SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Francis, 2011 NSSC 140

Date: 20110407
Docket: SYDJC302487
Registry: Sydney

Between:

Her Majesty the Queen

v.

Charles Ryan Francis, Tyler Joseph Francis
and Norman Sylliboy

Respondents

DECISION

Editorial Notice

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

Judge:	The Honourable Justice Frank C. Edwards
Heard:	March 21, 22, 25, 30 and April 1, 4, and 5, 2011 in Sydney, Nova Scotia
Written Release of Oral Decision	April 2011
Counsel:	John MacDonald, Crown Counsel Tony Mozvik, Defence Counsel Douglas MacKinlay, Defence Counsel

By the Court, Orally:

[1] The accused are charged that they:

> On or about the 25th day of August, 2007, at or near *, Eskasoni, did commit a sexual assault on S.P. contrary to Section 271 of the Criminal Code.

[2] On April 1st I found the accused Charles Ryan Francis not guilty. I put the matter over until today for submissions regarding the two remaining accused. Before I deal with the decision on that matter I just want to put on the record my disposition of a preliminary matter which arose during the trial.

[3] I first had to determine the appropriate course of action following the unfortunate admission of certain evidence contrary to s.276 of the *Criminal Code*. The options when that happened were:

> (a) declare a mistrial or
>
> (b) permit the Defence to make a late application
>
> pursuant to s.276.1 of the ***Criminal Code***.

Background: The problem arose during the evidence of A.P., a Crown witness. In direct testimony, Mr. P. gave evidence regarding the transportation of the Complainant on the night in question. In cross, Mr. P. (who was not charged) testified that he had had consensual sex with the Complainant that same night.

[4] In redirect, the Crown made an application pursuant to s.9 (2) of the ***Canada Evidence Act***, to cross examine Mr. P. on his police statement. In his statement, Mr. P. had made no mention of the sexual encounter with the Complainant. In fact, he admitted that he lied in his statement. Mr. P. said he dropped S.P. off at Charles Francis' trailer and saw her again, only once, when "she was coming out from the trailer." I permitted the cross examination by the Crown. The Crown made no mention of the breach of s. 276. At the time that breach apparently occurred to no one (including myself).

[5] The three accused testified in the following order, first Tyler Francis; second Charles Francis; and third Norman J. Sylliboy. Each gave evidence about having witnessed the alleged sexual encounter between A. P. and the Complainant.

[6] During cross examination the Crown asked Charles Francis whether he had had a previous relationship with the Complainant and Charles Francis replied that he had had intercourse with her before. In redirect, he elaborated on that. I ruled that that evidence contravened s.276 of the *Criminal Code* and that I would disregard it, (and further that that evidence was banned from publication).

[7] It was not until the third accused, Norman Sylliboy, testified that I put it to counsel that the evidence of A. P. also contravened s.276. At this point I invited counsel to make submissions on what could or should be done.

The Law:

[8] The governing law is set out in sections. 276, 276.1, 276.2, 276.3 of the ***Criminal Code*** as follows:

> 276.(1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the Complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the Complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the Complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full Answer and Defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case.

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the Complainant's personal dignity and right of privacy;

(g) the right of the Complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant 1980-81-82-83, c.125, s.19; R.S.C. 1985, c.19 (3rd Supp.), s.12; c.27 (1st Supp.), s.203; 1992, c.38, s.2; 2002, c.13, s.13.

Section 276.1 reads:

276.1 **Application for hearing** - Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) **Form and content of application** - An application referred to in subsection (1) must be made in writing and set out

a) detailed particulars of the evidence that the accused seeks to adduce, and
b) the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) **Jury and ublic excluded** - The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) **Judge may decide to hold hearing** - Where the judge, provincial court judge or justice is satisfied

a) that the application was made in accordance with subsection (2).

b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and

c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

Section 276.2 (1) reads:

276.2(1) **Jury and public excluded** - At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

2) **Complainant not compellable** - The complainant is not a compellable witness at the hearing.

