Newfoundland Supreme Court Trial Division

Citation: R. v. D.O.S.
Date: 1992-10-20
Docket: 1992 St. J. No. 2414

Between:
Her Majesty The Queen
and
D.O.S.

Green, J.

Counsel:
Jennifer Colford, for the Crown;
Wayne Dymond, for the accused.

[1] Green, J. [orally]: The accused, D.O.S. is charged with raping his niece, C.J., on a winter evening in a parked car outside the accused's home about 20 years ago. Specifically the indictment charges:

> "That D.O.S. on or between the 1st day of January 1972 and the 31st day of December 1973 at or near Clarenville, in the Province of Newfoundland, did unlawfully have sexual intercourse with a female person who was not his wife, without her consent, contrary to s. 143(a) of the *Criminal Code,* punishable by s. 144 of the *Criminal Code.*"

[2] D.O.S. has pleaded not guilty. Section 143(a) of the *Criminal Code,* as it existed at the time of the alleged offence, provides:

> "A male person commits rape when he has sexual intercourse with a female person who is not his wife,
>
> (a) without her consent, ..."

The accused denies that the incident took place at all. The plain issue facing me is whether, on the evidence presented, the Crown has proven beyond a reasonable doubt that D.O.S. had sexual intercourse with C.J. and, if so, that that intercourse occurred without C.J.'s consent.

The Allegations:

[3] C.J., a resident of Clarenville, Newfoundland, says that sometime in the winter of 1971 or 1972, when she was 11 or 12, she visited the house of her aunt and uncle (the accused) on "S" Lane around supper time to watch some cartoons on a T.V. channel that she could not get at her own home. Her home was about five minutes walk away. Present in the house were her aunt, the accused and their two sons. The accused was in the basement fixing a small red sports car. The aunt at some point went down into the basement as well. The two boys remained upstairs. C.J. was supposed to go home early to babysit at her own house. She called home to see if her friend, W.P. had arrived to help her babysit, and when told by her mother that she had, C.J. sang out to her aunt in the basement to let her know that she was leaving and that the two boys would be alone upstairs, and left.

[4] She says that as she was walking across the yard of the accused's house, he came out of the door and called out to her. She continued to walk on but when she turned around, she saw him running towards her so she also started running. She says that the accused caught up with her, about 20 feet from the house by the side of an inoperative car in the yard, grabbed her in a bear hug from behind pinning her hands to her sides and that a struggle ensued for about five to eight minutes during which C.J. tried to get away. At some point, she turned to face the accused and noticed he had a small knife in his hand. At that point she "froze", he opened the car passenger door, pushed her inside in the front and seat got in himself.

[5] C.J. testified that as she was heading away from the house she had noticed her friend W.P. coming down the lane to meet her and that W.P. witnessed the struggle which C.J. described as a "major struggle". She would have been 15 to 20 feet away when the incident occurred. C.J. says she called out to W.P. twice for help but W.P. froze in her tracks and did nothing. W.P. was about eight or nine at the time.

[6] Once inside the car, C.J. says that she and the accused sat there for about five to 10 minutes during which he did and said nothing except that he warned her that if she told anyone he would come after her. He still had the knife in his hand. She says that he then told her to take off her jeans and underpants, laid the knife on the car dashboard, pulled down his pants,

pushed her back across the console of the car (it had two bucket seats with console in between) so that her head was by the steering wheel, got on top of her, effected digital penetration first and then had sexual intercourse with her. Afterwards, he rolled into the back seat. During the incident, he was wearing a winter jacket with a hood and she had on a winter coat. This clothing was not removed.

[7] C.J. says that after the incident, the accused asked her to meet him the next day to go for a snowmobile ride to which she agreed so she could get out of the car. As she got out on the driver's side, she says he put his hand between her legs and she tried to bend his hand back to hurt him.

[8] She says she then went home. Her friend W.P. was not there. She lay down on her bed because the intercourse had been painful. When asked by her mother what was wrong she said "nothing"; She told no one about the incident until this year. Since 1981 she has been living in Alberta where she has married and has a child. She says that in March of 1992 she could not handle the memory of the incident any more. She was concerned to see her own daughter around me so she told a sister who was also residing in Alberta and eventually the news of her revelation reached her sisters and mother in Newfoundland. She gave a statement to the police in Alberta and the present charge resulted.

