IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. F. L., 2011 NSPC 8

Date: February 24, 2011
Docket: 1912581, 1912582
Registry: Halifax

Between:

Her Majesty the Queen

v.

F. L.

APPLICATION TO WITHDRAW GUILTY PLEA

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Marc C. Chisholm

Heard: July 8, 2010 & January 21, 2011, in Halifax, Nova Scotia

Decision: February 24, 2011

Charge: cc. 271(1)(a)

Counsel: Christopher Nicholson, for the Crown
Donald Murray, for the Defense

By the Court:

[1] This is an Application by the accused to set aside his guilty plea to count # 1, the sexual assault of his son.

Factual Background

[2] On May 28, 2008, the accused Mr. L. was arrested and charged that he between the 1st day of January 2006 and the 31st day of December 2007 did commit a sexual assault on his son contrary to Section 271(1)(a) of the Criminal Code and further that he at the same time and place aforesaid, did for the sexual purpose touch his son, a person under the age of fourteen years directly with a part of his body, to wit., his hands, contrary to Section 151 of the Criminal Code.

[3] The accused's son was 8 years old at the time of the alleged offences.

[4] The Crown alleged that the offences occurred at the accused's home on a night when his wife, the complainant's mother, was at work. It was alleged that the accused was watching pornography on the computer. That the child came out of his bedroom, dressed in his pajamas, wanting a drink of water. That the accused ordered his son to stand beside him and remove his pajamas. That the boy did as he was told. That the accused, while continuing to watch pornography, masturbated himself with one hand and

with his other hand twisted his son's penis back and forth. That, later, he told his son to get dressed and go back to bed.

[5] On July 14, 2008 the accused appeared in Court, without counsel or an interpreter and the matter was adjourned to July 31, 2008. The Crown elected to proceed by Indictment.

[6] On July 31, 2008 the accused appeared with counsel, Mr. Andrew Pavey. There was not an interpreter present. On Defense motion the matter was adjourned to September 18, 2008 for election.

[7] On September 18, 2008 the accused and his counsel Mr. Pavey were present. There was not an interpreter present. A Defense request for a further adjournment was granted. The case was adjourned for election to October 29, 2008.

[8] On October 29, 2008 the accused was present with his lawyer Mr. Pavey. There was no interpreter present. A further Defense request was granted. The accused's election was adjourned to December 3, 2008.

[9] On December 3, 2008 the accused was present with his lawyer Mr. Pavey. There was no interpreter. The case was again adjourned on Defense motion to January 2, 2009.

[10] On January 2, 2009 the accused was present with his lawyer, Mr. Pavey. An interpreter was present. A Crown motion to amend the date of the alleged offences was granted. The time period as amended alleging the offences were committed between January 1, 2006 and February 4, 2008.

[11] The accused elected to be tried in the Provincial Court . To count # 1, as amended, the accused through his counsel tendered a plea of guilty to the sexual assault of his son.

[12] A transcript of the relevant court proceedings of January 2, 2009 was prepared and submitted on this application.

[13] The transcript indicates that:

> The Court, through the interpreter, asked Mr. L. if he wished to plead guilty to sexual assault.
>
> Mr. L. indicted that was his wish.
>
> Mr. L. acknowledged that he understood that by pleading guilty he was giving up his right to have a trial. He acknowledged that his plea of guilty was voluntary.
>
> He acknowledged that he understood that the Court was not bound by the sentence submissions of counsel.
>
> There was no presentation of the facts of the offence by counsel and no inquiry by the Court regarding the facts.

[14] On January 2, 2009, at the request of Defense counsel, the Court ordered the preparation of a pre-sentence report (PSR). Sentencing on sexual assault was adjourned to April 6, 2009.

[15] On April 6, 2009 the accused appeared with counsel. An interpreter was present. Sentencing had to be further adjourned because the PSR had not been completed. Sentencing was adjourned to May 25, 2009.

[16] On May 25, 2009 the accused appeared with new counsel, Mr. Merrimen of Nova Scotia Legal Aid. An interpreter was present. Mr. Merrimen sought an adjournment to prepare for the sentence hearing. The motion was granted. Sentencing was adjourned to July 2, 2009.

[17] From July 2, 2009 to July 8, 2010 there were a series of adjournments on Defense motions to arrange for other counsel to represent Mr. L. on an application to withdraw his guilty plea.