3) **Judge's determination and reasons** - At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination; and

a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and

c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

4) **Record of reasons** - The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

Section 276.3 (1) reads:

> **Publication prohibited** - No person shall publish in any document, broadcast or transmit in any way, any of the following:
>
> a) the contents of an application made under section 276.1:
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> b) any evidence taken, the information given and the representations made in an application under section 276.1 or at a hearing under section 276.2
>
> c) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and
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> d) the termination made and the reasons provided under section 276.2 unless
>
> i) that determination is that evidence is admissible, or
>
> ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.
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> 2) **Offence** - Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Decision:

[9] I have now had the opportunity to hear from counsel. Crown counsel agreed that a mistrial would not be necessary. The Crown also agreed that the failure of the Defence to make a timely application pursuant to s.276.1 could be cured and that the Crown waived its right to written notice.

[10] Following the submissions of counsel, I have ruled that the A. P. evidence of an alleged sexual encounter with S.P. is admissible. There had been some evidence that the encounter had been videotaped and that the Complainant had

been very upset by that. I ruled that the evidence was relevant to the ability of the accused to argue that the incident provided the Complainant with a possible motive to fabricate her evidence. In making this decision , I considered the provisions of s.276(3) (a to h) and in particular, s.276(3)(a) - the right of the accused to make full answer and Defence.

[11] But it was a hollow victory for the Defence. By this time, I had heard all of the evidence (both Crown and Defence). I immediately advised counsel that I did not believe A. P.. I did not believe that he had had sex with the Complainant on the night in question. In my view, A. P.'s evidence was worthless in the context of the inconsistency between what that he had told the police in his statement and what he said on the witness stand. It followed that I therefore did not believe the corresponding evidence of each of the Accused that each had witnessed the sexual encounter between S.P. and A. P.. I indicated further that I did not believe the evidence of either C.D. or J.D. to the effect that each had seen the video of the S.P. and A. P. encounter.

[12] I advised counsel that my findings essentially left us with the application of the ***W.D***. case to the balance of the evidence which I will now consider.

[13] First of all I will outline the allegation which was made by the Complainant.

The Allegation: The Complainant, S.P. is 26 years old, (June *, 1984). She says that she started drinking at L.M.'s residence at approximately nine o'clock p.m. on August 24th, 2007. Between three and four a.m. on August 25th, S.P. left L.M.'s and went to D.T.'s, a two minute walk. She believes she had consumed four "revs" (which I understand are caffeinated vodka coolers) and 8 to 12 beer. Not long after she arrived at D.T.'s, she says that she made arrangements online for a drive home. (As I will note later, there is a dispute about who made the transport arrangements and for what purpose).

[14] A. P., (A.), and the Accused, Tyler Francis (Tyler) arrived shortly thereafter to give her a drive. They drove her to * where they let her off while they went to a bootlegger. S.P. then went inside a travel trailer owned by the Accused Charles Francis (Charles). Charles was in the trailer when S.P. arrived. S.P. denies that she had consensual intercourse with Charles at that time, or at any time that morning. She says that she and Charles talked though she cannot recall what they talked about. When A. and Tyler returned from the bootleggers, they gave her more beer. - she was unable to recall how much more she drank. She says she was drunk and in no condition to walk the two and a half miles to her own house. In fact she says she was so drunk that she could not sit up right without the support of a pillow.

[15] S.P. says that sometime later she fell asleep fully clothed on the double bed in the trailer. She remembers that when she woke up, she was naked. She says that the Accused, Norman J. Sylliboy (Norman), had his penis in her vagina. She says she told Norman "no" and to stop. At this time, she says "Tyler grabbed my

hair and stuck his penis in my mouth." S.P. says she gave up and stopped fighting. She says that Charles was videotaping Norman and Tyler having sex with her. She says that Charles told her he was going to put it on U-Tube.

[16] According to S.P. she again blacked out. At approximately four p.m. (Approximately 12 hours after the alleged sexual assault) S.P. said she was awakened by Brandon Francis, brother of the Accused Tyler and Charles. She says that Brandon drover her home in Charles' truck. Charles was also in the truck at the time but she had no conversation with him.

[17] When she got home, she says she showered in order to get rid of the smell of cologne. She says she didn't know what to do - she says that she told A.T. (A.) what had happened (either later that day or the next day) [A. says that S.P. told her that she was not really sure what had happened].

[18] S.P. went to the doctor a few days later. She said she was concerned about possible pregnancy and S.T.D. She did not show the doctor the bruises she claimed she got inside her thighs during the encounter in question.

[19] Inevitably rumors began t circulate in the community. S.P. says Norman phoned her before she went to the doctor to tell her she had not been raped. She says she hung up on him after that.

