Date: 19981123 Docket: CAC 143866
CAC 143937

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. C.R.S., 1998 NSCA 228

Pugsley, Hart and Cromwell, JJ.A.

BETWEEN:

C. R. S.	)	Donald C. Fraser, Esq
Appellant	)	for C. R. S.
-and-	)	
	)	James A. Gumpert, Esq.,Q.C.
HER MAJESTY THE QUEEN	)	for the Crown
Respondent	)	
- AND -	)	
	)	
HER MAJESTY THE QUEEN	)	
Appellant	)	
-and-	)	
	)	
C. R. S.	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	September 10, 1998
	)	
	)	Judgment Delivered:
	)	November 23,1998

Editorial Notice

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

THE COURT: The appeal is allowed, the conviction is quashed, and a new trial is ordered, per reasons for judgment of Pugsley, J.A.; Hart and Cromwell, JJ.A., concurring.

Pugsley, J.A.:

This is an appeal by C. S. from his convictions, for having sexual intercourse with a person not his wife who was under the age of fourteen (14) years, (contrary to s. 146(1) of the **Criminal Code**); committing an act of gross indecency (contrary to s. 157 of the **Code**); committing an indecent assault on a female person (contrary to s. 149 of the **Code**); having sexual intercourse with a female person not his wife, and without her consent, and thereby committing rape (contrary to s. 144 of the **Code**); having illicit sexual intercourse with his step-daughter (contrary to s. 153(1)(a) of the **Code**); and committing a sexual assault, contrary to s. 271(a) of the **Code**), entered by Justice Gruchy, sitting with a jury, on September 18, 1997.

The sections of the **Code** to which I have referred were extant at the time the offences were allegedly committed.

The first five offences allegedly occurred at varying times between December of 1968 and December 17, 1979, while the sixth allegedly occurred in the month of October of 1994.

The complainant in each case was D. S.. She became Mr. S.'s step-daughter on July *, 1976, when her mother, G. S., and Mr. S. were married. G. S. died on October *, 1994. (**editorial note- removed to protect identity*)

On November 14, 1997, Justice Gruchy sentenced Mr. S. to imprisonment for two years less a day for each of the six counts, to be served concurrently. The imprisonment was ordered to be served in the community. The sentence of imprisonment was to be followed by probation, with conditions, for an additional term of three years. The Crown has filed a notice of application for leave to appeal sentence.

A number of grounds of appeal have been advanced of behalf of Mr. S..

In view of my proposed disposition, it is only necessary to consider one ground - whether the trial judge erred in law in responding to questions from the jury posed during the course of their deliberations.

Background

The trial commenced on the morning of September 16,1997, and concluded early in the afternoon of September 17.

The complainant was the only witness called by the Crown.

In addition to giving evidence on his own behalf, the appellant called P. D., who was married to the complainant for a period of approximately nine years, from March, 1980, to 1989.

After summation by counsel on the morning of September 18, Justice Gruchy delivered his charge to the jury, which lasted about an hour.

The jury deliberated for almost two hours and then sent the following questions:

> Questions for council (*sic*):
>
> Why weren't these following people called as witnesses:
>
> - D.'s sister V.
> - D.'s brother D.
> - S. B.
> - S. S.
> - Residents around Mr. S.'s N. M. apartment
> - M.. A.
> - Other tenants living in H. home

- Neighbours
- V.'s teachers?

Evidence that was skipped over:

- D.'s suicide attempt
- Was Mr. S. sterile/was D. ever impregnated before her marriage to P. D..

After discussions between Justice Gruchy and counsel, the jury received instructions, and resumed their deliberations. No objection was taken by either counsel to the instructions.

An hour and fifteen minutes later the verdict was received.

Evidence of the Complainant (1968-1980)

The complainant, her mother, and younger sister V. lived in a two-storey apartment in H. when the mother started dating Mr. S. in January of 1969. The complainant was then eight, and V. five, years of age.

The complainant's older brother, D., resided at the T. T. S. but came home at Christmas and for the summer.

