IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. W. H. A., 2011 NSSC 168

Date: 20110429
Docket: CRAT-336695
Registry: Antigonish

Between:

Her Majesty the Queen

v.

W. H. A.

Editorial Notice

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

Restriction on publication: Sections 276.3 and 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 27-28, 2011, in Antigonish, Nova Scotia

Counsel: Catherine Ashley and Darlene Oko, for the Provincial Crown

Coline Morrow, for the Accused

By the Court:

Introduction

[1] Mr. A. is charged with two counts of sexual assault. The complainant KF is expected to say that the assaults occurred January 21 – 22nd, 2010. One of those assaults was what was previously known as a rape.

[2] Mr. A. made application pursuant to section 276.1 of the *Criminal Code*, to have the court admit as evidence at the trial before a jury, the fact that KF had consensual sexual intercourse after the alleged assault by Mr. A. and before her examination by nurses on January 24, 2010.

[3] Those nurses observed a 2.5 cm tear in her vaginal wall. KF is expected to testify that the forced sexual intercourse by Mr. A. was painful to her in her vaginal area.

[4] Mr. A. argues that the evidence of "other sexual activity" with JK should be admitted as it is relevant to explaining that the tear observed by the nurses could also be attributable to the sexual intercourse with JK.

[5] Notably there will be no expert evidence called to explain how and when this injury to KF may have occurred.

[6] The crown argues that the evidence should not be admitted, because if the jury hears that KF engaged in sexual intercourse after she alleges Mr. A. raped her, the jury will be less inclined to believe that Mr. A. sexually assaulted her.

Procedural History

[7] This hearing involved a two-stage process. Pursuant to section 276.1 I received the affidavit of Ms. Morrow upon which basis I was satisfied that "the evidence sought to be adduced is capable of being admissible under subsection 276 (2)". At the end of the hearing the Crown conceded that this threshold had been met.

[8] The second stage involves an evidentiary hearing pursuant to section 276.2 which is the subject of this decision. That section requires me to consider "whether the evidence, or any part thereof, is admissible under subsection 276(2)".

[9] Section 276(2) requires that I consider whether the evidence proposed:

> "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."

[10] During this stage, as it was part of the same voir dire I felt it appropriate to consider the affidavit of Ms. Morrow previously filed, even though it contains exhibits which are documented by or testified to by other persons. Similarly as the trial judge I take into account other undisputed facts of which I am personally aware, such as the general allegation here and the proceedings to date including the pretrial conference of March 21, 2011 and the materials filed by counsel which are on record.

[11] I heard evidence from Constable Shaw-Davis and nurses Jocelyn Landry and Suzanne Munro, and had the benefit of the submissions of counsel.

[12] I found the witnesses to be credible.

[13] I also find that the proposed evidence is a specific instance of sexual activity. More controversial is whether the proposed evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Position of Parties

[14] The defense position herein was that the proposed evidence [sexual intercourse with JK] was relevant to the credibility of KF, and relevant to explain to the jury that not only Mr. A. might be the cause of this tear in the vaginal wall.

[15] I have determined that the proposed evidence is not relevant to the credibility of KF insofar as it is based on the suggestion that the Form 2 that was filled out by the nurses on January 24, 2010, and recording KF's answers to them is inconsistent with her statement to Constable Shaw-Davis that she had sexual intercourse with JK after the alleged assault by Mr. A. and before her examination by those nurses.

[16] Ms. Landry and Munro both testified to the effect that they did not ask and KF did not say how she got any of the injuries they observed on her person that day. Moreover although the form suggests that KF indicated to them that she did not have sexual intercourse "between assault and physicians examination", their manner of filling out the form presents a mistaken impression. The form might give the impression that she indicated to them she had not had sexual intercourse between the assault and the physicians examination, but that is not what they recorded or intended to record.

[17] As to whether the proposed evidence is relevant to another issue at trial, the crown argues that it is not relevant to any issue.

[18] Notably however the crown expects to call as witnesses the two nurses, and may ask them about their observations including the fact of the 2.5 cm tear in the vaginal wall. The crown would argue that this evidence is relevant as corroborating the expected testimony from KF that the rape was associated with pain in her vaginal area.

