PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Fanning, 2012 NSPC 67

Date: 20120730
Docket: 2306068, 2309144, 2309145, 2328982, 2328983
Registry: Pictou

Between:

Her Majesty the Queen

v.

Jeffrey John Fanning

VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	15-17 May, 2012, 11-12 June 2012 , in Pictou, Nova Scotia
Charges:	Four counts of assault, s. 266b; one count of threats to cause bodily harm, s. 264.1(1)(a).
Counsel:	Patrick Young, for the Nova Scotia Public Prosecution Service Robert Sutherland, for Jeffrey John Fanning

By the Court:

A Family Reunion Turned to Turmoil

[1] In early March of 2011, Jeffrey John Fanning departed the province of Alberta and headed to Nova Scotia by bus to reunite with members of his birth family. This was against the advice of his mother, who had left Mr. Fanning's father back in Pictou County some 20 years before. To observe that the reunion did not go well is a vast understatement. Interpersonal conflicts erupted almost immediately, and Mr. Fanning's stay here has been a trying experience for a good many people, including Mr. Fanning.

The Charges

[2] Mr. Fanning stands charged with threatening to cause bodily harm to Patricia Gale Robinson on 18 March 2011; Ms. Robinson is a friend of Mr. Fanning's half-sister, Samantha Rice. He has pleaded guilty to damaging a side-light window at Ms. Robinson's apartment. Mr. Fanning has been charged with assaulting Samantha Rice and his biological father, John Rice, on 6 April 2011. Finally, Mr. Fanning is accused of assaulting his cousin, Stephanie Fanning, on

two different occasions, at two different locations, both during the months of May and June 2011. The Crown elected summary process on all charges.

The Presumption of Innocence

[3] Given that defence called evidence at this joint trial of these charges, I apply the principles set out in *R. v. W. (D.)*[1]: If I believe the evidence called by Mr. Fanning, I must find him not guilty; even if I do not believe the evidence of Mr. Fanning, but that evidence leaves me in a state of reasonable doubt, I must find him not guilty; even if I do not believe Mr. Fanning, and his evidence does not leave me in a state of reasonable doubt, I must ask myself nevertheless whether, based on the evidence I do accept, I am satisfied that the Crown has proven each and every element of the offenses beyond a reasonable doubt, and, if not, I must find Mr. Fanning not guilty.

[4] The *W. (D.)* algorithm is not intended as a form of automated reasoning; the Supreme Court of Canada, itself, made this clear in *R. v. S. (J.H.)*[2] and *R. v.*

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[1] [1991] 1 S.C.R. 742 at para. 28.

[2]2008 SCC 30 at para. 13.

Avetysan.[3] Even in cases when an accused has called evidence, a trier of fact might conclude that the prosecution's case has failed to prove beyond a reasonable doubt one or more essential elements of a charged offence, so that an acquittal might logically and legally flow from an analysis of the evidence without the need to analyze critically exculpatory evidence offered by the accused. Similarly, a trier of fact might find reasonable doubt to have arisen from a combination of defence and prosecution evidence. Particularly applicable here, reasonable doubt will arise if a Court cannot decide whom to believe.[4] There are an array of possible analytical permutations which might not fit nicely in the *W. (D)*. framework.[5] What is essential is that the Court keep the following core and constitutional principles of criminal justice in mind:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

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[3]2000 SCC 56 at para. 1.

[4]*R. v. H.(C.W.)* , (1991), 68 C.C.C. (3d) 146 at p. 155 (B.C.C.A.).

[5]*Supra* note 2 at para. 10.

- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

- a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;

- it is logically connected to the evidence or absence of evidence;

- it does not involve proof to an absolute certainty;

- it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;

- finally, more is required than proof that the accused is probably guilty -- a court which concludes only that the accused is probably guilty must acquit.[6]

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[6]See *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36.

Mindful of this need for a flexible analysis, I will explain why the Court finds Mr. Fanning not guilty of the charges against him.

