IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *C.F.*, 2005 YKSC 62

Date: 20051116
Docket: S.C. No. 05-01504
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

C.L.F.

Before: Mr. Justice R.P. Foisy

Appearances:
Ludovic Gouaillier — For the Crown
Lynn MacDiarmid — For the Defence

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

[1] FOISY J. (Oral): The accused, C.L.F., is charged that on or about the 23rd day of March 2004, at or near Dawson City, Yukon Territory, she being the parent of K.S.F.H., a person under the age of 14 years, and in relation to whom no custody order had been made by a court in Canada, did take her, with the intent to deprive R.M.H., a parent having lawful care or charge of K.S.F.H., of the possession of her, contrary to s. 283(1) of the *Criminal Code of Canada.*

[2] Defence counsel concedes, and properly so, that the substantive offence has been proven beyond a reasonable doubt, but relies on s. 285 of the *Criminal Code* to excuse the wrongfulness of the act.

[3] The defence of necessity described in s. 285 of the *Criminal Code* follows the same interpretation as the common law defence of necessity. In order for the defence to be made out the accused must provide evidence that:

1. The situation was urgent and the peril imminent.

2. Compliance with the law was demonstrably impossible such that there was no reasonable legal alternative to disobeying the law.

3. The harm inflicted would be proportional to and not greater than the harm sought to be avoided.

[4] The first two requirements of the test must be assessed on a modified objective standard, which incorporates the accused's situation and characteristics into an objective evaluation. The third requirement is to be determined using an objective standard. There is no onus on the accused to prove the defence. Rather, the burden of proof remains on the Crown, who must show that the accused's actions were voluntary in the circumstances.

[5] The defence, however, must raise the defence and show that it has an air of reality about it. This means evidence on the record upon which a properly instructed jury, acting reasonably, could acquit. Credibility and weight are not an issue here.

Crown counsel has not argued that the threshold had not been met. In my view, the air of reality test has been satisfied and the onus falls upon the Crown to meet the defence beyond a reasonable doubt.

[6] It is not my intention to deal with the evidence in great detail. Some witnesses, friends of both R.H. and C.F., were called to testify that either R.H. was not the type of person who would sexually assault his daughter and that they did not see anything inappropriate of a sexual nature performed by R.H. on his daughter. That R.H. was not seen to act inappropriately, vis-à-vis his daughter, is not surprising, as these types of acts are seldom done in public.

[7] The main witnesses in this case, as I see them, are Cam Sinclair, R.H. and Dr. Parsons for the Crown, and C.F. and M.F. for the defence. Other witnesses tended to support one side or the other, but not always, and some of their evidence will be mentioned later, in the proper context.

[8] R.H.'s testimony was, to my mind, unsatisfactory in some respects. It is true that I am not here to determine whether or not he sexually abused this child. However, in the context of credibility I found him to be argumentative and at times answering questions with questions. He denied sexually abusing his daughter, but he did admit taking showers with her on a regular basis. He preferred showers to bathing K.S.F.H., he said. When I asked him to comment on Michel Dupont's letter, Exhibit 1, his answer at first was that he did not remember the very graphic incident described by Dupont, whose letter was admitted as part of the Crown's case, by consent, as proof of the truth of its contents.

[9] When asked about the hearing in the Superior Court in Quebec, and specifically, when he said the trial or hearing judge wanted his promise that he would have K.S.F.H. properly assessed by specialists in the field of child sex abuse as soon as they returned to the Yukon, he gave his promise and then he said he kept it. The only evidence he gave about having his child assessed when he returned was taking her to a person named Megan, who saw the child three times, and as far as the evidence goes, there was no evidence of a conclusion or a report. There is not even any evidence as to who Megan is or of any specialty she may have. In my view, this is hardly the way to keep a promise or an undertaking to a Superior Court. In general, I found his evidence wanting.

[10] Cam Sinclair has been a regional social worker for Dawson City for three years with 32 years in the field. He was in charge of the file with respect to the problems that R.H. and C.F. were having while they were living together, after separation, and the problems were legion.

