In the Provincial Court of Newfoundland and Labrador
Judicial Centre of St. John's

2009 CanLII 38447 (NL PC)

Between

Her Majesty the Queen

And

Byron Prior

Judgment

[1] Mr. Prior is charged with a breach of section 300 of the *Criminal Code of Canada*. On the 29th of May, 2008, Mr. Prior is alleged to have published a defamatory libel that he knew was false. Mr. Prior has not denied making the alleged defamatory statements. During the trial he gave evidence and admitted that he made the statements. He has taken the position that the statements that he made were true and are therefore not defamatory.

THE FACTS

[2] The facts surrounding the making of the statements were not in dispute. The accused has for many years maintained that his younger sister, S.V., was raped and impregnated by a prominent local politician T.H. The alleged rape was said to have occurred in September of 1966. The accused is certain

of the date of the alleged rape as he states that it took place on the evening of a provincial election on the 8th of September, 1966. The accused stated that on the 8th of September, 1966, he was at the site where the election victory celebration was to take place in the company of his mother and younger sister, S.V. He said the he saw his sister accompany T.H. upstairs to the upper floor. He said that he voiced his objection and asked her not to accompany T.H. He said he was then ordered to leave the premises by another person who was working there. He stated that he left but later that same evening his mother and sister returned to their home. He overheard a conversation between them that led him to belief that S.V. had been raped. . He stated that he later witnessed S.V.'s pregnancy and his mother's care for her during the time following the alleged assault. The accused maintains the pregnancy was immediately after the alleged events in September of 1966. He stated that his sister S.V. had a child (M.P.) as a result of the rape and the child is presently working at a local business in the province.

[3] The accused made a complaint to the police about the alleged sexual assault of S.V. and her later pregnancy. He did so in an oblique manner in a series of statements. Two of his initial statements made in 1998 were entered at the trial. The first was made on the 3rd of July, 1998 to Constable Warr at RCMP headquarters in St. John's. The statement is very lengthy and was recorded. The transcribed text of the statement is 96 pages long. Constable Warr invites Mr. Prior to relate any and all information of sexual, emotional and physical abuse starting with his earliest memories. Mr. Prior relates a great deal of detailed information about himself and other family members including S.V., describing the details of any abuse that he witnessed. Despite the numerous incidents that he recounts, he does not mention T.H. at all in

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this statement and does not mention the alleged assault on the evening of the 1966 election.

[4] In a second statement made to the RNC on the 24th of July, 1998, he again gives a very detailed statement about sexual abuse in his family, relating incidents concerning himself, S.V., and other family members. The only mention he makes of T.H. is that he stated T.H. may have been involved in covering up incidents of abuse that took place within the family. He goes on to say that he had no evidence to offer that T.H. was involved in a cover up. He simply had a "gut feeling" that he was. Indeed, at one point in the interview he was asked, "Was (T.H.) involved with your mother at all?" Mr. Prior replied, "I wish I knew, if I did you wouldn't have to be wondering about it. I'd be letting you know." This is inconsistent with his later statements and his evidence at the trial. He stated that the reason that these earlier statements did not name T.H. as an assailant was because he felt that T.H. was too influential a person for him to bring an allegation against. He said that he wanted the police to discover the assault via a police investigation. This explanation makes very little sense and is not consistent with the balance of the content of these statements which are lengthy and detailed. His statement that he was afraid to bring forward an allegation against T.H. after alleging in his 1998 statement to the police that he had a "gut feeling" T.H. was involved in a cover up is not credible.

[5] The police did act on the complaint when it was made and interviewed S.V. on two occasions, once in 2004 and again in 2007. They also were in contact with her before this proceeding. The police evidence was that S.V. denied that she had been assaulted by T.H. and indeed stated to the police

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that she did not know T.H. Likewise, T.H. was interviewed by the police and denied that he knew S.V., the accused, or his family in 1966. He has since, of course, as a result of this offence become aware of the accused. T.H. testified at the trial and denied that he had committed any offence toward S.V., the accused, or any member of his family. He stated that he did not know the accused or his family in 1966 that there was no victory party or celebration in 1966 in the location claimed by the accused. He testified that during the election in 1966 he did not even have a formal campaign headquarters. He stated that he spent the night of the election at the home of two of his relatives.

