COURT OF APPEAL OF YUKON

Citation: *R. v. Kodwat*,
2017 YKCA 11

Date: 20170627
Whitehorse Docket: 16-YU796

Between:

Regina

Respondent

And

Jackie James Kodwat

Appellant

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Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Garson
The Honourable Mr. Justice Willcock

On appeal from: An order of the Territorial Court of Yukon, dated October 26, 2016 (*R. v. Kodwat,* 2016 YKTC 58, Whitehorse Registry 16-YU796).

Oral Reasons for Judgment

Counsel for the Appellant: V. Larochelle

Counsel for the Respondent: N. Sinclair

Place and Date of Hearing: Vancouver, British Columbia
June 22, 2017

Place and Date of Judgment: Vancouver, British Columbia
June 27, 2017

Summary:

The appellant was convicted of sexual assault. The sole issue at trial was consent. The complainant had no memory of the critical events. The trial judge held it was inconceivable that a young attractive woman would consent to sexual intercourse with a 46-year old man who meant nothing to her. The appellant challenged the finding that lack of consent had been established. HELD: appeal allowed and a new trial ordered. The conviction was founded upon a stereotypical assumption or generalization lacking in an evidentiary foundation.

[1] **WILLCOCK J.A.**: Jackie James Kodwat was convicted of sexual assault under s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46, by a Justice of the Territorial Court on October 26, 2016 for reasons indexed as 2016 YKTC 58. This is his appeal from conviction.

[2] He appeals on multiple grounds. For reasons set out below, I am of the view that one ground is dispositive of the appeal: the submission that in convicting him the trial judge relied upon an unfounded stereotype and the conviction is therefore unsound.

The Crown Case

[3] There was no dispute with respect to the essential elements of the case other than consent. The appellant engaged in sexual intercourse with the complainant, A.G., at his house in the early morning hours of December 20, 2015. A.G. made a complaint to the police later that day and the appellant was arrested and charged.

[4] The complainant's evidence with respect to the offence was very limited. A.G., then 17 years old, travelled to Whitehorse on December 19, 2015. She arrived into the afternoon and went with her friends to a dorm at Yukon College in the evening and began drinking vodka with them. She shared most of a 26 ounce bottle with one friend, although two or three others had some of that vodka. It is unclear how much she drank, but at trial she testified she was drunk when she left the College after midnight, after becoming involved in a fight, about which she recalled almost nothing.

[5] She then went to the family home of a friend, J.S., in the McIntyre subdivision of Whitehorse, intending to sleep there but felt uncomfortable sharing a bedroom with a couple who were intimate. She left for the home of another friend, D.C. She had nothing to drink at J.S.'s house and left in the middle of the night, apparently at about 3:00 a.m. She ended up at a home shared by the appellant and his mother in circumstances that were disputed. She has little recollection of what occurred there.

[6] She recalled that she spoke with a woman at the front of the house and then being in a messy yellow room where she sat in a computer chair at the end of a bed. When asked about the layout of house, she remembered nothing other than her description of the bedroom and what she recalled noticing as she left the next morning. She was asked (T. p. 13):

> Q. So you said you were in a – you were seated in a chair in the- in that room. What happened in the room?
>
> A. I got into the room and I don't remember anything. I remember coming to and I was drinking a glass of water. I remember Jackie (the appellant) getting me a glass of water or just asking me if I was thirsty, and that's all I remember until the next day.

[7] She had no idea what time she got to the room or how long she was there.

[8] She was asked (T. p. 13):

> Q. So, now, what else do you remember about that room, what happened there?
>
> A. I don't remember nothing else about that room.
>
> Q. When you got up in the morning, did you, did you fall asleep in that room?
>
> A. I fell asleep with my clothes on and my shoes and everything and I woke up in – on my stomach with my face away from that guy and my hands were like on my side and I remember waking up and looking over and I seen Jackie, and as soon as he felt me move, he tried grabbing me and pulling me closer to him, and he tried saying something to me, but as soon as I woke up I tried to stand up, but my pants weren't even on, so I pulled my pants up and saw that my second pair of pants was on the floor. And after that happened I could see that he saw that I was uncomfortable and awkward and I told him that I was going to call my mom and he just left the room. And after that I looked for all my clothes. I asked where my jacket is and I

> couldn't find my jacket, but it was out of his room. By the time I left I didn't even see him.

