PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. S.B.W.., 2011 NSPC 82

Date: 20111110
Docket: 2367404, 2367405, 2367367, 2367368, 2367369, 2367370, 2367728, 2367729, 2367734
Registry: Halifax

Between:

Her Majesty the Queen

v.

S, B. W.

Editorial Notice

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

Judge:	The Honourable Judge Del W. Atwood
Heard:	November 3 and 10, 2011, in Pictou, Nova Scotia
Charges:	Five counts of s. 137 under the *Youth Criminal Justice* Act, three counts of para.. 264.1(1)(a) under the *Criminal Code*, and one count of para. 266(b) under the Criminal Code.
Counsel:	T. William Gorman, for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid Commission For S, B. W.

By the Court:

[1] S, B. W. is charged with nine summary-conviction offences that happened allegedly between 15 July 2011 and 30 September 2011. These offences take in three discrete sets of transactions. First, Mr. W. is charged with having contact with L. M. between 15 July 2011 and 28 August 2011 while bound by a YCJA probation order which prohibited that contact. This allegation is set out in information number 641701 in two identical counts.

[2] Second, Mr. W. is charged with uttering threats to C. M. M. to cause death to Ms. M. and to cause bodily harm to A. R. J.; Mr. W. is also charged with two counts of breaching probation by uttering those threats. These offences are alleged to have occurred in the month of September 2011, and are set out in information number 641696.

[3] Finally, Mr. W. is charged with threatening and assaulting A. R. J. on 23 September 2011; again, there is a companion charge of breach of probation. These allegations are covered in information number 641763.

[4] Mr. W. is entitled to the full presumption of innocence guaranteed by para. 11(d) of the *Canadian Charter of Rights and Freedoms* . The presumption of innocence is also guaranteed statutorily in section 6 of the *Criminal Code of Canada*. A verdict in a criminal trial must be based on whether each

element of each offence has been proven beyond a reasonable doubt. This principle of reasonable doubt applies to issues of credibility as well as issues that depend upon findings of fact.[1]

[5] The three informations before the Court were tried jointly by consent, in accordance with *R. v. Clunas*.[2] The Court must consider the evidence before it as a whole, and may not parse it in a piecemeal fashion.[3] However, given that there has been no application for similar-act use of the evidence led by the prosecution, the Court must ensure that it consider each count separately; I may not use the evidence led against Mr. W. in one count to prove his guilt on any of the other counts. Similarly, I cannot use the evidence of Mr. W.'s conduct in relation to, say, the threats against Ms. M. to develop an opinion that Mr. W. was the sort of person who might have threatened Mr. J..[4] This analytical approach to the evidence is of particular importance in this case where there exists such a substantial contrast between the non-violent behavior of the accused as described by prosecution witness M., and the high level of violence described by Ms. M. and Mr. J..

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[1] *R. v. Ay* (1995), 93 C.C.C. (3d) 456 at p. 460 (B.C.C.A.).

[2] 70 C.C.C. (3d) 115 at para. 28 (S.C.C.). *See also* sub-s. 591(1) of the *Criminal Code*.

[3] *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at para. 33 (S.C.C.)

[4] R. v. M. (B.) (1998), 130 C.C.C. (3d) 353 at paras. 41-42 (Ont.C.A.).

[6] Reasonable doubt may arise from the evidence, or, significantly in this case, the absence of evidence.[5]

[7] In relation to information 641701, based on the candid concession of defence counsel, there is no dispute that Ms. M. was telling the truth when she described how she initiated and resumed contact with Mr. W., first through social messaging and texting, then in person, after Mr. W. finished serving a custodial sentence in June, 2011. I accept Ms. M.'s evidence on those two s. 137 YCJA counts; coupled with the documentary exhibit, Exhibit No. 1, a certified copy of a probation order binding Mr. W. to have no contact with Ms. M. which remained in effect between 15 July and 28 August 2011, I am satisfied that case nos. 2367404 and 2367405 have been proven beyond a reasonable doubt. The Court enters findings of guilt accordingly. Given that the two counts are identical, I stay judicially case no. 2367405 based on *R. v. Kienapple*.[6]

[8] Proof of the remaining charges is not nearly as clear. With respect to the allegations made by C. M., the Court would note Ms. M.'s significant imprecision regarding the date of her interaction with Mr. W.. The Crown applied, with no objection by defence, to amend information 641696 to

[5] R. v. Lifchus (1997), 118 C.C.C. (3d) 1 at p. 14 (S.C.C.).

