

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D.D.S.*, 2004 NSSC 276

Date: 20041222

Docket: CR 202632

Registry: Halifax

Between:

Her Majesty The Queen

v.

D. D. S.

Restriction on Publication: Criminal Code Section 486.3 and Section 539

Editorial Notice

Identifying information has been removed from this
electronic version of the judgment.

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: December 13 and 14, 2004, in Halifax, Nova Scotia

Oral Decision: December 22, 2004

Counsel: Chris Nicholson, for the Crown
Pat Atherton, for the Defence

By the Court: (Orally)

[1] I bring to the attention of those present that there is a publication ban in effect under s. 486.3 and s. 539 of the *Criminal Code*.

[2] D. D. S. has been charged that he at or near [...] in the County of Halifax, between the 20th day of August, A.D., 2002 and the 20th day of October, A.D., 2002 did for a sexual purpose touch JS, a person under the age of 14 years directly with a part of his body, to wit his hands and penis, contrary to Section 151 of the Criminal Code of Canada.

[3] Furthermore, at the same dates and place aforesaid, that he did commit a sexual assault on JS contrary to Section 271(1)(a) of the Criminal Code.

[4] JS is the daughter of the accused D. S.. She described three incidents that took place in the fall of 2002 which led to the present indictments. JS described how her father pushed her down on her bed, put his hands up her shirt and under her bra and then pulled her pants and underwear down and rubbed her vagina with his finger and then pulled out his penis and rubbed it on her vagina.

[5] Part of the family routine was that her father, D. S., would tuck her in at night when she went to bed. She described on two occasions when he did so where the accused put his hand up under her shirt and bra and rubbed his hand on her breast.

[6] The accused, D. S. testified. He denies these allegations. He testified he would never do these things to his daughter as alleged and that these incidents did not happen.

THE LAW

[7] The burden is on the Crown to prove these allegations beyond a reasonable doubt. The Defence has called evidence. The process I must follow, therefore, is that articulated by the Supreme Court of Canada in *R. v. W.D. (1991)*, 1 S.C.R. 742:

1. If I believe the evidence of the accused that he did not touch any part of his body to the body of JS or commit a sexual assault on her, I must acquit.
2. If I do not believe the testimony of the accused but am left with a reasonable doubt by his testimony, I must acquit.
3. Even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the balance of the evidence I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused.

FINDINGS

[8] The Crown called five witnesses and the Defence eight. The main Crown witness was JS.

[9] JS is a young lady who was approximately 13 years old at the time of the alleged incidents. She was born December [...], 1989. At the time of the alleged incidents, namely August 20 to October 20, 2002, JS was living with her parents D. and L. S. and her younger brother.

[10] JS describes the location of these incidents as being her bedroom, which was located in the basement of the family home, at [...], Halifax County, Nova Scotia. JS slept downstairs and the remaining family members slept upstairs.

[11] JS described how in the fall of 2002 she was on her bed and the accused came down and in her words “pushed me back and put his hands up my shirt and under my bra and then he pulled my pants and underwear down and started rubbing my vagina with his finger and then he pulled his pants down and rubbed his penis on my vagina”. The phone rang. Her father/the accused, according to JS then pulled back and left. JS described her fear at the time. She described the incident as happening at approximately 3:00 p.m. in daylight. At the preliminary inquiry, she described the event as happening in early September on an in-service day. On cross-examination at the trial before me, JS agreed that the likely date of the incident she described was on September 27, 2002, which was described as being a Professional Development Day. JS described other incidents. When her father would come down to tuck her in at bedtime, she testified that on two occasions he put his hand up and under her shirt and then under her bra. She described her father rubbing his hand on her breasts under her bra. When he did so, JS testified she would roll over. JS testified that there was never any discussions during any of these incidents.

[12] JS eventually told her boyfriend J. B. and her friend K. S.. K. S. persuaded JS to speak with the school guidance councillor B. S.. They met with Ms. S. on February 27, 2002. Upon hearing of the general nature of JS's problem, Ms. S. immediately called the Department of Community Services and spoke with Lori Corbett, an Intake Worker at the time.