[9] What he said to her when she woke was that she had a beautiful smile and white teeth (T. p. 13).

[10] She said nothing else in chief about the critical events of the evening or her interaction with the appellant. She denied knowing the appellant or having met him previously. She said nothing at all with respect to consent to the sexual encounter to which the appellant testified. She remembered nothing of any kind of sexual contact (T. p. 14).

[11] In cross-examination, she agreed the following passage from a transcript of a statement she made to the police on December 20, was "somewhat" accurate (T. p. 31):

> Q. Do you remember what happened that night?
>
> A. No, I remember walking and getting into the house. I remember him saying, "you can stay here because its like 3 in the morning: and then I just walked down the street and he walked up to me. Then I woke up. I was passed out on a chair at his house. I don't know I passed out on a chair off his bed. I woke up in the bed beside him, like no clothes on.

[12] The inaccuracy she noted at trial was that she awoke with some clothes on.

[13] The Crown called evidence with respect to the events that followed: her tearful arrival at D.C.'s house on the morning of December 20, her complaint to the police later that day, and her subsequent examination at the hospital.

The Defence

[14] The appellant testified in his own defence. He said the complainant had knocked on his door in the middle of the night; he had been up watching a movie and his lights were on. He recognized the complainant, having met her on three occasions previously. She told him she had not been able to get a friend to wake up and let her in, so he told her she could "crash" at his place. He showed her his room

and pointed out places where she could sleep. She chose a chair. About 45 minutes later (T. p. 64):

> She said she got sick and tired of sleeping on the couch, she wanted to sleep on the bed. I said "Sure" and she said: "There's nothing funny going to happen?" and I said "No."

[15] The appellant testified that after the complainant laid down beside him, he asked her if he could kiss her and she consented. About 25 minutes later, he asked her if he could have sex with her and, again, she consented.

[16] When defence counsel embarked on examination in chief with respect to consent, the Crown objected on the grounds the defence version of events had not been put to the complainant. The judge allowed the questioning, holding as follows (T. p. 65):

> The Crown witness: that is the complainant, was consistent throughout that she remembered nothing after she went to that room and …went to sleep, so therefore, she can't say – she can't really tell us anything about consent.

[17] The appellant testified in cross-examination that he did not notice evident signs of impairment or smell liquor on the complainant's breath (T. p. 74).

[18] The appellant's mother supported the appellant's evidence with respect to how the complainant arrived at the Kodwat residence.

Submissions

[19] The defence relied on the decision of the Alberta Court of Appeal in *R. v. Haraldson*, 2012 ABCA 147, where the court reviewed the jurisprudence with respect to s. 273.1 of the *Criminal Code* to the effect that:

a) The court must examine the degree to which intoxication negates comprehension or volition; and

b) Alcohol-induced imprudent decision-making, memory loss or loss of inhibition or self-control does not amount to incapacity.

[20] The defence argued that while there was evidence of memory loss, that was not an indication of incapacity at the relevant time, and the Crown was not able to demonstrate intoxication sufficient to negate consent.

[21] When asked by the trial judge why would "an attractive 17-year-old girl who is not intoxicated have sex with a 45-year-old man?" defence counsel said (T. p. 121):

> There we enter into the realm of speculation. Had [the complainant] wanted to say, "I would never ever have sex with someone like that", then that would have been before the court, but it is not for the defence to explain why [the complainant] wanted to have sex with Mr. Kodwat.

[22] Given his concern with respect to stereotypical assumptions in relation to consent, perhaps as a result of that exchange, defence counsel made the following submission (T. p. 135):

> Frankly I think there's a very real danger here that a conviction would be based on…the age difference or prior criminal records, the fact the complainant was a pretty young woman and that Mr. Kodwat was slightly older. …[T]hose are not sound reasons. Those are reasons we worry the jury might have in mind when they might – make adverse findings of fact, but I think your Honour would certainly be able not to take that into account in reaching a decision here.

[23] The Crown's submissions at trial were unclear. In the following summary (T. p. 138) of argument it is unclear whether the Crown did nor did not regard capacity as an issue and whether the Crown took the position there was or was not express evidence the complainant did not consent:

> Your Honour asked me what the Crown theory was and I said, he took her to the bed and he put her in the missionary position after she took off her clothes. There is no evidence that she consented and I don't think that's really an issue. My friend has made a great deal about the capacity to consent and I don't disagree that's an issue that you shouldn't turn your attention to. Rather, the evidence that I heard when the victim broke down was that she didn't consent. Those aren't her words exactly. And then we don't know what happened that night.
>
> And that's essentially- there's two issues.
>
> One is she said she didn't consent. She said she didn't agree to that.
>
> And then there's the other issue of capacity.

