

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Murley*, 2020 NSSC 352

Date: 20201211

Docket: *Halifax*, CRH No. 474186

Registry: Halifax

Between:

Her Majesty the Queen

v.

Edward Smith Murley

Restriction on Publication: s.486.4, s.486.5, and s.539(1)
Criminal Code of Canada

TRIAL DECISION

Judge: The Honourable Justice Kevin Coady

Heard: October 6, 7, 8, November 2, 3 of 2020, in Halifax,
Nova Scotia

Oral Decision: December 11, 2020

Written Decision: December 11, 2020

Counsel: Robert Kennedy, Crown Counsel
Kathryn Piché, Defence Counsel

By the Court:

[1] Edward Smith Murley stands charged with the following offences:

1. that he between the 13th day of May, 1978 and the 31st day of December, 1987, at or near Halifax, Nova Scotia, did commit an act of gross indecency with RL, contrary to Section 157 of the *Criminal Code*.
2. AND FURTHER that he at or near Dartmouth, Nova Scotia, between the 13th day of May, 1978 and the 3rd day of January, 1983, did indecently assault RL, a female person, contrary to Section 149(1) of the *Criminal Code*.
3. AND FURTHER that he at or near Dartmouth, Nova Scotia, between the 4th day of January, 1983, and the 12th day of May, 1988, did commit a sexual assault on RL, contrary to Section 246.1 of the *Criminal Code*.
4. AND FURTHER that he at or near Windsor, Nova Scotia, between the 13th day of May, 1985 and the 12th day of May, 1988, did commit a sexual assault on RL, contrary to Section 246.1 of the *Criminal Code*.

On March 15, 2018 he entered not guilty pleas and, as such, a five-day judge alone trial ensued. Mr. Murley testified at trial and denied that these alleged assaults ever occurred.

[2] The primary crown witness was the complainant, RL. She was born in 1973 and is now 47 years old. The offences are alleged to have occurred between 1978 and 1988 when RL was between five years and 14 years of age. It is obvious, from the evidence as a whole, that RL's early upbringing was unconventional in that her family unit was dysfunctional and unsettled. RL's mother was unable to sustain either stable residences or relationships. She reports attending three different schools when in Grade 4. She left home in her 15th year.

[3] RL testified that she, her mother, and younger sister lived in an apartment on Frederick Avenue in Halifax when she was four to five years old. She testified that Mr. Murley and his family lived in the same building. RL's mother was often away from the home and her care was provided by the Murleys. RL reported that she would be in the Murleys' apartment on a daily basis, often staying overnight. She came to consider the Murleys as "Uncle Ed and Aunt D".

[4] RL testified that, when she was five years old, she found a tar deposit in the parking lot where she was playing and soiled her new clothing and skin. She testified that Mr. Murley took her into his bathroom under the guise of cleaning her up. He removed her clothing and put her in his bathtub. He touched her, both inside and outside of her clothing. She testified that he rubbed her genital area and digitally penetrated her.

[5] RL reported many other sexual assaults at the Frederick Avenue address – more than she could calculate. She testified that, on many occasions when she stayed overnight, Mr. Murley would take her out to his couch where he would place her on his lap and slide her back and forth against his exposed penis. He would also grope her vaginal area.

[6] RL testified that there were so many incidents at Frederick Avenue that she “could not give you an exact number”. She stated Mr. Murley assaulted her “every time he got the chance”. Others would often be present in the apartment. Sometimes assaults would happen “outside in the yard”. She told no one at that time, due to the urging of Mr. Murley.

[7] The Murley family moved from Frederick Avenue to an apartment on Jackson Road in Dartmouth when RL was eight or nine years old. RL’s mother became dependent on the Murleys for childcare support. Consequently, she would drop RL and her sister off at the Jackson Road apartment for extended stays, including overnight visits. Sometimes RL’s mother would stay overnight. RL testified that Mr. Murley continuously sexually assaulted her at that location, although less frequently than at Frederick Avenue. Much of the alleged abuse involved touching and groping on more occasions than she can recall.

[8] RL testified that she and her sister would often sleep in a storage closet at the Jackson Road apartment so as to simulate camping. On many occasions, Mr. Murley would wake her and take her out to a couch. He would be wearing an open robe which exposed his genitals. He would guide her to his penis and have her masturbate him and perform oral sex on him. She stated, “I did as I was told”, and she recalled, “his hand on the back of my head.” Sometimes he climaxed and sometimes he did not. These incidents often occurred when other people were in the apartment. RL testified these incidents of oral sex continued on “many occasions”.

[9] RL testified that when she was “older than ten”, the Murleys moved to a small house on Jackson Road in Dartmouth. The well-established relationship

between the Murleys and RL's mother continued. The sexual assaults continued unabated. RL testified there were too many assaults at this location to count but that a couple of events stood out. It is also noteworthy that the Murleys' relationship broke down during this period and Mrs. Murley moved out of the home.