Mr. S. moved into the apartment six months later and shared a bedroom with the complainant's mother on the first floor. The complainant's bedroom was located on the

second floor, next to her sister's bedroom. A bathroom with a sink and shower was accessed through V.'s bedroom. A door with latch separated the sisters' bedrooms.

Mr. S. and the complainant's mother jointly determined that V. would go to bed each night at 7:00 p.m. and the complainant at 8:00 p.m. When the complainant went upstairs at 8:00 she always kissed her sister goodnight and then closed the common door before preparing for bed. V., she testified, was always asleep when she kissed her goodnight.

She testified that Mr. S. "tucked in" both her sister and herself at night, although it is not clear from her evidence whether V. was tucked in every night, or at what time this activity occurred.

The complainant testified that Mr. S. first assaulted her in the kitchen one afternoon when she was nine years of age. Her mother, and V., were in other rooms at the time. The assault consisted of placing his hands on the complainant's clothed breasts and running his hands over her body.

Two nights after the kitchen incident, she testified that Mr. S., upon being admitted to her bedroom, closed the door, sat on her bed, felt her breasts under her pyjamas, and then pulled her panties down and felt her vagina.

In the course of describing this incident, the complainant testified that:

> It just seemed like the harder I cried the more he did it.

After the assault, Mr. S. told her to "go and get cleaned up" when he had left the bedroom. After his exit, she would then walk by her sister's bed to the bathroom where she closed and locked the door and had a shower.

She stated that Mr. S. repeated the pattern in the flat in H. every night thereafter for the next two years, except that after she reached her tenth birthday the sexual assault included sexual intercourse, both vaginal and anal. On the first occasion when he performed sexual intercourse, she testified Mr. S. brought a rope to her bedroom, ripped her clothes off when she "fought him" and refused to undress, held her down on the bed, tied her hands together and then her feet together. He continued to use the rope every night in H.. On at least half the occasions when the assaults occurred, he ripped off her clothes, and took her torn underwear and pyjamas with him when he left. She never saw the clothes again. She always had a shower after she was assaulted because:

> I felt bad because he made me feel like . . . I was the person that did something wrong.

She acknowledged that her nightly showers occurred long after she was supposed to be in bed. She does not recall her sister waking up on any occasion. She testified that:

> I never made no noise. He just keeps saying, he said, he'd just tell me not to make any noise, he'd take his hand and put it over my mouth so I couldn't holler.
> Q. And when he was speaking to you during an incident how loud would his voice me?
> A. He'd whisper.

Although she would attempt to fight off his advances, she did not tell anyone of his actions as she was :

> . . . afraid of being beaten by him, and . . . he said he would threaten to hurt my mother and my sister and I didn't want that.

The family moved to a two-storey apartment in T. M. in 1970. The second floor consisted of four bedrooms and bath. The complainant's bedroom was next to her sister

V.'s bedroom. Each morning the complainant would be summoned out of bed by a call from her mother to prepare breakfast for Mr. S.. The complainant's mother would remain in bed while breakfast was prepared. She testified that before leaving the house at 7:30 a.m., Mr. S. would force vaginal, and often anal intercourse on her while she was in the kitchen. After he left the house, she would have a shower, and then wake her sister so the two girls could catch the school bus.

She stated that Mr. S. would continue the sexual assaults in the bedroom at night as well. On occasion he would use the rope to tie both her arms and her ankles. He would place his hand over her mouth "most of the time" when he forced himself on her. The complainant continued to have a shower each night after the assault.

From 1973 to 1979 the family lived in a two-storey, one-family house in C. All of the bedrooms were located on the second floor, but the only bathroom was located on the first floor.

She testified that on one occasion:

> He kept touching me and I tried to brush him away, and I was getting frustrated and scared and I was going to holler.
>
> Q. Did you holler?
> A. I tried to.
> Q. How?
> A. I tried to holler, and when I started to holler he, nobody heard me because he put his hand over my mouth and he told me, he said you're going to do what I say.
>
> . . .
>
> Then after he was through and I told him, I went, at that time I went to the bathroom and that time my mom woke up that time and started coming downstairs and she asked what was going on, and I tried to tell her but she just wouldn't listen, she told me, she said all you want is for me not to have your father, you want him for your boyfriend any way.

