

CANADA / JUDGMENT

## R. v. P.R.J.

2023 BCCA 13

### COURT

British Columbia Court of Appeal

### DECIDED

11 January 2023

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2023 BCCA 13 R. v. P.R.J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. P.R.J.,

2023 BCCA 13

Date: 20230111

Docket: CA48148

Between:

Rex

Respondent

And

P.R.J.

### Appellant

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Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Bennett

**The Honourable Madam Justice Horsman**

On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2021 (R. v. P.R.J., 2021 BCSC 2420, Kelowna Docket 91385-2).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

September 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 11, 2023

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Horsman

Summary:

P.R.J., was found guilty of three offences against her daughter, namely, sexual interference, invitation to sexual touching, and sexual assault. The trial judge applied the rule against multiple convictions--the Kienapple principle-- to conditionally stay the sexual assault charge and entered convictions on the two other charges. P.R.J. appeals her conviction on only the invitation to sexual touching charge. She argues first that the trial judge misapprehended the evidence when he stated that P.R.J. took her daughter's hand and placed it on P.R.J.'s genitals. Second, she argues that, as a matter of law, such conduct does not satisfy the elements of the offence of invitation to sexual touching. Finally, she contends that if the invitation to sexual touching offence was proven, then that conviction should be conditionally stayed by reason of the Kienapple principle. Held: Appeal allowed in part. First, while the trial judge did err in stating when the daughter disclosed certain evidence, it was not a material misapprehension because it did not affect the judge's reasoning process. The second alleged misapprehension was no more than a disagreement with the judge's interpretation of the evidence; it was open to the trial judge to find that P.R.J. "placed" her daughter's hands on P.R.J.'s genitals. Second, as the offence of invitation to

sexual touching can be made out where there is physical touching, P.R.J.'s actions satisfied the elements of that offence. Finally, the Kienapple principle applies to the charges of sexual interference and invitation to sexual touching. The invitation to sexual touching charge is conditionally stayed as the sexual interference charge best describes the totality of P.R.J.'s conduct.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

## Introduction

- [1] Following a trial, Justice Davies of the Supreme Court of British Columbia found P.R.J. guilty of having committed three offences against her daughter P., namely, sexual interference (Count 1), invitation to sexual touching (Count 2), and sexual assault (Count 3). In doing so, he rejected P.R.J.'s evidence denying that the single incident that formed the subject matter of the charges had occurred. By reason of the rule against multiple convictions set out in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, the trial judge conditionally stayed the sexual assault charge and entered convictions on the two other charges. P.R.J. appeals only the conviction on the invitation to sexual touching charge. That conviction was based on a finding that P.R.J. "placed" P.'s hand on her, i.e., P.R.J.'s, vagina.
- [2] P.J.R. advances several arguments. First, she says a new trial is warranted because the judge misapprehended the evidence when he stated P. had disclosed in a recorded interview with a police officer that P.R.J. had "placed" (or "put") P.'s hand on her vagina. That misapprehension is accepted by the Crown. P.R.J.'s position is that this error could have affected the judge's decision to accept P.'s evidence as to what occurred. P.J.R. further says the finding that she "placed" P.'s hand on her vagina is not supportable in light of the fact that P. did not describe any particular physical act by P.R.J.
- [3] Next, P.R.J. contends that if the judge's factual finding with respect to her having "placed" P.'s hand on her vagina is supportable, then, as a matter of law, such conduct does not satisfy the elements of the offence of invitation to sexual touching. In this regard, P.R.J. seeks an acquittal.
- [4] Last, P.R.J. contends that if the finding that she committed the offence of invitation to sexual touching is sustained, then that conviction should be conditionally stayed by reason of the rule against multiple convictions.
- [5] For the reasons that follow, I would allow this appeal to the limited extent of entering a conditional stay on the invitation to sexual touching charge. As discussed below, I have concluded that: (i) the misapprehension of the evidence was not material; (ii) it was open to the judge to find that P.R.J. "placed" P.'s hand on her vagina; (iii) the placing of P.'s hand satisfied the elements of invitation to sexual touching; (iv) the rule against multiple convictions applies to the charges of sexual interference and invitation to sexual touching; and (v) the sexual interference charge best describes P.R.J.'s conduct.

## Factual Background

- [6] What follows is intended as general background. Aspects of the proceedings and the evidence are discussed later, in greater detail, in relation to specific grounds of appeal.

