

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Al-Rawi*, 2020 NSSC 385

Date: 20201216

Docket: CRH 485671

Registry: Halifax

Between:

Her Majesty the Queen

v.

Bassam Aladin Al-Rawi

DECISION ON FRESH EVIDENCE

Judge: The Honourable Justice Gerald R.P. Moir

Oral Decision: December 16, 2020

Written Release: January 11, 2021

Counsel: Carla Ball, for the Crown
Ian Hutchison, for the Defence

Moir, J. (Orally):

[1] After eleven days of trial without a jury, I gave an oral decision on August 28, 2020 convicting Mr. Al-Rawi of committing sexual assault on Ms. ECB at Halifax on December 15, 2012. At Mr. Al-Rawi's request, sentencing was postponed so he could make a motion to reopen the trial, introduce Ms. ECB's victim impact statement as trial evidence, and seek a mistrial. This is my decision on that motion.

[2] A judge who tried a criminal case without a jury has a discretion to reopen the trial before sentencing. See, *R. v. Callender*, 2012 NSSC 176 (Hood, J.), at para. 7. On reopening, the judge has a discretion to continue with the trial or declare a mistrial. However, declaring a mistrial appears to be the only rational course when the fresh evidence challenges a finding already made by the judge about the credibility of a central witness. See, *R. v. Callender* at para 55.

[3] With one addition, the discretion to reopen a trial is exercised on the same principles as that for admitting fresh evidence on an appeal from conviction: the requirements for due diligence explaining the failure to adduce the fresh evidence at trial, that the evidence be relevant and capable of credit, and that the evidence, if believed, could reasonably be expected to have affected the result. See, *R. v. Callender* at para. 11.

[4] In addition to those four criteria that apply also on a motion to adduce fresh evidence on appeal, there may be a requirement for examination of the moving party trial strategy. It may be necessary for the motion judge to consider whether the motion is really a mere attempt to reverse a tactical decision made at trial. See *R. v. Callender* at para. 12.

[5] Mr. Al-Rawi picked up an intoxicated Ms. ECB in downtown Halifax. He drove a taxi, but there was no hire. On the contrary, he befriended this intoxicated person, eventually drove her to his home, and had intercourse with her there. Not only did her intoxicated passivity convey no consent, she pretended to have passed out when he took advantage of her.

[6] The very next day Ms. ECB underwent an invasive medical examination and she went to the police. Months later the police told her no charges were going to be laid. Years later, Ms. ECB heard a news report about a Halifax taxi driver acquitted of sexual assault on a passenger. Her reaction to that report is evidence of her motive in making a complaint and reviving it. The victim impact statement refers to that motive.

The trauma of sexual assault for me lasted well beyond the moment – it has impacted my personal life, professional life, and mental health.

Exactly a year after the assault, I had my first panic attack. It felt like my lungs couldn't take in enough air, like a brick was laying on my chest as I started sobbing out of, seemingly, nowhere. I laid on the floor for a long time trying to calm my body and mind.

In order to heal, I've had to force myself to revisit the assault many times. I've taken crisis counselling, therapy sessions, and joined group therapy for sexual assault survivors to address the impact this assault has had on my emotional state. I am fortunate to have had the resources to pursue this deep healing, and I understand and hurt to think that not all survivors are so lucky.

Adding insult to injury, in order to ask for time off work for the trial, therapy, or mental health time, I've repeatedly had to take the risk and disclose my assault to my workplace superiors in what often can be very uncomfortable and vulnerable conversations. The stigma of sexual assault translates to an impact to my professional reputation that I have [to] bear (and will continue to have to bear) with unknown and unquantifiable consequences to me. I've taken off nearly 12 weeks from work over the years for reasons related to this sexual assault.

This sexual assault has also affected my ability to be vulnerable in new relationships. I carry with me the anxiety and shame of being preyed on while vulnerable from alcohol. I have not had a serious romantic relationship in 8 years.

We're told that taking a taxi home is the safe and responsible choice. Anytime I need to take a taxi, my chest tightens, and memories flood back. I am afraid to ride in taxis if I have had even just one drink, but they are often unavoidable. Given I travel a fair amount for work, this alone has lasting and significant consequences, so I have been forced to learn to employ breathing techniques to cope.

Many of these impacts I will have to deal with for the rest of my life.

But the biggest impact for me has been the nearly 8 years of fear that his predatory cycle of abuse continues. And the constant questioning of myself about whether I did enough to stop violence against more vulnerable women. Finally, today I feel I have done enough, as Bassam Al-Rawi is held accountable by this court.

[7] It is the last paragraph of the statement that is most in issue on the motion.

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[8] The defence submits that doing enough may mean complaining and giving evidence or securing a conviction. It says the statement is open to the interpretation that Ms. ECB feels she has vindicated a wrong done to her alone, a wrong for which Mr. Al-Rawi has been acquitted, or both.