[18] A hearing of the application finally began on July 8, 2010. The hearing was not completed on that day. After a further series of delays due to the unavailability of a Crown witness, the hearing was completed on January 21, 2011.

[19] The lengthy delay, while regrettable, has no bearing on the Court's decision on this application.

[20] On January 21, 2011 the Court adjourned to consider it's decision.

[21] By letter dated February 2, 2011 the Court notified counsel that the accused's application to withdraw his guilty plea would be dismissed.

Decision

[22] On an application to set aside a guilty plea the accused's bears the burden of satisfying the Court that the plea was not valid.

[23] The standard of proof is the civil burden.

[24] In ***R v. Nevin*** (2006) Carswell no. 239 the Nova Scotia Court of Appeal at para. 7 cited, with approval, the decision of the Ontario Court of Appeal in ***R. v. R.T.*** (1992) Carswell Ont. 117 (Ont CA).

> "To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea."

[25] Although *Nevin, supra,* dealt with a motion to withdraw a guilty plea raised on appeal, the Court accepts this as the correct statement of the test to be applied on this application.

Defense Position

[26] The Defense position is multifaceted. It is submitted:

1) That the accused was not fully informed of the nature of the allegation: in part because of a communication issue, English not being the accused's first language and he not being fluent in English; and in part because he had not, prior to plea, viewed the video of his son's (the complainant's) statement to the police although it had been disclosed to his lawyer;

2) That the accused, by his plea, did not accept the Crown version of the incident upon which the charge was based; and

3) That the accused did not fully understand the effect and consequences of his plea, specifically it's effect on his ability to have contact with his son.

The Evidence

[27] The evidence on the application consisted of:

1) The transcript of the Court proceedings of January 2, 2009 when the accused entered a guilty plea to count # 1, sexual assault;

2) The affidavit of the applicant, F. L.;

3) The affidavit of Andrew Pavey, Mr. L.'s counsel prior to and at the time of his guilty plea;

4) The testimony of F. L.; and

5) The testimony of Phil Josey, Mr. L.'s probation officer who prepared the pre-sentence report.

[28] The Court will begin with the affidavit and testimony of Mr. L..

[29] At para. 4 of his affidavit, in relation to a 2007 incident, Mr. L. stated:

"No charges were laid against me for physical assault of my son."

[30] However, in his testimony he admitted that he was sentenced in October of 2007 for assaulting his son and uttering a threat to his wife. He was represented by Andrew Pavey on those charges. A guilty plea and joint sentence recommendation of probation was negotiated by Mr. Pavey on his behalf. The joint sentence recommendation was accepted by the Court.

The Accused's knowledge of the factual allegation

[31] In relation to what he knew about the factual allegation underlying the charge of sexual assault, Mr. L., in his affidavit stated:

8. I know that Mr. Pavey worked out a deal with the prosecutor which required me to plead guilty to one count of sexual assault, and to have both the prosecutor and Mr. Pavey recommend a sentence that would not put me in jail. When I

pleaded guilty on April 6, 2009, I expected that it would allow me to resume a parental relationship with my son, since I would not be going to jail, and since there would be no condition that I would not be able to see him. At that time I had not seen the videotaped interview of my son, and was not aware of the types of behaviour that he said that I did to his body. I only saw that videotape for the first time on December 29, 2009, in Mr. Donald Murray's office.

9. I remained of the beliefs that I had at that time of plea when I attended a meeting for the preparation of a pre-sentence report. I attended the pre-sentence report meeting without any interpreter since neither I nor the Probation Services had hired one. My lawyer had pointed out that the pre-sentence report reports me as saying that I "accept responsibility for [my] actions and expressed a great deal of remorse for [my] behaviour". At the time I did not know what my son was really accusing me of having done to him. What I was trying to express was that I was sorry that things turned out the way they did - especially the break-up of my family.

11. As I said above, I did not see my son's videotaped interview until December 29, 2009, in Mr. Murray's office. On that date I also had the assistance of an interpreter. Having heard my son's allegations, I most seriously deny that I have touched him in any sexual part of his body, or had him participate in any sexual kind on activity with me.

12. I also have come to the understanding over the course of the last year that because of the nature of the allegations, I may not be permitted to resume a parental relationship with my son even if there is no trial on the criminal charges.

13. I did not understand the nature of the sexual allegations that were the basis of the sexual assault charge at the time that I entered my guilty plea. I should not have entered that plea. The mistake I made in pleading guilty was caused partly by not watching the videotape of my son's accusation before pleading guilty, and partly I think by my trouble in understanding what I was supposed to be pleading guilty to because everything has to be done in translation.