[9] C.J. testified that she had visited the accused's house on many occasions prior to the incident but that she had never had any problems with the accused before. She has no explanation as to why the accused would have done what she says he did but she is adamant that the incident did occur and that it happened in 1971 or 1972 and not at any later date.

[10] Following the incident, she says that she had no contact with the accused even though he continued to live close to her until she moved away in 1981. This is confirmed by her mother, M.S., who said that, although she noticed nothing unusual at the time, now, looking back on C.J.'s childhood, she remembers that a change occurred in C.J.'s behaviour about the time she was in grade seven or eight -- she would avoid going over to the accused's house and appeared happy when she and her husband moved to another house in another part of the town around 1976. C.J. also says she never spoke to her friend W.P. after the incident because she did not want her to ask her about what happened.

The Defenee Evidence:

[11] The accused testified that he never raped or sexually assaulted C.J. in any way at any time and that the laying of charges against him in March of this year was a complete shock to him.

[12] He says that relations between his family and that of C.J.'s family were very close. His wife and C.J.'s mother visited each other regularly and the children spent a lot of time in his house. In so doing he, in effect, candidly admitted that he had the opportunity to assault C.J. but he, of course, denies doing so.

[13] The accused testified that in 1971 (indeed not until 1978), his house never had a basement in it. The original house into which he and his wife moved in 1969 was a converted barn and shed and it was located flat on the ground and remained in that condition until after he obtained a permit from the Town of Clarenville in 1974 to relocate his house further up on the same road on his family's land, but further away from his mother's house. He says he actually moved the house pursuant to the permit in 1975 by placing it on skids and dragging it to its new location. The granting of permission to move the house was confirmed by the Town Clerk of the Town of Clarenville, who testified that a permit to relocate a dwelling was issued to the accused on August 16, 1974. She also confirmed there were no other requests made by the accused to relocate a dwelling in the Town's records. The accused also testified that he made no such other request.

[14] Upon relocating his house, the accused had it placed on concrete blocks about four feet off the ground, with the result that there was a "crawl space" under the house thereafter, which was enclosed by 4' x 8' sheets of aspenite panelling placed lengthwise. He says that the entrance to the crawl space was not wide enough, nor was the crawl space high enough, to admit a vehicle under the house.

[15] In 1978 the accused obtained a further permit from the Town to "replace walls in [his] basement". This was also confirmed by the Town Clerk. He testified that at that time he built a full basement that was even larger in area than the existing house so as to accommodate an extension to the house planned for the following year. This extension was inferentially

confirmed by the original wiring permit dated October 27, 1978, which was placed in evidence.

[16] There was also placed in evidence a photograph which I find was taken by the accused around 1977 or 1978, showing the accused's house, a pile of concrete blocks used to construct the new basement walls, and what the accused says were the scrape marks on the ground where the house was dragged over the ground from its old location. From the photograph it is also clear that the accused's relocated house is immediately across the road from a house owned by one V.S. The accused indicated that the former location of his house was further down the road towards his mother's house and away from V.S.'s house.

[17] The accused also denied owning a red sports car or any sports car for that matter at or around the time when C.J. says the rape could have occurred. He says the only sports car he owned was a Triumph Spitfire which he purchased in the spring of 1976 from his employer George G.R. Parsons Limited in Clarenville (he having started work with the company shortly before, following a recent layoff from Duffitt Motors). He says that when he purchased the car it was green in colour. The photograph of the house to which I have already referred also shows a green sports car parked by the accused's house. David Thistle, an auto supply dealer in Clarenville, testified that in 1979-1980 the accused ordered flame red paint for his car. He remembers this because the particular brand of paint was defective and caused blistering. He had to inspect the accused's vehicle with respect to a complaint he had made and at that time the car was red in colour. Shortly after this incident he stopped carrying this particular brand of paint and his business records confirms this.

[18] The accused also denies that he ever had an unused or inoperative car in the front yard of his house in the circumstances where C.J. says the rape occurred. He says that all of the cars owned by him in the years surrounding the date of the alleged incident were of the bench seat and not "bucket seat", variety, with the exceptions only of a Renault which he owned and demolished prior to his marriage in 1968, and the Spitfire which he bought in 1976.