## Evidence at Trial

- [7] In November of 2018, P.R.J. entered into a rehabilitation program to address a longstanding substance abuse issue. At that time, P., who was then eight years old, was placed in the care of P.R.J.'s sister, M.F.
- [8] In December of 2018, P. told M.F. that P.R.J. had sexually touched her. As a result of that disclosure, in mid-January of 2019, P. was interviewed twice by a member of the Royal Canadian Mounted Police Child Exploitation Unit with specialized training and expertise in interviewing children. Those interviews were video and audio recorded.
- [9] The initial interview lasted approximately two-and one-half hours. During that interview, P. told the officer that one night when she was seven or eight years old, she crawled into P.R.J.'s bed; both were naked. P. said that P.R.J., who had been drinking, digitally penetrated P.'s vagina.
- [10] Following this interview, while M.F. and P. were having lunch, P. told M.F. she had forgotten to tell the officer something important, namely that P.R.J. had kissed her vagina. This resulted in P. being interviewed again that afternoon for approximately 20 minutes. P. told the officer about the kissing incident.
- [11] P. was nearly eleven years old at the time of trial. She was permitted to testify from outside the courtroom by means of closed-circuit television: see Criminal Code, R.S.C. 1985, c. C-46, s. 486.2.
- [12] At the outset of the trial, the Crown sought to have P.'s recorded interviews admitted into evidence under s. 715.1 of the Criminal Code. The trial judge held a voir dire to determine that issue. The Crown called two police officers and P. In her evidence-in-chief, P. adopted the contents of the interviews. During cross-examination, she testified P.R.J. made her touch (and digitally penetrate) P.R.J.'s vagina.
- [13] P.R.J. did not call any evidence on the voir dire or oppose the admission of P.'s interviews. The judge ruled P.'s interviews admissible and, with the consent of the parties, the evidence called on the voir dire became evidence on the trial proper.
- [14] M.F. was the Crown's final witness.
- [15] P.R.J. testified. She denied the incident P. described ever happened.

## Closing Submissions

- [16] The overall position taken by P.R.J.'s counsel (who is not counsel on this appeal) was that the Crown had failed to prove P.R.J.'s guilt on any charge beyond a reasonable doubt. He submitted P. could well be mistaken about the evidence she gave and that P.R.J.'s evidence was more reasonable. He pointed to what he submitted were several inconsistencies in P.'s evidence and noted the lack of any corroborative physical evidence. No specific submissions were made with respect to the invitation to sexual touching charge.
- [17] Crown counsel's overall position was that P.R.J.'s evidence should be rejected and that the evidence given by P. should be accepted because she was both credible and reliable. Passing reference was made to the cross-examination in which P. stated P.R.J. had made P. touch P.R.J.'s vagina.

## Trial Judge's Reasons

(2021 BCSC 2420)

- [18] The trial judge instructed himself on the burden and standard of proof before setting out the elements of the offences. He then reviewed the law concerning the approach to be taken in assessing the evidence of young children.
- [19] Applying the principles in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, the judge did not believe P.R.J. or find that her evidence raised a reasonable doubt. He provided several reasons for those conclusions.
- [20] In accepting P.'s evidence, the judge stated:
- [132] After considering the totality of P.'s evidence both in the taped interviews and her testimony at trial, while bearing in mind, also, her young age both at the time of the incident in issue and at the time of the interview as well as at trial, I have concluded that the Crown has proven beyond a reasonable doubt that the accused committed each of the offences charged.
- [133] I find that P. was an honest witness who at trial did her best to recall events when she was much younger. When she could not do so, she admitted she could not recall. Most significantly, however, P. was steadfast in her testimony at trial in direct and cross-examination about what she said her mother had done to her that night in both touching and kissing her vagina and in placing her hand on her mother's own vagina.
- [134] In concluding that I can rely safely upon P.'s testimony notwithstanding the accused's denials, I specifically refer to and rely upon the following:
- 1) In the two interviews conducted by Constable St. Thomas after she left her mother's care, P. was responding to open-ended questions that were not suggestive and did not contaminate or otherwise negatively impact the truthfulness of her answers.

- 2) P. was demonstrably uncomfortable and reluctant in discussing the subject of the sexual charges which she disclosed.
  - 3) P. demonstrated age-appropriate understanding of body parts and their function.
  - 4) P. was compellingly detailed both in contemporaneous drawings used to describe what her mother had done and in her simple descriptions of those acts including the smell of her mother's fingers which she said "smelled like nothing else."
  - 5) P.'s impromptu use of the Kleenex box to describe her mother's use of her fingers and mouth to go inside her vagina which described superficial as opposed to deep penetration.
  - 6) P.'s comparison of the touching of her vagina by her mother with the "tap tap tap" of using toilet paper herself.
  - 7) P.'s description of the differences between her mother's behaviour when "normal" the day after the incident as opposed to her belief that the night before when she said, "I think she was drinking and have pills and stuff."
  - 8) P.'s evidence that, although she could not smell alcohol that night, she knew her mother was drinking that night because she had never done that before.
  - 9) P. seeking to excuse her mother's behaviour by associating it with alcohol and pills not only convinces me of the truthfulness of her evidence about that night, but also the remainder of her evidence and her reluctance to testify about the matters her mother had done.
- [235] The totality of the evidence including that of P. herself also convinces me that she was not influenced by either her aunt or her grandmother in respect of the disclosures to her aunt that gave rise to these charges or as to the statements she made in interviews to Constable St. Thomas and her testimony at trial.
- [21] The Crown having accepted the Kienapple principle precluded convictions being registered on both the sexual interference and sexual assault charges, the judge, as requested by the Crown, entered a conditional stay on the latter charge. As a result, P.R.J. was convicted of sexual interference and invitation to sexual touching.

