

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R v. R.B.J., 2010 NSSC 122

Date: 20100401

Docket: Pic No. 302963

Registry: Pictou

Between:

Her Majesty the Queen

v.

R.B.J.

Restriction on publication: Pursuant to Section 486(3) of the Criminal Code of Canada

Editorial Notice

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

Judge: The Honourable Justice N.M. Scaravelli

Heard: March 22, 23, 24, in Pictou, Nova Scotia

Counsel: Ingrid Brodie, counsel for the Crown
Jeffrey Hunt, for the Defence

By the Court:

[1] I confirm the publication ban in effect pursuant to Section 486(3) of the *Criminal Code*, which provides that the identity of the complainant or a witness, or any information that could disclose the identity of the complainant, not be published or broadcast in any manner. So for this reason, I intend to use initials when referring to the victim and the offender.

[2] The accused stands charged:

That between August 23rd, 2007 and August 29th, 2007, at or near *, Nova Scotia, he did commit a sexual assault on E.M.D. contrary to Section 271(1)(a) of the *Criminal Code*.

[3] Sexual assault is an assault as defined under Section 265(1)(a) of the *Criminal Code* committed in circumstances of a sexual nature, such that the integrity of the victim is violated.

[4] Sections 265(1)(a) reads:

A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

[5] The complainant is 46 years of age. She is 5'6" tall and weighs approximately 130 lbs. She alleges she was sexually assaulted on two occasions by the accused during an overnight visit to the home of the accused and his now estranged spouse. The accused denies all allegations of sexual conduct.

[6] The Crown case is based on the testimony of the complainant. The accused and his estranged spouse testified on behalf of the Defence.

[7] The complainant testified she first met the accused's spouse B.J. in 2002 through work as a * at a *. The accused and B.J. were not married at the time, but were living together and had a child. The complainant estimates visiting her home on three occasions between 2004 and 2006 when she left the area to attend university. One occasion involved a Halloween Party at the accused's home in 2005. There was a large crowd at the party where alcohol was consumed and music was played. The complainant stated the accused's son was upstairs in a bedroom. She stayed until after midnight and never saw the child. Another visit was to assist B.J. with * regarding her upcoming wedding to be held at their home.

[8] In the summer of 2007, the complainant was working a summer job in the area. She was residing at a friend's house. Her last day of work was to be August 31st. Prior to returning to university, the complainant testified she was invited to B.J.'s home for drinks and also to see pictures of their wedding. She stated the plan was for her to stay overnight because they were going to have drinks.

[9] Her evidence is that she drove her vehicle to B.J.'s residence around seven to 7:30 p.m. When she got there she went upstairs with B.J. and was shown the room she would occupy which was next to their bedroom. Their six year old son was upstairs in his room on the bed watching television. The complainant testified when she got there B.J. had been drinking wine. There was a bottle of wine outside on the deck. B.J. poured her a glass of red wine as they sat out on the deck talking. It took about an hour to consume her glass of wine. She was offered a second glass of wine. The wine bottle on the deck was empty. The complainant stated the accused took their glasses into the house and poured them each a glass of wine. The complainant stated she was not aware if the accused was drinking as he was inside the home most of the time.

[10] Later that evening the complainant and B.J. left the deck and went into the kitchen area of the home which opens onto the living room area where the accused was sitting on the couch. The complainant and B.J. sat at the kitchen computer while B.J. used the computer. They then moved to the living room. The complainant sat on the other end of the couch from where the accused was sitting. This couch was located on the back wall of the living room next to an open archway to the stairway leading upstairs as well as next to the entry to a sunroom and doorway leading to the street outside.

[11] While in the living room the accused poured the complainant another glass of wine. She stated she had a sip of the wine but did not drink all of it. The conversation revolved around * and *. After a while B.J. moved onto the staircase indicating she was going to bed. The complainant said B.J. was intoxicated and very tired.

