PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Gillis*, 2012 NSPC 122

Date: 20120705
Docket: 2300497, 2300498
Registry: Pictou

Between:

Her Majesty the Queen

v.

Terrance Allan Gillis

VERDICT

Restriction on publication: Pursuant to s. 486.4 of the *Criminal Code*, any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	29 September, 29 November, 19 December 2011; 5 July 2012, in Pictou, Nova Scotia
Decision:	5 July 2012
Written decision:	25 January 2013
Charge:	Section 271of the *Criminal Code* and sub-s. 89(1) of the Liquor Control Act
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service Bronwyn Duffy, for the Town of New Glasgow Stephen Robertson, Nova Scotia Legal Aid Commission, for Terrance Allan Gillis

By the Court

Preamble

[1] Terrance Allan Gillis is charged with sexually assaulting J. N. W., contrary to section 271 of the *Criminal Code*. There is a publication ban in place in relation to the identity of the complainant and that publication ban remains in full force and effect. The Crown elected to proceed indictably; Mr. Gillis elected to have his trial heard in this Court, and pleaded not guilty.

[2] Mr. Gillis is charged in the same information with supplying liquor to a person under 19 years of age, contrary to sub-section 89(2) of the Liquor Control Act. That is a straight summary conviction matter.

[3] Both charges were tried together by consent, pursuant to *R. v. Clunas*,[1] and in accordance with section 591(1) of the *Code*.

Theory of the Crown

[4] I will focus first on the sexual assault charge as that is the more serious of the two allegations. The theory of the Crown is that J. N. W. (who was 15 years

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[1] [1992] 1 S.C.R. 595 at para. 28.

old on the pertinent date, Friday, 15 October 2010) got together with several of her friends after school. She had told her parents that she would be going to the gym and then to a hockey game and a movie. The real plan was to hang out around town. At the prompting of two of her friends, J. D. G. and J. R. A., this evolved into getting an adult to fetch some liquor and then drinking it. J. R.A. and J. D. G. were acquainted with someone whom they felt might be willing to make such a purchase; known to them as "Gene Simmons", this person turned out to be the accused, Mr. Gillis. J. N. W., J. R. A., J. D. G. and a third friend of J.N.W.'s, S. K. W., tracked down Mr. Gillis at his apartment on MacDonald Street in New Glasgow. J. D. G. .and J. R. A. negotiated the details of the liquor purchase with Mr. Gillis. J. N. W. and her friends waited in the apartment while Mr. Gillis made a quick run to the liquor store, which was nearby. After Mr. Gillis returned with a bottle of vodka, J. N. W. and her friends stayed, drank and talked. Mr. Gillis drank shots while the rest drank mix.

[5] At some point, Mr. Gillis mentioned owning a pair of leather chaps or pants. Whether it was Mr. Gillis's idea or J. N. W.'s is not clear, but J. N. W. went eventually with Mr. Gillis into his bedroom to see the pants. After taking a look, J. N. W. turned to leave. As she did so, Mr. Gillis grabbed her with one hand,

pulled her toward him, wrapped her free arm around her upper body and then moved his other hand down inside J. N. W.'s pants, under her underwear. Mr. Gillis rubbed J. N. W.'s vagina and then penetrated her digitally. After a short time that seemed to J.N.W. an eternity, Mr. Gillis stopped. J. N. W. was shocked by what had happened. She left the bedroom, went to the bathroom where J. R. A. and S. K. W. were attending to an intoxicated J. D. G. J. N. W. told her friends that they had to leave. Mr. Gillis then appeared and kicked everyone out.

[6] J. N. W. and her friends were picked up later by S. K. W.'s mother at a fast-food restaurant a short walk away from Mr. Gillis's apartment. J. N. W. did not reveal to her friends that night the full details of what had happened in the bedroom; she talked to another friend and a boyfriend over a month later and told them some of her ordeal. It was not until March of 2011 that she spoke with police and provided a complete account.

[7] The prosecution asserts that J. N. W. should be believed because her testimony is supported materially by J. R. A., J. D. G., S. K. W. and even by Mr. Gillis himself, as he admitted to police to having taken J. N. W. into his bedroom. The prosecution argues that any inconsistencies between J. N. W.'s testimony of

what she revealed about the incident to her friends, and what her friends recall her saying are attributable to the normal operation of human memory.

