PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Rafuse*, 2019 NSPC 66

Date: 20191113
Docket: 8297679
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Ryan Rafuse

Restriction on Publication: s. 486.4 CC A ban on publication of any information that could disclose the identity of the victim and/or complainant

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	October 1, 2019, in Bridgewater, Nova Scotia
Decision	November 13, 2019
Charge:	Section 271 of the **Criminal Code of Canada**
Counsel:	Kristin O'Keefe, for the Crown Joshua Bryson, for the Accused

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

- By court order made under subsection 486.4(1) of the **Criminal Code**, information that may identify the person described in this decision as the victim [and/or complainant] may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published.

By the Court:

[1] Ryan Rafuse is charged that on the 14th day of May 2018, at or near Chester, Nova Scotia, that he did commit a sexual assault on D.S., contrary to Section 271 of the **Criminal Code**.

FACTS:

[2] The complainant and the accused were both employed on the day in question on a large private estate located in Chester, Nova Scotia.

[3] The complainant worked on a team comprised of women who tended the gardening needs of the estate. The accused was in a supervisory position over the 'men's group'. The accused, as well, had an overall managerial authority which allowed him to give permission for employees to take days off.

[4] The complainant approached the accused during the workday to ask if she could have a specific day off to assist in the lobster fishery.

[5] The accused ok'd the request and then asked the complainant to assist him in moving empty water bottles from the basement of the main residence.

[6] The complainant, in her evidence, testified that while in the basement the accused tore open her jacket and said, “now is your chance”. The complainant took this as a clear attempt to engage in sexual activity. The complainant quickly responded saying, “Ryan you’re fucking retarded”. She said this to the accused several times showing an unmistakable refusal to engage in any sexual activity.

[7] The complainant stated the two got the water bottles and moved them out of the basement and continued their work. She did not return to work the next day due to the incident and refused to go back to that employment due to the fact she would have to continue working with the accused. The incident was later reported to the authorities and the charge was laid.

[8] The accused testified that when in the basement nothing untoward occurred. He spoke about the complainant asking to retrieve a piece of electrical equipment that was being thrown out but still useful. This was confirmed by the complainant.

[9] The accused denied ever opening the complainant’s jacket. He denied saying, “now’s your chance” and also denied that the complainant said anything to him about being retarded.

[10] The only other evidence of note came from two co-workers. One testified that the complainant was distraught after coming up from the basement and would

not look her in the eye. That witness, as well, had spoken to the complainant after it was learned the complainant was not coming back and that the complainant was clearly upset.

[11] The other witness said the complainant was in a good mood after coming up from the basement and nothing seemed out of the ordinary.

LAW:

[12] Not unlike a number of sexual assaults, this matter provided little in the way of ancillary evidence to which a judge can turn to in making definitive fact findings. Sexual assaults rarely occur in the view of another individuals and perpetrators almost always choose private areas which isolate them and their victims. Such cases rely heavily on findings of credibility by the trier of fact.

[13] The most fundamental rule that a trial judge must remember in a case such as this is that the burden of proving the guilt of the accused lies upon the prosecution. Before an accused can be convicted of any offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence. See ***R. v. Vallancourt***, [1987] 2 S.C.R. 636.

[14] The principle of reasonable doubt as outlined above applies equally to issues of credibility, as well as those of fact. See ***R. v. Ay***, [1994] B.C.J. No. 2024 (B.C.C.A.).

[15] The question of what is reasonable doubt as a standard of proof was discussed by the Supreme Court of Canada in ***R. v. Lifchus***, [1997] 3 S.C.R. 320. There, the Supreme Court set out that reasonable doubt is not like subjective standards of care that we employ in important everyday situations. It is not proof to an absolute certainty. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. The Court was clear about proof beyond a reasonable doubt and that it falls much closer to absolute certainty than to proof on a balance of probabilities. See ***R. v. Starr***, [2000] S.C.J. No. 40.

[16] In this matter, given that an accused has testified, I must also apply the principles of ***R. v. W.D.***, [1991] 1 S.C.R. 742. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. If any of the evidence by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his

evidence, before I can convict, I have to ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt. If the Crown has not proven any element beyond a reasonable doubt, then I must acquit.

