

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. McLellan, 2011 NSSC 118

Date: 20010314

Docket: SYDJC335121

Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

v.

Waylon McLellan

Defendant

Editorial Notice

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

Restriction on publication: Sexual Assault on a 15 yr. old

Judge: The Honourable Justice Frank C. Edwards

Heard: March 8th, March 9th, 2011 in Sydney, Nova Scotia

**Written Release of
Oral Decision:** March 23, 2011

Counsel: Darcy MacPherson, for the plaintiff
Tony Mozvik, for the defendant

By the Court, Orally:

[1] This is my decision in the case of the **Queen v. Waylon McLellan** following a day and a half of evidence on March 8, 2011 and March 9, 2011. The Accused is charged with committing a sexual assault on J.M. between January 1st, 2009 and May 31st, 2009.

THE ALLEGATION:

[2] J.M. was 15 yrs. old at the time (her date of birth is June *, 1993). She lived in the family home in * with her mother, *, two younger siblings, *, (born *), *, (born *) and her father, *.

[3] J.M. testified that on the day in question the Accused and his common-law wife Patricia, came to J.M.'s house for a visit. J.M. said they stayed for ½ hr. to 45 minutes. They had brought two quarts of Crown Royal with them. The Accused and Patricia were both drinking.

[4] According to J.M., Patricia invited her back to their house to spend the night. J. M. had never over-nighted there before. She accepted the invitation and says the three of them, along with *. , who is also called *, left together. It was still daylight. Once outside, J.M. retrieved a quart of Captain Morgan rum she had purchased and stashed outside under the back step. She says the Accused and Patricia saw her do this and it was about a 10 minute walk to the Accused's house.

[5] After they arrived, J.M. says that she and the Accused and Patricia began drinking. In fact, she says she was drinking on the way to the Accused's house. The Accused and Patricia were drinking the Crown Royal mixed with coca cola. J.M. was drinking the Captain Morgan. She did not recall whether she was drinking it straight or if it was mixed with gatorade.

[6] The Accused and Patricia's home was a summer cottage they had rented. It was quite small, though precise measurements are not in evidence. Apparently, the structure is uninsulated and difficult to heat. For that reason the upstairs was blocked off with only the lower level in use.

[7] There are no bedrooms on the lower level. The dining area contained the sofa bed where the Accused and Patricia normally slept. That area also contained the TV, a rocking chair, and a lounging chair. There was also a wood stove which was not in use. (Exhibit #1 is a sketch of the layout drawn by Patricia during her evidence). There is no definitive evidence about the size of the sofa. All agreed however, that it would be a tight fit for three people.

[8] J.M. says that, in addition to the drinking, she, the Accused and * smoked some marijuana. She does not remember Patricia smoking any.

[9] Later they extended the sofa bed. J.M. and Patricia sat where the pillows go while the Accused and * sat on the other end closest to the TV. The Accused and * were playing a video game. At some point, Patricia fell asleep and eventually so did J.M.

[10] J.M. says that when she woke up her pants and panties were down to her ankles. She says that the Accused had his finger or fingers in her vagina and that the Accused was whispering in her ear that he knew she wanted him.

[11] J.M. pulled her pants back up but the Accused tried to get them down again. He also placed her hand on his erect penis. J.M. says that the Accused pushed her shirt and bra aside and began sucking on her breasts. J.M. repeatedly told him “no”. She got up and went to the kitchen area. The Accused followed her, where “he picked me up and put me around him”. J.M. says she got down and either went into the bathroom or back to the sofa. She does not remember which.

[12] At some point, J.M. did return to the couch or sofa bed and laid beside Patricia. She remembers that at that time, Patricia said something to the Accused and he did not touch J.M. again.

[13] J.M. says that throughout the ordeal she was terrified and unsure of exactly what she should do. She thinks she went back to sleep and left the residence later in the morning when Patricia was leaving for work.

[14] J.M. acknowledged that she returned alone to the Accused’s residence the following day. She said she went back to get what remained of her liquor. She did so knowing that Patricia probably would not be home and that there was no telephone connection.

[15] In cross-examination J.M. testified “I don’t know what was wrong with my head to go back up there”. J.M. says she only went back to the Accused that one time. She insists she did not go back after that.

[16] J.M. was unable to specify an approximate date of the incident. The crown therefore framed the charge between January 1st and May 31st, 2009.

