

Citation: *R. v. F.E.B.*, 2019 YKTC 27

Date: 20190523
Docket: 17-00671
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

F.E.B.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Paul Battin
Vincent Larochelle

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM C.J.T.C. (Oral): F.B. faces a charge of having assaulted her son, D.B., in Whitehorse, between March 1, 2015 and July 11, 2016. The Crown initially elected to proceed by Indictment, but on March 7, 2018, with the consent of the defence, the Crown re-elected to proceed by summary conviction.

[2] Two witnesses testified as part of the Crown's case. The first witness, D.B. is 14 years of age and would have been 10 or 11 years old at the time of the allegation. H.S.

is 10 years of age and would have been between 6 and 8 years old during the time period covered by the Information.

[3] F.B. testified in her own defence.

[4] The question to be determined in this matter is whether F.B. assaulted her son in a bedroom at his grandmother's apartment.

Summary of Relevant Evidence

[5] Defence counsel indicated during the testimony of D.B. that jurisdiction and identification were not in issue.

[6] The parties read into the record an agreed statement of facts. In summary, it is agreed that between March 13, 2015 and July 11, 2016, H.S. resided with her paternal grandmother, H. During approximately the same period of time, but for the period of December 3 to December 8, 2015, D.B. and his brother A. resided with their maternal grandmother, M.B. Between December 3 and December 8, 2015, they resided with H. These living arrangements were by way of a voluntary care arrangement.

D.B.

[7] D.B. testified that his mother, the defendant, assaulted him at the apartment of his grandmother, M.B., when he was younger. He indicated that he and his brother, A., and his sister, H.S., were brushing their teeth in the bathroom when his brother placed a stool on his foot and stepped on the stool. As this hurt D.B., he yelled at his brother. His mother arrived in the bathroom to determine what was occurring. D.B. testified that his mother "was yelling at me because A. never gets in trouble". She told D.B. to get

out of the bathroom. He testified that he raised his arms as he tried to slip past her into the hallway. His mother accused him of trying to hit her.

[8] D.B. testified that his mother grabbed him by the neck in what he described as a chokehold. He felt pressure on his neck. He displayed the action in court by putting his right hand on his left shoulder with the forearm around his mouth.

[9] He tried to tell her to let go, but her arm was over his mouth. He also testified that his mother said that he tried to bite her, although he had not done so. She dragged him down the hall into his grandmother's and A.'s room.

[10] His mother threw him on the floor in A.'s room. She then started to hit him on the legs and the back and to kick him on his back. He was unable to recall how many times his mother kicked or hit him. As this occurred, she told him that she wanted to teach him a lesson about trying to hit her.

[11] She left the room and started yelling at his grandmother. The bedroom door was partially open. He believes that his mother left the apartment after that.

[12] He moved to the bed in the room and lay there. H.S. later brought him food as he had missed dinner. She asked if he was "okay" and he responded that he was.

[13] He testified that his grandmother came into the bedroom and told him that "it would be fine". She also brought him clothes as he had wet his pants when his mother struck him.

[14] The assault left him with some bruises on his back and on the shin of his right leg.

[15] He believed that he was 9 or 10 at the time of the incident and that it may have occurred in the summer. He was living with his grandmother, M.B., at the time.

[16] In cross-examination, he agreed that in the past he has told his grandmother, H., that he does not want to stay with his mother and that he does not like her.

[17] He agreed that he exaggerates at times, including with respect to whether his teachers have been mean to him. He denied ever lying to his teachers or parents as to what he does at school. He denied ever talking to H.S. about this incident, even when she came into the room to give him food. He agreed that he told his nana, H., about the incident, but not immediately after it happened.

[18] He agreed that sometimes his mother has to put him in his room because of the way that he is acting.

[19] He did not take issue with the suggestion that this incident may have occurred one or two months after his youngest brother, T., was born. He does not remember his mother having any medical difficulties or bad health after T. was born.

[20] He did not dispute that at some point he and H.S. performed a play for his social worker, Brian, concerning this alleged assault. He testified that he possibly called it “horrible, vicious mother”. In the play, the children dream of living with their father.

[21] He also agreed that he sometimes was jealous of his brother, A., because his brother never gets in trouble.

H.S.