She also testified that on one occasion when Mr. S. was forcing intercourse upon her, they both heard her sister coming down to the kitchen. Mr. S. pushed her and told her to get to the bathroom. Her sister:

> ...didn't say nothing, she just saw me taking off for the bathroom . . . I had my nightdress on.

She also described two instances that occurred at night in her bedroom at C.:

> Well he come home drinking and, he come home drinking and he come in my room, he would holler where daddy's girl, and I wouldn't say anything because I was scared I tried to hide underneath the covers, and he got louder, and my mother would not say leave the kids alone, and he'd just, he wouldn't listen to her, and I didn't answer my door, and he would break it down, tear it off the hinges.
>
> Q. Did he?
> A. Yes, he did.
> Q. How often did that happen?
> A. It didn't happen too often, I mean him tearing the door down.
> Q. Did it happen more than once?
> A. It happened twice, as I can recall.

She agreed, in cross-examination, that her brother and sister would have been aware of these incidents.

The sexual attacks continued, she testified, until she commenced dating Mr. D. in September, 1979. Mr. D. subsequently moved into a vacant bedroom in the C. apartment. They moved to other lodgings shortly before they were married in March, 1980.

Evidence of the Complainant - Senior Citizens' Residence - October, 1994

Shortly after the death of her mother on October 9, 1994, Mr. S. told the complainant that he required assistance as he:

...needed somebody to clean his house and straighten things up.

A friend of the mother, M. A., promised the complainant that she would be at the S. apartment, located at the senior citizen's apartment complex in N. M. The complainant testified that upon being assured by Mr. S. that Ms. A. was inside, the complainant removed her coat upon entry. Mr. S. locked the door behind her. When it became apparent that Ms. A. was not present, Mr. S. told her she couldn't leave and dragged her into the bedroom. She tried to kick him and free her arms. He pushed her on the bed, ripped her clothes, and forced intercourse upon her.

She was asked in cross-examination:

> Were you yelling, screaming, trying to fight him off? What was going on?
> A. Yes, I was hollering, and I asked him to stop.
> Q. Were you hollering very loud?
> A. I was hollering loud enough to my knowledge.
> . . .
> A. Yes, and when he was dragging me and I tried to, about that time when he was dragging me I was half between the floor and upright. Like I was leaning over when he was dragging me, and I tried to get away from him, and . . .
> Q. And were you yelling, hollering, screaming all the time?
> A. Yes, I was yelling and hollering.
> . . .
> Q. And I assume while you were in the bedroom you were yelling and hollering still?
> A. Yes, I tried to squirm, but I couldn't because he was, I mean squirming he leaned on me and I couldn't get away from him.
> Q. But you continued to yell and holler, I take it, from what you told us?
> A. Yes.
> Q. And once again nobody came?
> A. No.

After he completed the act, he told her she could go. She retrieved, "zipped up" her coat, went to the mall and sat there until her bus came.

She subsequently told her friend, S. B., "what happened" that day.

Some time later, she spoke to a social worker, Sylvia Skerry, and as a result, contacted the police.

She explained that she had not reported the assault earlier as:

> I always thought ever since I was a child, there was nothing I could do about it.

She was not asked any questions respecting the present whereabouts of Sylvia Skerry.

She testified that neither S. B. nor M. A. was in court. She stated that she did not know whether M. A. was still alive.

The only evidence respecting the availability, or competency of her brother, was the following exchange:

> Q. And was this after D. had come to live at home?
> A. Yeah, I think D. was home and going to the F.
> By the Court: Going to what?
> A. The F. It's for handicapped kids to go to so they can, you know, go and get a job.
> Q. Sheltered workshop?
> A. Yeah, sort of a workshop, yeah.

Mr. S., in cross-examination, testified that:

> I had nothing against D., but he got on those spells. He'd have spells, and once he pretty near burnt the house down.

The complainant confirmed, in cross-examination, that she hated living in the same house as Mr. S.. After she had left the family home with Mr. D., she told him how Mr. S. had sexually abused her.

> I told him everything that happened.

In addition, she told Mr. D. that she had been sexually abused by her natural father.