Theory of the Crown

[6] The theory of the Crown is that Mr. Fanning is ruled by an angry and volatile personality. Mr. Fanning admits abusing alcohol, and had completed a treatment program just prior to leaving Alberta; the Crown proposes that Mr. Fanning is one of those people who becomes a gladiator when under the influence of alcohol. Fully fuelled up, and enraged by resentment which he harboured against his birth family, particularly his biological father, John Rice, Mr. Fanning exploded when confronted with minor family conflicts; his tendency to go over the top when irritated, offended, or told "no" when looking for money for drugs, resulted in him threatening and attacking family members–namely, his biological father, John Rice, his half-sister Samantha Rice, and cousin, Stephanie Fanning; when Samantha Rice's friend, Patricia Robinson, stood in his way of getting money for drugs from his half-sister, he threatened to harm her and her children and broke a window at the entrance of her apartment. Mr. Fanning was enabled in

all this by an older female friend with whom he had become romantically involved, one Carmen Lynn Regan. Ms. Regan became a source of money, liquor, refuge from the law, and, ultimately, favourable but false testimony. Not content to wait for his day in court, Mr. Fanning sought to intimidate Aaron Rice, who had witnessed the assaults upon Stephanie Fanning. He also aggressively confronted Stephanie Fanning one day after court, prior to the conclusion of the trial, again, seeking to intimidate a witness who had yet to testify. This, briefly, is the Crown's theory.

Theory of the Defence

[7] Not surprisingly, Mr. Fanning's appraisal of the situation is very much different to the prosecution's. Mr. Fanning looked forward to reuniting with his birth family very much. Mr. Fanning arrived in Pictou County, and quickly established himself as the protector of his half-sister, Samantha, and his teen-aged half-brother, Aaron Rice. Believing that Patricia Robinson had taken some of Samantha's money, Mr. Fanning got into a shouting match with Ms. Robinson, broke a window at the entrance to her apartment, but then left on the suggestion of Ms. Regan; the war of words was just that: mutual insults, but no threats. Then,

about three weeks later, alarmed to find out that Aaron had been assaulted by their father, John Rice, Mr. Fanning intervened, only to be assaulted by Samantha. All the while this was going on, Mr. Fanning found himself having to resist the romantic advances of his first cousin, Stephanie Fanning, who, motivated by revenge at being spurned, has come to court with fabricated accounts of assault.

The Legal and Evidentiary Effect of a Single Trial of Multiple Counts

[8] Mr. Fanning is being tried for five counts charged in three informations: one count of threatening Ms. Robinson; one count of assaulting Samantha Rice; one count of assaulting John Rice; two counts of assaulting Ms. Fanning. The three informations before the Court were tried jointly by consent, in accordance with *R. v. Clunas*.[7] Although tried jointly, the Court must consider each case independently. The procedural reason for this is that the Crown did not advance a similar-fact-evidence application, a prerequisite for an expansive treatment of incriminating evidence in multi-count trials.[8] The principled reason for a specific-

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[7]70 C.C.C. (3d) 115 at para. 28 (S.C.C.). See also sub-s. 591(1) of the *Criminal Code*.

[8]*R. v. F. (T.C.)* 2006 NSCA 42at para. 27.

charge-limited analysis of the evidence is that the Court must not be overwhelmed by the number of charges arrayed against Mr. Fanning. Additionally, the Court must not engage in propensity reasoning; this means, if I were to find Mr. Fanning had committed one or more of the offences of which he stands charged, I should not utilize that finding to draw the inference that Mr. Fanning is a person more likely from his criminal conduct or character to have committed the remaining offences.[9] Certainly there is much circumstantial evidence that the Court has heard in this trial–evidence of chronology, family history, interpersonal relationships, substance-abuse problems of Mr. Fanning and certain Crown witnesses–that is relevant to the entire sweep of charges before the Court.[10] Furthermore, Stephanie Fanning is a complainant in two of the counts of which Mr. Fanning stands charged; it is clearly necessary that I consider the whole of her evidence in relation to both of those counts.[11] Finally, I would observe that findings made regarding the credibility of a witness pertaining to one particular count may carry over into credibility findings regarding other counts.[12]

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[9]*Ibid*. at paras. 29 and 31.

[10]*Ibid*. at para. 45.

[11]*Ibid*.; *R. v. Litchfield,* [1993] 4 S.C.R. 333 at paras. 37-39.

