

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* E.M.W., 2011 SCC 31, [2011] 2 S.C.R. 542 | **Date:** 20110617  **Docket:** 33930 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**E.M.W.**

Respondent

**Coram:** McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 11)  **Dissenting Reasons:**  (paras. 12 to 13) | McLachlin C.J. (Binnie, Deschamps, Abella, Charron and Cromwell JJ. concurring)  Fish J. |

R. *v.* E.M.W., 2011 SCC 31, [2011] 2 S.C.R. 542

Her Majesty The Queen *Appellant*

v.

E.M.W. *Respondent*

**Indexed as:** R. ***v.*** E.M.W.

2011 SCC 31

File No.: 33930.

2011: May 20; 2011: June 17.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Cromwell JJ.

on appeal from the court of appeal for nova scotia

*Criminal law — Appeals — Powers of Court of Appeal — Reasonable verdict — Jurisdiction of a court of appeal to consider whether there was a miscarriage of justice — Whether there was a miscarriage of justice.*

E.M.W. was convicted of sexual assault. A majority of the Court of Appeal allowed an appeal and ordered a new trial. It held that the trial judge had improperly used pre‑trial statements by the complainant in ways that assisted the Crown’s case, and that Crown counsel’s questioning and conduct had rendered the trial unfair.

*Held* (Fish J. dissenting): The appeal should be allowed and the respondent’s conviction should be restored.

*Per* McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Cromwell JJ.: A failure to raise miscarriage of justice as a distinct ground in a Notice of Appeal does not deprive a court of appeal of jurisdiction to consider whether there was a miscarriage of justice. The shortcomings in the trial did not result in a miscarriage of justice. The trial judge’s reasons do not support an inference that the complainant’s pre‑trial statements were used improperly. Crown counsel did not ask impermissible leading questions. Crown counsel’s conduct did not affect the trial judge’s appreciation of the evidence or render the proceedings unfair.

*Per* Fish J. (dissenting): The trial was unsatisfactory. Crown counsel’s cross‑examination was inappropriate and prejudicial. Defence counsel did not attenuate the prejudicial effect of Crown counsel’s cross‑examination. Nor did the trial judge’s detailed and thoughtful reasons set things right.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 693(1)(*a*).

APPEAL from a judgment of the Nova Scotia Court of Appeal (Fichaud, Beveridge and Farrar JJ.A.), 2010 NSCA 73, 295 N.S.R. (2d) 141, 263 C.C.C. (3d) 136, 935 A.P.R. 141, [2010] N.S.J. No. 515 (QL), 2010 CarswellNS 650, setting aside the accused’s conviction for sexual assault entered by Campbell Prov. Ct. J., 2009 NSPC 33, [2009] N.S.J. No. 329 (QL), 2009 CarswellNS 396, and ordering a new trial. Appeal allowed, Fish J. dissenting.

James A. Gumpert, Q.C., and Mark A. Scott, for the appellant.

Donald C. Murray, Q.C., and Roger A. Burrill, for the respondent.

The judgment of McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Cromwell JJ. was delivered by

1. The Chief Justice — This is an appeal as of right pursuant to s. 693(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. For the reasons that follow, we would allow the appeal and affirm the conviction of E.M.W.
2. After a trial before judge alone, E.M.W. was convicted of sexual assault of his daughter, who at the trial was 12 years old (2009 NSPC 33 (CanLII)). A majority of the Court of Appeal (Beveridge and Farrar JJ.A.) allowed E.M.W.’s appeal from conviction and ordered a new trial, on the ground of miscarriage of justice (2010 NSCA 73, 295 N.S.R. (2d) 141). Fichaud J.A. dissented, on the view that the grounds relied on by the majority were not raised in the Notice of Appeal, and that in any event, a miscarriage of justice was not established.
3. In this Court, three points were argued.

