

Citation: *R. v. Laxton*, 2017 YKTC 44

Date: 20171002
Docket: 16-00336
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Faulkner

REGINA

v.

LESLIE DAVID LAXTON

Appearances:
Amy Porteous
Andre Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] The accused, Leslie David Laxton, is charged with sexual assault.

[2] The record of the proceedings does not indicate that any order was sought pursuant to s. 486.4(1) of the *Criminal Code* to protect the identity of the complainant. Nor does the record disclose whether or not the complainant was advised of her right to seek such an order. In the circumstances, I have decided to refer to the alleged victim as “the complainant” or as “M.S.”.

[3] The basic facts are not in dispute. In February of 2016, Mr. Laxton was an elected member of the Yukon Legislative Assembly representing Porter Creek Centre. He was also the Speaker of the Assembly. Mr. Laxton and the complainant had

become acquainted some years prior when she worked as a server at “Panda’s”, a restaurant patronized by the accused.

[4] In early February, Mr. Laxton came into the grocery store where M.S. worked as a cashier. He ended up going through M.S.’s till and the two struck up a conversation. M.S. told the accused that she was quitting her job at the grocery store. The accused suggested that M.S. call him as he might be able to help her out. Exactly what Mr. Laxton said is unclear, but M.S. was encouraged and hopeful that he might be able to get her a job with the government. Mr. Laxton may have given her his business card.

[5] Soon after, M.S. called Mr. Laxton’s office and made an appointment to see him at the office, which was located in the Legislative Assembly Chambers portion of the Yukon Government Main Administration Building in Whitehorse.

[6] On February 16, 2016, M.S. went to the appointment. She and Mr. Laxton met in his office and spoke at some length. M.S. became somewhat discouraged because the conversation did not appear to be leading to a job offer. However, eventually, Mr. Laxton invited Helen Fitzsimmons into his office. Ms. Fitzsimmons was the Director of Administration, Finance and Systems in the Legislative Assembly Chambers. Ms. Fitzsimmons showed M.S. some potential jobs that were posted on a government website and offered to help with M.S.’s resume, which she had brought with her.

[7] Ms. Fitzsimmons then left the office and the meeting soon came to an end as Mr. Laxton had to go to a medical appointment.

[8] As M.S. got up to leave, Mr. Laxton gave her a hug and a brief kiss on the lips. M.S. testified that she was shocked by Mr. Laxton's actions but did not do or say anything at the time to express her feelings. M.S. and Mr. Laxton then left the office and walked together to the public foyer of the building where Mr. Laxton again hugged and kissed M.S. They then parted company.

[9] M.S. was very upset about what had occurred, however, she took no immediate action. Approximately two months later, she telephoned Ms. Fitzsimmons to complain of being sexually harassed by Mr. Laxton. The complaint was relayed to the Premier. Shortly thereafter, Mr. Laxton resigned his position as Speaker of the Legislative Assembly and left his party caucus to sit as an Independent MLA.

[10] In May, M.S. made a complaint to the Yukon Human Rights Commission alleging sexual harassment. At the end of May, she gave a statement regarding the incident to the R.C.M.P., which ultimately led to the charge of sexual assault.

[11] The test for determining if the accused committed a sexual assault is objective rather than subjective. The court must determine whether, viewed in light of all the circumstances, the sexual or carnal context of the assault would be visible to a reasonable observer (*R. v. Chase* [1987] 2 S.C.R. 293). *Chase* also provides some guidance on the factors that may be relevant in assessing the circumstances to determine if they are of a sexual nature:

...The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S.J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault")

(1987), 29 *Crim. L. Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances (per McIntyre J. at para.11)

[12] Almost without exception, an unwanted touching of a female's genital, breasts or anal region would be considered a sexual assault. A hug, on the other hand, is much more equivocal. A kiss, especially one on the lips may stray much closer to the line, but still, much depends on the surrounding circumstances. The context may be overtly sexual at one end of the spectrum or entirely familial at the other.

