IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.T.F., 2005 NSSC 369

Date: 20051125
Docket: CRSK 238548
Registry: Kentville

Between:

Her Majesty The Queen

Informant

v.

R. T. F.

Defendant

Editorial Notice

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

Restriction on Publication:	**Pursuant to S. 486(3) of the Criminal Code**
Judge:	The Honourable Justice Allan P. Boudreau
Heard:	November 25, 2005, in Kentville, Nova Scotia
Written Release of Decision:	April 3, 2006
Counsel:	Shane Parker, Esq., counsel for the Crown
	Chris Manning, Esq., counsel for the Defendant

By the Court: (Orally)

[1] R. T. F. is charged on a five count indictment dated January 19, 2005, with two counts alleging sexual assault, two counts alleging invitation to sexual touching and one count alleging anal intercourse, all against the same female complainant. Mr. F. has pled not guilty to all counts.

[2] The Crown confirms that the offences are alleged to have occurred between January of 1998, not 1997, and the indictment has been amended accordingly, and May, 1999 and September, 1999, at times when the F. household lived in [...] and [...], Nova Scotia, respectively.

[3] The date of birth of the complainant is May [...], 1992. She would have been between the ages of six and seven at the time of the alleged offences. These allegations first came to light in June of 2004 when the complainant was twelve years old.

[4] By way of background facts, Mr. F. and the complainant's mother, Ms. R. were highschool sweethearts dating back to 1993. Mr. F. and Ms. R. were married on December [...], 1995. The complainant was approximately three and one-half years old at that time. The complainant's natural father is not Mr. F. but an individual by the name of P.H.. During most of the marriage Ms. R. was a Personal Care Worker. I am not sure if she has any nursing

degrees but she worked at a nursing home in the [...] area. Mr. F. attended University after highschool but I am not aware if he has a University degree. During most of the marriage he worked at coffee and doughnut establishments, mostly as an employee of [...] shops. Mr. F. worked mostly day shifts from 6:30 a.m. to 4:00 p.m. and the odd Saturday. Ms. R. worked eighty hours every two weeks, made up of shifts of either 7:00 a.m. to 3:00 p.m. or 3:00 p.m. to 11:00 p.m. She stated she never worked the 11:00 p.m. to 7:00 a.m. shift and she was able to work her eighty hours total for the two weeks in a sporadic period of time. Her work was not necessarily split evenly over the two week period.

[5] Mr. F. and Ms. R. have two other children, a son M. born February [...], 1996 and a daughter, R., born March [...], 1998. Ms. R. testified that she took full maternity leave when R. was born and that she returned to work September 20, 1998. She stated she was home constantly during her six month maternity leave. The family moved quite often, living at times only a few months in a particular residence. Finances were always tight and the relationship was rather tumultuous during most of its existence. Mr. F. and Ms. R. lived in [...] for a short period of time, then they moved to [...] in [...]

in January, 1998. By that time M. was almost two years old and the complainant was almost six years old and Ms. R. was pregnant with R..

[6] R. was born approximately six weeks after the family moved to [...]. They lived in an apartment in a two unit white house. Ms. R. wanted the complainant to attend [...] School in [...], Nova Scotia. As a result she was in elementary school in [...] only a few months. In order to accommodate this the complainant lived a good deal of the time with her maternal grandparents, who lived in the same district as the [...] School. There is some conflicting evidence as to how much time during the school year the complainant would have lived at her grandparent's home in [...] while Mr. F. and Ms. R. and R. lived in [...]. I am satisfied that this was a majority of the time. The evidence shows that the complainant took the school bus from her grandparents' residence. Moreover, both Mr. F. and Ms. R. worked at the time and they only had one vehicle. It is possible that Ms. R. could have driven the complainant to the [...] School on occasion, but I find that this would have been the exception rather than the rule.

[7] During July, 1999, the family moved to the community of [...], which is in the [...] School district. There they occupied what has been described as a yellow residence or apartment. By the time they moved there the

relationship between Mr. F. and Ms. R. was rocky indeed. They are in agreement that they separated and that Mr. F. moved out of that residence on August 23, 1999. For all intents and purposes their cohabitation relationship ended at that time except for a visit by Mr. F. over the 1999 Christmas holidays. I understand that visit was to see if there might be any hope for their relationship, but there was none. I am satisfied that Mr. F. only resided in the yellow house in [...] some three to four weeks. It is unclear how much time, if any, the complainant would have spent at her grandparents residence during that period of time.

