

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Gallant*, 2019 NSPC 5

Date: 20190312

Docket: 8091215,

8091216, 8091217

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Colin Michael Gallant

Restriction on Publication: s. 486.4CC Ban of Publication of any information that could disclose the identity of the victim and/or complainant

Judge: The Honourable Judge Paul B. Scovil, JPC

Heard: October 15, 2018 and November 13, 2018, in Bridgewater,
Nova Scotia

Decision March 12, 2019

Charge: 266(b), 271 and 266(b) of the **Criminal Code of Canada**

Counsel: Sharon Goodwin, Crown Attorney
Peter Planetta, Defence Attorney

A Ban of Publication of the contents of this file has been placed subject to the following conditions:

- By court order made under subsection 486.4(1) of the **Criminal Code**, information that may identify the person described in this decision as the victim [and/or complainant] may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published.

By the Court:

[1] Colin Gallant faces three counts under the Criminal Code. An assault under 266 from between the 14th of November 2016 and the 1st of December 2016, a sexual assault under 271 from between the 26th of December 2016 and January 1, 2017 and a final assault under 266 from the 2nd of February 2017.

Facts:

[2] Colin Gallant and M.L. met, as many couples do these days, on line. They quickly established an intimate relationship and became common-law parties.

[3] The initial ardour of the couple began to fade. The difficulties between Mr. Gallant and M.L. led to arguments. The couple, during their time together, had moved from the Spryfield area to a community near Bridgewater, Nova Scotia. The last argument between the two was significant enough that their landlord called the police.

[4] Upon the police arriving, they spoke to M.L. where they were advised by her of three separate instances which resulted in the three charges before the Court.

[5] The first incident was as a result of M.L. backing away from a previous indication of possible sexual encounters, or a three some, with Mr. Gallant and a

third person. M.L. testified that when she advised Gallant that she was no longer interested, Gallant became angry stating he should be able to have what other people have.

[6] During the course of the argument, M.L. was shoved to the floor, then grabbed and pushed to a couch. There the accused poked M.L. in the area of the collar bone with his finger. As M.L. went to leave their apartment, Mr. Gallant grabbed her by the lapels of her jacket causing a rip in the fabric.

[7] The second incident described by M.L. occurred once again where there were arguments over the couple's sexual relationship and Mr. Gallant's desire to include a third party. Mr. Gallant said humans are sexual beings and uttered words to the effect as to whether she wanted people to grab her. At some point after that, he squeezed her breast over the clothes and then grabbed her by the vagina over the clothes. These actions were the under pinning for the sexual assault charge.

[8] The third incident occurred on February 2, 2017. The couple were living in an apartment in a community near Bridgewater, Nova Scotia. On the day in question, the couple again were arguing with each other over their relationship ending.

[9] During the course of the argument, Gallant grabbed M.L. by the hair on top of her head. At that point, Gallant had a chef's knife in his hand. He then let M.L. go and put down the knife saying, "this is why I need help".

[10] In cross-examination, M.L. was extensively questioned in her ability to recall details and inconsistencies in her evidence. In particular, it was asked why she had only mentioned that Gallant was holding a knife when she testified in court and not in her initial statement given to police.

[11] M.L. gave the following reply:

"it was my first contact with the police. I was not planning on talking with the police. I had not sorted through the fog of confusion in my mind that had come from the time of verbal abuse and violence that I had been living with for some time with Mr. Gallant. When I talked to the constable at the bakery, I was highly emotional and was speaking openly about what was going on.

The sex assault had happened more than a month prior and was not the foremost thing on my mind at the time."

[12] M.L. testified in cross-examination that she had realized that she had not mentioned the knife after reading over her statement to police. She was not sure how to deal with this but spoke to Victim Services about it the morning of the trial.

[13] Mr. Gallant, in his testimony, denied any assaults other than poking M.L. with his finger. He denied shoving M.L., grabbing her by her genitals and denied having a knife in his hand as described by M.L.

