Court of Queen's Bench of Alberta

Citation: R v JR, 2016 ABQB 414

Date: 20160721
Docket: 151368743S1
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

JR

Respondent

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any way.

Identification Ban – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No one may publish any information that may identify a person as having been dealt with under the *Youth Criminal Justice Act*.

No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.

NOTE: This judgment is intended to comply with the restrictions so that it may be published.

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Appeal from the Acquittal by
The Honourable Judge Savaryn
on the 22nd day of April, 2016
Docket: 151368743Y1

Introduction

[1] A Youth Court Judge acquitted the Respondent of sexually assaulting a 15-year-old girl, a student at his high school. Finding that sexual touching had occurred, the judge rejected much of the complainant's testimony on the question of consent and ruled that the Crown had not established the necessary criminal intent to prove the offence beyond a reasonable doubt.

[2] For reasons that follow, the Crown has established to a reasonable degree of certainty that the errors alleged affected the outcome of this case. Particularly, the trial judge erred by assessing the evidence with resort to prohibited stereotypical reasoning and misapplying the law of consent (including the defence of mistaken belief in consent). The errors warrant overturning the acquittal, entering a conviction, and returning the case to Youth Court for disposition.

Jurisdiction, Standard of Review, and Threshold

[3] The Crown may appeal acquittals of summary conviction offences on questions of law: *Criminal Code*, RSC 1985, c C-46, s 813(b)(i). The threshold question is whether, to a reasonable degree of certainty, the trial judge's errors affected the outcome of the case: ***R v Graveline***, 2006 SCC 16, [2006] 1 SCR 609 at para 15.

[4] The issues on this appeal concern questions of law: ***R v B(RG)***, 2012 MBCA 5, [2012] 4 WWR 697 at para 59; ***R v H(JM)***, 2011 SCC 45, [2011] 3 SCR 197 at para 28 .

[5] The standard of review in this case is correctness: ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235.

Overview of the Evidence

[6] What happened at the school that day is straightforward. Much of the incident was captured on a camera recording viewed by the trial judge.

[7] During an afterschool workout, the Respondent, who was unknown to the complainant, approached her asking if she was involved with another boy. About 10 or 15 minutes later, the Respondent walked past the complainant's locker where she heard him say, "that ass though" as he walked by. The complainant found the comment to be disrespectful but thinks she laughed it off because she was not expecting it.

[8] Next, the two caught up to one another in the hallway as the complainant was on her way out of the school. After some small talk the Respondent told the complainant that she was sexy and fit and touched or slapped her buttocks several times. The complainant felt uncomfortable but laughed it off at first as she was unsure of how she was feeling. The recording shows her smiling and giggling.

[9] The Respondent then pushed the complainant into a locker, an act that made the complainant "feel really unsure" where he again grabbed at her buttocks, ran his hands over her body, and tried to kiss her. With the intention of getting away from him, the complainant quickly moved out of the way. She told the Respondent to go the opposite way as she turned a corner. He did not. Rather, he followed her, pushed her into a closed doorway, and again grabbed her buttocks and breasts and tried to kiss her as she tried to push him away and fend him off with a water bottle. The Respondent said she should "just let him do it". She said "No" and "It wasn't right". The complainant was not laughing when she said these things. The incident (which is not captured on the recording) lasted less than 20 seconds, but it felt like a minute to the complainant.

[10] After extricating herself, the complainant left the school walking down the same hallway that the Respondent had taken, which was her normal route out of the school. Outside, the Respondent went to the complainant asking for a hug. She declined and walked away. The Respondent came back, grabbed her, and hugged her. The complainant was upset. She felt disrespected and uncomfortable.

[11] Later that evening, the complainant texted a friend, Alex, about what had happened. She attached a 'smiley face' emoji with tears coming from its eyes and an acronym for 'laughing my ass off', which she explained was joking and that if she had told Alex she was mad, he would have probably tried to hurt the Respondent.

[12] While the complainant was not sure how she felt about what had transpired that day, she denied having found it funny or "just a flirtatious event" which she "enjoyed the attention [from]".