[6] Counsel for the Crown entered as exhibits S.V.'s birth certificate and the birth certificate of M.P., who Mr. Prior alleges was the child born as a result of the alleged rape. S.V., according to her birth certificate, was born in December of 1955, making her ten years old at the time of the alleged rape. M.P.'s birth certificate states that she was born in January of 1968. It is quite obvious that these dates are not consistent with Mr. Prior's allegation of assault and pregnancy and indeed make it quite clear that his allegation cannot be true. Mr. Prior's response to the birth certificates is that they are not correct and have been made deliberately inaccurate to cover up T.H.'s actions.

[7] There is no corroboration for Mr. Prior's allegation in any of the evidence. The allegation is contradicted by the denials of the parties alleged to be the subject of the allegation, the birth certificates, the police investigation, and Mr. Prior's inconsistent statements to the police. All of this establishes that there was no such assault. I would note with respect to

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the denials of the parties, S.V. did not testify at this proceeding. There was an application for her to testify by video link which was denied. Consequently, the evidence of her statements to the police are relied on only for the purpose of establishing that the police did interview her and informed the accused of the results of that interview. The accused in his evidence did acknowledge that S.V. did not support his actions or allegations.

[8] Mr. Prior has engaged in a campaign to publicize his allegations that T.H. had raped his sister. In the past, he has made statements about it on the internet, he has set up a booth on Parliament Hill in Ottawa with signs on it claiming that T.H. had assaulted S.V., and has printed and distributed pamphlets to that effect.

[9] In relation to the specific allegation before the Court, the evidence was that Inspector Carroll was driving on the Prince Philip Parkway in St. John's on the 29th of May, 2008. Inspector Carroll testified that he saw the accused standing on the sidewalk near the east parking lot of the Confederation Building. The accused had a Newfoundland and Labrador flag draped over his shoulders and had a placard with the words on it that : "(T.H.) is a child rapist, police, lawyers and politicians cover up DNA." There was also a reference to a web site contained on the placard. Inspector Carroll was concerned about the content of the placard and contacted police headquarters to ask that the matter be investigated. Constable Normore was assigned to investigate the matter.

[10] Constable Normore had investigated a similar complaint regarding the accused and T.H. in 2007. Constable Normore was already aware of the

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activities of the accused on Prince Philip Parkway having been informed about it on the 27th of May, 2008. As a result of that, he had been in contact with the Crown Attorney's office and had a package of information prepared and a letter to serve on Mr. Prior. The package of information he had to serve contained two statements from S.V., a one page statement obtained by another police force, and a 17 page transcript of a statement taken by Constable Normore. It also contained a copy of a Supreme Court decision in relation to the earlier allegation. This package was entered as Consent #5.

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[11] Constable Normore drove to the Prince Philip Parkway and observed the accused standing on the sidewalk wearing a placard and distributing pamphlets. The placard was as described by Inspector Carroll and entered as Consent exhibit #3, and the pamphlets were entered as Consent #4. Both the placard and pamphlets contained the allegation that T.H. was a child rapist.

[12] Constable Normore approached the accused and spoke to him and read the letter prepared by the Crown Attorney's office. He then served the accused with the package and advised him of its contents. The conversation between the accused and Constable Normore was recorded and the recording and the transcript of the recording were entered at the trial. He asked Mr. Prior to stop his activity of displaying the placard and distributing the pamphlets. Mr. Prior refused and was subsequently arrested by Constable Normore and charged with this offence.

THE LAW

[13] Section 300 of the *Criminal Code* states :

> "Every one who publishes a defamatory libel that he knows to be false is guilty of an indictable offence and liable to imprisonment to a term not exceeding five years."