[11] C.F. and her sister M.F. both testified that Mr. Sinclair was the man with the power and the man to see. Sinclair attempted to help by arranging meetings with both of R.H. and C.L.F., having K.S.F.H. assessed by a child development officer (who had nothing to do with sexual abuse) and did provide some liaison with Dr. Parsons and the police. However, in spite of what he knew about the sexual abuse allegations, it seems that nothing was done by him to have the child assessed by a proper specialist in this area. Sinclair took the view that since Dr. Parsons found no physical signs of abuse, that was the end of the matter. He felt no need to go beyond Dr. Parsons' findings. Yet,

Dr. Parsons testified that because K.S.F.H. was uncooperative he was not able to perform a proper examination; even an attempt to get a proper vaginal swab failed.

[12] Dr. Parsons was of the view that the lack of obvious physical abuse signs did not mean that there was no abuse. He was in fact concerned about the child's complaints as expressed by her mother and felt that a follow-up was required. He told all of this to Sinclair. Dr. Parsons testified that as a result of a mix-up, no follow-up was performed and that he had been relying on Social Services.

[13] Cam Sinclair, in spite of Dr. Parsons' advice, did nothing on the issue of sexual abuse, in spite of repeated requests and reports of sexual abuse by C.F., and later by M.F., her sister.

[14] C.F. testified at length about her life with R.H., their separation, their subsequent problems and, in particular, allegations of sexual abuse on K.S.F.H.. At first, when K.S.F.H. would act up and wouldn't let her mother touch her vaginal area when changing her diapers because it hurt, she was not particularly concerned about sexual abuse. The child had frequent vaginal yeast infections and frequent constipation. However, as time passed, the child's use of dolls, including Barbie and Fifi, indicated that her father was touching her inappropriately by inserting his finger into her vagina.

[15] This became very troublesome for C.F. She did not want to believe that R.H. would do these things. She complained to Social Services and the police were advised by Social Services. She complained when she saw Dr. Joanne Devenish, Dr. Parsons, and the child development assessment therapist, Rosemary Plaskett. That she did not want to believe that R.H. was the perpetrator of these acts on K.S.F.H., who during the

relevant times was 2-4 years of age, is substantiated by the evidence of Gloria Baldwin Sholtz, a child abuse treatment services supervisor who worked for Yukon Family Services during the years 2002 and 2003 and who counselled C.F. three times alone, counselled both the father and the mother five times, and saw R.H. alone once and later got a phone call from him.

[16] It was not until February 2004 that K.S.F.H. showed her mother how her dad was fondling her vagina area, and K.S.F.H said she liked it and invited her mother to do the same. It was at this point that C.F. decided that R.H. was the abuser and something had to be done. The many instances when K.S.F.H. related these graphic, almost unbelievable episodes to others, such as M.F., C.F.'s sister, and Brigitte Demers, a friend in Quebec, supports the allegation of abuse.

[17] Support is also found in Exhibit 1, Michel Dupont's letter, although in my view I would conclude that I would accept the evidence of C.F. and that of her sister, M.F., without this letter. I accept the evidence of M.F. in spite of the incident where she admitted being dishonest at what she said was at the instance of Cam Sinclair regarding moving expenses.

[18] C.F. kept turning to Social Services for help with this problem and no help was forthcoming. The police would not act. Dr. Parsons and Dr. Devenish did nothing further to assist. She consulted a lawyer. She wanted a lawyer to act quickly, primarily for the sake of the child. R.H. had already mentioned to her that he could take the child and she feared for the child and feared that she would lose her child. She believed that her position before the Court would be jeopardized if she insisted on alleging sexual

abuse without proof. More evaluations or physical evidence was needed, the lawyer related.

[19] In March of 2004, she was very depressed, she was scared, she cried and shook a lot, she was hurting. This is the evidence given by Mr. Sinclair. This evidence coincided with C.F.'s own evidence as to her condition then. No one believed her and no one was helping. The child was, in her belief, being sexually abused by the father. In hindsight she admitted she might have tried to obtain an expert on child abuse on her own and that not to have done so was a mistake, but was not thought of at the time.