[13] B. S., is the school guidance counselor at the [...] School. Ms. S. described [...] as being a school for Grade 6 thru 9. She knew JS previous to February 27, 2002 and described both her and K. S. as being quiet girls who knew their responsibility as students. JS disclosed to Ms. S. in words to the effect that "she did not like what her dad does to her".

[14] Later, Lori Corbett and Constable Donald M. Williams of the R.C.M.P. attended on February 27, 2003, at [...] School and spoke with JS. A written statement was taken by Constable Williams. JS was accompanied home to meet with her mother and that evening stayed at A. K.'s house, another friend.

[15] Lori A. Corbett is presently an Intake Casework Supervisor with the Department of Community Services. In 2002 she was an Intake Caseworker. She took the call from Ms. S. on February 27, 2002. She described JS physically shaking as she talked to her at [...] School.

[16] Constable Donald Marshall Williams, was on duty at the Tantallon office of the R.C.M.P. on February 27, 2002. He was advised by his shift supervisor that there was a disclosure at [...] School and attended at [...] School. He and Ms. Corbett met with JS and took a written statement. Constable Williams described JS at the time as being upset and observed her crying and being very emotional. Constable Williams later took a statement from the accused, D. S..

[17] Another Crown witness was K. S., a classmate and best friend of JS in February of 2003. She testified that she encouraged JS to see Ms. S. and accompanied her to meet with Ms. S. on February 27, 2003.

[18] During the meeting with Ms. S., she described herself and JS as being upset and crying.

[19] The Crown called J. D B. presently a grade nine student at [...]. He had a dating relationship with JS which started in November of 2002, which terminated in the winter of 2003. He spoke to JS on February 26, 2003 and in his words, because he felt something was not normal asked her was she ever abused. He indicated she answered his question and was crying at the time. He spoke to her again later than night.

[20] This was the extent of the Crown evidence.

[21] Defence counsel in his summation has acknowledged that this Court based on the Crown's evidence as presented is entitled to enter a finding of guilt. However, defence counsel suggests that when this evidence is tested with reference to the other evidence that has been placed before the Court that the Crown has failed to prove guilt beyond a reasonable doubt.

[22] Defence counsel acknowledges that corroboration in these type cases is no longer required, nevertheless, he has urged that I attempt to determine as a matter of common sense what there is to corroborate JS's testimony.

[23] It is important in cases such as this involving allegations by a young person, where the incidents related occurred with only the accused and complainant present that the Court looks at all the evidence to see if there is other evidence to support and enhance that of the complainant. However, it is not necessary that JS's evidence be supported in order to convict the accused as corroboration in law is not necessary.

[24] Defence counsel has outlined several inconsistencies in JS's testimony which defence counsel suggests tends to question whether or not these incidents happened:

1. JS testified at trial that the first incident was when the accused touched her vagina with his hand and rubbed his penis on her vagina and touched her breasts. When she described this incident during her testimony at the

Preliminary Inquiry she described this incident as being the second incident.

On cross-examination, her explanation for this discrepancy was that her memory got better since then. Her recollection was that this incident was the first followed by the two incidents where the accused rubbed her breasts as he tucked her in for bed.

2. Another inconsistency pointed out by the defence was the date on which the first incident took place. JS testified that the first incident happened on an in-service day at approximately 3:00 p.m. Attendance records for her school were entered which showed that she was in attendance at school except for in-service days. The only in-service day noted was September 27, 2002. She was asked on cross-examination whether or not she was at the babysitter's that day and she denied being with the babysitter. The babysitter, A.L.S. was called and according to her records, both JS and her younger brother were with her on that day. The defence points out that on September 27, 2002 Mr. S., according to work records entered into evidence was at work. I am satisfied JS was wrong when she testified that the first incident happened on September 27, 2002, given the evidence of the babysitter A.L.S. and the work record of the accused.

3. JS testified that by the end of October, 2002, she was afraid of her father and didn't want contact with him. She testified she tried to avoid him, but not make it obvious. The Crown called several witnesses including JS's mother and grandmother as well as her Aunt, who was the sister of the accused, who all testified that they did not observe any tenseness between JS and the accused and in fact testified as to the loving father/daughter relationship between them.

