YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R v. C.R.*, 2018 NSPC 78

Date: 20181206
Docket: 8172047
Registry: Truro

Between:

The Queen

v.

C.R.

Restriction on Publication:
No one shall publish the name of a young person if it would identify the young person as a young person dealt with under this Act—s. 110 Youth Criminal Justice Act

Judge:	The Honourable Judge Alain J. Bégin,
Heard:	December 6, 2018, in Truro, Nova Scotia
Decision	December 6, 2018
Charge:	271 Criminal Code of Canada
Counsel:	Thomas Kayter, for the Crown Kristy MacKinnon, for the Defendant

By the Court:

This is my decision in the Youth Justice Court matter of C.R.

[1] This is a criminal trial. The Crown has the onus of establishing beyond a reasonable doubt that C.R. committed a sexual assault on K.S. on September 29, 2017, contrary to s. 271 of the Criminal Code. The Crown proceeded by Indictment.

[2] The onus of proof never switches from the Crown to the accused. Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2 SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[3] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> "39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
> >
> > What does the expression "beyond a reasonable doubt" mean?
> >
> > The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

[4] It is settled law that an accused person bears no burden to explain why their accuser made the allegations against them. Reasonable doubt is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[5] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[6] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict the accused of offenses proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[7] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in

isolation. It is part of the whole of the evidence that I have heard and must consider.

[8] A criminal trial is **not** a credibility contest.

[9] On the issue of credibility I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[10] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA), "**Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?**"

[11] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence, but standing alone it is hardly determinative.

[12] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[13] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[14] The Ontario Court of Appeal in ***R. v. G(M)*** stated at paragraph 23:

> "Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. **But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**"
>
> And at paragraph 24, "…it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….**While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence.** There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…"

[15] The case of ***R. v. G(M)*** is particularly instructive in the case before me today.

[16] A trier of fact is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[17] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge

must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[18] The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) referred at paragraph 17 to the ***R. v. Gushue*** case which is 117 NSR (2d) 152 which cautioned that:

> "…There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt."

[19] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated:

> "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 judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault 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."

[20] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> "The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt**…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt."

[21] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

Analysis of Evidence

[22] I have reviewed all of the evidence of both K.S. and C.R. from the trial two days ago.

[23] In summary, K.S. testified that C.R. did not stop vaginal sex after she asked him to. That she withdrew her consent for continued vaginal sex but he persisted after her pleas for C.R. to stop. C.R. testified that vaginal sex never even occurred. He never penetrated K.S. as he became 'grossed out' by the whole idea. They both agreed that K.S. performed consensual oral sex prior to the vaginal, or attempted vaginal, sex.

[24] Prior to the sexual encounter, K.S. and C.R. had been in what they described as a dating relationship that did not involve spending much, if any, time together, but really only involved chatting via the Snapchat medium. That dating relationship had ended a couple of months before the sexual encounter.

[25] The alleged incident occurred on September 29, 2017, and K.S. gave a statement to the police on October 16, 2017. When K.S. was asked when during the police statement that she knew that she was not telling the truth she responded "Never."

[26] Apparently, a couple of weeks after providing the police her statement K.S. is with her grandmother and she relates to her grandmother the version of events that she had told to the police. K.S. is advised by her grandmother that that is not what happened, and her grandmother then proceeds to tell her what did happen between her and C.R. K.S. testified, "When grandma told me, I remembered."

[27] Neither K.S. nor her family members bring the glaring, and serious, contradictions in the two versions to the attention of the police. The trial for this

matter was scheduled on January 8, 2018 for December 4, 2018. Presumably K.S. and her family would have been informed of the trial date shortly thereafter. Neither K.S., nor her family members, bring the glaring contradictions in her stories to the attention of the police or the Crown.

[28] Only on July 4, 2018 does K.S. advise Cst. Thorne of the RCMP as to what she now claimed to be the true version of events of September 29, 2017.