[19] Finally, and perhaps most importantly, the accused also called as a witness W.P., C.J.'s childhood friend, now a candidate in St. John's to

become a Salvation Army officer, who testified that she has no recollection whatsoever of seeing any altercation, scuffle or incident between C.J. and the accused or anyone else in circumstances similar to those described by C.J. She also cannot recall relations with C.J. ever breaking off abruptly in 1972 or at any time before she moved away in 1976. (I note in passing that W.P. had been contacted on the telephone by an R.C.M.P. officer investigating this case. She confirmed to him that she had no recollection of the incident but no written statement was taken from her. She also says that she had had no contact with the defence until a few days prior to the trial.)

[20] On the basis of this evidence I must decide whether the Crown has proven the offence beyond a reasonable doubt.

Analysis:

[21] Although the accused was not obligated to testify he chose to do so. Although he admits that C.J., as well as C.J.'s brothers and sisters, were frequent visitors to his house, he denies that any incident of an untoward nature, especially any incident of the type described by C.J., ever occurred between them at any time. This is not a case therefore where an accused acknowledges the general circumstances alleged by an accuser but places a different (and innocent) interpretation on them or who acknowledges the specific incident but alleges that it was consensual. Here there is an outright denial and it is this denial of the accused that therefore places his credibility in stark opposition to the credibility of C.J.

[22] In many cases of rape (or sexual assault as it is now called), the court is often faced with very little more than the word of the complainant against the word of the accused and credibility of each becomes of critical importance. Even in such situations, however, one is not, in the last analysis, faced with having to choose which of two mutually contradictory stories is correct. Obviously if the accused is believed, he must be acquitted; however, even if there is some doubt as to the accused's version, the court must nevertheless acquit if it is not satisfied beyond a reasonable doubt that the Crown's version of the facts (or any version of the facts within the wording of the indictment as originally framed or as amended) is correct: *R. v. D.W.* (1991), 122 N.R, 277; 3 C.R.(4th) 302 (S.C.C.).

[23] In this case, there exists some other peripheral evidence against which the credibility of the complainant and the accused and the correctness of their respective versions can be judged.

[24] I have to say I have considerable concern about the quality of the evidence here.

[25] As indicated, C.J. could give no explanation as to why the accused, her uncle who had never bothered her before despite contact with her in his home, would on this occasion, while his wife and children were in the house, run after C.J. with a knife, struggle with her merely 20 feet from his house in full view of another person only 15 feet away in daylight and rape her in an abandoned car in his front yard. C.J.'s only answer was that he probably had planned the attack for a while and was merely waiting for an opportunity to do it. In my view common sense dictates that if the accused was waiting for an opportunity to rape his niece he surely did not pick a very good one. It strains belief to think that the accused would act in such a way in such circumstances as described by C.J. Whilst I recognize that the Crown does not, as part of its case, have to establish any particular motive on the part of the accused, and the complainant is not required to have an explanation for the accused's conduct as a precondition to a conviction, the absence of any rational explanation (either from the complainant or from the evidence generally) as to why the accused might have acted in the manner alleged, has to be weighed when assessing whether the story given by C.J. is believable or not.

[26] In addition to this reaction to the "sense" of the complainant's story judged against common experience, there are significant discrepancies in important details of the events described by C.J. that raise questions as to the accuracy of the story and, in my view, raise questions as to the reliability of the evidence relating to the whole incident. I note the following:

1. C.J. says that the incident happened outside the accused's house where he is living now (in 1992) and that his house was located directly across the street from V.S.'s house. This is demonstrably false. It has been established by independent evidence that prior to 1975 the accused's house was located further down the road towards his mother's house and it would not then have been opposite V.S.'s house.

2. C.J. says that at the time of the rape the accused had been working

on his sports car in a small basement in the house. It has also been demonstrated by independent evidence that basement walls in the house were replaced in 1978 and the accused has testified that prior to 1975 there was no basement at all and that between 1975 and 1978 there was only a crawl space under the house that was not big enough to admit a vehicle.