[6] (1975) 15 C.C.C. (2d) 524 (S.C.C.).

cover the full month of September, 2011 (notwithstanding, I would note, that the information was sworn on 28 September 2011), as Ms. M. was simply unable to pinpoint a specific date during that month on which she had been threatened by Mr. W.. Ordinarily, uncertainty about an exact date would not be of much significance; however, I believe that it is a very significant credibility factor in this case, as Ms. M. testified in court only a little over a month after the alleged offence. Ms. M. stated she spoke with the police liaison officer at her school the same day Mr. W. threatened her; this officer was not called to provide date-of-complaint evidence. Ms. M. testified that her friend C. M. was accompanying her when she was approached and threatened by Mr. W.. Ms. M. was not called to give evidence.

[9] Pertaining to the allegations made by A. J., the Court would note that Mr. J. described a serious injury to the side of his head resulting from Mr. W.'s alleged assault. The officer who investigated the assault told the Court that he took a photograph of this injury. For reasons not made known to the Court, this photography was not tendered in evidence. While I certainly accept the investigator's evidence that he observed an injury to the right side of Mr. J.'s head, this is not, in the Court's view, the same quality of evidence as a photograph. In *R. v. Nikolovski*,[7] the Supreme Court of Canada

[7] (1996), 111 C.C.C. (3d) 403 (S.C.C.).

underscored the evidentiary value of image-capturing evidence; the Court then proceeded to describe some of the permissible uses of such evidence. A trier of fact may examine a captured image and may draw inferences from what is observed. In this case, a photograph might have allowed the Court to make findings of fact about the recency of Mr. J.'s injury, among other things. Without a photograph, the Court cannot speculate about what might have been depicted.

[10] The Court listened closely to the evidence of S. L. H.; Ms. H. stated that she was with Mr. J. when he was allegedly assaulted and threatened by Mr. W.. While I believe that Ms. H. was making an earnest effort to remember what happened to Mr. J., her hesitancy and uncertainty left the court in a state of reasonable doubt regarding the accuracy of her testimony. Even honest witnesses can be wrong. Ms. H. told the Court that her friend C.F. was present when Mr. J. was assaulted. C.F. was not called to give evidence.

[11] The Court would note that both Mr. J. and Ms. H. testified that Mr. W. forced Mr. J. to call Ms. M.. Ms. M. was not asked whether she had received a call from Mr. J. along the lines Mr. J. described.

[12] The officer who investigated the assault on Mr. J. was not the one who arrested Mr. W., and the arresting officer was not called to give evidence. Consequently, there is no evidence before the Court regarding Mr. W.'s physical condition at the time of his arrest with respect to, for instance, offensive injuries to his hands or knuckles as will often be the observed in fist-attack assaults.

[13] One might ask rhetorically why Ms. M. and Mr. J. would fabricate a complaint against Mr. W.? The problem with this sort of analysis is that it runs the risk of shifting the onus to Mr. W. to lead evidence of a motive to fabricate. This would be a fundamental attack on the presumption of innocence.[8]

[14] This cumulative absence of evidence leaves the Court in a state of reasonable doubt regarding the charges in informations 641696 and 641763 and I would find Mr. W. not guilty of those offences.

[15] The Court will deal with sentencing on case number 2367404.

Dated at Pictou, Nova Scotia, this 10th day of November, 2011.

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[8] *See R. v. Riche* (1996), 146 Nfld. & P.E.I.R. 27 at para. 15 (N.L.C.A.); *R. v. Krack* (1990), 56 C.C.C. (3d) 555 at 561 (Ont.C.A.).

Atwood P.C.J.