[29] In assessing the testimony of both C.R. and K.S., I am guided by the case of ***R. v. Stewart*** (1994) 90 CCC (3d) 242 (Ont.CA) where the Ontario Court of Appeal stated that the testimony of children should not be subjected to a lower level of scrutiny than that of adults.

[30] I also refer to the case of ***R. v. W.R.*** (1992) 74 CCC (3d) 134 (SCC) where the Supreme Court of Canada stated that the same standard of proof applies and, just as with adults, a judge is free to treat a child's evidence with caution where the circumstances of the particular case indicate caution is appropriate.

[31] This brings us to the evidence of K.S. Her inconsistencies go beyond collateral, or peripheral, issues. They go to the core of the allegations against C.R. As previously noted, one of the most valuable means of assessing the credibility of a witness is to examine the consistency between what the witness said in the witness box and what she said on other occasions.

[32] In the case of **R. v. H. (D.)** 2016 ONCA 569 the Ontario Court of Appeal stated that where there is inconsistency about a key fact the judge will be unable to accept the witness' testimony about this fact unless there is a rational basis for preferring the in-court version to the prior inconsistent account. In a judge alone trial, if the internal inconsistencies are material enough, or frequent enough, it can be a legal error to rely on that witness unless the trial judge articulates a reasoned basis for doing so despite those difficulties.

[33] I am unable to articulate a reasoned basis for preferring one version over another by K.S. for the drastically differing versions of events as it relates to the allegations of sexual assault. In her statement to police K.S. gives a version that she claims that she did not know was untrue at the time that she gave it. That version depicted a violent and forceful sexual assault by C.R. and then in court

K.S. testified about a consensual sexual encounter that only lacked consent when consensual vaginal intercourse became painful.
[34] A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[35] I do not know K.S.'s motivations for lying to the police, and I will not speculate.

[36] What I do know is that I cannot accept K.S.'s multiple, and serious, inconsistencies that go to the core of the sexual assault allegations as the basis for finding beyond a reasonable doubt that C.R. sexually assaulted K.S. contrary to s. 271 of the Criminal Code as he was charged.

[37] The Crown stated that K.S. and C.R.'s testimony was diametrically opposed. I add to that comment that K.S.'s court testimony was also diametrically opposed to what she had told the police only a couple of weeks after the alleged incident occurred.

Summary/Decision

[38] I noted at the start that I was guided by the case of ***R. v. W.D.*** I must first consider whether I believe C.R.'s evidence, and if so, then he is entitled to be acquitted on the charges where I believe his denial.

[39] I have already stated that it is possible for a trial judge to accept some of a witness' evidence, and to reject other portions, as confirmed in ***R. v. Reid*** by the Ontario Court of Appeal. A trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[40] There is no way to separate the truth from the lies in K.S.'s testimony. I do not believe <u>any</u> of the evidence by K.S., and I absolutely, and completely, believe <u>all</u> of C.R.'s testimony. Any time that there is a contradiction in the evidence between K.S. and C.R., the evidence of C.R. is to be believed, and the evidence of K.S. is not.

[41] There is no need for me to consider the second and third stages of the ***R. v. W.D*** test.

[42] I find as fact that there was no sexual assault by C.R. on K.S. I also find as fact that any and all sexual contact between C.R. and K.S. on September 29, 2017 was with the consent of both C.R. and K.S.

[43] C.R. is not guilty.

[44] It is extremely unfortunate that even though C.R. did not commit any crime, that for the remainder of his life there will be a little red flag on his file should he ever have to complete a vulnerable persons check.

[45] I am ordering that a transcript of my decision be prepared and provided to C.R. in case he ever needs to have such a background check completed so that he can prove that he did nothing wrong. C.R. should not have this false allegation tainting him for the remainder of his life.

Alain J. Bégin, JPC

YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: *R v. C.R.*, 2018 NSPC 78

Date: 20181206
Docket: 8172047
Registry: Truro

Between:

The Queen

v.

C.R.