[12]*R. v. MacIntosh* 2011 NSCA 111 at para. 176.

Mr. Fanning's Evidence

[9] I did not find Mr. Fanning's evidence to be credible. Mr. Fanning is one of those witnesses able to give a facile and glib account of just about every bad thing that happens to erupt when he is in close proximity to the event. His situation-normal analysis of his first few months back in Nova Scotia must be considered against a backdrop of his excessive use of alcohol after having been discharged from a treatment program just before he left Alberta, his flight from the law when he knew police were likely looking for him for his liquor-store thefts, and his flash-point temper that left Ms. Robinson's window shattered. Mr. Fanning sought to portray his interaction with family as chivalrous and charitable, while those around him–with the sole exception of Ms. Regan–were motivated by malice and hidden agendas. The fact is that real life does not resemble this black-and-white starkness.

[10] Given the number of charges, and applying the principles set out in *R. v. Arcangioli*,[13] I find that I am unable to draw a consciousness-of-guilt inference

[13][1994] S.C.J. No. 5 at para. 43.

from Mr. Fanning's conversation with Aaron Rice at Carmen Regan's home regarding what Mr. Rice had told police, or from Mr. Fanning's confrontation of Stephanie Fanning at the TD parking lot in New Glasgow. However, I most certainly do find that I may consider that evidence in assessing Mr. Fanning's credibility,[14] as I find his explanations, in fact, incredible.

[11] Although I find Mr. Fanning an incredible witness, I do not believe that I can write-off his testimony altogether. That is because of the testimony that has been given by Carmen Lynn Regan.

Carmen Regan's Evidence

[12] Carmen Lynn Regan testified twice during this trial. Most of her testimony was given as, indeed, a Crown witness. Ms. Regan described how she came to know Mr. Fanning through his mother, how they became acquainted by telephone prior to his arrival in Nova Scotia, and how this acquaintance has blossomed into a romantic relationship. Ms. Regan told the court about her work as a financial

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[14]See *R. v. White*, [1998] S.C.J. No. 57 at para. 26.

adviser and her volunteer work with groups such as Crime Stoppers, Victim Services and others.

[13] There were many troubling aspects of Ms. Regan's testimony. It is clear to the Court that she was prepared to tolerate–indeed, accommodate–Mr. Fanning's risky abuse of alcohol. When Ms. Regan drove Mr. Fanning out to her friend's home in Lyon's Brook in mid-June 2011, it is not lost on the Court that this would have been at a point in time police were looking for Mr. Fanning in relation to liquor-store thefts in New Glasgow, giving rise to a possible inference that Ms. Regan was assisting a fugitive. In taking Aaron Rice into her home on 17 July 2011 and facilitating–for lack of a better word–a discussion between Mr. Fanning and Mr. Rice about what Mr. Rice had told police Mr. Fanning had done to Stephanie Fanning, Ms. Regan ought to have known, given her work with victims of crime, that she was doing something highly ill advised and precarious. Finally, Ms. Regan's account of how it came to pass that she and Mr. Fanning accidentally came into contact with Stephanie Fanning on 15 May 2012 in the parking lot of the TD bank in New Glasgow, including her description of the serpentine course she took to get there–along Riverside Drive, past the entrance to the TD parking lot, into the Goodman Building lot, across Dalhousie Street, and into the TD–beggars

description when one considers that she had the great, big Bridgeview Square parkade immediately to her right. I couple this with the fact that, although Ms. Regan was able to produce for the Court a copy of the notice from the Town of New Glasgow verifying the street closure that she claims accounts for her driving route she took that day, she did not appear to have in hand the one document that would have supported cogently her assertion that she parked at the TD to get cash from her own bank up on Provost Street, specifically, a transaction record from the Bank of Montreal.

[14] Nevertheless, Ms. Regan was called principally as a Crown witness. If she had said anything to police inconsistent with her testimony, it was not presented to the Court though *Milgaard* application.[15] If she had failed to co-operate with police by declining to give a statement, it was not made known to the Court in the context of an application to have her found adverse under sub-section 9(1) of the *Canada Evidence Act*.[16] Rather, the strategy adopted by the Crown in this case was

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[15]*R. v. Milgaard*, [1971] S.J. No. 264 at para. 55 (Sask.C.A.) leave to appeal to S.C.C. refused, 4 C.C.C. (2d) 566N.