## The Grounds of Appeal

### Misapprehension of the Evidence

### The Alleged Errors

- [22] P.R.J. contends the trial judge twice misapprehended the evidence with respect to P. touching P.R.J.'s vagina.

[23] With respect to the first alleged error, there is no dispute that the judge erred in stating that P. disclosed during her second interview that P.R.J. had "placed" or "put" P.'s hand on P.R.J.'s vagina. This error appears in the following paragraphs of the judge's reasons under the heading "Evidence of P":

[68] In that second interview, P. provided information that she had not provided earlier concerning the accused having touched P.'s vagina and about the accused placing P.'s hand on her own vagina.

[69] As to the specificity of that sexual touching and kissing of her vagina and her mother's actions in putting P.'s hand on the accused's vagina, I refer to the transcript of P.'s second interview by Constable St. Thomas which I have again edited to remove irrelevant distractions and inaudible responses.

However, in the excerpts reproduced in the reasons, P. does not say anything about her hand being placed or put on P.R.J.'s vagina. Indeed, it is not something she mentioned in either interview.

[24] In her evidence-in-chief, P. did not say anything about touching P.R.J.'s vagina. However, that subject was raised by P.R.J.'s counsel during P.'s cross-examination:

Q Okay. So, is this what you told your auntie? I'm just going to ask you this and you tell me if this is what you told your auntie. You told her that [P.R.J.] made - [P.R.J.], your mom, made you stick your fingers into her own vagina and smell that. So, did that happen?

A Yes.

Q You also said to your aunt according to your auntie that [P.R.J.] wanted [you] to touch [P.R.J.'s] vagina area and then smell her fingers. Do you remember -

A She [indiscernible/CCTV].

Q And you told your auntie that?

A Yeah.

Q But you didn't mention that in the videotapes that we just saw; right?

A I don't think I did. I don't know.

Q So, are you really sure that that happened or were you wrong about that?

A I don't know if I told her, but that did happen.

Q Did you ever -- did your mom ever tell you to put your hand in her private parts?

A Like, that night?

Q Or any other time.

A Just one night she did. That night when she touched [indiscernible] just that night.

Q Okay. But did she make you touch her in the same place?

A Yeah.

Q She did?

A She wanted me [indiscernible] wanted me to.

[Emphasis added.]

[25] I have emphasized the word "her" above, because P.R.J. takes the position "her" refers to M.F. and, therefore, P. was not sure she told M.F. she had been made to touch P.R.J.'s vagina. She suggests this demonstrates that P. did not disclose this particular touching prior to trial. However, I do not agree with this interpretation of what P. said. P. was interviewed by a female officer and, having regard to the question about the videotapes, it is evident P. was referring to that officer.

[26] M.F. was not specifically examined with respect to whether P. had told her about touching P.R.J.'s vagina. However, in her evidence in chief in regard to when P. first disclosed what had occurred, M.F. stated:

And then [P.] says, "Well, you know, I know she drinks, so I know she doesn't mean to do this, but this is what she did one time", and she proceeded to tell me what she did, touching back and forth, and I was taken aback by it.

[27] The second error alleged by P.R.J. is that the judge was mistaken as to the substance of P.'s evidence when he found P.R.J. had "placed" or "put" P.'s hand on P.R.J.'s vagina. In this regard, P.R.J. points to the fact that in cross-examination, P. stated only that P.R.J. "made" or "wanted" P. to touch P.R.J.'s vagina. The Crown's position is that the judge drew a reasonable inference from P.'s evidence. In the alternative, the Crown say that if the judge erred, then the error was not material.

## Analysis

[28] The burden on an appellant who asserts a trial judge misapprehended evidence is a stringent one. The principles to be applied are set out in *R. v. Osinde*, 2021 BCCA 124, wherein I stated:

[17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes "as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": *Morrissey* at 218.

- [18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge's reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.
- [19] Although a trial judge is uniquely positioned to make credibility assessments, where those assessments are based on misapprehensions of evidence and played a critical role in reaching a conviction, the assessments and the verdict will be insupportable: *R. v. C.L.Y.*, 2008 SCC 2 at para. 21, [2008] 1 S.C.R. 5. This is so even when the evidence adduced at the trial was capable of supporting a conviction: *Lohrer* at para. 1.
- [20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: "[t]he plain language or the thrust of the reasons must disclose an actual mistake": *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56-57, 59, 61-62. If so, then the reasoning that led to a conviction is based on "unsteady ground": *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge's reasoning process.
- [29] With regard to the first alleged error, the issue is not whether the trial judge misapprehended the evidence but whether the misapprehension that occurred played a critical role in his acceptance of one aspect of P.'s evidence. P.R.J. argues that the fact P. did not disclose being made or directed to touch P.R.J.'s vagina when interviewed was material and relevant to the assessment of her credibility and reliability in regard to her in-court testimony in regard to that touching. She says P.'s failure to mention that touching when interviewed constitutes a "difference" between her recorded statement and in-court testimony that the judge was required to consider. This point was not raised at trial. Indeed, defence counsel characterized the differences in the versions of events given by P. at different times as "slight". It is apparent from defence counsel's questions that he was in possession of a statement by M.F. in which M.F. stated P. had disclosed having been made to touch P.R.J.'s vagina.
- [30] In my view, P.R.J. has not met the high bar of showing that the judge's error materially affected his reasoning process in assessing the reliability or credibility of P.'s testimony regarding touching P.R.J.'s vagina. The error was a matter of detail, not substance, given P. had disclosed that touching to M.F. prior to being interviewed. This is not a case in which a judge mistakenly believed a complaint had previously disclosed an aspect of their in-court version of events when no such disclosure had ever been made.

