R. v. Ricchio

Ontario Judgments

Ontario Superior Court of Justice

R.F. Goldstein J.

Heard: February 2, 2021.

Judgment: February 16, 2021.

Court File No.: CR-18-50000598-0000

[2021] O.J. No. 874 | 2021 ONSC 1126

Between Her Majesty the Queen, and Gioacchino Jack Ricchio

(52 paras.)

Counsel

Michael Coristine for the Crown.

Cydney Israel, for the Defence.

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REASONS FOR JUDGMENT

R.F. GOLDSTEIN J.

1 I convicted Gioacchino Ricchio of Sexual Assault on December 10, 2020: *R. v. Ricchio*, *2020 ONSC 7633*. He now comes before the Court for sentencing.

1. THE FACTS

(a) Circumstances Of The Offence

2 On March 10, 2018, A.S. was 17 and D.J. was 16. They were friends. They lived in Scarborough. During the afternoon they went to the Kensington Market area of downtown Toronto. They agreed to meet up with A.S.'s friend, Ibrahim Beyo. Mr. Beyo was with Mr.

Ricchio. Mr. Ricchio had a car and was driving. D.J. had never met either Mr. Beyo or Mr. Ricchio. A.S. had never met Mr. Ricchio. The four of them agreed to "kick up" for the evening. They smoked marijuana together. They all agreed to go to a hotel to party. On the way, Mr. Beyo and Mr. Ricchio picked up a bottle of Hennessey cognac to drink.

3 While they were parked on a side-street, Mr. Beyo opened the bottle. He filled a smaller bottle clear bottle with the alcohol. D.J., A.S., and Mr. Beyo took turns drinking. Mr. Beyo asked if anyone wanted to try a Xanax. "Xans" is the street name for the drug flubromazolam. A.S. and D.J. at first refused to take a Xans, and then consented. A.S. did not take hers but put it in her pocket. She later turned the pill over to the police. Health Canada analyzed the pill. It was flubromazolam. D.J. took her pill. Although it is not entirely clear, it seems that D.J. took another half pill. A sample of her urine taken after the incident showed that she had marijuana and flubromazolam in her system.

4 D.J. got very drunk. She did not remember anything after taking the flubromazolam. Her memory is a blank from the time she took the pill until the time she woke up in the hospital the next day.

5 After D.J. consumed the flubromazolam the four went to a hotel in Etobicoke. Mr. Ricchio rented the hotel room. He then took D.J. up to the hotel room. In my reasons for judgment, I found as a fact that D.J. was noticeably intoxicated. She was showing the combined effects of alcohol, flubromazolam, and marijuana. She was incapable of consenting.

6 Mr. Beyo and A.S. followed and entered the hotel room a short time later.

7 There is no question that sexual activity occurred at the hotel between D.J. and both Mr. Beyo and Mr. Ricchio. As I mentioned in my reasons for judgment a forensic biologist from the Centre of Forensic Sciences analyzed substances obtained from D.J.'s underwear and body. The biologist made the following findings:

* Mr. Beyo's semen was found on the front panel of D.J.'s underwear;
* Mr. Ricchio's saliva was found on D.J.'s neck, cheek, and right breast;
* The bodily fluid amylase was found in the front crotch area of D.J.'s underwear. The amylase had the profiles of both Mr. Beyo and Mr. Ricchio. The forensic biologist could not determine whether the amylase was derived from semen or saliva.

8 Mr. Ricchio at some point took D.J. into the bathroom. D.J. was incapacitated. A.S. testified that she heard D.J. tell Mr. Ricchio that she did not want to have sex with him. As I indicated in my reasons for judgment, I accept A.S.'s evidence at that point. D.J. has no memory of anything that happened in the hotel room. At first blush it may seem contradictory that D.J. could be incapable of consenting, but also capable of telling Mr. Ricchio that she did not want to have sex. I do not agree that it is a contradiction. Although I do not have expert evidence on the point, I think I can say that as a matter of common human experience many people who are very

drunk and incapable of making considered decisions do not necessarily lose all of their ability to communicate.

9 According to the testimony of A.S., which I accept on the point, Mr. Ricchio came out of the bathroom and adjusted his chains and his pants as he was interrupted. A.S. saw D.J. lying on the floor of the bathroom, wearing just her underwear and bra. It was at that point that Mr. Beyo went into the bathroom, and had sexual intercourse with D.J.