[24] While, in reviewing the evidence, the Crown referred to evidence upon which the trial judge might conclude the complainant was too intoxicated to consent to sex, the Crown did not dispute the defence submission that the evidence of the complainant's alcohol consumption throughout the relevant period was limited. There was no evidence of drug consumption. The complainant did not testify that she did not consent to sexual intercourse.

Reasons for Conviction

[25] The trial judge accepted much of the appellant's testimony. At para. 23, he found the appellant to have given his evidence "in a straightforward manner" and that he had not been "particularly shaken on cross-examination". He noted: "His story was essentially consistent". He accepted the appellant had met the complainant on previous occasions and that the complainant had knocked on the appellant's door to gain admittance to his residence.

[26] At para. 24, he noted the complainant was "clearly uncomfortable and distraught", and "There were a few instances where her testimony was successfully challenged, but not on the key points dealing with consent" (emphasis added). That conclusion with respect to consent is difficult to reconcile with his observation in the course of the appellant's examination in chief that the complainant had not said anything about consent. It can only mean that she was consistent in testifying that she recalled nothing of the sexual contact.

[27] The critical passages in the reasons for judgment demonstrate the trial judge concluded the complainant would not have consented to engage in sex with the appellant and, therefore, must have been asleep or passed out when intercourse occurred:

> [29] The evidence of the accused as to consent, I have to rule, is disbelieved. It is clearly self-serving coming from a repeat offender who is familiar with the court process. It has no air of reality and does not meet the test set out in *Faryna v. Chorny*, as commented on by subsequent British Columbia Court of Appeal decisions. It does not accord in any way with reasonable human behaviour for that time, place, and circumstance.

> [30] It is inconceivable that an attractive 17-year-old girl would consent to kiss for 20 to 25 minutes and then have unprotected sexual intercourse with the accused who meant nothing to her and whom she did not remember — and furthermore, who was 28 years her senior. She had passed out from being drunk and overly tired. It is preposterous to think that she woke up when the movie was over and voluntarily kissed the accused for 20 to 25 minutes and then had unprotected sex with him. It defies any reasonable expectation of being believed.
>
> [31] Even if the accused had no prior record, his evidence would still be disbelieved. It makes no sense at all. The 17-year-old complainant removed herself from his residence as quickly as she could in the morning, and earlier had rebuffed the advance of this older man as he attempted to get close to her and compliment her on her smile and teeth. There was no attraction at 3 a.m., nor at 4 a.m., nor at 9:44 a.m. There was absolutely no consent at 4 a.m. to the removal of clothing, the kissing, or sexual intercourse.
>
> [Emphasis added.]

[28] Although the trial judge referred, in the cited passages, to the well-accepted description of an appropriate approach to the assessment of credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, and our Court's subsequent consideration of that case, and although he referred to surrounding circumstances in this case, there was no evidence of the complainant's state of mind at 3:00 or 4:00 a.m., and the judgment clearly hinges upon the trial judge's view expressed in the emphasized sentence at the start of para. 30. That was the foundation for the conclusion the complainant had passed out and had not consented to engage in sex.

[29] The trial judge distinguished *Haraldson* as a case where there was evidence the complainant actively participated in the sexual acts said to amount to an assault and as a case where the Crown failed to prove beyond a reasonable doubt "either an absence of capacity to consent, or consent in fact." In the case at bar, he held:

> [37] A.G. had not remembered the accused from the three to four times he may have supplied her with booze or cigarettes. He was not important to her at all. There is no evidence whatsoever that she was ever physically or sexually attracted to him. A.G. simply wanted a place to stay, as she was drunk and confused and very tired.
>
> [38] The accused gave her a place to crash, which she did; however, he could not resist the temptation and had his way with her while she was passed out. He had unprotected sexual intercourse with a 17-year-old girl who was drunk and very tired and passed out. The defence theory that she was ashamed and did not want to remember is rejected. She did not remember because she was passed out. It's as simple as that.

