

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. A. M.*, 2021 NSSC 349

Date: 2021-11-24

Docket: Syd. No. 500919

Registry: Sydney

Between:

Her Majesty the Queen

v.

A. M.

Publication Ban: S. 486.4; 486.5

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Heard: September 28, 29, 2021, in Sydney, Nova Scotia

Decision: November 24, 2021

Subject: Criminal Law - Sexual Assault;

Summary: Accused charged under s. 271 of *Criminal Code of Canada*. Events alleged to have occurred in 1982.

Result: Accused acquitted, assessment of evidence of Complainant. Description of Offender by Complainant a key issue. Crown failed to meet burden of proof beyond a reasonable doubt.

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Written Decision: November 24, 2021

Counsel: Mark Gouthro, for the Crown
David J. Iannetti, for the Defendant, Mr. M.

Section 486.4 - 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 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.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 486.5 - Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

By the Court:

Introduction

[1] The Defendant, A. M., stands charged that he:

Between February 5, 1982 and February 7, 1982, at or near [...], in the County of Cape Breton, Province of Nova Scotia, did unlawfully have sexual intercourse with K. D., a person not his wife, without her consent, thereby committing rape, contrary to Section 144 of the *Criminal Code*.

[2] In this case, the Crown preferred an indictment pursuant to section 577 of the *Criminal Code* on the 25th of September, 2020.

[3] The trial in this matter was held on September 28 and 29, 2021. The Crown presented two witnesses, the Complainant, [...] (who shall be referred to as K. D.) and [...] who shall be referred to as M. J.

[4] The burden rests solely on the Crown to prove the elements of the offence beyond a reasonable doubt. This burden is an onerous one.

[5] The Accused did not testify in his own defence. There is no obligation for him to do so. He is presumed innocent. Mr. M. has entered a plea of not guilty to the charge against him.

The Evidence

[6] A summary of the evidence of the Complainant, K. D., is as follows:

[7] On or about the 6th of February, 1982, she was at a dance with friends and after the dance ended, she then went to [...] house, which she described as [...]. Ms. D stated she had been drinking that evening and night. At around 3:00 o'clock in the morning Ms. D. left [...]’s house to walk to her home.

[8] Ms. D. stated she was picked up by A. M., whom she knew as, [...]. Mr. M. is the older brother of her good friend, [...]. Ms. D. stated she trusted Mr. M. and got in the truck with him.

[9] Ms. D. described the truck as a one cab truck with a single seat.

[10] Ms. D. stated she fell asleep soon after she got into the truck.

[11] Ms. D. stated that when she awoke Mr. M. was on top of her with his penis inside her. She described it as feeling like it was curved, like it had a bend to it. Ms. D. testified that she shouted, “What are you doing”, and grabbed his hips and pushed him off of her.

[12] Ms. D. stated she started to pull her pants up and got out of the truck. Mr. M. moved over to the driver’s side and was laughing when she opened the door of the truck. She got out of the truck and finished pulling up her pants, shut the door and started walking home.

[13] Ms. D. stated it happened on the road that is now covered by the new road that heads towards [...].

[14] Ms. D. testified she did not tell anybody about the incident for years.

Background

[15] The incident alleged is historic in that the Complainant testified it occurred in 1982. It has been 39 years since the alleged assault which was reported to the police in 2019.

[16] K. D. said she did not inform anyone of the incident until many years later, when she told M. J., her friend from childhood. K. D. was unsure of when this was, but recalled the details of the meeting, playing guitar and visiting with her at M. J.’s house. K. D. did not provide M. J. with details other than that A. M. assaulted her years earlier. She testified she told no one after that for a long time.

[17] In 2019 there was an incident involving K. D.’s sister in law and her family. K. D. became involved and began to have flash backs. She earlier described having a nightmare which led to these flashbacks. A lot was happening to her and she stayed up all night in distress having only two (2) hours sleep.

[18] She ended up contacting four (4) persons by messaging their wives, one of which was A. M.’s wife, with K. D. informing her that she had been sexually assaulted by him. She testified that in making these contacts she was in “survival mode”.

[19] She testified she had been later verbally attacked or confronted by the Accused and his wife in [...]. Eventually, the matter had been reported to police on November 30, 2019.

Analysis

[20] In assessing the evidence at trial, I found that K. D. appeared honest and tried very hard to be truthful. She did her best to recall the events of February 5 to 7, 1982. She knew the dates, she said, because it was the weekend before the winter carnival and those dates were shown in Exhibit 1, which is a clip from the archives of the publication , the “[...]”.