- [31] The second alleged misapprehension concerns the judge's finding that P.R.J. "placed" or "put" P's hand on her vagina. P.R.J. says this was an error because P. only said P.R.J. "made" or "wanted" her to touch P.R.J.'s vagina. P.R.J. submits that based on P's testimony it is impossible to determine whether she physically took P's hand or used some form of verbal or non-verbal cue to communicate her desire to have P. touch her vagina.
- [32] I would not give effect to this argument. P's evidence was that P.R.J. had "made" / "wanted" her to touch P.R.J.'s vagina in the same way P.R.J. had touched P's vagina, i.e., by digital penetration. Given P's age and the fact that she had not been a willing participant in what occurred on the night in question, it was open to the judge to infer P.R.J. had drawn P's hand to her vagina to make that penetration happen. P.R.J.'s complaint is no more than a disagreement with the judge's interpretation of the evidence; it does not rise to the level of a misapprehension of evidence: *R. v. Swales*, 2014 BCCA 350 at para. 49, 360 B.C.A.C. 291.

Do the Facts Found by the Trial Judge Constitute the Offence of Invitation to Sexual Touching?

#### The Alleged Error

- [33] The invitation to sexual touching count on the indictment was worded as follows:

[P.R.J.] from the 10th day of July, 2017 to the 10th day of November, 2018, inclusive, at or near [place omitted] in the Province of British Columbia, did, for a sexual purpose, invite, counsel or incite [P.], a person under the age of sixteen years, to touch, directly or indirectly, with a part of her body, or with an object, the body of [P.J.R.], contrary to Section 152 of the Criminal Code.

- [34] P.R.J. submits the conduct the trial judge found her to have engaged in does not satisfy the elements of an offence under s. 152 of the Criminal Code. She says that based on those findings that charge should now be dismissed. Whether the facts found by a trial judge satisfy the elements of an offence is a question of law subject to the correctness standard of review: *R. v. Mara*, [1997] 2 S.C.R. 630 at para. 29; *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 40.
- [35] This ground was advanced by P.R.J. on the basis that the trial judge, in para. 133 of his reasons, found only that she had engaged in the physical act of placing P's hand on her vagina and that the judge cannot be taken to have accepted P's testimony that she also told P. to do so. The Crown's position is that para. 133 should be read as a finding that P.R.J.'s actions included this verbal component which, in the Crown's view, invited or incited P. to place her hand on P.R.J.'s vagina. It is unnecessary to resolve this issue because I have concluded P.R.J.'s conviction under s. 152 is supported by her physical actions.

#### Analysis

- [36] P.R.J.'s argument focuses on ss. 151 and 152 of the Criminal Code. Those provisions read as follows:

## Sexual Interference

- s. 151 Every person, who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
  - a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
  - (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

## Invitation to Sexual Touching

- s. 152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,
  - (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
  - (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[Emphasis added.]

Section 22(3) of the Criminal Code provides:

For the purpose of this Act, "counsel" includes procure, solicit or incite.

- [37] P.J.R. submits her actions amount to only an act of sexual interference (s. 151) and not an invitation to sexual interference (s. 152). Her position is that while an invitation can be both verbal and non-verbal, once there is physical contact for a sexual purpose, s. 152 is inapplicable. She cites *R. v. J.H.*, 2010 NSSC 218, 291 N.S.R. (2d) 92, as authority for that position.
- [38] J.H. was charged with two offences arising out of one incident. Count 1 alleged he did for a sexual purpose "invite" the complainant to touch his genital region (s. 152). Count 2 alleged he did for a sexual purpose directly touch the complainant with his hand (s. 151). The Crown proceeded summary before a Provincial Court judge. The complainant testified that while standing in front of her, J.H. grabbed her hand, put it down the front of his shorts, and made a squeezing motion with his legs. J.H. testified those events never happened.
- [39] The trial judge had a reasonable doubt with respect to whether the incident the complaint described had occurred and dismissed both charges. In addition, she held that Count 1 could not be proven because there was no evidence of any manner or type of

communication between J.H. and the complainant. The Crown unsuccessfully appealed the dismissal of both charges on a number of grounds, including that the trial judge erred in finding that the evidence of the complainant could not, in any event, establish the commission of an offence under s. 152. P.R.J. relies on the following passage from the reasons of Justice MacDonald, the summary conviction appeal judge:

- [26] R. v. Sears (1990), 58 C.C.C. (3d) 62, (Man.) C.A., is authority for the principle that the offence is made out when the invitation, counselling or inciting occurs, not when the touching occurs, if at all. The action of J.H. in grabbing the hand of J.M.T. and putting it down his spandex shorts would be part of the actus reus for an offence under s.151 of the Criminal Code.
- [27] A review of the transcript of the proceedings confirms to me the trial judge's conclusion there were no words of invitation or counselling, nor for that matter, any form of actions that would fall within the pervuew [sic] s. 152. Thus, her finding of a not guilty is confirmed and I would dismiss the appeal on Count #1.

