YOUTH COURT OF NOVA SCOTIA
Citation: *R. v. A.R.*, 2018 NSPC 11

Date: 20180508
Docket: 8167343
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

A. R.

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
Heard:	March 13, 2018, in Bridgewater, Nova Scotia
Decision	May 8, 2018
Charge:	Section 271 of the **Criminal Code of Canada**
Counsel:	Sharon Goodwin, Crown Attorney Alan Ferrier, Q.C., Defence Attorney

By the Court:

[1] This matter before the Court involves two very young persons who engaged in sexual activity. This activity has resulted in a charge of sexual assault, pursuant to Section 271 of the **Criminal Code of Canada**.

[2] The concept of simply accepting one version of an account of sexual assault over another may have a superficial appeal to it. Taking such a course of action, however, goes against our long-held concept of fundamental justice in the context of Criminal Law. Rather any criminal conviction engages a complex and necessary consideration by courts of all the evidence to determine, not which person's evidence to accept, but fundamentally has all the evidence provided lead to the conclusion that the Crown has proven beyond a reasonable doubt the guilt of the accused.

Facts:

[3] M.H. is a grade 12 student with a date of birth of May 5, 2000. She was 15 years of age when she alleges she was sexually assaulted by the accused in October of 2015. The accused, A.R., was born on the 13th day of December, 1998 and was 16 at the time of the incident.

[4] The two young people had been dating for some time. It was often the situation where A.R. would pick M.H. up at her home in the morning and drive her to school.

[5] On the day in question, A.R. arrived at M.H.'s home to pick her up and then attend school. M.H.'s mother and step-father had already left the home for work. This resulted in A.R. coming into M.H.'s home. The two went downstairs to M.H.'s room where they began to engage in consensual sexual intercourse.

[6] M.H. testified that she initially consented to the activity. She received a text from her step-father during intercourse, which she found upsetting. She testified that she immediately said to A.R. that the text lead her to believe her 'dad was mad'. She then told A.R. she no longer wished to continue sexual activity.

[7] A.R. said that he couldn't see why they had to stop. He then raised his voice. A.R. then grabbed her and brought her back on top of him. He then proceeded to ejaculate. M.H. testified that she recalled telling A.R., "No", and that he said he would be quick.

[8] M.H. testified that initially after the text, A.R. was sympathetic but then became angry.

[9] After this occurred, M.H. said she was a mix of emotions being both angry and sad. She then screamed at A.R. not to touch her and to get out of her room. She said she locked the bedroom door when A.R. exited her bedroom but somehow he was able to unlock the door and re-enter.

[10] Once back in the room, A.R. began telling M.H. that it was okay and that she could stay or come to school with him. She decided to continue onto school with A.R. On the way to school, A.R. told her that he did not know why she was upset with him.

[11] M.H. did not disclose this to any person until the fall of 2017. The disclosure lead to police involvement and the charges before the Court. In cross-examination, M.H. agreed that this complaint came forward when the couple finally broke up in 2017.

[12] A.R, testified that in 2015, he often picked up M.H. to drive to school. He had no recollection of an event as described by M.H. occurring. She had never locked him out of her room. He never recalled M.H. receiving a text message from her father in the manner she described. In short, A.H. denied the incident ever happened.

Law:

[13] Sexual assaults continue to be one of the most difficult types of cases that our courts must deal with. Like this matter, they often have no corroborating evidence and are heavily dependent on credibility.

[14] 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.

[15] 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.).

[16] 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.

[17] 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.

[18] 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)

[19] 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.

[20] 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:

[21] A number of principles regarding credibility can be gleaned from Canadian courts.

[22] First, 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)

[23] Secondly, there are not inflexible rules which mandate when a witness' evidence should be evaluated according to adult or child standards. Any system based on a criteria that is inflexible, would be one that would resurrect stereotypes as rigid and unyieldly as those rejected by developments on how courts are to deal with child witnesses.

[24] Third, generally when an adult testifies as to events that occurred when they were a child, credibility should be assessed according to the criteria applicable to an adult witness. Having said that, the presence of inconsistencies, particularly on peripheral matters, should be considered in the context of the witnesses' age at the time of the events about which they are testifying occurred.

[25] Finally, 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:

[26] 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).

[27] 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.

Analysis:

[28] The complainants evidence was delivered in a highly credible manner. There was nothing in her testimony which I find to give pause as to her credibility.

[29] Defence counsel argues that as the complainant only came forward after breaking up with A.R., this late complaint, on the heels of a breakup, negatively affects her credibility.

[30] I do not find that to be the case. I accept her evidence. It is clear that there was originally consensual sexual activity between M.H. and A.R. When M.H. said she no longer wished to continue, consent was withdrawn. Continuing sexual activity without consent is a sexual assault.

[31] As set out earlier in this decision, having found M.H.'s account credible does not end the matter. The Court cannot take M.H.'s testimony, prefer it over A.R.'s and then enter a conviction. Rather, I must look at the whole of the evidence to determine whether reasonable doubt exists on any element of the offence.

[32] As part of my analysis of whether reasonable doubt exists, I must look to A.R.'s evidence. If I accept his evidence, I must acquit. Even if I do not accept A.R.'s evidence but it raises a reasonable doubt, then I must acquit him.

[33] I must say, I had some difficulty with A.R.'s evidence concerning the issue of M.H. receiving texts on her phone while in her bedroom. His categorical statement that she never received a text in her bedroom while he was there with her, but she had in other areas of the house, gives me caution. Teenagers spend a great deal of time in their bedrooms. They also spend a great deal of time texting. It is hard to accept that M.H. would never have received a text in her bedroom with A.R. present.

[34] Having stated the above, I cannot say at the end of the day, that I completely reject A.R.'s denial of the event happening as described by M.H. In law, that would leave me with a reasonable doubt. Accordingly, in law, I must acquit.

Paul Scovil, JPC