IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. W. H. A., 2011 NSSC 173

Date: 20110503
Docket: CRAT-0336695
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: Section 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski

Heard: May 2, 2011, in Antigonish, Nova Scotia

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

Coline Morrow, for the Accused

By the Court:

Background

[1] Section 12 of the *Canada Evidence Act* allows any witness to be questioned as to whether the witness has been convicted of any criminal offense.

[2] In this case, the Crown has indicated in its March 14, 2011 letter that it will seek to cross-examine Mr. A., if he testifies, with respect to his criminal record pursuant to section 12 of the *Canada Evidence Act*. The Crown specifically sought to cross-examine him on his prior convictions pursuant to section 334, 342 and 380 of the *Criminal Code of Canada*. At the *voir dire*, the Crown expanded its request to convictions on the CPIC system, including a break and enter, s. 306(1)(b), s. 334(b)(ii), and s. 294(a) thefts, and possession of stolen property s. 355(a) of the *Criminal Code*.

[3] Defense counsel on behalf of Mr. A. in its letter May 2, 2011 states: "Mr. A. applies for a ruling from your Lordship that none of his criminal record be referred to, should he testify on his own behalf." At the *voir dire*, Defence counsel noted that the jury has seen Mr. A. in shackles (only on April 26th), that they have likely

seen he is in custody by virtue of the public view of his walk from the jail to the court [the jail being attached to the rear of the Courthouse]; and heard Cst. Shaw-Davis' slip in testimony May 2nd wherein she stated:

> **<u>MS. ASHLEY</u>**: You were talking about the samples and the exhibits that you had sent to the Lab. Can you recap for us what you did send?
>
> **<u>CST. SHAW-DAVIS</u>**: Sure. I sent...basically they wanted KF's clothing that was sent. What...in reference to the two that...the two cushions that were seized from the home...were done off of our forensic team in Port Hawkesbury. And what they did was they did a forensic lighting on them to search for bodily substances. There was nothing identified on the cushions, so those weren't necessary to be sent to the lab. Further to that, what we sent was the panties, the pajama pants and the T-Shirt to the Lab in Ottawa for testing. The Lab contacted me shortly thereafter identifying that there was a hit and that it was on...it was a hit of an offender on the known...
>
> **<u>MS. MORROW</u>**: Well.
>
> **<u>MS. ASHLEY</u>**: Sorry.
>
> **<u>JUSTICE ROSINSKI</u>**: Perhaps. Okay. So, just for the jury's sake here, a hit is a match.
>
> **<u>CST. SHAW-DAVIS</u>**: A match.
>
> **<u>JUSTICE ROSINSKI</u>**: Yeah. Okay.
>
> **<u>CST. SHAW-DAVIS</u>**: There was a match...
>
> **<u>MS. ASHLEY</u>**: Just...just one second. Can we ask that the jury be excused, My Lord?
>
> **<u>JUSTICE ROSINSKI</u>**: Sure.
>
> ***** JURY EXITS THE COURTROOM *****

[4] Defence counsel argues that these items already cast Mr. A. in the light of criminality, and that the addition of drawing the jury's attention to a specific group of "crimes of dishonesty", spread over time, will irrevocably paint him as a habitual criminal, and that the jury will likely infer that he is therefore so much less trustworthy than KF **and** they may also rely on prohibited propensity to crime reasoning that he likely committed these alleged offences too. That level of unfairness is intolerable argues Defence counsel.

The Law

[5] A succinct and precise compilation of the law applicable to such applications is set out in *R. v. Shrubsall,* (2000) 186 NSR (2d) 81 by Justice Saunders (as he then was). As he points out [paraphrasing him]:

> - any accused is entitled to a fair, though not necessarily favorable trial process.
>
> - presumptively Mr. A.'s criminal record is prima facie relevant insofar as it is probative of a fact in issue (which in this case the crown argues is the credibility of Mr. A. should he testify).

-if satisfied that the criminal record in this case is so relevant, then the trial Judge must consider if its probative value is overborne by its prejudicial impact on trial fairness.

[6] The crown has submitted during this *voir dire* Mr. A.'s redacted criminal record. It seeks to cross-examine him only to that extent. The Defense seeks to have any questioning of Mr. A. on his criminal record be prohibited.

[7] Some of the factors to consider are:

(1) the nature of the previous convictions and their remoteness in time to the present charge/trial;

(2) the circumstances of the accused;

(3) whether the case boils down to a credibility contest between the accused and another witness;

(4) is there is a need to determine whether Mr. A. is more worthy of belief than the person attacked;

(5) would a mechanical application of section 12 *Canada Evidence Act* undermine the right to a fair trial?

Application of these Principles to the Case at Bar

[8] Mr. A. is accused of, what was previously known as a "rape", of KF. The crown evidence has come from KF as to the circumstances of the offense. It also rests in part on DNA evidence from which an expert has given the opinion that the likelihood of another male person having been the donor of the male DNA found, on the underwear [both white and purple] and T-shirt of KF apparently worn at the time of the assault, is extremely rare.