[8] It appears that Mr. F. and the complainant had a good step-parent, step-child relationship during the time that Mr. F. resided with the family. When she was around he said he treated her as his daughter and she called him dad. In fact the complainant was led to believe that Mr. F. was her natural father and by all accounts she loved him. There was some evidence that the complainant was somewhat begrudging of the fact that Mr. F. spent more and more time with his son M. as M. grew older and less and less time with her, but that would be a normal reaction.

[9] Almost immediately after the separation of Mr. F. and Ms. R. the complainant was told that Mr. F. was not her natural father. She was within

a very few weeks introduced to Mr. H., who is her natural father. Mr. H. apparently was not interested in pursuing a relationship with the complainant and within a few weeks he was soon out of the picture as well.

[10] Ms. R. met and started dating her present husband in 2000. They began living together in 2001 and they were married in February of 2004. The complainant has regarded Mr. R. as her father and has been calling him "dad" for quite some time now. The R.'s have now legally adopted the complainant.

[11] Custody and access issues have been very chaotic between Ms. R. and Mr. F.. They have been the subject of court proceedings and numerous visits and interventions by the RCMP. These relate only to the children M. and R.. Mr. F. did not pursue access with the complainant because of child support issues and he only sought access with his two natural children. It appears that, at some stage in those proceedings, a court decided he was not in fact in *loco parentis* to the complainant.

[12] The evidence is clear and by all accounts the complainant was upset, even devastated, that Mr. F. was coming up to pick up M. and R. and not her. This was to the point where she was provided with counselling. There was a custody and access assessment performed some time after the separation

and the complainant still professed her affection for Mr. F. to the assessor. This evidence was led, I believe, for the Court to draw the inference that the complainant had opportunity to discuss any issues concerning Mr. F. prior to June of 2004.

[13] Mr. F. alleges that, since the marriage of Ms. R. to her present husband, she has made numerous phone calls and threats to his present home which he now shares with his fiancee and their new son. He says Ms. R. now claims that she and her new husband have a good relationship and are well off financially, such that they don't need Mr. F. and that they can well look after all three children, being the complainant, M. and R..

[14] Mr. F. and his fiancee both testified that such a telephone call was left on their answering service approximately one week before the present accusations surfaced and that the allegation is that Ms. R. said, among other things, that the RCMP would soon be on their door step. Although no tapes of conversations were made, I am satisfied that threatening calls have occurred between the parties in the past over child support and access issues. This, of itself, is not conclusive of anything. There was no evidence that the conversation of June 12, 2004, between the complainant and Ms. R., was motivated by the conflict between Ms. R. and Mr. F..

[15] The allegations which are contained in the five count indictment dated January 19, 2005, first arose on Saturday, June 12, 2004 at around 7:00 p.m. The complainant had told Ms. R. earlier in the day that she needed to talk, but the talk did not take place until the evening when Ms. R. thought the complainant seemed anxious. There is no evidence from anyone as to what was discussed between Ms. R. and the complainant except that Ms. R. said the complainant said something about a nightmare. Ms. R. says she became hysterical and she called to her husband. They then called an RCMP cousin of her husband and a lawyer whom Ms. R. had worked for in the past.

[16] There was testimony that Ms. R. took the complainant to the IWK Children Hospital for a complete physical examination, on June 14, 2004, apparently arranged through Family and Children Services; however, this date may have been stated in error. It appears the RCMP had been contacted within one half hour or so of the complainant saying something to her mother on the evening of June 12th. The complainant was interviewed by an RCMP officer and a social worker on June 14, 2004. The approximately one hour video of this interview was placed in evidence with the consent of the parties and is Exhibit 2. A fifty-five page transcript of that video was also

filed with the court and it is most helpful because the audio is not always easy to follow. The transcript is dated March 9, 2005.

[17] The evidence at trial consisted of Exhibit 1 - which is drawings by the complainant during the interview on June 14, 2004; Exhibit 2 - the video interview of the same date; Exhibit 3 - a two page document showing a form which gives a front and rear outline of what appears to be a young person's body and Exhibit 4 - a photograph of Mr. F. and the complainant taken on August 17, 1998. There were also four witnesses who testified: Ms. R., the complainant, Ms. S. and Mr. F..

