

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Crowe*, 2012 NSSC 175

Date: 20120326

Docket: CRH 340325

Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Thomas Crowe

Editorial Notice

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

Restriction on publication: Section 486 C.C.C. (Sexual Assault)

Judge: The Honourable Justice M. Heather Robertson

Heard: March 20, 21, 22, and 23, 2012, in Halifax, Nova Scotia

Decision: March 26, 2012 (**VERDICT**)

**Written Release
of Decision:** April 27, 2012

Counsel: Paul Carver and Eric Taylor, for the Crown
J. Brian Church, Q.C., for the accused

Robertson, J.: (Orally)

[1] Robert Thomas Crowe is charged with the unlawful confinement of the complainant I. T., contrary to s. 279(2) of the *C.C.C.*, sexual assault contrary to s. 271(1)(a) of the *C.C.C.*, sexual assault causing bodily harm contrary to s. 272(2)(b) of the *C.C.C.*, breach of his probation order contrary to s. 733.1(1)(a) and breach of his recognizance under ss. 810 and 811 of the *C.C.C.* These charges arise from the events that are alleged to have occurred on June 27, 2010.

[2] Ms. T. is a young woman who was about to celebrate her 19th birthday on June *, 2010. Today she is in her third year of university pursuing a Bachelor of Arts in *. In June of 2010, she had just completed her first year of studies.

[3] On Saturday, June 26, 2010, she was at work at *, a clothing store in Dartmouth. Her co-workers D. I. and K. P., invited her home for drinks after the store closed on Saturday night.

[4] She left work, went home and changed her clothing. Having received a text message from K. P., she agreed to walk to meet her at the Ultramar Service Station on * Street, from where they would both walk to D.'s house on * Street, some five minutes away. Ms. T.'s own home was on * Street, but at the opposite end just north of the intersection known as “*.”

[5] When she arrived at the Ultramar, K. was waiting for her, accompanied by the accused Robert Crowe whom she had never met before. They walked to D.'s house and began drinking, chatting, playing music and just hanging out for the evening.

[6] The evening has been described by Ms. T. and Ms. P. in their evidence and by Mr. Crowe, the accused who also testified. In early part of the evening, they were joined briefly by another young man, J., who lived in the basement apartment of the residence and who invited them downstairs to his apartment for about the first half hour of the evening. Following that visit, these four returned to the main floor living room, where they continued the evening.

[7] Alcohol did play a role in the evening. K. shared a pint of vodka, she had brought with her, with I. T. she testified that she drank more than half of the

contents of her own pint and I. drank the balance. They had the first shot downstairs at J.'s and the balance upstairs in the living room.

[8] Ms. T. acknowledged that from her arrival at approximately 11:00 p.m. until her departure at 3:30 or 4:00 a.m., she drank vodka, about half a pint, had one shooter of another type of alcohol, possibly rum, at the very end of the evening. She testified that she also shared a marijuana joint with D., sometime after midnight. She testified that early in the evening "I felt a little from the alcohol, but was not really drunk or intoxicated." Later she described herself as "pretty intoxicated and just wanted to walk home." Having deliberately ignored a call and a text from her father, who wanted to pick her up around 1:00 a.m., she decided she had better walk home, back down * Street, about a 20-minute walk, in order to sober up, before encountering her dad.

[9] Mr. Crowe suggested, in his evidence, that Ms. T. might have had more to drink, and a few shooters at the end of the evening and possibly two joints shared with D., but he described her as drinking, but not too drunk and "never trashed." He agreed that on the walk home she was not stumbling or having difficulty talking or being really inebriated.

[10] Mr. Crowe testified that he had a beer at his own home, from an eight-pack he had bought, and then cycled over to D.'s house with the rest of the beer in his back pack, arriving around 10:00 p.m. He testified that he drank all the eight-pack, but for one that he gave D.. He testified he did not smoke any marijuana, although shared a pack of cigarettes with K., which they had bought at the Ultramar just before meeting Ms. T..

[11] Their brand was "Canadian Classic" king size, the same brand as the cigarettes found on the ground in the driveway at * Street, where the alleged sexual assault is said to have occurred, as Mr. Crowe walked Ms. T. down * Street toward her home, at the end of the evening. There was no DNA or fingerprint evidence to suggest this cigarette package was the identical package shared by K. P. and the accused. However, Ms. P. believed she gave the package away at the end of the evening and the accused believed that he took it with him and then, according to his evidence, gave it to Ms. T. when he left her, at *.

[12] Ms. T. testified that while at D.'s place, all four of them hung out for the evening together, mostly sitting on the sofas in the living room, drinking, chatting

and watching videos on television. She testified K. P. and Mr. Crowe had an occasional cigarette on the front porch. She testified that she did not go to the second storey of the house, which was D.'s brother's room.