Theory of the defence

[8] The theory of the defence is denial. Mr. Gillis denies sexually assaulting J.N.W. in any way. Further, Mr. Gillis asserts forcefully that he could not have assaulted J. N. W. sexually, as he suffers from a sexual dysfunction arising from the methadone treatment that he has been receiving for some time from Dr. William Doran.

Presumption of innocence

[9] Mr. Gillis is presumed innocent of this charge. That presumption is guaranteed constitutionally in paragraph 11(d) of the *Charter* and statutorily in para. 6(1)(a) of the *Code*. It is not for Mr. Gillis to prove his innocence; rather, the Crown bears the burden of proving each element of the offence beyond a reasonable doubt.

[10] This burden of proof never shifts until such time as, having heard all the evidence and the submissions of counsel, the Court might find each and every element of the offence to have been proven beyond a reasonable doubt.[2]

[11] A criminal trial is not a truth-telling contest. It is not an exercise in preferring the evidence of one witness over the evidence of another.[3]

[12] Furthermore, although proof beyond a reasonable doubt does not require absolute certainty, it is, indeed, very, very close to that absolute.[4]

[13] I wish to address one issue raised by the prosecution in its closing argument, and that is the assertion that Mr. Gillis has not effectively "denied" sexually assaulting J. N. W., so that his defence of, indeed, denial is rendered somehow unsustainable.

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[2] *See R. v. Avetysan* 2000 SCC 56 at para. 10; *R. v. Bouvier* (1984), 11 C.C.C. (3d) 251 at 264 (O.C.A.), *aff'd*. 22 C.C.C. (3d) 576 (S.C.C.).

[3] *See R. v. H.(C.W.),* [1991] B.C.J. No. 2753 (C.A.).

[4] *See R. v. Lifchus*, [1991] 3 S.C.R. 320 at para. 13; *R. v. Starr* 2000 SCC 40 at paras. 231, 242.

What constitutes a denial

[14] Mr. Gillis elected trial in this Court and pleaded "not guilty". That is a denial. Mr. Gillis did not testify. Nevertheless, in his video-recorded statement given to police–tendered by the prosecution as Exhibit #1, and admitted without the necessity of a voluntariness *voir dire*, with defence consent, pursuant to *R. v. Park*.–Mr. Gillis admits offering J. N. W. an innocuous hug and nothing more. That is a denial. To suggest that Mr. Gillis ought to have been more emphatic or said something more to police to underscore the point, would be to unfairly deny Mr. Gillis the legal and evidentiary effect of what he stated clearly to the investigators: that he gave J. N. W. a hug and that was all. Advocating that the Court draw an inference from Mr. Gillis's statement that he did not really and truly deny the accusation made against him, is to invite an impermissible and unsupported inference and would strip Mr. Gillis of his right to silence, a right that runs throughout his trial, as described by Abella J. in *R. v. Turcotte*,[5] and as

[5]2005 SCC 50 at para. 55.

recently elaborated upon by White J.A. in his very instructional opinion in *R. v. Adams.*[6]

Permissible and impermissible uses of evidence

[15] This leads me to a further point. In weighing Mr. Gillis's statement to police, I caution myself that I may consider only those portions of the recording that are admissible in evidence. Comments made by investigators during the course of their interrogation of Mr. Gillis are not evidence, and that is particularly so with respect to what investigators told Mr. Gillis that J. N. W. and her friends had said in their statements to police.

[16] Furthermore, I recognize fully that statements made by J.N.W. to others describing what she alleges the accused did to her are not evidence of the truth of those statements. To hold otherwise would offend the rule against oath-helping.