[12] The complainant and the accused remained on the couch and continued talking for about 15 to 20 minutes about * matters. The accused began to talk about B.J. That she did not understand him and was not smart. The complainant responded that B.J. was different but that she liked her. The complainant testified that while she was

sitting on the couch, the accused came over and sat on top of her. He straddled and faced her with his knees on either side of her thighs. She stated he was sitting on the top part of her thighs very close to her. The accused started kissing her. He was grabbing her and reached into her shirt and pulled her right breast out of her bra. He put his mouth on her breast. The complainant was also wearing a knee-length skirt and underwear which she described as a G-string. She stated her natural reaction was to grab him by the throat with her left hand. She pushed and squeezed his throat attempting to get him off her. When she did this he was still sitting on top of her, but no longer kissing her. She told him to get off, that she did not want this and that B.J. was her friend. The complainant stated as the accused moved he shoved something into her vagina. She said it was painful and she shouted 'ouch'. She assumed he must have inserted fingers as he had nothing in his hand as he stood up. She estimated the time lapse of this assault to be less than five minutes.

[13] The complainant stated the accused walked around the other side of the coffee-table and paced back and forth eyeballing her. The complainant said she felt lightheaded and not in control of her legs when she got up off the couch. She decided to go upstairs where B.J. was and where she would feel safe. When asked in direct examination about whether she considered calling a cab, she responded that she did

not want to get into a cab with a stranger 'that is just the way I am'. She did not consider going to her vehicle as she does not drive when drinking.

[14] The complainant stated she went upstairs on her hands and knees as she was concerned she might fall. She went to the bedroom next to B.J. She laid down on top of the bed fully clothed and put a blanket over her. She fell asleep and at some point during the night woke up lying on her left side. Her knees were hanging over the side of the bed and the accused was performing oral sex on her. She could hear him making noises as he had his mouth on her genitals and her clitoris. She said she tried to move her legs but could not move so she tried to talk him out of the situation. The accused got up and laid behind her on his side putting his hands all over her body. The complainant said that she told the accused in a loud voice that he had to get out of her bed and that she repeated this.

[15] The accused stood up put his hand on the doorknob, looked at her and closed the door as he left. The complainant stated the next thing she remembers is waking up in the morning. While still unsteady she went downstairs, left the house and drove home. On the way out, she noticed her glass of wine in the living room was still full. When she got home, the complainant laid down on the couch. She went to the

bathroom, got sick, went back to the couch and fell asleep. She stated she called her male friend upon waking and told him what happened. She called work and advised she was not feeling good and would not be in for a while. She went to work later that afternoon. After work she called her doctor's office and made an appointment for the next day. At the doctor's office she asked to be checked for infection or disease. She was also concerned there may have been a drug in her body.

[16] The complainant stated she did not go to the police following the incident. She thought about it and discussed it with people. She thought about telling B.J. but felt she would not believe her. She was concerned that the accused's word would be accepted over hers because of his position in the community. She was due to commence her university term in a few days and left the area.

[17] The complainant stated she had no further contact with B.J. A few days after her return to university she received an e-mail from the accused's e-mail address which stated as follows: "Hey...if you use this e-mail address, e-mail me back. I wanna talk. I hope youre not upset."

[18] The complainant felt the e-mail was from the accused regarding the incident. She did not respond to the e-mail. She gave the e-mail to the police about a year later.

[19] Under cross-examination, the complainant could not recall meeting B.J., and the accused at a grocery store a week or so before and discussing a possible visit. On the date in question, she believes she went to their home from her residence after work which is a 5 to 10 minute drive. She did not bring any night clothes, change of clothes or toothbrush. She had her *medication with her that she takes in the evening, but not her * medication that is taken in the mornings. In response to the suggestion that she and B.J. each had their own bottle of wine on the deck, she replied that she did not remember that. She stated she was not sure if their conversation on the deck included her summer employment. She could not recall if B.J. said something insensitive to her regarding her place of employment. She could not recall if B.J. offered to call her a cab more than once throughout the evening. She stated the accused was in the kitchen when she went upstairs. The complainant stated she did not think she made the best decisions following the incident downstairs by not calling out to B.J. at the time or going to her upstairs. She acknowledged that she also could have left the house through the nearby door when the accused was in the kitchen or used the phone in the living room.