In light of R. v. R.V., 2021 SCC 10, 402 C.C.C. (3d) 295, I am unable to accept this narrow interpretation of s. 152.

- [40] R.V. was charged in a three-count indictment with sexual assault, sexual interference, and invitation to sexual touching of his partner's daughter. Each charged covered a period of approximately eight years, from when the complainant was approximately seven years old until she was approximately 13 years old. A jury convicted R.V. on the sexual interference and invitation to sexual touching charges but acquitted on the sexual assault charge. As discussed below, the invitation to sexual touching charge was based entirely on evidence of physical contact between R.V. and the child.
- [41] R.V. appealed the convictions on the basis that the verdicts were inconsistent. The Crown cross-appealed. The Crown agreed the verdicts were inconsistent but argued that the inconsistency arose from an error in the jury instructions and not an inconsistency in the jury's factual findings. A majority in the Court of Appeal for Ontario allowed R.V.'s appeal, set aside the convictions on the sexual interference and invitation to sexual touching charges, and entered acquittals on those charges. The Court also dismissed the Crown's cross-appeal: R. v. R.V., 2019 ONCA 664, 147 O.R. (3d) 657.
- [42] In the Supreme Court of Canada, a majority allowed an appeal by the Crown and restored the convictions for sexual interference and invitation to sexual touching. It found that R.V.'s acquittal on the sexual assault charge was based on a misdirection by the trial judge which left the jury with a mistaken impression that the "force" required for sexual assault was different from the element of "touching" required for sexual interference and invitation to sexual touching.
- [43] With respect to the relationship between the offences of sexual interference, invitation to sexual touching, and sexual assault, Justice Moldaver (for the majority) said this:

- [51] Sections 151, 152 and 271 of the Criminal Code use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature (Criminal Code, s. 265(1)(a); *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24).
- [44] Importantly, in holding that the jury's verdicts on the sexual interference and invitation to sexual touching charges were not affected by the misdirection in regard to sexual assault, Moldaver J. said:
- [69] Further, the legal error was isolated to the acquittal. The trial judge's instructions on sexual interference and invitation to sexual touching were legally correct in that the jury was properly instructed on the essential elements of those offences and on the evidence. The error in the instruction on sexual assault did not colour the instructions on the remaining offences. I can thus conclude, to a high degree of certainty, that the error pertained solely to the sexual assault charge, not to the sexual interference or sexual invitation charges.
- [72] Since I have found that the verdicts are not actually inconsistent, the convictions are not unreasonable on that basis. R.V. does not allege any other basis by which his convictions might be unreasonable, and for good reason: they are supportable on the evidence tendered at trial and consistent with the jury instructions on those two offences. Accordingly, R.V.'s appeal from his convictions should have been dismissed.
- [Emphasis added.]
- [45] The instructions the jury in R.V. were given that are relevant to P.R.J.'s appeal were summarized by Chief Justice Strathy (for the majority) in the Court of Appeal:
- [16] After explaining how to determine whether the force was applied in circumstances of a sexual nature, the trial judge reviewed the complainant's evidence concerning the incidents, which she described as the complainant's hand "touching" the appellant's penis, the appellant's hand "touching" her breast area and her vagina, the complainant's pelvis "touching" the appellant's pelvis, and the appellant's hand "touching" the complainant's head and pushing it down to his penis.
- [19] The trial judge then turned to the instructions for the other two offences, first sexual interference and then invitation to sexual touching. Again, she described the elements of the offences and broke them down into specific questions. In the case of sexual interference, she explained that the Crown was required to prove beyond a reasonable doubt: (i) the complainant was under 16 years old at the time; (ii) the appellant touched the complainant; and (iii) the touching was for a sexual purpose. She explained that "touching" involves intentional physical touching, whether direct or indirect, of any part of the

complainant's body and that "[f]orce is not required" for sexual touching. She did not review the evidence on this count because it was the same as the evidence on the sexual assault count.

- [20] The trial judge then reviewed the essential elements of invitation to sexual touching: (i) the complainant was under 16 years old at the time; (ii) the appellant invited the complainant to touch his body; and (iii) the touching he invited was for a sexual purpose. Again, she instructed the jury on the meaning of "touching", including that "[f]orce is not required". She then identified the complainant's evidence pertaining to this count, including that the appellant had: pushed her hand down to his penis; grabbed her wrist and put her hand on his penis to masturbate him; pulled her on top of him to ride him; and pushed her head down to his penis. Each of these acts was also referred to in the trial judge's instructions on sexual assault.