[17] The concepts embodied in ***W.D.***, were expanded upon by the Nova Scotia Court of Appeal ***in R. v. Brown***, [1994] N.S.J. No. 269. In ***Brown***, Justice Matthews stated as follows:

> **17** These observations in our opinion are equally applicable to cases where a judge sits alone. As Chipman, J.A remarked in **R. v. Gushue** 117 N.S.R. (2d) 152 at 154:
>
> ...There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt. See R. v. Cooke (1988), 83 N.S.R. (2d) 274; 210 A.P.R. 274 (C.A.); R. v. Nadeau, [1984] 2 S.C.R. 570; 56 N.R. 130 (S.C.C.); R. v. K.(F.) (1990), 73 O.R. (2d) 480 (C.A.); R. v. J.G.N. (1992), 78 Man. R. (2d) 303; 16 W.A.C. 303; 73 C.C.C. (3d) 381 (C.A); R. v. K.(V.) (1991), 68 C.C.C. (3d) 18 (B.C.C.A)

[18] Justice Matthews continued on his decision to adopt the reasoning used in the following case:

> **18** The British Columbia Court of Appeal in **R. v. K.(V.)** considered issues similar to the instant case. Understandably not all of the issues were the same. After a useful analysis of the proper procedure to be followed in such cases, Wood, J.A speaking for the court commented at p. 35:
>
> 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.

[19] In ***R. v. Mah***, 2002 N.S.C.A. 99, Justice Cromwell of the Nova Scotia Court of Appeal (as he then was), spoke about ***W.D.*** in the following manner:

> **41** 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 relates 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: **see R. v. Avetysan**, [2000] 2 S.C.R. 745; [2000] S.C.J. No. 57 (Q.L.) at 756. As Binnie, J. put it in Sheppard, 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.

Credibility:

[20] A number of principles regarding credibility can be gleaned from Canadian courts which included that, regardless of age, an individual's credibility and evidence should be assessed according to that criteria which is appropriate given the witness mental development, understanding and ability to communicate. (See ***R. v. W.(R.)***, [1992] 2 S.C.R. 122 at p. 134)

[21] Also, one of the most valuable means of credibility assessment is to examine the consistency between what the witness said in the witness box and what they have said on other occasions.

Sexual Assault:

[22] A sexual assault is an assault which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. (See **R. v. Chase**, [1987] 2 S.C.R. 293).

[23] Parliament has codified the meaning of consent in relation to sexual activity in 273.1(1) of the **Criminal Code** which states that, "consent is the voluntary agreement of a complainant to engage in the sexual activity in question". Section 273.1(2)(e) goes on to say that the complainant, having consented to engage in sexual activity, expresses, by word or conduct, a lack of agreement to continue to engage in the activity then there no longer remains consent. Simply put, no means no. Further, no means no at any stage of sexual activity.

ANALYSIS:

[24] First, I should be clear that the events as described by the complainant are, without any doubt, a sexual assault. The opening of the complainant's jacket with

the words, “now’s your chance”, amounted to a clear violation of the complainant’s sexual integrity.

[25] Having said the above, I can also say that I accept the evidence of the complainant. Her testimony was compelling and forthright. At no time did it seem that she sought to embellish what took place or to add editorial comments to gain favour.

[26] The evidence overall showed someone who was so impacted by the occurrence, she could not face going back to the work force. In short, I accept her testimony.

[27] The matter does not end there. As indicated in **Mah (Supra)**, there is a danger in simply preferring one version over the other and convicting on that basis. To do so is to abandon principles of reasonable doubt and ignores our courts admonitions in **R. v. W.D.** and cases that follow.

[28] As was pointed out by defence counsel in his submissions, the evidence given by the accused was unimpeached. His evidence was also given in a straightforward manner with nothing that could, on it’s face, show a lack of credibility. His evidence cannot be simply rejected. Even if I did have doubts about it, the testimony of the accused would raise a reasonable doubt.

[29] While I strongly suspect that the version given by the complainant is what happened in the basement of the residence that day, suspicion and probability is not enough to convict on the criminal standard of proof beyond a reasonable doubt.

CONCLUSION:

[30] Accordingly, I acquit the accused.

Paul B. Scovil, JPC