[17] In reviewing the evidence, I observe that it would be a legal error for me ask rhetorically why J. N. W. and her friends would fabricate an account of what

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[6]2012 NLCA 40 at paragraph 18.

happened in Mr. Gillis's apartment on October 15, 2010. This would amount to imposing a burden of proof upon Mr. Gillis to offer up an explanation for J. N. W.'s testimony. It would be wrong in law to do so.[7]

[18] However, while it would be improper legally to place a burden of proof on Mr. Gillis, it is quite a different matter to note merely that the credibility of J.N.W. is undoubtedly at issue in this trial. In assessing the circumstances that either support or diminish J. N. W.'s credibility, it is appropriate to consider that there is no evidence, either direct or circumstantial, that J. N. W. had an *animus* against Mr. Gillis, extraneous to the alleged offence. These two people were not well acquainted at all. In fact, there was one and only one meeting between J. N. W. and Mr. Gillis and that was on the evening of October 15th. There is an important distinction between, on the one hand, imposing an impermissible and unconstitutional burden of proof on an accused to show why an alleged victim might fabricate a complaint, and, on the other, drawing reasonable inferences in assessing the credibility of a witness. This was underscored usefully by

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

Steele J.A. in *R. v. S. (A.J.)*[8] and Roberts J.A. in *R. v. B.(G.K.)*.[9] In this case, I draw the reasonable and common-sense inference that J.N.W. is not out to get Mr. Gillis; there is nothing in their limited common history that would give rise to such a level of malice.

Analysis of the evidence

[19] I found J. N. W. to be a highly credible and reliable witness. This is based on what I consider to be strong circumstantial guarantees of reliability, and I caution myself against placing undue reliance on witness-box demeanour and comportment. Admittedly, J. N. W. did not disclose immediately what had happened to her in Mr. Gillis's apartment. I draw what I consider to be the common-sense inference that she was shocked and likely embarrassed by what had happened to her that evening. Undoubtedly, J. N. W. felt, in the immediate aftermath of the event, some sense of remorse, possibly for having mislead her parents and gone off with school mates for an ill-advised evening of hanging out and underage drinking.

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[8][1998] N.J. No. 249 at para. 33 (C.A.).

[9]2001 NLCA 6 at paras. 30-33.

[20] I would observe, as well, that J. N. W. had a good recall, indeed, an excellent recall of the location of Mr. Gillis's apartment several months after she had been there. Notwithstanding the fact that she was unfamiliar with that area of New Glasgow, she directed Sgt. Chisholm to the very house where Mr. Gillis lived. A Sophanow-compliant identification procedure was carried out by police, conducted, significantly, by Cst. MacPhee, who was unconnected with the investigation in any way. And so it was that this was a pristine Sophanow procedure; it is clear to me, from my viewing of the video-recorded photopack-lineup procedure, that J. N. W. identified with certainty a photograph of Mr. Gillis– a man known to her from one encounter only–as her assailant. We then have the assurance that J.N.W.'s identification of Mr. Gillis is correct, as Mr. Gillis, in his statement to police, placed himself with J. N. W., indeed, in his bedroom.

[21] J. N. W.'s highly emotional affect on the witness stand was what one would expect of a witness being compelled to recall a traumatic event. I am mindful that I must be guarded against assessing credibility based solely on courtroom

demeanour, and I apply fully the highly useful guidance of Saunders J.A. in *R. v. S.H.P.* on that point.[10]

[22] In this case, J. N. W.'s demeanour is but one factor in a constellation of circumstances guaranteeing her reliability. I draw the common-sense inference that the discrepancies between witness accounts of what was said by J. N. W. after leaving Mr. Gillis's bedroom are attributable to the normal operation of unscripted human memory.

[23] I recall, as well, that all three of J. N. W.'s friends were clear that J. N. W. was very upset after exiting the bedroom, and wanted to leave Mr. Gillis's apartment without delay. According to S. K.W., "she was crying and screaming". As recalled by J. R. A., "J.N.W. came out of the room crying. She was freaking out." J. D. G.'s memory was that "she was crying, she was pretty upset." This is the reaction of someone who has experienced a traumatic event.

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[10] 2003 NSCA 53 at para. 28. *And see R. v. Sanichar* 2012 ONCA 117 at para. 36; appeal heard and reserved 6 Dec. 2012, [2012] S.C.C.A. No. 223.

[24] Although all four of these young people had been drinking, I find that J.N.W. had not consumed very much; she was able to observe and comprehend what Mr. Gillis was doing to her, and was able to retain an accurate and unimpaired memory of the events of the evening of October 15, 2010.

