NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. F.L.***, 2011 NSCA 91

Date: 20110929
Docket: CAC 348207
Registry: Halifax

Between:

F.L.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

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

Publication Ban:	**pursuant to s. 486.4(1) of the Criminal Code**
Judges:	Saunders, Hamilton and Beveridge, JJ.A.
Appeal Heard:	September 27, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	Donald C. Murray, Q.C., for the appellant Mark Scott, for the respondent

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 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

Reasons for judgment:

[1] After hearing counsels' submissions we recessed and then returned to court to announce that we were unanimously of the view that the appeal be dismissed, with reasons to follow. These are our reasons.

[2] The appellant was initially charged with touching for a sexual purpose, and sexual assault of his 8 year old son, * (*editorial note-identifying information removed*) contrary to ss. 151 and 271 of the **Criminal Code**. It was alleged that one evening in 2006, while his wife was working the night shift at a *, the appellant was watching pornography on his computer. His son was asleep. When the boy came out of his bedroom for a drink, the appellant invited him to watch the pornography while he masturbated himself, and touched his son's penis at the same time. * (*editorial note-identifying information removed*) was threatened to be punched if he did not take his pants off and comply. The Crown proceeded by Indictment.

[3] From July 31, 2008, until April 6, 2009, the appellant was represented by Mr. Andrew Pavey. An interpreter (the appellant being *) was present when anything of substance occurred.

[4] On January 2, 2009, with both the assistance of legal counsel and an interpreter, the appellant pleaded guilty to sexually assaulting his son. Through the interpreter, the court confirmed the guilty plea and underlying aspects, as described in s. 606 (1.1) of the **Code**. The matter of sentencing was adjourned for the preparation of a pre-sentence report.

[5] Approximately one year following Mr. L.'s guilty plea to sexually assaulting his son, he appeared with new counsel to begin the process of seeking to withdraw his guilty plea. Numerous adjournments ultimately resulted in the matter being heard on July 9, 2010, and continued on January 21, 2011.

[6] The basis of Mr. L.'s argument was that partly as a result of his poor comprehension of the English language, he did not understand or agree with the facts underlying his plea of guilty to the allegations of sexual assault. He maintained that he was only teaching his son how to properly clean his penis and pleaded guilty on the understanding that this attempt to instruct his son in personal hygiene was a cultural taboo in Canada. He said he decided to plead guilty to spare

his son the trauma of testifying, and to try to restore contact between the two. He added that any expression of remorse referred to by the probation officer in the pre-sentence report related to the break-up of his family following these charges rather than to the allegations of sexual assault.

[7] The appellant's motion to withdraw his guilty plea was heard by Nova Scotia Provincial Court Judge Marc C. Chisholm, the same judge who had taken his plea back in January, 2009. After two days of hearing, Chisholm, P.C.J. rendered a decision now reported at 2011 NSPC 8 wherein he dismissed the appellant's motion to withdraw his plea. Following counsels' submissions he accepted their joint recommendation and sentenced the appellant to six months in custody, to be served under house arrest with strict conditions, together with various ancillary orders, followed by two years' probation.

[8] The appellant now asks that we allow the appeal, strike the guilty plea, and remit the case to the Provincial Court for either a rehearing of the motion to withdraw his plea, or a new trial, before a different judge.

[9] After carefully considering the record and counsels' submissions we are unanimously of the view that the appeal ought to be dismissed.

[10] In addressing the validity of the appellant's guilty plea, and quite apart from having to be satisfied that the plea was voluntary and unequivocal, Judge Chisholm was also obliged to determine whether the plea was informed by an awareness of the nature of the allegations as well as the effect and consequences of the plea. See, for example, **R. v. Nevin**, 2006 NSCA 72, and **R. v. Laffin**, 2009 NSCA 19.

[11] Given the appellant's denial that he ever sexually assaulted his son and that he was only attempting to teach the boy personal hygiene, Judge Chisholm was required to very carefully test the appellant's explanation and his overall credibility. In that, Judge Chisholm had the benefit of a full hearing which included: detailed affidavits submitted by both the appellant and his former counsel Mr. Andrew Pavey; cross-examination of the appellant and the probation officer who authored the pre-sentence report; as well as comprehensive written and oral submissions from counsel.

[12] Ultimately the judge rejected the appellant's assertions. He noted the internal inconsistencies in the appellant's evidence, as well as the contradictions between the appellant's evidence and that of his former counsel, and probation officer.