[32] In his testimony Mr. L., initially, claimed limited knowledge of what the Crown alleged. At page 17 lines 4-20 he stated:

> Q. Okay. But you understood that this was a pretty serious situation for you, an allegation of sexual assault and a guilty plea to sexual assault?
>
> A. No. He didn't understand the nature of the seriousness. The informations were not sufficient. He - - he understood only a light sketch of what was - - what he was accused of, and he proceeded on that basis.
>
> Q. Well, sir, did you not appreciate that sexual assault is a serious crime?
>
> A. No. His only consideration was his son. He had not seen the video proceedings, so he didn't understand what - - what was going. He had no full understanding of it.
>
> Q. But you knew, did you not, that the plea was regarding one incident that involved your son?
>
> A. His understanding was, what - - the way he understood, is that that was one incident when he taught his son how to - - how to clean his penis and...

[33] In his testimony Mr. L. said that on one occasion he touched his son's penis for the purpose of showing him how to clean his penis. He thought that the criminal charges related to that incident (p. 18 line 8):

"Since this - - this is - - since a different country, different customs, he thought that this whole accusation was referring to that incident."

[34] This evidence regarding his knowledge and understanding of the nature of the charge to which he pled guilty led to the following questions and answers at page 23 lines 10-18:

Q. The 2nd, he entered his guilty plea here in this court?

A. A qualified yes. He knew that he was pleading guilty in sexual assault but he thought that that was referring to that incident - - or it's not even an incident, that case when he showed his son how to clean his private parts. That - - that's what he thought. It wasn't clear to him, okay, what the sexual assault was referring to. The content of the plea was not clear."

[35] And at page 23 lines 19 to page 26 line 15:

Q. Okay, sir, but you were told by Mr. Pavey what the circumstances of the allegation were going to be in court?

A. What circumstances?

Q. Yes.

A. What circumstances Mr. Nicholson is referring to?

Q. Okay. I guess we'll just get right to that then. Concerning one incident, when your son was eight years old -- and I'll just -- I'll read part of it. I'll stop as I go and then I'll -- it's going to take me a few minutes. Okay. "That his mom was working night shift at the *, F. was in his bedroom and came out because he was thirsty, and he saw his father watching porn. His father saw him and told him to come out and watch."

A. Ah...

Q. "F." -- I'll just read it, right...

A. He said...

Q. Oh.

A. Well, he said that's not true. He saw his son, he told him to come, make his -- have his drink and go back to his room because the following day was school day.

Q. All right, but what I'm trying to do here is just read the entire incident and...

THE INTERPRETER: So you require that there should be no interruption?

MR. NICHOLSON: If I could just finish it.

MR. L. (*Without Interpreter*): Sorry. Sorry.

BY MR. NICHOLSON:

Q. Okay. Because what I'm asking, really, is was this incident told to Mr. L. by Mr. Pavey. Okay? So can I just continue?

A. Yes, he -- he already indicated that Mr. Pavey did tell him this. And he told Mr. Pavey the same thing as he just told the court, namely that this was not true.

Q. Okay. So to be clear, Mr. Pavey did relate the incident to him?

A. Yes.

Q. Okay. And you know there's more to it? I haven't finished it. You know there's more?

A. Yes.

Q. And what you're saying is, when he related that to you, you told him it was not true?

A. Yes.

Q. And you had an interpreter for that?

A. Yeah.

Q. And then after telling him it was not true, you still went to court and pleaded guilty to that allegation?

A. Yes, he did, because he asked Mr. Pavey advice, what's the best way for him to proceed, and he has -- he had no experience in courts, with court proceedings, so he relied on Mr. Pavey's advice as to, you know, what's the best way to proceed. He -- he wanted to close the case as soon as possible because he was unemployed and he was unable to pay his lawyer. He wanted to save for his son the whole court proceedings. He had no full understanding of what he was accused of, so that's why he made the wrong decision. He made a mistake, it was the wrong decision, but that's due to his inexperience in court proceedings.

Q. Sir, I'm going to suggest to you, you did know what the allegation was because Mr. Pavey read it to you.

A. If he had known exactly, precisely, he would never have pleaded guilty. He's not a sophisticated man. He -- if he has a full grasp of he whole thing, then his decision would have been different.