4. A. K. is presently 15 years old and a friend of JS's, and was a friend of JS's in the fall of 2002. A. K. testified about the "blind incident". She was at the S. residence along with another friend, K. S.. The girls were alone in the house and JS knocked down and damaged a large blind in the living room. A. K. testified that when Mr. S. and his wife returned, he was very upset and yelled at JS in front of her friends. The S., A. and K. then ate supper and after supper she, A. and K. went down into JS's bedroom. A. testified JS wasn't happy that her parents were angry at her and she described how JS started to cry and said something to the effect about "how she would do whatever to get out of the house because she wasn't happy". Presumably the Defence suggests this statement as evidence of a motive for JS to bring forth untrue allegations.

5. Prior to Christmas 2002, JS while out shopping with her mother and brother for Christmas presents, bought a mug for her father that said, “#1 Dad”. The defence queries why someone would buy a mug that says, “# 1 Dad” after all of this has happened.

6. The accused and his wife, L. S., brought forward evidence of a medical condition that the accused suffered in the fall of 2002 at the time of these alleged incidents. The accused testified that due to his diabetes his penis was cracked and bleeding and that it was necessary for him to apply a cream to his penis which caused it to take on a yellowish tinge. The implication of this evidence is that JS should have noticed the condition of the accused’s penis during the first incident when she indicated her father rubbed his penis along her vagina.

7. The defence introduced evidence through L. K. and her daughter A. K. that on February 27, 2003 JS spent the night at their residence. During the evening both witnesses testified that JS stated that she had been raped multiple times by her father. This argues the Defence, is inconsistent with the statement she provided to Constable Williams and Ms. Corbett and to her testimony at trial.

[25] The defence has asked that the Court use common sense in assessing the evidence of JS and the other witnesses who gave evidence and the Court should consider these inconsistencies when it determines whether or not these incidents happened.

[26] JS was 13 years old at the time of these alleged incidents. That the accused is her father would obviously create emotional stress for JS.

[27] Is JS's testimony credible?

[28] In *R. v. R.W.*, 74 C.C.C. (3d) at p. 134 the Supreme Court of Canada describes the approach to be taken with children's evidence. McLaughlin J.

comments:

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)* (1990), 56 C.C.C. (3d) 200 at pp. 219 - 20, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, when, in referring to submissions regarding the Court of Appeal judge's treatment of the evidence of the complainant, she said that

...it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have

misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[29] I have taken this common sense approach in assessing JS's evidence and credibility. JS was straightforward in her testimony before this Court.

Understandably she was emotional given the relationship between the accused and JS and the seriousness of the incidents she related. Her testimony before this Court was consistent with the statement given to Lori Corbett and Constable Williams.

However, there are inconsistencies pointed out by the Defence that I will now deal with in the same order in which I have enumerated them earlier and provide comment:

1. The first inconsistency noted was the discrepancy in the preliminary inquiry evidence of JS where she described the first incident as related before this Court as having been the second incident. I am satisfied that the first incident was as testified to by JS at the trial before me. JS is a young witness and with young witnesses, time and place are often not as important details as to adults. She corrected the sequence of incidents at trial which I accept.
2. The second discrepancy was the date on which the first incident took place. JS appears to be mistaken that the incident took place on an in-service day or on September 27, 2002. A mistake as to the time of the incident is not

uncommon for a young person. I also note the indictment covers the period the 20th day of August, 2002 to the 20th day of October, 2002. The accused had opportunity on September 16, 2002 to be alone with JS after her return from the babysitter. He also had opportunity on weekends to be alone with JS. As well, his immediate supervisor K. C. testified that it would be possible for an employee such as the accused to switch a shift and it would not be reflected in the schedule of days worked as presented to the Court. The accused has denied that he switched any shifts on those days yet, in cross-examination the accused was referred to p. 8 of the statement given to Constable Williams where he admitted that he got scheduled days off every two weeks and that it was not uncommon for him to change his scheduled days off so that he would be home on in-services days. The accused in evidence admitted that he was off on September 16, 2002. The accused denies any contact with JS on that day indicating that he had to run several errands. As to opportunity for the second and third incidents, the accused readily admitted that he regularly tucked in JS every night.

