room in the basement.

- [7] K.D. eventually moved out of the house around the end of July 1996. Around August 1996 K.D. told the Ministry of Social Services that she suspected that someone was sexually abusing M. She also reported that her brother T.H. was abusing the appellant.
- [8] On Christmas Day 1996 M. and her brother moved from her father's house to her mother's house for Christmas access. The children visited their father's house on 1 January 1997 to celebrate A.'s birthday, but they then returned to their mother's house. On 3 January 1997 T.H. telephoned L.H. and told her that someone had made an anonymous report of child abuse. He asked her to take M. to their physician, Dr. Todd, for examination. When T.H. was informed that the appellant was the assailant, he decided that the children should stay with L.H. instead of returning to his house after their school holiday.
- [9] The appellant was subsequently charged with sexually assaulting M.H. T.H. was subsequently charged with offences against the appellant.
- [10] The trial of the appellant took place on 4 and 24 September 1998. M. testified that the appellant's first assault happened on a chair at his parents' house. The subsequent assaults occurred on the floor in her bedroom, the appellant's bedroom and her father's bedroom, all at her father's house. Medical evidence was introduced to show that there had been vaginal penetration of M.
- [11] The main issue was the identity of the person or persons who assaulted M., and in particular, M.'s credibility as a child witness. There was evidence that M.'s cousin W., who is about four years older than M., was involved. Another possibility was a boy named N., who is about five years older than M. and who lived across the street.
- [12] The appellant testified on his own behalf. Other than M., no witness said that there was any inappropriate behaviour between the appellant and M.
- [13] The theory of the defence was that M. had named the appellant as an assailant because she was afraid of naming the real assailant, who was perhaps her cousin or someone else. The crux of this appeal is the learned trial judge's treatment in his reasons for judgement of the following exchange between M. and defence counsel during M.'s cross-examination:

Q: Well, I'm going to put it to you that the reason you don't remember these things is because it never happened. That never happened with [N.]. Do you agree with me? THE COURT: Well, I think the proper way should be "yes" or "no." MS. GILL: Well -- THE COURT: With a child dealing with an adult, agreeing with an adult or not -- MS. GILL: I apologize, Your Honour. THE COURT: -- sometimes that has a stigma. MS. GILL: Q: I'm going to --okay. I'm going to say that in -- and you tell me if you -- if it's "yes" or "no." I'm going to tell you that it didn't happen with [N.] in his bedroom. These bad things you've told us about. Yes or no? A: Yes. Q: It did happen? A: Yes. Q: Okay. Is it possible somebody else did these bad things to you, [M.]? A: Yes. Q: And you're afraid to tell who that is? A: Yes. Q: And that's why you've said that [N.] did them when, in fact, it's somebody else? A: Yes.

[14] The appellant was convicted on 24 September 1998. He was sentenced on 23 November 1998. In his reasons for judgment the learned trial judge dealt with the issue of the credibility of the complainant and appellant in the following manner:

The issue, as both counsel say, is one of credibility of [M.], a nine year old child, recalling incidents over a two year period when she was a six or seven year old, and certainly she appears to be a troubled girl now. I have Mr. [S.] who is age eighteen, I believe, recalling situations when he was fifteen and sixteen and in a homosexual relationship with Mr. [H.] and addicted to alcohol and drugs. It is not a question of Mr. [H.]'s lifestyle or what was going on, because he was doing what some people might consider bad things and that he naturally would go on to do another bad thing involving a child. One question that obviously is of concern is the question asked by defence counsel and unfortunately not followed up by defence counsel, Crown or myself, and it is probably open to me. It was asked of [M.] if it was possible that someone else did bad things to her and that she was afraid to tell and she answered "yes". "And that is why you said [N.] did it and not someone else?" and the answer was "yes". We are dealing with a nine year old child witness. Questions have to be asked simply, unequivocally. She did not go on to recant her testimony. She went on to reiterate the aspects of [N.], the penis and the vagina, and says that both [W.] and [N.] were involved in this type of activity. Whether or not there was another party, or whether the other party was [W.], or whether there is another party over and above [W.] and [N.] that she would give evidence relating to their involvement sexually with her, I do not know the answer to that question. In my opinion, I do not really need to know. When all is said and done, and looking at the situation, the credibility aspect, I am satisfied that [M.] gave evidence as best she could, a nine year old. You do not expect it to flow as an adult who perhaps has rehearsed the story, comes in and can be somewhat calculating, giving evidence and putting their story forth. This is a young child I think who has gone through a traumatic situation, probably did not want to recall it, but gave the evidence as best she could as befits a nine year old. Mr. [S.], on the other hand, had difficulty with his evidence. I do not find him to be a truthful witness or a credible witness, in particular with respect to the aspects of his dealings with [M.]. He was using drugs to a great extent, and he was around the house to a great extent, getting three and five hundred dollars from Mr. [H.] a week and could not bring himself to babysit the children. I think he was distancing himself a little bit too much from the children. I would think he would have some interaction but, as he tells it, he had little or no interaction with children that he lived in a house with for two years with their father. I find that hard to believe. When all is said and done, I find [M.] to be a truthful witness. I accept her evidence. I find it to be credible. Where her evidence differs from the evidence of Mr. [S.], I accept the evidence of [M.H.] and do not accept the evidence of [N.S.]. Having said that, I am satisfied beyond a reasonable doubt that the Crown has proved its case, and would convict him of the charge before me.