[36] At page 27 lines 7 - 10:

Q. So did you not realize that to plead guilty in court you had to admit that the facts were true?

A. Yes, he knew he was pleading guilty in something that was not true.

[37] And page 31 line 19 to page 32 line 14:

Q. Mr. L., the incident Mr. Nicholson was describing to you where your son came out to get a drink of water, okay, Mr. Nicholson was about to go on, I believe, and say that during that incident you were supposed to have been masturbating at the computer and touching your son's penis.

<u>MR. L. (Without Interpreter)</u>: No, absolutely not.

<u>THE INTERPRETER</u>: No.

<u>MR. L. (Without Interpreter)</u>: No, absolutely.

<u>THE INTERPRETER</u>: No.

<u>BY MR. MURRAY</u>:

Q. Did Mr. Pavey tell you that that was the accusation?

A. Mr. Pavey said that, but he told Mr. Pavey that that wasn't true.

Q. When you appeared in court on January 2nd, 2009, with Mr. Pavey, okay, were you admitting to -- did you understand you were admitting to that behaviour?

<u>MR. L. (Without Interpreter)</u>: No, absolutely.

[38] In assessing the evidence of Mr. L. the Court has consciously considered whether Mr. L., by his answers, appears to have fully understood the questions posed and that the Court fully understands Mr. L.'s responses.

[39] Mr. L.'s affidavit evidence that he was not charged with assaulting his son in 2007 is clearly contrary to his testimony that he plead guilty and was

sentenced for assaulting his son in October 2007. No explanation was offered for this inconsistency.

[40] Mr. L.'s evidence regarding his knowledge of the facts alleged by the Crown in relation to the sexual assault of his son was clearly inconsistent.

[41] Mr. L., initially, claimed that he had but a limited knowledge of the allegation of sexual assault made against him.

[42] Mr. L. claimed that he thought the sexual assault related to his teaching his son how to clean his penis.

[43] Yet Mr. L. later testified that his lawyer told him, in detail, what it was that the Crown alleged he had done to his son, i.e. masturbating his son while he masturbated himself while watching pornography on a computer. He acknowledged that such discussion occurred with the benefit of an interpreter before he entered his plea of guilty.

[44] And, Mr. L. testified that he knew what he was admitting to by his plea of guilty (page. 27 line 9).

[45] These inconsistencies cause me to conclude that Mr. L.'s evidence was not credible.

[46] The Court is not persuaded that Mr. L.'s not having seen the video of his son's statement prevented his having a full understanding of the specific

allegation of sexual assault; nor that a language/communication issue prevented him from having a full understanding of the specific allegation of sexual assault.

[47] The Court is not persuaded that Mr. L. had any lack of knowledge or understanding of the specific allegation of sexual assault.

[48] Mr. L., in his testimony, indicated that he told his lawyer, Mr. Andrew Pavey that the allegation that he masturbated his son while watching porn and masturbating himself was not true. He did not make such an assertion in his affidavit.

[49] Mr. Pavey, in his affidavit, indicated:

> 7. THAT my client was told of all the allegations with a translator before the negotiations were completed and before he entered his guilty plea to the charge.
>
> 8. THAT my client plead guilty to one incident of sexual assault between the dates January 1, 2006 and February 4, 2008.
>
> 9. THAT my client was advised of the facts to be relied upon at the sentencing as well as the joint submission to be made by the Crown and myself.
>
> 10. THAT, I had full clear instructions from my client that he wished to enter a guilty plea to the charge and I did not believe there were language barriers as we had an interpreter throughout. I understood that, in part, Mr. L. wished to enter a guilty plea to avoid his son having to take the stand.

11. THAT I had previously represented Mr. L. in a matter before the Supreme Court (Family Division) in which he had chosen not to pursue having contact with his son.

12. THAT my client fully understood the plea of guilty was to one incident and that the joint submission was to include Sex Offender Assessment and counselling as needed, was for a sentence of a Conditional Sentence, Probation, 109 Firearm Order for 10 years, a SOIRA order and a DNA order.

[50] The Defense chose not to cross-examine Mr. Pavey on his affidavit.

[51] Mr. Pavey's affidavit does not state that Mr. L. denied the specific act of sexual assault alleged. The Defense position is that Mr. Pavey participated in concluding a plea and sentence negotiation and the entering of a guilty plea knowing that the accused denied that he committed the act of sexual assault as alleged or any other sexual assault. For counsel to do so would be improper. The only evidence that this occurred was the evidence of Mr. L.. The interpreter who was present was not called to give evidence. Mr. L.'s evidence was not found credible by the Court.