Defence Evidence

Mr. D. testified that he had spent two or three months in C. with the family unit, that the complainant seemed to get along "great" with her mother and Mr. S., and never complained that Mr. S. had sexually abused her. She told him she had been sexually abused by her natural father.

Mr. S., 72 at the time of his trial, testified that the incidents described by the complainant "never happened". He stated that he kissed both daughters goodnight "downstairs" before they went to bed, but that it was his wife, not he, who tucked them in. He also testified that the complainant only prepared his breakfast on two occasions.

Charge to the Jury

The trial judge summarized the position of the defence as follows:

> The defendant, C. R. S., denies that he engaged in any sort of sexual contact or activity with the complainant at any time. In particular, he specifically denies the complainant's allegations that he engaged in any such activity or contact with her when she was between the ages of nine and nineteen, or during the month of October in 1994. It is the position of the defence that the complainant's allegations are unsupported by any other evidence than her own and, on the contrary, called into question by the only third party evidence presented in this proceeding, that of P. D.

Discussion With Counsel In the Absence of the Jury

After reading to counsel the questions posed by the jury, and distributing material from Ewaschuk and Boilard, Justice Gruchy continued:

> Having considered that I propose that the answer will be somewhat as follows and I will hear both of you having read it.

> There are no easy or quick answers to your questions. The process of our legal system is known as an adversarial process. It is not inquisitorial. What does that mean? It is for the Crown to bring to you sufficient evidence to satisfy you of the guilt of the accused beyond a reasonable doubt. The accused has no burden to adduce evidence to demonstrate that he is not guilty of the crimes charged, however, in the adversarial process he may do so. The burden of proving beyond a reasonable doubt always rests with the Crown. You must ask yourselves which party bore the burden of producing these witnesses. You must not, however, speculate what these witnesses might have said. You must not draw inferences, favourable or unfavourable, from absent witnesses. The case for each litigant is conducted by counsel who is not expected nor even permitted to explain or justify his or her conduct of the case. There may be good and valid reasons for both parties not to have called the missing witness. You must consider only the evidence produced before you to reach your verdict.
>
> Now, according to Mr. Justice Jean-Guy Boilard, I must decide whether the omission to call the witness is capable of supporting the principle adverse inference, that is, if there is an adverse inference. This may be done by determining the importance of the missing witnesses and by looking at the evidence for the presence of some explanation about the absence of the witnesses that have an air of reality. As we all know, there is no explanation within the evidence as to why those witnesses were not called, nor would I have expected it, some of it, in the circumstances <u>But I do conclude, however, that the absent witnesses, some of the absent witnesses might have been, and probably were, important links to the case for the Crown, especially with respect to the matter of the support, that is for independent support on the complainant's evidence.</u> Accordingly, and I want both of your submissions on this, I am considering saying to the jury that they:
>
> > . . . may draw an inference that had these witnesses been called, he or she would not have assisted the party, that is, would have been unfavourable. You must, however, be reminded to act with caution in proceeding to make that inference, bearing in mind that there might be some undisclosed good and valid reason for not having called the witness.
>
> Now those are with respect to the witnesses, and I will hear your submissions on what I have said from each of you and then we will go on to the second part of their inquiry. . . . (emphasis added)

From their responses, it is evident that both counsel assumed Justice Gruchy's instructions would leave it to the jury to draw inferences unfavourable to the Crown respecting the failure to call the absent witnesses.

The Crown's position was that:

> It is equally possible that the witnesses who were not called would have not provided any useful evidence and that the relevant evidence is not admissible evidence.

Defence counsel submitted, in essence, that the jury should be instructed that an inference unfavourable to the Crown's position could be made.