[Emphasis added.]

- [46] It is readily apparent that Moldaver J. found R.V. to have been properly convicted of invitation to sexual touching for having engaged in physical contact with the complainant for the purpose of having her touch him for a sexual purpose.
- [47] I do not accept P.R.J.'s submission that R.V.'s conviction for invitation to sexual touching can be distinguished because his conduct included: (i) laying underneath the complainant while he was unclothed and she was clothed, simulating intercourse and ejaculating on his stomach; and (ii) laying underneath her while he was clothed and she was unclothed, simulating intercourse: S.C.C. at para. 9; Ont. C.A. at para. 6. P.R.J. says those acts could have been the basis on which that conviction was upheld. There are two responses to that argument. The first is that it ignores the fact that those actions involved R.V. engaging in physical contact with the complainant for a sexual purpose. Thus, R.V.'s conduct does not distinguish his actions from P.R.J.'s actions in the way P.R.J. claims it does. The second is that in para. 69 of his reasons, Moldaver J. held that the jury instructions on that charge had been correct with respect to both the law and the evidence. That evidence included R.V. using his hand to take the complainant's hand and place it on his genitals, which is equivalent to what R.J.R. did with P.'s hand.
- [48] *Mariona c. R.*, 2018 QCCA 1524, also involves facts equivalent to what P.R.J. did. In that case, Mr. Mariona took X's hand to force her to touch his penis. At trial he was found to have committed both sexual assault (s. 271) and invitation to sexual touching (s. 152). In upholding those findings, the Court of Appeal said this: [translation]
- [12] The evidence shows that the Appellant took the Complainant's hand in order to force her to touch his penis. To do this, he uses force due to the lack of consent of the victim. This gesture amounts to assault. Since it is posed for sexual purposes, the trial judge was right to find a sexual assault even if no gesture of a sexual nature was posed on the body of the victim.

[14] The Appellant entices X to touch him and took her hand to do so. The gesture constitutes an invitation even in the absence of verbal communication. The specific mens rea is also present since the intention was clearly to be touched for a sexual purpose.

[Emphasis added.]

See also: R. v. R.C.R.T., 2016 MBQB 2 at paras. 7, 43 (conviction), appeal dismissed 2018 MBCA 139, and 2017 MBQB 113 at para. 1 (sentence): accused found to have committed invitation to sexual touching based on his having put the complainant's hand on his penis.

[49] Last, sight should not be lost of the fact that although the offence created by s. 152 is commonly referred to "invitation to sexual touching", the means by which that offence can be committed extends beyond actions that fall under the verb "invite". In particular, by virtue of the definition of "counsel" in s. 22(3) of the Criminal Code, an offence under s. 152 is committed when someone "procure[s]" a person under the age of 16 to touch them for a sexual purpose. In this regard, it is of note that in discussing the meaning to be given to the words "procure, solicit, or incite" in s. 22(3), Justice Fish said this in R. v. Hamilton, 2005 SCC 47, [2005] 2 S.C.R. 432, a case that involved charges of counseling the commission of indictable offences that were never committed:

[22] In their relevant senses, the Canadian Oxford Dictionary (2nd ed. 2004) defines "counsel" as "advise" or "recommend (a course of action)"; "procure" as "bring about"; "solicit" as "ask repeatedly or earnestly for or seek or invite", or "make a request or petition to (a person)"; and "incite" as "urge". "Procure" has been held judicially to include "instigate" and "persuade": R. v. Gonzague (1983), 4 C.C.C. (3d) 505 (Ont. C.A.).

[Emphasis added.]

Black's Law Dictionary, 11th ed. (St. Paul, Minn.: Thomson Reuters, 2019), contains the following definition of "procure":

1. To obtain (something), esp. by special effort or means.
2. To achieve or bring something about (a result).
3. To obtain a sexual partner for another, esp. an unlawful partner such as a minor or a prostitute.

[50] Returning to the case at bar, when P.R.J. took P.'s hand and placed it on her vagina, she instigated/brought about/ procured P. to touch her for a sexual purpose, thereby committing an offence under s. 152.

Does the Kienapple Principle Apply?

[51] P.R.J. contends the rule against multiple convictions precludes convictions being recorded for both sexual interference and invitation to sexual touching when the finding of guilt on the latter charge is based entirely on a physical act of touching for a sexual purpose. This issue was not raised before the trial judge. Although the Crown did not concede this point, it did state during the hearing of this appeal that, if ever there were a case in which ss. 151 and 152 offences should be subject to the Kienapple principle, then this would be it. The Crown

agrees that when P.R.J. took hold of P.'s hand she did so for a sexual purpose and that, by doing so, she committed both offences.

