Citation: *R. v. S.H.*, 2006 YKTC 77

Date: 20060814
Docket: 05–00474
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

R e g i n a

v.

S.H.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486(3) of the *Criminal Code*.

Appearances:
David McWhinnie — Counsel for Crown
Ed Horembala — Counsel for Defence

REASONS FOR JUDGMENT

[1] S.H. has been charged with one count of sexual assault, contrary to s. 271 of the *Criminal Code*. The complainant, N.B., is a 17-year old female, who was 16 years of age at the time of the alleged offence, on November 8, 2005. N.B. is the biological daughter of M.B. and the "step-daughter" of D.L., a former husband of M.B. Although M.B. and D.L. are now divorced, they maintain a good relationship. They also have a son, aged nine years, as a result of their relationship. At the time of the incident, the two parents shared custody of the children, who lived with each parent part of the week. This arrangement was not inconvenient for the parties as they lived four blocks apart.

[2] M.B., the mother of N.B., has had a relationship with the accused, S.H., for approximately four years. Although he visited M.B.'s home when the children were staying in her house, he only stayed overnight when they were living with D.L. I understood that D.L. disapproved of S.H. and would not allow the children to be in M.B.'s house if S.H. was staying the night. S.H. had his own residence on the other side of Whitehorse from M.B.'s residence. As a result of limited social contact between N.B. and S.H., N.B. did not know S.H. very well.

[3] N.B.'s evidence was quite straight forward. On November 7, 2005, she returned home from basketball practise between 9:30 and 10:00 p.m. She got something to eat and went upstairs to watch television and then went to bed. Although S.H. was not at the residence when she arrived, she later heard his voice downstairs and looked out her mother's bedroom window and saw his van parked in the driveway. She turned the television off around 11:00 p.m. and fell asleep. She was awakened by her younger brother around midnight who came into her room and laid down on her bed for 15 or 20 minutes. He then went into his mother's room. Apparently this happens not infrequently as her younger brother sometimes gets frightened at night.

[4] When N.B. was awakened by her little brother, she could still hear S.H.'s voice downstairs. When her little brother left, she fell asleep quite quickly.

[5] N.B. woke up again between 1:15 and 1:30 in the morning, because, as she stated, she felt something, perhaps a combination of touch and instinct. As she woke up, she felt a hand on or fingers inside the waistband of her track pants, pulling away from her right hip. A thought immediately came into her head that it was her cousin, who sometimes "bugs" her, meaning bothers her. But as her eyes adjusted to the dark, she realized it was S.H. She said he was kneeling on the floor, beside her low futon bed, with his face close to hers. She spoke saying "What time is it? Who are you?" While she was speaking, S.H. said "I'm sorry", two or three times. S.H. stood up and left the room.

[6] N.B. was able to provide a considerable amount of detail about this intrusion into her room. When she woke, S.H.'s face was close to and over hers. With the light from the window and the hallway, she immediately recognized S.H. He was wearing red track pants and a toque – he often wears a toque in the house. She also described the touching in the same detail. She woke up feeling something on the side of her pants – she was wearing long sweat pants, panties, a bra and tee shirt. She felt a finger or hand come out from under her clothing. She could feel the hand against her skin. Later she said that she "felt it come out from under my waistband".

[7] N.B. got up immediately, intending to check up on her little brother. Outside her door, she saw S.H. at the end of the hall near the stairs. She told him "just leave". She then checked on her little brother who was in her mother's bedroom. This took just a few seconds. She waited until S.H. was downstairs and then went downstairs herself. She observed her mother sitting on and asleep on the couch in the living room. The lights and television were on in the living room. S.H. was at the side door, putting on his shoes and was in the process of leaving. At this point he was wearing a "puffy black jacket" that he was not wearing when he was in her room.

[8] After S.H. left, N.B. locked the door. N.B. then woke up her mother, who was sound asleep. It took M.B. a few minutes to wake up. According to M.B., N.B. was crying and upset, and told her "he friggin touched me". When M.B. asked, "what do you mean?", N.B. said it again. When she heard what had happened, M.B. became angry and upset and wanted to talk to S.H. According to N.B., M.B. called several times with no answer. On the fourth call, S.H. answered. M.B. demanded to know what had happened. S.H. kept saying that he was sorry. He also said "that he thought it was me", meaning he had made a mistake and thought N.B. in her bed and in her room was in fact M.B. When M.B. told S.H. that the police would be called, S.H. said he wanted to return and talk to M.B. about what had happened. M.B. said no to his request.

[9] N.B. called her step-father, D.L., several times, and when she did not get an answer, she decided to walk to his residence. She did not know what to do and wanted to talk to someone other than her mother. After explaining to D.L. what had occurred, a decision was made to call the police. The police attended, interviewed N.B. and arrested S.H. later in the morning.

