SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.F.*, 2023 NSSC 277

Date: 20210817
Docket: 490540
Registry: Halifax

Between:

His Majesty the King

v.

W.F.

DECISION (ADMISSIONS)

Restriction on Publication: s.486.4, s.486.5, s.517(1), and s.539(1)

Judge:	The Honourable Justice John Bodurtha
Heard:	October 19 and 21, 2020, in Halifax, Nova Scotia
Oral Decision:	August 17, 2021
Written Decision:	August 31, 2023
Counsel:	William Mathers and Tiffany Thorne, Crown Counsel Jonathan Hughes, Defence Counsel

By the Court (orally):

Background

[1] During the proceedings in court, W.F. has expressed a preference of being addressed by first and last name. For the purposes of this decision and, in keeping with the publication bans in place, I will use initials only and gender-neutral pronouns throughout.

[2] This decision relates to my decision in *R. v. W.F.*, 2023 NSSC 275, where I refused to allow W.F. to withdraw their admissions made before Justice Arnold in a *voir dire* held October 19 and 21, 2020. Any applicable facts can be found in that decision. This decision relates to the use, if any, which the Crown may make of W.F.'s testimony on the *voir dire* of October 19 and 21, 2020.

Analysis

[3] Section 13 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") reads as follows:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[4] Section 5(2) of the *Canada Evidence Act*, similarly protects a witness who is compelled to testify from having their incriminating testimony used against them in subsequent proceedings.

[5] In *R. v. Kuldip*, [1990] 3 SCR 618, the accused testified at both his first trial and at his second trial. The majority of the Supreme Court held that it was appropriate for the Crown to cross-examine the accused on their prior testimony for the purpose of impeaching their credibility at pp. 635-636:

> An accused has the right to remain silent during his or her trial. However, if an accused chooses to take the stand, that accused is implicitly vouching for his or her credibility. Such an accused, like any other witness, has therefore opened the door to having the trustworthiness of his/her evidence challenged. An interpretation of s. 13 which insulates such an accused from having previous inconsistent statements put to him/her on cross-examination where the only

> purpose of doing so is to challenge that accused's credibility, would, in my view, "stack the deck" too highly in favour of the accused.

[6] In *R. v. Henry*, 2005 SCC 76, the appellants had testified at both their first and second trials. The appellants were cross-examined on inconsistencies between their two testimonies. The Supreme Court of Canada unanimously affirmed its earlier ruling in *Kuldip* as it pertained to cross-examination of the accused on prior inconsistent testimony. The Court went on to note that if highlighting a contradiction in the accused's testimonies "reasonably gives rise to an inference of guilt, s. 13 of the *Charter* does not preclude the trier of fact from drawing the common sense inference." (para. 48). In addition, the Court noted that section 5(2) of the *Canada Evidence Act* will act as a bar to cross-examination even for the purpose of impeachment of credibility, but that protection only applies when the witness is compelled to answer incriminating questions (paras. 49-50). In *Henry*, the appellants had voluntarily testified at both their first and second trials. They were not compelled to testify in either matter; therefore, the protections afforded by section 13 of the *Charter* and section 5(2) of the *Canada Evidence Act* did not apply. The Court stated at para. 47:

> … Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection "from being indirectly <u>compelled</u> to incriminate themselves" in any relevant sense of the word, and s. 13 protection should not be available to them. [Emphasis in original]

[7] Lastly, in *R. v. Nedelcu*, 2012 SCC 59, the accused was involved in a motorcycle accident that was pursued in both the civil and criminal courts. In the civil action, the accused testified to having no memory of events while, in the criminal action, the accused gave a detailed account of events. The majority of the Supreme Court held that section 13 of the *Charter* is only engaged if 1) the accused gave incriminating evidence, and 2) the witness was compelled to provide that evidence (paras 6-8). In this case, while the accused was compelled to testify in the civil action, the accused did not give any evidence in the subsequent criminal trial that the Crown was seeking to use as "incriminating". Therefore, the Crown was permitted to cross-examine the accused on inconsistencies between their civil action testimony and their criminal action testimony for the purpose of impeaching the accused's credibility. Whether or not evidence from a prior proceeding is characterized as "incriminating evidence" is determined at the time when the Crown seeks to use it at the subsequent hearing (para. 16). The Court found that the Crown is not precluded from cross-examining an accused on apparent

inconsistencies, “with a view to testing the witness’s powers of recollection and hence, the overall credibility and reliability of [their] testimony.” (para. 28).

Conclusion

[8] I agree with the authorities provided that section 13 of the *Charter* does not extend to preventing an accused from being cross-examined on testimony they gave in earlier proceedings, where the cross-examination is being done for the purpose of undermining or impeaching the accused’s credibility.

[9] In this case, W.F. voluntarily testified in support of their position to withdraw from their earlier admission on the voluntariness of their statement to police. W.F. was not compelled to testify at this *voir dire*, nor will they be compelled to testify at the voluntariness *voir dire* or at the trial. Should W.F. choose to testify in a subsequent proceeding (be it a future *voir dire* or at the trial proper), I find based on the authorities that the Crown is permitted to cross-examine W.F. on apparent inconsistencies in their prior testimony in the aforementioned *voir dire*, for the purpose of testing the overall credibility and reliability of their testimony.

Bodurtha, J.