THE DEFENCE EVIDENCE:

[17] The Accused testified. He completely denied he made any sexual advances toward J.M.. He insists that only he and Patricia slept on the sofa bed. The Accused says that J.M. slept in the lounging chair.

[18] The Accused says that Robert MacDonald was there the next day when J.M. came looking for her liquor. He says that J.M. continued to visit two to three times per week up until the time he was charged in August, 2009. I will have more to say about the Accused’s evidence later.

[19] Robert MacDonald testified for the defence. He confirmed that he was present in late January, 2009 when J.M. came looking for her liquor. Fortunately for the defence, not much turns on MacDonald's evidence. He was obviously there to help a friend. In my assessment he would say whatever he had to say, truth or fiction, to further that goal. MacDonald denied, for example, that he and the Accused had discussed J.M.'s visit. Then, when pressed in cross-examination, he admitted that they had, in fact, had that discussion.

[20] Maggie White, Patricia's sister, testified for the defence. Maggie's boyfriend, Lawrence "Kirk" MacLellan testified as well. They both gave evidence that they saw J.M. at the Accused's residence at different times in the summer of 2009. If believed, their evidence clearly contradicts the evidence of J.M.. I do not believe either of them. When I measure their evidence against that of J.M., I have no doubt that J.M. is telling the truth. Maggie White was combative when giving her evidence. I had the impression she was more interested in helping her sister than she was in giving accurate evidence.

[21] Similarly, Kirk had no specific reason to mentally note a visit by J.M. to the Accused's house in July of 2009. Why would he remember that J.M. had "come

as far as the door to talk to Patricia” a year and a half earlier? Why would that possibly make an imprint on his memory? Far from helping the defence these two reinforced my suspicion that the entire defence was concocted and rehearsed.

[22] Patricia White is the Accused’s common-law wife. She also was an aggressive witness who was doing all she could to protect her spouse and father of her child. The nub of her evidence was that the sexual assault did not happen - that “I would wake up if he was doing that to her”.

[23] To reinforce her position Patricia denied that either she or the Accused were drinking. I suspect that that was to destroy the notion that she had passed out, or at least was in a drunken stupor, due to alcohol consumption. I simply do not believe that J.M. made up her evidence about the amount of drinking which was taking place on the evening in question.

[24] Which brings me back to the Accused. I note that the Accused took the stand last. In other words, he sat and listened to what all his witnesses had to say in direct and how they responded in cross-examination. He could then be sure to avoid saying anything which could contradict them. I may have found him more

convincing if he had taken the stand first. Whether the sexual assault happened or not, it is easy, as the Accused did, to give an unqualified denial.

[25] Like Patricia, the Accused testified that when J.M. arrived at his house she was drunk. His words were “pretty buzzed for sure”. This was the same girl they had seen 20 minutes earlier sitting at the computer in her parents’ presence at home. Both he and Patricia emphasized the contrast between themselves and J.M., that they were cold sober.

[26] Both emphasized that the Accused only drank beer. When he was asked about the effects of drinking a lot of rum, the Accused came close to admitting, contrary to his and Patricia’s evidence, that he did in fact consume hard liquor and not just beer. He stated “I couldn’t drink that much rum myself” and then he appeared to catch himself, and said “most people who drank that much couldn’t remember a frigging thing”.

[27] What started with a categorical denial that the Accused drank hard liquor by both he and Patricia, softened in cross to drinking hard liquor on special occasions only. Even in their alleged state of complete sobriety, neither had the slightest

concern about allowing a 15 yr. old girl to consume rum in their home. Their evidence is not credible. I am satisfied they were both drinking as J.M. described.

[28] Applying the **W.D.** analysis, I conclude that I do not believe the Accused. I am also satisfied that his evidence is not capable of raising, and does not raise, a reasonable doubt. I must now turn to the evidence which I do accept to determine whether it proves the Crown's case beyond a reasonable doubt.

[29] Aside from some background evidence by J.M.'s mother and brief evidence by Cst. Cornelisse, the Crown's case hinges on the evidence of J.M., the complainant.

THE COMPLAINANT:

[30] What the complainant describes is, on its face, an implausible scenario: a sexual assault on her in a bed where the Accused's spouse lays sleeping. It is only conceivable in a situation where the Accused is confident that his drunken spouse will not awaken, and/or a situation where the Accused is so drunk and lustful that he is willing to run the risk. That may have been the case on the night in question.