ISSUES

[15] The respondent has framed the issues in the following manner:

1. Did the learned trial judge err in law regarding the burden of proof on the issue of identity?

2. Did the learned trial judge err in law by disregarding or misapprehending evidence of the complainant's credibility or motivation?
3. Did the learned trial judge err in law by misapprehending evidence of the appellant's credibility?

ANALYSIS

Burden of Proof on Issue of Identity

- [16] The main concern with M.'s testimony is that she may have been fearful of naming her cousin W. as an assailant, and that this may have motivated her to name the appellant. With regard to this concern, the appellant says that the trial judge erred in applying the burden of proof to the issue of the assailant's identity.
- [17] A judge sitting alone is not required, in his reasons, to recite the test for reasonable doubt; nor is he required to verbally caution himself as he would instruct a jury; nor is he required to discuss all factors dealing with the credibility and reliability of the witnesses: *R. v. A.A.M.* (1996), 71 B.C.A.C. 258 at pp. 266 and 277; *R. v. D.C.F.* (1 June 1992), Victoria Registry V01465 (BCCA) at pp. 8 and 13-14. Where the reasons for judgment are susceptible to two different interpretations, the interpretation which presumes that the judge applied the law correctly should be preferred: *R. v. A.A.M.*, supra at 269-270; *R. v. D.C.F.*, supra at pp. 13-16.
- [18] In my view, the trial judge did not misconstrue the burden of proof. He concluded his reasons by saying that the Crown had proved its case beyond a reasonable doubt. There is nothing in his reasons to indicate that the trial judge did not follow the test for reasonable doubt prescribed in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397, [1971] 1 S.C.R. 742.
- [19] The Supreme Court of Canada in *R. v. B.(G.)*, [1990] 2 S.C.R. 3, 56 C.C.C. (3d) 200 (cited to C.C.C.) has spoken clearly and unanimously regarding the proper assessment of children's testimony. In a sexual assault case with an eight-year-old complainant, Wilson J. at p. 219 spoke for the court in upholding the judgment of the Saskatchewan Court of Appeal. She said:

... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well-founded and comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.

Wakeling J.A. of the Saskatchewan Court of Appeal had said:

Although the cross-examination was conducted quite reasonably in these trials...I find it unremarkable that the youthful witness would eventually find shelter in silence or simple agreement with counsel's suggestions.

[20] In *R. v. W.(R.)*, [1992] 2 S.C.R. 122, 74 C.C.C. (3d) 134 (cited to C.C.C.), which is another case of sexual offence with complainants aged nine to sixteen years, the children's testimony featured a number of inconsistencies and was contradicted by other evidence. McLachlin J. (as she then was) spoke for an undivided court at pp. 142-144:

The law affecting the evidence of children has undergone two major changes in recent years. The first is removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. . . . The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults. So if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into an error. The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children [citing *R. v. B.(G.)*, *supra*]. . . . Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.

[21] Contrary to the appellant's submission, the trial judge was not required to warn himself of or take cognizance of the inherent frailties of the identification evidence of a nine-year-old child. Indeed, if he had assumed that children's identification evidence is inherently frail, he would have been in error.

[22] The complainant's single troublesome answer does not automatically create a reasonable doubt. The trier of fact is entitled to accept or reject specific parts of a witness's testimony. In his reasons, the trial judge focused on the contentious cross-examination, which implied that the complainant named the appellant because she was afraid of naming W. He dealt with this by commenting that "We are dealing with a nine year old child witness. Questions have to be asked simply, unequivocally." He had seen and heard M. give different answers to different wordings of the same question. He had repeatedly intervened because he perceived that she did not always understand defence counsel's questions. He was in the best position to weigh the significance of the complainant's answers.

[23] It is clear from his reasons that the trial judge did not misapprehend the testimony of the complainant. Apart from the single "Yes" response to defence counsel's question which is the subject of this appeal, M.'s testimony regarding the physical details of the assaults, and the identity of her assailants, remained internally consistent and also was consistent with her

mother's testimony about her disclosures. The complainant, in chief and on cross-examination, consistently described the number and location of the appellant's assaults, and the furniture in his room. Her testimony is also consistent with her naming two assailants. In cross-examination and in re-examination, the complainant testified that her cousin W. also sexually assaulted her, and she clearly distinguished W.'s assault: it occurred only once, at their grandmother's house where, on the appellant's own evidence, the complainant and W. frequently played. There was no evidence connecting the appellant to that location. The complainant's testimony regarding the number and location of the appellant's assaults was consistent with the details of her disclosure to her mother, which were admissible to rebut the defence of recent fabrication.