[16]R.S.C. 1985, c. C-5.

to wait until closing argument to attack Ms. Regan's credibility. Section 9(1) of the *Canada Evidence Act* is clear:

> 9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

[15] This clearly does not mean that the prosecution may call only those witnesses who are in testimonial lockstep with each other. Having produced Ms. Regan and elicited her account that Mr. Fanning did not assault Stephanie Fanning or threaten Ms. Robinson, the Crown operated well within the bounds of permissible advocacy to call Ms. Fanning, Aaron Rice and Ms. Robinson to say that Mr. Fanning did, in fact, do all those things. However, in holding off until closing argument before attacking the credibility of Ms. Regan–and that is the essence of impeachment: attacking the credibility of a witness–the prosecution chose not to confront Ms. Regan with the accusation that her partiality in favour of Mr. Fanning led her to give untruthful evidence. Typically, when a party who calls

a witness wishes to challenge the credibility of that witness through cross-examination, there must be a ruling by the court to support it.[17]

[16] Consider cases when there has been impermissible cross-examination by the prosecution of its own witnesses.[18] Even in such an instance, the witness has been at least confronted with the allegation that the witness is motivated to be untruthful. In this case, there was no such confrontation. Although not a *Browne v. Dunn*[19] analog , as Ms. Regan was not a defence witness being cross examined by the prosecution, courts in this country have recognized a broader concept of confrontation–giving a witness the opportunity to respond to allegations of untruthfulness–as a component of trial fairness.[20]

[17] Nevertheless, assuming as I shall for the purpose of this judgment that the Crown was not obligated to apply to have Ms. Regan declared adverse so as to

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[17]*R. v. MacIntyre*, [1963] N.S.J. No. 8 at para. 12 (A.D.).

[18]See, *e.g.*, *R. v. Paquette* 2008 ABCA 49.

[19](1893), 6 R. 67 (H.L.) .

[20]See, e.g., R. v. Dalton, [1998] N.J. No. 131 (C.A.).

confront her with the accusation that her evidence was biassed and untruthful, I consider, in assessing her credibility that there is no evidence before the court of a prior inconsistent statement or of lack of co-operation with police.

The Case for the Prosecution

[18] Turning now to the key witnesses for the prosecution, the Court is confronted with a number of questions. The first is the unexplained failure of Patricia Robinson, Samantha Rice, Aaron Rice and John Rice to answer to their subpoenas on the first day of trial. Certainly, the failure of an accused to appear for trial, or the absconding of an accused during trial, may give rise to an adverse inference as to guilt, yes, but also as to credibility. In this case, no explanation was sought of these witnesses to account for their absences; an unexplained failure to attend court as ordered will hardly enhance credibility.

[19] Concerning the threats against Patricia Robinson, I recognize that the damage to her window supports her description of the accused's actions outside her apartment; however, I consider as well that Mr. Fanning has pleaded guilty to causing that damage. There was, unfortunately, no scene photography done in this

case–if it had been done, it was not presented in court. The probative effect of scene imaging was underscored by the Supreme Court of Canada in *R. v. Nikolovski*.[21] Had photography of the scene been exhibited in this case, the Court might have been able to make a finding regarding Ms. Robinson's description of Mr. Fanning flicking blood from his lacerated hand onto her door , which would have supported strongly her description of the accused's level of rage. As it is, the Court has the description of Cst. Joudrey that he saw blood on the glass and the ground only, but could not recall seeing blood on the door. I have considered the evidence of Samantha Rice, who testified she heard Mr. Fanning threaten to beat up Ms. Robinson and harm her kids. I will review more of Ms. Rice's evidence shortly.

[20] The Crown argues that the accused's alleged threats against Ms. Robinson–indeed, all the assaults against his family, as well–were the "natural progression" of resentment arising from Mr. Fanning's dysfunctional childhood and family history.

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[21][1996] S.C.J. No. 122 at para. 21.