[14] A defamatory libel is defined in section 298 as:

> ".. matter published without lawful justification or excuse ,that is likely to injure the reputation of any person by exposing him to hatred ,contempt or ridicule, or that is designed to insult the person of or concerning whom it is published."

[15] Section 299 defines publishing as:

> "A person publishes a libel when he
> a) exhibits it in public
> b) causes it to be seen or
> c) shows it or delivers it ,or causes it to be shown or delivered with intent that it should be read or seen by the person whom it defames or by any other person."

[16] The accused has in this case caused the external circumstances of the offence to occur. The matters published clearly contain statements that are defamatory. He has caused these statements to be published in the methods specified in section 299 by exhibiting them both on a sign and by distributing leaflets with the allegations contained in them. The only issue that remains to establish the complete offence is whether or not the accused had the mens rea to commit the offence.

[17] In **R v Lucas** (1998), 14 C.R. (5th) 237, the Supreme Court held at paragraph 30:

> " It (the crown) must also prove both that the accused knew the defamatory libel was false and that the intent was to defame."

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[18] There is in this case no question that the accused intended that his words defame T.H. His settled intention was to "expose" the crimes of T.H. to the public and thereby redress the wrongs he believes he and his family have suffered at T.H.'s hands. The issue in this case is that the accused has stated he believes the statements about T.H. are true and as a result has argued that given that belief he cannot be convicted of the offence.

[19] I am satisfied that the statements made by the accused are false and that there is no evidence that the sexual assault he alleges ever took place. In fact, the evidence conclusively establishes that it did not. There is no objective evidentiary basis upon which the accused could base his belief and he was told by Constable Normore to stop publishing the statements as the police were satisfied they were untrue.

[20] Given the apparent unreasonableness of the accused's belief which he continues to hold in the face of a great deal of contrary evidence, I found that an assessment of the accused was warranted. This was necessary in light of the extreme efforts that he has made to publicize his obviously false beliefs, activity that would appear to be beyond what one would expect from a rational person, activity he carried out despite being told by S.V., the supposed victim of the offence, that she wanted him to stop his activities. He persisted in traveling to Ottawa and setting up a booth on Parliament Hill and distributing leaflets setting out his allegations. He has spent hours and days of his time at various public places most, recently in this province displaying signs with his allegations displayed upon them. All of this gives rise to a concern that the accused may be suffering from a mental disorder.

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[21] It is clear that the court cannot raise the issue of criminal responsibility on its own motion. In **R v. Swain**, [1991] 1 S.C.R. 933 the Supreme Court held:

> An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witnesses to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system.

[22] In **R v Piette**, 2005 BCSC 1724, the court held that a court does not have the authority to raise the issue of NCRMD on its own motion but can order an assessment of the accused in relation to the issue.

> Part XX.1 provides the trial judge with a spectrum of procedural steps that may be taken with respect to an accused whose mental capacity is in question. Section 672.11 permits a trial judge to order a psychiatric assessment to assist in determining a number of issues relating to mental incapacity as described in the section. Section 672.12 permits the trial judge to order an assessment at any stage of the proceedings where there are reasonable grounds to believe the evidence is necessary to determine mental capacity. The section does not say a court may raise the issue of mental capacity independently of either party. The power of a court to override the fundamental and constitutionally protected right of an accused to conduct his or her defence at trial would require the clearest of language. Such language is absent from s. 672.11 and s. 672.12.
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> In my view, the provisions empowering a court to make an assessment order may be invoked where the mental capacity of an accused has been placed in issue by an accused or by the Crown - that is, in a manner consistent with the constitutional

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> rights of an accused as described in Swain - but where neither party has adduced evidence sufficient for a court to determine the issue. In that case, a trial judge may order an assessment independent of an application by either party in order to provide the court with evidence to assist it in making its determination with respect to the mental capacity of an accused.
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> It may be, as the Crown argues, that a trial judge is empowered by these sections to order an assessment in the absence of either party raising the issue of mental capacity. If that is so, I am of the view that an accused or the Crown must nevertheless raise the issue of mental capacity before the court can consider a verdict of NCRMD. The assessment may persuade one or the other of the parties to invoke the mental incapacity defence. However, the defence must be raised in the manner described in Swain. The burden is then on the party raising the issue of mental capacity to prove the issue on a balance of probabilities.

