SUPREME COURT OF NOVA SCOTIA
Citation: *R. v J.A.F.* 2021 NSSC 357

Date: 2021-12-03
Docket SPH: 505894
Registry: Port Hawkesbury

Between:

HER MAJESTY THE QUEEN

v.

J.A.F.

DECISION

RESTRICTION ON PUBLICATION: SECTION 486.4 CRIMINAL CODE

Judge: The Honourable Justice Gregory Warner

Appeal Heard: December 3, 2021

Oral Decision: December 3, 2021

Charges: Section 271 of the ***Criminal Code*** **of Canada**

Counsel: Peter Harrison, for the Crown
No one appearing for the accused

By the Court, oral decision from the Bench:

[1] I may produce a written version of this oral decision. If so, it will be edited for grammar and composition without changing any of the reasons or analysis of fact or law.

[2] The accused, Mr. F., was acquitted of sexual assault of a fifteen year old family member after a short trial on March 30th, 2021, in a brief oral decision given at the same time.

[3] The crown appeals.

[4] The two grounds of appeal are, first, the trial Judge erred in law by improperly assessing the complainant's credibility by considering stereotypical behaviour about complainants of sexual assault, and, second, the trial judge erred in law by providing sufficient reasons in its decision to ground an acquittal given the evidence presented at trial.

[5] I am going to reverse the order of the analysis for the purposes of this Decision.

[6] The evidence of the three witnesses consumed approximately 92 minutes.

[7] The complainant's mother testified for about nine minutes, primarily about the date of the incident, between her daughter, the complainant, and the accused.

[8] The complainant testified for about 66 minutes in direct and cross.

[9] The accused testified for about 17 minutes.

[10] The trial court's oral decision consisted of 14 paragraphs. There was no paragraphing in the oral decision.

[11] For ease of reference, I have assigned paragraph numbers.

[12] The twelfth paragraph contains the Crown's allegation of improper use of stereotypical reasoning.

[13] For purposes of brevity today, I will not read into the record the Oral Decision of the trial court. It will be included in full because it's so short in the published Decision.

[14]

> (1) Well, as both parties have pointed out, this is a case where the Crown must prove the incident beyond a reasonable doubt.
>
> (2) If the Allegations, as made by the complainant, are true, it's quite clear that the defendant perpetrated a touching, an assault, a non-consensual assault, on the person of a young person and the touching

that occurred according to the complainant, would result in a conviction for sexual assault.

(3) The complainant testified in a straight forward basis. It is apparent that her recall of the incident became more elaborate the more often she told her story, not to a vastly different context, as all I can appreciate is what's been before the Court. I haven't seen, and I shouldn't be privy to, the contents of the statement. It's only admissible evidence, which is before the Court which is accepted or otherwise contradicted, that I can consider the evidence on. It is disturbing that these allegations occurred between family members, if not by law at least *de facto*.

(4) The perpetrator of the alleged assault was ostensibly the uncle of the young person. The perpetrator was some few years older than the young person who was assaulted. They knew each other in a family way. She apparently on a number of occasions slept in the bedroom of the accused. They shared the bed, certainly not for a sexual purpose, on previous occasions. This was a combined family all attending, or in the holiday season, for a celebration. According to the accused some 11 people, and I think accordingly to the complainant at least nine people. There was a paucity of sleeping accommodation.

(5) The young lady who allegedly was assaulted was going to work the next day. This occurred on a Friday and the evidence appears to be that she may have returned, although she doesn't recall, the defendant indicates she that she returned. That the incident allegedly complained of, if it happened, it all happened on a Friday and that she returned to the premises on Saturday night. She doesn't recall whether she returned to the premises on that weekend or not.