[10] RL described the Jackson Road house as two storeys with two bedrooms downstairs. One bedroom was occupied by the Murleys and the other by "the girls". She described the first incident of sexual intercourse when she was "more than 11". She testified Mr. Murley wanted her to go downstairs on an occasion when Mrs. Murley was not there. She says she resisted but relented when he intimated that he would move on to another child in the home. Once in the Murley bedroom, he removed her underwear and digitally penetrated her. He then performed oral sex on RL and made her masturbate him. She tried to leave the bed, but he pulled her back down. He then got on top of her and engaged in sexual intercourse. RL testified intercourse happened "a couple of other times" involving a similar scenario.

[11] RL's testimony about the first alleged incident of sexual intercourse was quite detailed. She recalled the smell of Old Spice cologne and could feel his "scratchy" chest hair. She stated she "could not breathe". She stated she felt "wet" and believes he climaxed. She stated that, on the third incident, he could not climax. Fondling and oral sex continued throughout the period at the Jackson Road house. The last contact with Mr. Murley was when she was 14 years old. RL also describes assaults at Albro Lake and at a residence/vehicle at or near Windsor, Nova Scotia. She testified he kept doing the "stuff" he was doing all along and that he took advantage of any opportunity he could find.

[12] RL testified that when she was 14 years old, she told Mrs. Murley about Mr. Murley's abuse. She says she described the abuse in general terms, although she did report that he raped her. Mrs. Murley urged RL to tell her mother. RL testified that when she and Mrs. Murley told RL's mother, the response was, "Why do you want to ruin my life?" She left home months later and moved in with a boyfriend's family.

[13] Sexual assaults generally occur in private so direct corroboration is rare. The Crown called several peripheral witnesses who were able to corroborate secondary aspects of RL's testimony. One such witness was HM, RL's younger sister. She recalled living at Frederick Avenue when she was "just about school

age”. She recalled visiting the Murleys at the Jackson Road apartment and the Jackson Road house. She recalled going to Albro Lake with the Murleys.

[14] HM testified about living on Frederick Avenue with RL and their parents. She recalled that she and RL spent considerable time with the Murleys when their mother was unavailable. She confirmed that they called the Murleys “Uncle Ed and Aunt D”. She recalled RL missing from their bedroom and not knowing where she went. She recalled the “tar story”. HM recalls the Murleys living in a small apartment on Jackson Road but could only provide minimal details. She did testify that she and RL attended at that residence “quite a bit”. She also recalls the Murleys’ house on Jackson Road and confirmed that they stayed there. Sometimes they would “stay over” and one summer they stayed at the house “for some time”. She testified that their mother was very close to the Murleys throughout.

[15] DM is Mr. Murley’s former spouse. She confirms living on Frederick Avenue, the Jackson Road apartment and house. RL’s mother was “one of her dearest friends”. She confirmed that, while living at Frederick Avenue, she would see RL and HM on a daily basis and they would often stay overnight on the floor or couch. She testified that, at times, the girls would be alone with Mr. Murley and that he only paid attention to RL. She testified she had a very clear memory of her time at the Jackson Road apartment in 1982 when RL was nine years old. She reported that RL and her family visited quite often and would stay overnight. She recalls the girls sleeping in a storage closet. DM was employed at the time and, as a result, “the kids” would often be alone with Mr. Murley. She testified that Mr. Murley always wore a striped housecoat and that he never wore anything under it. This point of evidence was also advanced by both RL and HM.

[16] DM has a clear recollection of her time at the Jackson Road house. She testified that “[S.]and the kids” would visit quite often and sometimes stayed overnight. She left Mr. Murley in May, 1984, when RL was 11 years old and HM was eight years old. Prior to that she worked shifts, leaving Mr. Murley alone with “the kids”. She confirms RL told her about Mr. Murley’s abuse without details.

[17] Upon arrest, Mr. Murley participated in a cautioned exchange with a police investigator. The video and transcript (Exhibit 2 collectively) were tendered by the Crown with the consent of the defence. While he spoke freely, he maintained his innocence. He stated that RL’s allegations were completely untrue and “it did not happen.”

[18] Mr. Murley elected to testify at his trial. He confirmed the relationship between his family and RL's family. He confirmed living at Frederick Avenue and on Jackson Road. Much of his testimony focused on his employment during the material years. The import of Mr. Murley's testimony is that these events could not have occurred because his employment kept him away from home. In other words, he never had the opportunity to commit these offences. He refutes the testimony that suggests opportunity. He testified that he never watched the girls alone and that "DM was usually there." He acknowledged that RL and HM would sleep in the storage closet at the Jackson Road apartment. He acknowledged that he often wore a striped housecoat, but denies wearing nothing underneath. While Mr. Murley's testimony amounts to a complete denial, it does not refute the peripheral details advanced by RL, HM and others.

