PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. J.P.S.*, 2015 NSPC 55

Date: 2015-07-24
Docket: 2524442 - 45
Registry: Bridgewater, NS

Between:

R.

v.

J.P. S.

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge James H. Burrill, J.P.C.
Heard:	June 23, 24, 25, 26, 27, 2014; April 20, 21, 22, 23, 24, 2015, June 4, 5, 2015; July 24, 2015, in Bridgewater, Nova Scotia
Decision	July 24, 2015
Charge:	271 CC, 266 CC, 264.1(1)(a) CC, 86(1) CC
Counsel:	Richard Hartlen, for the Crown David Bright, Q.C., for the Defendant

S. 486.4 CC –A ban on publication of any information that would disclose the identity of the victim and/or complainant

By the Court:

[1] Over several days over the course of over two years now, this Court has heard evidence in the trial of J.S. who's charged with having committed four

offences on K. S., now known as K. N.. He's charged with sexual assault, assault, threats and careless use of a firearm.

[2] The allegation with regard to sexual assault revolve around testimony of K. S. that she was punched repeatedly in the vagina in the course of an argument that began over discussions about pornography.

[3] With regards to the incidents of assault, Ms. S., Ms. N. I'll call her in this decision, that's the name she chooses to go by now, says that she was assaulted repeatedly during the course of her relationship with Mr. S., the accused. At various times in her testimony, she described the number of times she was assaulted. Suffice it to say that she says it was numerous, some three times a week or on another occasion in the transcript of her evidence that I had occasion to review earlier this week, she said it was 70 plus times.

[4] With regard to the incidents of threats, there are a couple of points in her testimony, to name a few, where she says that she was threatened with death or bodily harm at the hands of the accused. In fact one, she says was followed up with an assault. She says that, the Crown didn't refer to this this morning, she says in her testimony that during the incident of the hot lemon drink, she says that the accused, just before pouring the lemon drink over her, said "I could pour this

lemon over you". On another occasion with regard to a suggestion that she might disclose evidence of abuse he had said to her "If you tell anyone, that she would die or somebody would die"

[5] With regard to the section 86(1) incident, the careless use of a firearm, it's very clear that the allegation of the crown in that circumstance is that there was a point in the relationship that he came home one day, that she was on the sofa at their house and that he took his loaded firearm from his service revolver, put it to his head and said "I've got a mind to shoot myself in the head right here in front of you", and then he tried to get her to put her fingers on the trigger. She screamed and after a very short period of time, she says that J.responded "whatever" holstered his firearm and left and went back to work. Those are essentially the underpinnings of the allegations and the testimony of Ms. N. that was given over a number of days.

[6] The accused denies the offences. The accused says that either those incidents did not happen or they happened in a much different way. For instance with the lemon drink being spilled on her, he simply says that was an accident where he got the bulk of the lemon, called it Neo Citron because that's what it was, Neo Citron spilled over him. She did get some, he went and got a towel or a cloth

to clean it up and that no one was burnt during the incident, it was simply an accident.

[7] Both counsel have agreed, and it's very clear to anybody that sat through this case that credibility is the one issue that the court faces here. I agree with the Crown's assessment that if the allegations of Ms. N. are proven beyond a reasonable doubt, they constitute proof of each of the offences before the Court. There is no, or can be no discussion, no serious discussion about whether the elements of the offences are made out by her allegations.

[8] It's very clear, however, that in a case where credibility is involved it's not simply a situation where the Court looks at the evidence and decides which of the two versions it prefers, in fact no one argues that today. Mr. Hartlen certainly does not argue that on behalf of the Crown. It's always a question about whether the evidence at the end of the day proves the allegations beyond a reasonable doubt. It's not simply a case of saying I prefer the evidence of her, or I prefer the evidence of him, and deciding it on that basis. It's an assessment of the evidence of each of the witnesses that have testified, the material facts of this case, assessed in the context of the whole of the testimony that I must consider.

[9] Both counsel have asked me to consider what makes sense in an assessment of that issue of credibility and Mr. Hartlen referred me to the oft-quoted phrase from a case that was decided May 16, 1951, of **Faryna v. Chorny**, [1952] 4 W.W.R. 171 (B.C.C.A.) in a case that wasn't even a criminal case, but it's oft been quoted to assist judges in their decision-making process and assist the public in understanding in how decisions are, or should be made. Paragraph nine of that judgement, I think it bears reading, not only what Mr. Hartlen read, but the paragraph preceding it. It says this:

> 9. If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility…"

[10] I'll omit the quotation from an earlier case.