3. The third inconsistency raised by the Defence was JS's testimony that she was afraid of her father, yet several witnesses testified that JS and her father, the accused, had a good relationship and that they did not observe any hesitation on JS to be near her father during the fall of 2002 and winter of 2003. She testified that while she tried to avoid her father, she did not make it obvious. Many witnesses have testified of observing a typical father/daughter relationship between JS and the accused and also testified that they did not observe any tension between JS and her father. One of the witnesses, J.M. S., is JS's grandmother and mother of the accused. The other

is L. S., the accused's wife. Another witness, T.D., is the accused's sister. These observations were of JS when she was with her parents at family outings with many persons present, not in a situation where JS would be alone with the accused. She testified she was afraid of her father which I accept given that the incidents that she has brought forward took place when she was alone with the accused. The incidents as described by the witnesses called by Defence all took place at family gatherings where JS's mother, brother, relatives and friends were present. While JS admitted in cross-examination she was tense and nervous around her father, she indicated that she did not try to make it obvious.

4. A. K. testified that after the so-called "blind incident" that JS said words to the effect, "how she would do whatever to get out of the house because she wasn't happy". K. S. in testimony did not recall JS saying this to A. K.. This statement was made in the context and after the accused had yelled at her in front of her friends. The accused testified that he later went down to see JS and her friends to apologize. JS has denied that she made this statement. I am not satisfied on the evidence that this statement if made, would suggest a motive for JS bringing these allegations before the Court. I did not observe any spitefulness or vindication towards the accused/her father in the manner in which JS testified. She appeared upset and crying at times and uncomfortable as she gave her evidence. As well, I take comfort that both Lori Corbett, a trained social worker and Constable Williams, a long time member of the R.C.M.P. both commented in testimony how upset JS appeared to be during their interview of her which in my view is consistent

with the serious nature of the allegations JS was bringing forth, especially allegations that involved her father.

5. JS bought her father a mug for Christmas that said, “#1 Dad”. The defence queries why someone would buy a mug that says “#1 Dad” after all of this has happened. JS was out shopping with her mother and brother for Christmas presents. She testified that she was afraid of her father but did not want to make it obvious. To not buy a present for her father at Christmas would be obvious. JS was 13 years old at the time and had not as yet disclosed these incidents.

6. The defence suggests that because of the condition of the accused’s penis that if the incident had taken place JS would have noticed the discolouration and cracking. When questioned on cross-examination JS testified that she only glanced at the accused’s penis and did not notice anything unusual. The incident appeared to happen in a very short time and her testimony was while she may have glanced “she did not try to remember”. This was no doubt a traumatic experience for JS given the sexual nature of the contact between her and her father. Given the short time frame and the nature of the contact, I accept her explanation for the reason she did not notice the condition as testified to by the accused and his wife, L. S..

7. The last inconsistency noted by the defence is the testimony of L. K. and her daughter, A. K., who testified that on February 27, 2003 when JS stayed at their house, she told them that the accused had raped her multiple times. There is some discrepancy between the evidence of L. K. and A. K.. A. K. said that she was alone with JS when she was told this. L. K. testified

that both her daughter A. and JS were in A.'s room when JS told her of these multiple rapes. A. K.'s testimony was that JS told her she was raped three to five times. L. K. testified that JS told her that she was raped on four or five occasions. L. K. testified that she has become very good friends with the accused and his wife, L. S.. However, I do accept the evidence of L. K. and her daughter, that in fact, on this occasion JS did in fact indicate she was raped by her father a number of times. These allegations of rape while more serious than the incidents related by JS are of sexual acts by her father on her. A. and L. K. testified that at the time she made these statements she was upset. She is a young girl who had just met with her guidance counsellor, a social worker and R.C.M.P. officer to make allegations of sexual acts by her father to her. She is a young girl of 13 who obviously exaggerated the nature of the acts performed by her father on her. However, she was clear in her testimony before this Court and clear in her statements as to what transpired when she spoke with the trained social worker Lori Corbett and the experienced police officer, Constable Williams.

[30] JS's testimony was clear and forthright before this Court as to what happened between her and the accused during the three incidents related. The testimony is consistent with the statement she provided to Lori Corbett and Constable Williams.