[21] The natural-progression argument is a challenging one, particularly in the context of a trial in which pretty much all of the alleged crimes arise from interpersonal conflict. The criminal-law reports are made up largely of such cases. The trajectories are varied. In one case, people get into an argument, the argument escalates into shouted insults, and someone gets charged with causing a disturbance. In another, the insults escalate to menacing words, and a charge of uttering threats is laid. In some cases, the threats are carried out, and a trial for assault or assault-causing ensues. There are, of course, the more extreme cases, when a vicious assault results in death; the charge is then some form of culpable homicide. How is any one a more "natural progression" than any other? Unless, of course, the court were to reason that an accused in a particular case might be just the type of person to commit such a crime. For reasons I discussed earlier, this Court cannot engage in such reasoning.

[22] Samantha Rice testified to witnessing the threats against Ms. Robinson and being assaulted when she intervened to protect her father, John Rice, from Mr. Fanning. In describing the assault, Ms. Rice said she was struck a blow to her right cheek, forceful enough to cause swelling and bruising. Yet, it was admitted by counsel, pursuant to section 655 of the *Code*, that Cst. Lesko, the officer who

responded to the assault complaint on 6 April 2011, “could not see any visible injuries, redness or markings” on Ms. Rice’s face.

[23] The evidence of Stephanie Fanning is particularly troubling. Ms. Fanning gave a richly detailed and vivid account of being seriously assaulted by the accused on two occasions–once, at Ms. Regan’s home in New Glasgow, and also at Ms. Regan’s sick friend’s home in Lyon’s Brook. And yet, as descriptive as her testimony might have been regarding the Lyon’s Brook incident, Ms. Fanning conceded in the course of very effective cross examination by defence counsel that she really had no memory of the incident due to her level of impairment; instead, she relied on what she had been told by Aaron Rice to inform the evidence she gave in Court. In its closing argument, the prosecution conceded that the Court should not accept Ms. Fanning’s evidence on the Lyon’s Brook incident. That is a very fair and proper concession to have made. But it’s not as simple a matter as carving off that one bad limb and letting the patient limp along with a remnant of credibility. How can the Court accept Ms. Fanning’s evidence at all when she has the capacity to elaborately recount an incident of which she has no independent recollection?

[24] Finally, there is the evidence of Aaron Rice. Mr. Rice was sixteen years of age at the time he testified. He described witnessing Mr. Fanning assaulting Stephanie Fanning, once at Ms. Regan's home, and on another occasion at a home in Lyon's Brook where Ms. Regan had taken Mr. Fanning to hide out.

[25] What is particularly odd about Mr. Rice's testimony is his description of a conversation he had with Mr. Fanning and Ms. Regan after he showed up at Ms. Regan's home on 17 July 2011 looking, it seems, for shelter. If he harboured a fear of Mr. Fanning because of his size, as he said he did early on in cross-examination, it failed to deter him from looking for a roof over his head at the very place he knew Mr. Fanning would be found. Further, Mr. Rice acknowledged on cross-examination having had a conversation with Mr. Fanning and Ms. Regan much the same as described by Ms. Regan in her initial cross-examination. Mr. Fanning asked Mr. Rice why he had lied to police about the assaults on Stephanie Fanning; Mr. Rice apologized and said he didn't know why he had done it. Nothing about Mr. Rice being a rat or a snitch. If Mr. Rice's testimony about the assault on Ms. Fanning at Ms. Regan's home is true–an assault that, according to Mr. Rice, he and Ms. Regan both witnessed–then this conversation on 17 July must have been a very strange one, indeed. It would have parallelled a meeting of the

central committee of the North Korean Workers' Party, where everybody knows the ugly truth, and yet everyone chooses to speak around it. Whereas, the script of the discussion at Ms. Regan's home would certainly make sense if Mr. Rice had falsely accused Mr. Fanning of assault, with Mr. Fanning seeking an explanation from the person who had wrongly accused him.

[26] In the final analysis, the Court simply cannot decide whom to believe. That finding, in law, constitutes a reasonable doubt, and it is for that reason that I find Mr. Fanning not guilty of the charges for which he has been tried.

DATED 30 July 2012 at Pictou, Nova Scotia.

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J.P.C.