[22] H.S. is 10 years of age. She testified to an incident that occurred when her two brothers were in the bathroom brushing their teeth. She was walking down the hallway to brush her teeth when she saw A. standing on a stool that was on D.B.'s foot, causing D.B. to swear. Her mother grabbed D.B. by the arm and pulled him into the first bedroom, after which she closed the door.

[23] H.S. was living with her nana, H., at the time but was visiting her grandmother, M.B.

[24] She heard D.B. crying and yelling and telling his mother to stop. She later said that she could hear hitting, crying and yelling. D.B. was yelling with screaming noises.

[25] Once her mother exited the bedroom, she closed the door and told H.S. not to enter. H.S. went to the bathroom, and despite what her mother had told her, she snuck into the bedroom. D.B. was lying on the bed crying. She brought tissue to him and wrote on a notepad that she had brought, asking him if he was okay. He was looking at the wall and did not reply. He was crying with his hands on his stomach. She noted that he was shaking.

[26] She also noted that his pants were wet, between the knees and the waist, but closer to the waist.

[27] She hid the incident from others because she was embarrassed about it, but she ultimately “came clean” and told her nana, teacher, and social worker, Brian. She does not remember how long after the incident that she told these people.

F.B.

[28] F.B. testified that D.B. developed a strong bond with T.S., the father of H.S., even though T.S. was not his natural father. As F.B. was no longer with T.S., she felt that he was the “fun dad” and she the disciplinarian.

[29] She testified that when D.B. was younger he was prone to tantrums and that as he aged he became “physically taxing”. She found it hard to discipline him when he responded to a request in the negative. She felt that he was jealous of his younger brother, A. She would often have to defend A. because of the age difference between him and D.B. They would fight and on one occasion, it became physical. This occurred at her mother’s house when he pushed A. who started fighting back. There was an incident in 2016 where both boys were hitting each other. She recalls this as a moment of change, where things started to get worse.

[30] At times, she had to guide D.B. in a physical manner into his room.

[31] Her youngest child, T., was born on January 4, 2016 and immediately adopted by a couple. She testified that she was very ill during this pregnancy. She suffered from hyperemesis and lost weight during the pregnancy. Her muscles deteriorated and she had pubis separation. She ultimately had an emergency operation at which time the baby was born. She spent three extra days in the hospital.

[32] After this experience, she felt exhausted and endured a lot of pain. She had a long recovery of approximately eight weeks.

[33] In terms of the incident alleged, she recalls an occurrence in the bathroom in approximately early February 2016. She was spending significant amounts of time at her mother's apartment. Her children were living with their grandmothers as a part of a voluntary care agreement.

[34] During this time, F.B. was in physiotherapy for her hips and she was trying to get her muscles back to normal. She still had stitches in her lower abdomen. Her stomach muscles were very sore. Walking was still difficult for her and on the evening in question she was only shuffling around. She testified that she was, for example, unable to kick at this point.

[35] On the evening in question, all the children were with her at her mother's place. They had finished dinner and she was going through the bedtime routine. H.S. was going to return to her paternal grandmother's residence. She recalls that she sent the boys to the bathroom, while H.S. remained in the living room. Her mother was cleaning up in the kitchen. F.B. was puttering around the house, doing random things such as cleaning or sorting laundry.

[36] F.B. heard the boys yelling at each other. A. was telling D.B. to stop. She went into the bathroom and separated the boys. Because of D.B.'s tone, she told him to go into the middle room for a time out. That is where the boys would sleep together. D.B. did not want to go into the room and expressed his frustration as to how unfair it was.

[37] She grabbed him by the arm and tried to guide him to the middle room. While approaching the bedroom door, he threw his arm up and back at her. He swung his arm to escape her grasp and, at the same time, hit her. She was telling him to calm down. He was partially in the room and she was partially in the hallway. She stood blocking the doorway as they stood face to face. She continued to hold him while telling him to calm down, at which point he dropped to the floor. He was kicking at her while throwing a fit. She stood back while still standing in the doorway.

[38] Once he stopped, she told him to go and lay on the bed. The door to the bedroom was open throughout the occurrence. When D.B. moved to the bed, F.B. left the door open. She assisted A. to brush his teeth. H.S. subsequently went home with her paternal grandmother. D.B. eventually calmed down and came out of the room.