10 What happened in the bathroom between Mr. Ricchio and D.J.? It was not necessary for me to resolve the question of what happened in the bathroom beyond finding that an intrusive sexual assault took place. The Crown concedes that the evidence does not support a finding beyond a reasonable doubt that Mr. Ricchio had sexual intercourse with D.J. The amylase fluid found in D.J.'s underwear could have been either semen or saliva. Mr. Ricchio testified that he simply wetted his finger and touched D.J.'s underwear on the outside. In my reasons for judgment I called that "bizarre". I think it is possible that Mr. Ricchio had sexual intercourse with D.J., but I am unable to find beyond a reasonable doubt that he did. At the same time, I reject Mr. Ricchio's evidence that he simply touched D.J.'s underwear with a wet finger. It is not necessary for me to analyze human sexual behaviour in detail in order to reject that evidence. I can reject it because it does not make sense, and, as I noted in my reasons for judgment, it is simply too convenient. What I do find are the following facts:

* D.J. was incapacitated when Mr. Ricchio took her into the bathroom;
* Mr. Ricchio removed all of D.J.'s clothing save her underwear and her bra;
* Mr. Ricchio touched D.J.'s neck and breast area with his hands and mouth;
* Mr. Ricchio touched D.J.'s vaginal area with his hands most certainly and possibly also with his mouth.

11 In my view, this was a highly intrusive sexual assault, involving at least digital penetration and other forms of sexual touching.

(b) Circumstances Of The Offender

12 Mr. Ricchio is now 20 years old. He left school in grade 10. He has had various labouring jobs, including working as a roofer.

13 When he was very young, Mr. Ricchio was diagnosed with a learning disability. Prior to this trial, he was assessed by a psychologist. According to the assessment of Dr. Stones, the psychologist, Mr. Ricchio's learning disability includes a long history of communications deficits that are exacerbated by anxiety. He has been tested at the low end of the intelligence spectrum.

14 Dr. Stones described some of the testing that Mr. Ricchio has undertaken. I accept that Mr. Ricchio has intellectual deficits. When I observed him testifying, however, I found that speaks plainly but was able to communicate effectively. I had no difficulty at all understanding his evidence.

15 In 2017 Mr. Ricchio was convicted as a young offender of one count of robbery; one count of

possession of a restricted or prohibited weapon; and one count of failure to comply with a recognizance. He was given a suspended sentence and placed on probation for two years.

(c) Impact On The Victim And The Community

16 At the time of the sexual assault, D.J. was 16 years old. She was not a child, but she was still young and vulnerable. She has experienced physical and emotional trauma from this assault. She has lost her sense of trust of people. She has experienced feelings of fear and shame. Most importantly, she has moved out of the province. She no longer feels safe here. She now resides in another province.

17 D.J.'s comments that she no longer feels safe, that she has trust issues, and that it has deeply affected her relations with the people she loves is common among those who have experienced sexual assault. It is a deeply traumatizing experience and has implications beyond the effects on one person. As D.J.'s mother attested in her victim impact statement, it has also affected their relationship. In some ways, this assault has broken up their family with D.J.'s move.

2. MITIGATING AND AGGRAVATING FACTORS

18 There are both mitigating and aggravating factors in this case.

19 The key mitigating factors are that Mr. Ricchio is still very young; that he enjoys the support of an extended network of friends and family; and that he seems to have some intellectual deficits that have held back his education and employment.

20 Mr. Ricchio filed 11 letters of support from friends and family. I will mention only a few of them. His long-time hockey and soccer coach described Mr. Ricchio as a kind, caring, and respectful man; a team player; and a role model. His mother filed a letter of support, and as one might expect she described a loving young man who plays an important role in his family. Michelle Kehl, who appears to be a family friend, described him as the first to help with things such as lifting groceries or running errands. She also noted that Mr. Ricchio is not "an indulgent young person who as seen across our youth today. He is not a drinker or partyer ..." Regrettably, Ms. Kehl obviously does not know Mr. Ricchio as well as she thinks she does -- on his own evidence he is most certainly a partyer, a drinker, and a voracious consumer of marijuana.