[9] Note that the statement refers to the last eight years. It concerns a motive to lay the complaint as well as to revive it after the news reports. It concerns “more vulnerable women”. Thus, the concern is generalized. A person has been abused and fears that the perpetrator will abuse others, unless he is deterred.

[10] The Crown’s main submission at the motion to reopen the trial for fresh evidence is expressed in a simple proposition with which I fully agree: “There is no fresh evidence in this case.”

[11] The subject of Ms. ECB’s motive to complain and to revive her complaint was explored in detail on cross-examination. I start at p. 171, l. 7 and end at p. 182, l. 14.

Q: And on March 22, 2013, you were told by the police that they were not going to lay any charges in respect of your complaint.

A: That’s correct.

Q: Okay. And it was on April 16, 2013 that you received an email from the police indicating that the name of the suspect was Bassam?

A: I believe so, yeah.

. . .

Q: Now, let’s fast-forward a little here to March of 2017. I understand, at that time, that you were living out of province.

A: Correct.

Q: Still within the jurisdiction of Canada, itself?

A: Yes.

Q: and that when driving to work, this . . . one morning, you heard a news article on the radio?

A: Yes.

Q: That news article caused you some distress?

A: Yes.

Q: And the contents of the news article was that Bassam Al-Rawi had been acquitted of a sexual assault before Halifax Provincial Court?

A: Yes.

Q: Okay. And hearing the name “Bassam”, you then began to review your materials in relation to your 2012 complaint?

A: I reviewed my emails with the police officer.

Q: Okay and then, having done that, you then emailed the investigating officer for the file before Halifax Provincial Court, that’s correct?

A: Yes.

Q: Okay. In fact, the officer that you emailed was Constable Monica Thibault?

A: Umm, I emailed the officer who was on my case.

Q: Yes.

A: ...Sarah Dempster and she did not reply, and I called the Halifax Police. I don't know if I email them. I left a voicemail is what I recall.

Q: Would you have sent an email to Constable Thibault dated March 3rd, 2017 at 3:56 hours asking to get in touch with . . . sorry . . . the Halifax Regional Police, not Constable Thibault, on March 3rd, 2017 asking to get in contact with a witness, Constable Mona Thibault?

A: I don't recall that...

Q: Okay.

A: ...exact correspondence.

Q: Perhaps the reaching out to the Halifax Regional Police Force is that you were somewhat angry that charges had not been laid in 2012, correct?

A: No. The reason I reached out [to] the police was when I read the article, it had indicated there was an information warrant, ah received by the CBC and within that part of the article, there were other cases listed, and I recognized the details of what I thought was mine, listed, and so the purpose of calling the police was to confirm that that was my case that was listed as the information warrant.

Q: Just to confirm, between 2013 and 2017, the police did not seek any further information from you, in respect to this investigation, did they?

A: No.

Q: No. And you did not provide any further evidence or information to the police in relation to this file?

A: I don't, I don't believe so.

Q: No. And, in fact, you were made aware by the police on August 9, 2017 that charges would be laid against Mr. Al-Rawi in respect to these proceedings, correct?

A: Yes.

Q: Okay and then you were then asked to meet with the police in Toronto, to provide a further statement and that did not take place until February 18th, 2018, correct?

A: ...that is correct.

Q: Okay. Now, at the time that you reached out to Halifax Police in March of 2017, you also reached out to the media, correct?

A: Yes, I did.

Q: Okay and you also provided an interview or statement to CBC?

A: Yes.

Q: And as part of that interview process, your face was blackened out, or your person was blackened out?

A: Yes.

Q: Okay and was your voice disguised in that point, in that statement?

A: Yes.

Q: Okay and you were asked a series of questions by a journalist?

A: Yes.

Q: Okay and the answers to those questions, were those answers truthful?

A: They were ah very brief and shortened, but yes, I believe them to be truthful.

Q: Okay. Were the answers correct?

A: I believe so.

Q: Okay and the purpose of reaching out to the media, would that have been because you were frustrated that charges were not laid in 2012, 2013?

A: I, that was part of the reason. I reached out because I was looking for information about whether the cases were connected and I was frustrated, and I felt very guilty that this had happened to this girl, this other girl.

Q: Were you angered by the fact that Mr. Al-Rawi was acquitted in those proceedings?

A: Pardon?

Q: Were you angered by the fact that M. Al-Rawi was found not guilty in those proceedings?

A: I was frustrated by that.

Q: Frustrated, but not angered?

A: I wasn't angry.

Q: But, certainly the acquittal, itself, was sufficient in order to provoke a reaction from you, whereby you reached out to the media, we can agree with that?

A: Yes.

Q: Have you ever previously provided a statement to the media?

A: No.