[39] She testified that she was focused on D.B. during the incident that occurred around the threshold to the bedroom.

[40] She did not hear formally about the allegations until approximately a year and a half to two years later.

Analysis

[41] This is not a credibility contest between the Crown and defence witnesses. The burden is, of course, on the Crown to prove the charges beyond a reasonable doubt. This burden never shifts to the defence.

[42] When assessing the evidence of younger witnesses with respect to credibility, I am not to hold them to adult standards. As the Supreme Court of Canada stated in *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.):

26 ...Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[43] This does not lead to a different standard of proof in criminal cases involving a child witness. It does mean that in assessing a child's evidence, I should be cognizant of the child's mental development in taking a common sense approach to his or her testimony: *R. v. B. (G.)*, [1990] 2 S.C.R. 30. I should assess a child's evidence in the context of his or her age at the time of the events and at the time of testifying.

[44] I am also mindful of the Ontario Court of Appeal's statement in *R. v. C.(H.)*, 2009 ONCA 56 at para. 42 that:

...But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult...

[45] Finally, as F.B. has testified, this case requires an analysis of the principles set out in *R. v. W.(D.)* [1991] S.C.R. 742, namely: if I believe the evidence of the accused, or am left in a reasonable doubt by it, then I must acquit. Even if I am not left in doubt by the evidence of the accused, I must ask myself whether on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Credibility and Reliability of F.B.

[46] F.B. testified in an articulate fashion. She professed a detailed recollection of the events in question, despite not learning of the specific allegations until one and a half to two years later. Although she adamantly denies hitting or kicking D.B., her description of the beginnings of what led to her placing her son in his room is similar to what he described. There was a dispute in the bathroom between D.B. and A. and she intervened.

[47] I find parts of her testimony to be troubling. Firstly, as indicated, she described herself as being in a fragile physical state at the time of this incident. Having gone through a major medical procedure, she was in the recovery process. She still had stitches in her abdomen, her muscles were very sore, and she had difficulty walking.

[48] At the same point in time, according to F.B., D.B. was prone to tantrums and as he became older and bigger, he was more difficult to discipline. She described him as “physically taxing”. As F.B. described it, he had previously “thrown fits”. He had also refused, at times, to accept her direction of going to a room for a time out, which would result in her having to physically guide him into the room.

[49] Yet despite this history and F.B.’s fragile state, she not only intervened in the bathroom to separate the boys, but she testified that she physically interacted with D.B. by taking his arm to guide him to the bedroom, and by what she described as holding him after he had thrown his arm up in order to prevent flailing. In cross-examination, she agreed that the action of holding D.B. was “kind of a bear hug”, but mostly an effort to defend herself and prevent him from throwing himself or flailing. Considering her

stated physical condition at the time, I find it very odd that she would attempt to separate the boys let alone grab her son's arm and attempt to escort him to the bedroom. More significantly, I find it implausible that she had the physical capacity to hold D.B. in the manner described to prevent him from flailing. I do not accept that this occurred in the manner that she indicated. I accept that there was physical contact, but I find that F.B. has exaggerated her physical frailty at the time of the incident.

[50] I also have difficulty with the amount of detail that F.B. professes to have regarding this incident, despite her not learning of the allegation until after a lengthy period of time. She testified that the incident stands out in her mind, because of her physical state. As indicated, I do not accept her description of her physical condition. Even if she had reason to have a recollection of a confrontation between her and her son, the amount of small detail that she provided belies belief. Although prior to the incident, she could not say that she was doing more than puttering, she recalled that her mother was in the kitchen and that H.S. was watching television in the living room. She recalled going to help A. brush his teeth after D.B. threw his fit. She remembered that after the incident her mother was still in the kitchen. Her mother later went into the bedroom to talk to D.B. She had a memory of H.S. leaving to stay with her grandmother H., because H.S. only stayed over on weekends.

[51] In cross-examination, the Crown questioned F.B. as to whether it was possible for someone to have been behind her in the hallway when she was in the bathroom door dealing with the boys. As indicated above, H.S. testified to walking down the hallway and to seeing what initially occurred. F.B. initially stated that this was probably not possible because her back was not completely towards the hallway and her

peripheral vision allowed her to see more than just the inside of the bathroom. Although she stated that she felt like she would know if H.S. had come down the hallway, she finally admitted that it was possible that H.S. had come down and peeked around the corner into the bathroom.