(6) I won't elaborate lengthily, but she explains that there was a touching, a groping, which ended up in her vagina area being touched to the point that she tells in a later explanation that it hurt. The defendant allegedly worked his hand under her wired bra. She was in her PJs and that he groped her breast area. She left the room, the bedroom, went into the bathroom, returned and then she says she saw the partially covered defendant masturbating. She didn't actually see what he was particularly doing, but he indicated that he was

going to cum or ejaculate and then she allegedly sees ejaculate in his hand or so and then he leaves the bedroom and then comes back in. They both agree that while they were in the bedroom this father figure, Jay or James, went into the washroom, made some noise. They thought that was quite hilarious and both the complainant and the defendant laughed about the whole thing.

(7) So there's some particulars parts of the description of the premises, and how they ended up there, are all agreed to. The real cleavage in the testimony is whether there was a sexual assault.

(8) The defendant denies entirely any inappropriate sexual touching, let alone an assault or masturbation in the presence of his young niece, so-called. He was challenged under cross-examination, although briefly, and adamantly maintains his complete and utter innocence.

(9) The crown must prove their case beyond a reasonable doubt. I think all the elements of territorial identification, identity of the accused, if the facts are found or admitted by….or they're admitted by the defendant or found by the Court, would amount to sexual assault. And it's not a question of consent one way or the other, even with the age differential, because the… it's not a question of consent or the misapprehension of consent, the defendant is saying nothing happened of a sexual nature whatsoever.

(10) The question is has the Crown proven beyond a reasonable doubt whether the sexual assault, as described, took place.

(11) In the case of *R. v. Lifchus*, the Supreme Court of Canada has defined reasonable doubt, a highly academic concept, is best described and when left to a jury as is the jury…or can the trier of fact be sure that the event took place. And as the Court posited, what's the motive in the complainant making up a story about the activities, the heinous activities of her purported uncle? We don't know I guess. There is a suggestion that she may have been under the influence of, I guess the word is edibles, edible… I presume that's edible cannabis products. She alleges that she was proffered alcohol, a single drink from a silver flask. The defendant says, I had no sliver flask. I didn't offer her any alcohol but I did see her eating edibles. Where she says the incident took place around midnight, they were

> up playing games on the Xbox until three or four o'clock in the morning.
>
> (12) And I posit to the Crown, why should a young person return to a situation she has already left stating that she thought she was going to be sexually assaulted. She used the word "rape". But she came back. And I agree. I have to look at the world through her eyes. I have to look at the world through her eyes with regards to consent, if that was the case. It's got to be a subjective consent by the complainant As I say, consent doesn't come into this question to be evaluated because the statements of the parties are so far apart. It happened. It didn't happen.
>
> (13) Has the Crown proven beyond a reasonable doubt that it happened? There is no corroborating evidence, and I realize there doesn't have to be. There's no evidence of semen, et cetera. There's no observer. There's nothing else which points to the act being perpetrated other than the allegations of the complainant.
>
> (14) Is that enough? I can't be sure that the incident took place as complained. I'm very skeptical that it may have happened. But as I'm obligated, can I find that it has been proven beyond a reasonable doubt? I cannot. And I'm obligated by law to enter an acquittal.

[15] The seminal and still frequently cited description of the standard and scope of review by a summary conviction appeal court is that stated by Cromwell, JA as he then was, in ***R v. Nickerson*, 1999 NSCA 68**, at paragraph 6. It reads:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in R. v. Burns, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple

> review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[16] The Crown's brief cited ***R v. Pottie*, 2013 NSCA 8,** paragraph 16 to the same affect.

[17] Several appellate courts have added guidance that are particular to the two grounds of appeal in this case.

[18] I will refer to that additional guidance in the separate analysis of each ground.

Ground #2 – Insufficient reasons to ground an acquittal

[19] With respect to the second ground of appeal, the reasons given by the trial judge are insufficient to ground an acquittal when read in the context of the trial transcript.

[20] As noted in the Crown's brief, the Supreme Court of Canada has consistently emphasized the importance of trial reasons. In ***R v. Sheppard*, 2002 SCC 26,** the Court held that it is through reasoned decisions that Judges are held accountable to the public, ensuring transparency in the adjudicative process and satisfying both the public and the parties that justice has been done in a particular case. Moreover, for the purposes of appellate review, reasons must be sufficient in the context of the case for which they were given.