[20] When she got upstairs she did not attempt to close the bedroom door. She believed her bedroom door was open when the accused was assaulting her upstairs. The bedrooms were close together on the upstairs landing. It did not cross her mind to call out to B.J. from the bedroom, but she talked to the accused in a loud voice.

[21] The complainant acknowledged she would have been wearing her underwear during the two assaults. She stated her G-string does not necessarily cover her vagina.

[22] The complainant acknowledged her decision to file a complaint with the police some eight to ten months following the alleged assault was based partly on reading comments in a newspaper blog regarding misconduct by the accused with a * on the Internet. She felt she had to come forward so it would not happen to more people.

[23] The complainant was examined on prior inconsistent statements. At the preliminary hearing the complainant stated she was not certain whether B.J. was drinking when she arrived at her home. At trial she maintained B.J. was drinking upon arrival. Asked why she did not call a cab on cross-examination, she stated she was not in control of her body so she did not want to get into a cab. When asked the

same question at preliminary hearing she stated her reason as feeling unsafe being in a cab with someone she didn't know. At trial she stated that she tried to get out of bed upstairs when the accused was with her, but could not move. In a prior police statement, she stated that she did move while on the bed. At trial, the complainant felt she did not explain to police in the right words.

[24] B.J. testified she currently resides in the matrimonial home. She and the accused separated in August 2009. B.J. was aware the complainant had been away to University in 2007. That summer they met at a grocery store. The complainant was working in a summer job in the area and suggested they get together. After several telephone calls and voice mails from the complainant, B.J. called and invited her to come over for a glass of wine.

[25] When the complainant arrived they went into the kitchen where B.J. opened two bottles of wine. One a Merlot which she prefers and *. The other a bottle of Ernest and Gallo Rose' she obtained from the fridge for the complainant. The two of them went out onto the deck where they consumed some wine. Each person poured their own wine. She estimates they may have consumed three or four glasses of wine each

that evening. There was about one to one and one half inches of wine left in each bottle.

[26] While on the deck, they had a general conversation about life, school, and work. The complainant was concerned about funding for University. While speaking about her summer job the complainant made a reference to a camp where some women employees and former clients partied and had sex all night. The complainant asked B.J. if she was into that and B.J. replied that she was not. B.J. stated she expressed strong feelings about whether this behaviour was appropriate. She stated the complainant was agitated and defensive about her summer employer.

[27] At one point during the evening they went inside and around the house looking at pictures and returned to the deck. After finally entering the house later in the evening, they went to the accused's computer on the kitchen table. B.J. went online checking on bursaries for university on behalf of the complainant. She also checked her email and emailed her cousin. B.J. assumed the complainant provided her with her email address as it was written on a piece of paper.

[28] At this time the accused was sitting on the end of the couch in the living room which is open to the kitchen. B.J. and the complainant moved to the living room. B.J. sat on an armchair. The complainant sat on the other end of the couch from where the accused was sitting. They continued to talk about student loans and jobs.

[29] Throughout the evening B.J. stated she offered to call a cab for the complainant as she had been drinking. When asked on the deck the complainant refused, stating she did not take cabs as a cab driver would rape her. When the offer was repeated in the living room, she refused stating she was concerned about physical assault. B.J. then indicated she was going to bed and invited the complainant to stay over in their spare room. The complainant accepted and B.J. went up stairs to open the futon in the spare room and to make the bed. B.J. said while upstairs she could hear the complainant and the accused talking.

[30] B.J. testified that while she was in the bathroom taking off her makeup, the complainant entered through the open doorway. B. J. showed her the spare room. The complainant went into the room. B.J. finished taking off her makeup and went to bed. She recalls waking up when the accused came to bed.

[31] In the morning the complainant was gone. The bed was made. The complainant had left without saying goodbye. B. J. thought this might be related to the previous evenings talk about the camp party. A few days later she sent the email to the complainant from the accused's computer. She was concerned the complainant might think she was judging her. The complainant did not respond to the email. B.J. stated she uses the accused's email account all time including the evening she and the complainant were using the computer.