[10] S.H. gave evidence on his own behalf. He is a 42-year old man, currently employed and has a good work record. He has known M.B. for five to six years. He confirmed M.B.'s evidence that he visited at M.B.'s residence often and that he never stayed overnight when the children were home. When he stayed overnight, M.B. often required him to sleep in another room – her son's room usually, or her daughter's room – because of his snoring. He sometimes used N.B.'s room to watch television.

[11] S.H. gave a detailed account of the events of November 8, 2005. He said that he had a beer right after work, and then went to the gym. He left the gym around 8:30 p.m. and had another beer at the High Country Inn, where he bought a six-pack of beer, that he took to M.B.'s home. He stated that he drank most of the beer, and when it was gone, he went out and bought another six-pack and a bottle of wine. He said that he also smoked a marijuana cigarette while on this errand. When he returned, he and M.B. watched television and he drank the beer and a portion of the wine. According to S.H., he experienced a blackout. He remembers being in the kitchen looking for more alcohol. He remembers a "snap shot" of being on the bathroom floor upstairs. He said he has no recollection of being in N.B.'s room, or of saying anything to her or of leaving N.B.'s room. He does remember leaving M.B.'s house, but does not remember driving home. He does remember the telephone call. He remembers telling M.B. that he did not remember waking N.B. or touching her.

[12] S.H. has had an "alcohol problem" since he was 17 or 18-years of age. He described himself as an alcoholic. He was involved in Alcoholics Anonymous 15 years ago, but has not completed a treatment program or sought formal

counseling. Using “will power”, he stopped drinking for 12 years. He started drinking again after he met M.B., about five years ago. He said that when he drinks to excess, he does suffer “blackouts”, meaning periods of time when he cannot remember what happened. In other words, neither the excessive drinking or the “blackout” he experienced on November 8, 2005 were new experiences for S.H.

FINDINGS

1. I found the evidence of N.B. to be very credible. She had not been drinking when the incident occurred. She provided a lot of detail of the events before, during and after the incident that were either confirmed by other evidence or that remained consistent throughout her testimony.

2. I am satisfied of the following facts:

    (i) S.H. was intoxicated from excessive alcohol consumption at the time of the incident;

    (ii) S.H. touched N.B. by putting his hand under her sweat pants and panties, and touched her skin in the area of her hip;

    (iii) this touching took place in N.B.’s bedroom around 2:30 a.m. when N.B. was asleep; and

    (iv) N.B. did not invite or consent to the touching.

DEFENCE POSITION

[13] S.H., through his counsel, advanced the following alternatives:

1. S.H., because of his state of intoxication, forgot that N.B. was at home and thought that the person in N.B.’s room, in her bed, was in fact M.B. In other words, S.H. made a mistake;

2. S.H. was merely touching N.B. to wake her up; and

3. the touching was not sexual. It was very brief. It was in the area of N.B.'s hip – as contrasted with a touching of the breast or vaginal area.

THE LAW

Elements of Sexual Assault

[14] Sexual assault is an assault, within any one of the definitions of that concept in s. 265(1), which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated.

[15] In *R.* v*. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada described in detail the elements that the Crown must prove to obtain a conviction for sexual assault at paras. 23 – 52.

[16] The court held that the *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary and the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of the behaviour. The absence of consent is purely subjective and determined by reference to the complainant's subjective state of mind towards the touching, at the time it occurred. The accused's perception of the complainant's state of mind is not relevant to a finding of *actus reus* and only becomes relevant when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry (*Ewanchuk* at paras. 25 & 26).

[17] With respect to *mens rea,* the Court reiterated that sexual assault is a crime of general intent. The *mens rea* contains two elements: intention to touch and knowing of, or being reckless or willfully blind to, a lack of consent on the part of the person touched (*Ewanchuk* at para. 42).

[18] Section 33.1 of the *Criminal Code* prohibits an accused from arguing lack of general intent or voluntariness by reason of self-induced intoxication in sexual assault cases. The section goes on to clarify that a person is criminally at fault if, having rendered himself unaware of, or incapable of consciously controlling his behaviour due to self-intoxication, he voluntarily or involuntarily interferes with the bodily integrity of another.

ACCUSED'S INTENTIONS

[19] The accused's "intentions" may be considered at two separate stages of the analysis. The accused's intention (or lack thereof) to obtain sexual gratification is one of the factors that can be considered when determining whether the assault was of a sexual nature, in order to prove *actus reus*. The accused's intention, however, is not determinative, as the test is objective.

[20] However, s. 33.1 prohibits the accused from claiming lack of general intention and voluntariness where the accused's behaviour results from self-induced intoxication. In such circumstances, his conduct is deemed to depart markedly from a reasonable standard of care, by virtue of s. 33.1(2) of the *Criminal Code*.

[21] The test of whether an activity is sexual in nature is an objective one having regard to all of the circumstances. In *R.* v. *Chase*, [1987] 2 S.C.R. 293, McIntyre J. identified some of the factors to be considered including:

1. the part of the body touched;
2. the nature of the contact;
3. the situation in which it occurred;
4. any words or gestures accompanying the contact including any threats; and
5. the accused person's intent or purpose including the presence or absence of elements of sexual gratification.

