

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Barrett*, 2019 NSPC 75

**Date:** 20191028

**Docket:** 8272720 No.

**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

Sherri Dawn Barrett

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**Library Heading**

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

**Judge:** The Honourable Chief Judge Pamela S. Williams

**Heard:** June 17, 2019 and September 23, 2019 in Dartmouth, Nova Scotia

**Written Decision:** October 28, 2019

**Subject:** Sexual Assault

**Summary:** Sherry Dawn Barrett was charged with committing a sexual assault on J.C., a continuing care assistant, who attended Ms. Barrett's home on June 7, 2018 to provide care services.

**Issues:** The sole issue is whether Ms. Barrett touched J.C. in a sexual manner, without consent. Findings of credibility and reliability were necessary.

**Result:** Ms. Barrett's evidence was rejected as it lacked credibility and reliability. The Court was not left with a reasonable doubt that her version of events could be true. J.C.'s evidence

was accepted in its entirety. The evidence established beyond a reasonable doubt that Ms. Barrett violated J.C.'s sexual integrity by making several unwanted sexual advances toward J.C.

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<b>Heard:</b>	June 17, 2019 and September 23, 2019, in Dartmouth, Nova Scotia
<b>Decision</b>	October 28, 2019
<b>Charge:</b>	Section 271 of the <b>Criminal Code of Canada</b>
<b>Counsel:</b>	Janine Kidd, for the Crown Giancarla Francis, for the Defence

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

- Section 486.4: Bans ordered under this Section direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections.

**By the Court:**

**Introduction:**

[1] Sherry Dawn Barrett is charged with committing a sexual assault on J.C., a continuing care assistant, who attended Ms. Barrett's home on June 7, 2018 to provide care services.

[2] Date, jurisdiction and identity are not in issue.

**Issue:**

[3] The sole issue is whether Ms. Barrett touched J.C. in a sexual manner, without consent. Findings of credibility and reliability are necessary.

**Law:**

[4] A sexual assault is an intentional application of force that violates the sexual integrity of another. It is a general intent offence, meaning that the Crown need not prove that the accused intended the touching to be of a sexual nature.

[5] All accused persons are innocent until proven guilty.

[6] The Crown has the burden to prove all essential elements of the offence beyond a reasonable doubt. This does not require proof to an absolute certainty or beyond any doubt.

[7] I am instructed by the Supreme Court of Canada in **R. v. Lifchus** [1997] 3 SCR 320 para 39:

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. An accused person bears no burden to explain why their accuser made the allegations against them.

[8] I am also guided by the Supreme Court of Canada in **R. v. WD** [1991] 1 SCR 742 in assessing credibility:

If I believe the evidence of the accused, I must acquit. If I do not believe the accused but I am left with a reasonable doubt that her version of events could be true, I must acquit. If I am not left with a reasonable doubt that her version could

be true, I must then consider whether, on the remainder of the evidence before me, I am convinced of the guilt of the accused, beyond a reasonable doubt.

[9] I am mindful of the task ahead. As the Nova Scotia Court of Appeal explains in **R. v. D.D.S.** 2006 NSCA 34 at para. 77:

. . . 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?

[10] With respect to the demeanour of witnesses, I am mindful of the cautious approach to be taken. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in **D.D.S.** at para. 77, demeanour can be considered by a trier of fact when testing the evidence but standing alone it cannot be determinative.

[11] 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 be considered reliable evidence on the same point.

[12] 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.

[13] The effect of inconsistencies upon the credibility of a crucial witness was described by the British Columbia Court of Appeal in **R. v. B. (R.W.)** (1993), 40 W.A.C. 1 at pp. 9-10:

It is essential that the credibility 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...

[14] The Court 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.

[15] I am guided as well by the Nova Scotia Court of Appeal in **R. v. Brown** [1994] NSJ 269 para 18 which referenced paragraph 35 of the BC Court of Appeal case **R. v. K. (V.)**:

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 crime.

**Background:**

[16] J.C. is a 4 ft. 9, 124 lb. 27-year-old continuing care assistant whose duties include attending to clients' hygiene, cleaning homes and preparing meals. Ms. Barrett is a 6 ft. 200 lb. 44-year-old client. On June 7, 2018 J.C. was assigned to attend Ms. Barrett's residence to do house cleaning duties.

**Allegations:**

[17] In her testimony J.C. identified several encounters of unwanted sexual touching by Ms. Barrett:

1. After cleaning the bathroom Ms. Barrett came up behind J.C and slapped her behind, in the middle once, describing it like a 'love tap'. J.C. ignored the gesture, saying "that stuff happens to me quite often, so I just proceeded to do my job".
2. In the kitchen Ms. Barrett slapped J.C. on the right side of the buttocks and said "You're pretty, I just want to keep you in my pocket; I want to keep you here forever; I want to request you back to

be my caretaker”. J.C. responded that she had a partner, and this was her profession.

