

CANADA
PROVINCE OF NOVA SCOTIA

Case #893850

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

JOSEPH PENNELL
[Cite as: R v. Pennell, 2001 NSPC 12]

DECISION

HEARD BEFORE: The Honourable Judge C.H.F. Williams , JPC

PLACE HEARD: Halifax Provincial Court

IN THE MATTER OF: Criminal Code 266(b)

COUNSEL: R. Woodburn, Crown Attorney
P. Nolen, Defence Attorney

Cite as **R v. R v. Joseph Pennell, 2001 NSPC 12**

R v. JOSEPH PENNELL

Delivered orally May 16th, 2001

The Honourable Judge C. H. F. Williams, JPC

Counsel: Mr. R. Woodburn, Crown Attorney

Mr. P. Nolen, Defence Attorney

Introduction

The accused, Joseph Richard Pennell, stands charged that he did, on May 22, 1999 at or near Halifax in the County of Halifax, Province of Nova Scotia, unlawfully assault Corinne Strangward.

Summary of Evidential Finding of Facts

On the evidence before me I accept that:

(a) Corinne Strangward was on May 22, 1999, the girlfriend of the accused. That evening, she, the accused, and other mutual friends were at a house party. During the course of the evening she had consumed alcohol and drugs and she became intoxicated. She also understood from friends present that the accused may have been cheating on her. In any event, she wanted to leave the party and persisted in asking the accused to leave with her. He made it clear that he did not want to leave and it was also his opinion she was not in a fit state physically to go any where. She invited him into the washroom to discuss their disagreement. They had a heated discussion and a physical altercation when they were alone in the bathroom.

(b) Following the altercation, she called the police who arrived and observed that she was upset and showed red marks around her neck. She related to the police that the accused had grabbed her by the throat leaving the red marks that they saw. She also gave a written statement implicating the accused as her assailant. In testimony, however, she does not adopt fully her statement to the police and, in particular, her comments concerning the accused's culpability. Instead, she portrayed herself as an aggressive, vindictive and intoxicated person to whom the accused did not apply any gratuitous force. Any force that he applied was to control her aggressive conduct toward him. Defence evidence also depicted her as the aggressor.

The Crown invoked the *Canada Evidence Act*, s.9, and following the *voire dire* held under that section I declared the witness, Corinne Strangward, to be adverse to the Crown. I permitted the Crown to cross-examine her and then it entered into another *voire dire* for me to assess whether her out of court statement satisfied the threshold of reliability criterion of the exception to the hearsay rule.

Analysis

I have no doubt that she spoke to the police and gave them the information which they wrote down and which she signed. Further, I have no doubt that what she told the police she intended them to believe her and to act upon her report. But, that, in my opinion, is distinct to whether in fact what she reported was indeed the “truth.” I say that when I consider her demeanour, in Court, as she testified, and, in particular, the consequences of her conduct on the administration of justice in this case. It therefore seems to me that to admit her prior inconsistent statement as reasonably necessary and reliable would require a closer analysis of the surrounding circumstances of her contemporaneous contact with the police on the night in question. Her recantation satisfies the necessity criterion. *R. v. F.J.U.* [1995] 3 S.C.R. 764.

On the facts of this case, the test for reliability, in my view, is not the veracity of the police who testified as to what he saw, heard and wrote. Rather, in my opinion, here, the real test for reliability is the honesty and credibility of the witness and complainant, Corinne Strangward, when she made her comments to the police and her testimony under oath. I say that when I assessed her testimony in light of the total evidence and her demeanor as she testified. On the evidence, she was romantically involved with the accused and had suspicions that he was cheating on her. Further, on the night in question, she was angry with him and was under the influence of alcohol and non-prescription drugs. She was arguing aggressively with him to leave with her to go to another location which he had no desire to do. They had a heated argument when they were alone in the washroom and she testified that she was the aggressor and that the accused was merely restraining her and applied no gratuitous physical force to her person. When she spoke to the police, she testified that her then present intention was to misinform the police as she was hurt emotionally and was being vindictive toward the accused. Thus, in my opinion, she had a motive for lying to the police.

In addition, I also considered and weighed the testimony of Constable Anthony Gillis in light of all the evidence. He testified that he and Constable Marques Reeves attended to a “domestic assault” call. On arrival, he observed that the complainant was crying and upset and that she had red marks around her neck. She told them that the accused's misconduct caused the marks that they noted. From the police perspective there appeared to be physical corroborative evidence of the complaint. Further, when she stated that she was afraid of reprisal from the accused or his friends the police had a reasonable belief that the complaint was true.

However, Strangward does not, in testimony, adopt fully her statement to the police. In short, she does not admit to the contents of the statement that speak to the accused intentionally applying force to her person. From the principled approach, as clarified by Iacobucci J., in *R. v. Starr*, 2000 CarswellMan 449, 2000 SCC 40, 36 C.R. (5th) 1., as the threshold reliability, the circumstances surrounding the taking of her statement must “provide circumstantial guarantees of trustworthiness” Her motive to lie is a relevant factor and the presence of the marks on her neck as corroborating evidence is not a material consideration. (*Ibid.*, paras. 215- 217). Here, in my opinion, there exists circumstances of suspicions that could vitiate the presumption of reliability that normally underlie the exception to the hearsay rule. In my opinion, the circumstances in which her statement was

made does not “lend sufficient credibility to allow a finding of threshold reliability.” As put by Iacobucci J., *ibid.*, at para.155. “. . . the governing principles of hearsay admissibility must be reliability and necessity.”

Conclusions

In my view, to admit her out of court unsworn statement as the true evidence would essentially discredit her sworn evidence. Even if I were to concede the point submitted by the Crown that her physical appearance as seen by the police gives some credence to her out of court statement, nonetheless, when I weigh her testimony along with that of the accused and others who were present, the position of the Crown, in my opinion, if acceded to, would compromise the trial fairness and raise the spectre of a wrongful conviction as it would allow the Crown to introduce and to depend upon unreliable hearsay against the accused.

Therefore, I find on the total evidence, her statement to the police lacked the necessary circumstantial guarantees of trustworthiness and is not sufficiently reliable to be used substantially. Consequently, in my opinion, it does not satisfy the threshold reliability criterion and it does not rise to the level for the test of ultimate reliability.

Overall, credibility is in an issue. Having heard the witnesses and assessing their testimonies as they testified, doubts arise, in my mind, with respect to the testimony of the witness Strangward. When combined with all the evidence I was concerned with its coherency and internal consistency. Her inconsistencies destroyed her credit which was never rehabilitated. Further, I could not make a positive finding of credibility and reliability. Concluding that she was entirely truthful was difficult. In addition, her testimony did not induce in me that confidence and assurance to ground guilt in the accused beyond a reasonable doubt.

The accused denied the allegations. His testimony, although I do not fully believe him, in my view, raises some doubt. Nonetheless, the burden is always on the Crown to prove beyond a reasonable doubt all the essential elements of the offence. Thus, when I follow and apply the guidelines as pronounced in *R. v. W(D)* [1991] 1 S.C.R. 742 on the total evidence, I am left in some doubt.

Therefore, on the facts that I accept, I conclude that it would be unsafe to convict the accused. Put another way, in my opinion, the Crown has not proved beyond a reasonable doubt all the essential elements of the offence charged and I find the accused not guilty. I will enter an acquittal on the record.