Q: And, returning back to this interview with the police in Toronto of...in February of 2018, the purpose of that interview was to establish how you had come to connect Bassam Al-Rawi to your file, that's correct?

A: Yes.

Q: Okay and as you told the police in Toronto in 2018, at the time of the offence took place, or alleged offence, you could not identify the alleged perpetrator, that's correct?

A: That is correct.

Q: And that you were now making the identification based upon your review of your emails?

A: I was making the identification based on the fact that the police told me that my case was listed in the information warrant.

Q: Okay. But the police officer simply just wanted to speak to you to see how you were connecting yourself to that file.

A: Yes.

Q: And you told the police officer what you've told me today?

A: Yes.

Q: Okay. No other evidence provided to the police.

A: I don't believe so at that...

Q: Nor new information provided to the police?

A: On that interview, I don't believe so.

Q: No. Nor startling revelation or new piece of evidence that you've shared with the investigating officer?

A: I don't believe so.

Q: No. We didn't talk about the...case in that, in that interview.

Q: But you can agree with me, though Mrs., Ms.[ECB], while that, sorry, that since Mr. Al-Rawi's acquittal in March of 2017, you've not shared with the police any significant or huge, or significant piece of ah, new piece of evidence?

...

Q: You're told by the police in 2013 charges are not going to be laid, correct, Ms.[ECB]?

A: Correct.

Q: Okay. You're interviewed by the police in February of 2018 and you provide a statement to them explaining how you connected the two cases, correct?

A: Yes.

Q: Okay. No other evidence provided to you...by you to the police from 2013 onwards?

A: No, specifically, the police office said we're not here to discuss your case.

Q: Okay, but outside the confines of that interview in February of 2018, you've not provided another statement, a third statement to the police?

A: I provided an extra detail that I remember when we were preparing for the pretrial, I think, maybe that is what you are implying.

Q: Okay and that extra detail would have been what, please?

A: That I recalled going to my brother's apartment while we were in the taxi.

Q: Okay, but outside going to your brother's apartment, there's no further information that you've shared with the police about this file, since your statement in February of 2018?

A: The only other information that I shared was on the morning of the pretrial, or the...I forget the name of it...pretrial...

Q: Preliminary, preliminary.

A: ...preliminary, thank you...which was that I felt that throughout the evening the person was telling me that my brother didn't care about me.

Q: Uh-huh, but those, so two pieces of further information that you've shared?

A: Yes.

Q: And outside those two pieces of information, no other details, or evidence or?

A: I'm just going to think about it.

Q: Okay.

A: I don't believe so, but...ah, umm in between that time I also shared my call logs.

Q: Uh-huh.

A: Yeah, with the police

Q: You also provided the spreadsheet?

A: Yes, and that spreadsheet, yes.

Q: So, we have the spreadsheet, the call logs, what about the text messages?

A: the text messages I had provided in 2013.

Q: Okay. You provided the information to Crown counsel and the police in a meeting before the preliminary inquiry that you had been to our brother's residence with the cab driver...

A: Yes.

Q: ...that's correct? And you also shared with the police and Crown counsel the morning of the preliminary inquiry that you could recall the cab driver making some comments about your brother within the apartment?

A: Yes.

Q: Okay. So, what you have, I've counted on my hands here, I think it's 5 pieces of information, would that sound correct?

A: Yes.

Q: Any other pieces of information, documents, evidence, statements, anything else that you've given to the police or Crown since the interview on February 18, 2018?

A: Not that I recall.

Q: Okay and just to confirm between being told that charges would not be laid in March of 2013, and the statement to the police in February of 2018, no further documents, statements, evidence or any additional information provided to you by...to the Halifax Police as part of this file?

A: I don't recall the exact date that I provided the phone logs.

Q: Okay. But, outside the phone logs, no other information?

A: Not that I recall.

[12] The Crown visited the issue in re-direct starting at p. 421, l.3.

Q: Mr. Hutchison was asking you a series of questions about a news article involving another girl, something like this had happened to, and you mentioned that you felt guilty, that this had happened to another girl. Why did you say that you felt guilty? Why the feeling of guilt?

A: Umm, I had made a statement in a, in an attempt to raise this issue with the police, and nothing happened from that and I felt extremely guilty that it went on to happen to someone else.

MR. HUTCHISON: Well, perhaps if I could just interject, My Lord. It didn't happen to someone else because Mr. Al-Rawi was found not guilty. The record has to reflect that My Lord.

MS. BALL: Certainly, alleged to have happened, I think it's fair to say.

THE COURT: If just explains why she felt guilty...

MR. HUTCHISON: Yes, My Lord, yes.

THE COURT: ...whether it had a rational foundation or not is another question.