[13] By 3:30 or 4:00 a.m. K. P. was tired. The evening was winding down and Ms. T. knew she needed to get home and chose to walk to make sure she was sober on arrival home. The accused accompanied her walking beside her, with his bicycle.

[14] Ms. T. testified that about half way down the length of * Street, a stranger approached them from behind and asked if Mr. Crowe had a light. He did and lit the cigarette for the stranger. The stranger walked on down the street and Mr. Crowe told her to "wait." Ms. T. testified that the accused pushed her up against a short retaining wall and attempted to kiss her. She said "no" and pushed him away and they continued their walk on down the street.

[15] She testified that as they approached the * where * Street intersects with * Street, the accused pushed her into a driveway of a house two or three houses up from the corner.

[16] She described his actions, how he pushed her to her knees and said, "suck my dick" and when she said no and resisted he grabbed her hair and shoved her head forward on his erect penis forcing her to have oral sex. She testified about a continuing assault where he told her to bend over and pushed her to do so. He had dropped his pants and pulled her stretch pants down and forced his penis up her anus. She further testified that he pushed her to the ground and that she was lying on her back in some bushes just off the paved portion of the driveway and he attempted vaginal intercourse and also attempted to kiss her neck and upper chest in the thoracic area. At one point he shoved his hand down her throat scratching the back of it.

[17] She testified she did not scream, but was crying. She testified "I asked if he'd let me leave, he said no - you'll just tell your parents. I said, no I won't, he bent me over again, but that's when the car stopped."

[18] She also testified that "he was angry and told me to shut up, but I couldn't stop crying."

[19] She testified that finally a van stopped and someone called out “Is everything okay?” At this point, Mr. Crowe then ran into the bushes up the driveway and she ran into the street toward the van answering “no.” She declined their offer of a drive, ran back up the driveway, retrieved her cell phone and purse and ran toward home, crossing the intersection at * and stopping to rest in the lit parking lot of the Tim Horton’s on * Street to ensure that the accused was not around and had not followed her. She testified that she then went the balance of the distance, a few more doors to her home.

[20] While in the driveway on her back being assaulted she had, she testified, tried to reach for her phone and press a button, any button to place a call. She testified Mr. Crowe took the cell phone from her. The scene in the driveway at * Street is depicted in a series of photographs shown as Exhibits 8 and 15 in evidence before the Court.

[21] On arriving home she jumped into the shower. Her father was not at home and his car was not in the driveway. She assumed he had gone looking for her. When her father returned, she testified that she did not tell her father about the assault. Instead she called a friend N. at 4:50 a.m., and told her what had happened. She testified that her friend counselled her to go to the police. However, she went to bed for a few hours, before getting up in the morning, dressing then leaving the house for work. She testified that she arrived at the mall at about 10:00 a.m. accompanied by her friend M. and explained to her employer she could not work that day. She also called K. and D., who were still at D.’s house and told them of the assault. She asked them to accompany her to the police station. Ms. T. drove to D.’s, picked them up and all four went off to the police headquarters on Gottingen Street in Halifax to report the assault.

[22] After the initial interview with the police Ms. T. drove with M. to the QEII for the SANE examination. She gave a taped interview to the police later in the evening of June 27 and also provided all of her clothing worn that night, to the police.

[23] Mr. Crowe tells a different version of the evening’s events. He too confirmed that the evening was about the four of them largely hanging out, drinking, talking, playing music and watching television until about 3:30 a.m. He described shared cigarettes with K. P. on the front deck and all four being out on the back deck, where he testified that D. and I. shared a joint.

[24] However, his version of the evening departs from the testimony of Ms. P. and Ms. T., as he testified to a sexual encounter, initiated solely by Ms. T., sometime after midnight, that separated them from the group.

[25] He testified that as he was in the kitchen getting a beer out of the fridge Ms. T. came into the kitchen and began flirting with him and asked him if he would like to go upstairs with her. He agreed. He testified she led the way to the door off the living room that led to the upstairs bedroom, while D. and K. remained sitting on the couch in the living room.

[26] He testified that they proceeded upstairs, that Ms. T. placed her drink on the night side table and that he placed his unopened beer on the bed. He testified how she pushed him backwards on the bed and climbed on top of him. He testified that they were making out and removing each other's clothing and that they then engaged in consensual oral sex followed by vaginal sex. He testified precisely as to the timing of each of these acts, which amounted to a 20-25 minute absence from their friends D. and K. who remained in the living room.

[27] Mr. Crowe testified that after this encounter, which he described as casual one-night stand, he and Ms. T. got up, dressed and went downstairs.

[28] Mr. Crowe could not recall any particular conversation that he had with Ms. T. during this encounter, but he did recall her groaning and panting during sex.