[32] B.J. identified photographs of their house. The upstairs is a small area consisting of a small landing, bathroom and three bedrooms all in close proximity. She testified regarding the accused's physical condition and limitations. She described him as having a fused spine starting from the neck down which limits his range of motion. He would suffer pain from a jolt. B.J. gave graphic evidence of their sex life which she described as mechanical, requiring planned positioning, including oral sex.

[33] Under cross-examination B.J. stated that when they sleep their bedroom door and their son's bedroom door are always open. She acknowledged she had her own email account. She had difficulty remembering her password. Referring to the email

sent to the complainant from the accused's email address, B.J. acknowledged the email did not contain a greeting or a signature. She stated she used his email so much that she did not sign her name. That the complainant saw her using the accused's email when she was with her at the computer in the kitchen that evening. When asked how the complainant would know the email was from her, B. J. responded it would be obvious from their prior conversation. She felt she may have slighted the complainant. That she thought about it for a couple of days before sending the email.

[34] B.J. stated she was not offended by the complainant's remarks about the sexual activity with women at the camp. She stated the complainant told her previous stories about her sexual encounters. She had no way of knowing whether the camp story was true or not. B.J. denied discussing her sexual relationship with the accused.

[35] B.J. acknowledged she and the accused had conversations about what happened that evening. That she would accept what he said happened where she was not present. She agreed that it was possible some of the information came from things stated by the accused, however, if he mentioned something she could not recall she would say so.

[36] The accused testified. He is 5'6" tall and weighs 135lbs. He estimated his weight in 2007 was 125lbs. He is separated from his wife B.J. They are planning a divorce. He stated B.J. has a new partner. They just returned from a vacation together.

[37] The accused has a prior conviction for sexual exploitation. He received a sentence of four months' incarceration and a period of probation.

[38] He testified that he and B.J. met the complainant in a grocery store in the summer of 2007. The complainant and B.J. talked for a while. Sometime later the complainant was invited to their home for a drink. When she arrived the accused and their son were sitting in the living room. The complainant and B.J. came into the kitchen, took two bottles of wine to the counter, opened both bottles and took them outside onto the deck with two wine glasses. The accused remained inside in the home with their son. He could not hear what they were talking about out on the deck. He did not get either of them wine or food that evening. At one point in time they came into the house and walked around looking at pictures and then went back out onto the deck.

[39] They came into the house around 10:30 p.m. Both were carrying wine glasses. At that time the accused states he opened his third beer of the evening. The complainant and B.J. were by the computer. He stated his gmail account was always open as he was the primary user of the computer. B.J. used his account out of convenience.

[40] During a conversation in the living room, B.J. asked the complainant if she were sure she did not want her to get a cab. B.J. then told the complainant she was welcome to stay overnight. B.J. then went upstairs to ready the room. The accused described the upstairs spare room as being 8' x 10' in size. When the futon opened up there was very little walking space. He could hear B.J. open the futon from downstairs. He then heard water running and assumed she was in the bathroom. The complainant then walked upstairs. The accused stated he could hear them talking and B.J. telling the complainant where her room was. The accused finished his beer, finished watching T.V. and went to bed.

[41] He stated they always left their bedroom doors open as their son will often get out of bed and come into their room during the night.

[42] The next morning the complainant was gone. The accused recalled she had to work the next day. It was a day or two later that B.J. told him about the conversation regarding the camp party.

[43] The accused denied the allegations of sexual assault made by the complainant.

[44] He described his physical condition as “poker spine.” His spinal column and vertebrae are fused as are his hips. His hands are also deformed to an extent. His most effected area is his neck. He has no side to side head movement and restricted up and down movement. Trauma causes inflammation and pain. He began a renewed course of treatment in 2009 with beneficial results. He is now more flexible.

[45] The accused stated he could not preform the acts disclosed by the complainant without causing himself extreme physical pain.

[46] Under cross-examination he was asked to demonstrate his range of movement. He acknowledged it was possible their son would have been watching T.V. on the bed upstairs that evening. He also acknowledged that he and B.J. discussed in detail the

events of that evening after he had been charged some months later. He was initially not aware of the specific allegations.