[13] In submissions, the defence dealt with Ms. ECB's testimony that she contacted the police and the CBC because, despite the acquittal, she was frustrated and felt guilty about another attack by Mr. Al-Rawi on another woman:

As Ms.[ECB] said in her testimony, and I'm reading My Lord, from line 3, page 176 of the transcript, "And I felt very guilty that this had happened to this girl, this other girl". Well, Mr. Al-Rawi had been found not guilty. Mr. Al-Rawi had been determined not to be responsible but Ms.[ECB] felt guilty. Guilty, one can say because of the finding of innocence in respect of Mr. Bassam Al-Rawi. She goes looking for further information, she tells us about how that she emailed Halifax Regional Police. And, as a result of her frustration, My Lord, she reaches out to the media and makes statements to the media. This isn't someone, My Lord, she reaches out to the media and makes statements to the media. This isn't someone,

My Lord, who is doing her civic duty. This is someone, My Lord, who is upset, who is angry, who is frustrated that a person who she doesn't even know is the actual suspect in her case, a person that she cannot even identify has been found not guilty of a sexual assault before Halifax Provincial Court. We should just reflect upon the point, My Lord, that at that point in time, and still to this day, [ECB] doesn't know if Bassam Al-Rawi was the person who was in the cab or in the bed with her the following morning. But still, My Lord, frustrated and assuming that this person, Bassam, which she had been told about by the police, was the same person who had been acquitted before Halifax Provincial Court she reaches out, My Lord, to the media and starts the process of making statements. She told us in testimony, My Lord, that in August of 2017 that charges would be laid against Mr. Al-Rawi. And then she went on to tell us, My Lord, that she provided a further statement to the police on February 18, 2018 but really did not provide any new information to the interviewing officer. As one looks at the chronology, My Lord, of all of the evidence which has been presented in this case the only new evidence which has really come to light is that of Mr. Ala Hadad. Mr. Hadad was interviewed by the police November of 2018. Nothing changed, My Lord, between March of 2013 and the subsequent decision to charge Mr. Al-Rawi in August of 2017. Now, where does that leave us in terms of Ms. [ECB]'s testimony, well, Ms. [ECB] did not like the fact that someone by the name of Bassam had been exonerated of a crime he did not commit. And, that's the person, My Lord, who appears before the court, who gives testimony and who is the principle witness for the Crown. She doesn't come to this court as a neutral party, My Lord, she comes to this court as someone who is frustrated.

[14] I made it clear in my decision that I had to examine the frustration and guilt, that I did not regard Ms. ECB as "a neutral party". I said as follows at para. 12 to 18.

[12] The problem with the Crown's case about sparse evidence on the identity of the accused is compounded by another problem about delay.

[13] There was a long delay between Ms. ECB making a complaint to the police and the laying of the charges. The offence allegedly occurred on December 15, 2012. She presented herself for examination by a sexual assault nurse examiner later that same day. Three days later she was interviewed by the police, and she provided a video statement.

[14] The police interviewed Mr. Al-Rawi on March 22, 2013. They advised Ms. ECB that they were not laying charges.

[15] Four years later, Ms. ECB was listening to the CBC while driving to work. She learned that a taxi driver had been acquitted of sexual assault. The first name of the accused matched her record of the taxi driver's name against whom she had complained. She contacted the police again and she granted an interview to the CBC.

[16] In cross, she was asked whether she contacted the police and the CBC out of anger. She said her contact with police was to discover whether her complaint was a related case. Also, she was frustrated and she felt guilty about the other woman's case.

[17] A few months later, the police told Ms. ECB that they were laying charges on her complaint after all.

[18] When considering the testimony of Ms. ECB, I must examine any distortion caused by the frustration or the guilt, over the many years between the events and the trial.

[15] I dealt with Ms. ECB's credibility at para. 106 to 118 of the trial decision. I dealt with her bias at para. 107 saying that a lay person might see the significance of an acquittal differently than a lawyer would and pointing out that the complaint was made years before the grounds for this particular kind of bias arose.

[16] The evidence on special bias, the submissions on that subject, and my inclusion of it in my reasoning about credibility were all a part of the trial. The victim impact statement adds nothing, except to make it clear that the bias was generalized, that it was based on a concern for an indeterminate group of women who may be vulnerable to Mr. Al-Rawi.

[17] That generalized motivation neither contradicts Ms. ECB's evidence on her frustration and guilt over the acquittal nor does it add anything to the motivation, the lack of neutrality that her trial evidence revealed. Therefore, there is no fresh evidence in this case.

[18] Put another way, the statement at the end of the victim impact statement could not have affected the result at trial. Ms. ECB made it clear in her evidence on cross-examination and redirect examination that she was motivated to revive her complaint by frustration and guilt arising from reports that a taxi driver had been acquitted of charges of sexual assault on a passenger. The evidence was the subject of submissions on credibility and Ms. ECB was found to be credible.

[19] I dismiss the motion to reopen the trial.

J.