

Citation: *R. v. Romero*, 2023 YKTC 48

Date: 20231109
Docket: 22-00087
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge K.L. McLeod

REX

v.

JOHN DAVE BAGCAT ROMERO

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s.486.4 of the *Criminal Code*.

Appearances:
Adrienne Switzer
Andre Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] MCLEOD K.L. T.C.J. (Oral): Mr. Romero faces three charges: sexual assault, sexual interference of a person under the age of 16, and communication with a person under the age of 16 for the purpose of committing the offence of sexual interference, all of which are alleged to have occurred between January 1, 2022, and April 7, 2022.

[2] There is really no issue that Mr. Romero had sexual relations with A.B. and was communicating his sexual wishes in what I will term "text language", which text messages were filed as an exhibit in these proceedings.

[3] There is no issue that A.B. was 14 years old at the time of these occurrences.

Mr. Romero, whose birthdate is January 11, 2001, turned 21 years of age in the second week of the charged period.

[4] There is also no issue as to the following: first; that A.B. was a willing participant and, in fact, the architect of the sexual interaction that she had with Mr. Romero, she wanted him to give her a tattoo, and second; that given her age, that being 14, these actions were illegal.

[5] The Crown still has to prove all the elements of the offences with which Mr. Romero is charged, beyond a reasonable doubt, and further if Mr. Romero testified and raised an air of reality to his “mistaken belief of age” defence, the burden of proof remains on the Crown to prove beyond a reasonable doubt that the accused did not take all reasonable steps, in the circumstance, to determine her age (see *R. v. Gagnon*, 2018 CMAc 1, at para. 28, aff’d 2018 SCC 41).

[6] I will now turn to a brief summary of the non-contested facts in this case. A.B. had seen Mr. Romero at a sport centre, she liked his tattoos. She had long wanted what she described as an “under-boob tattoo” but of course was too young to get a tattoo without her parents’ permission. She posted TikTok videos of herself captioning the fact that she wanted this tattoo hoping that he would comment on her video. There was no response from him, so she posted the same video of her dancing to her Facebook page. She also posted a video suggesting she wanted a Raiders Cap because she knew he had one, and then when not seeing him at a basketball league

game posted a video of her dancing with a friend and entitled it: "Dave wasn't at league today".

[7] She received a message back about the hat from Mr. Romero and she started to have messaging communications with him. A.B. knew that her older brother knew Mr. Romero but did not want her brother to know that she was communicating with his friend. In a message to her, Mr. Romero said he just wanted "a low-key life" with no drama. Their communications then reverted to Snapchat, because I was told, Snapchat messages have a shorter life span.

[8] The first time that they met in person after numerous communications was when she went to his house after sneaking out of her parents' home, at 2:00 a.m. and getting an Uber. They drank Vodka and had their first episode of sexual intercourse. She returned home in the early hours of the morning. Neither A.B. or Mr. Romero were definitive as to whether she got home by way of Uber or whether he drove her, dropping her off down the street from her house as according to A.B., her brother knew Mr. Romero's car, so they did not want him to know. However, they were sure that on the second occasion they met, he drove her to the area of her home.

[9] They continued to see each other, each time there was some kind of sexual activity either intercourse or fellatio, including the time Mr. Romero gave her a tattoo for which she paid him. A copy of the e-transfer is contained in Exhibit 1.

[10] The "relationship" ended when A.B.'s mother found out about it in early April 2022, and went to the police.

[11] Thus, the details of what occurred are mostly undisputed, in that the sexual activity took place and she was 14 years of age. Mr. Romero has raised the defence of having a mistaken belief in the age of A.B. This defence to the sexual assault and sexual interference charge is contained in s. 150.1(4) of the *Criminal Code*, which states:

(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took **all reasonable steps** to ascertain the age of the complainant. [emphasis added]

[12] With respect to the third count which relates to Mr. Romero, charge of communication with A.B., the defence is found in s. 172.1(4) which states:

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took **reasonable steps** to ascertain the age of the person. [emphasis added]

[13] Thus, the difference between the two subsections is this: the accused must take “**all**” reasonable steps to determine the age of the complainant to avail himself of the defence with respect to the sex acts themselves. Whereas under the defence relating to communication, he just needs to take reasonable steps. However, for the purpose of this trial, both counsel concur, the difference is one without a distinction. I agree.