[19] I found RL's testimony to be credible and forthright, especially in light of the challenges she has faced in her life. I found her evidence to be balanced and moderately stated. While she often struggled with her memory, she did not falter in her recall of the alleged offences. She was never evasive or exaggerative. She was not awkward about recalling the personal and traumatic events that have defined her young life in a totally dysfunctional environment. She was unmoved by cross-examination.

[20] RL testified about unique things she recalled from the assaults that lend credibility to her evidence. One example is about the striped housecoat he regularly wore. This point was confirmed by other witnesses including Mr. Murley. She testified she "could feel his skin" under her and that she was "facing away" from him when he had her on his lap and "sliding" her "back and forth". She referenced sleeping in a storage closet at the Jackson Road apartment, a point confirmed by other witnesses, including Mr. Murley. She recalled that when she performed oral sex on Mr. Murley, he had his hand on the back of her head. As to the alleged intercourse, she described the "scratchy feeling" of his chest hair and the aroma of Old Spice cologne. RL's testimony, as a whole, was spontaneous and not contrived. It is obvious that she is a very intelligent person.

[21] Mr. Murley's testimony amounts to a bald denial. While he acknowledged much of the Crown's narrative, he steadfastly denied ever touching RL. The import of his testimony is that his employment was such that he never had the opportunity to commit these offences. I do not accept that defence, as I am satisfied that Mr. Murley had more than ample opportunity to offend as alleged. I accept that he was often away from home for days, or even a week, but those

absences were occasional. For much of the timeframe, he was driving a taxi locally and had custody of his own young children. This defence is not made out by Mr. Murley and is refuted by the testimony of other witnesses who were close to his family at the material times.

[22] I found Mr. Murley's testimony to be evasive and self-serving. Under cross-examination he continuously avoided answering direct and difficult questions and attempted to escape to safer ground where he would expound on safer, extraneous information. I conclude this tact was Mr. Murley's imagined way of neutralizing the evidence against him. It did not accomplish that goal and the strategy was readily apparent. I also reject his suggestion that this prosecution is being driven by the animosity of his former spouse in retaliation for taking custody of their two children in 1984. There is no evidence supporting such a proposition.

[23] Given RL's allegations, and Mr. Murley's complete denial, the case of *R. v. W.(D.)* [1991] 1 S.C.R. 742, must be applied. The principles of that case can be summarized as follows:

First of all, having heard the accused's evidence, if I believe his evidence, I must find him not guilty.

If his evidence leaves me in a state of reasonable doubt then I must also find him not guilty as the Crown has failed to prove it's a case beyond a reasonable doubt.

If I do not believe his evidence, and are not left in a state of reasonable doubt, then I must go on to determine if the evidence remaining establishes guilt beyond a reasonable doubt.

This approach ensures that the onus never shifts. I can state unequivocally that I do not believe Mr. Murley's denials and they do not leave me in a state of reasonable doubt. The question that remains is whether the Crown has proven all four counts on the Indictment beyond a reasonable doubt.

[24] *R. v. W(D)*, *supra*, was extensively considered by Justice David Paciocco in an article entitled "*Doubt About Doubt: Coping with R. v. W.(D.) and Credibility Assessment*" (22 Can. Crim. L. Review 31 – 2017). He offered the following propositions respecting this assessment in a criminal trial:

A criminal trial is not a 'credibility contest.' It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charges alleged, beyond a reasonable doubt. It is therefore wrong to decide criminal cases where there is conflicting evidence about whether the accused is guilty, simply by deciding which version of events is preferred. The decisive question is whether,

considering the evidence as a whole, the Crown has proved the guilt of the accused on the specific charges alleged, beyond a reasonable doubt.

...

In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt the evidence must be considered as a whole. It is therefore possible to reject entirely evidence that is inconsistent with the guilt of the accused and convict solely because of the considered and reasoned acceptance beyond a reasonable doubt of evidence that the accused is guilty.

...

trial judges may assess the evidence in the order that logically commends itself, so long as they do not arrive at an ultimate conclusion about the guilt of the accused before considering the evidence in its entirety, and so long as it is clear that they are not simply comparing conflicting evidence to find the version they prefer.

Accordingly, Justice Paciocco confirmed that the evidence in a criminal trial must be considered as a whole. As a result, it is permissible for a trier of fact to reject entirely the exculpatory evidence simply because of the imposing strength of the Crown case, even if no specific reasons can be articulated for why the accused's evidence is disbelieved.

[25] Justice Doherty, of the Ontario Court of Appeal, commented as follows:

An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

This is exactly the situation Mr. Murley finds himself in at the present time. For reasons I have stated, I reject his denials outright. Also, for reasons I have stated, I find RL's testimony truthful, reliable and accurate. On the evidence, as a whole, I am satisfied the Crown has proven all four counts beyond a reasonable doubt.

[26] I point out that *Criminal Code* sections 157, 149(1) and 246.1 have been replaced by amendment. I have reviewed the essential elements of all four sections and I am satisfied that all have been proven beyond a reasonable doubt. Convictions will be entered on all four counts in the Indictment.

Coady, J.