[52] The Court is not persuaded that Mr. L. told Mr. Pavey that he denied the specific act of sexual assault alleged by the Crown.

[53] The accused in his affidavit and in his testimony stated that he by his plea of guilty, wanted to spare his son testifying. Mr. Pavey, in his affidavit corroborated this evidence of motive. The fact that this was part of the

accused's motivation for pleading guilty does not alter my view of his knowledge and understanding of the nature of the allegation to which he plead guilty nor his understanding that he, by his plea, was admitting to that allegation.

[54] As a matter of Court practice where a guilty plea is entered and sentencing adjourned it may be preferable for the facts of the offence to which the plea of guilty relates be placed on the record at the time of the plea. Such a practice may reduce the possibility of a later dispute on the facts. However, where that hasn't occurred, while it is a factor to be considered, it is not determinative of an application to withdraw a guilty plea.

[55] The burden of establishing that the plea was invalid rests on the applicant, the accused. The argument that the accused was not fully aware of the nature of the allegation made against him relies mainly on his evidence. The Court did not find that his evidence, on key points, credible. The Court is not satisfied that Mr. L. lacked a full knowledge of the nature of the allegation to which he plead guilty.

The Accused's knowledge of the effect of his guilty plea

[56] The accused admitted that he understood that by his plea he was admitting to the offence alleged. The accused had previously been in court and pled guilty to a criminal charge.

[57] The Court is not persuaded that the accused did not understand that by pleading guilty he was admitting to the facts, as alleged, and giving up his right to have a trial on the allegation. Mr. L. was aware of the joint sentence recommendation.

Voluntariness of the Accused's plea

[58] The accused testified that his plea was voluntary.

[59] There is nothing before this Court that raises a concern regarding the voluntariness of Mr. L.'s plea.

The Accused's knowledge of the consequences of his guilty plea

[60] Mr. L. claimed not to have appreciated the affect of his plea on his future contact with his son (see his affidavit s. 7 & 8). He stated, in paragraph 8, that there would be no condition that he would not be able to see his son.

[61] In his testimony (page 21 line 19 to page 22 line 11) he indicated that he was aware that as part of the joint sentence recommendation he was agreeing to a condition not to have contact with his son.

[62] In his affidavit, Mr. Pavey indicated that Mr. L. was aware of the agreed condition of sentence that he not have contact with his son. Mr. Pavey also indicated that in relation to a Supreme Court Family Division matter Mr. L. had decided not to pursue contact with his son.

[63] The accused's evidence regarding his awareness of the consequences of his plea to sexually assaulting his son on a decision of the Supreme Court Family Division regarding access to the child was not credible.

[64] The Court is not convinced that the test in *Nevin, supra* regarding awareness of the consequences of a guilty plea extends to the impact of the plea on a Supreme Court Family Division order regarding access to the child but, if it does, the Court is not persuaded that the accused was not aware of this consequence of his guilty plea to the sexual assault of his son.

The Evidence of Phil Josey

[65] Mr. Josey was the accused's probation officer and author of the Pre-sentence Report (PSR). His evidence related to the accused's ability to communicate in English and a purported admission of the offence and an

expression of remorse. The Court is conscious of the fact that no interpreter was present during their PSR meeting.

[66] Mr. L. testified that he told Mr. Josey that he admitted to showing his son how to clean his penis as his father had shown him and his remorse was for the trouble brought to his family.

[67] Mr. Josey testified that Mr. L. did not offer an explanation for the sexual assault.

[68] Mr. Josey testified that he'd been a probation officer for 25 years. If Mr. L. professed innocence of the crime or offered an innocent explanation such as his teaching his son to clean his penis as his father taught him such information would seem extremely relevant and worthy of inclusion in the PSR by the author thereof.

[69] The Court is not persuaded that Mr. L. offered an innocent explanation of his guilty plea to Mr. Josey as he testified.

[70] Mr. L.'s expression of remorse to Mr. Josey may, in part, have been motivated by the troubles he'd caused his family. If so it does not affect the Court's view of his evidence, or the Court's conclusions.

Conclusion

[71] Taking all of the foregoing into consideration the Court has come to the conclusion that the test in *Nevin, supra*, has not been met and, therefore, the application of the accused to withdraw his guilty plea ought to be dismissed.

[72] Application dismissed.