3. In the living room while completing paperwork Ms. Barrett kneeled in front of J.C. and put her arms around her. While hugging J.C. Ms. Barrett moved her mouth towards J.C. saying she wanted to kiss J.C. J.C. replied, “no this is unprofessional”. J.C. stood up and Ms. Barrett then picked J.C. up; J.C.’s feet dangling in the air. J.C. pushed away, and Ms. Barrett let her go. J.C. headed down the hallway, and while leaning down to get her book bag, Ms. Barrett grabbed her by the buttocks and lifted J.C. up. Ms. Barrett then asked for a hug and J.C. admits having said “sure” – knowing that her next step was to leave, never to return. According to J.C. she gave Ms. Barrett a “side hug and kind of patted [her] on the back”. J.C. then grabbed her book bag and ran out the door.

[18] J.C. stated she reported the incident to her work that night. The next day she told her care supervisor. A couple of weeks later J.C.’s employer advised it was J.C.’s decision whether to file a complaint with police. J.C. filed a complaint and provided a statement to police on the 27<sup>th</sup> of August 2018.

[19] Ms. Barrett denies all allegations.

**Analysis:**

[20] J.C.'s evidence, if believed, constitutes several instances of unwanted sexual touching. An analysis of the evidence is necessary to make findings of credibility and reliability to determine what evidence is accepted or rejected.

Sherri Barrett's Evidence

[21] Ms. Barrett asserted that J.C. had been a high school classmate, and last saw her in 1996. Given J.C.'s stated age of 27, this is clearly impossible. J.C. would have been no more than 4-5 years old in 1996. Ms. Barrett may well have confused J.C. with J.C.'s mother who is approximately Ms. Barrett's age. By her own admission, Ms. Barrett was groggy due to medications she had consumed. Regardless, Ms. Barrett's evidence on this point is unreliable and I reject it.

[22] Ms. Barrett said that J.C. admitted to her she was not allowed to be in Ms. Barrett's residence to which she responded "Well, if you're not allowed to be here, then call your work and tell them that you do actually know who I am, and that". Ms. Barrett then testified that J.C. said "No, we're good friends. I'll stay ... and classmates". J.C. denied having said this. Clearly the two were never classmates, for reasons noted above, and there is no evidence they were close friends. Furthermore, J.C. was in Ms. Barrett's home in her capacity as a continuing care

assistant. She was acutely aware of her employer's policy that employees are not to care for clients known to them personally. In fact, J.C. changed her assignment that day to ensure she would not be in a conflict with another client, whom she knew. That is how she was re-assigned to attend Ms. Barrett's residence. I do not find Ms. Barrett credible on this portion of her evidence. I do not accept that this exchange ever took place.

[23] Ms. Barrett next contended that J.C. propositioned her for sex and threatened Ms. Barrett when she said no. She alleged J.C. said 'If you say anything and that, I will. . . I am in charge of everybody'. Further Ms. Barrett stated J.C threatened to stop homecare and VONs from coming to her home. Ms. Barrett continued, "So I thought to myself, Okay, Sherri, just let her do her housework and that and she'll be gone". Ms. Barrett certainly left the impression that she was the victim in this scenario. Later in her testimony Ms. Barrett stated J.C. "was the one acting smart ass and that. And, actually, thinking about it, it . . . like that day scared me that somebody I knew would do this to me, would proposition me for sex".

[24] I am unable to reconcile this piece of testimony with other portions of Ms. Barrett's evidence where she described her interactions with J.C. as "friendly", and the visit as "perfect" noting at the end of the visit she shook J.C.'s hand. According to Ms. Barrett she thanked her, told J.C.it was nice seeing her and said,

“Hopefully we can see each other around the streets and we can say hi to each other now that we’ve recognized each other and know who we are”. This is not the sort of commentary one would expect from someone who had just been propositioned and threatened. I am unable to reconcile these pieces of evidence; I do not accept that J.C. propositioned or threatened Ms. Barrett.

[25] Ms. Barrett acknowledged J.C. cleaned the bathroom and kitchen and that ‘they carried on with each other – talking about who they went to school with’. Again, it seems highly unusual to admit to carrying on with someone who had, moments earlier propositioned and threatened her. And, as mentioned it would be impossible to have had a conversation about who they went to school with, given the 14-year age difference. Ms. Barrett’s evidence in this regard is not credible.

[26] Ms. Barrett said she asked J.C. whether there was any paperwork for her to sign and was told, ‘No – You remember, I’m the boss; I’m in charge’. Ms. Barrett then said she asked whether a copy of the paperwork would be left behind, and J.C. said “Oh no. You don’t get a copy of this, and that”. J.C. on rebuttal confirmed that paperwork is to be left in the client’s apartment on top of the fridge. J.C. denied having taken the paperwork with her. There is an obvious contradiction on this point. I am unable to determine, on the evidence before me,

whether the paperwork was left behind. In any event, it does not go to an essential element of the offence and the relevance of this evidence is unclear to me.

[27] Ms. Barrett denied touching J.C. other than shaking her hand. She further denied that J.C. gave her a side hug before leaving.