[22] The importance of the accused's intentions when determining whether the touch was of a sexual nature will vary depending on the circumstances. For example, in both *R.* v*. Chau,* [1996] A.J. No. 1019 (Alta. Prov. Ct.) and *R.* v*. C.J.* (1990), 58 C.C.C. (3d) 167 (Nfld. C.A.), the accused's intentions figured prominently in the judge's analysis of the circumstances and ultimate acquittal of the accused. In *R.* v*. K.B.V.* (1993), 82 C.C.C. (3d) 382 however, the Supreme Court of Canada held the accused guilty even though his intention was discipline and not sexual gratification, and in *R.* v*. Bernier* (1997)*,* 119 C.C.C. (3d) 467 (Que. C.A.), affirmed [1998] 1 S.C.R. 975, the accused was convicted where the touching occurred in the context of joking and was specifically found not to be for sexual gratification.

[23] In summary, the intention of the accused in touching the complainant is relevant but not conclusive in considering both the *actus reus* and *mens rea* of the offence of sexual assault. The accused's intention to touch the complainant is required to prove both the *actus reus* and *mens rea*, but it is not necessary to prove that the accused intended the touch to be for a sexual purpose.

SELF-INDUCED INTOXICATION and MISTAKE of FACT

[24] Sexual assault is crime of general intent. Section 33.1 of the *Criminal Code* prohibits an accused from relying on the defence of self-induced intoxication to show lack of general intent or voluntariness in cases of sexual assault.

[25] Several sexual assault cases have considered mistake of identity resulting from self-induced intoxication. Both the Yukon Territorial Court in *R.* v*. P.W.S.*, [1999] Y.J. No. 54 (in obiter), and the Saskatchewan Court of Queen's Bench in *R.* v*. Dixon,* [1982] S.J. No. 243 held that an accused who made a mistake of fact, and made sexual advances upon the wrong partner due to self-induced intoxication, could not rely on the defence of drunkenness and was guilty of the general intent offence of sexual assault.

[26] It also appears that s. 33.1(2) now precludes the defence of extreme drunkenness inducing a state akin to insanity or automatism in general intent offences. Even if the principles in *R.* v*. Daviault*, [1994] 3 S.C.R. 63 survived (which I doubt), the defence would need to establish this defence on a balance of probabilities.

CONCLUSION

[27] The Crown has established beyond a reasonable doubt that S.H. touched N.B. and that the touching was without N.B.'s consent. I am also satisfied that the touching was of a sexual nature as defined in *R.* v*. Chase* (supra):

1. The touching occurred in the complainant's bedroom at 2:30 in the morning while she was asleep in her bed;

2. The touching was in the area of her hip, using his hand under the waistband of her sweat pants and panties;

3. The touching stopped when the complainant woke up; and

4. The accused responded to the complainant by repeating, "I'm sorry, I'm sorry" several times. He immediately fled the premises. I acknowledge that these words are ambiguous, in that they could refer to two situations. First, that he had made a mistake, thinking he was touching M.B., the complainant's mother. Alternatively, it could be an apology, acknowledging a guilty mind and knowledge that the person he was touching was N.B., not M.B. In either case however, the touching was for a sexual purpose.

[28] I am also satisfied that S.H. was intoxicated at the time of the assault. S.H. is an admitted alcoholic who has struggled with this problem since he was 17 years old. He was aware that when he drank to excess he often suffered from loss of memory or blackouts. He has never sought formal treatment for his problem. Alcoholic amnesia is not in itself a defence to a specific intent crime

and is not available for a general intent crime – see *R.* v*. Hartridge,* [1967] 1 C.C.C. 346 (Sask. C.A.). Moreover, assuming without finding that S.H. was mistaken, believing that he was touching M.B. and not N.B., that mistake resulted from his self-induced intoxication. Where the crime charged is one of general intent, an accused cannot claim a lack of knowledge of the true facts where the mistake results from self-induced intoxication: see *R.* v*. P.W.S.*, [1999] Y.J. 54 (Yuk. Terr. Ct.); *Bernard* v*. Her Majesty the Queen*, [1988] 2 S.C.R. 833.

[29] The suggestion that S.H. was in the complainant's room with the purpose of merely waking her up, or mistakenly believing that he was waking up M.B., the complainant's mother, is inconsistent with the nature of the touching and simply has no "air of reality". It is not a "reasonable possibility" as defined in *R.* v*. Robert* (2000), 143 C.C.C. (3d) 330 (Ont. C.A.) at p. 338. Even if that were S.H.'s purpose or intention, it would not alter the outcome in this case, as all of the objective indicators support the finding that the touching was for a sexual purpose.

[30] In the circumstances, I find S.H. guilty of the charge of sexual assault, an offence contrary to s. 271 of the *Criminal Code.*

Lilles, T.C.J.