SUPREME COURT OF NOVA SCOTIA
Citation: R. v. D.C. M., 2009 NSSC 143

Date: 20090429
Docket: CR 295010
Registry: Halifax

Between:

Her Majesty the Queen

v.

D. C. M.

Editorial Notice

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

Restriction on publication: Section 486.4 Criminal Code of Canada

Judge: The Honourable Justice Glen G. McDougall

Heard: March 23, 24, 25, 26 and 27, 2009, in Halifax, Nova Scotia

Counsel: Catherine Cogswell, for the Crown
Brian Church, Q.C., for the Accused

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

2005, c. 32, s. 15, c. 43, s. 8.

By the Court:

[1] D. C. M. (henceforth "the accused") stands charged:

(1) that between the 1st day of January 2001 and the 31st day of December 2004 at, or near Halifax Regional Municipality, in the County of Halifax in the Province of Nova Scotia, did unlawfully assault E. G., contrary to Section 266(a) of the Criminal Code;

(2) AND FURTHER that he at the same time and place aforesaid, did unlawfully commit a sexual assault on E. G., contrary to Section 271(1)(a) of the Criminal Code.

[2] The accused initially elected trial by a court consisting of a Supreme Court judge and jury. A notice of re-election to Supreme Court judge alone, consented to by crown counsel, was filed with this Court on or about the 17th day of March, 2009.

[3] The accused was arraigned and entered "not guilty" pleas to both offences prior to the commencement of trial on the 23rd day of March, 2009.

[4] The trial ran until Friday, March 27, 2009. The crown called a total of three witnesses. In addition to the complainant the Court heard from Cst. Neville Greeley, a member of the * and Detective Constable James Bennett, a member of the Halifax Regional Police Service.

[5] The defence elected to call evidence. H. K., a relative of the accused testified as did the accused.

[6] The Court must be alert to the requirements commonly referred to as the "W.(D.)" instruction. This instruction originates from the decision of Cory, J. in **R.** v. **W.(D.)**, [1991] 1 S.C.R. 742. Although the instruction is intended for members of a jury, a Judge deciding a case on his or her own must also be guided by its message. It is in essence a credibility instruction. It is tailored to avoid resolving the case on an "either or basis" or on the basis that the complainant's version appears more credible than the accused's. This type of reasoning could lead to an unjust result.

[7] It is a fundamental requirement in our system of criminal justice that the crown must prove each and every element of any offence charged beyond a reasonable doubt.

Witness credibility is important in deciding what, if any, evidence to accept and what facts are proved or what inferences can be made based on that evidence. But, it does not end there. It is only after all the accepted evidence is considered can a court decide whether or not the charge or charges have been made out. If the Court is left with a reasonable doubt after considering all the evidence it must acquit.

REVIEW OF THE EVIDENCE

[8] I will not review in detail all the evidence of each of the witnesses that were called. I will, instead, focus on the more significant aspects of the evidence that assisted me in reaching my verdict. This is not to suggest that I have neglected to consider all of the evidence that was presented. I assure you I have considered it all.

[9] Actually there is a considerable amount of consistency in the evidence of the two principal witnesses. The complainant and the accused agree on where they were living at the time of the alleged incidents. They were co-habiting in a common law relationship and certainly there was opportunity for the alleged events to have taken place.

[10] Certain elements of the offences are not in dispute. Time and place as well as identity are not factually in issue. It is not a "who done it" case or a "mistaken belief in consent" type of case.

[11] The accused simply denies the complainant's allegations. Obviously witness credibility is key to deciding this case. It is not, however, the sole determining factor. Even if I have reservations in regards to the truthfulness of the accused's testimony I can only convict if I am satisfied, based on the entirety of the evidence that I do accept, that all essential elements of the offences have been proved beyond a reasonable doubt.

[12] The two charges laid against the accused result from four incidents that allegedly took place on three separate occasions in three different locations.

[13] There is an allegation of sexual assault and one of physical assault at the * Motel in * sometime between January and March of 2003.

[14] The second incident is alleged to have occurred sometime in June or July of 2003 at the * in *. The allegation is one of assault.

[15] The third incident involves an allegation of sexual assault sometime in June of 2004. This incident is alleged to have taken place in the apartment the couple rented at * in *.