[18] The law is clear that an accused person is presumed innocent until proven guilty in a court of law. This presumption of innocence continues right through and until the end of the trial and until displaced. The burden on the Crown to displace the presumption of innocence is proof beyond a reasonable doubt. Therefore, what the Crown alleges the Crown must prove beyond a reasonable doubt. As stated by the Crown, it is not proof to an absolute certainty and we all know that is rarely possible, but it is only proof beyond a reasonable doubt. As also pointed out by the Crown, a reasonable doubt is not merely a fanciful doubt but it must be based on reason and

common sense and it must be based on the evidence and the analysis of the evidence as a whole.

[19] The Court must assess the credibility of witnesses and in this case it must assess the credibility of a child or a young person, keeping in mind not to apply the rigorous standards one might apply to a reasonable adult person. The Court's have been sensitized in recent years to the need to be vigilant, not applying adult standards to the assessment of the testimony of a child. As also stated by the Crown, this does not lessen the burden of proof required of the Crown. What it requires is a sensitivity that children or young persons' testimony can be vague or lacking on certain details, times, etc., especially if the alleged events occurred a long time previously when the witness was very young. In the end, however, the Court must still be sure of the guilt of an accused person before it can find him or her guilty. If one cannot say that based on the evidence as a whole one is sure of the guilt of an accused, then there would exist a reasonable doubt and that doubt would have to be given to the accused.

[20] In this case the primary evidence of the Crown is that of the complainant as provided in the video statement and her direct and cross examination. On

the other hand, the primary evidence of the defence was the testimony of Mr. F. and the cross examination of the Crown witnesses.

[21] It is not unusual to have such a situation because there are rarely any witnesses to these kinds of allegations. The Court must also remind itself that the law has for quite some time now abolished the requirement for corroborative evidence in these kinds of situations. Therefore, one cannot base a reasonable doubt on the lack of corroboration or lack of corroborative evidence.

[22] In this case Mr. F. testified and the Court must also direct its mind to the three pronged test outlined in the case of **R. v. W.D.** The first aspect of this case that I should look at is the very nature of the allegations. It is the theory of the Crown and the evidence of the complainant that she was ravished sexually by Mr. F. every time the two were alone when Ms. R. had gone to work. These are repeated acts of vaginal intercourse and oral sex performed by Mr. F. and one act of anal intercourse. One must keep in mind that what might seem like every time to a child may not in fact be every time. Nevertheless, the theory of the Crown and the evidence of the complainant would lead one to conclude that the incidents were very extensive.

[23] It is alleged that these incidents occurred while Mr. F. and Ms. R. lived in the white house in [...] from January, 1998 to July, 1999 and in the yellow apartment in [...] for some three to four weeks. This is a very extensive period of time as well, some one and one-half years.

[24] With regard to the white house, this would be at a time when the son M. would be approximately two and one-half years old at the beginning and R. would be a baby and would presumably also be in the house at the time. I say this because Ms. R. testified that she took her full six months maternity leave after R. was born, and she was born shortly after they moved to the white house on [...]. Therefore, when Ms. R. was at work Mr. F. would also have the care of M., aged two and one-half to three and one-half and R., aged six months to eighteen months. It is somewhat difficult to imagine how this sexual abuse, particularly the extensive vaginal penetration could have gone on for so long in the circumstances without any one, including Ms. R., having seen any signs, either physical or emotional; however, strange things do happen and it is not impossible.

[25] Mr. F. testified that the complainant was prone to urinary infections during the period of time in question and that she received medical attention. The defendant is obviously asking the Court to draw the inference that if the

allegations were true someone would have seen signs of abuse. However, neither the Crown nor the defence provided the Court with any medical evidence, opinion or otherwise. It is therefore difficult to draw inferences from that evidence, but one must still apply common sense to the evidence.

[26] With regard to the description of places where the family lived, I do not find it unusual that the complainant could have described her surroundings. It is not as if she had been taken to a strange place. In my opinion, this evidence is capable of supporting inferences in favour of guilt, or inferences in favour of not guilty, on behalf of the accused. Therefore, a court cannot draw inferences unfavourable to an accused unless they are the only inferences open to the Court from that evidence and I find that they are not.