> "…A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

[11] Paragraph 10 is the paragraph quoted by Mr. Hartlen:

> 10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour

> of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem In truth it may easily be self-direction of a dangerous kind."

[12] Paragraph 11, and I will read this as the last paragraph:

> 11 "The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."

[13] From that quote it's clear that the assessment of credibility requires an examination of the facts of the case in the context of the whole of the facts that the court has heard in testimony. As I say, both counsel have asked me to apply common sense in the assessment of credibility and in reality the common sense that I apply to this case must be applied in the context of what so often is the case in cases of domestic violence, and that is, is that what may appear to be common sense to some, is not how incidents play out in the domestic context where one partner is abusive to another. This court sees repeatedly, and case law is ripe with

examples, where the competing emotions of a victim of lack of self-worth, loyalty, dedication to their partner, self-blame, economic factors, or simply love, make people stay in abusive relationships. So when one says that if something were happening, why wouldn't the other leave, and in assessing whether or not that makes sense in the circumstance, the court must view that through the lens of the complexity of relationships in domestic situations that are violent.

[14] At first blush, both counsel are arguing that the actions of either the accused or the complainant simply don't make sense in the circumstance. In this case, the Crown argues would it make sense that this strapping police officer, who obviously had the emotional fortitude to choose his career path and put his proximity to B. at risk, be the type of individual that would end up following the direction of Ms. N. and sleeping on the floor for three days after his lap top was smashed, and she essentially ejected him from their bed. And Mr. Bright argues that if Ms. N. was so abused, so fearful of J., and couldn't wait to get out of this unsafe situation, why would she be encouraging him to stay when he was about to leave and J. was in the driveway ready to take him away. Those are but two examples that able counsel have argued before the Court today which suggest that the actions of one of the parties involved in this incident don't make sense.

[15] It's clear in the evidence, this was argued by Mr. Hartlen, that there is some common ground in the testimony of the two essential witnesses in this case, Ms. N. and Mr. S.. There is common ground as to the essential genesis of the relationship and both counsel are essentially arguing that the other partner has taken some half-truths, or half-lies and spun them, to use the phrase in **Faryna v. Chorny**, with the skilful exaggeration to make a statement to the court. For example, the defence agrees that the Neo Citron incident has some truth to it in that there was a liquid that was spilled that night and some of it got on K. S..

[16] The Crown suggests that Mr. S.'s evidence is not credible and that it should not raise a reasonable doubt in the Court's mind. And that really is the first step or two in the **W.(D.)** process (ref **R. v. W. D.** [1991] 1 S.C.R. 742 (S.C.C.)). First of all, if I believe the accused I must find him not guilty of the offences, or if I believed him, I would find that he didn't commit any offence. Secondly, even if I do not believe him, but his evidence leaves me in a state of reasonable doubt, I must find him not guilty. It would only be if his evidence did not raise a reasonable doubt, that I would go on to consider the whole of the testimony that I do accept to determine whether or not that satisfies me beyond a reasonable doubt. And the Crown argues that Mr. S. should not be believed, that his evidence should not raise a reasonable doubt because his evidence does not make sense. In the

context of a man who is able to make decisions that I referred to, just moments ago, does it make sense that he would, knowing that he was in a relationship with this woman, get married to her when she had thrown groceries at him after the text from M. incident. That she had grabbed him by the penis in the movie theatre in an aggressive, condescending fashion. And that she had even met with X., in what was very early on in their relationship, in what he viewed as an attempt to manipulate the situation between he and X., and to use his words, "to size up her competition". So why would he marry in that context? And why, after all that went on afterwards, when he was clearly a man that had a career, essential financial security, support of family and friends, why would he stay in what could only be described as a miserable situation? The crown says look carefully as well at the evidence that he has given, and how he's put a spin on it that is derogatory to Ms. N.. Look at the evidence that he gave about the […] trip and her reaction on the strip when someone was handing out, what I assume were business cards of prostitutes. How that that was spun to make it look as if she was unreasonably jealous and that he looked away to keep peace, when really all he was doing was doing what a respectful partner would do for their female partner in such circumstances. And, why, if he was so angry over these emails that she had concocted, why would he then go and deliver these cheques that were reduced by

$300 each because of K.'s calculation of why child support should be reduced from the, I think it $548 to $248, but yet he took them, despite the fact that he was mad, to X.. And only thereafter made it right. And if he was a man that had to walk on egg shells around her all the time, why in the world would he choose a female counsellor and continue to go to that female counsellor when it obviously upset Ms. N. and he was essentially trying to keep the peace. So the crown argues that Mr. S. should not be believed.