[52] Overall, I have concerns with respect to F.B.'s credibility.

Credibility and Reliability of H.S.

[53] H.S. presented as older than 10 years of age. She testified in a straightforward and seemingly forthright manner. She provided relatively detailed evidence. Her testimony did not raise any concerns. I find it to be both credible and reliable.

[54] I will address her evidence below when considering the testimony of D.B.

Credibility and Reliability of D.B.

[55] D.B. appeared younger than his stated years. He answered questions in a straightforward manner. He presented as relatively unsophisticated for his age.

[56] He conceded matters that did not necessarily place him in the best light. For example, he agreed to having exaggerated comments he made with respect to teachers being mean to him at school. Despite this concession, his previous exaggeration is a matter that I must consider when assessing his evidence.

[57] It is clear that his relationship with his mother is strained. He testified that he did not want to live with her. He readily agreed that he and his sister presented a puppet

show to his social worker which treated the subject matter of the charge against his mother.

[58] Regarding the allegation before me, D.B. testified that he, his brother, A., and sister, H.S., were all in the bathroom brushing their teeth when he and A. began having issues. Both H.S. and F.B. testified that H.S. was not in the bathroom at that time. Although inconsistent with other evidence, this is the type of discrepancy that, in my view, deserves little weight.

[59] On the other hand, I do take into account that D.B.'s description of part of the incident is not completely consistent. He initially testified that his mother had put her forearm around his neck while he was trying to get out of the bathroom and then dragged him into a bedroom. During cross-examination, he reiterated this, but stated that when he ended up outside of the bathroom, his mother was in the bathroom doorway. He then agreed that he could not have been outside the bathroom standing in front of her.

[60] I am also cognizant of other differences between H.S. and D.B.'s testimony. The main difference relates to what transpired in and around the bathroom area between F.B. and D.B. H.S. testified that her mother grabbed D.B.'s forearm and pulled him into the bedroom. This is inconsistent with D.B.'s description of his mother's forearm around his neck and then over his mouth as she dragged him out of the bathroom and into the bedroom. I should note, however, that it is also inconsistent with F.B.'s testimony that she guided D.B. into the bedroom by holding his arm.

[61] On the other hand, when D.B. testified he wet his pants in the bedroom, the manner in which he described it came across as genuine. He explained that after his mother had assaulted him, his grandmother checked in on him and told him that everything would be fine. She then brought him pants so that he could change himself.

[62] H.S., as well, described that when she snuck in the bedroom to see D.B., she noted his pants to be wet, which would be consistent with him having wet himself.

[63] H.S.'s description of the sounds she heard coming from the bedroom could be consistent with either D.B.'s version of being assaulted or F.B.'s version of D.B. having a tantrum and banging his feet on the floor. The fact that she testified to D.B. yelling "stop" is more consistent with his version of events. H.S. was concerned enough with what she had heard to check on her brother, even after her mother had told her not to go into the bedroom.

[64] I should add that H.S.'s testimony that her mother closed the bedroom door after which she heard these sounds is also inconsistent with the testimony of F.B. that D.B.'s tantrum commenced while she was at the threshold of the bedroom door and that she never closed the door.

[65] Finally, contrary to D.B. testifying that he had never spoken to H.S. about the incident after the fact, she recalled talking to D.B. once about the incident, but not in a detailed fashion.

[66] In assessing D.B.'s evidence, I am mindful of the need to be flexible due to the fashion in which children recall and recount events. Considering his evidence as a

whole, I prefer it to the evidence of F.B. However, my task is not to decide which evidence I prefer. In order to convict F.B. of a criminal offence, I must be satisfied beyond a reasonable doubt that the Crown has proved all of the essential elements of the alleged offence.

[67] Although I believe it is more likely than not that F.B. assaulted D.B. in the bedroom, based on the matters of concern in some of D.B.'s testimony, I am unable to find beyond a reasonable doubt that she did so. As a result, I must acquit her of the offence.

CHISHOLM C.J.T.C.