The Issues

[13] There is no dispute that sexual touching occurred. The issues in the first instance and, on this appeal, are focused squarely on consent and the defence of mistaken belief of consent.

[14] The issues on appeal can be distilled to:

1. Whether the trial judge erred in interpreting and applying the law of consent; and
2. Whether the trial judge erred in interpreting and applying the law on the defence of mistaken belief in consent.

Analysis

1. Did the trial judge err in interpreting and applying the law on consent?

[15] Consent in the context of sexual activity is not a difficult concept. It means just what the word implies. It is a voluntary agreement to engage in sexual activity. There is no such thing as implied consent: ***R v Ewanchuk***, [1999] 1 SCR 330 at para 31. Consent can come from words or conduct. Similarly, lack of consent can come from words or conduct. If given, consent is not forever and can be withdrawn at any time by words or conduct: *Criminal Code*, s 273.1.

[16] It is long beyond debate that in Canada "No means No", that "No" does not require a minimal word or gesture, and that acquiescence or ambiguous conduct do not equate to consent: ***Ewanchuk***; ***R v Park***; [1995] 2 SCR 836; ***R v Hutchinson***, 2014 SCC 19, [2014] 1 SCR 346 at para 17.

[17] Absence of consent is determined by referencing the complainant's subjective state of mind about the sexual touching when it occurs. This said, a complainant's credibility must also be assessed on the totality of the evidence. If the complainant's words and actions, before and during the incident, raise a reasonable doubt about consent, the accused must be acquitted. If not, the burden is met: ***Ewanchuk*** at paras 26, 27 and 29.

[18] In this case, the trial judge rejected almost all of the complainant's evidence, finding that her actions were inconsistent with non-consensual sexual touching. The one exception is the acceptance of the complainant's evidence that she told the Respondent to stop and felt uncomfortable during the incident in the doorway.

[19] Mindful that findings of fact are typically given deference, that is not so where the finding is based on erroneous understanding or application of the law. This is what happened here.

[20] The trial judge noted the complainant's apparent complacency with the Respondent's touching her and that she did not seem to be distressed or fending off the Respondent's advances until the doorway incident. He found that despite the complainant saying "No" to the Respondent during the incidents at the locker and in the doorway:

> …in fairness to the accused, the complainant tried so hard to laugh it all off, that I do not believe she was successful in communicating her discomfort which initially I find was totally internalized as she was literally and by her own admission laughing his grabs off [sic]; and even at the end, I am not convinced she clearly expressed her objections.

[21] He went on to find:

> …the accused did not mean to touch the complainant sexually without her consent and nor was he reckless or willfully blind to her lack of consent. The complainant's actions, certainly in the video, at worst being ambivalent or tolerant

> if not accepting or smiling while her words which, although she testified were expressions of objection which presuming some consistency with the complainant's actions and body language in the video, I find were unclear … .

[22] The trial judge found the complainant's post-incident demeanour and text to her friend inconsistent "with her having been serious or clear in her objections of having communicated any serious objection clearly to the accused".

[23] These findings do not accord with the law on consent. Even if the trial judge was correct that consent was given to touching before the doorway incident (which I do not think can be concluded without resort to prohibited reasoning), it is clear that any such consent was withdrawn. Consent means "Yes". The word "No" does not mean "Yes". The word "No" coupled with fending off an attacker with a water bottle does not mean "Yes". There is nothing ambiguous about it. Even if the situation was as the trial judge found "at best ambiguous", that is not "Yes". Finally, the complainant's state of mind after the incident is irrelevant to the question of consent. Indeed, the trial judge's consideration on the complainant's post-incident conduct is indicative of sexual stereotyping about how victims of sexual assault will behave. As an example, the requirement that a complainant raise the hue and cry has long since passed into the mists of time.

[24] There is no place for sexual stereotyping in sexual assault cases and no inference should be drawn about a complainant's credibility on how a victim of sexual assault is to react to the trauma: ***R v Shearing,*** 2002 SCC 58, [2002] 3 SCR 33 at para 121; ***R v DD,*** 2000 SCC 43, [2000] 2 SCR 275 at para 33; ***R v ADG***, 2015 ABCA 149, 25 Alta LR (6th) 379 at para 33. Put simply, the criminal justice system must not allow myths and stereotypes about sexual assault victims to influence outcomes.