[20] About two weeks later, S.P. says she was visited by Cst. Gaetan Stevens. S.P. says she did not want to tell Cst. Stevens anything because she is the Accused Charles Francis' common law wife.

[21] Finally, in November, she says Tyler confronted her at a party. He yelled at her and said she had ruined his life - S.P. says that's why she went to the police. "If they had left it alone, they wouldn't be here."

The Defence Evidence: Tyler Francis was the first Accused to testify. He denied having any sexual contact with S.P. He says that he did witness S.P. having intercourse "doggie style" with Charles while at the same time having oral sex with Norman. Tyler says that he recorded this encounter on A. P.'s phone and that S.P. was upset with him for doing that.

[22] Charles Francis was the second Accused to testify. Charles described how he and S.P. were exchanging text messages on the morning in question. He says that she agreed to come to his trailer if he would arrange a ride. Charles arranged for Tyler and A. P. to pick S.P. up at D.T.'s. when she arrived at the trailer, Charles says he had consensual sex with her (both oral sex and intercourse).

[23] Strictly speaking, this alleged consensual sex between S.P. and Charles is also subject to s.276. It is not sexual activity that forms the subject-matter of the charge. I ruled it was admissible (the Crown did not object) subject to consideration of the fact that S.P. had not been questioned on it and her evidence

about merely have conversation with Charles upon arrival at the trailer, would be contra that of Charles.

[24] There is also contradictory evidence about why S.P. went to Charles' trailer. I consider that there is a reasonable prospect that the evidence would assist in arriving at a just determination in the case and therefore, I allowed it to go in. I will elaborate on that later.

[25] Charles says that later he and Norman and S.P. were in the trailer. As described by Tyler, Charles claims to have had intercourse "doggie style" with S.P. while at the same time Norman had oral sex with her. Charles says S.P. consented to this encounter.

[26] Norman Sylliboy was the last Accused to testify. He confirmed the evidence of Tyler and Charles regarding the "doggie style" and oral sex encounter.

Analysis: The Complainant's evidence is problematic. I have no doubt that she was drunk. I am unable to determine with any certainty whether she was so drunk that she could not consent to the sexual activity in question. There is conflicting evidence from a number of witnesses about S.P.'s condition. Her friend, A.T., for example, says, "she wasn't that drunk. I was drinking so I am not really sure."

[27] A.T. was not at the trailer later that morning. She therefore cannot say how much more liquor S.P. consumed and what effect it had on her. T.J. S., who has

known all three Accused, “all my life” saw her at the trailer. He says that S.P. was sober.

[28] Then there is the Complainant’s evidence about why she went to Charles’ trailer. Contrary to what she says, I am satisfied that she went there to meet with Charles. I am inclined to believe Charles, and not her, on this point. I am also inclined to believe Charles when he says that he and S.P. had consensual sex shortly after she arrived at the trailer. But what happened later, which of course is most germane to the charge respecting Norman and Tyler, is something I cannot determine with any certainty. Indeed, S.P. told her friend A. that she is not really sure what happened. I believe that that is probably correct. It is impossible for me to say whether or not Tyler and Norman are being truthful about their involvement. Their evidence does however raise a reasonable doubt in my mind.

[29] I have already found Charles Francis not guilty. He was not charged with having non-consensual sex with S.P. - he was charged with aiding and abetting (and thus, as a party to the offence allegedly committed by Norman and Tyler) by videotaping the evidence and threatening to put it on the internet. In the particular circumstances of this case, I was not satisfied beyond a reasonable doubt that Charles’ actions in videotaping and threatening to put the matter on the internet constituted aiding and abetting. I have no criticism of the Crown in proceeding with the charge against Charles. If I were to find Norman and Tyler guilty, it would be a close call on Charles, but I still would have found him not guilty.

[30] Before I conclude I want to stress that the Accused should not go back to their community and say that they, and not S.P., were believed by the court. That would be incorrect and would misrepresent what this trial was about. The Crown has to prove its case beyond a reasonable doubt - when, as here, I am left unable to determine exactly what happened, I must resolve that doubt in favour of the Accused and find them not guilty.

[31] Tyler Francis and Norman Sylliboy please stand up. On the charge in the Indictment I find each of you not guilty and you are discharged from court.

J.

Sydney, Nova Scotia