- [24] Plainly, the trial judge was alive to the evidence distinguishing the two assailants and their assaults. In his reasons, the trial judge referred to the complainant's disclosures and testimony of the appellant's assaults and W.'s assault. He referred to the testimony of K.D. and T.H., which indicated that the complainant had nightmares and genital pain long before the period of W.'s alleged assault. He also referred to T.H. finding the appellant alone with M. on the floor of her bedroom and on the floor of the appellant's bedroom - two precise locations where M. said she was assaulted.
- [25] Finally, it is clear from his reasons that the trial judge did not misapprehend the testimony of Dr. Fitzsimons and other witnesses as indicating the identity of any assailant. He properly referred to such evidence as corroborating the occurrence of sexual assaults. In addition, the testimony of T.H., K.D., and the appellant himself, indicated the appellant had opportunities to assault the complainant in the locations where she said that he had assaulted her.
- [26] I cannot therefore conclude that the trial judge erred in applying the burden of proof with respect to the assailant's identity.

Complainant's Credibility or Motivation

- [27] On the issue of credibility, the Supreme Court of Canada has held that "Unless the record reveals an error of law or in principle or a clear and manifest error in the appreciation of the evidence, a court should not intervene in the determination": *R. v. C.(R.)*, [1993] 2 S.C.R. 226, 81 C.C.C. (3d) 417 (cited to C.C.C.) at p. 422.
- [28] The Supreme Court in *R. v. Francois*, [1994] 2 S.C.R. 827, 91 C.C.C. (3d) 289 (cited to C.C.C.) held that a conviction is not unreasonable simply because certain facts may have been suggested to the complainant, or because she may have had reason to concoct her accusations. McLachlin J. said at pp. 296-297:

In the end, the jury must decide whether, despite such factors, it believes the witness's story, in whole or in part. That determination turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common

sense of the jury, which cannot be assessed by the Court of Appeal. The latter domain is the 'advantage' possessed by the trier of fact, be it judge or jury, which the Court of Appeal does not possess and which the Court of Appeal must bear in mind in deciding whether the verdict is unreasonable: *R. v. W.(R.)*, supra. In considering the reasonableness of the jury's verdict, the Court of Appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness's evidence in its entirety. Or the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable. A verdict of guilty based on such evidence may very well be both reasonable and lawful.

- [29] This case is not comparable to the appellant's authority in *R. v. R.(D.)* (1996), 107 C.C.C. (3d) 289 (S.C.C.), in which three severely abused and disturbed children together alleged assaults by many different perpetrators, and the trial judge failed to "separate fact from fiction" when faced with bizarre testimony.
- [30] Furthermore, this is not a case, as the appellant suggests, "involving diametrically opposed testimony from the defence and Crown without any corroborating evidence to support either version." Rather, it is a case with corroboration that the complainant was sexually assaulted over a period of months, and with corroboration that the appellant had opportunities to commit the assaults in the locations specified by the complainant, during the same period of time.
- [31] Apart from M.H.'s single contentious "Yes" answer, there was no evidence that she was motivated to accuse the appellant because she was afraid of accusing her cousin W. or anyone else. Indeed, the evidence suggested that no one was trying to protect W. If the complainant was afraid of naming her cousin, her fear did not prevent her from naming him to her mother and her therapist over a year before the trial. Nor did her fear prevent her from answering questions about W.'s assault, once the topic was raised in cross-examination. There was no evidence that the complainant's family made her fearful of naming the "real" assailant. L.H. testified that when the complainant disclosed W.'s assault, Ms. H. made an appointment for the complainant to talk with her therapist about this new allegation. Significantly, defence counsel at the trial never cross-examined the complainant's parents or her aunt on whether they encouraged her to "protect" W.

Evidence of the Appellant's Credibility

- [32] Finally, the appellant submits that the trial judge misapprehended the evidence of the appellant's credibility. However, I find nothing in the trial judge's reasons to suggest that he rejected the evidence of the appellant based on his view of the appellant's lifestyle. Neither did the trial judge, as the appellant suggests, "criticize" the appellant for using drugs and

alcohol and not babysitting the children. His comment regarding babysitting was made in the context of assessing the appellant's contact with the children, and hence his opportunity to assault the complainant.

CONCLUSION

[33] For these reasons I would dismiss the appeal.

[34] NEWBURY, J.A. I agree.

[35] HALL, J.A. I agree with the reasons of Mr. Justice Cumming. Mr. Zipp, with his usual clarity of reasoning, has focused the attention of the court on the important issues in the case. But having read and re-read the trial transcript and considered the relevant authorities, I am of the view that no error has been demonstrated in the trial judge's reasoning or ultimate conclusion, and accordingly, I too would dismiss the appeal.

[36] CUMMING, J.A. The appeal is dismissed.

"The Honourable Mr. Justice Cumming"

"The Honourable Mr. Justice Hall"

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Prepared on 28 October 2026 · Esheria