SUPREME COURT OF NOVA SCOTIA
Citation: R. v. J.A.H., 2011 NSSC 433

Date: 20111003
Docket: CRH 329525
Registry: Halifax

Between:

Her Majesty the Queen

v.

J.A.H.

Editorial Notice

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

Restriction on publication: Section 486.4 CCC Order restricting publication — sexual offences:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction

of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Judge: The Honourable Justice Glen G. McDougall

Heard: August 29 - September 2, 2011, in Halifax, Nova Scotia

Oral Decision: October 3, 2011

Written Decision: January 5, 2012

Counsel: Eric R. Woodburn and Tanya Carter, on behalf of the Provincial Crown
Luke Craggs, on behalf of J.A.H.

By the Court (Orally):

[1] J.A.H. stands charged with the following two indictable offences:

(1) that he between the 16th day of December, 2009 and the 5th day of January, 2010 at, or near Halifax, in the County of Halifax in the Province of Nova

> Scotia, did unlawfully commit a sexual assault on M.H., contrary to Section 271(1)(a) of the Criminal Code.
>
> (2) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose touch M.H., a person under the age of sixteen years directly with a part of his body, to wit: his hands, contrary to Section 151(a) of the Criminal Code.

[2] At this juncture it would be appropriate to mention that there is a publication ban preventing anyone from publishing anything that could lead to the identification of the complainant.

[3] If found guilty on either charge the accused, since the Crown has proceeded by way of indictment, is liable to imprisonment for a term not exceeding ten years.

[4] The offence of sexual interference provides a minimum punishment of imprisonment for a term of 45 days if the accused is found guilty of the indictable offence. On summary conviction the minimum period of imprisonment is fourteen days.

[5] Although the original indictment did not state that the matter was being prosecuted indictably, this was addressed at the outset of trial by way of a Crown motion to amend the indictment to reflect the offence described in section 151(a) of the **Criminal Code**.

[6] The Crown proceeded by way of indictment on both charges.

BRIEF SUMMARY OF THE CROWN'S CASE

[7] The theory of the Crown's case is that late in the evening on the 27th of December, 2009 the accused returned to the apartment which he shared with his then nine-year-old daughter – the complainant.

[8] The accused and the child's mother are estranged from one another. He had the primary care and control of the child which ended when a complaint which led to these charges was made to the Department of Community Services. The complaint was made by B.N. – sister to the complainant's mother and hence the child's aunt. The source of B.N.'s information was the complainant herself who disclosed the

information in a conversation that took place at the home of M.N. and M.A.N. on the evening of January 10, 2010. M.N. and M.A.N. are the complainant's maternal grandparents. They have had the temporary care and control of their granddaughter since she was apprehended by Children's Aid on January 11, 2010.

[9] After returning to his apartment late in the evening of December 27, 2009 the accused is alleged to have summoned his daughter from her bedroom. He was seated on a wooden chair in the kitchen. He requested his daughter to stand in front of him. He then, allegedly, put his hands down the front of her pyjamas and touched her stomach, the upper part of her thighs and her vagina.

[10] Given the age of the child at the time of the alleged incident consent is not a relevant factor that has to be proved. Only the age of the child has to be established.

BRIEF SUMMARY OF THE DEFENCE THEORY OF THE CASE

[11] The Defence's version of events is markedly different from that of the Crown in one very fundamental aspect. According to the accused, who testified in his own defence, he returned to the apartment to find his daughter standing in the kitchen in front of the dishwasher with her back to him. She appeared to have had her hands down the front of her pyjamas. When she turned around upon hearing him enter the front door he noticed what he described as a look of embarrassment on her face. When he confronted her and asked her what she had been doing she, according to the accused, denied doing anything wrong. This angered the accused who felt she was lying to him. He decided to discipline her and demanded that she present herself and to pull down her pajamas to be spanked. She instead bolted past him and ran to her bedroom. In a fit of anger the accused testified that he threw one of the kitchen chairs across the room, breaking it. He denies touching his daughter but admits that he might have angrily over-reacted to the situation.

R. V. W.(D.) INSTRUCTION AND GENERAL APPROACH

[12] Before getting into a more detailed look at the testimony of the witnesses called by the prosecution and that of the accused, the Court must remind itself of some of the basic tenets of our system of criminal justice.