[16] These alleged incidents were not reported until April 9, 2007. By then the complainant had already ended the relationship that she and the accused had had, and was involved in a custody and access dispute in *. It was suggested by the defence that this might have motivated the complainant to make the allegations in order to gain the upper hand in that matter. What is known is that an affidavit of the complainant filed in support of her position made reference to alleged physical and verbal abuse by the accused along with conduct which she characterized as being sexually demeaning.

[17] There had been a fourth incident of alleged physical assault against the complainant. This alleged incident although last in time was the first to be reported. The police were called and charges were laid. This alleged incident occurred about a month after the third incident previously mentioned when the couple were still residing at the * apartment. Before the matter went to trial the complainant recanted her allegations in a letter she wrote and sent to crown counsel. This letter is dated October 16, 2004 and was written when the complainant was living back home in *. The accused was living in Nova Scotia at the time but maintained contact with the complainant and their daughter who was born on the * day of October, 2003. The crown based on the letter chose not to proceed with the charge and it was either withdrawn or dismissed for lack of evidence.

[18] The complainant suggested she wrote the letter recanting her story at the request of and with the assistance of the accused. She claimed to have been afraid of the accused and concerned that he might disclose some sexually explicit photographs of her that the accused had taken while they were living together. The accused acknowledged having taken the photographs but he denied having possession of them.

[19] Regardless of what actually happened the complainant either did not tell the truth when she initially registered the complaint with the police or else she lied when she recanted her initial story. If the latter is the case, I am not persuaded she did it out of fear of what the accused might do to her. He was no longer living with her at the time. She was in * where she had the support of her family and friends.

[20] Furthermore, on those occasions when the accused visited the complainant in * he was permitted to stay with her and their daughter. A video recording taken shortly after the October 16, 2004 letter was written shows the accused sitting at a table retrieving messages from his phone message system. In the background can be heard the voice of the complainant saying: "There's daddy. Yummy. Umh, Umh." This does not give one the impression that the complainant was in fear of the accused. On the contrary, she appeared to be quite comfortable and relaxed in his presence. This video recording was made sometime in early January, 2005 which would have been only about six or seven months after the alleged sexual assault which she said took place in June of 2004.

[21] There is also the evidence of the various greeting cards and notes given to the accused by the complainant. The sentiment expressed and the sometimes sexual innuendo contained in these messages do not support the complainant's testimony at trial.

[22] I am also troubled by the complainant's denial that she ever physically struck the accused after they departed * in 2002. She was asked specifically whether she had ever struck the complainant while they were in * during April and May, 2003. She denied the suggestion when it was put to her by defence counsel on cross-examination.

[23] The evidence of H. K., a cousin of the accused, who was called as a defence witness painted a startlingly different picture. She witnessed an incident in which the complainant physically assaulted the accused by punching or hitting him on the arm. She then positioned herself in such a way that Ms. K. felt she was about to strike the accused on the back of his neck. At this point Ms. K. stood up in what she described as being a supportive stance and intervened verbally which caused the complainant to stop. This incident which was apparently prompted by a comment the accused had made regarding the complainant's relationship with her son from a previous relationship is one that you would expect the complainant should have remembered.

[24] I am further troubled by the lack of corroborating evidence at least to the physical assaults that the accused is alleged to have perpetrated against the complainant.

[25] The complainant testified that the accused often pulled her by her hair to the point that she felt her scalp would come off. She also testified that he would slap her

about the face and head. On one occasion, at the *, she said he could have hit her three or four times or possibly five or six times. She recalled that after one of these blows she heard her jaw crack. She said it was audible enough that the accused, too, had heard it.

[26] On another occasion at * in * she testified that the physical assault lasted all night and that the accused's knee had struck her stomach. At the time she was about six month's pregnant with the couple's daughter and she was concerned about the effects this might have on the unborn child. Yet, she did not seek medical attention to allay any concerns she might have had. She simply maintained her regular appointment schedule with her doctor during the pregnancy. She did not discuss or report this or any other similar incident to her doctor.

[27] When called upon to demonstrate the force of the blow she experienced at the hands of the accused, the complainant struck the ledge that forms part of the witness box in the courtroom with such force that I was concerned that she might have hurt her hand. If she did, she did not let on. Given this demonstration I am surprised that she never showed any visible signs of abuse such as bruising or abrasions after any of the alleged physical assaults. She testified that she never displayed any bruises or marks of any kind. She did not complain that her jaw was sore for a couple of weeks after the * incident. She never sought medical attention as a result of these alleged attacks.