- [52] As discussed in *R. v. Prince*, [1986] 2 S.C.R. 480, the Kienapple principle precludes multiple convictions for different offences when there is both a factual and legal nexus connecting them. In this case, the critical question is whether there is a sufficient legal nexus. More particularly, the question is whether, in a situation where the s. 152 offence is made out through an act of touching, it can be said that there is an "additional and distinguishing element" between the s. 151 and s. 152 offences that would refute a sufficient legal nexus: *Prince* at 498. As Justice Doherty stated in *R. v. K. (R.)* (2005), 198 C.C.C. (3d) 232 at para. 36 (Ont. C.A.), "[t]he sufficiency of the legal nexus between offences will depend on an interpretation of the statutory provisions that create the offences and the application of those statutory definitions to the circumstances of the case" [emphasis added].
- [53] Both s. 151 and s. 152 were enacted to protect children against sexual abuse and exploitation. Section 151 requires the offender to have touched, either directly or indirectly, the complainant for a sexual purpose. Section 152 requires the offender to have communicated with the complainant in an effort to have the complainant touch them or another person for a sexual purpose. That communication can be verbal or non-verbal and, as discussed above, non-verbal communication can involve the offender touching the complainant.
- [54] In the present case, the communication (i.e., essential element) underlying P.R.J.'s conviction under s. 152 involved her touching P.'s hand for a sexual purpose. That touching satisfied the essential element of the s. 151 offence of which P.R.J. was also convicted. In these circumstances, there are no additional or distinguishing elements between the two offences and there is, to use the language of Chief Justice Dickson in *Prince*, "sufficient correspondence between [the] elements [of the two offences] to sustain the Kienapple principle": at 501. To conclude otherwise would mean that a case in which the Crown proved only that the offender took the complainant's hand and placed it on their own genitals would result in the offender standing convicted under both s. 151 and s. 152, if the Crown chose to proceed on both charges. In my view, that result would run counter to the fact, recognized by the Chief Justice, that "Canadian courts have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict": *Prince* at 489-490.
- [55] The Quebec Court of Appeal took a similar approach in *Mariona*. As previously discussed, Mr. Mariona was convicted at trial of both sexual assault and invitation to sexual touching based on a single incident in which he took X's hand to force her to touch his penis. Although the Court of Appeal held that Mr. Mariona was factually guilty of both offences, it applied the Kienapple principle and granted a conditional stay on the sexual assault charge. After noting that the Kienapple principle had not been applied to charges of sexual assault and invitation to sexual touching in *Casavant c. R.*, 2016 QCCA 1340--a decision I will come back to--the Court stated: [translation]

- [18] The factual situation is different here, however. Indeed, the two charges relate to a single event of very short duration. The facts of the two offenses are identical. The use of force to bring the complainant's hand towards his genitals, which constitutes the assault justifying the conviction for assault, is the same act which is considered to be an incitement for the purposes of the second offence. The required mens rea is also similar, an intention to touch or touch for a sexual purpose without the consent of the victim.
- [56] In *Casavant*, Mr. Casavant was found guilty at trial on charges of sexual assault (s. 271) and invitation to sexual touching (s. 152). Those charges alleged the offences occurred over a three-month period. In a statement admitted into evidence under s. 715.1 of the Criminal Code, the complainant described several incidents during which Mr. Casavant touched her genitals, several during which he kissed her on the mouth using his tongue, and one during which he rubbed his foot between her legs. She also described an incident during which she touched his penis through his clothes. At the sentencing stage, the judge entered a conditional stay on the sexual assault charge on the basis of the Kienapple principle and recorded a conviction only on the invitation to sexual touching charge.
- [57] In allowing Mr. Casavant's conviction appeal and ordering a new trial, the Court of Appeal held that the trial judge had erred in several respects, the most significant being that he had dealt with the matter on the basis that Mr. Casavant had been charged with sexual interference (s. 151) rather than invitation to sexual touching (s. 152). In that regard, Justice St. Pierre stated, in part:
- [49] A review of the content of the judgment leads me to conclude that the judge dealt with the case as though the appellant had been charged with an indictable offence under section 151 Cr. C. (sexual interference), which was not the case, and failed to analyze the essential elements of the offence under section 152 Cr. C. Thus, the appellant seems to have been convicted of a crime with which he was not charged, and the reasons provided by the judge do not allow us to logically connect his verdict (under s. 152 Cr. C.) to a discernable, intelligible basis.
- [50] I have come to this conclusion considering that (1) the judge convicted the appellant of sexual touching, (2) he did not discuss the relationship between the complainant and the appellant, particularly the complainant's insistence and the appellant's repeated refusals, (3) he ordered a conditional stay of proceedings in regard to the charge under paragraph 271(1)(a) Cr. C., and (4) he dealt with "the events" as a whole, without nuance or distinction, despite the complainant's retractions and clearly contradictory statements, and without taking into account, in this context, the mother's testimony that the complainant had lied in the past, that she was jealous, and that she has an imaginary world.
- [58] Justice St. Pierre went on to state that the Kienapple principle cannot apply as between charges of sexual assault and invitation to sexual touching because they are distinct offences. In doing so, she referred to *R. v. Rhynes*, 2004 PESCTD 30, 186 C.C.C. (3d) 29, application for leave to appeal and appeal dismissed 2004 PESCAD 15, 239 Nfld. & P.E.I.R. 89,