[27] The Court also considered the video to see if it is consistent within itself. Some inconsistencies have been pointed out, perhaps the most significant one pointed out is at page 36 of the transcript. The complainant states at line 14 and 15 that it only happened once at the yellow house and at page 47, lines 14 - 21, she states a number of times that it happened more at the yellow house than the white house. The evidence does show however that Mr. F. was only at the yellow house for a short period of time - three to four weeks at most, but at the white house for over a year. It is difficult to see

how this could be possible if the incidents occurred every time, or almost every time that Ms. R. went to work and Mr. F. did not go to work. There is no indication that the complainant is confused about the locations of the white house versus the yellow house. She seemed very clear on that point.

[28] The Crown points to Exhibit 1 and says the detail is striking, especially regarding positions on the bed and on the floor. I am fully aware that the testimony of young complainants has been found to be lacking in some instances because of a lack of detail, but the Supreme Court of Canada has clearly said that this may be quite normal for incidents which happen to young children, particularly a long time ago. However, in this case the fact that the complainant at the age of twelve seems to be able place she and Mr. F. in definite positions, in definite orientations to the bed, to the window, etc., some five to six years later, relating to a time when she was six or seven years old, raises a question and casts some suspicion on this evidence.

[29] The question in my mind is, is she relating incidents five or six years old or something more recent, and here I am referring specifically to the question of the dream, or the nightmare which was supposed to have been very scary. In fact, the complainant refers to being scared or scared of the complainant during some of the incidents. I am not clear as to where the scarey aspects

of the allegations come from. The complainant testified she told such a story to one friend at a "truth and dare game" during a sleep over and then to another friend over the telephone or at another sleep over. There is no indication that the complainant had any scary thoughts or feelings when she told those stories, nor some several weeks later when she told her mother of a scary nightmare - the scary dream, which is what prompted her to talk to her mother.

[30] As I said before, we have no evidence of what she related to her mother, but the evidence would lead one to infer that she wanted to talk about the nightmare or the dream because that is what she found scary. Likewise, that is what she first wanted to talk to the officer and the social worker about on June 14, 2004. She wanted to talk to them about the dream first. As I stated to the Crown in closing arguments, it was rather incredulous and disturbing to me that this aspect was totally ignored by the interviewers. In my view this should have been explored at the beginning of the interview to try to determine with clarity where the allegations were coming from.

[31] It is difficult to see where the scary assertions come from, as I said, except from the dream, especially when one considers that the complainant showed no fear or anxiety around Mr. F., either before or after the separation.

However, after the dream and in the video statement she described herself as being scared of Mr. F. and that he was an evil person. It appears that those feelings have come about since the scary nightmare of June 11, 2004.

[32] In this case Mr. F. testified and I must apply the test in **R. v. W.D.** Mr. F. vehemently denied all of the allegations and he provided some explanations. If I believe him, that is the end of the inquiry, I must acquit him. I can say that I do not necessarily believe Mr. F.. The aspects of his testimony regarding the alleged innocent prodding of his penis by the complainant on three occasions and his explanations about those incidents leave me suspect.

[33] Even if I do not believe him, however, I must still decide whether his testimony raises a reasonable doubt. I find that his testimony alone does not raise a reasonable doubt. I therefore have to go on to consider the evidence as a whole to see if the Crown has proven the guilt of Mr. F. beyond a reasonable doubt, including the testimony of Mr. F.. One has to keep in mind that Mr. F. does not have to prove anything.

[34] When I consider all of the evidence, particularly the factors and circumstances that I have outlined earlier, I am unable to say that I am sure of the guilt of Mr. F.. Those circumstances, the nightmare, what took place

before and after the separation, together with the testimony of Mr. F., lead me to have a reasonable doubt about the guilt of Mr. F.. I must, in law, give the benefit of that doubt to the accused. I must say that the admissions of Mr. F. regarding the few incidents of prodding while awakening, that I have referred to earlier, and his explanations, cause me to be suspect. But suspicion alone is not sufficient to amount to proof beyond a reasonable doubt. I want to make it clear that I am not saying that these things did not happen. They may have, but that is not enough to satisfy the burden on the Crown to prove Mr. F. guilty beyond a reasonable doubt.

[35] I find that I am left with a reasonable doubt which I must give to Mr. F.. Mr. F., I therefore find you not guilty of counts one to five on the indictment of January 19, 2005 and you are hereby discharged.

Allan P. Boudreau, J.