

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D.A.R.*, 2011 NSSC 192

Date: 20110609

Docket: CRT-320306

Registry: Truro

Between:

Her Majesty the Queen

v.

D.A.R.

Editorial Notice

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

Restriction on publication: Section 486.4(1) of the *Criminal Code*

Judge: The Honourable Justice N.M. Scaravelli

Heard: February 21-22, 2011, and May 5, 2011 in Truro, Nova Scotia

Oral Decision: June 9, 2011

Counsel: Paul Drysdale, Esq., for the Crown
David Bright, Q.C., for the Defence

By the Court:

[1] I confirm the publication ban in effect pursuant to Section 486.4(1) of the *Criminal Code* which provides that the identity of the complainant or witness or any information that could disclose the identity of the complainant not be published or broadcast in any manner.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 witnesses.

[2] This is a historical sexual assault case. The Accused, D.R., stands charged:

That he, between the 1st day of June, 1978 and the 31st day of December, 1980 at or near Truro in the County of Colchester, Province of Nova Scotia did indecently assault L.K., a male person then under the age of fourteen years, contrary to Section 156 of the *Criminal Code of Canada*.

And further, at or near Truro, in the County of Colchester, between the 1st day of June, 1978 and the 31st day of December, 1980 did commit an act of gross indecency with L.K., a male person then under the age of fourteen years, to wit: fellatio, contrary to Section 157 of the *Criminal Code of Canada*.

[3] Section 156 and 157 of the *Criminal Code* were repealed in January of 1983 and in January of 1988 respectively. Section 140 of the *Criminal Code* in force at the time of the alleged offences provided that:

“Where an accused is charged with an offence under Section 146, 149 or 156 in respect of a person under the age of fourteen years, the fact that the person charged consented to the commission of the offence is not a defence to the charge.”

[4] The Complainant, L.K., would have been between the ages of ten and thirteen years at the time of the offences were alleged to have occurred.

[5] The Accused, D.R., denies the allegations.

[6] I am mindful there is a presumption of innocence in favour of D.R. The burden is on the Crown to prove the charges beyond a reasonable doubt. This burden does not shift to the accused.

[7] 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.)* 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 an acquittal. (*R. v. J.H.S.*, Supreme Court of Canada).

[8] Both of the charges arise out of the same alleged incidents. Neither indecent assault nor gross indecency are expressly defined in the *Criminal Code*.

[9] Indecent assault is an assault defined in the Oxford Dictionary as a sexual assault that does not involve rape.

[10] Sexual assault is an assault which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated, as stated in *R. v. Chase* (1987), Supreme Court of Canada.

[11] Regarding the definition of gross indecency, our Nova Scotia Court of Appeal in *R. v. M.H.M.* (1994), adopted the following definition:

Gross means in section 157, out of all measure, shameful, flagrant. Therefore an act of gross indecency is the performing of something flagrant, shameful, offensive to common propriety, a very marked departure from the decent conduct expected of the average Canadian in the circumstances...

[12] The Accused, D.R., was introduced to L.K.'s family in 1977 through a mutual acquaintance. At that time he was contracted to decorate and update the living room of L.K.'s family home in Truro. L.K. would have been ten to eleven years old at the time. D.R. would have been 29 to 30 years of age. This initial work led to further work in other areas of the home over approximately the next three years. In 1978, L.K.'s family took over ownership of a family cottage property in P.E.I. where they spent summer vacations. D.R. was also contracted to perform work at this cottage property commencing in June 1978. He would work there at times over the next couple of summers. D.R. resided in W., Nova Scotia, during this period. There were occasions when D.R. stayed overnight at the family residence in Truro as well as the cottage property in P.E.I. Over this period of time, a friendly relationship was established between D.R. and the family. L.K.'s father worked during the day in his office in Truro/Bible Hill. L.K.'s mother V.K., oversaw the renovations.

[13] The Complainant, L.K., currently resides in *. He is married, has one child and is employed. He is the youngest of four brothers who grew up in the family home in Truro. Two boys each shared a bedroom. By 1976, two brothers were off to university and L.K. and another brother had their own room. There were two beds in L.K.'s bedroom which was adjacent to his parents' bedroom.