[21] The reasons must be both factually and legally sufficient. Factual sufficiency is concerned with "what" the trial Judge decided and "why". (***Sheppard***, paragraph 55).

[22] Ordinarily, factual sufficiency is a very low bar, especially with the appellate court's ability to review the record. Even if the trial Judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record, may explain the factual basis of the finding to the aggrieved party.

[23] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal. (***Sheppard***, paragraphs 64 and 65). Lawyers must be able to discern the viability of an appeal and the appellate court must be able to determine whether an error has occurred.

[24] Legal sufficiency is context specific and must be assessed considering the live issues at trial. Cursory reasons may obscure potential legal errors and not permit the appellate court to follow the trial Judge's chain of reasoning. (***Sheppard***, paragraph 40).

[25] To succeed on appeal, the Appellant's burden is to demonstrate either error or frustration of the appellate process. (***Sheppard***, paragraph 54). Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. It is

only where ambiguities in the context of the record render the path taken by the trial judge unintelligible, that appellate review is frustrated. (***Sheppard***, paragraph 46).

[26] An appeal court must be rigorous in its assessment, looking to the problematic reasons and the context of the record and determining whether the trial Judge erred or appellate review is frustrated.

[27] It is not enough to say that the trial Judge's reasons are ambiguous. The appeal Court must determine the extent and significance of the ambiguity. (In ***R v. G.F.,*** 2021 SCC 20 at paragraph 79, the Supreme Court adopted from ***Sheppard,*** what I summarize in paragraphs 25-27 of this decision.

[28] The reasons provided by the trial Judge in this case made clear that the accused was to be acquitted of the sexual assault. The Crown submits that, when read in conjunction with the record, the reasons are at best ambiguous as to why that acquittal was justified.

[29] The Crown submits that there are three important ambiguities related to the complainant's testimony and the trial Judge's questions and determinations surrounding it.

[30] First, was the trial Court's statement at the third paragraph of the oral decision:

> the complainant testified in a straightforward basis. It is apparent that her recall of the incident became more elaborate the more often she told her story, not to a vastly different context…

[31] The Crown submits, and I agree, that there is no explanation as to how, or if, these findings affected the trial Judge's assessment of the complainant's credibility.

[32] Second, the Crown alleges an ambiguity when, in paragraph 11, the trial judge, after noting *R v. Lifchus* and defining reasonable doubt, questioned why the complainant would make up a story about being sexually assaulted,:

> And as the Court posited, what's the motive in the complaint making up a story about the activities, the heinous activities of her purported uncle? We don't know I guess.

[33] The third alleged ambiguity related to the Judge questioning Crown in closing submissions as to why the complainant, an alleged victim of sexual assault, would leave the location of the sexual assault and return moments later, then agreeing with the Crown that victims of sexual assault behave differently, and

repeat this stereotypical reasoning in paragraph 12 of the decision, without elaboration or relating the statement to the evidence:

> And I posit to the Crown, why would a young person return to a situation she had already left stating that she thought she was going to be sexually assaulted. She used the word “rape”. But she came back.

[34] The only issue before the Court was whether or not a sexual assault occurred as described by the complainant. There were no issues of jurisdiction, nor issues of consent. It was simply a straight credibility determination where the accused flat out denied - not that the complainant slept in his bed on January 4th , but that he touched her and acted in the manner she described.

[35] In paragraph 13 of the trial Decision, the Court said:

> Has the Crown proven beyond a reasonable doubt that it happened? There is no other corroborating evidence, and I realize there doesn’t have to be. There’s no evidence of semen, et cetera. There’s no observer. There’s nothing else which points to the act being perpetrated other than the allegation of the complainant.

[36] At no point does the trial Judge conduct the equivalent of a W.D. analysis. There’s no point at which he makes findings of credibility for or against either the complainant or the accused.

