IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Currie, 2012 NSPC 123

Date: 20121217
Docket: 2099980
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Michael Bradley Currie

Defendant

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: December 17, 2012

Charge: Section 264.1(1)(a) *Criminal Code*

Counsel: Mark Gouthro, and Kathy Pentz, Q.C., for the Crown
Chris Conohan, for the Defence

Introduction

[1.] Mr. Michael Currie, the defendant, and Ms. Eryn Butts-Currie had been in a relationship since 1999 and despite having been volatile at times, they were married in January of 2008. This incident is alleged to have occurred in September of 2009. They are now separated and are governed by a Family Court Order regarding custody and access of their four year old son.

[2.] Ms. Eryn Butts-Curie alleged that sometime between the evening of September 5th and early morning hours of September 6th. Mr. Currie spoke to her on the phone on numerous occasions and during one call he is alleged to have uttered a threat to cause death or bodily harm.

[3.] The Crown called two witnesses, the complainant and Constable Maxner. The defendant testified on his own behalf.

Issue: Did Mr. Currie utter threats to cause death or bodily harm as alleged by the complainant.

The Law

(1.) Credibility of Witnesses

[4.] *R. v. Jaura*, p. 4, para. 12 and 13, states:

> The assessment of credibility is not a science (*R. v. Gagnon, [2006] 1 S.C.R. 621*) nor can it be reduced to legal rules or formulae: *R. v. White (1947), 89 C.C.C. 148 (S.C.C.)*. However, proper credibility assessment is closely related to burden of proof. For this reason, an accused is to be given the benefit of reasonable doubt in credibility assessment: *R. v. W.D. [1991] 1 S.C.R. 742; (1991), 63 C.C.C. (3d) 397*. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an "either/or" approach where the trier of fact chooses between competing versions -- particularly on the basis of mere preference of one over the other: *R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.)* cited with approval *R. v. Morin, [1988] 2 S.C.R. 345;* see also *R. v. Chan (1989), 52 C.C.C. (3d) 184 (Alta. C.A. and authorities cited therein)*. Acceptance of a complainant's version does not resolve the case. The court must still consider and weigh the defendant's version and, if unable to reject it, must consider itself to be in a state of reasonable doubt: *R. v. Riley (1979), 42 C.C.C. (2d) 437 (Ont. C.A.)*.
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> - The learned trial Judge then proceeded to consider each version in isolation and preferred the version of the complainant to that of the appellant. Having concluded that he preferred the complainant's testimony to that of the appellant, he found that the Crown's case had been proved beyond a reasonable doubt. With respect, we think that he erred in approaching the issue before him in that manner. The issue before him was not which version of the evidence was true, but rather, on the totality of the evidence viewed as a whole, whether the Crown's case had been proved beyond a reasonable doubt.
> - It is not without significance that the trial Judge did not specifically reject the evidence of the appellant nor find his

> evidence to be incredible. Yet, in this case the appellant could not be convicted unless his evidence on the issue of consent was totally rejected.

In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors -- such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors -- varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole.

[5.] I am also mindful of *R. v. W.D.* which states at para. 27:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in R. v. Morin, supra, at p. 357.
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> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well [page758] instruct the jury on the question of credibility along these lines:
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> - First, if you believe the evidence of the accused, obviously you must acquit.
> - Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Analysis

[6.] This is a case of domestic violence, one the courts see far too often. And, as is often the case, there are few, if any, witnesses to the incident so the court is left with a "he said/she said" scenario.

[7.] Ms. Eryn Butts-Currie's testimony was not a complicated narrative. She did not embellish her testimony and when she was not sure, she said so. It was obvious she was under some stress but she maintained her composure.

[8.] Mr. Currie was very cocky, sometimes smirking or laughing at the statements made by the complainant or questions of Crown counsel. He denied threatening his ex-wife, even suggesting she was intoxicated on the night in question, and that it was her who was threatening him.

[9.] There is nothing inherently believable or unbelievable in Mr. Currie's denial. It will have to be examined in relation to all of the evidence hard by the court.

[10.] As stated earlier, this is not a complicated scenario and on many occasions the single narrative of the complainant can carry the day and prove the Crown's case beyond a reasonable doubt.