[14] The first question I must answer is whether Mr. Romero has demonstrated an "air of reality" to his mistake of age defence. Both counsel agree that he has, as do I. This test simply requires me to consider the totality of the evidence and assume that what

Mr. Romero has told me is true; that he believed A.B. to be 16 years of age and took all reasonable steps open to him to confirm that.

[15] Once this initial test is met, the burden of proof that this defence does not apply turns to the Crown. The Crown must then prove beyond a reasonable doubt that:

1. Mr. Romero did not believe A.B. was at least 16 years old, (a subjective test); and
2. He did not take all reasonable steps to ascertain her real age (an objective test).

1. The evidence as to Mr. Romero's belief.

[16] I will turn first to the evidence of how Mr. Romero's belief about A.B.'s age was formed. There is one issue regarding the credibility of this belief.

[17] J.A. testified. He is Mr. Romero's friend and was the one who had first alerted him of the posted videos that A.B. had made trying to attract Mr. Romero's attention. Mr. Romero asked him how old A.B. was. J.A. said he responded that he would "get back to him". He did and testified that he told Mr. Romero "she was around 16". J.A. explained at the trial that he had asked his sister who told him that A.B. was a year older than she. Apparently, his sister was 15 years old at the time. Under cross examination, J.A. explained that his sister had worked with A.B., but that they were not friends nor in the same school.

[18] According to J.A., once he gave Mr. Romero the information that A.B. was about 16 years old, she was never mentioned again. In cross examination, he said, “I didn’t suspect that he was going to give her a call, because we both knew she was young.”

[19] With respect to her appearance, Mr. Romero testified that when he saw A.B. without clothes for the first time, he thought she had more the appearance of someone who was 18 years of age, given her physical development. Furthermore, Mr. Romero testified about a conversation he had with A.B. after one of their sexual encounters. He asked when she was going to tell her parents that she had a tattoo; her response was “in two years she was going to live in Quebec, she would be 18 and would tell them then”. While this evidence is not relevant as to the reasonable steps inquiry because it speaks to a time after the sexual encounter, it can inform any credibility assessment of the strength of Mr. Romero’s belief (see *R. v. George*, 2017 SCC 38, at para. 21).

[20] A.B. was asked about this conversation and she did not recall it. However, this conversation, if it did occur, occurred before the text messages that form the evidence on the communication charge, particularly with respect to any act of fellatio occurring but, that is frankly of no import, given the fact that sexual activity had taken place.

[21] Reasonable doubt is a high standard. I must be sure as to the fact that the Crown has proven a lack of belief by Mr. Romero that A.B. was 16 years old. This is a subjective test and what little information Mr. Romero had, from either version of the account of A.B.’s age, informed his subjective belief. I find that the Crown has not proven beyond a reasonable doubt that such a belief did not exist.

2. Were all reasonable steps taken?

[22] The reasonable steps criteria is where the main submissions of counsel were focussed. This is an objective text and requires me to look at the context and narrative in this case. In some fact situations, it would be reasonable to ask a partner's age, in this case Mr. Romero never asked A.B. In some cases, more may be needed, especially since it is common that the young are often motivated to misrepresent their age, especially when it comes to alcohol consumption, etc. (*George*, at para. 9).

[23] What is obvious is that Mr. Romero cannot rely on the actual sexual activities that occurred to support his belief. His testimony that it appeared to him she had experience at intercourse does not fulfill the reasonable steps requirement. The test requires the **reasonable steps** be taken **before** the activity not during or after (*George*, at para. 18).