[14] L.K. testified the first incident of sexual activity occurred in Prince Edward Island in the summer of 1978 while they were at the summer cottage. D.R. drove him to Cavendish Beach just prior to sunset. This was the first time D.R. ever drove him to the beach alone. There was a lifeguard stand tipped over on its back in the sand. L.K. sat in the chair which would place him on his back facing upwards. He thought it was funny at the time. While standing, D.R. leaned over the chair and began tickling and poking his torso and stomach. L.K. said they were both laughing. D.R. then began poking over his shorts and penis area. L.K. said it felt strange—he thought it was a mistake. L.K. got out of the chair and they proceeded back to the car. While he was standing with his shoes in his hand, D.R. came up behind him, put his arms around him, put both hands down the inside of his shorts and fondled his penis and scrotum. L.K. stated he froze, he did not know what to do—why it happened—he couldn't process it. It lasted a minute or two. L.K. could not recall how it ended. He testified D.R. stated it was something best kept between the two of them. Later that summer, L.K. recalled travelling to see the movie Grease in Charlottetown with his parents. L.K. and D.R. were in the back seat. Following the movie, on the drive home D.R. reached over to hold L.K.'s hand. L.K. pulled his hand away.

[15] L.K. described another summer incident in P.E.I. He could not recall the month or year. He and D.R. were at Cavendish Beach in the sand dunes. L.K. was lying on his back. D.R. performed oral sex on L.K. L.K. stated he had an erection.

[16] L.K. could not recall the number of nights D.R. stayed over at the family home in Truro between the fall of 1978 and 1980. When he did stay over, D.R. would normally stay in his room that had two beds. His bed was by the door. He recalls D.R. crossing the room to his bed and fondling his genitals under his pajamas on more than one occasion. L.K. stated there were two occasions when he was standing in the middle of his bedroom. D.R. kneeled in front of him and performed oral sex on him. The second time this occurred, L.K. had an orgasm. He stated he did not know what it was at the time as it was his first orgasm. D.R. was not wearing any clothing during these instances.

[17] L.K. stated there were other times when he would pretend to be asleep, put on his headphones and roll away to avoid activity. He would ask a friend to stay over if he knew D.R. was staying or he would stay over at a friend's home.

[18] L.K. stated there was an evening in his home when he was asked to perform oral sex on D.R. D.R. stated he wanted him to have "a little taste." L.K. said his

mouth made contact with D.R.'s penis—he tried it—pulled back in a matter of seconds. D.R. appeared disappointed and angry. The tone of his voice changed when he said, “That sure was a little taste.”

[19] L.K. stated this could have occurred at the same time as one of the previous described incidents of sexual activity in Truro.

[20] L.K. stated he continued to become more guarded. He did not want to be around D.R. He was afraid that if it would happen again, how much more activity would happen. He did not tell his parents at the time, as he thought it would open shame. He did not know how his father would react—how he would be judged when everyone knew.

[21] Sometime after his brother N. was married in late August *, L.K. was aware that D.R. was to be at his house in Truro that evening. He decided to tell his mother in order to end the activity. He told his mother without going into specific details. He stated that D.R. never returned to their home after that date.

[22] I will comment here that at trial L.K. thought the date of his brother's marriage was August 27th, *, and it was following that date when he disclosed D.R.'s conduct

to his mother. The Accused, D.R., testified he would have been with the family in P.E.I. on that date and was cross-examined as to the accuracy of that statement. Following trial, the Complainant, L.K., contacted the Crown to advise that his brother's wedding took place at Truro on August 30th, *. I have reviewed that evidence, and I find that neither the Complainant nor the Defendant was absolutely certain of the date. In any event, I find that nothing turns on this point. The uncontradicted evidence is that the confrontation between L.K.'s mother and D.R. took place following this wedding.

[23] Under cross-examination, L.K. indicated he did not know how much time lapsed between the two incidents in P.E.I. He acknowledged the second incident could have been the next day. He denied any incident relating to flying kites. He thought about contacting the police over the years, but was not ready to deal with it. Eventually he participated in marriage counselling, as well as individual and group counselling for male sexual assault survivors. In 2007, L.K. using an alias, e-mailed D.R.'s business partner at his place of business looking to identify D.R. in a photo. D.R.'s partner confirmed identification after which L.K. identified himself, still under an alias, as a victim of sexual abuse by D.R., threatening D.R. if he came near him again.

[24] L.K.'s mother, V.K., is currently * years of age and widowed. She testified she felt her family opened their home to D.R. over the period of time he performed work at their home in Truro and the cottage property in P.E.I. She confirmed he stayed overnight at times in both locations, although she could not recall how often. V.K. did testify of an evening in Truro that D.R. worked late. He started for home in Windsor but came back and stayed the night. The only extra bed at the time was in L.K.'s room. He stayed there overnight. V.K. testified that shortly after returning to Truro from the summer cottage in P.E.I. in late August 1980, her son, L.K., disclosed the nature of the relationship between him and D.R. She was devastated as the family trusted D.R. and invited him into their home. D.R. was expected to deliver palm trees to the house that day. V.K. put on her jacket and sat by the living room window waiting for his car to arrive. She went out to the driveway and accosted him when he got out of his car. She could not recall what she said to him but remembered calling him a worm. She could not recall his response. This was the last contact they had with D.R.