[47] The accused did not think that either B.J. or the complainant was overly intoxicated that evening. Both had wine in their glasses when they came in from the deck. He could only recall B.J. offering to call a cab on one occasion.

[48] The Crown suggested that if the complainant did squeeze his neck that evening, he could have taken pain medication and went to bed and no one would notice in the morning. The accused agreed this was possible depending on the force used. He also agreed that it would be possible to bend from the waist down to the futon in the bedroom but that he could not manage oral sex in the position the complainant described.

[49] He acknowledged he could probably physically be able to cup and kiss the complainant's breasts while sitting back on her knees as long as he was not up against her.

[50] Medical evidence in the form of written reports was introduced by way of agreement by the Crown and Defence. In response to predetermined questions, Dr. Mosher, Rheumatologist, and the accused's treating physician described his diagnosis as ankylosing spondylitis. He has permanent fusion of the cervical spine which led him to have no movement in his cervical spine at all. She described his condition as a painful arthritis.

[51] She states:

This means that he was unable to look up, down, sideways or bend laterally. This fusion is due to the solid block of bone between his second vertebrae and fifth vertebrae. This is permanent and does not change with time. His lower back was restricted in movement only moving 2.5 centimetres when normal would be movement greater than 5 centimetres.

[52] Dr. Mosher was unable to provide an opinion on the effect of the accused having been grabbed by the throat except to say he would be at an increased risk of fracture and that pain was subjective to the person.

[53] The Crown called the complainant to give rebuttal evidence. She was asked if there was any conversation that evening regarding her place of summer employment.

Her response was that there was no discussion. The complainant denied having any discussion regarding female group sex with B.J. or her views on the subject.

[54] Under cross examination the complainant acknowledged that B.J. knew where she worked during the summer. In response to the question of whether the subject of her work was discussed that evening her response was that she did not remember discussing work. She stated that she did recall prior conversations regarding sex but it was limited to B.J.'s interest in sex and her relationship with the accused. She could not recall any further conversation regarding the topic. She acknowledged she socialized with staff at staff parties.

[55] The Crown's position can be summarized as follows:

- The complainant as a credible witness.
- There was a plan for the complainant to stay overnight.
- That despite the accused's medical condition, while in the living room he could have moved back on the complainant's knees and bent down to place his mouth on her breast.
- That the complainant was not at full strength under suspicious circumstances and even if she injured the accused he could have taken medication that night and recovered by the next morning.

- That following the assault in the living room the complainant was in crisis and simply made a bad decision by going upstairs to bed instead of seeking help, fleeing or calling a cab.

- That the complainant only talked to the accused loudly upstairs in the bedroom as she was unable to move when being assaulted on the bed.

- That the email was sent by the accused and not by his spouse B.J.

- That having discussed the events with the accused, B.J. innocently constructed their version of the events but that she is not telling the truth about sending the email to the complainant.

[56] The position of the Defence can be summarized as follows:

- The accused did not commit the offence of sexual assault.
- The complainant was not initially invited to stay overnight.
- The accused was not physically capable of committing the assaults as described by the complainant.

- It was reasonable for the accused and his spouse B.J. to discuss the events of the evening as they were both there.

- B.J. has no motive to collaborate at trial with the accused as an estranged wife who was betrayed by the sexual misconduct prior to their separation.

- Events described by the complainant were not tenable. She was not consistent in her testimony and had made prior inconsistent statements affecting her credibility.

[57] In the case before the court there is presumption of innocence in favor of the accused. As a result, the burden is on the Crown to prove the charge beyond a reasonable doubt. The burden does not shift to the accused.

[58] As stated earlier, the Crown's case is based on the testimony of the complainant. Section 274 of the *Code* specifically provides that no corroboration is required for a conviction of the offence of sexual assault.

[59] Certainly, the acts alleged to have been committed by the accused, if proven, beyond a reasonable doubt would constitute sexual assault.