21 Mr. Ricchio's sister Cassandra wrote perhaps the most honest letter and I am inclined to give it the most weight. She described Mr. Ricchio as kind and honest. She described his relationship with his new niece. However, Cassandra also wrote "to sit here and write that my brother is perfect I will not. Everyone is flawed." That is an honest assessment.

22 Giana Giordano is a friend of one of Mr. Ricchio's sisters. She indicated that she has never seen him cross any boundaries with women. She indicated that "he respects women, it is not in him to treat a girl in a disrespectful manner." I accept that Ms. Giordano has never seen Mr.

Ricchio cross any boundaries, but, regrettably, it is most definitely in him to "treat a girl in a disrespectful manner".

23 Having said that, I reviewed these letters very carefully. They speak of a decent and caring young man that is quite at odds with the person who sexually assaulted D.J. Given his criminal record, I do not find that this offence was out of character for him. I acknowledge that it is a youth record. It is also a record involving robbery -- that is a different offence, of course, but it is also a crime of violence. I do accept that Mr. Ricchio is capable of strong, loving, and respectful relationships in his life and that he has community and family support.

24 There are, however, also significant aggravating factors in this case.

25 Mr. Ricchio's criminal record is aggravating. As I have mentioned, it is a youth record. As an aggravating factor a youth record has limits. It is, however, a significant aggravating factor that Mr. Ricchio was on probation -- as an adult, although the underlying offence occurred when he was a young offender -- when he sexually assaulted D.J.

26 The most important aggravating factor is the circumstances of the offence. Mr. Ricchio callously took advantage of a young and vulnerable person for his own sexual gratification. Mr. Ricchio knew perfectly well that D.J. was incapable of consenting. He knew perfectly well that she had been drugged. I do not accept that he was unaware that D.J. had taken the flubromazolam pill. He was right there when Mr. Beyo handed it over. I accept A.S.'s and D.J.'s evidence that pill-taking was discussed in the car. I reject Mr. Ricchio's evidence that he was unaware of it. I am satisfied beyond a reasonable doubt that he knew Mr. Beyo gave D.J. flubromazolan, and that he knew that D.J. took it. I agree with Ms. Israel that there is no evidence of a plan to incapacitate and then assault D.J. In my view, however, Mr. Ricchio's behaviour was still highly aggravating even though it was a tactical decision to take momentary advantage of an incapacitated female.

27 It is also aggravating that Mr. Ricchio proceeded even though D.J. told him that she did not want to have sex with him. Mr. Ricchio did not stop because he did not accept that "no means no." He stopped because he was interrupted by A.S. and Mr. Beyo.

28 I also find it very aggravating that Mr. Ricchio was prepared to abandon D.J. when she was incapacitated, lost in a park, and A.S. was unable to find her. Mr. Ricchio was far more concerned that D.J. might soil his car by vomiting than he was that she was seriously ill. One can debate whether Mr. Ricchio had any kind of legal responsibility for D.J.; what is not debatable is that after sexually abusing D.J. Mr. Ricchio and Mr. Beyo simply washed their hands of her. I wish to be clear that I do not find that abandoning D.J. is an aggravating factor merely because it was caddish behaviour, although it was that. I find it was aggravating because it was potentially dangerous. Mr. Ricchio and Mr. Beyo took D.J. to a part of the city she was not familiar with when she was incapacitated, and then left her semi-naked and alone in a park, with no means to get home. Her friend, A.S., did not know where she was. That created an obvious situation of significant danger for D.J.

29 In my view, Mr. Ricchio's conduct is comparable to that of the offender in *R. v. Thurairajah*,

2008 ONCA 91. In that case, the offender raped a 14-year old girl while she was very drunk, while she was passed out. He and two friends then drove her to a schoolyard and dumped her in a snowbank. She was only partially clad. He then called her brother and told him that he had found the victim in a snowbank and asked him to come get her. When he did, she was non-responsive, drooling, and face down in the snow. He could not revive her. He called 911. Firefighters could not revive her. She had to be taken to the hospital. She was hypothermic, unable to speak, and had no control over her limbs. Doherty J.A., in the Court of Appeal, called the offender's actions "stunningly callous and highly life- threatening treatment of the helpless victim after the rape."

30 This conduct makes me very skeptical of letters describing Mr. Ricchio as a caring young man. I might be persuaded that this offence was a momentary lapse of judgment of an otherwise caring young person but Mr. Ricchio's criminal record suggests quite the opposite. So does the evidence of this offence.