[29] Mr. Crowe says that once downstairs they continued socializing, having drinks, talking, listening to music and watching videos until it was time to leave.

[30] He testified that he walked Ms. T. down * Street toward * . He too testified that a stranger came along and asked for a light for a cigarette about half way down the street.

[31] He testified, however, that there was no physical sexual contact with Ms. T. on the way home, that the only touching between them was when at * he bid her good night by hugging her, then got on his bike and drove up * Street to go home himself.

[32] So like many alleged sexual assaults, they occur when only two people are present, the accused and the complainant.

[33] The exercise for me is to weigh the credibility of the parties' testimony and determine if, on all of the evidence that is before me, I am satisfied that the Crown has proved the charges against the accused, beyond a reasonable doubt.

[34] Let me address the standard of proof.

[35] The Crown must prove its case, i.e., that the accused committed these offences with which he is charged. The Crown must prove all the elements of the offences. Counsel has agreed that the date, time and place of the alleged offences are proven and that the identity of the accused is also not at issue. It is of course denied that the accused used force as defined by the *Criminal Code* and committed these alleged sexual assaults. Rather, the accused says the only sexual acts that occurred were consensual between him and Ms. T. and that this happened earlier in the night upstairs in the bedroom, accounting for the presence of his DNA on a swab taken from her neck, during the SANE examination.

[36] I have often quoted *Liftus*, as I instruct myself on the law. Mr. Church cited an earlier decision of mine *R. v. Smith*, 2007 NSSC 171, where I stated:

The Crown must prove its case beyond a reasonable doubt. Reasonable doubt has been defined by the Supreme Court of Canada in *R v. Lifchus*, [1997] S.C.J. No 77. The often quoted language characterizing reasonable doubt is:

- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;
- more is required than proof that the accused is probably guilty - a judge or jury who concludes only that the accused is probably guilty must acquit;

- proof beyond a reasonable doubt is closer to absolute certainty than it is to probable guilt.

[25] When the accused testifies the trial judge must instruct him or herself according to *R v. W(D)* (1991), 63 C.C.C. (3d) 397.

[26] The often quoted three part test:

- First, if you believe the evidence of the accused, obviously you must acquit.
- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[27] The challenge of course it to ensure that in weighing the critical issue of credibility of the complainant and the accused, as to these events, that the court not merely engage in a "he said - she said" analysis leading to a choice of one version of events over the other thereby possibly shifting the burden to the accused to explain away the complainant's testimony. This is referred to as the "forbidden reasoning" discussed in a cluster of recent cases including *R v. Maharaj*, [2004] 186 C.C.C. (3d) 247 (Ont. C.A.); *R v. D. (S.J.)* (2004), 186 C.C.C. (3d) 304; *R v. Dore* (2004), 189 C.C.C. (3d) 526 (Ont. C.A.); *R. v. L. (C.J.)* (2004), 197 C.C.C. (3d) 407 (Man. C.A.); *R v. C.S.B.*, [2005] N.S.J. No. 402 and *R v. Lake* [2005] N.S.J. No. 506.

[28] These appeal cases are instructive in that they warn of the danger that in weighing the accused evidence against a complainant's testimony, a matter of necessity I might add, but that the court should not lose sight of the burden of proof or shut down the *W(D)* analysis prematurely, i.e. by failing to conduct the analysis in light of step 2 and step 3 of *W(D)*.

[29] This cannot mean that the acceptance of a Crown witness to the disbelief of an accused is unacceptable or "forbidden." But the analysis must be thorough and reasoned in light of *W(D)* and if a conviction were to be entered the accused must be able to understand why, by reading a reasoned judgment.

[37] Now in this case, it becomes important to look for the evidence that can corroborate either version of these event, as testified to by the complainant and by the accused, Mr. Crowe.

[38] In order to accept Mr. Crowe's version of the events of the evening I would have to accept that Ms. P. was mistaken in her evidence that there could not have been more than a five-minute interval during the entire evening, when Ms. T. was not in her presence. She did step out for cigarettes on the front deck, but she testified that the door was often open and they continued conversing from the front deck into the living room. She agreed that she or Ms. T. would also have been out of sight when using the bathroom, for a few moments, but never more than five minutes.

[39] She also testified that no one went upstairs to D.'s brother's bedroom and that it was strictly out of bounds.

[40] She testified that were anyone to have been upstairs she would have known it, been able to hear noise or movement in the bedroom and none occurred or I would have to conclude that Ms. P. had so much to drink she did not notice 20-25 minutes passing without Mr. Crowe and Ms. T. being present.

[41] With respect to the walk home, Mr. Crowe declines any knowledge of the driveway at * Street, having according to his testimony said goodbye to Ms. T. at the intersection and watched her walk across the intersection proceeding north on * Street.