[20] I accept her evidence and that of M.F. and Brigitte Demers. I accept that she was in a desperate physical and mental state, and her belief that she had to firstly save her daughter and secondly save herself.

[21] Once in Quebec, amongst family and friends and after a month or so of respite, she contacted a lawyer with a view of commencing custody proceedings. R.H., as he said it, beat her to the punch, and after nine hours of hearings at which C.F. was present, the trial judge returned the child to the Yukon with her father for a custody determination by the Yukon courts. He had serious reservations about the sex abuse allegations and gave instructions that K.S.F.H. should be properly assessed by a specialist. I have dealt with this matter earlier in these reasons.

[22] It is in this setting that I now turn to the three elements of the defence of necessity as interpreted by the case law. I am aware, before commencing with the first element, that the defence must be applied strictly and in a limited fashion. Firstly, the situation must be urgent and the peril imminent. In accepting, as I do, the evidence of

the mother that there can be no doubt that the situation was urgent regarding K.S.F.H. After hearing her evidence, I am certain of the honesty of her belief, even if mistaken, that her child was being sexually abused. In her mind, the peril was even more than imminent, it was well underway and ongoing.

[23] Was her honest belief reasonable in the circumstances? The answer is an unqualified yes. It would have been unreasonable, perhaps even a dereliction of duty, to have closed her eyes to the signals her child was sending her, particularly after the signals were also being given by the child to others, especially M.F., who was close to her, and Mrs. Demers, who became close to her. I conclude that the modified objective standard, which incorporates the accused's situation and personal characteristics into an objective evaluation, has been shown. At the very least, there is a reasonable doubt.

[24] The second element is that, compliance with the law must be demonstrably impossible such that there is no reasonable alternative but disobeying the law. Again, here the modified objective test is to be applied. In the situation she found herself in was it unreasonable to act as she did? Were there reasonable alternatives to her leaving? It was clear to her, I repeat, that no one believed her, or at least, no one was prepared to assist her. She sought legal counsel to try and get a quick *ex parte* resolution to the custody issue. She was told that a full-blown custody battle would be necessary, with evidence of abuse by professionals. Any attempt to proceed quickly on short notice with sexual abuse allegations would risk her application for full custody.

[25] C.F.'s first language is not English, she has a limited education and none in the law that I know of. She interpreted that letter as meaning that she would lose her case

because she could not advance the claim of sexual abuse. Further delay would mean further harm to her daughter. While she agreed that in hindsight, she made a mistake in not pursuing independent professional help and evaluation on her own, I do not think that the law requires a person in her condition and state of mind to have a perfect, well-thought-out reaction.

[26] Also, R.H., as I mentioned, had already advised her, when he returned from the 2003 Christmas vacation in British Columbia, that he could have taken the child away. This, in her mind, and reasonably so, simply made her position with K.S.F.H. more precarious. Under the circumstances, time was of the essence. Her daughter's safety and security, and indeed her own security, were in issue.

[27] Once in Quebec, she undertook to institute proceedings for custody and hired a lawyer to do so. While her plan was not perfect, her solution, in my view, was honest and reasonable.

[28] The third element is whether the harm inflicted was proportional and not greater than the harm sought to be avoided. During argument, Mr. Gouaillier, for the Crown, properly conceded that if the Crown had not succeeded on the first and second elements, he saw no possibility of succeeding on the third.

[29] I am of the view that the move to Quebec, where the child was doing quite well, was obviously much better than the harm sought to be avoided, that is, the ongoing sexual abuse.

[30] As a result, the Crown has not met the onus it bears to show beyond a reasonable doubt that there was no necessity here and that the taking of the child was voluntary, as that is interpreted in the case law. At the very least, there is a reasonable doubt, taking into account all of the evidence, particularly the evidence of the accused.

[31] Accordingly, I find her not guilty.

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FOISY J.