[31] Defence counsel appropriately cross-examined J.M.. There he highlighted a number of inconsistencies between her evidence on direct and what she had said earlier, either in her police statement or at the Preliminary Inquiry. On direct, for example, J.M. said that she did not start drinking until she got to the Accused's home. In her statement, she had said "on my way up I started drinking it and by the time I got there I was drunk". She then relented by saying that now she does not know whether she drank on the way to the Accused's house or not. That excerpt from her statement seems to square with the Accused's evidence that she may have been drunk upon arrival. I am satisfied that J.M. probably did drink on the way to the Accused's home. I am also satisfied however that the Accused and Patricia were with her and, as I noted earlier, that they too were drinking.

[32] Counsel also brought out other inconsistencies which dealt with, for example, whether her pants were merely pulled down or taken off, or about how she described the size of the sofa bed, or about precisely what the Accused whispered in her ear, or about why she did not tell the police about the Accused licking her breasts, or why in her statement she had not mentioned the Accused picking her up.

[33] I thought that her response in each case was appropriate and probably truthful. She noted, for example, “I can’t pinpoint every word he said to me”. But she does remember “bits and pieces”. And sometimes she remembers details that she had not thought of on previous occasions and sometimes the situation may be too embarrassing to be explicit: for example, when she did not mention the breast licking in her mothers and the male police officer’s presence during the taking of the statement. I suggest that such natural variation in the narrative often makes the narrative more believable and not less. If she were saying exactly the same thing every time, I suggest that that would be suspect. She was trying to recount a traumatic and confusing situation which she is alternately trying to remember and to forget.

[34] Similarly, J.M. was pressed about why she did not simply wake Patricia or cry out or run home. Her answer was insightful. She said “when you’re in a situation like that, it’s hard to do anything”. Later, she said “my mind was blank, it’s really a tough situation”. She explained that she did not want to go home because she was drinking. She was friends with Patricia. She had no idea how

Patricia would react if awakened. If I accept for a moment that J.M. is telling the truth, then I am not surprised that a 15 yr. old would react as she did.

[35] But as compelling as I find J.M.'s evidence to be, I have to determine whether it discharges the Crown's onus of proof. The Accused is fortunate that it is not my job to determine whether a sexual assault probably occurred. I have to be satisfied beyond a reasonable doubt. I have to be sure.

[36] By her own admission, J.M. was very drunk that night. On a scale of 1 - 10, 10 being most drunk, she placed herself at 9. I have to be sceptical about the accuracy of her evidence when she had consumed that much alcohol. I am also concerned by her failure to tell the police that she went back to the Accused's house the next day. I can think of some innocent reasons why she would make that omission; for example, the fear of not being believed and that's probably the primary one. I cannot ignore the possibility, however, that she was being deliberately selective with some of the detail.

[37] J.M.'s failure to disclose the return to the Accused's house is just one part of the problem. The return itself is puzzling. J.M. returned to the Accused's

house the day after an alleged traumatic episode, knowing that he was probably there alone. (She knew that Patricia had gone to work). J.M.'s return may be explicable in light of her immaturity. Her thought process may have been that she had paid for the liquor and she did not want him to benefit from it, or she may not fully have come to grips of what had occurred and the implications that flowed from it. But I cannot speculate. The bottom line is that, by returning to the Accused's home in those circumstances, J.M.'s conduct is apparently inconsistent with her account of what had happened just hours earlier. In the context of all of the evidence, this conduct causes me to hesitate in making a finding of guilt.

[38] Finally, I am concerned that J.M. cannot be more specific about when the alleged event occurred. It is not unusual for a complainant to wait months, or even years, before disclosing. Here, J.M. disclosed a maximum of eight and as little as three months after the fact. Despite her academic difficulties I found her to be a reasonably intelligent person. There were no doubt psychological factors at play which might explain her difficulty. But, when she cannot zero in on this important fact, even identify the month in which it occurred, I am left with some question about the general reliability of her evidence.

[39] The evidence was that J.M. only slept over at the Accused's home on that one occasion. Yet, I do not recall her mother * being asked if she could help identify that unique occasion. Similarly, (in fairness to the Crown they could not anticipate that the Accused would deny that he drank anything but beer) the mother was not asked about the alleged drinking of the Crown Royal by the Accused and Patricia. Further, there was no explanation provided by the Crown for not calling *.

[40] On the whole of the evidence, therefore, I am left with a reasonable doubt. I therefore find the Accused not guilty.

J.

Sydney, Nova Scotia