[13] There have been a number of sexual assault cases wherein an unwanted hug or kiss has been considered. Without attempting an exhaustive analysis of these cases, suffice it to say that the decisions have gone both ways based upon the existence or absence of other additional factors pointing toward or away from a sexual component to these actions. See *R. v. Etherington*, 2016 BCPC 186, *R. v. Fleming*, [2012] N.J. No. 142 (Prov. Ct.), *R. v. V.J.B.*, 1999 ABPC 114, *R. v. V.T.*, 2016 ONSC 374, *R. v. George*, 2015 ABPC 108, *R. v. Duke*, 2013 SKQB 246, and *R. v. Cheema*, 2015 BCPC 340. It is true that in *R. v. V.T.*, Morgan J. states that a kiss on the lips "would be unambiguously sexual", however, this statement is *obiter* and, in my respectful view, not a correct statement of the law. One must look more fully at the surrounding circumstances.

[14] In this case, while the two hugs and kisses are undisputed, there is considerable disagreement between the parties regarding the circumstances leading up to them.

[15] According to M.S., although she and Mr. Laxton were long-time acquaintances, there had never been any physical contact or touching. In particular, they had never hugged or kissed. Moreover, she said, owing to past trauma, she is uncomfortable with and resistant to, such contact.

[16] Mr. Laxton, on the other hand, testified that he had hugged and kissed M.S. on a number of occasions. By his account, the relationship was flirtatious, though never intimate. In addition to meeting M.S. at Panda's restaurant, he had also met her on a number of occasions at local bars where they had drinks together.

[17] I should pause to note here that, in the context of a sexual assault allegation, the previous relationship between the parties has no relevance to the issue of consent. Indeed, the accused does not claim that M.S. consented. Rather, the degree of familiarity between the two is relevant to Mr. Laxton's intentions. If the hugs and kisses were a repetition of what had occurred in the past, it is easier to accept that they were normal and familial.

[18] I also note that nothing that may have occurred between the parties prior to February 16, 2016 could be construed as "sexual activity" within the meaning of s. 276 of the *Criminal Code*.

[19] Mr. Laxton also testified that he is in the habit of hugging and kissing female friends. Several witnesses were called who confirmed that Mr. Laxton is, indeed, a physically demonstrative man.

[20] I found that the complainant's assertions that she had never had any degree of such physical contact or familiarity with the accused to be less than entirely credible.

[21] In making this finding, I expressly do not take into account Mr. Roothman's cross-examination regarding a landlord-tenant dispute involving the complainant. I do not know enough about the matter to draw any conclusions, and if I did, would not be justified in concluding that her conduct in that matter was relevant to her credibility here.

[22] Neither do I make anything of the fact that some time went by before M.S. complained about Mr. Laxton's conduct. Quite apart from the abrogation of the recent complaint rules by s. 275 of the *Criminal Code*, it has long been recognized that victims of sexual assault may be reluctant, conflicted or fearful and thus delay disclosure.

[23] That said, I found the complainant to be an argumentative witness and one exceedingly reluctant to concede any point she thought might detract from her view of the incident.

[24] It is true that Mr. Roothman's cross-examination of the complainant was, at times, confusing and, most certainly, repetitive. It is perhaps understandable that the witness would begin to exhibit a degree of annoyance. However, M.S. went beyond what was reasonable.

[25] The most telling example concerned her view of the meeting with Mr. Laxton. She testified in chief that she had gone to the meeting with high hopes that she would be offered a job with the government. As the meeting went on, she realized that no job offer was coming and had decided to leave. It was perfectly clear from this that the complainant was disappointed at how the meeting had gone. Yet, in cross-examination, she repeatedly denied being disappointed. A reasonable witness would have conceded the point and moved on.

[26] I also listened very carefully to the complainant's testimony regarding the course of the conversation between the accused and herself on the date in question. She tried to suggest that the conversation contained sexual innuendo or was leading in that direction. In fact, there was nothing in what she recounted that could reasonably be so construed. The only example she could point to was that, at one point, as he talked of family, Mr. Laxton said that his relationship with his partner, Leslie Joling was not perfect. It is unsurprising that Ms. Joling would be mentioned during a discussion of family as the complainant was acquainted with Ms. Joling as well as the accused, and the complainant testified that she may have asked about her.

