SUPREME COURT OF NOVA SCOTIA
Citation: *R v. DS*, 2024 NSSC 178

Date: 20240528
Docket: 515151
Registry: Sydney

Between:

Her Majesty the Queen

v.

DS

Defendant

Restriction on Publication: 486.4

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 11, 2024, in Sydney, Nova Scotia
Oral Sentencing Decision:	May 28, 2024
Counsel:	Darcy MacPherson for the Crown Tony Mozvik, for DS

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Introduction

[1] The Defendant, DS, is charged that between June 1, 2020 and August 21, 2020, that he did at or near […], commit a sexual assault upon the Complainant, EM, contrary to s. 271 of the *Criminal Code*.

[2] The Defendant and Complainant were married in […] and separated in […]. The Complainant moved from the matrimonial home in […], to live with her parents. The Complainant rented a self storage unit for her possessions, furniture, and items from the matrimonial home. They have since divorced.

[3] On the date of the alleged offence, the parties agreed to meet at the unit. EM had requested that DS deliver a tv which she needed. EM testified the incident occurred in mid July before the purchased of a new home on […].

[4] EM testified the unit was locked, stating she had the key. She arrived first and DS arrived about 10 minutes later. On her arrival she unlocked the unit and open the door awaiting the Defendant.

The Allegation by EM

[5] On most of the surrounding facts, the evidence of the Complainant and the Defendant is in common. They agreed to meet at […], he would bring the tv EM had requested, it was an inside storage unit.

[6] The Complainant testified that when DS pulled in, he took the tv from his truck, walked down the hall to the unit, and placed it in the unit on a dresser, the last thing put in the unit, she said. EM said it was at this point the incident happened.

[7] She testified she was in front of the unit getting ready to close it, the Defendant was 10 feet away, if that she said, when he said “Since we are here, do you want to have a quickie”. She got upset and started to cry. She said he seemed to feel bad for what he said, and asked if he could give her a hug.

[8] She testified when she went to hug him, he tried to kiss her, and she avoided it by moving her head back.

[9] EM says the Defendant then slipped his hands down the back of her pants, her pants were leggings with an elastic waist band. She said he put both hands down, probably to the top of her buttocks, lower than her back, "on her bum" she said. She was asked in direct if she was wearing underwear, she did not recall if she was or was not, but thought she was wearing underwear.

[10] She said, he then pulled her into his groin area and she said, "what are you doing". EM testified DS said so you don't want it do you, and she said no and then he kept his hands down, but pulled them around to the front off her pelvic area with the palms of his hands facing him as previous.

[11] He touched the center of her pelvic area, with is palms in the same direction as before, right above her vagina, probably two 2 inches above, referring to the tips of his fingers.

[12] EM said he continued to use his hands to pull her into his groin area saying you don't fucking want it over and over, stating he got very mad, very loud and said, "never talk to me again". He stormed out of the unit, got in his truck and left.

Defendant DS

[13] DS testified that previous arrangements had been made, they spoke on the phone. EM wanted a tv, and they arranged to meet. When he arrived he got out of his truck, opened the doorway to the unit. EM was standing down the hallway with the unit open. He went and got the tv, and carried it down the hallway, 80 feet he said, to the unit

[14] DS stated he placed the tv on the dresser inside the unit, which he described as 10 x15 feet unit filled with furniture and household items he had placed in storage for her. They spoke many times, he said. The Defendant said, he brought things to the unit without her knowing, he accommodated her, whatever she wanted, he said.

[15] DS described the Complainant as wearing sneakers and black pants, he was not sure of the shirt. She was standing about 8 feet from him with her arms folded and her head down. He looked at her and when she looked up he said, "I know it sucks". He said he extended his arms out and was surprised at how quickly she walked over and hugged him. It was a "sad moment", he said, and one of the few times they had been face to face since the separation.

[16] DS testified "I just hugged her and jokingly said, since we are here do you want a quickie". EM got upset at this suggestion, he said but he stated to her he was only joking. It was the type of humor they would laugh at when married. When she continued to be upset DS said they traded words and then he left.

[17] DS testified he did not at any point touch EM's buttocks or pelvic area. He put his hands on her in the "standard placement for a hug". When they were married he said, she had high waisted tights and said he remembered the tights she had on were similar with black mesh at the bottom. When asked, DS said his hand would have been on her back when she hugged him, stating it was "hard to say" if they were on her waist or back.

[18] DS also stated that when they hugged, he leaned back. The Crown took issue with this statement, cross examining the Defendant at length about his position in relation to the Complainant when he leaned back. The Crown suggested numerous times this would cause their pelvis' to touch. There was a lot of back and forth on this, including whether it was necessary to bend ones knees.

[19] The Defendant testified he was familiar with the storage units and had rented them before. He stated there was cameras located there and that he made efforts to phone the company under the new name of Access Storage.

[20] Exhibit 2 is a call log dated February 1, 2023 representing the Defendant's phone records, which he stated showed his attempts to obtain video footage for July, 2020. DS said he inquired and was not able to obtain a video. The Defendant referred to a call made January 10, 2023 to a Halifax number and attached the location and phone number for the storage facility in Reserve.

[21] The Crown takes issue with this evidence, as it did, other aspects of the Defendant's testimony stating it was 15 months later when the inquiry was made, and there was no obligation upon the Defendants to disclose any findings.

[22] The Crown suggested in cross-examination that there were no cameras inside the buildings. The Defence objected on the basis there was no such evidence to that effect. The Defendant was then asked if he knew where the cameras were located. He did not but said Access Storage advertises 24 hour video surveillance.