[21] Given that the incident is alleged to have occurred decades ago, K. D. cannot be expected to remember every detail. That said, her recall of the assault itself seemed fairly clear. For example, she was picked up hitchhiking, the truck a single seater, the green dash board light emitting, the church area where they pulled in, as shown in the aerial photo in Exhibit 2. In addition, falling asleep with her head against window, waking up with the Accused inside of her, how it felt, shouting “what are you doing”, and walking home, crying.

[22] K. D. did not report the incident to anyone for many years, stating she blocked it out, to put it behind her, as a means of survival. She also gave evidence, that she believed her father would “kill” Mr. M. if he knew. No adverse inference can be taken from this time frame. All rules pertaining to “recent complaint” were abolished essentially by s. 275 of the *Criminal Code* as being based on myths and stereotypical thinking.

[23] As stated, she did testify that she told her friend, from childhood, M. J..

[24] M. J. testified that she remembered the visit with Ms. D. quite well. She stated she told her that she was sexually assaulted by the Accused, but did not give details. M. J.’s evidence was that she offered comfort to her and suggested that Ms. D. stay with her for a couple of days to deal with things. She taught Ms. D. a song on the guitar, and remembered that Ms. D. stayed with her for two days, spending the weekend in her basement.

[25] M. J. in cross-exam, was asked about the timing of this visit. In direct, she said, it was 1994 when both she and Ms. D. would be in their early 20’s, but when challenged by Defence in regard to a statement given to Cst. Marinelli, she acknowledged that she was mistaken and it was when she was 31 and Ms. D. was 30.

[26] It became apparent during presentation of the Crown’s case that identity of Mr. M. as the person who committed the offence was a central issue. K. D.

testified it was him, stating he was the older brother of her best friend growing up and she knew his family well.

[27] In her direct testimony she described that she knew it was Mr. M. by the shape of his head. In cross-examination, she confirmed this as the basis for her description of the Accused stating she did not see his face. It was “just the shape of his head”, she said.

[28] It was in re-examination that she provided more detail by stating it was the shape of his head before she got on the truck and as she was leaving or “getting off” the truck, she recognized his voice as he was laughing and had spoken to her. She testified in direct that she was listening to him before she fell asleep and said in cross that she fell asleep “pretty much right away”.

[29] In further questioning, on re-cross defence Counsel attempted to nail down her evidence. She stated, “getting on the truck” it was the silhouette of his head and then when “on the truck” she knew it was him from the light shining on him and his voice, stating she was “absolutely sure” it was A. M.

[30] In criminal matters the Court must not “parse” the evidence given at trial but consider it as a whole.

[31] The context of the evidence at trial here, is that the events alleged were almost 40 years ago. While the Complainant is not likely to forget such a traumatic event, the caselaw tells us that caution must be exercised when assessing identity evidence as it can be fraught with frailties.

[32] On the other hand, the Accused is someone she was familiar with, his family being well known to her family. Ms. D. is only a few years younger than the Accused and she was a friend of his sister. She was at his family’s house almost every day, she said.

[33] It must also be considered that the Complainant, by her own testimony, had consumed a considerable amount of alcohol. She testified she drank heavily in her younger years and possibly consumed a 40 oz bottle of vodka, as it was a weekend. She recalled having eaten which would perhaps lessen the degree of impairment but at 17 years of age, and at 3:00 a.m., there seems little question she would have been under the influence of alcohol to a significant degree, whether or not she had a high tolerance for alcohol.

Decision

[34] Having considered the whole of the evidence, I am left with concerns on the issue of identification, proof of which is an essential element of the offence charged. I have difficulty with the reliability of the Accused being identified by “the shape of his head”. K. D. also testified at one point that “she did not see his face”. When asked if she had an opportunity to see the Accused at any other time during the incident, the Complainant stated it was his voice, she recognized it she said from him laughing, after the alleged assault and listening to him before she fell asleep. I found that her description of the Accused kept evolving.

[35] Mr. M. has denied the charge in the indictment by entering a not guilty plea. He is entitled to the benefit of any doubt the Court has, that is reasonable in the circumstances. On the basis of the evidence, I have such a doubt here, for the reasons I have indicated.

[36] I therefore acquit Mr. M. of the charge against him. I wish to add that this finding is made with the greatest of respect to the Complainant, Ms. D.

[37] Accused is acquitted.

Murray, J.