[37] In a “he said, she said” situation, absent corroborating evidence, there is a requirement for some analysis related to the facts in evidence as he finds them, upon which he explains the pathway, even inarticulately, to the parties before him.

[38] In ***R v. J.C.***, 2018 NSCA 72, on an appeal from a conviction of sexual assault, our Court of Appeal overturned the conviction, on the basis of insufficient reasons.

[39] Beginning at paragraph 28, the Court reviewed the factual analysis that either existed or did not exist in the case up to paragraph 39, and beginning at paragraph 43 through to 51, set out the principles in ***Sheppard, Dinardo***, and in particular, ***R.E.M.***, that directly apply to the analysis in this case.

[40] It was noteworthy that the Court of Appeal noted in ***R v. J.C.,*** at paragraph 29:

> The reasons are short, just 26 paragraphs over eleven double spaced pages organized into six parts as follows: INTRODUCTION; ISSUES; CREDIBILITY OF WITNESSES; ASSESSMENT AND CREDIBILITY; POSITION OF THE PARTIES; and ANALYSIS.

That decision was almost twice as long as the decision in this case.

[41] Very little, if any, of the decision in our case directly related to credibility. Some of it, as the Crown suggests, might be ambiguous as to whether it must have related to credibility, even if it did not describe the judge’s reasoning path.

[42] Not unlike the comment made at paragraph 3 of this Judge's decision about the evidence of the complainant in this case, at paragraph 32 in ***R v. J.C.,*** the Court of Appeal noted:

> the trial Judge remarked favourably about all of the witnesses. She observed that: K.R. (that would be the complainant in that case) had testified in a straightforward manner and did not embellish her evidence.

[43] With respect, the trial judge's reasons were factually insufficient to ground an acquittal.

[44] The trial Judge's reasons were also legally insufficient to ground an acquittal.

[45] This was a trial where both the complainant and the defendant testified. Credibility was the live issue at play. While a judge need not discuss all the evidence of the accused on any given point, they must show credibility was a live issue, and to quote from the Supreme Court of Canada in ***R.E.M.,*** "grappled with the substance of the live issue". The trial Judge never mentioned credibility in his decision and only briefly referenced the defendant's testimony at paragraph 8.

[46] There is nothing in either the trial transcript or the decision, to suggest that the trial Judge engaged in a W.D. analysis of the defendant's testimony or what specific credibility concerns he had with the complainant's testimony. As such,

the cursory reasons provided by the trial Judge hinder this Court's ability to follow the chain of reasoning leading to the acquittal of the accused.

[47] The factual and legal insufficiency of the trial Judge's reasons constitute an error of law.

Ground #1 – Inappropriate assessment of Complainant's credibility by considering stereotypical behavior of sexual assault victims.

[48] In ***R v. Cooke*, 2020 NSCA 66**, an appeal from conviction for sexual assault, the Court of Appeal held that the trial Judge over emphasized and misapplied the prohibition against stereotypical reasoning.

[49] Relevant to this Court's analysis are several paragraphs in that decision. Paragraph 29 consists of a reference to **R v. Roth, 2020 BCCA 240.** Beaton, JA quoted paragraphs 130 and 131 in **Roth** for the distinction between permissible and impermissible use of a piece of evidence that carried the potential for impermissible reasoning in the credibility assessment and applied those principles at paragraphs 23 and 27.

[50] Relevant to the issue of sufficiency of reasons, in **Cooke** at paragraph 30, the Court of Appeal noted, "As in Roth, here there is no indication the judge considered or resolved the inconsistencies and contradictions in the complainant's

evidence in assessing credibility." In **Cooke**, the trial Judge had convicted on the basis of the evidence of the complainant.

[51] The Supreme Court of Canada's focus in R v Ewanchuk, 1999 SCC 711, was on consent, but at paragraph 95, Justice L'Heureux-Dubé made a strong and oft-repeated statement, endorsed by then Justice McLachlin:

> Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The Code was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. (in the Ewanchuk case).