[11.] The complaint came to light two days after the alleged incident because Mr. Currie called 911 regarding his wife kicking and pounding on his back door. As a result of Constable Maxner and his partner investigating, Mr. Currie was charged with uttering threats to his wife two days earlier.

[12.] The complainant gave a statement to the police officer. In her testimony she stated she told the police officers about the *57 procedure. Defence counsel in cross examination questioned the complainant about those phone records and the fact that there were none at trial. It is <u>not</u> a complainant's responsibility to investigate and gather evidence; that is the responsibility of the police agency. No phone records were entered as exhibits.

[13.] The complainant had not reviewed her statement prior to testifying. Had she been instructed to do so, it may have refreshed her memory. She was not sure if the defendant said "slice me" or "cut me" because she was so used to "him" (meaning Mr. Currie) threatening her.

[14.] A statement was not taken from the complainant until two days later, and perhaps this may have affected the contents and with the passage of time (over two years) people's memories fade.

[15.] Constable Barkhouse who arrested the defendant, was not called to testify so any conversation between the defendant and Constable Barkhouse has not been rebutted as it pertains to the defendant's testimony that he showed the police "scuff marks" on the door, that the defendant says were caused by the complainant.

[16.] Constable Maxner did not speak to the defendant. He did not testify as to any observations he may or may not have made of the door. There were no photographs taken of the door. Constable Maxner did not hear any of the alleged phone calls and in fact there is no suggestion they were recorded. There is no evidence Constable Maxner requested the complainant show him "caller ID" on her telephone so he could record the name and number that appeared on the complainants telephone.

[17.] Constable Maxner did not disclose to anyone, including a supervisor, etc., that he had been the complainant in a matter in 1999 involving Mr. Currie. Defence counsel suggested a bias towards the defendant and as a result when this complaint arose, Constable Maxner acted upon it.

[18.] Neither party, Constable Maxner or the defendant, has had any involvement with one another since that time in 1999 and, in fact, the defendant said he was away and in his own words, "he didn't know he was a police officer."

[19.] Constable Maxner did not know he was responding to the defendant's home and he did not speak with the defendant; Constable Barkhouse did. Constable Maxner had worked in New Waterford for two and a half years and had no encounters with the defendant.

[20.] I do not find any evidence of bias by Constable Maxner, although he should have advised his supervisors immediately upon becoming aware of the situation and his past involvement with the defendant.

[21.] Unfortunately this file of domestic violence was handled like so many others. A police officer gets a statement from a complainant who says he/she is willing to testify and a charge is laid, in keeping with their domestic violence pro-charge protocol. That appears to end the investigation. Zero tolerance does not equate with zero investigation.

[22.] Defence counsel says that Ms. Butts-Currie is lying about the complaint because she has made complaints in the past and then told the Crown Attorney it was not true.

[23.] It is not unusual for a person who is in an abusive, volatile relationship to make a complaint and then recant. Their reason is usually quite plausible and simple, time has passed – they want to get back together.

[24.] Does that mean she is lying now? No it does not. She has not recanted; she has testified under oath.

[25.] The defendant says he spoke to her on the phone that day; he just denies the threat.

Conclusion

[26.] Is the complainant lying about what happened: No, I find she is being truthful to the best of her ability. Is her memory or recollection tentative on the key issue? Yes, by her own admission she is not quite sure of the exact words.

[27.] Is Mr. Currie being truthful about the events of the date in question? No he is not. He has taken every opportunity to destroy the complainant's credibility and paint himself in a positive light. [R. v. Currie, 2012 NSPC 70, *O'Connor Application*]

[28.] Given all of the above, has the Crown proven the charge beyond a reasonable doubt?

[29.] The police may have a zero tolerance policy when it comes to domestic violence cases, however, it seems there is also "zero investigation."

[30.] Once again there appears to have been other evidence available for the police to gather, but they did not. The complainant's narrative is left to carry the Crown's case. Unfortunately that is not sufficient, and as suspicious as the circumstances are, suspicions are not the test. The Crown has not proven this case beyond a reasonable doubt and I find the defendant not guilty.

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The Honourable Judge Jean M. Whalen, J.P.C.