The Instructions Respecting the Questions

Justice Gruchy responded to the jury questions:

> There are no easy or quick answers to your questions. The process of our legal system is known as an adversarial process. It is not an inquisitorial one. What does that mean? It is for the Crown to bring to you sufficient evidence to satisfy you of the guilt of the accused beyond a reasonable doubt. It is not for you or for me to make inquiries into the evidence. That is the function of counsel. The accused has no burden to adduce evidence to demonstrate that he is not guilty of the crimes charged, however, he may do so. The burden of proving guilt beyond a reasonable doubt always rests with the Crown. You must ask yourselves which party bore the burden of producing these particular witnesses. You must not, however, speculate what those witnesses might have said. You must not draw inferences, favourable or unfavourable, from the absent witnesses.
>
> The case for each litigant is conducted by counsel who is not expected, nor even permitted, to explain or justify his or her conduct of the case. There may be good and valid reasons for both or either party not to have called the missing witness, or witnesses. You must consider only the evidence made before, produced before you to reach your verdict. I ask you to consider whether these absent witnesses were an important link to either of the parties' cases. In particular, I ask you to ask yourselves whether these witnesses would have provided independent support for the evidence of the complainant. If you conclude that either of the parties did not, and did not have the ability, to call these witnesses, sorry, did not, but had the ability to call these witnesses, you may draw an inference that had the witness been called he or she would not have assisted the party. That is, would not have been, would not have been favourable to the party who ought to have called him or her. But I must caution you that in proceeding to make that inference, bearing in mind that there might be some perfectly good, undisclosed and valid reason for not having called the witness. (emphasis added)

Analysis

Counsel for Mr. S. does not submit that any tactical, or other improper considerations, motivated the Crown in electing not to call the absent witnesses. No issue of non-disclosure is raised by the appellant.

It should be noted that no request was made by either counsel to the trial judge to call any witness.

The duty imposed on a trial judge to fashion a response, in a reasonable time, that is "full, careful and correct" to a jury question (**R. v. W.D.**, [1991] 1 S.C.R. 742 at 759), is a difficult task but particularly when it requires a consideration of issues involving, as it does here, a significant number of absent witnesses. The jury questions focused on at least nine individuals, or groups of individuals. With the possible exception of the complainant's brother, D., none of the evidence adduced provided any explanation respecting the absence of the witnesses concerned.

Comments from a trial judge to a jury respecting the drawing of an adverse inference against one of the parties for the failure to call a witness, are only permissible in selected circumstances, and even then should be exercised with "caution" (Martin, J.A. on behalf of the Ontario Court of Appeal in **R. v. Koffman and Hirschler** (1985), 20 C.C.C. (3d) 232 at 237) or "great caution" (Brooke, J.A. on behalf of the Ontario Court of Appeal in **R. v. Zehr** (1981), 54 C.C.C. 65 at 68) or "the greatest of caution" (Goodman, J.A. on behalf of the Ontario Court of Appeal in **R. v. Charrette** (1982), 67 C.C.C. (2d) 357 at 359).

The reason for this caution was succinctly expressed by Justice Brooke in **Zehr** at p.68:

> This kind of comment from a trial judge can seriously affect what might otherwise be the jury's assessment of the credibility of those who do testify and perhaps, more importantly, the integrity of the case.

Such an inference should only occur where the witness is of some importance to the case (Martin, J.A. in **Koffman** at 237).

When one examines the list of absent witnesses prepared by the jury, many of them had only a peripheral, or collateral involvement with the main issues in this case. They should not have been considered of sufficient importance to merit the drawing of an inference against either party.

In this category, I would class:

- S. B., S. S., M. A., other tenants living in H. home, neighbours, V.'s teachers.

When approaching the issue of the circumstances which would permit an adverse inference to be drawn against an accused, I find that comments of Esson, J.A. in **R. v. Rooke** (1988), 40 C.C.C. (3d) 484 (B.C.C.A.) at 520 to be helpful:

> The basis for drawing an adverse inference must be found in the conduct of the accused in not calling a particular witness. It is not enough to justify drawing an inference, and therefore not enough to justify a comment, that it appears that some witness might have been able to throw some light on some issue. Comment on the failure of an accused to call a witness should only be made if the evidence discloses circumstances which a reasonably competent defence counsel, considering the matter before closing his case, would recognize as providing logical grounds for drawing an adverse inference. There may be such circumstances if the witness is one to whom the accused can reasonably be said to have had greater access than the Crown, and if the person appears to be in a position to corroborate the defence on an issue in a significant respect, and if no reason appears from the evidence why the accused cannot call him or would not be acting reasonably in calling him. I do not intend that as an exhaustive list. The point is that, where circumstances of that kind exist, the accused and his counsel have reasonable notice that the Crown may invite the jury to draw an adverse inference, and that the court may instruct the jury that it may do so. (emphasis added)