[52] The Alberta Court of Appeal in ***The Queen v. A.R.J.D.*, 2017 ABCA 237**, the majority decision from which was adopted, in a very brief decision by the Supreme Court of Canada at 2018 SCC 6, overturned a trial judge's acquittal and credibility assessment based in part on the fact that the complainant did not show behaviour consistent with abuse such as avoidance of the accused.

[53] In a comment by Lisa Dufromont, a university professor who often comments on Supreme Court of Canada decisions, to the reported decision of the Supreme Court of Canada, she asked the question raised by the dissenting Justice in the Alberta Court of Appeal and addressed by the Nova Scotia Court of Appeal in ***Cooke***: "does the requirement to avoid stereotypes about sexual assault complainants mean that a complainant's after the fact conduct can never give rise

to legitimate inferences rooted in a particular factual context? She notes that in ***A.R.J.D***., the trial Judge's reasons were not clearly rooted in any particularities of the factual context but rather on the absence of evidence of avoidant behaviour.

[54] I adopt and incorporate paragraphs 26 to 68 of the majority decision in ***A.R.J.D.***, in particular paragraphs 58 and 59, upheld by the Supreme Court's brief but clear endorsement.

[55] The analysis of the evidence by the trial judge in this case, is similar to the analysis conducted by the trial judge in ***A.R.J.D..*** It is not at all similar to the factual matrix in ***Cooke***.

[56] In **R v *A.B.A*, 2019 O.N.C.A. 124,** the Court of Appeal found that the trial Judge acquitted the accused on what the Court of Appeal found to be assumptions as to how victims of sexual assault would react.

[57] It appeared that the trial judge's analysis in ***A.B.A.*** was far more extensive than the trial Judge's analysis in this case. The standard of review was described in paragraphs 13 to 15 and applied to a more detailed analysis of the evidence by the trial Judge in ***A.B.A.*** than in this case.

[58] The Ontario Court of Appeal decision in ***A.B.A.*** is very relevant to this case. The factual matrix is similar to that in this case.

[59] Most of the trial Court's very brief decision in this case does not relate to the credibility issue upon which a finding of a reasonable doubt was made.

[60] That which may relate to credibility included, first, at paragraph three, the trial Judge's statement that the complainant testified in a straightforward manner and that it appeared that her recall of the incident became more elaborate the more often she told her story.

[61] Second, at paragraph 11, the trial Court posited: "…what's the motive in the complainant making up a story about the activities…we don't know I guess."

[62] Third, at paragraph 12, the trial Court posited: "…why would a young person return to a situation she had already left stating that she thought she was going to be sexually assaulted."

[63] And fourth, at paragraph 13, "There is no other corroborating evidence, and I realize there doesn't have to be. . . There's nothing else which points to the act being perpetrated other than the allegation of the complainant."

[64] The trial court did not indicate whether it did or did not believe, either the complainant or the accused. It did not conduct a W.D. analysis under any of its possible formats.

[65] The only express and intelligible "why" or reason for acquittal was its reference to stereotypical reasoning - the absence of avoidant behaviour, without relating that to any of the evidence at trial.

[66] The factual context in ***A.R.J.D.*** and ***A.B.A.*** are similar to those in this case. The only clear basis for the trial Court's conclusion, if there is a clear basis, is the improper stereotypical reasoning.

[67] This error had a material impact on the verdict.

[68] In summary, I conclude that the appeal should be granted on both grounds. The trial Judge's improper use of stereotypical reasoning, despite acknowledging it to be impermissible during Crown's closing submissions, was an error of law and material to the result.

[69] The absence in the Court's very brief decision of any analysis or other explanation, or reasoning pathway, express or reasonably implied, for the outcome, is also an error of law.

[70] There is effectively no explanation, other than the improper stereotypical reasoning, the absence of corroborating evidence, and the "I don't know we guess" with respect to the motive of the complainant that might relate to the end result

[71] For the above reasons, the Appeal is granted and a new trial is ordered.

Gregory M. Warner, Justice