[23] A ***Browne v. Dunn***, (1893), 6 R. 67 (H.L.), issue arose following the Defendant's evidence. The Complainant was recalled to give further evidence. She

asked if she recalled DS telling her he was joking when he asked about having a quickie. EM answered, “no he said he was sorry, but he never said it was a joke”.

Analysis

[24] The Crown submits EM testified in a forthright and consistent manner. She was honest and attempted to be truthful in her answers. For example, she thought she wore underwear, but was not sure.

[25] The Crown argues DS’s story is very similar to hers, in all respects except for the assault. They both agree it was DS who mentioned sex and this is entirely consistent with her evidence submits the Crown.

[26] The Crown further submits it is significant how the incident came to light. EM had been asked to give a statement on an unrelated matter. She did not go to the police in relation to this matter specifically. The police learned of this matter from her in November, 2021 when she gave a statement in another investigation. It was at that time the present charge before the Court came to the police’s attention.

[27] Constable Miller gave brief evidence in his report of the investigation into the present charge. His report read in terms of the timeline, that Constable Lynk was dispatched on November 11, 2021 to phone (EM) regarding a sexual assault that occurred two (2) years previous. He was asked by Defence if he stood by the report. He said yes, but that his report was mistaken as to the date which should have read November 23, 2021 as indicated by Constable Lynk’s report.

[28] I will mention that the recent complaint provision of the *Criminal Code* has been removed. This Court is ever mindful of the need to avoid myths and stereotypes in its reasoning in charges such as these, the underlying reason being there is no set pattern of behavior by alleged victims in sexual assault matters.

[29] In cross-examination, EM agreed that she and DS are not on good terms and agreed that she has a strong hatred for the Defendant. She confirmed the date of her separation as […] and divorced on […].

[30] She was also cross-examined on her statement to police, and specifically (page 58) when she was asked “did he (DS) touch you at that time?” EM answered, “No but his hands were in my pants”. The questioning continued.

> Mr. Mozvik Q: So I guess what I'm asking were they still around the waistband or did he actually put them…
>
> A: No they were till around the waistband.

[31] The Defence argued that this is unequivocal. Did he touch you, the Complainant clearly said no, but she had also said his hands were in her pants. In re-direct, the Crown asked her to read the next question and answer that was not asked by Defence.

> Q: Okay but they were still inside your pants?
>
> A: Yeah, its just like when […] doesn't get what he wants.

[32] In a criminal matter the Court must not parse the evidence, but consider it as a whole.

[33] The Defendant argues that the Complainant could be motivated by hatred of her former husband. He submits EM's evidence must be looked at through that prism. This event happened shortly after separation.

[34] On this point, when EM was recalled to give evidence, I found she did not take an opportunity to embellish or strengthen her evidence. She said simply, he said nothing about a joke, adding he said he was sorry.

[35] In direct evidence the Complainant testified DS seemed to feel bad, which is consistent with him apologizing and also consistent with what he said about holding out his arms to give her a hug and it being a "sad moment".

[36] The Defence pointed out that in her statement the Complainant mentioned nothing about him pulling her into his groin as she said at trial. The Defence argued EM's evidence grew stronger between the statement she gave to the police and her evidence at trial.

[37] The Crown in his cross-examination questioned the Defendant on his evidence that "he didn't believe" his and EM's pelvis' touched, suggesting he was less than sure, as he did not say, they "did not" touch. This was typical of the detail explored in cross-examination of the Defendant by the Crown.

[38] The Crown aggressively cross-examined DS about his statement that he leaned in while embracing in a hug, suggesting this was his interpretation of what

was actually their pelvis' touching and thus more consistent with the Complainant's evidence that he pulled her into his groin.

[39] Following a lengthy exchange, I found that DS was unmoved in his evidence on this point.

[40] The Crown submits if the Court accepts EM's evidence about how the charge came about, then the Court must also accept her evidence of what transpired during the meeting between her and the Defendant. The Crown submits her speaking to the police was not for the purpose of laying a charge. She said she was "just trying to portray the character of this individual". As a general rule the Crown is not permitted to adduce evidence of an Accused's character as it may be prejudicial.

[41] The law is I may accept all, part or none of a witness's testimony as it pertains to the evidence at trial.

Decision

[42] In this case I find that the Complainant's evidence was given in an honest manner and that she was factual in her description of the events. It cannot be expected that events will line up perfectly in every respect.

[43] The Crown submits the stories are similar, except for the sexual assault. It must be said that simply because the stories are similar, does not mean it is the Defendant that is not forthcoming or fabricating his testimony. There is a burden to meet and that burden remains on the Crown at all times.

[44] This is a ***R v. WD***, [1991] 1 S.C.R. 742, case because the Accused testified. I must consider his evidence in the context of all of the evidence, including the Complainant's. When I do, I find I am left with some doubt. Having considered the evidence as a whole, while I find EM to be forthright, I find that DS's evidence leaves some question as to what transpired between the parties in July, 2020 as alleged.

[45] For example while joking about sex in these circumstances may seem implausible, the same may be said for the Defendant stating he was sorry and proceeding to pull the Complainant into his groin.

[46] It is not appropriate for me to decide, simply based on whom I find more credible. This is not a credibility contest and not a matter of choosing one version over another. (***Deepak v. R***, 2024 NSCA 12, at paragraphs 22-29)

[47] In my respectful view, the doubt I hold is sufficiently reasonable that the benefit of that doubt must be resolved in favor of the Accused.

[48] Based on all of the evidence, I am not satisfied the Crown has met the burden upon it to establish guilt beyond a reasonable doubt. I am left with such a doubt in this case. In the result the Accused is therefore acquitted of the charge of sexual assault.

[49] This concludes my decision.

Murray, J.