[25] Under cross-examination, V.K. could not recall if D.R. had stayed for dinner, consuming wine on an evening that he stayed over in L.K.'s room. She stated her husband did not drink. When asked if it were possible she could have hugged D.R. that evening, she chuckled and responded she may have in a friendly way.

[26] The Accused, D.R., testified that he was starting up his * business at the time he was introduced to L.K.'s family. He was also involved in the * world at the time. D.R. had specific recollection of the lifeguard chair incident in P.E.I. as well as the sand dune incident. He also had specific recollection of an overnight stay in L.K.'s bedroom in Truro. D.R. denies any sexual activity occurred on these occasions. The lifeguard chair incident occurred shortly after he returned from [*editorial note- information removed to protect identity*], around August 21st or 23rd, 1980. He was distraught as [*editorial note- information removed to protect identity*]. V.K. called him and invited him to P.E.I. to visit the family as they were closing the cottage. When he got there, he told V.K. he was going for a walk on the beach and might not come back that evening. In his mind, he needed to have a cry. V.K. and her husband were packing for the move back to Truro at the end of the season. She asked him to take L.K. with him as he had been cooped-up all day. At the beach L.K. was sitting back in the toppled lifeguard chair. D.R. told him it was time to go, but L.K. refused. L.K. had his hands on the arms of the chair. D.R. tried to pry his fingers off. He poked him in the ribs to get his hands free. L.K. got up and fell back into D.R. There was no touching of genitals. The sand dune incident occurred the following day. D.R. took L.K. to the beach to fly kites. L.K. tripped, fell into a sand dune and let go of the kite. D.R. picked him up. L.K. was not on his back in the dune and there was no oral

sex. D.R. testified in the late summer or early fall of 2008 he and V.K. travelled to Denmark, Nova Scotia, to pick up wingback chairs to finish the living room in Truro. D.R. intended to leave for client work in Sydney that evening. To celebrate completion of the living room, V.K. brought out a bottle of wine. They drank wine and had snacks. Because of the wine, they both agreed he should not drive. He went to his car and returned with his overnight bag. V.K. told him to stay in the spare bed in L.K.'s room. At bedtime, V.K. offered a hug. It progressed as she started kissing his neck and holding him tight. D.R. stated he got himself out of the situation. When he went into L.K.'s bedroom, it was dark. He went to the bed across the room to take his clothes off. He noticed L.K. was in that bed. D.R. went to the other bed without touching L.K. The next morning, D.R., L.K. and his mother had breakfast together. There was no one else there. He then travelled to Sydney. The following day he drove to V.K.'s house in Truro to deliver the palm trees. He was met by V.K. standing outside at the top of the steps. She was screaming that D.R. was a terrible person. She told him to get out and never come back. D.R. said she never mentioned L.K. and would not accept the plants. D.R. believed V.K. may have been upset about the evening he stayed over and they consumed wine. That she went on the offensive.

[27] Under cross-examination, D.R. described his relationship with L.K.'s family as a good business relationship. He got along well with L.K.'s mother, but he did not

consider them to be friends. D.R. stated he only stayed overnight in Truro on two occasions. D.R. stated it was a Saturday when V.K. and he travelled to Denmark to pickup the chairs and he stayed overnight. When asked where her husband was at that time, he replied he did not know if he was in the house that evening—that he did not see him. He didn't think the hugging and kissing on the neck was of a sexual nature. That he just said goodnight. D.R. stated that when he entered the bedroom that evening, the room was dark—there was light coming into the window on the far side of the bedroom where his bed was located. His eyes were not adjusted. He acknowledged in cross-examination that he took his clothes off by the bed, but that he kept his underwear on. He felt for and grabbed his overnight bag that someone had placed on the bed, but did not feel or see L.K. there. When his eyes adjusted, he noticed L.K. on the bed. He then took his bag to the other bed.

[28] The evidence of alleged acts in Prince Edward Island during the time period covered in the indictment are not the subject of the charges. The evidence was admitted as part of the narrative to provide context as to the relationship between L.K. and D.R. when the alleged sexual abuse started.

