

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Finck*, 2017 NSPC 72

**Date:** 20170919

**Docket:** 8074143/8074144

**Registry:** Amherst

**Between:**

Her Majesty the Queen

v.

Matthew Finck

**Restriction on Publication: pursuant to s. 486.4 of *Criminal Code***

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**DECISION**

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**Judge:** The Honourable Judge Alain Bégin

**Heard:** 31 August 2017, in Amherst, Nova Scotia

**Decision:** 19 September 2017 (oral)  
4 May 2018 (written)

**Charges** Sections 271 and 266 Criminal Code

**Counsel:** Ms. Mary Ellen Nurse, for the Crown  
Mr. Robert Rideout, for the Defence

**By the Court:**

[1] This is the decision for the matters relating to Matthew James Finck that were heard on August 31<sup>st</sup>, 2017. In particular, Mr. Finck was charged with committing a sexual assault on A.C., contrary to section 271 of the *Criminal Code*, and of committing an assault on A.C. contrary to section 266 of the *Criminal Code*. The alleged dates of the offences were between the 1<sup>st</sup> of February 2016 and the 28<sup>th</sup> day of February 2016. The crown proceeded by way of summary conviction.

[2] The court heard from A.C., Deputy Chief Dwayne Pike, Sharon Gay, Jillian Martin and Matthew Finck.

**The Law**

[3] The crown has the onus of establishing beyond a reasonable doubt that Matthew James Finck committed the offences with which he is charged. The onus of proof never switches from the crown to the accused.

[4] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous

doubt. The burden of proof placed on the crown lies much closer to an absolute certainty than to a balance of probabilities.

[5] In *R. v. W. (D.)* [1991] 1 SCR 742 the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[6] Even where I do not believe the accused, and his evidence fails to raise a doubt, I must still consider whether on the evidence I do accept, if the crown has proved the essential elements of each offence beyond a reasonable doubt. I may only convict the accused of offences proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[7] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in

isolation. It is part of the whole of the evidence that I have heard and must consider.

[8] A criminal trial is **not** a credibility contest.

[9] On the issue of credibility I am guided by the case of *Faryna v. Chorny* [1952] 2 DLR 354, where the court held that the test for credibility is whether the witness' account is consistent with the probabilities that surrounded currently existing conditions. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[10] Or as stated by our Court of Appeal in *R. v. D.D.S.* [2006] NSJ No. 103 (NSCA):

*Experience tells us that one of the best tools to determine credibility and reliability is **the painstaking, careful and repeated testing of the evidence to see how it stacks up.** How does the witness' account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or criminal case? (emphasis added)*

[11] Credibility and reliability are different. Credibility has to do with a witness' veracity, whereas reliability has to do with the accuracy of the witness' testimony.

Accuracy engages consideration of the witness' ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[12] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[13] The Ontario Court of Appeal in *R. v. G.(M.)* [1994] OJ No 2086, stated at paragraph 27:

*Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. **But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.** (emphasis added)*

[14] And at paragraph 28:

*...it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented...While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue...(emphasis added)*

[15] The Nova Scotia Court of Appeal in *R. v. Brown* [1994] NSJ 269 (NSCA) referred at paragraph 17 to *R. v. Gushue*, 117 NSR (2d) 152, which cautioned that:

*There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the crown proved its case beyond a reasonable doubt.*

[16] And at paragraph 18 of that same *Brown* case the Nova Scotia Court of Appeal referred to paragraph 35 of the British Columbia Court of Appeal case *R. v. K.(V.)* (1991) 68 CCC (3d) 18 (BCCA) which stated:

*I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender-related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would*

*have the effect of shifting the burden of proof to those accused of such crimes. (emphasis added)*

[17] In the case of *R. v. Mah*, 2002 NSCA 99, the court stated:

*The W.D. principle is not a “magic incantation” which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant’s version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge’s function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt...the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt. (emphasis added)*

### **A.C.’s Evidence**

[18] A.C. testified that:

- She and Mr. Finck had been in a relationship for approximately two and a half years.
- They had initially met on social media, and eventually she moved in with Mr. Finck into a two bedroom trailer at 10 Bayview Drive in Cumberland County, Nova Scotia.