> [39] As to *W.(D.)*, quite obviously, I do not believe the evidence of the accused and, thus, there is no reasonable doubt coming from his evidence. Furthermore, I am convinced beyond a reasonable doubt by the totality of the evidence of the guilt of the accused.
>
> [Emphasis added.]

[30] There was no evidence in support of the highlighted portion of the judgment. The scenario described is an inference drawn from the fact the accused had sexual intercourse with the complainant and the judge's settled view that the complainant, if conscious, would not have consented to intercourse with the appellant.

Argument

[31] The appellant says the conviction was founded upon the stereotypical reasoning and speculation regarding the way in which men and women interact to which he referred in his submissions. Citing the judgment of Mr. Justice Cromwell in *R. v. Mah*, 2002 NSCA 99 at para. 75, he says the trial judge's assumptions about the ways of the world prevented him from genuinely considering whether he had a reasonable doubt.

[32] He says the alleged error amounts to a reviewable error of law, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), in which Mr. Justice Doherty held:

> 52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 1994 CanLII 4004 (NS CA), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
>
> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

[33] In response to the argument that the trial judge wrongly relied upon an unsupported assumption, the Crown, relying on *R. v. J.*, 1992 CarswellBC 1092, 12 B.C.A.C. 81 (B.C.C.A.), submits that judges must bring their common sense into the

courtroom and apply that common sense to the assessment of witnesses' credibility. In that case, Mr. Justice Hinds observed as follows at para. 38:

> While it may be unwise for a judge to make reference to personal experience, a judge is not required to cast aside his or her common sense prior to entering a courtroom. Quite the reverse is needed. A judge, like a juror, is expected to use common sense to assess the credibility of a witness. Common sense is derived from the common experiences of life ...

[34] While acknowledging that a conviction founded upon sweeping generalization would be problematic, the Crown says the impugned remarks in this case arise not from generalizations or unsubstantiated stereotypical reasoning but, rather, from detailed consideration of the appellant's evidence as to consent in the context of the surrounding circumstances and the evidence as a whole.

[35] The Crown concedes, on appeal, it does not assert a negation of consent by intoxication pursuant to s. 273.1(2)(b). It relies upon the complainant's evidence that she "was asleep at the time of the sexual contact and that her consent was thereby negated in law" (citing *R. v. A.(J.)*, 2011 SCC 28).

Discussion

[36] As this case illustrates, judges called upon to draw inferences with respect to human behaviour must wrestle with two competing imperatives: on one hand we are not to leave our common sense at the door, on the other, as we are reminded in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 68, myths and stereotypes pervade public perceptions of sexual assault. Some favour the accused, others the Crown.

[37] In *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, a case referred to by both the appellant and the respondent, the Supreme Court was divided in their views on the allegation that the trial decision was undermined by an apprehension of bias. While the decision turned on that question, all judges of the court expressed, to some degree, the view that unsupported assumptions and stereotypes should not affect the trial judge's assessment of the evidence.

[38] Mr. Justice Major, writing for the minority wrote:

> 13 The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.
>
> [Emphasis added.]

[39] Madam Justice L'Heureux-Dubé and Madam Justice McLachlin wrote:

> 35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:
>
> > ... the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
> >
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
> >
> > [Emphasis added.]

[40] Mr. Justice Cory (with whom Justice Iacobucci agreed) in a concurring judgment wrote:

> 120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.
>
> [Emphasis added.]

[41] While it may have been open to the trial judge to draw the inference that the complainant did not consent to sexual intercourse from all of the surrounding circumstances established by the evidence, the conclusion that it was

"inconceivable" that any 17-year-old woman in these circumstances would have engaged in consensual sex with an unfamiliar man of the appellant's age was a stereotypical assumption or generalization lacking in an evidentiary foundation. In my view, there is a danger that assumption resulted in a conviction that was not founded upon the evidence.

[42] For that reason, in my view, the conviction should not be sustained. I would set aside the conviction and order a new trial.

[43] **NEWBURY J.A.**: I agree.

[44] **GARSON J.A.**: I agree.

[45] **NEWBURY J.A.**: The appeal is allowed and a new trial ordered.

[discussion with counsel]

[46] **NEWBURY J.A.**: Mr. Kodwat is to be returned to the Whitehorse Correctional Centre.

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The Honourable Mr. Justice Willcock