[14] In his testimony under cross-examination, in addition to agreeing that he had poked his finger into M.L., Gallant also stated he took her by the back of the head and pulled her towards him to kiss her.

[15] Mr. Gallant denied that he had ever assaulted M.L. in anyway. Mr. Gallant's statement to the police was introduced in Crown evidence without objection from the Defence.

Law:

[16] This matter before the court fundamentally centers around issues of credibility. Having said that, like all trials, the primary rule that a trial judge must remember in a case such as this is that the burden of proving the guilt of the accused lies upon the prosecution. Before an accused can be convicted of any offence the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence. See *R. v. Vaillancourt*, [1987] 2 S.R.C. 636.

[17] It is also important to understand that the principle of reasonable doubt, as outlined above, applies equally to issues of credibility, as well as those of the facts. See *R. v. Ay*, [1994] B.C.J. No. 2024 (B.C.C.A.).

[18] We then must ask, “what is reasonable doubt? The question of what is reasonable doubt as a standard of proof, was discussed by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320. There, the Supreme Court set out that reasonable doubt is not like subjective standards of care that we employ in important everyday situations. It is not proof to an absolute certainty. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense and not on sympathy or prejudice. The Court was clear about proof beyond a reasonable doubt and that it falls much closer to absolute certainty than to proof on a balance of probabilities. See *R. v. Starr*, [2000] S.C.J. No. 40.

[19] In this matter, given that an accused has testified, I must also apply the principles of *R. v. W. D.*, [1991] 1 S.C.R. 742. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused but his testimony raises a reasonable doubt, I must acquit. If any of the evidence brought forward by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I have to ensure myself that on each and every element of the offence, there is evidence which provides proof beyond a reasonable doubt. If the Crown has not proven any element beyond a reasonable doubt, then I must acquit.

[20] The concepts embodied in *W.D.* were expanded upon by the Nova Scotia Court of Appeal in *R. v. Brown*, [1994] N.S.J. No. 269. In *Brown*, Justice Matthews stated as follows:

17 These observations in our opinion are equally applicable to cases where a judge sits alone. As Chipman, J.A. remarked in *R. v. Gushue* 117 N.S.R. (2d) 152 at 154:

...There is a danger here that the court asked itself the wrong question: that is which story was correct, rather than whether the Crown had proved its case beyond a reasonable doubt. See *R. v. Cooke* (1988), 83 N.S.R. (2d) 274; 210 A.P.R. 274 (C.A.); *R. v. Nadeau*, [1984] 2 S.C.R. 570; 56 N.R. 130 (S.C.C.); *R. v. K.(F.)* (1990), 73 O.R. (2d) 480 (C.A.); *R. v. J.G.N.* (1992), 78 Man. R. (2d) 303; 16 W.A.C. 303; 73 C.C.C. (3d) 381 (C.A.); *R. v. K.(V.)* (1991), 68 C.C.C. (3d) 18 (B.C.C.A)

18 The British Columbia Court of Appeal in *R. v. K.(V.)* considered issues similar to the instant case. Understandably not all of the issues were the same. After a useful analysis of the proper procedure to be followed in such cases, Wood, J.A. speaking for the court commented at p. 35:

I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgment I noted the gender-related stereotypical thinking that led to assumptions about the credibility of complainants in sexual cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[21] While the issue at the end of the day is not credibility, credibility can often form a crucial role in a trial judge's determination of whether the Crown has proven a case beyond a reasonable doubt. A trial judge's assessment of credibility can lead to that judge accepting all, none, or part of a witness's testimony.

[22] While there are no set rules for determining credibility, courts will often look to a witness's ability to observe the events that they are testifying about. Were they sober, intoxicated, angry, upset or face with a number of stimuli? Any of these things may, or may not, affect a person's ability to recall events. People's animosity towards others may intentionally or unintentionally affect the way they recall events. People may miss lead or falsify testimony intentionally due to prejudice, hate or to minimize their roles in events as they unfolded. Accused, likewise, may lie or misstate facts to avoid conviction.