[17] The Crown says that I should accept the evidence of Ms. N., especially in light of the fact that it is corroborated with testimony of others who saw bruising, and is corroborated by photographs that were secretly sent to a friend and produced in evidence and what was not mentioned was also a ripped item of undergarment. And that in these circumstances that because of the dynamics of domestic abuse she, despite outward appearances of being a competent, professional police officer who had previously been a counsellor at a shelter for abused women, stayed in this abusive relationship because she loved Mr. S. and just wanted to make it work, essentially. That she denied the abuse to Cst. Shipley, to Bruce Hill, Derek Smith, because she just didn't want it known and it would have been shocking had she kept notes with that mind set, even though she was a police officer and knew what her duty as a police officer was. It's clear that the

argument is that in these circumstances she was an individual who was thinking in terms about stereotyping, in terms of what a battered spouse might think. She was willing to accept and deal with the abuse, hide it and live with it hoping that somehow she could change Mr. S. and his approach to her. She says that she had come from other failed relationships and she deeply feared being hurt, either emotionally or physically.

[18] The crown argues that there is both internal and external consistency in her evidence and that she endured four days of scrutiny of her integrity, her sex life and other intimate details of her life. And that maybe she became emotional at times, but that was because she stills bears the scars of the relationship and the emotion was still, even after this time, raw. The crown says she had no motive to lie. Would she have been that aggressive, vindictive, put herself through all of that and carry that forward through the whole court process over these years. The Crown suggests that that would not have happened.

[19] With respect to the number of incidents the crown says that remember while she details certain incidents, there were many incidents of nipping or scraping of a foot down the shin, that happened, she says repeatedly and almost in the same manner. And, as I look at the evidence, with regard to estimations of time, three times a week, 70 times over the course of the relationship that doesn't make sense

together, but I will say that it's not uncommon for witnesses to give numbers to incidents and them not being internally consistent or make sense. It's just an estimate, an estimation which witnesses are generally notoriously bad at making.

[20] With regard to actual evidence of witness, other witnesses to abuse, the crown has proffered B. N. who says that he saw the accused stomp on his mother's foot while it was over some glass and that she bled as a result of that. It's noteworthy that she did not complain about that, it's noteworthy that the accused himself said that he has wracked his brain with regard to that and as best as he can figure out there may have been a time where he was examining his wife's foot for a piece of glass that she thought was in it, but he denies that incident.

[21] I will say this, that I've considered the evidence, just on that point, considered the evidence of B. as a whole, and I've listened carefully to all of the witnesses testify about what took place at the plaza and considered B.'s view of what that incident was all about and it demonstrated to me that he was a witness that this court could not rely upon for proof beyond a reasonable doubt as to that allegation.

[22] I've considered all of the testimony of all the witnesses in this case. I spent not only today listening to the arguments of counsel, I spent the trial listening to

the witnesses, the way that they gave their testimony. I reviewed both the transcript and my notes of these witnesses for most of this past week when I've not been sitting in court. And I've attempted to apply the **W.(D.)** test, and have applied the **W.(D**.) test to the circumstances of this case. I've considered and reviewed fully the arguments of the Crown with respect to the evidence of the accused, and as bizarre as some of that evidence may seem to the objective observer, those are probably the wrong words, but that is essentially what the crown argues. Despite those arguments that have been put forth, I am satisfied that anything that doesn't appear to be in accord with the one view of common sense, is directly attributable to the fact that the accused was in an abusive relationship.

[23] In a word, having considered the evidence of the accused, I believe him. Where his evidence varies from the evidence of Ms. N., in material aspects, I do not believe her evidence and it certainly does not convince me beyond a reasonable doubt. Having believed the accused, I believe that these incidents did not occur as has been testified to by Ms. N.. I believe that they did not occur. And in the one instance where the accused admits to, during the course of an argument, retrieving an unloaded service revolver and making some comments about that and what he should do with it or what she was doing to him, I do not consider in the context of

the whole, that that was careless use of a firearm. The accused is found not guilty of all the charges before the court, he's free to go.

James H. Burrill, JPC