[23] In light of the evidence and Mr. Prior's strongly held belief that T.H. committed an offence that on the objective evidence presented could not be true, an assessment was ordered pursuant to section 672.11. The order was made to provide counsel with information concerning the mental condition of the accused. An out of custody assessment was carried out by Dr. Craig. Dr. Craig provided an opinion to the court that Mr. Prior is suffering from a mental illness, delusional disorder. Counsel for the Crown as a result asked to pursue the issue of a verdict of NCRMD. Mr. Prior, through his counsel, asked to obtain a second opinion in relation to the issue.

The second opinion was obtained and the accused was assessed by Dr. Semple who is a registered psychologist in the Province of Ontario. Dr. Semple was called at the trial and qualified as an expert in the field of psychology and testified on behalf of the accused. Dr. Semple working in conjunction with several others provided a report and concluded that the

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accused does not suffer from delusional disorder or other psychotic illness. Dr. Semple testified that the accused was tested with a number of psychological tests by several of his colleagues. He interviewed Mr. Prior and administered a personality test and two other psychological tests. He testified that in his view Mr. Prior had a traumatic childhood and had suffered as a result of that. He stated that he thought Mr. Prior was depressed and in addition suffered from a neurosis and should be treated for those conditions. He did not state what type of neurosis Mr. Prior had but he believed Mr.Prior's actions had been harmful to himself and had a detrimental effect on his family. He stated that he did not think Mr. Prior anticipated what the official response would be to his actions in making his allegations against T.H. and that Mr. Prior believed that these allegations were true.

On cross examination Dr. Semple was reluctant to acknowledge that Mr.Prior's statements about T.H. were false. Instead he maintained that allegations of the type alleged are difficult to prove or disprove. Dr. Semple relied almost exclusively on his test results and the information provided by his interview with Mr. Prior to form his opinion. I did not find that Dr. Semple's opinion properly addressed the issue before the court and as a result I do not find it helpful in addressing the issue of NCRMD.

[24] In relation to the issue of NCRMD, the onus is on the party raising the issue to establish it on a balance of probabilities. The opinion of Dr. Craig is that the accused is suffering from a disease of the mind, delusional disorder, the severity of which was such as to render him incapable of appreciating that his acts were wrong.

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[25] In **R. v. Chaulk** (1990), 2 C.R. (4th) 1, the court held that wrong means morally wrong not legally wrong. The issue is whether the accused due to disease of the mind, was rendered incapable of knowing that the act committed was something that he ought not to have done. The accused may well be aware the act is contrary to law but, by reason of disease of the mind, at the same time be incapable of knowing that the act is morally wrong in the circumstances, according to the moral standards of society.

[26] **R v. Oomen** (1994), 30 C.R. (4th) 195 holds that section 16(1) embraces not only the intellectual ability to know right from wrong in an abstract sense but also the ability to apply that knowledge in a rational way to the alleged criminal act. The provision focuses upon the particular capacity of the accused to understand that the act was wrong at the time it was committed.

[27] In this case, the accused suffers from a disease of the mind, delusional disorder and had a false belief that deprived him of the capacity to rationally make a choice about the rightness or wrongness of his actions. Were his beliefs true about the crimes of T.H., his actions in publicizing them did, in the words of Dr. Craig, " … constitute a legitimate attempt (although extreme) attempt to bring T.H. to justice."

[28] Consequently I am satisfied that counsel for the Crown has met the burden of proof in establishing that the accused was not criminally

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responsible at the time of the offence and a verdict of not criminally responsible on account of mental disorder is entered.

Disposition

The court makes no disposition at this time. The accused is remanded in custody to the Waterford Hospital pending a disposition by the review board.

Dated at St. John's
This 20th Day of July, 2009

David Orr

P.C.J.

Counsel for the Crown E. Reid

Counsel for the Accused M. Coady

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