[19] No expert evidence is expected to be called regarding how and when this 2.5 cm tear in the vaginal wall may have occurred. To that extent its probative value would be greatly reduced – see *R.* v. *DC* [1999] O.J. 3568 [Ontario Court of Appeal] at paragraph 23.

[20] If the observations of the nurses become evidence, the defense argues that in the absence of knowledge of KF's sexual intercourse with JK after the alleged assault by Mr. A., the jury will be left with a distorted picture. That is they may infer that the 2.5 cm tear in the vaginal wall is associated with the rape of KF by Mr. A., and thus it would tend to corroborate KF's testimony. It is therefore vital the defense argues that the jury be aware there is another and innocent explanation for the 2.5 cm vaginal wall tear – that is the sexual intercourse with JK which occurred prior to the examination by the nurses.

Analysis

[21] The difficulty in resolving this matter lies in the fact that there will be no expert opinion evidence regarding the 2.5 cm tear in the vaginal wall. I accept the defense position that if the evidence of that injury is introduced a jury may be inclined to infer that Mr. A. is responsible and that that evidence is consistent with KF's position that she was raped.

[22] On the other hand the defense has also argued that without expert evidence the evidence regarding the 2.5 cm tear has almost no probative value.

[23] While that evidence might have little probative value, I must decide this issue in advance of the testimony of KF. KF is expected to be the first crown witness. Therefore if I rule the proposed evidence admissible she will be asked about it by the defense.

[24] At that point in the trial there will be no evidence before the jury of a 2.5 cm tear in the vaginal wall. It is possible that that evidence may never be placed before the jury because either neither counsel asks the question of the nurses, or that

evidence is ruled inadmissible as being of no probative value, or a successful argument by defense that it's probative value is substantially outweighed by its prejudice to the fair trial rights of Mr. A..

[25] This underlines the point that the relevance of the other sexual activity can only be said to be relevant because of the expected evidence of the nurses having observed the 2.5 cm tear in the vaginal wall.

[26] I also appreciate the crown's position that the fact that KF had sexual intercourse with JK after the alleged assault, may cause a jury to question the credibility of her assertion that she was raped by Mr. A.. Again it may be that expert evidence regarding the psychological dynamic of KF in these circumstances might explain such behavior and counter such drawing of inferences by a jury.

[27] I notice well that the defense has not precisely indicated what defense it may rely on in this case. Generally Mr. A. could claim three potential defenses:

> One – denial that any sexual intercourse occurred between him and KF

> Two – that any sexual intercourse between them was consensual

> Three – that even if not consensual sexual intercourse, he had an honest and mistaken belief that KF was consenting.

[28] While I appreciate that Mr. A. does not have to prove his innocence, these are the defenses that are available to him generally speaking.

[29] Mr. A.'s position is that the evidence of the tear may be used by the jury to infer non-consensual sexual intercourse which would be relevant to all three of these possible defenses.

[30] It seems to me that in order to avoid the problem created by timing here [KF testifying first and before the nurses], it may be in the interests of justice, considering the factors in section 276(2) (c) and 276(3) to find that, **<u>at this time</u>**, the evidence is not admissible.

[31] If it should happen that the nurses testify about the 2.5 cm tear in the vaginal wall, and the nature and quality of that evidence suggests a realistic concern that Mr. A.'s right to full answer and defense may be jeopardized without the jury being aware of the sexual intercourse between KF and JK, this issue may be

revisited, and possibly result in KF being recalled to the stand and asked about the "other sexual activity" – i.e. sexual intercourse with JK.

Conclusion

[32] I therefore find that I am satisfied pursuant to section 276.2 that the proposed evidence of "other sexual activity" **conditionally** meets the requirements of section 276(2), given my taking account of the factors in section 276(3) and specifically the right of the accused to make full answer and defense, and society's interest in encouraging the reporting of sexual assault offenses, and the reasonable prospect that the evidence will assist in arriving at a just a determination in this case. I also recognize the potential prejudice to the complainant's personal dignity and right of privacy.

[33] On a conditional basis I rule the evidence of "other sexual activity" to be inadmissible. I reserve the right to reconsider this issue upon application by either of the parties during the trial.

J.