[23] In relation to the evidence given by Mr. Gallant, I have difficulties with a great deal of it.

[24] In part, he corroborates several important aspects of M.L.'s testimony. To begin with, Mr. Gallant agrees that during the course of an argument described by M.L., he poked her with his finger. He agreed such a poke could be considered as an assault by others. He went on to say he did not believe he assaulted M.L.

[25] Mr. Gallant also testified that he took M.L. by the back of the head and pulled her towards him to kiss her. This dovetails with M.L.'s testimony on that point but it greatly minimized by Mr. Gallant when compared to M.L.'s testimony.

[26] In relation to other evidence, Mr. Gallant's statement to police cast a shadow over his denial in court. At page 33 of the transcript of his statement he stated, "there was never any sexual issues. There was never an assault for that. Like, there was never any real bad assault. Like, any, anything major". When questioned about this in cross-examination, Mr. Gallant said he could not recall saying that but there were no assaults.

[27] Further at page 45 of his statement, Mr. Gallant again confirmed taking M.L. by the back of the head when the police asked about grabbing her by the hair. At line 14 of that page, he himself used the term 'grabbing by the back of the head'. In Court, he equivocated from that.

[28] It was interesting to note that at page 49 of Mr. Gallant's statement he blamed M.L. for coming forward as a result of pressure from her boss. He felt that because her boss was a feminist. Gallant stated M.L.'s boss had problems with men and also with him.

[29] When asked by the police if M.L. was not being truthful about his pinching her nipples and grabbing her vagina, he answered at page 57 as follows:

"I'm just going to say no, because I'm, I'm not going to say anything that is going to put her in jeopardy for being labeled as a liar, and I'm like, I'm not going to put myself in jeopardy for, for being some kind of monster that I know I'm not. So, I'm just going to say no."

[30] At the end of the day, having reviewed all the evidence, I find I cannot accept the testimony of Mr. Gallant where it conflicts with M.L. Having rejected it does it still raise a reasonable doubt on any element of those offences before me. Not only does it not raise any doubts the testimony of Mr. Gallant regarding both the poking of M.L. and the grabbing of her head, would lead to conviction on the two assault charges.

[31] I have rejected the evidence of Mr. Gallant. I have also examined if his evidence raises any reasonable doubt on any element of the Crown's case and find that it does not. Having said the above, I must still critically analyze the entire evidence including the testimony of M.L. to determine if I am left with any reasonable doubt on any of the elements of the defence.

[32] M.L. was quite frank in dealing with areas of her evidence. She readily admitted having difficulties remembering some details surrounding the three incidents that have led to charges. I find that at no time did she seek to embellish her evidence or go out of her way to castigate the accused. I was impressed with her forthright answers and demeanor. She was very credible in her testimony.

[33] In determining credibility of witnesses it is not, nor should it be, a contest of who can give the most minute details of what transpired in an occurrence.

Witnesses, when in their first contact with police, may not turn their minds to the details that are later put under the microscope of trial examination. They may be traumatized, frightened, hurt or simply not in a position at early stages to give a full rendition of what had happened. This does not make them a liar. It does call for a court to objectively analyse the evidence of a witness to assess reliability.

[34] Here, I find M.L. reliable. I accept her evidence as to the three incidents which have led to these charges.

[35] In relation to the charge of sexual assault, a sexual assault is one where an accused touches a person in a sexual way without their consent. (See *R. v. Chase* [1987] 2 S.C.R. 293, *R. v. J. A.*, 2011 SCC 28.)

[36] Here, the grabbing of the breast and vagina area of Mr. M.L. was clearly a sexual assault intended by the accused to violate her sexual integrity. Accordingly, I convict him of the 271 charge.

[37] In his actions, as described by M.L. in relation to the other two charges of assault, the accused again is convicted of those charges.

Paul B. Scovil, JPC