[42] That means I would have to conclude that Ms. T. either made the whole incident up and staged the scene in the driveway where her flip-flops were found, the cigarette package, the hair weave allegedly ripped from her head during the assault, the bloody tissue and the receipt with her name on it, all left on the ground for the police forensic team to find later on June 27. Of course, those items were found and this has been addressed by the evidence of the police officers who testified and has been shown in the exhibits before this Court.

[43] Or the other possibility I would have to consider is that Ms. T. was so drunk she did not know her attacker and that this unknown assailant lured her back across the intersection, up three driveways to * Street and assaulted her.

[44] That a sexual assault occurred is a finding I am able to make with near certainly, I accept that the forensic evidence at the scene, showing what remained behind after Ms. T. fled, was not staged and confirms the evidence of the complainant as to what took place in the driveway. The photos support her testimony. They are taken in the light of day. The driveway was unlit at 4:00 a.m. but she could describe the gravel, the bushes, the exact location of the assault, which is confirmed by Exhibit 15.

[45] I also accept the testimony of Ms. Whynot , the SANE examiner, who testified to the injuries suffered by Ms. T.. These injuries including abrasions on the hips, scratches on the back and knees, bruising near her vagina and a slit anus opening. These are consistent with a violent sexual attack.

[46] I also accept that although all four people together that night, Mr. I., Ms. P., Ms. T. and Mr. Crowe, were drinking and two of them sharing a joint, there is no evidence that any of them was so totally drunk or totally impaired as to be confused about their surroundings.

[47] Not even Mr. Crowe suggests Ms. T. was really drunk. He testified she walked normally down * Street beside him. They conversed. They hugged goodnight and he watched her cross the intersection. This is his description of her condition, hardly a condition, in which she could have then been waylaid by another assailant, lured or dragged back across a large intersection and assaulted three doors further up * Street in a dark driveway.

[48] After considering all of the evidence before me, I find the complainant to be more than credible. I also find that her testimony is confirmed by Ms. P.. She was never apart from Ms. P. for 20-25 minutes, upstairs in a bedroom that evening. She was never in the bedroom.

[49] Her injuries were real and are well documented by the evidence before me.

[50] In short, it is preposterous to suggest that the assaults upon Ms. T. did not occur or took place in any manner other than she has outlined in her testimony.

[51] She knew her assailant, Mr. Crowe. She simply had the misfortune to meet him for the first time that night and to allow him to accompany her on the walk home.

[52] I do not believe that her evidence is less worthy of belief because she did not scream out, or flee into the van which strangers were driving but instead ran home barefoot, because home and safety were so close at hand.

[53] We do know that there is no stereotypical way to respond to a sexual assault. I agree with the Crown that the myths documented in the *Seaboyer* case, [1991] S.C.J. No. 62, put this erroneous thinking to rest.

[54] Ms. T. was afraid and crying and asking the accused “please let me just go home.”

[55] I also do not fault her from not calling 911. We live in an age where young people are constantly connected by cell phones and social networks, texting one another. To their detriment, they may often choose the comfort of communicating with their friends when in danger, over seeking the safety and protection of their parents or even the police.

[56] Ms. T. had not heeded her father’s advice to be home around 1:00 a.m. or call him for a drive home. She made the mistake of partying too long into the early morning hours, and chose to walk home, unfortunately.

[57] I do not accept Mr. Crowe’s version of the evening as credible. It is in my view, a story he made up to explain away the evidence of his DNA upon Ms. T..

[58] His video statement to the police was a complete denial of any physical contact with Ms. T. throughout the evening at the house or on the way home.

[59] As he testified he had to save the story about the earlier consensual sex, for his lawyer, if he needed it.

[60] Mr. Crowe admitted to having a lengthy criminal record as a youth from age 14. Perhaps he has indeed had a troubled past.

[61] But on all of the evidence that is before me and having instructed myself according to *W(D)*, I find that the Crown has proven beyond a reasonable doubt that Mr. Crowe committed a violent sexual assault on Ms. T. at * Street in Dartmouth, on June 27, 2010, contrary to s. 272(2)(b) of the *Criminal Code*

causing her bodily harm and also unlawfully confined her during this assault contrary to s. 279(2).

[62] With respect to Count 2, the charge pursuant to s. 271(1)(a) of the *Criminal Code*, which the Crown has isolated as “the attempted kissing episode” half way up * Street before the driveway assault, I am not convinced beyond a reasonable doubt that this incident meets the criteria of a sexual assault and I find Mr. Crowe not guilty of this charge.

[63] It follows that the Crown has also proved the breaches, Count 4 and Count 5 of the indictment. I find Mr. Crowe guilty of these counts.

Justice M. Heather Robertson