- She noticed a change in their relationship as she became a victim of emotional, and then physical abuse at the hands of Mr. Finck.
- Mr. Finck would tell her that she “looked trashy” and would call her a “whore”.
- She indicated there was constant name-calling by Mr. Finck.
- Mr. Finck isolated A.C. from her family and friends.
- A.C. conceded that her stubborn attitude would lead to some of the violence at the hands of Mr. Finck.
- With regards to the physical violence, A.C. indicated that Mr. Finck would throw her, choke her, and wrap his arms around her neck from behind.
- A.C. also stated that Mr. Finck would tell her that she was going to die.
- A.C. would always walk in front of or behind Mr. Finck, never beside him.
- A.C. would not be permitted to leave the home without Mr. Finck in her presence, unless he needed her to run errands for him, such as picking up marijuana for him.

- A.C. stated that if she took too long to return from her unescorted absences, that Mr. Finck would come looking for her.
- A.C. also stated that Mr. Finck threatened to kill her family with a shotgun if she left him, and that he would start at her grandmother's house and proceed through her family "one by one" until Mr. Finck was the only one that A.C. had left.
- A.C. stated that Mr. Finck "made her feel like the lowest piece of garbage".
- A.C. described Mr. Finck as a "Jekyll and Hyde" depending on who was in their company.
- A.C. stated that Mr. Finck would follow A.C. to her grandmother's house when she tried to leave him.
- She stated the police had to intervene in the relationship, at one time removing Mr. Finck from A.C.'s grandmother's house.
- Mr. Finck registered to attend NSCC classes that A.C. was registered in after she had left him.
- She stated there was no internet, telephone or television service at the house.

- Mr. Finck had A.C. placed on his social assistance claim.

[19] A.C. identified exhibit one, which was screenshots of a chat group created by Mr. Finck. On page three of that exhibit, we can see where Mr. Finck states “you already know how terrifying I was”, and on page four Mr. Finck stated “ya just never know when everything that you love could disappear”. A.C. took that message as a threat.

### **The Alleged Assault**

[20] With regards to the alleged assault, the evidence related to the section 266 assault charge stems from an incident in mid-February 2016 when Mr. Finck, according to A.C., choked her so severely that the blood vessels in her eyes had burst, and she had choked on her vomit. A.C. stated after the incident, Mr. Finck would not allow her to go to the hospital.

### **The Alleged Sexual Assault**

[21] The evidence relating to the section 271 sexual assault charge stems from an incident in mid-February 2016. A.C. testified she had packed her belongings to leave the relationship as she felt that she had to get out of the relationship, as Mr.

Finck was getting more violent and angry over time. A.C. indicated that she told Mr. Finck that she was “not happy” and that she “wanted to leave”.

[22] A.C. stated that Mr. Finck accused A.C. of going to see her old boyfriend and that he called her a “cheating whore”. A.C. was wearing her bra, t-shirt, underwear and jeans. She testified that Mr. Finck tore all of these clothing items off of her.

[23] A.C. testified that she was screaming “someone help me” as she hoped that a neighbour would hear her through the open bedroom window. Mr. Finck covered her mouth to stop her screams.

[24] A.C. testified that after half an hour of struggling, she gives up the fight and lays lifeless on the bed. Mr. Finck then, while calling her a worthless whore, proceeds to take off his clothes and has sexual, vaginal intercourse with A.C.

[25] When asked if she consented to the sexual intercourse, A.C. stated “no”. A.C. testified that she was screaming “no” and “get off of me” while Mr. Finck was having intercourse with her. These words did not stop Mr. Finck.

[26] Mr. Finck then left A.C. alone in the bed.

[27] A.C. testified that as a result of the intercourse, she suffered pain in her abdomen and cervix.