[25] In viewing Mr. Gillis's statement to police, I found Mr. Gillis's denial lacking any credibility whatsoever. Mr. Gillis appeared initially in the recording to have embarked on a voyage of discovery, as he professed initially complete ignorance of the reasons for the police calling him in, then offered up piecemeal admissions and finally revealed that he had been expecting a call from police all along. This leads the Court to conclude that the visit from J. N. W. and her friends on 15 October was most definitely a highly memorable event for Mr. Gillis, even months later when questioned by police. Accordingly, his initial plea of ignorance was merely a feint.

[26] I have considered carefully the expert evidence of Dr. Doran offered by defence, relating to Mr. Gillis's sexual-dysfunction. Dr. Doran has been treating Mr. Gillis principally in administering methadone; he has made no clinical observations of sexual-dysfunction symptoms in treating Mr. Gillis, beyond what

Mr. Gillis has told him. In assessing the weight to be given to an expert's opinion, I rely on the principles enunciated in *R. v. Lavallee*: an opinion may be given weight only if there is evidence to support the facts upon which the opinion is predicated. [11]

[27] In this case, Mr. Gillis did not testify, and so has not told the Court about having erectile dysfunction, nor did he mention it in his statement to police. Accordingly, Dr. Doran's evidence on this point is based mostly on hearsay. However, Dr. Doran did say that he had prescribed an erectile-dysfunction treatment for Mr. Gillis. I am satisfied on that basis that there is circumstantial evidence supporting the doctor's opinion that Mr. Gillis suffers from erectile dysfunction. Nevertheless, the doctor's evidence does not create in my mind any reasonable doubt about any of the active or intentional elements of the offence of sexual assault. First of all, Dr. Doran was very clear that he had treated Mr. Gillis for erectile dysfunction only, not loss of libido. The doctor testified that erectile dysfunction and loss of libido can arise independently, although "more commonly they go together". The doctor noted on direct examination that the consumption of alcohol by a person experiencing sexual dysfunction may worsen the effect, but

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[11] [1990] S.C.J. No. 36 at para. 66.

"in any given moment, can cause the patient to become disinhibited", and thus be *more* apt to act on sexual impulses.

[28] There is nothing in Dr. Doran's evidence that would raise in my mind a reasonable doubt about Mr. Gillis's ability to engage intentionally in the sexually aggressive actions described by J. N. W.

[29] I find that Mr. Gillis applied force intentionally to J. N. W., without her consent, on that date in his apartment in New Glasgow; he did so in the manner described by J.N.W. This assault–a digital penetration of the victim's vagina–violated fundamentally J.N.W.'s sexual integrity and constituted a sexual assault in accordance with the principles set out in *R. v. Chase*.[12]

[30] I do not believe Mr. Gillis's evidence and it does not create in my mind a reasonable doubt. Furthermore, based on the evidence that I do accept, including the highly credible evidence of J. N. W., I find that the Crown has proven each and every element of the offence of sexual assault beyond a reasonable doubt and accordingly, I find Mr. Gillis GUILTY of count #1 accordingly.

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[12](1987), 37 C.C.C. (3d) 97 at 102-103.

Supplying liquor to minors

[31] Assessing separately, as I am required to do, the second charge under section 89(1) of the Liquor Control Act, I hasten to observe that, although in his statement to police, Mr. Gillis expressly declined to speak to police regarding that particular charge, I draw no adverse inference from that. In the Court's view, that is not a circumstantial admission of guilt; it is simply an exercise by Mr. Gillis of his constitutional right to silence.

[32] However, based on the evidence that I do accept–specifically, the highly credible evidence of J. N. W. and her three friends–I find that Mr. Gillis did, indeed, take cash for the purchase of a quantity of Skye Vodka from people Mr. Gillis knew were underage. In my view, the circumstances of that transaction would have left Mr. Gillis in no doubt that he was being called upon to make a purchase for minors. All four of these young people were clearly under the age of 19 years, their appearance leaves no doubt about that. There was no evidence of Mr. Gillis's exercising of any degree of due diligence. Simply in virtue of the appearance of those four young people, each of whom testified before me, Mr. Gillis would have known well that he was being called upon to buy liquor for

minors, which he did freely and voluntarily and for a fee. Accordingly, the Court finds Mr. Gillis GUILTY of the second charge under section 89(1) of the Liquor Control Act.

[33] We will set a date for sentencing, and bail will continue.

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J.P.C.