[24] What is the definition of reasonable steps? *R. v. W.G.*, 2021 ONCA 578, states:

61 “Reasonable steps” are steps that provide information reasonably capable of supporting an accused’s belief that the complainant is of legal age. In other words, the steps must be **meaningful**. Steps that solicit information that does not reasonably support a belief in legal age are not reasonable steps. Relevant considerations include not only the nature of the steps themselves, but also the information that those steps solicit. The steps need not always be active. However, where the early steps of an accused could reasonably support a belief that the other person is of legal age, but later events raise “red flags” that the other person may not be of legal age, additional steps may be required to meet the standard of s. 150.1(4): *Morrison*, at paras. 106-109. [emphasis added]

62 There is no magic number or exhaustive list of steps that an accused must take to satisfy the “all reasonable steps” requirement in s. 150.1(4). A practical, common-sense approach should prevail, informed by the overarching purpose of the provision – to protect vulnerable young people from sexual crimes by assigning responsibility for preventing adult/youth sexual activity on adults. And by an enhanced standard. Not simply

“reasonable steps”, but “all reasonable steps to ascertain the age” of the complainant.

[25] So, I pose the question; what steps were taken by this defendant? He inquired of J.A. who was close to A.B.’s brother asking about her age and grade. He testified “I got a heads-up what age she is”. Mr. Romero said that J.A. told him A.B. was 16 and in Grade 10. J.A.’s testimony is less definitive, “that she was around 16”. His testimony did not include any mention of A.B.’s grade. Mr. Romero said he wanted to be confident she was really 16, “because she might not be”. It is of note that he never asked J.A. how he found out what age A.B. was, rather he assumed since J.A. was friends with A.B.’s brother, he would know her age.

[26] Mr. Romero testified that he wanted a low-key life as he was new in Canada and swapped their conversation to Snapchat. His rationale was to hide the conversations because he knew her brother would not like his younger sister dating him.

[27] At first he asked about her age before everything happened but subsequently he testified that he was not really sure when he asked J.A. as to A.B.’s age saying, “I think it was before I had a sexual relationship”. He received the information from J.A., which was that she was, and he did not ask how J.A. knew this information. He now knows that J.A. asked his younger sister, and she gave J.A. her answer which was relayed to him.

[28] Mr. Romero admitted that he knew if she was underage, he could get into trouble. He thought that the legal age was 15 or 16 and conceded that he chose not to clarify what age she was. He also said they agreed to keep their “relationship” secret

from the brother, as he did not think her parents would approve of him being involved with her. He also did not think her parents would approve of her getting a permanent tattoo, and thought she was legally too young to get one but gave her one anyway.

[29] Mr. Romero never asked A.B. her age, her birthday, or, in fact anything. Having removed her clothes, thinking her to be older, he never even asked her age. If he honestly thought she had the appearance of an 18-year-old, he would have known J.A. was incorrect both in terms of the grade and age of A.B.

[30] At this point, I will turn to the evidence of A.B. with respect to her age. She indicated that she knew she looked older, and she had made certain assumptions. She had assumed Mr. Romero knew her age. She testified that she never lied about her age and did at one point tell Mr. Romero she was in Grade 9. That testimony was never opposed either through cross examination or through Mr. Romero's testimony. Frankly, that utterance is not on its own dispositive, but what is of relevance is that Mr. Romero testified "I knew if she was underage, I could get into trouble", and that the legal age was 15 or 16 and he agreed with the suggestion **that he chose not to clarify her age.**

[31] I will now turn back to the reasonable steps issue. This is where the real problem lies for Mr. Romero. While there is no definitive list of steps that a defendant must take, there must be some steps that are objectively reasonable. Counsel, Mr. Roothman, relies on the decision of *R. v. Chapman*, 2016 ONCA 310, in which the Court states: "in some cases an accused's visual observation of the complainant may be enough to constitute reasonable steps". Clearly more is needed in this case, given the first time Ms. Romero and A.B. met, it was at 2:00 a.m., Mr. Romero knew she was in the

ballpark of being legal/not legal for sexual activity, and there was no discussion regarding her age.

[32] I must examine any "steps" Mr. Romero took. He watched her videos which she clearly had made to interest him, that included film of her cleavage, makeup, and obviously flirtatious actions. Much about the era in which young people live must be considered: sexually precocious videos and photographs on social media in this day is not exclusive to people over a certain age. There is no doubt that there has been situations over the years, as recognized by the cases, where young people want to make themselves look older (*George*, at para. 9). It is only after Mr. Romero sees these videos, that were directed at him, that he asks a question as to the age of A.B. He knew there was a possibility she was underage, thus the social media representations were not persuasive to him.