I am satisfied that the evidence of JS is credible in relation to her testimony regarding the three incidents which took place between August 20, 2002 and October 20, 2002. Her testimony before this Court was forthright in responding to questions from both Crown and Defence and she came across as mature. At the

same time she was obviously in stress, upset and crying at times. She corrected the sequence of incidents and I do not find any motive in the evidence before me to suggest that she has fabricated these incidents. She was upset when she met with B. S.. B. S. has known JS for some time and described her as a quiet and responsible student and someone she would listen to. Both Lori Corbett and Constable Williams described her as being very upset when they met with her. This would be consistent with the traumatic incidents that she described. The time between the disclosure in February of 2003 and the three incidents as related in September/October 2002 are close in time. The testimony of JS as to the nature of the incidents contain detail as to the nature of the incidents and describe acts of a sexual nature.

[31] The accused has given evidence. He denies any inappropriate contact with his daughter. The accused gave a video taped statement to Constable Williams in February of 2003 and a transcript of that statement is in evidence. A portion of the statement was put to the accused on cross examination. In my view, these portions are consistent with the evidence of JS that her father committed inappropriate sexual acts on her and inconsistent with the evidence of the accused at trial that he did not in any way touch JS in an inappropriate way.

[32] The accused was cross-examined on his statement. Defence counsel admitted the statement as being free and voluntary.

[33] The following question at p. 17 of the Statement was put to the accused in cross-examination:

Williams - So it's possible you might have went too far a couple of times and never realized it.

D. S. - Yes. I'm going to be sick.

[34] The accused's response to this statement was that he was confused at the time he gave this statement. He then denied any inappropriate touching.

[35] Another portion of his statement given to Constable Williams (p.33) was put to the accused where he said the following:

And inappropriately my hands were coming back on the inside of her leg.

[36] Again, the accused's response was that he was confused when he gave the statement and in fact he did not remember giving this statement. The statements given during the videotaped statement are as I have said are consistent with JS's version of inappropriate contact between her and her father.

[37] As to opportunity to commit the first incident, the accused had opportunity on weekends and on September 16 when he was off. He denies any contact on that date suggesting he was very busy running errands. There was opportunity on October 4, 7 and 8. As to the second and third incidents he tucked JS in every

night. JS's evidence has not been challenged as to the consistency of her statement but it has been challenged as to time. As commented by McLaughlin J. In *R. v. R.W. (supra)* children often experience the world differently from adults and that details important to adults like time and place may be missing from a child's recollection.

[38] The Defence called a number of witnesses to challenge JS's testimony that the first incident happened approximately 3:00 p.m. on an in-service day most likely September 27, 2002. K.J.C. is the accused's immediate superior at [...]. He entered evidence to show that on September 27, 2002 according to the work schedules he had prepared, the accused was at work. A.L.S., a babysitter for JS and her younger brother gave evidence that on September 27, both JS and younger brother were at the babysitters. As I said, I am satisfied that JS was obviously mistaken as to September 27, 2002, as being the date of the first incident.

[39] A number of family members were called to testify as to the relationship between JS and the accused during the fall of 2002 up to and including the disclosure in February of 2003. All testified there was a typical father/daughter relationship and no sign of any tension between JS and the accused.

[40] I have considered the demeanour of the witnesses. I have considered the inconsistencies as pointed out by the Defence. I find on the totality of the evidence

before me that D. D. S. is guilty of the two counts as set out in the indictment before me. In particular, I am satisfied that JS was under 14 years old at the time of the offences which took place between August 20, 2002 and October 20, 2002. I am satisfied that D. D. S. touched JS with his hands and penis and that the touching was for a sexual purpose.

[41] I'm satisfied on the totality of the evidence before me that D. D. S. intentionally did these acts to JS and that JS did not consent.

[42] I am satisfied that the contact took place and circumstances of a sexual nature, given that the incidents took place in JS's bedroom, that the incidents involved, the touching of her vagina and breasts and that the touching was done with the hands and penis of Mr. S.. As a result, I find the accused guilty on both counts of the indictment, namely under s. 151 and s. 271 of the *Criminal Code*.

Pickup, J.