[9] The Crown has concluded its case. The Defense had not definitively articulated whether its defence is a denial; that there was consent; or that there was an honest and mistaken belief in consent. All of these are possibilities in the case at bar, bearing in mind that the Crown always bears the burden of proof beyond a reasonable doubt and that Mr. A. is presumed innocent.

[10] Defense counsel conducted an extensive and detailed cross-examination of KF. The Defense elicited evidence showing that KF was rebelling against her mother's directions by smoking cigarettes and marijuana, drinking alcohol, staying out late and sometimes not returning home when expected. KF also lied to her

mother. KF was born in 1992 and was still in school at the time of this incident in January 2010.

[11] Defense counsel pointed out inconsistencies between KF's testimony and her police statement [videotaped] and preliminary inquiry transcript. KF does not have a criminal record.

[12] At a previous *voir dire,* I ruled that Mr. A.'s videotaped statement to the police was admissible. The Crown has indicated it intends to rely on it only for the purposes of cross-examining Mr. A. should he testify.

[13] Mr. A. was born July 1, 1974. Mr. A.'s criminal record (Exhibit VD#4-1 and VD#4-2) includes the following non-violent offenses :

> (1) January 20, 2009 [Antigonish] – section 380(1)(b) – fraud less than $5000 – five months conditional sentence;
>
> (2) September 12, 2006 [Antigonish] - section 380(1)(b) - fraud less than $5000 - 1 month custody and 30 months probation;
>
> (3) April 27, 2006 [Shubenacadie] – section 334(b)(ii) - theft and four counts of theft of credit card – section 342(1) – six months jail and two years probation;

(4) January 18, 2006 [Antigonish] – section 380(1)(b) - fraud less than $5000 - 21 days intermittent jail plus 12 months probation;

(5) March 8, 1995 [Kingston, Ont.] - section 355(a) - possession of stolen property over $1000 - 1 month jail consecutive;

(6) January 12, 1994 [Halifax] - s. 334(b)(ii) - theft under $1000 - 1 month jail consecutive;

(7) January 21, 1993 [Unknown] - s. 334(b)(ii) - theft under $1000 - 3 months open custody;

(8) July 12, 1988 [Dartmouth] - s. 294(a) - theft over $1000 - 4 months secure custody;

(9) September 18, 1986 [Guysborough] - s. 306(1)(b) - break and enter and theft - 12 months probation.

Balancing the Probative Value as Against the Prejudicial Effect to the Fair Trial Rights of Mr. A.

[14] If during the Defense case, the basis upon which a trial judge makes his/her decision changes significantly, they may revisit their ruling.

[15] Here the criminal record offenses in issue all: go to the issue of truthfulness/credibility; several are quite recent to both the time of testimony and the alleged offense; are those of a mature individual save the "youth" record; and are specifically relevant in the case at bar because credibility as between KF and Mr. A. should he testify, is likely to be determinative of the outcome.

[16] On the other hand, I must keep in mind that while the credibility of KF has been questioned, particularly by the use of prior inconsistent statements, she does not have a criminal record. The Defense did question her repeatedly however about her rebelliousness, and specifically brought out that she lied repeatedly to her mother as part of that.

[17] I also keep in mind that if Mr. A. testifies he will be no doubt cross-examined on his videotaped statement to the police. In that statement, from start to finish, he is adamant that he did not have sexual intercourse with KF. That is arguably somewhat at odds with the DNA evidence.

Conclusion

[18] Mr. A.'s credibility will be tested against his videotaped statement to the police. It will also be tested as against the complainant KF's evidence, as her evidence will be against his. The Defense has indicated that at this time it intends to call the mother of KF – KK. Presumably this evidence will be elicited to undermine the credibility of KF. The Defence position, as far as I can tell, is that KF lied to her mother (perhaps to explain her absence between January 22nd and 24th) and her mother's belief in her truthfulness did not allow KF to retreat from these lies.

[19] In this context, it is my opinion that to maintain a semblance of balance of each of these witnesses' testimony for the jury, that it is appropriate and necessary for the Crown to have the opportunity to question Mr. A. about those select offenses referred to above that are most recent, i.e.: items 1 to 4 in para. 13. The other offences are too stale and/or cross the line by casting Mr. A. as a hardened, habitual offender.

[20] I find that these criminal convictions are relevant to Mr. A.'s credibility, and that the prejudicial effect of the jury being aware of them is not so significant that they should be excluded from evidence as inadmissible. I direct that the Crown not extend its examination of Mr. A. to either the sentence or circumstances of these offences. The Defence is not so limited.

[21] As previously indicated, if the circumstances change sufficiently I am prepared to revisit this ruling.

J.