[13] First and foremost is the presumption of innocence and the burden of proof that always prevails in any criminal trial.

[14] The accused is presumed innocent until it is proven otherwise. The prosecution must prove each and every element of the offence, of which a person has been charged, beyond a reasonable doubt. The simple probability of guilt or of being likely guilty is not enough. This presumption of innocence is so fundamental to our rights as Canadian citizens that it is enshrined in the *Canadian Charter of Rights and Freedoms* at section 11, para (d).

[15] Furthermore, the burden on the Crown to prove each element of the offence beyond a reasonable doubt never shifts. In other words, it never falls to the accused to prove his or her innocence.

[16] If, after hearing all the evidence, the Court is left with a reasonable doubt as to the accused's guilt then he must be found "not guilty".

[17] The accused does not have to testify. Neither does he have to call witnesses to testify on his behalf.

[18] In cases where the accused does testify, however, the Court must instruct itself specifically by reference to the words of former Supreme Court of Canada Justice Ronald Cory in the often quoted case of **R.** v. **W.(D.)**, [1991] 1 S.C.R. 742. If I believe the accused's evidence that he did not commit the offences charged, I must find him "not" guilty.

[19] Even if I do not believe the accused's evidence but I am still left with a reasonable doubt I must acquit.

[20] And, even if the accused's evidence does not leave me with a reasonable doubt the rest of the evidence that I do accept must prove his guilt beyond a reasonable doubt and, if not, he must be found "not" guilty.

[21] In a case, such as the one that is presently before this Court, there are usually only two parties directly involved. There are seldom any other eyewitnesses who could be called to corroborate one party's recollection of events over that of another.

[22] The Court must not place itself in the position of simply choosing the more plausible version of what took place. Indeed, it might not be possible to reconcile differing versions. If this should be the reality, the Court must resist the urge to reach

an ultimate decision simply on the premise that someone must be telling the truth and therefore someone must be lying.

[23] Perhaps no one is lying. People testify as to what they recall. I doubt if anyone has perfect recall nor does everyone have the same ability to recall past events. There are numerous factors that come into play. The significance of the event; the elapse of time since it happened; external influences; the motive to tell the truth or to lie are only a few of these factors.

[24] Studies have shown that eyewitness testimony going to identification can be very problematic. The witness believes what he or she testifies to and testifies truthfully. The problem is with reliability. Can you rely on their testimony? Without any other corroboration a Court would be extremely reluctant to convict on eyewitness testimony alone unless there were some very unique and obvious physical characteristics exhibited by the accused person or if the eyewitness was actually acquainted with the person or at least familiar enough to identify him or her.

[25] The Court is also mindful of the fact that we are dealing with a complainant who was only nine years old at the time of the alleged event. She was not quite 11 years old when she was called to testify about events that had occurred a little more than 20 months previously.

[26] Young witnesses do not always have the same ability as adults to recall precise details or to describe events fully and accurately. This might help to explain certain inconsistencies in the complainant's testimony that would tend to make them less significant than if they were found in the testimony of an adult witness.

[27] With these general principles in mind I will take a closer look at the evidence of the complainant and the accused. I will also look at the evidence of the other Crown witnesses to see if their testimony corroborates, refutes or helps me to understand and appreciate the two conflicting versions of events that happened on December 27, 2009 and the subsequent events that occurred in the days that followed.

[28] I do not intend to review in detail the evidence of each witness that was called to testify. I will focus primarily on the events that took place in the shared apartment after the accused arrived home after visiting N.R. and G.(aka D.) O. – a couple who occupied another apartment in the same complex of connected buildings.

REVIEW OF THE EVIDENCE

[29] The Court heard from three witnesses regarding the lead-up to the events that culminated in charges being laid.

[30] The complainant and the accused both testified. So did N.R. N.R., as mentioned previously, was a friend of the accused and his daughter. She no longer considers the accused her friend.

[31] Sometime during the afternoon of December 27, 2009 the accused and his daughter arrived at the apartment N.R. shared with her partner, D. O. She remembers the date as she had earlier broken her wrist and she was scheduled to have surgery to repair the break the next day, the 28th.

[32] The accused and D.O. were drinking buddies. Sometime after the accused arrived he and D.O. left to buy some liquor. The accused's daughter – dressed in her pyjamas with the draw-string waist – remained behind in the apartment with N.R.