3. POSITION OF THE CROWN AND DEFENCE

31 Mr. Coristine, for the Crown, argued that the proper range for this offence is 18 months to three years. His position is that I should sentence Mr. Ricchio to 2 years less a day in the reformatory, with a 24-month period of probation. That sentencing position reflects Mr. Ricchio's moral blameworthiness in comparison with Mr. Beyo. It also reflects Mr. Ricchio's youth, and principles of denunciation and deterrence. He accepts that the Crown cannot prove beyond a reasonable doubt that Mr. Ricchio had sexual intercourse with D.J. but argues that the assault was still highly intrusive and harmful.

32 Ms. Israel, for Mr. Ricchio, argues that the range for this offence is 15-18 months. She argues that Mr. Ricchio is young, and that he has strong community and family support. She also argues that Mr. Beyo's conduct was worse, as reflected in the sentence he received: he has a more serious criminal record including adult entries; he provided D.J. with the flubromazolam; his semen was found in D.J.'s underwear; and he attempted to obstruct justice by asking D.J. and A.S. to change their stories to the police.

4. CASE LAW

33 Mr. Coristine relies on *R. v. Friesen*, *2020 SCC 9* to argue that Mr. Ricchio's assault on D.J. should be considered at a higher end of the range. In *Friesen* the offender horrifically abused a small child. The Court made four observations at paras. 141-146 about the range of sentences for sexual offences:

* First, range of sentence does not depend on a specific type of sexual activity. The presence or absence of penetration is not a cornerstone of the sentencing range;
* Second, "courts should not assume that there is a correlation between the type of physical act and the harm to the victim". In other words, conduct involving touching or masturbation is not necessarily less serious than penetration or cunnilingus;

* Third, sexual interference with a child is violent, harmful, and exploitive regardless of whether there is penetration; and,

* Fourth, there is no hierarchy of physical acts. There is no "ladder" with touching at the low end and penile penetration at the high end. The harmfulness of the act depends on the circumstances of the case; some acts of touching and masturbation can be more intrusive than some acts of penetration. It depends on the extensiveness and intrusiveness of the act.

34 Ms. Israel argued that *Friesen* is really about the sexual abuse of children and has no application to an adult. I disagree. Paragraphs 137-140 of the decision deal with sentencing ranges generally. It is true that some aspects of *Friesen* refer specifically to sentencing in cases of sexual interference. I do not, however, see any principled reason to distinguish the Supreme Court's comments on that basis. Sentencing is an individual process. All of the Court's observations about the harmfulness of different types of sexual abuse can equally, as a matter of logic, apply to adult complainants.

35 The Crown relied on *R. v. J.R.*, *2008 ONCA 200*. The victim blacked out at a party and had no memory of the events. A vaginal swab taken the day after indicated that J.R. and J.D.'s semen, and the semen of an unidentified third man, was found in her vagina. J.R. and J.D. were tried together. J.R. testified and said that he believed the victim was consenting. The trial judge convicted both men of sexual assault. He sentenced J.R. and J.D. to two years, but during submissions J.R.'s counsel asked to have his sentenced to two years less a day for immigration purposes. J.R. had a lengthy criminal record and his pre-sentence report indicated that he had an attitude of entitlement towards women. J.D. had no record, a good pre-sentence report, and was of Aboriginal background. On appeal, J.D. argued that he should have received a lesser sentence than J.R., given J.R.'s record and background. The Court of Appeal rejected that argument at para. 25:

> I agree with the appellant J.D. that in most circumstances, he should have received a lower sentence than his co-accused, given the significant differences in their antecedents, respective characters, and prospects for rehabilitation. However, in my view, in the circumstances of this case, where each man took advantage of the complainant when she was incapacitated, leaving her in a state where she woke up naked, helpless, and alone on the bathroom floor of the hotel room, the two-year sentence is at the low end of the appropriate range of sentence. The appellant J.R. hardly knew the appellant and took advantage of her, while the appellant J.D. was her good friend and did the same thing. Both engaged in reprehensible criminal conduct. In these circumstances, there is no basis to impose a lower sentence than two years on the appellant J.D.