[33] He made one inquiry; never asked how his friend knew of her age, and never asked anything of A.B. which may have provided clarification. While the "all reasonable steps" question is not an exhaustive list, it is much more than a vague question, the timing of which is vague as well.

[34] Finally, it is Mr. Romero's own language that he chose not to clarify what age A.B. was, is the final persuasive step in the Crown proving (beyond a reasonable doubt) that reasonable steps were not taken.

[35] Thus, the defence fails.

[36] Now I will turn to the issue of what the Crown must prove beyond a reasonable doubt with respect to the charges of sexual assault, sexual interference, and the communication charge.

[37] It is the defendant's position that if Mr. Romero knew there was a chance she was underage or never really turned his mind to the issue of age, then the Crown has failed to prove beyond a reasonable doubt that he believed she was underage or wilfully blind or reckless to that fact. The Supreme Court of Canada decided in *R. v. Morrison*, 2019 SCC 15, at para. 97, that the accused's belief could be established beyond a reasonable doubt by the defendant believing that the young girl was under 16 or by the defendant being wilfully blind as to the age of the person.

[38] The issue of what the Crown must prove has been the subject of much legal discussion following the decision in *Morrison*. That decision dealt with a case where the defendant was charged with communicating with a child, when in fact, the person with whom he was communicating his sexual wishes, was an undercover officer. The majority decided that when the complainant is not underage, i.e., in a situation such as a sting operation, the Crown must prove the defendant believed the complainant with whom he was communicating was underage. The Crown cannot seek to support a conviction when only recklessness as to the age of the complainant is proven, even if the Crown can prove that the reasonable steps requirement was not met.

[39] However, since this decision, when the complainant is a real person, the Court of Appeal of Ontario in *R. v. Carbone*, 2020 ONCA 394, and the Court of Appeal of British Columbia in *R. v. Angel*, 2019 BCCA 449, have not endorsed this approach. These

courts have interpreted the *Morrison* decision as only applying to the defence where there was not a real under 16 complainant.

[40] In *Carbone*, the Ontario Court of Appeal (which the defence urges me to follow) has stated that where the defendant argues the defence of belief and reasonable steps regarding age of the complainant and which is not supported by the evidence and therefore rejected, then I have to go back to basics. The trial judge must then decide whether the Crown has proven beyond a reasonable doubt that the defendant believed or was wilfully blind as to her age or was reckless as to her underage status. Then and only then can the defendant be convicted.

[41] In the Court of Appeal of British Columbia in *Angel* (which the Crown urges me to follow) the Court has come to a different more stringent conclusion. The Court stated that once the defence of mistaken belief of age has not been proven beyond a reasonable doubt, or indeed does not have an air of reality, the essential element of the offence of touching the complainant was established, there was a touching for a sexual purpose, and the defendant was recklessly indifferent as to her age.

[42] Thus, the Ontario Court of Appeal imports one further step, that is looking to the offence itself, having rejected the defence raised, to determine whether the Crown has proven the case beyond a reasonable doubt which requires a finding of actual belief, wilful blindness, or recklessness.

[43] Very recently, the Ontario Court of Appeal in *R. v. Fox*, 2023 ONCA 674, unequivocally endorsed *Carbone* and stated that the Crown must prove, under the section of child luring where the child is real (as opposed to a sting operation) beyond a

reasonable doubt that the defendant knew, was wilfully blind or was reckless to the fact that the person was under the legal age.

[44] I will now finally turn to whether the Crown has proven the case therefore on all counts beyond a reasonable doubt. I was asked to deal with a binary choice, choose either the British Columbia or the Ontario's Court of Appeal conclusion. Frankly, given Ontario's most recent endorsement of the recklessness test, I would be prepared to prefer the Ontario position since it is the more recent recitation of the law. However, I find that I do not need to decide that issue, as given the testimony to which I have alluded, I have concluded that while the Crown has not proven beyond a reasonable doubt that Mr. Romero **knew** A.B. was under 16 years of age, it has proven that that he was wilfully blind as to her age. He did not want to confirm her age, thus there was no conversation. Although A.B. was a willing participant, she could not in law consent, and therefore there will be a finding of guilt on all counts.

MCLEOD, K.L. T.C.J.