R. *v.* V. (K.B.), [1993] 2 S.C.R. 857

K.B.V. *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* V. (K.B.)

File No.: 22944.

1993: June 16; 1993: July 15.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Criminal law -- Sexual assault -- Accused grabbing three-year-old son in genital area to discipline him -- Absence of evidence of sexual gratification -- Accused convicted of sexual assault -- Whether assault was a sexual assault.

The accused was charged with sexually assaulting his three-year-old son. In a statement to the police, he explained that he grabbed his son's genitals in order to

deter him from grabbing the genital region of adults and to show him how much it hurts. The accused was convicted. The trial judge concluded that the absence of evidence of sexual gratification on the part of the accused was irrelevant in this case, given the other indicia which lead to the conclusion that the assault was in fact a sexual assault. The majority of the Court of Appeal upheld the accused's conviction.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Cory, McLachlin and Iacobucci JJ.: It was clearly open to the trial judge in this case to conclude, from all the circumstances, that the assault was one of a sexual nature. The assault was such that the sexual integrity of the child was violated.

Per Sopinka J. (dissenting): The lack of an intention of sexual gratification on the part of the accused was relevant in this case and changes the whole complexion of the accused's activity. In every aspect of the test for sexual assault, except the part of the body attacked, the assault was non-sexual in nature. The proper

disposition is to dismiss the appeal and substitute a conviction for common assault.

Cases Cited

By Iacobucci J.

Applied: *R. v. Chase*, [1987] 2 S.C.R. 293.

By Sopinka J. (dissenting)

R. v. Chase, [1987] 2 S.C.R. 293.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 271(1).

APPEAL from a judgment of the Ontario Court of Appeal (1992), 8 O.R. (3d) 20, 71 C.C.C. (3d) 65, 13 C.R. (4th) 87, dismissing the accused's appeal from his conviction on a charge of sexual assault. Appeal dismissed, Sopinka J. dissenting.

Philip Campbell, for the appellant.

Susan L. Reid, for the respondent.

//Iacobucci J.//

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Cory, McLachlin and Iacobucci JJ. was delivered by

IACOBUCCI J. -- This is an appeal which comes to us as of right. The appellant was convicted of sexually assaulting his three-year-old son by grabbing his genitals; the conviction was upheld by the Court of Appeal of Ontario (1992), 8 O.R. (3d) 20, Grange J.A. dissenting on whether the assault was a sexual assault within the meaning of s. 271(1) of the *Criminal Code*, R.S.C., 1985, c. C-46.

In *R. v. Chase* , [1987] 2 S.C.R. 293, the Court dealt with the offence of sexual assault and McIntyre J., after discussing applicable principles and authorities, stated, in delivering the judgment of the Court (at p. 302):

> Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* [now s. 265(1)] which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or

> carnal context of the assault visible to a reasonable observer". . . . The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant. . . . The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

In the case at bar, the trial judge referred, as did Osborne J.A. for the majority in the Ontario Court of Appeal, generally to the above comments of McIntyre J. in convicting the appellant. Among other things, the appellant, on three occasions, violently clutched the little boy's scrotum and there was evidence of bruising and severe pain. In my view, it was clearly open to the trial judge to conclude from all the circumstances that the assault was one of a sexual nature and that the assault was such that the sexual integrity of the appellant's son was violated.

Accordingly, I would dismiss the appeal.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. (dissenting) -- In my opinion, the learned trial judge in this case failed to accord any weight to the absence of any motive or intent on the part of the accused to seek sexual gratification in doing what he did. The weight to be accorded this factor in determining whether the assault is of a sexual nature will depend on the circumstances of the case. See *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302. I agree with Grange J.A., dissenting herein in the Court of Appeal (1992), 8 O.R. (3d) 20, who concluded as follows (at p. 26):

> When I examine the undisputed circumstances of this assault, I cannot reach the same conclusion. I cannot agree that the lack of an intention of sexual gratification is irrelevant. It seems to me, in the circumstances of this case, most relevant and changes the whole complexion of the appellant's activity. In every aspect of the test, except the part of the body attacked, the assault was non-sexual in nature.
>
> The assault was a misguided form of discipline and a cruel, unjustified attack upon a helpless child. It was assaultive; it was contemptible; it was deserving of punishment; but it was *not* sexual assault.
>
> In light of *R. v. Nantais*, [1966] 2 O.R. 246, [1966] 4 C.C.C. 108 (C.A.), the proper disposition is to dismiss the appeal and substitute a conviction for common assault. [Emphasis in original.]

I would dispose of the appeal as proposed by Grange J.A.

Appeal dismissed, SOPINKA J. *dissenting*.

Solicitors for the appellant: Copeland, Liss, Campbell, Toronto.

Solicitor for the respondent: The Ministry of the Attorney General, Toronto.