**Cross Examination of A.C.**

[28] In the cross examination of A.C. by Mr. Rideout, A.C. stated that:

- Mr. Finck had broken up with her multiple times, but she was never allowed to leave.
- She never reported any assaults to the police when they attended at the residence in February 2016.
- She never received any medical attention for her injuries, as Mr. Finck would not allow it.
- She acknowledged that she had multiple contacts with social services as her child was in care and that she did not report abuse by Mr. Finck to the family support worker during her access visits.
- She acknowledged there was a phone at her grandmother's house that she could have used to call the police but she did not do so.

- On some occasions, Mr. Finck would be in the room with her with the social services worker, but on other occasions he was not.
- She indicated that one of the workers asked her about the burst blood vessels in her eyes, but she told the workers that she was unsure what had happened, as Mr. Finck was in the adjoining room.
- She said that she had no intentions on marrying Mr. Finck, but he thought otherwise.
- She acknowledged lying on occasion to the social workers as it related to Mr. Finck. This included a recantation on or about March 1<sup>st</sup>, 2016 of Mr. Finck choking her.
- A.C. stated that she lied to the social workers as she was dependent on Mr. Finck for her social assistance.
- A.C. denied recanting the allegations she made to the police about Mr. Finck, she just did not take the matters any further than her initial reports.
- A.C. was asked why she waited until February 2017 to tell the police about Mr. Finck if she had terminated their relationship six months prior in September 2016. A.C. responded that she was uncertain what she could do

regarding Mr. Finck as she was in a common-law relationship with him at the time of the alleged assaults.

- A.C. was asked if there was a rape kit taken after the alleged sexual assault in mid-February and she stated that she was not allowed by Mr. Finck.
- A.C. stated she did not discuss the domestic violence with her family doctor as Mr. Finck attended her medical appointments.
- A.C. was asked why she did not break contact with Mr. Finck and she responded that was Mr. Finck “had me broken”.
- A.C. was asked about her returning to Mr. Finck after there was a break in their relationship and she responded that she had been “kicking myself since” for returning to Mr. Finck.
- A.C. acknowledged that for the period of October 2015 to January 2016 that Mr. Finck had left the house and he was living five minutes away with another woman.
- A.C. was asked why she didn’t leave the relationship during this period and she responded that she was not allowed. She indicated that she never knew

when Mr. Finck would come back, and that one time she did leave to go to a friend's place and that Mr. Finck brought her back.

**Deputy Chief Pike**

[29] Deputy Chief Pike testified that on February 24<sup>th</sup>, 2016 that he attended to help A.C. remove her belongings from the residence. He testified that no charges were laid, as Constable Jobe was supposed to get a statement from A.C. as she had alleged a choking incident, but there were no physical markings on A.C.

[30] Deputy Chief Pike did overhear A.C. state that she was afraid of Mr. Finck.

**Sharon Gay**

[31] Sharon Gay testified that she was a resident of Bayview Drive and that in August 2016 she noted A.C. and Mr. Finck walking down the road. Mr. Finck was walking in front of A.C. A.C. appeared to be in distress. Ms. Gay indicated that Mr. Finck got into A.C.'s face, leaning into her. Ms. Gay was so troubled by the interaction between Mr. Finck and A.C. that she asked her brother to call the police.

[32] The police arrived and Ms. Gay spoke to the police.

**Jillian Martin**

[33] Jillian Martin was the assigned caseworker for the Department of Community Services for A.C. She would see A.C. once per month. She confirmed that Mr. Finck would be in the room when she met with A.C.

[34] Ms. Martin indicated that A.C. “appeared timid, not wanting to speak” when in the meeting with Mr. Finck in attendance.

[35] Ms. Martin also stated that she had concerns regarding the controlling behaviour of Mr. Finck.

[36] Ms. Martin did confirm that there was a note in her file from March 2016 where A.C. had alleged that Mr. Finck had choked her and that the police were called to the matter. She indicated that she did not see any marks on A.C.

[37] On cross examination, Ms. Martin stated that A.C. was initially distressed from the loss of her child from her care, but that towards the end she was not distressed.