Jurisdiction to Consider the Issue of Miscarriage of Justice

1. The first question is whether the majority of the Court of Appeal erred in allowing the appeal, given that the issues of miscarriage of justice and admissibility of the evidence were not raised in the Notice of Appeal. We agree with the respondent that the failure to expressly raise miscarriage of justice as a distinct ground of appeal does not deprive a court of appeal of jurisdiction to consider that issue. A potential miscarriage of justice is always something a court must be able to consider. However, the fact remains that the rules require that the grounds that the appellant relies on be set out. This ensures that the opposite party has notice of what will be raised. More broadly, it ensures that the court receives full submissions on all the issues that will be raised. Where additional grounds come to light after filing, good practice requires that the grounds be amended. If the court wishes to explore an issue that has not been raised, it may be necessary to grant an adjournment to ensure a full and fair hearing.
2. The respondent argues that despite the economy of the Notice of Appeal, the appeal hearing was full and fair. We need not linger over this question. Suffice to say that the Court of Appeal had jurisdiction to hear submissions on whether there had been a miscarriage of justice, and the issues were fully canvassed before this Court, whatever may have been the case below.

Improper Use of Prior Statements

1. The complainant had made statements to a friend and to the police on the matter, before testifying at the trial. The majority of the Court of Appeal was of the view that these statements had been improperly used or alluded to, in ways that bolstered the evidence of the complainant or otherwise assisted the Crown.
2. In our view, the majority of the Court of Appeal was wrong to seize on the trial judge’s reference to the content of the complainant’s disclosures to show that he had improperly used the evidence about these disclosures. The trial judge’s careful and thorough reasons when read as a whole in light of the trial record do not support the inference drawn by the majority of the Court of Appeal.

Did the Conduct of the Trial Constitute a Miscarriage of Justice?

1. This trial was far from perfect. At times, questions were asked or statements made that were tasteless, indeed unsavoury. Crown counsel’s soliloquizing on personal matters was unnecessary. However, we are not satisfied that these defects, however unfortunate, affected the trial judge’s appreciation of the evidence or rendered the proceedings unfair, so as to give rise to a miscarriage of justice.
2. We do not agree with the majority of the Court of Appeal that Crown counsel asked impermissible leading questions of the complainant. Leading questions are questions that suggest an answer or assume a state of facts that is in dispute. Here the questions put by Crown counsel to the complainant in examination-in-chief did not cross this threshold. Crown counsel, in meeting the challenge of a child reluctant to respond, asked binary questions that gave her a choice between alternatives. They did not, however, suggest an answer. The main components of the offence were elicited from the complainant by non-leading questions. We are not satisfied that her evidence, viewed as a whole, was improperly obtained by leading questions.
3. We do not find it necessary to go into detail on the other allegations of failings in the trial. The trial judge’s reasons show that he was alive to the concerns raised by inappropriate aspects of the trial, and took them into account in his careful and detailed reasons. The shortcomings of the trial therefore did not, in this case, result in a miscarriage of justice.

Conclusion

1. We would allow the appeal and restore the conviction.

The following are the reasons delivered by

1. Fish J. (dissenting) — With respect for those who are of a different view, I have concluded that the respondent’s trial was unsatisfactory ― notably because of the inappropriate and prejudicial cross-examinations of the respondent and N.L., the complainant’s grandmother, who was an important defence witness. The failure of defence counsel to object hardly attenuates the prejudicial effect of the impugned cross-examinations. Nor do defence counsel’s inexplicable questions regarding the respondent’s refusal to submit to a polygraph test justify the Crown’s persistent cross-examination suggesting that the respondent’s reason for refusing to do so can only be explained by his guilt. Finally, I recognize that the trial judge delivered detailed and thoughtful reasons for concluding as he did (2009 NSPC 33 (CanLII)). In my respectful view, however, they cannot set right the unsatisfactory nature of the trial.
2. Accordingly, without endorsing in their entirety the reasons of the majority in the Court of Appeal (2010 NSCA 73, 295 N.S.R. (2d) 141), I agree that the respondent is entitled to a new trial and would therefore dismiss the Crown’s appeal to this Court.

*Appeal allowed,* Fish J. *dissenting.*

*Solicitor for the appellant:  Public Prosecution Service of Nova Scotia, Halifax.*

*Solicitor for the respondent:  Dartmouth Professional Centre, Dartmouth.*