[60] Credibility is an issue in this trial. Proof beyond a reasonable doubt in the context of the credibility of conflicting testimony has led to the so called W.D. (R v. W.(D.) [1991] 1 S.C.R. 142) test where the Supreme Court of Canada instructed the trial court that it must acquit an accused in three situations. First, if the trial judge believes the accused. Second, if the trial judge is left with a reasonable doubt based on the evidence of the accused and third, even if the evidence of the accused is not believed but there is a reasonable doubt as to guilt based on all the evidence. In

addition to the above, where the trial judge does not know whom to believe, there must be a reasonable doubt resulting in acquittal. (R v. J.H.S. [2008] S.C.C. 30)

[61] I do not find the complainant's evidence to be as clear and consistent throughout as submitted by the Crown. She was not as clear and precise on cross-examination where she often stated she could not recall or was not sure. In her direct evidence she testified that she and B.J. shared one bottle of wine. On cross-examination when asked if there were actually two bottles of wine she stated that she did not remember. When giving her evidence on re-direct, she stated there was no discussion about her place of employment that evening. Moreover, there was no talk of inappropriate social activities at work. However, on cross-examination she was not sure if the conversation on the deck included her place of employment nor could she recall if insensitive remarks were made regarding her employer. She also stated in cross-examination, she could not recall B.J. asking her on more than one occasion if she wanted a cab.

[62] Moreover, as indicated earlier, there was evidence of prior inconsistent statements.

[63] There are aspects of the complainant's evidence that I find implausible. She attributes her inability to respond to the assaults as one would expect under the circumstances, to the fact that she had no control over her legs and that she could not move her body. That she was still unsteady the next morning having only consumed two glasses of wine. The complainant's evidence is that she subsequently asked to be tested by her doctor for the presence of a drug in her body. The suggestion is that she unwillingly consumed a drug while at the accused's home which disabled her. There is insufficient evidence to support any finding of this nature. There is no evidence of having consumed a drug. According to the complainant she was alert and strong enough to use her training and grab the accused around the neck in an attempt to prevent further assault by the accused on the couch. She went upstairs and entered her bedroom unaided. She was alert enough to talk herself out of the situation in the upstairs bedroom yet, according to her, immediately passed out when the accused left the room.

[64] Similarly, the complainant's evidence of a pre-planned overnight visit is questionable. The complainant and B.J., although friendly, were not close friends. They only saw one another on one occasion over the previous year without any other communication. The complainant's residence was only a five to ten minute drive

away. The complainant was scheduled to work the next morning. The complainant did not take any articles of toiletry or clothing for an overnight visit. Moreover, she did not deny being offered a cab by the B.J. during the evening.

[65] The evidence of the accused's physical condition and limitations in terms of range of motion were not challenged by the Crown. The Crown submits that despite the accused's disability, he was capable, as he admitted, of sliding back on the complainant's legs toward her knees and placing his mouth on her breast. That, however, is not the evidence before the Court. The complainant's evidence was that the accused straddled the top part of her thighs very close to her when the assault occurred. I find at the time of the alleged offence the accused had a form of painful arthritis with severe restrictions in the range of movement of his neck and head.

[66] I am not entirely persuaded by the Crown's position that B.J. innocently constructed the events as described by her and the accused, but had lied about the e-mail. Clearly, B.J. would not have been present at the times of the alleged assaults. I do have doubts about whether she actually sent the e-mail. On the other hand her motive to want to believe and support her husband as submitted by the Crown is also

questionable given his prior conviction for a sexual offence and subsequent separation.

[67] I am unable to make a determination regarding the credibility of the accused. He denied outright that the events occurred. He was present in the courtroom when B.J. gave her evidence. His evidence essentially mirrored her evidence. I am satisfied, however, the accused did not attempt to exaggerate his physical limitations when testifying.

[68] In this case, there are serious contradictions in the evidence adduced by the complainant and on behalf of the accused. It is not the function of this Court to choose between the two versions of the events presented by the Crown and the accused. Even if I were suspicious that something likely occurred between the complainant and the accused on the evening in question, it is not the function of the Court to solve the case.

[69] After considering all of the evidence, the Court must decide whether the Crown has proven the charge beyond a reasonable doubt.

[70] In this case, and for the reasons I have given, based on all of the evidence, I find there is a reasonable doubt as to the guilt of the accused.

[71] I find the accused not guilty.

J.