IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***Ashraf - No. 2,*** 2003 NSPC 050

Date: 20031006
Case No.(s): 1202696
1202697
Registry: Halifax

Between:

R.

v.

Nabeel Ashraf - No. 2

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision on Violation of Undertaking, rendered orally on October 6, 2003, in Halifax Nova Scotia
Counsel:	Gregory E. Lenehan, for the Crown No Defence Counsel present

BY THE COURT

Introduction

[1] The accused, Nabeel Ashraf, was restrained by an Undertaking from having any communication with or going to the premises where the complainant, Jing Zhang, lived. The complainant reported to the police that the accused violated the terms of his Undertaking by telephoning her, arriving at her building and attempting to dissuade her from proceeding with charges against him. Also, he approached and spoke to her when she was in the women's washroom at a local university that they both attended. The accused denied all her assertions.

Evidence

[2] Essentially, the evidence for the Crown disclosed that the complainant was at one time dating the accused and it ended when the accused was charged with assaulting her. As a result, he signed an Undertaking to have no communication with her or to go to her place of residence. The complainant averred that he violated his Undertaking by calling her on several occasions asking for forgiveness. He also came to her building and, as she did not want him to enter her apartment, she met him in the stairwell where they spoke with him requesting her to drop the charge against him. She did not invite these contacts nor did she wish him to contact her.

[3] On July 17, 2002, she was at a local university that she attended and had gone to the women's washroom. To her consternation and surprise the accused entered the washroom and wanted to speak to her. She told him that she was not interested and that she would call the police. She did. When the police arrived, they observed that she was upset and distraught. When they arrested the accused, he stated voluntarily, "The only time I speak to her is when I have questions about the court case." (For analysis and findings on this point, see: ***R. v. Ashraf***, [2003] N.S.J. No.326.)

[4] On the other hand, the accused while he acknowledged that he knew the complainant and that he had signed an Undertaking to have no communication with her or to go to her residence, denied that he, in any manner, violated his Undertaking. He admitted that he was at the local university on the day in question but he never saw the complainant. Likewise, he did not recall going to her residence but was emphatic that he had no contact with the complainant, as she has stated. Furthermore, he denied that he told the police that he had contact with the complainant "concerning the court case."

Analysis

[5] Here, credibility of the parties is the essential issue. First, as this court stated in ***R. v. McIsaac*** [1999] N.S.J. No. 137 at para. 6:

> The principle of the presumption of innocence always applies. In short, the Crown must prove beyond a reasonable doubt the existence of all the essential elements of [the offences charged]. Reasonable doubt may arise from the evidence, a conflict in the evidence or lack of evidence. Further, a criminal trial is not a credibility contest. After I have considered all the evidence, reasonable doubt is also applied to the issue of credibility of the witnesses. In other words, it is not an either or choice between the versions of facts. In addition, I am entitled to believe all the testimony of a witness, some of it, or none of it. After hearing all the evidence, I am entitled to reject a witness' testimony if I consider it inconsistent and unreasonable in all the circumstances of the case. Further, if I believe the accused, I must acquit. If I do not believe the accused but I am left in doubt by his testimony, I must also acquit. Even if I do not believe the testimony of the accused, I must still ask myself on the evidence that I accept, whether I am convinced beyond a reasonable doubt of the existence of all the essential elements of the offence. (See also: R. v. W.D. [1991] 1 S.C.R. 742).

[6] This Court also observed in ***R. v. C.R.B.*** [1999] N.S.J. No. 217 at para. 11:

> Overall, it seems to me that a witness' testimony is considered true until there is some particular reason to doubt it. Doubts may arise from the inherent unreasonableness of the testimony itself. Doubts may also arise from the cross-examination of the witness. Such cross-examination may show that a fact is incredulous because of commonsensical inaccuracies that reveal obvious errors. In addition, extraneous evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness that testimony would have little or no probative value. (See also, R v. W.D. [1991] 1 S.C.R. 742).

[7] Also on the point is ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.) where O'Halloran J.A. stated at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

[8] In my opinion, based upon my impressions of the witnesses as they testified and on my impressions of their testimonies, the accused denials of any communications with the complainant or saying anything inculpatory to the police, were fatuous and self serving. I say that when I consider, by way of example only, that the whole basis for the voire dire, which was conducted, was to find inadmissible a statement that he made to the police. Thus, it is reasonable to conclude, and I do conclude and find, that the purpose of the voire dire was that he wanted to suppress a statement that he made and apparently knew that he had made. Otherwise, it made no logical sense for him to attempt to declare the statement inadmissible if in fact he did not utter it.

[9] I, however, found that the statement which he made to the police was not only voluntary but it also did not violate his ***Charter*** rights, as alleged. See: ***R. v. Ashraf***, [2003] N.S.J. No.326. Consequently, here, I conclude and find that he did say to the police, "The only time I speak to her is when I have questions about the court case."

[10] This statement, in my view, supported the complainant's testimony that he did contact her to dissuade her to drop the charge against him. Likewise, I think, as it is in harmony with the probabilities that a practical and informed person would readily accept as reasonable in the circumstances, that it is also supportive of her testimony that he went to her building and spoke with her. I so find.

[11] In my view, the complainant's testimony was straightforward and she impressed me as someone who wanted to be careful that her recollections of the events were truthful. Whatever small missteps she might have made, to my satisfaction, she corrected them and maintained her creditworthiness. The observations of the police when they saw her on July 17, 2002, were that she was upset and distraught. This, in my view, supported her testimony

that she was surprised to see a man in the woman's washroom and particular the accused against whom she had a restraining order.

[12] The accused however denied that he was in the washroom just as he has also denied that he said anything self-incriminating to the police after his arrest. I, however, found that he did say something to the police. Further, as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances, I think that when he spoke to the police he was trying to deflect their possible acceptance of the idea that he was in a female washroom. Therefore, as it is consistent with the probabilities that surrounded the currently existing conditions, I think that to put him in a less despicable light, given the washroom report, he was prepared to admit voluntarily that he had contacted her, but not in the washroom. I say that because, in testimony, he has intimated that it was against his character to be in a woman's washroom. It therefore appears that he then might have reasoned that since it was not socially acceptable for a male to be in a female washroom when females were present, in the circumstances, he did not want the police to accept and believe that he had entered the woman's washroom. Therefore, it is reasonable to conclude and find, as it is consistent with the existing probabilities, that to modify and to lessen the impact of the complainant's report, he wanted the police to know that he had indeed contacted her but not in the manner and place as she was reporting that he did.

[13] I, however, should add that my impressions of the accused as he testified was that he was a quick minded individual who was adeptly attempting to suppress the truth. I found that his testimony was not only internally inconsistent but was also inconsistent with that of other credible witnesses on particular crucial points and his creditworthiness was never rehabilitated. After hearing him and observing him as he testified, I was not left in any doubts by his testimony.

Conclusions

[14] On the analysis that I have made, I do not believe the accused when he denied that he never had contact with the complainant. In particular, on the evidence, I accept and find that he did communicate with the complainant and went to her residence at 5594 Fenwick Street. Likewise, I do not believe the accused when he denied entering the woman's washroom on July 17, 2002 and communicated with the complainant. I accept and find that he did enter the washroom and spoke with her.

[15] Therefore, in the end, I conclude and find that the Crown has proved beyond a reasonable

doubt that the accused has violated his Undertaking as charged in both counts of the Information tried before me. I therefore find him guilty as charged in both counts of the Information tried before me and will enter convictions on the record.