[25] The judiciary is responsible for ensuring that impartiality is not compromised by these biased assumptions: ***Ewanchuk*** at para 95. Regrettably, that did not occur in this case. The trial judge's finding about the complainant's post-incident conduct is not the only instance of prohibited stereotypical reasoning (of how the complainant should have been expected to react). As examples, the trial judge observed that she did not:

i. disclose dismay after hearing the Respondent's disrespectful comments;

ii. avoid walking the same path as the accused;

iii. call for help to a nearby janitor or passersby;

iv. appear upset, noting that after passing the janitor she was "genuinely and constantly smiling for a period of five seconds" and that after being pushed into the doorway she "peacefully emerged" with her water bottle in one hand and a book in the other;

v. communicate "any serious objection clearly to the accused"; and

vi. texted her friend later that day using the 'smiley face with tears' emoji and acronym for 'laughing my ass off'.

[26] The trial judge erred in law in making these findings and I am satisfied, to a reasonable degree of certainty, that his error affected the outcome of the case.

2. Did the trial judge err in interpreting and applying the law on mistaken belief in consent?

[27] To repeat, the trial judge ruled: "…the accused did not mean to touch the complainant sexually without her consent and nor was he reckless or willfully blind to her lack of consent". Without saying the words, the trial judge implied that the defence of mistaken belief in consent was available to the Respondent. In doing so, he incorrectly interpreted and applied the law.

[28] To successfully invoke the defence of mistaken belief in consent, an accused must have taken reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting: *Criminal Code*, s 273(b).

[29] Even in the absence of an unequivocal "No", the defense cannot be raised if the Respondent knew the complainant was essentially "not saying Yes". ***Ewanchuk*** directs (at para 46) that to "cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence".

[30] Silence, passivity, or ambiguous conduct does not constitute consent: ***Ewanchuk*** at para 51.

[31] ***R v Cunningham***, 2016 ABCA 141, [2016] AJ No 448, an application for leave to appeal case, is also instructive. There, the Court found no likelihood of success on appeal involving the defence where the accused kept touching the complainant after she told him to stop and pushed him away. The Court noted that there was no evidence to raise the defence and that the accused's behaviour was the opposite of the steps required by the *Criminal Code*.

[32] Even if one were to accept the trial judge's findings that there was consent to the pre-doorway touching, there can be no doubt that like the complainant in ***Cunningham***, the complainant withdrew any consent she might have given by clearly conveyed physical and verbal cues. Like the accused in ***Cunningham***, the Respondent did the opposite of what the defence required of him – he persisted in the face of objection. That is not a "reasonable step" that could satisfy the statutory threshold for invoking the defence: ***Cunningham***, *supra*; ***R v Dippel***, 2011 ABCA 129, 48 Alta LR (5th) 362.

[33] For a defence to have an air of reality, there must be evidence upon which a properly instructed jury acting reasonably could acquit: ***R v Cinous***, 2002 SCC 29, [2002] 2 SCR 3. In this case, there is no such evidence and the defence lacks an air of reality. In short, the trial judge erred in law by considering the defence and then by finding that the Respondent was not reckless or willfully blind to the complainant's lack of consent.

Conclusion

[34] The appeal is allowed.

[35] The trial judge incorrectly interpreted and applied the law of consent in the context of sexual assault, including the law concerning the defence of mistaken belief in consent.

[36] The evidence amply supports an absence of consent to the sexual touching and that there was no air of reality to the defence of mistaken belief in consent.

[37] Since I am satisfied that the Respondent should have been found guilty but for these errors, the acquittal is overturned and a conviction entered pursuant to s 686(4)(b)(ii) of the *Criminal Code*. The matter is returned to Youth Court for disposition.

Heard on the 14th day of July, 2016.
Delivered Orally at the City of Edmonton, Alberta the 14th day of July, 2016.
Dated at the City of Edmonton, Alberta this 21st day of July, 2016.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

A. Bartier
Alberta Justice
for the Appellant

M. Fontaine
Michel G. Fontaine Professional Corporation
for the Respondent