and *R. v. Legare*, 2008 ABCA 138, 236 C.C.C. (3d) 380, appeal on other grounds dismissed 2009 SCC 56, [2009] 3 S.C.R. 551, as standing for the proposition that an offence under s. 152 can be committed only by communication and not by touching. However, Casavant, Rhynes, and Legare pre-date the Supreme Court of Canada's decision in *R.V.* and in none of them was consideration given to the fact that physical contact can be a means of communication under s. 152. Other noteworthy aspects of these cases are that: (i) Mr. Rhynes was convicted on two charges that particularized that he had "incite[d]" the complainant to touch him for a sexual purpose, but those convictions were set aside because there was no evidence he had done anything positive to urge, persuade, or encourage the complainant to do so; and (ii) Mr. Legare had no physical interaction with the complainant, as the offence was alleged to have been committed through an online chat room, and the court there determined the issue to be one of whether the mens rea was made out.

- [59] The facts of the present case are comparable to those in *R.C.R.T.* As discussed in the reason for sentence in that case (2017 MBQB 113), *R.C.T.R.* was found guilty of sexual assault, sexual interference, and invitation to sexual touching based on the fact that one night he touched his daughter all over her body, put her hand on his penis, put his mouth on her genitals, and put his penis in her vagina. At the outset of her reasons, Justice Greenberg dealt with the application of Kienapple principle. She held that conditional stays should be entered on the sexual assault and invitation to sexual touching charges. With respect to whether the invitation to sexual touching charge should be stayed in light of the conviction for sexual interference, she said this after referring to *Prince* and the need for there to be a legal nexus between the offences:
- [9] While invitation to sexual touching captures sexual conduct that may not be caught by sexual interference, both offences target the same wrong -- sexual acts with children. In my view, by enacting more than one offence, Parliament broadened the scope of conduct that is criminalized but did not intend to add extra punishment just because the conduct in question could result in convictions for both offences. Doherty J.A. explained the crux of the Kienapple principle in *[R. v. K. (R.) (2005), 198 C.C.C. (3d) 232 (Ont. C.A.)]*:
- [39] I think the three factors identified in *Prince* as severing any possible legal nexus between offences provide further support for the view that the crucial distinction for the purposes of the application of [the] Kienapple rule is between different wrongs and the same wrong committed in different ways. If the offences target different societal interests, different victims, or prohibit different consequences, it cannot be said that the distinctions between the offences amount to nothing more than a different way of committing the same wrong.

[10] In the circumstances of this case, convictions for both sexual interference and invitation to sexual touching would offend the rule in *Kienapple*. As the same range of punishment applies to both offences, the choice of which conviction to maintain cannot be based on the fact that one charge is more serious. However, the charge of sexual interference more accurately describes the conduct in this case. So there will be a conditional stay on the charge of invitation to sexual touching.

[Emphasis added.]

See also: *R. v. Hussein*, 2017 ONSC 4202 at para. 45-47: during one incident the accused committed offences under ss. 151, 152, and 271; conviction recorded only in the s. 151 charge.

[60] A parallel can be drawn between the present case and the application of the *Kienapple* principle in *R. v. Seymour*, 2014 BCCA 301, 359 B.C.A.C. 118. Mr. Seymour was convicted of attempting to break and enter into a business and of mischief to the entrance gate to that business. The facts were that he had used a grinder in an effort to open a gate in the fence around the business's property. The mischief charge related to the damage done to the gate. In entering a conditional stay on the mischief charge, Justice Bennett said this, in part:

[35] "Break" is defined in s. 321 of the Criminal Code as "to break any part, internal or external". In this particular case, the act of trying to cut the lock amounts to both damaging the property and is the same act as "breaking" under s. 348. Normally, the offences would not attract the application of the rule against multiple convictions, as the element of "damage" is a separate and distinct element from those elements required to prove breaking and entering. However, on the facts of this case, the act of breaking caused the damage to the property, which is the gravamen of the offence of mischief. Therefore, the offences charged "do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong" (*R. v. K. (R.)*) at para 37).

[Emphasis added.]

[61] In the present case, P.R.J.'s taking of P.'s hand was both an act of sexual interference and the means by which she committed the offence of invitation to sexual touching. In these circumstances, those offences describe different ways of committing the same criminal wrong.

[62] To sum up, in this case the trial judge found that on that night, P.R.J. sexually interfered with P., thereby committing the offence charged in Count 1 of the indictment. P.R.J. did so by digitally penetrating P.'s vagina, kissing P.'s vagina, and placing P.'s hand on her vagina. While the taking of P.'s hand satisfied the element of the offence of invitation to sexual touching charged in Count 2, to paraphrase Dickson C.J. in *Prince*, to separately convict P.R.J. of that offence would be to heap multiple convictions on her in respect to a single criminal act without good reasons. What occurred that night was a single act of child abuse that should result in a single conviction. The offence of sexual interference best captures the totality of P.R.J.'s conduct.

**Disposition**

[63] I would allow this appeal to the limited extend of entering a conditional stay of proceedings on Count 2.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Horsman"

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