The trial judge,in response to the jury questions, left the clear instruction that the jury could draw an adverse inference against Mr. S. for failing to call all, or any, of the absent witnesses:

> I ask you to consider whether these absences was an important link to either of the parties' cases . . . if you conclude that either of the parties did not . . . but had the ability to call these witnesses, you may draw an inference that had the witness been called, he or she would not have assisted the party, that is, would not have been, would not have been favourable to the party who ought to have called him or her. (emphasis added)

With respect to the absent witnesses remaining (the complainant's sister and brother, and the residents adjoining Mr. S.'s apartment in October, 1994) the circumstances surrounding the alleged assaults in the family home, as well as the senior citizen's residence, do not provide, in my opinion, logical grounds for drawing an adverse inference against Mr. S..

It is to be remembered, that these witnesses, indeed all of the witnesses listed by the jury, were first mentioned in the examination, or cross-examination, of the complainant. None arose during Mr. S.'s evidence, and none was relied on by him to corroborate his defence.

In the main charge to the jury, Justice Gruchy stated:

> It was also established throughout [the complainant's] evidence, that she alleges the accused sexually assaulted her thousands of times in the family home, yet was, as far as we can tell on the evidence before us, never detected by other members of the household. (emphasis added)

The Crown did not take issue with this instruction, either at the conclusion of the charge, or during this appeal.

In the light of the complainant's evidence of the lack of detection of the assaults in the family home, how logically could an adverse inference be drawn against Mr. S. for failing to adduce evidence from the complainant's sister and brother, to confirm the complainant's evidence that neither of them detected anything confirmatory of an assault?

How, logically could an adverse inference be drawn against Mr. S., for failing to call those persons who lived adjacent to his apartment when, at the close of the Crown's case, there was no evidence that the complainant's "yelling and hollering" was heard by anyone?

I conclude that the trial judge erred when he left it to the jury to draw an adverse inference against Mr. S. for failing to call any of the listed witnesses, let alone the nine referred to.

The failure of defence counsel to object to the judge's charge, particularly in light of the discussion with counsel before the additional instructions were given, should not preclude the allegation of error being advanced on this appeal (**R. v. Imrich**, [1978] 1 S.C.R. 622 per Ritchie, J. at 631).

In view of my determination that the trial judge erred when he left it open to the jury to draw an adverse inference against Mr. S., and my conclusion that a new trial must be ordered, it is neither necessary, nor desirable, to decide whether the remaining witnesses (i.e. the complainant's sister and brother, and those who resided next to Mr. S.'s apartment in October, 1994) were of sufficient importance to require the trial judge to leave it to the jury to determine whether an adverse inference should be drawn against the Crown arising from its failure to call them.

I simply observe that a compelling argument could be advanced that their evidence was important to the Crown's case in view of the pattern of alleged behaviour that Mr. S.

"tucked in" both sisters at night, the alleged resistance to the nightly attacks, the noise and shouting surrounding the alleged breaking down of the complainant's bedroom door in the middle of the night, and the "yelling and hollering" of the complainant during the alleged assault in October, 1994.

Evidence of that nature was presumably the type of evidence that the trial judge had in mind when he observed to counsel that:

> . . . the absent witnesses, some of the absent witnesses might have been, and probably were, important links to the case for the Crown . . .

Conclusion

In view of the error referred to, and being unable to say that the result would necessarily have been the same had the jury been properly instructed, I would allow the appeal, quash the conviction, and order a new trial.

Pugsley, J.A.

Concurred in:

Hart, J.A

Cromwell, J.A.

C.A.C. No. 143866
C.A.C. No. 143937

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

C. R. S.	)	
Appellant	)	
-and-	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	
-- AND --	)	
	)	
HER MAJESTY THE QUEEN	)	
Appellant	)	REASONS FOR
	)	JUDGMENT BY:
-and -	)	
	)	PUGSLEY, J.A.
C. R. S.	)	
Respondent	)	
	)	