3. Additionally, C.J. says that the sports car in question was red; yet it has been demonstrated that the accused's car was painted red only in 1979-1980 and that at least in 1977 or 1978 (the time when the photograph was taken) the car was green in colour. Whilst it is true that it would be possible for the accused to have painted the car red at an earlier date, prior to its being green, there is no evidence of this and the accused denies doing so. As well, the accused says that he bought the car only in 1976.

4. C.J. says that the rape occurred in an unused car with bucket seats and a floor console in the accused's yard. The accused says he never had a car in the yard and that he did not own any car with bucket seats between 1968 and 1976. He gave a detailed history of his car ownership. This might have been able to be verified or challenged by the Crown by searching the Registry of Motor Vehicles and providing evidence of such search. No such evidence was presented. I believe the accused's uncontradicted evidence on this point.

5. C.J. says that the accused caught up with her about 20 feet from the house; yet she had been running to get away from him for a "couple of minutes". Common experience indicates that running even at an unhurried pace unmotivated by fright would enable a person to cover 20 feet in a few seconds.

6. C.J. has no explanation as to why, when she saw the accused running after her, she began to run. At that point her evidence was that she had not seen the knife. As far as she was aware the accused, who had called out to her, could have been running to catch up to her to give her a message or for any number of other innocuous reasons; yet C.J. says she ran to get away from him even though she had had no bad experiences with the accused before and can give no reason for this. Again common experience says that this makes no sense.

7. C.J. has said that after the rape occurred, the accused rolled off her

into the back seat; yet she says that after he rolled into the back seat and when she tried to get out of the front driver's side of the car, the accused put his hand between her legs and she bent his hand back to hurt him. It is difficult to conceive of how the accused could have done this given their respective positions in the car at that time.

8. W.P. was only 15 to 20 feet away from the struggle, according to C.J., and saw what even to a child would have to be regarded as a startling event. Whilst it is possible that she could have forgotten about it, in my view that is unlikely. It was suggested by Crown counsel that she may have repressed her memory of the incident because of guilt at not helping out at the time; however, that is speculation and the theory of guilt was not pressed in cross-examination.

[27] In this case I find the evidence of W.P. to be very valuable and it is fortunate that she was located by the defence and subpoenaed to testify. I found her to be a very intelligent, and truthful witness when she says that she has no recollection of having witnessed anything untoward between C.J. and the accused. Although she would have been quite young at the time, she was an aware little girl who did well in school and had developed some social awareness and social skills, as evidenced by her participation in activities outside the home, such as brownies. I am satisfied, based on my own view of what sort of impression this incident, if viewed, would have had on a young, impressionable child, and based on W.P.'s own testimony, that if it had occurred, W.P. would have remembered it. On the evidence she has no reason to lie about the matter.

[28] The Crown has submitted that C.J.'s actions afterwards in avoiding contact with the accused are consistent with a little girl's aversion to someone who has done something traumatic to her. That may well be, but as pointed out by the defence, they are equally consistent with any other number of explanations. In themselves those actions cannot, in the circumstances of this case, resuscitate what is otherwise a weak Crown case.

The Police Investigation:

[29] Before leaving W.P.'s evidence I feel I must make some comment on

the role of the police investigation with respect to W.P.'s involvement in the case. As indicated, when W.P. was contacted by the police by telephone, she indicated, as she did in court, that she could not recollect seeing any incident of the nature described by C.J. As a consequence, no statement was taken from her; yet her evidence, I have found, was very valuable to a determination of this matter and, specifically, was valuable to the defence.

[30] It is perhaps natural, if on questioning, a person says he or she cannot recall an incident, to assume that that person has nothing of value to add to the investigation and to discount that person's further involvement. There is, however, a great danger in this. The effect of being too quick in concluding that because a person cannot recollect anything specifically about a particular incident, the person's evidence is of little value, may be to reject relevant evidence that does not support the Crown's case. The fact that a person does not recollect may of course mean that he or she has forgotten but it could also mean, in circumstances where the witness had an opportunity to observe and would normally be expected to have seen something, that the incident did not happen. The Crown (and I use that term compendiously to include the police) have á duty in investigating an alleged crime, to attempt to uncover all reasonably available evidence that may have the effect of confirming the charge or exonerating the accused. Through the doctrine of disclosure that information then becomes available for the use of the defence and there may even be circumstances, where the Crown ought, in discharge of its duty, to call evidence damaging to its own case as part of the case for the Crown.