[33] Sometime later the accused and D.O. arrived back at the apartment. They played cards and drank alcohol well into the evening.

[34] At one point the accused confronted N.R.'s son, N.R. The confrontation was quite heated with yelling and hollering on the part of J.A.H. In N.R.'s opinion the accused was "out of control."

[35] The accused told his daughter to leave and return to their apartment. N.R. could not remember when M.H. left as she was pre-occupied with the aggressive behaviour the accused was directing at her son.

[36] According to the testimony of the complainant, her father gave her his keys when he told her to go back to their apartment. She needed the keys to get back in. The accused testified that his daughter had her own set of keys which were tendered as an exhibit at trial. N.R. was not able to offer any evidence that would help to resolve this issue. Nor was she able to say whether the complainant returned home through the internal stairways or whether she went outside which is the way the complainant said she went.

[37] This is important in deciding how things unfolded after the accused left and returned home to his apartment.

[38] He says he entered his apartment from the outside gaining access with his magnetic swipe card. He then went up the stairs and unlocked the front door to his apartment using a key.

[39] His daughter testified that she had her father's keys which she used to gain access first through the outside door and then to the apartment. She went immediately to bed as she was already wearing her pyjamas and she was tired. Some short time later she was awakened by the sound of her father buzzing the apartment to get her to come down to let him in. She says she went down the stairs and opened the door. She then went back up the stairs and went back to her bedroom. She noticed that her father appeared to be unsteady on his feet and needed to use the handrails on the stairwell for support.

[40] When the accused testified, he said that he let himself into the building. When he opened the door to the apartment he found his daughter standing in the kitchen with her back to him. According to his testimony she was standing in front of the dishwasher. It appeared to him that she had her hands down the front of her pyjamas. He thought this was the case as the pyjamas seemed to be pulled tight around her backside.

[41] When he asked her what she was doing she immediately turned around with her hands by her side and told him that she was not doing anything wrong. He was angered at what he perceived was a lie and demanded that she present herself to be spanked. He proceeded to seat himself in one of the wooden kitchen chairs and told her to come over and pull down her pants so he could discipline her.

[42] Instead of following her father's command the complainant ran past him to the refuge of her bedroom. The accused then threw one of the kitchen chairs across the room causing parts to break off. He then, according to his testimony, simply went to the living room next to the kitchen and fell asleep on the sofa.

[43] The next morning after he awoke he made cinnamon pancakes for his daughter. He does not often make cinnamon pancakes for his daughter. He does not like to eat them.

[44] If the Court was to accept the accused's testimony he would have to be acquitted. He might have misinterpreted what he believed he saw his daughter doing and then over-reacted when he thought she had lied to him about it but it would not constitute criminal behaviour. That would be the end of it.

[45] The Court must, however, consider the complainant's version of what took place after her father returned to the apartment. Could she be mistaken? Could she have made up the whole thing for some unknown reason? To address these concerns the testimony of the other witnesses called by the prosecution plays a pivotal role.

[46] According to the complainant she went immediately to her bed after letting her father in. She only left the comfort and privacy of her room when she heard her father calling to her to come into the kitchen.

[47] She testified that she saw her father sitting on a kitchen chair facing her. He told her to walk over to where he sat. When she was positioned in front of him he then proceeded to put his hands down the front of her pyjama bottoms touching her stomach, the upper part of her legs and her vagina. She told him to stop and then she grabbed his hands and removed them. She returned to the relative safety of her bedroom where she tightened the drawstrings of her pyjama bottoms for added protection. She went back to bed.

[48] The next morning she asked her father why he had done it. She said he did not offer an answer. He remained silent.

[49] She kept this to herself until she revealed things to her aunt, B.N. at her grand-parents' house on the evening of January 10th, 2010. According to B.N.'s testimony the complainant cried after telling her for fear that her father would get in trouble.

[50] B.N. also testified that her niece said her father had done something similar when she was about four years-of-age. The complainant when asked if she would be surprised that her aunt had told the authorities this answered very matter-of-factly that she would because she had never said this. According to the complainant she never changed her clothes or took a bath in front of her father except perhaps when she was a baby. She also was certain that her father had never touched her improperly other than this one time.