[13] A few brief examples will illustrate the obvious conflicts in the evidence. Under cross-examination at the hearing, Mr. L. denied telling the probation officer, Mr. Phillip Ralph Josey, that he accepted responsibility for sexually assaulting his son, or expressing remorse for having done so. He said Mr. Josey "did not understand him well" and that his expression of regret related to the break-up of the family. He said he told the probation officer that he was simply repeating the same lesson on personal hygiene that he had once learned from his own father. He said he was doing nothing more than "just passing this knowledge on to his son." When he told the probation officer that he accepted responsibility for his actions, all he meant was that he had been too harsh with the lad and had expected too much of a young child.

[14] By contrast, Mr. Josey's evidence was that he never had any difficulty communicating with Mr. L. over the course of his supervision, and that there had never been any request to have an interpreter present. Mr. Josey confirmed that the appellant had accepted responsibility for his actions and that when he had questioned Mr. L. he was not able to offer an explanation for his behaviour. Had he provided an innocent explanation, Mr. Josey said he would have certainly included such an account in his report.

[15] In his affidavit filed in support of his motion, Mr. L. swore:

> [11] ... Having heard my son's allegations, I most seriously deny that I have touched him in any sexual part of his body, or had him participate in any sexual kind of activity with me.
>
> ...
>
> [13] I did not understand the nature of the sexual allegations that were the basis of the sexual assault charge at the time that I entered my guilty plea. I should not have entered that plea. ...
>
> [14] I therefore ask to withdraw my guilty plea and to have a trial of the allegations that my son has made against me.

[16] However, on cross-examination at the hearing, Mr. L. admitted that his former counsel, Mr. Pavey, *had* related to him the details of the allegations of sexual assault but that he had decided to plead guilty and acknowledge the facts upon which the charge was based, even though "he knew he was pleading guilty to something that was not true" because "... he wanted to close the case as soon as possible because he was unemployed and he was unable to pay his lawyer." Mr. Pavey's affidavit makes it clear that the appellant (with his translator present) was fully advised of all of the allegations and the facts to be relied upon at the sentencing hearing. He was told that the joint submission on sentencing to be made by counsel would include a sex offender assessment and counselling as required as well as other standard ancillary orders. Mr. Pavey swore that he had clear and complete instructions from his client to proceed on that basis with the plea.

[17] Judge Chisholm noted that the defence chose not to cross-examine Mr. Pavey on his affidavit. In rejecting Mr. L.'s evidence, Judge Chisholm wrote, in part:

> [51] ... The Defense position is that Mr. Pavey participated in concluding a plea and sentence negotiation and the entering of a guilty plea knowing that the accused denied that he committed the act of sexual assault as alleged or any other sexual assault. For counsel to do so would be improper. The only evidence that this occurred was the evidence of Mr. [L.]. The interpreter who was present was not called to give evidence. Mr. [L.]'s evidence was not found credible by the Court.

[18] It cannot be seriously suggested that the judge erred in the conduct of the hearing or that his questioning of the appellant was improper or gives rise to an apprehension of bias.

[19] We see no error in Judge Chisholm's recitation or treatment of the evidence; his application of the law to the evidence; his analysis; or his conclusion. Based on the record before him, it was certainly open to the judge to conclude that Mr. L.'s assertions were not credible, and that he had failed to satisfy the heavy burden of demonstrating that when he entered his plea he failed to fully appreciate the allegations which led to the charge of sexual assault.

[20] If the appellant wished to challenge the facts relied upon by the Crown, he could have done so after losing the motion to withdraw his plea, and before proceeding to sentencing. Yet he made no attempt to put the Crown to strict proof

of its facts. Rather, through counsel, he accepted the facts stated by the Crown at the sentencing hearing as the basis for the sexual assault against his son.

[21] On March 16, 2011, following release of the judge's decision, and with an interpreter present, counsel raised a factual error with the trial judge. Counsel for the appellant advised the judge that the reference in his reasons to Mr. L's convictions for assaulting his son and for uttering threats against his estranged wife, were mistaken (the references had apparently been reversed). The judge acknowledged the error and edited his decision to reflect the correction noting in open court on the record, that "It would not affect my overall view with respect to Mr. [L.]'s evidence and the Court's conclusion on the motion." We accept that the judge's error was minor, easily and appropriately corrected, and of no consequence to the outcome, or the merits of this appeal.

[22] In conclusion, the appellant's credibility was an issue Judge Chisholm had to decide. He did so fairly with reasons that are clear, cogent and fully supported on the record. Judge Chisholm did not miss, mistreat, or misapprehend the evidence. He correctly applied the law. There was no miscarriage of justice. The appeal is dismissed.

Saunders, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.