

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D.E. W.*, 2009 NSSC 171

Date: 20090406

Docket: CRH 306406

Registry: Halifax

Between:

Her Majesty The Queen

v.

D. E. W.

Restriction on publication: Section 486.4 C.C.C. (Sexual Assault)

Editorial Notice

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

Judge: The Honourable Justice M. Heather Robertson

Heard: April 6, 2009, in Halifax, Nova Scotia

Decision: April 6, 2009 (**Mistrial - Orally**)

Written Release: May 29, 2009

Counsel: Shauna MacDonald and Jan Murray, for the Crown
Anne L. Calder, for the defendant

Robertson, J. (Orally):

[1] This is the continuation of the matter of R. v. D. E. W., CRH No. 306406. Both Crown and Defence counsel have made a motion for a declaration of a mistrial. Now, I should make some preliminary comments. I am in receipt of correspondence from Mr. David Bright of the law firm of Boyne Clarke who has been engaged by the Crown to give advice in this matter and today Jan Murray from his office is appearing on his behalf.

[2] I received a call from Mr. Bright on Wednesday, April 1st indicating that he had been engaged by the Crown and that he and Crown counsel Ms. Shauna MacDonald and Defence counsel Ms. Calder wished to speak with me, meet with the Court, on Thursday, April 2nd and the time arranged for 1:00 p.m. We met. Mr. Bright subsequently followed up on that meeting by correspondence dated April 3, 2009 and I would like to place this in evidence as an Exhibit to this trial. Ms. Lyver, that correspondence will be the court's exhibit. (Exhibit #4 - will be part of the trial record.)

[3] As a result of this correspondence two issues were raised. The first being that because of certain electronic messages (e-mails) Ms. Calder sent to Crown counsel, Ms. MacDonald, there was a certain representation made with respect as to what the accused had said at a relevant time. However, there was a later contradiction in the direct testimony of the accused on the last day of trial. As a consequence of this, Ms. Calder has placed herself in the position of potentially being called as a witness to speak to that contradiction that raised a serious concern.

[4] Secondly, it became apparent during trial that Ms. Calder had had some difficulty opening and therefore viewing the video tape of the accused's statement to the major crime unit of the Halifax Police. Further, Crown counsel came to understand that Ms. Calder had not viewed two video statements made by two Crown witnesses, also made to the major crime unit before she had completed cross-examinations of these two Crown witnesses.

[5] So those are two serious issues that the Court now has to deal with. The first issue is one that could possibly have been dealt with or resolved by an adjournment and appointment of new Defence counsel. However, the second reason for this joint motion raises concerns that relate to the accused having the opportunity to

make a full answer and defence. This cannot be cured other than by the action of the Court in declaring a mistrial. I am declaring a mistrial. I understand that this is a joint submission made by Defence counsel and the Crown after recognition of these incurable errors. I am happy to hear from counsel now if there is anything more that needs to be added. We can speak briefly on a-go-forward basis of what the Court will now do to assist in ensuring that this trial commences in a very speedy manner.

MS. MACDONALD: Thank you, your Honour. Just with respect to legal aid counsel, I spoke personally with Ms. Margaret MacKenzie of Nova Scotia Legal Aid on Friday. She is the managing lawyer of the Halifax office of Legal Aid. She had already been alerted to the situation I believe because Mr. W. contacted somebody at their office. She assured me that a new certificate would be issued for conduct of this trial and uh, also indicated that um, that she would facilitate obtaining new counsel in any way that she could. ...

THE COURT: Yes ... Mr. W. do you have any, have you contact counsel, any particular counsel at this stage?

MR. W.: I have um, My Lady, um, I have contacted a couple and um, they apparently they don't, um, the ones I prefer, um, they don't take certificates, um.

THE COURT: Alright ... Ms. MacDonald are you confident that Legal Aid will address the issue quickly and there will be some communication with Mr. W.?

MS. MACDONALD: Legal Aid will be certainly prepared to issue ...

THE COURT: ... It would be important to bring the matter back to Crownside immediately, following the appointment of new counsel. The Court will facilitate the earliest trial dates possible.

Justice M. Heather Robertson