[38] Ms. Martin stated that there were no notes in her file regarding a sexual assault, but she did state that there was “lots of concern regarding the nature of their relationship” by the Department.

**Matthew Finck**

[39] Mr. Finck testified and stated as follows:

- He is on disability due to anxiety and depression.
- He was in a relationship with A.C. for two and a half to three years.
- The relationship with A.C. was “amazing” until the Department of Community Services got involved with the care of her child, after which time she was “losing her mind” and “we fell apart”.
- He tried to help A.C. with her issues.
- He indicated they were planning on getting married in October 2016.
- He indicated he only went to one or two of A.C.’s access visits with her child.
- Mr. Finck testified that A.C. was free to come and go as she pleased.
- He testified that things in their relationship would be great until A.C. started thinking about her son.

- When asked about the issue of consent for the alleged sexual assault, Mr. Finck responded that A.C. usually initiated sex. Interestingly, there was no outright denial of the lack of consent for the alleged incident.
- When asked to recall the choking assault, Mr. Finck responded “not at all”.
- When asked if Mr. Finck caused her blood vessels to burst, he stated that one morning “she just woke up with them”.
- Mr. Finck also tried to explain his possible involvement by stating “not unless while I was sleeping”. Again, not a denial.
- Mr. Finck indicated that A.C. attended most Department of Community Services meetings without him.
- He confirmed that he was in another relationship in December 2015 and he was trying to build a relationship with the other woman, and that during this time A.C. would come to see him every day.
- When asked if he had A.C. under his thumb, he responded that he had “no idea what she was talking about”.

- Mr. Finck then did acknowledge that perhaps he had A.C. under his thumb as it related to their “finances”.
- When asked if he was checking up on A.C., Mr. Finck did not deny this, but instead stated that he was “keeping an eye on her” and that he would “follow her to be sure that she was okay”. This strains credulity.
- With regard to the incident on Bayview when the police attended, Mr. Finck stated that the police had stated that they would lay charges against A.C. This is in contradiction to the testimony by Deputy Chief Pike.
- When again asked if he had sexually assaulted A.C., Mr. Finck responded “no, most of the time she wandered around naked”. This was a strange non-denial.
- When asked to speculate as to why A.C. would make these false allegations against him, Mr. Finck responded that was because he was out with four other women and she was either jealous or upset over this. Strangely, this event would have occurred approximately one year before A.C. would have gone to the police.

**Cross Examination of Mr. Finck**

[40] Mr. Finck had to acknowledge that while he stated that he was not the type of person who would commit a sexual assault, he had in fact pleaded guilty to such an offence in the past couple of weeks.

[41] Mr. Finck also acknowledged that A.C. would babysit the children of his girlfriend during the three months that he was separated from A.C.

[42] Mr. Finck acknowledged that he enrolled in the same classes as A.C. and that he attended her class. He brought her backpack to the class and gave it to their teacher.

[43] Mr. Finck also acknowledged that the police had to attend at the NSCC due to his demanding to see A.C.

[44] Mr. Finck acknowledged that he was at most of the Department of Community Services meetings with A.C.

[45] Mr. Finck also acknowledged that if A.C. was not home that he would go looking for her. He did so because he was “worried that she was not coming home”. This contradicted his other evidence.

[46] Mr. Finck could not explain why A.C. would be suicidal as he claimed if things were going well with her relationship with her child prior to their separation.

[47] When asked if he added Chad Coates to the chat group in exhibit one, Mr. Finck responded “allegedly” instead of denying that he had done so. He then responded, “not as far as I can remember”. These are not believable denials.

[48] When asked if his comments in exhibit one showed that he still loved A.C. as he was claiming, Mr. Finck responded “I was emotionally upset and distraught”.

### **Positions of the Parties**

[49] Mr. Rideout correctly states that this is a “he said, she said” type of case. There is no evidence other than the testimony of the parties.

[50] Mr. Rideout states that A.C. was distressed over the loss of the care of her son. That this case revolves around the issues reliability and credibility.