[51] The Court also heard from the complainant's maternal grand-parents, M.N. and M.A.N. Both are retired, former school teachers. M.N. had been at one time a *. It is obvious that both Mr. and Mrs. N. love their grand-daughter dearly and have been supportive of her and her father despite the estrangement of their daughter from the accused. They both testified of the love that their granddaughter had for her father with whom she primarily resided. They do not appear, to me, to be trying to destroy that relationship.

[52] In their testimony they recalled the telephone call made to their residence by the accused late in the evening on January 25, 2010. The accused by then had been charged and was under a court order not to have contact with them or with his daughter. Despite this the accused telephoned their residence. Mrs. N. first answered the phone. She recognized the accused's voice. He asked to speak to Mr. N.

[53] Mr. N. had just gone to bed and had not quite fallen asleep.

[54] She handed the telephone to him. J.A.H. was on the other end. He appeared to be under the influence of alcohol.

[55] He accused the Ns. of trying to pit their family against his. Mrs. N. did not immediately listen in on the conversation but after a few minutes she decided to pick up another extension in order to do so.

[56] Based on their independent recollection of what they heard the accused say it is apparent that J.A.H. was not calling out of concern for them or his daughter. He was clearly trying to intimidate them by suggesting that their granddaughter would end up in a foster home estranged from the family the same as another grandchild of the Ns. who had been adopted out earlier.

[57] At one point in the conversation the accused said to M. N.:

> I came home that night and found M. touching herself. I wasn't going to let, or accept that grade 4 investigation of herself. I told her to turn around and I educated her.

[58] This or words to this effect were also recalled by Mrs. N. who listened in on part of the conversation on the telephone between her husband and J.A.H.

[59] The accused was extensively cross-examined on this and other remarks that he made during the course of the telephone call. He did not deny saying it. He simply said he could not recall much of what he had said. He agreed that if Mr. and Mrs. N. said he had said it he could not deny it.

[60] Neither did he, despite repeated opportunities, offer an explanation of what he meant when he said: "I educated her."

[61] During the course of his testimony, J.A.H. admitted to having a rather extensive criminal record including possession of a weapon, break and enter, assault, breaches (of conditions) and what he described as "possession of theft tools." The previous assault involved his former partner, K. N. - the mother of the complainant.

[62] At one point in cross-examination the accused suggested that he left his former position in the * voluntarily despite the fact that he had no job and no place for him and his daughter to live. He further suggested that his superiors, despite knowing of his criminal conviction, offered him a promotion to persuade him to stay.

[63] J.A.H.'s failure to offer an explanation of what he meant when he said "I educated her"; his criminal record; his suggestion that his superiors in the * were prepared to promote him in the face of his criminal convictions in order to persuade him to stay; the fact that he said he did not really understand the nature of the allegations made against him until he heard his daughter testify on the first day of trial which I find to be absolutely incredible; and his motivation to deny the very serious allegations of sexual assault and sexual interference of his daughter convince me that where his testimony differs from that of the complainant it is her testimony that should be believed.

[64] The complainant was honest and forthright in presenting her evidence. She had no reason to lie. Indeed the testimony of her aunt, B. N., and her grandparents, M.N. and M. A. N., demonstrated a concern for her father's well-being and genuine love and affection for him. She has nothing to hide nor should she feel bad for the situation she was put in. She did the correct thing. She shared it with someone she trusted. That person also did the right thing by reporting it to the appropriate people at the Provincial Department of Community Services. Any allegation of this nature or any suspicion of child abuse has to be reported.

[65] I am satisfied that the Crown has proved all of the elements of both sexual assault contrary to s. 271(1)(a) and sexual interference contrary to s. 151(a) of the **Criminal Code** beyond a reasonable doubt.

[66] At this juncture, J.A.H., I am going to ask you to stand please. J.A.H. on the charge that you sexually assaulted the complainant contrary to s. 271(1)(a) of the **Criminal Code**, I find you "guilty".

[67] On the second count that you did, for a sexual purpose, touch the complainant, a person under 16 years of age, directly with a part of your body, to wit: your hands, contrary to s. 151(a) of the **Criminal Code**, I also find you "guilty".

[68] Based on the Kienapple principle (**R.** v. **Kienapple**, [1975] 1 S.C.R. 729; 15 C.C.C. (2d) 524; 44 D.L.R. (3d) 351) this latter charge will be judicially stayed. Sentencing on the sexual interference charge will take place on Friday, November 18, 2011.

McDougall, J.