[31] Where, as here, a lack of recollection occurs in the face of something which as a matter of common experience would likely make a lasting impression on the witness, if it in fact occurred, that lack of recollection assumes a greater importance than merely amounting to information from someone who has "nothing to add". Such lack of recollection may Well contribute to a reasonable doubt. The accused is entitled to the benefit of that evidence. It is incumbent on the Crown to make that information available to the defence, and in some circumstances, to the court and not merely to discount or dismiss it simply on the assumption that the lack of recollection means that the witness has nothing to add. In my view, the greatest guarantee of an accused person's civil liberties, is not the court, defence counsel or even the *Canadian Charter of Rights and Freedoms,* but

a competent police force dedicated to conducting a thorough investigation with an open mind and with a view to uncovering relevant evidence that bears on the truth or falsity of the allegations facing the accused.

[32] There is obviously a great danger in merely acting on a complainant's statement and, as long as no one else specifically contradicts it, proceeding on to court without further investigation to attempt to check out peripheral details. The fact that corroboration has been done away with in most sexual offences as a matter of law does not mean that cross-checking and verification of peripheral details by the investigators of crime can also be done away with.

[33] Although I am not privy to all of the details relating to the contact with W.P. by the police in this case or the reasons why nothing further was done, (which might in the circumstances have made it reasonable for the police to have acted as they did) I am tempted to say that I am left with the nagging feeling that more perhaps could or should have been done in this case.

[34] Defence counsel says that when he became aware of the role of W.P. after having read C.J.'s written statement which was given to him as part of disclosure, he assumed that she would be called by the Crown as a material witness. When the Bill of Indictment was filed about two months ago and her name was not listed thereon as a potential Crown witness, he then made attempts to track her down and eventually located her residing in St. John's and subpoenaed her to testify for the defence.

[35] As I have said, it is fortunate that she was made available to testify. Without further information, it would be inappropriate to make any further comment as to whether in the circumstances it was appropriate that the defence be left to its own devices to conduct its own investigation relative to W.P. or whether more should have been done by the police by way of follow up. My comments should be regarded on a more general level as they relate to the potential dangers inherent in this type of investigation.

[36] In making these comments I in no manner impute any criticism of Crown counsel in this case. She has only taken over this file in conjunction with assumption of her job as Crown attorney in this area in the last couple of weeks and she has conducted herself in the courtroom in this trial in a completely professional manner.

Disposition:

[37] I have carefully observed the accused as he was giving his evidence and considered the reasonableness or otherwise of his answers against the backdrop of the other known circumstances affecting his family and C.J.'s family at the relevant times. I found his evidence to be straight forward and nonevasive. He admitted to circumstances which he did not have to acknowledge such as the fact that he at one time owned a car with bucket seats. Nevertheless, he was adamant about the propriety of his relationship with C.J. and was unshaken in cross-examination.

[38] I do not have to speculate or to reach a conclusion on what motive C.J. may have had to accuse the accused falsely. He bears no burden to explain why his accuser may be lying or mistaken. The sole question is whether the evidence taken as a whole satisfies me beyond a reasonable doubt that the accused raped C.J. This is not a case of a witness simply not being able to pin down accurate dates, times and details of an otherwise credible story. If a sexual assault of some nature did occur (and I am not saying that it did) it must have occurred in circumstances wildly different from those alleged by the complainant here and in circumstances where, and at times when, the complainant herself adamantly denies that it did occur. After considering the matter carefully and making due allowance for the impact of the passage of time on the complainant's ability to recall dates, times and details with accuracy, I am nevertheless driven to the conclusion that the evidence does not establish beyond a reasonable doubt that this rape occurred. In fact, it is not the lack of detail but the degree of detail recounted by C J. in this case -- and its improbability of explanation when viewed against other externally - established background facts -- that convinces me that it would not be safe, on the standard of proof applicable in a criminal case, to convict the accused on the evidence presented. Accordingly, I find the accused not guilty and I acquit the accused of the charge against him. Accused acquitted.