[29] As stated in *R. v. J. (F.E.)*, (1989) Ont. C.A., assessing credibility in sexual abuse of children cases is very difficult. Given the principles of presumption of

innocence and the Crown's burden to prove its case beyond a reasonable doubt, the Court must be vigilant in avoiding assumptions favouring the credibility of complaints who complain of historical child sexual abuse. I am also mindful of the comments in the Supreme Court of Canada in *R. v. W. (R)*, (1992) that when considering an adult's evidence of abuse when he was a child, inconsistencies as to peripheral matters such as time and location should be considered in the context of the age of the witness at the time the events were alleged to have occurred.

[30] I'm satisfied that the Crown's evidence of sexual activity occurring at the complainant's home in Truro, if proven beyond a reasonable doubt, constitutes all of the elements of both charges of indecent assault and gross indecency at the time.

[31] Reviewing the authorities dealing with credibility, there is no particular rule as to what part of trial evidence to consider first. I am mindful the evidence is not considered for the purposes of preferring one witness' evidence over the other.

[32] In analysing credibility of the witnesses in this case, I am also mindful that the events were alleged to have occurred more than 30 years ago. In this regard, the Complainant, L.K., was candid in not specifically recalling surrounding details, including dates and times. This is also understandable in the context of his age at the

time. I found L.K. to be a credible witness. He was able to clearly give evidence surrounding the sexual activity, including evidence that would be embarrassing to him, such as ejaculating for the first time from oral sex and placing his mouth on D.R.'s penis. I find that L.K. did not embellish his evidence. There were no inconsistencies in his evidence of sexual activity, nor was this evidence challenged in cross-examination.

[33] As to V.K.'s evidence, I found her to be a credible witness. She was very careful throughout her direct and cross-examination, pausing to reflect on each question, and answered to the best of her ability without embellishment or exaggeration. Her failure to recollect exact dates or numbers of times D.R. stayed over nights in Truro was understandable. She was not challenged on her version of the events surrounding her confrontation with D.R. in the driveway. She was not questioned on D.R.'s version of the events. She did not have any recollection of drinking wine or giving D.R. a friendly hug, but admitted to the possibility.

[34] My impression of the Accused, D.R., is that he carefully crafted his evidence to undermine the Crown's case. Rather than a blanket denial, he placed himself at the scene of the alleged sexual activity and other surrounding events described by the Complainant and his mother, and gave detailed but harmless explanations of his

conduct. Unlike the admitted lack of specific recollection including dates and times from the Complainant and his mother, D.R.'s evidence is striking and unbelievably clear in detail, recollecting events of 30 years ago that would have been totally insignificant to him at the time, including the exact number of times he spent overnight at the family's Truro residence. The passage of time is an important factor in this case.

[35] I do not believe D.R.'s evidence that he stayed overnight in Truro on only two occasions.

[36] D.R.'s evidence is that V.K. stood outside on her step screaming at him when he drove in the driveway presumably because of the rejection of her prior advance, does not ring true. Why would she make such an open display regarding something alleged to have occurred in private? According to his evidence in cross-examination, there was no sexual connotation to the alleged interaction. They had a pleasant breakfast the next morning. Also on cross-examination, D.R. stated it was on a Saturday he stayed over. He was then unable to explain the presence or absence of V.K.'s husband in the home on Saturday, throughout the evening and Sunday morning.

[37] I conclude that I find D.R. not to be a credible witness. Having found that, I am not left in doubt by the evidence of D.R. However, I must ask myself whether on the basis of the evidence as a whole, I am convinced beyond a reasonable doubt that the Crown has proven the guilt of D.R.?

[38] In this case, except for the denial of sexual activity, much of D.R.'s evidence confirms the Crown's evidence. In this regard, I refer to the time lines set out in the Indictment, the evidence of D.R. being alone with L.K.—staying overnight in L.K.'s house in Truro—sleeping in L.K.'s bedroom—being undressed in L.K.'s presence in the bedroom—prior physical contact including poking and tickling the complainant.

[39] I accept the evidence of L.K. regarding the sexual activity that occurred in his bedroom in Truro, which included D.R.'s fondling of L.K.'s genitals and performing fellatio leading to orgasm. I find this activity occurred within the time frame set out in the Indictment. I find the sexual activity ended by early September 1980. I find L.K. was under the age of fourteen years at the time.

[40] Considering the evidence as a whole, I find the Crown has proven its case beyond a reasonable doubt and I find the accused guilty of both counts, indecent assault and gross indecency.

J.