36 In *R. v. Tweneboah-Koduah*, *2018 ONCA 570*, the offender pulled up the victim's shirt and kissed her breasts. She then blacked out and awoke to find the offender's penis in her mouth. The offender also penetrated her with his penis. She was a 17-year-old university student. She was, as the trial judge described it, significant and visibly intoxicated *R. v. Tweneboah-Koduah*, *2017 ONSC 640*). The Court of Appeal upheld a 26-month sentence. The Court of Appeal noted

the significant aggravating factors, including that fact that she was 17 years old; and that part of the assault occurred when she was completely

37 In *R. v. Walsh*, *2019 ONSC 1286* the offender was a lacrosse player on scholarship at an American university. He was a first offender. A jury convicted him of an act of forced fellatio and forced vaginal intercourse. Afterwards, while the victim was naked and vomiting in the bathroom, he Face-Timed with his friends and then invited them to his condo. They saw the victim's distress and laughed about it. The trial judge described his behaviour as "nothing less than deplorable and demeaning". She sentenced Walsh to two years in the penitentiary.

38 The defence relies on *R. v. Ghadghoni*, *2020 ONCA 24*. The offender and the victim were strangers. They went to the offender's home from a nightclub. The victim was severely intoxicated, as demonstrated by video and toxicology evidence. She could barely stand. When she left the nightclub briefly, she was so inebriated that the bouncer would not let her back in. The trial judge found that the offender had a plan to exploit the situation for his own gratification. He found this to be an aggravating factor. He sentenced the offender to 30 months. The Court of Appeal found that there was no evidence of such a plan. The offender was a young, first offender. The Court reduced the sentence to two years less a day.

39 The defence also relies on *R. v. M.W.*, *2020 ONSC 3513*. The victim came to the offender's motor home. She was running an errand on behalf of her father. M.W. gave the victim 7-Up mixed with vodka. She became intoxicated. One of M.W.'s friends heard the victim crying and whimpering. He came in but left when M.W. yelled at him, but went back in and pulled M.W. off the victim. M.W. had a dated criminal record. He pleaded guilty and the trial judge acceded to a joint submission of 12 months in custody and two years probation.

40 Finally, the defence relies on *R. v. Scinocco*, *2017 ONCJ 359*. The victim became intoxicated and fell asleep. She awoke to find the offender sexually assaulting her. He touched her vagina and tried to penetrate her with his penis. The offender had a dated record. The trial judge found that he had preyed on a vulnerable victim. He sentenced the offender to one year imprisonment.

5. PURPOSES AND PRINCIPLES OF SENTENCING

41 In cases of sexual assault, the principles of deterrence and especially denunciation play a critical role. In *Thurairajah*, which I have referred to previously, Doherty J.A. stated the following at para. 41:

> Generally speaking, sentences imposed on young first offenders will stress individual deterrence, where necessary, and rehabilitation. General deterrence will play little, if any, role in fashioning the appropriate sentence in this category of offender in most cases: *R. v. Ijam* *(2007), 87 O.R. (3d) 81* (Ont. C.A.), at 93-94. Serious crimes of violence, particularly sexual assaults, do provide an exception to the general rule described above. While all of the principles of sentences remain important, including rehabilitation, for serious crimes involving significant personal violence, the objectives of denunciation and general deterrence gain prominence: *R. v. Ijam, supra*; *R. v. Wells* *(2000), 141 C.C.C. (3d) 368* (S.C.C.) at para. 26.

42 Given Mr. Ricchio's age and family support, I must also take the principles of rehabilitation into account. He is still a very young man.

43 The principle of parity must also be considered. Mr. Beyo pleaded guilty to two counts of sexual assault; one count of administering a stupefying substance; and one count of obstruction of justice. Justice Kelly imposed a sentence of 26 months based on a joint submission.

44 There is no question that Mr. Beyo's overall level of moral blameworthiness was higher than Mr. Ricchio's. Mr. Beyo had sexual intercourse with D.J.; he provided the flubromazolam; and he attempted to persuade D.J. and A.S. to cover up his involvement. On the other hand, Mr. Beyo pleaded guilty and accepted responsibility. It is not an aggravating factor that Mr. Ricchio had a trial; that was his right and he is not to be punished merely for exercising his rights. Mr. Beyo's guilty plea, however, spared D.J. from testifying. Even a proper, professional, and respectful cross-examination -- which describes Mr. Newton's cross-examination of D.J. -- is still an agonizing experience for a complainant in a sexual assault case. Sparing D.J. that experience no doubt factored heavily in Mr. Beyo's favour. In addition to a higher level of moral blameworthiness, Mr. Beyo also has a criminal record as an adult, in contrast to Mr. Ricchio's record.