[28] There are major internal inconsistencies in Ms. Barrett's evidence. At times she appeared a bit confused by the questions being asked of her, especially when asked about the events of June 7<sup>th</sup>. She gave a long explanation of her health difficulties and her surgery of July of 2018. She had to be redirected on occasion to answer the question asked of her. Ms. Barrett's state of health and the medications she was on may have contributed to some confusion on June 7<sup>th</sup>, 2018 but it is unlikely this would account for Ms. Barrett's apparent confusion on the day of trial - June 17, 2019. Regardless, I am unable to reconcile her testimony. It lacks credibility and is therefore unreliable. In short, I do not accept Ms. Barrett's evidence on these points and I do not believe her denials of having touched J.C. Nor am I left with a reasonable doubt that Ms. Barrett's evidence could be true.

Evidence of J.C.

[29] The evidence of J.C. was clear and detailed; She answered all questions without hesitation. She was careful to indicate when she was unsure of a point and made several admissions that could be construed as against her interest.

[30] Upon arrival J.C. noticed a picture of Ms. Barrett's sister, Barbie. The two had grown up in the same town. According to J.C., she knew *of* the accused but did not know her personally. In fact, J.C. confirmed, had she known Ms. Barrett personally, she would have been obliged to leave as her employment policy prohibited service provision to personally known clients. J.C. is of the view that she was not conflicted in providing care services to Ms. Barrett.

[31] J.C. confirmed that she and Ms. Barrett had a conversation about who they knew from their hometown.

[32] J.C.'s recollection of the events was clear. There is nothing to suggest that her capacity to recollect was impaired in any way. When asked about her memory of the events and her statement to police on August 27<sup>th</sup>, 2018 the following exchange provides a cogent explanation:

Q. Would it be fair to say that your memory would not be as good on the . . . August 27<sup>th</sup> as it would have been on June 7<sup>th</sup> the date of the alleged incident?

A. I would say it was better.

Q. Better?

A. Yeah.

Q. On page six of your statement, line 19 to 22, you said, "It's all a big . . . one big blur kind of a thing. Like I know what happened and like I . . . some things. But some things I forget and some things I don't.

A. Yeah.

Q. So it's a fair statement that on that day, your memory wasn't as good as it would have been on the 7<sup>th</sup>?

A. A lot more things came out on that day than it would have on the 7<sup>th</sup>. I had time to actually sit down and process what happened to me more than it would have been on the 7<sup>th</sup>. Because, the 7<sup>th</sup>, if you would have asked me, I probably could have told you a whole different story because my mindset was not on what happened. I just had to go to work and that's the way I felt. And, like I said, it was not . . . it was not good. I was not myself. I proceeded to go to work after that . . . after the incident because I was thinking of other people than myself.

[33] J.C. acknowledged she probably should not have gone back to work that day as she was not herself. In fact, she admitted in her August 27<sup>th</sup> statement to police that a subsequent client on June 7<sup>th</sup> lodged a complaint against J.C. but she cannot recall the details. She offered that her employer would be able to provide the details. J.C. was forthcoming in this regard.

[34] When asked why she did not leave after the initial slap on the buttocks J.C. stated that it happens quite often; she is used to it and she does not find it abnormal. She therefore continued with her duties. It is only after Ms. Barrett made suggestive comments (you're pretty – I just want to keep you in my pocket) that J.C. responded by saying she had a partner and that this was her profession. When J.C. was doing the paperwork and Ms. Barrett wanted to kiss her, she testified that she said no.

[35] Just before leaving the Barrett residence, J.C. described having been picked up by the buttocks. She acknowledged giving Ms. Barrett a hug, at Ms. Barrett's request and provided her reasoning:

Just because I know if I did what she asked, I knew my next step was I was going to leave, and I was not coming back. I was gone and I was going to be safe. So, I just kind of did a side hug and kind of patted [her] on the back. And, after that, I grabbed my book bag and I ran out the door.

[36] J.C. reported the incident to her employer that day and to her supervisor the next day. Ms. Barrett confirmed that it was not long after the encounter with J.C. that home care was discontinued. No explanation is provided as to the reasons; however, it is possibly related to the allegations of sexual touching.

[37] Some time passed before a complaint was lodged with police, but J.C. explained that she was unsure whether she or the employer was to do this. Once she was told the decision was hers to make, she lodged the complaint and gave a statement to police.

[38] J.C.'s evidence was both internally and externally consistent. She did not hesitate to explain her reasons for reacting in the manner she did. She admitted to having hugged Ms. Barrett, something that Ms. Barrett, herself denied having happened. It is inconceivable that J.C. would make this statement against her interest if it had not indeed occurred.

[39] Though perhaps nervous while testifying, J.C. gave her account of the events in a fair, measured and thoughtful way. It was neither understated nor overstated. J.C. presented as a conscientious and professional employee who does her best to provide care for her clients, including Ms. Barrett. It is inconceivable that she would risk her employment by having sexual contact with clients or threatening them. On the whole of the evidence I accept that J.C.'s evidence is both credible and reliable and I accept it in its entirety.

### **Conclusion**

[40] I find that Ms. Barrett violated J.C.'s sexual integrity by making several unwanted sexual advances toward J.C. as noted above. I therefore find Sherri Barrett guilty of sexual assault contrary to s. 271 of the *Criminal Code*.

Pamela S. Williams, JPC