[51] Mr. Rideout states that there is no corroboration, no physical marks on A.C., no rape kit, no medical reports and no specific dates. He claims that this was a loving relationship.

[52] Mr. Rideout claims that A.C. could have left at any time, and that her failure to do so lends an air of unreliability. He also cites lack of reporting raises a doubt.

[53] Ms. Nurse states that A.C. was stuck in a classic case of an abusive relationship.

[54] Ms. Nurse points out that A.C. testified that she did not initially know what she had to endure in a common-law relationship.

[55] Ms. Nurse points out how the controlling behaviour of Mr. Finck continued after the break-up with Mr. Finck enrolling in A.C.'s classes at the NSCC. She also states that exhibit one is an acknowledgment by Mr. Finck as to the true state of their relationship and his past behaviours towards A.C. Ms. Nurse also points to the concerns by Ms. Martin as to the nature of the relationship between A.C. and Mr. Finck.

[56] Ms. Nurse points out that Mr. Finck acknowledges the broken blood vessels by A.C.

### **Summary/Decision**

[57] I noted at the start that I was guided by the case of *R. v. W.(D.)* (supra). I must consider whether I believe Mr. Finck's evidence, and if so, then he is entitled

to be acquitted on the charges where I believe his denial. I do not believe the evidence of Mr. Finck, so I must turn to the second stage of *R. v. W.(D.)* (supra).

[58] Even where I do not believe Mr. Finck's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence. The evidence by Mr. Finck did not raise a reasonable doubt, so I must turn to the third stage of *R. v. W.(D.)* (supra).

[59] Even where I do not believe Mr. Finck, and Mr. Finck's evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the crown has proved the essential elements of each offence beyond a reasonable doubt. I may only convict Mr. Finck of the offences proven beyond a reasonable doubt.

[60] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, Mr. Finck's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[61] There is no doubt whatsoever that the relationship between Mr. Finck and A.C. was a relationship that was emotionally and physically abusive. I accept the

evidence of A.C. that Mr. Finck exerted increasing control over A.C. Mr. Finck acknowledged as much by his admissions of being financially controlling, checking up on her, following her around, attending most of her appointments with the Department of Community Services, having her babysit for him when he is in a new relationship, going to her grandmother's to bring her back home, and enrolling in the same classes as her at the NSCC.

[62] This was not a healthy, loving relationship as claimed by Mr. Finck.

[63] A.C. was a compelling and credible witness.

[64] Mr. Finck was not credible as it related to either the assault or the sexual assault. His half-hearted and self-serving denials were not credible.

[65] Where Mr. Finck's testimony contrasted with A.C.'s, I accept her evidence and reject his. Mr. Finck was not a compelling or credible witness on the stand. His evidence on various issues was contradicted by other witnesses. I acknowledge that this trial is not a credibility contest, but it is about reasonable doubt.

[66] Mr. Finck acknowledged the broken blood vessels, but he does not know how they occurred. He suggested that perhaps he struck A.C. while he was

sleeping. If she in fact woke up one morning with burst blood vessels in her eyes, and this was not a result of a choking assault, there is no doubt whatsoever that in a supposedly loving relationship that an immediate visit would have been made to the hospital to ensure that A.C. had not suffered a stroke or some other medical emergency. The choking incident is mentioned in Department of Community Services documents, and also during a police visit to Bayview Drive. I find as fact that Mr. Finck assaulted A.C. by choking her in mid-February as she described in her testimony. It is clear from the evidence that A.C. did not consent to this assault. Mr. Finck is guilty of that offence.

[67] With regard to the sexual assault in mid-February of 2016, I again accept the evidence of A.C. and reject the evidence of Mr. Finck. A.C. was very clear that there was no consent to that sexual activity. For Mr. Finck to claim that A.C. often wandered around the trailer naked does not give him permission to do what A.C. testified occurred. Mr. Finck's denials were not believable. I find as fact that Mr. Finck sexually assaulted A.C. in mid-February of 2016 and find him guilty of that offence.

Alain Bégin, JPC.