45 Ultimately, the principle of parity does not require that Mr. Ricchio receive the same sentence as Mr. Beyo. Sentencing is an individual process. That said, when I take all of the circumstances into account, including Mr. Beyo's higher level of moral blameworthiness but also his guilty plea, I find that Mr. Ricchio's sentence must still be one that is not significantly less than the sentence that Mr. Beyo received. In my view, the case of *J.R.* (which I have previously mentioned) has applicability.

7. ANCILLARY ORDERS

46 I make the following orders:

* A DNA order pursuant to s. 487.051 of the *Criminal Code*;
* A prohibition order pursuant to s. 109 of the *Criminal Code* for life;
* A *SOIRA* order pursuant to s. 490.012 and s. 490.013(2)(b) of the *Criminal Code* for 20 years;
* A non-communication order with D.J. and all members of her family pursuant to s. 743.21 of the *Criminal Code*.

8. SENTENCE TO BE IMPOSED

47 The circumstances of this crime are simply offensive. Mr. Ricchio's behaviour was callous, calculating, and, ultimately, criminal. The harm to a young vulnerable victim -- like D.J. -- was significant. She knows that she was sexually abused, but as she pointed out, she will never know exactly what Mr. Ricchio did to her.

48 Although I cannot find beyond a reasonable doubt that Mr. Ricchio penetrated D.J. with his penis, I am satisfied beyond a reasonable doubt that the sexual activity still involved touching D.J. in a most intimate and degrading way. D.J. was a young person at the time of the offence. She may have been capable of consent at law, but she was also only 16 years old. She may have engaged in young adult behaviour, but she was clearly vulnerable. Her own perception of herself as a young person was demonstrated when she texted her mother to ask permission to stay out late. I find, based on the principles set out in *Friesen*, that the sexual activity was intimate, extensive, and degrading. Looked at from D.J.'s point of view, Mr. Ricchio's sexual abuse of D.J. was just as harmful to her as Mr. Beyo's.

49 Although I do take into account these aggravating circumstances, I am also mindful that Mr. Ricchio is young, that he has intellectual deficits that will make his future going forward more challenging, but that he does have the benefit of strong family support. He is on the threshold of deciding whether he is going to try to live the life of a solid, responsible citizen -- which I have no doubt his family wants to help him do -- or to live the kind of life that generated very serious youth convictions and an adult conviction for sexual assault. My concern about Mr. Ricchio's choices will be reflected in the probation order.

50 Cases of sexual abuse involving a vulnerable young person call for strong denunciatory sentences, often involving the penitentiary, even where the accused is also a youthful first offender. I note that in *Tweneboah-Koduah* the Court of Appeal upheld a 26-month sentence for an 18-year old offender with no criminal record under not dissimilar factual circumstances; although sexual assault in that case was more violent than the one in this case, the extra aggravating feature of abandonment and a criminal record was not present in that one. I also note that in *J.R.* the Court of Appeal upheld (and slightly modified) almost identical sentences of two years less a day for two young men who both sexually assaulted an incapacitated victim, even though one of the young men had a significant criminal record.

51 When I take all of the circumstances into account, I find that a sentence of two years less a day is appropriate. Mr. Ricchio will be placed on probation for two years. In addition to the statutory terms, the terms of probation will be:

* He is to report to a probation officer within 48 hours of release and thereafter as directed by his probation officer;
* He will attend for employment or other counselling as directed by his probation officer, and will sign any releases that are required for the probation officer to obtain information about his counselling;
* He will have no contact, directly or indirectly, with D.J., A.S., or Ibrahim Beyo. Crown counsel or the OIC of the case will provide the full names of D.J. and A.S. to the registrar;
* He will have no contact with any person known to him to have a criminal record unless that person is a direct member of his family. By family I include a parent, grandparent, or sibling.

52 Mr. Ricchio will present himself to the Toronto Police at 361 University Avenue no later than 3 pm today in order to be taken into custody.

R.F. GOLDSTEIN J.