[28] Crown counsel has referred to me the case of **R.** v. **D.D.**, [2000] 2 S.C.R. 275. The majority decision written by Major, J., at para. 65 states:

> 65 A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[29] In the case that is presently before me the complainant did not speak to a person in authority until April 9, 2007. This is more than four years after the initial alleged incident at the * in *. Indeed all three of the alleged incidents that are now before this

court had already occurred prior to the incident that was reported and later recanted. One is left to wonder why she did not report these earlier incidents at that same time.

[30] The case of **R.** v. **D.D.**, *supra*, does not say that the delay cannot be taken into consideration whatsoever. It "is simply one circumstance to consider in the factual mosaic of a particular case." It is not determinative of credibility but it can be considered in the analysis.

[31] It is also worthwhile noting the wording used in the affidavit filed on behalf of the complainant in her custody dispute with the accused. I am aware of the context in which such a document is used. The focus is on what is best for the child but it is, nonetheless, a contest between two competing factions. Oftentimes affidavits are structured to advance the positive attributes and characteristics of the affiant while pointing out the somewhat less admirable qualities of the other party. The complainant's affidavit indicated that the accused had been physically and verbally abusive towards her and had also been sexually demeaning. It does not use the word assault either in regard to any alleged physical or sexual misbehaviour on the part of the accused. Does sexually demeaning conduct equate to a sexual assault? Perhaps but perhaps not. As such it is another "circumstance to consider in the factual mosaic of [this] particular case." (See **R.** v. **D.D.**, *supra*, at para 65)

[32] The Court as part of the prosecution's case also heard from Cst. Neville Greeley of the *. Cst. Greeley testified that he was assigned responsibility to interview the complainant about these alleged incidents. As soon as he learned that the complaint involved events that had taken place in another Province he proposed to conduct an investigative interview with the intention of forwarding the information to the jurisdiction where the events were alleged to have occurred.

[33] In addition to conducting the interview Cst. Greeley checked computer records for any calls that might have been made by the complainant which did not result in a file being opened. There were a total of five calls logged during a period beginning on July 7, 2005 and ending on September 26, 2006. These calls were all made after the complainant and the accused's relationship had ended. There were none noted during the period that the relationship existed. Although the calls made post-separation could possibly be an indication of the fear that the complainant professed to have had of the accused could it not also be said that the absence of calls per-separation could possibly indicate her lack of fear of the accused?

[34] I should also comment on the accused's testimony. Crown counsel in her closing arguments described the accused as being "arrogant and pompous." She also described him as "long-winded" and "caught up in his web of lies" regarding his alleged involvement in the drafting of the letter in which the complainant recanted her first allegation of assault.

[35] I observed the accused while he was testifying. Certainly he displayed an air of confidence which at times appeared somewhat smug but he did not, in my opinion, appear arrogant and pompous.

[36] He admitted to having contact with the complainant in contravention of the no-contact provision of the recognizance. This was clearly wrong and he acknowledged his mistake. The court takes a dim view of this blatant disregard for a court order but the accused is not before this court for a breach of a condition of his release for a prior charge that was previously dealt with. I will simply say to the accused that court orders are meant to be obeyed. In future should he be subjected to any court order it would be wise for him to abide by its conditions or else risk the possibility of further court sanctions.

[37] These cases are always difficult to decide. I realize that it must have been extremely difficult for the complainant to relive portions of her life that if they happened the way she described them, they must have been very traumatic and upsetting for her.

[38] The evidence, however, must satisfy the criminal standard of proof beyond a reasonable doubt. Even if I had determined that the accused was lying I would still have to be satisfied on the totality of the other evidence that I do accept that he is guilty of the alleged offences beyond a reasonable doubt.

[39] For the reasons previously stated I have reservations concerning the complainant's credibility. I am not convinced beyond a reasonable doubt as to the accused's complicity in these alleged events.

[Court asks Mr. M. to stand]

[40] As a consequence and for the reasons stated, I find you, D. C. M. "not guilty" on both counts.

[41] At this point in time unless Mr. M. is under some other court order that I am not aware of, the conditions or terms of the undertaking and promise to appear that was issued to him on October 12, 2007 are vacated and he is free to go.

McDougall, J.