[27] It is simply too much of a stretch to say that the accused's comment about his relationship with Ms. Joling had any sort of sexual overtones to it, especially as the conversation lasted well over an hour and touched on a number of topics.

[28] The complainant also testified that, during the course of the meeting in Mr. Laxton's office on February 16, 2016, she had a conversation with Ms. Fitzsimmons regarding an elderly woman that Ms. Fitzsimmons used to accompany to Panda's

restaurant. M.S. said she mentioned that she would allow this elderly woman to hug and kiss her on the lips. This was very unusual and she would never allow anyone else to do this. While Ms. Fitzsimmons recalled the conversation about the fact that she would bring the elderly woman into Panda's (it was how she and M.S. met), she did not recall any conversation regarding the unique nature of the kissing. Neither did Mr. Laxton.

[29] While it could be a coincidence, or unusually prescient on the complainant's part, it seems remarkable that she would have announced to Ms. Fitzsimmons and Mr. Laxton that she does not normally allow anyone to hug and kiss her, when this is exactly what was about to happen mere minutes later.

[30] M.S. was also insistent that the R.C.M.P. had failed to record or transcribe a portion of her statement to the police. She said that she told the police she was reluctant to report the matter to them because of the problems with sexual harassment within the R.C.M.P. This portion of the statement, she testified, was missing. Again, this could have happened but it seems unlikely.

[31] In sum, while I believe substantial portions of the complainant's testimony, I remain cautious about accepting it totally.

[32] In contrast, I found Mr. Laxton's evidence quite credible. He made no attempt to deny that he had hugged and kissed the complainant. He provided a more detailed and logical account of the meeting between himself and the complainant. His version of the

prior relationship with M.S. found significant support in the evidence of the defence witnesses, particularly Marg Eschak. Ms. Eschak said that the relationship between M.S. and Mr. Laxton at Panda's was very familiar and involved much physical touching and flirting initiated by M.S. Ms. Eschak said she remembered it simply because it was so striking and so unusual.

[33] How, in the end, should the hugs and kisses be characterized? I find that there was nothing in the conversation at any point, before, during or after these acts that was suggestive of a desire on the part of the accused to become romantically involved with the complainant. Indeed, the portion of the meeting most proximate in time to the incidents in question was entirely business-like. Throughout the course of the conversation the accused did not ask the complainant any particularly personal questions or suggest further contact.

[34] The hugs and kisses themselves were brief and were not accompanied by any other touching that might more conclusively point to a sexual purpose. While the first kiss was in the accused's office, the second was in a public area of the building. The Crown argued that the hugs and kisses were more suspect because, although the parties were acquainted, they had not seen one another for a considerable period of time. However, it might equally be argued that one would be more likely to be so demonstrative with a friend one hadn't seen for a long time – or did not expect to see again for a considerable period.

[35] There is evidence that Mr. Laxton and the complainant had engaged in similar acts of familiarity in the past so that the accused's actions were not unprecedented or

“out of the blue”. There is also evidence that Mr. Laxton was in the habit of kissing and hugging female friends.

[36] As the complainant acknowledges, part of the conversation between Mr. Laxton and herself involved her saying that she had just quit drinking. This was significant as M.S. also acknowledges that she is an alcoholic. She also told Mr. Laxton that she had gone to Yukon College to further her education. The accused’s explanation for the hugs and kisses – that he was pleased by these positive changes in the complainant’s life and wanted to be supportive – could reasonably be true.

[37] While the accused could have impulsively decided to sexually assault the complainant, if he had hoped something amorous would come out of inviting the complainant to meet him, he would likely have chosen a venue other than his office in the legislature.

[38] After considering all the circumstances, from the perspective of a reasonable, objective person viewing what occurred, I find the accused’s actions equivocal. Indeed, it must be noted that the complainant herself was still struggling to characterize what happened. During her testimony regarding Mr. Laxton’s alleged assault on her, she said that even now she wasn’t sure what it all meant. It may well be that what he did was unwise, even foolish, especially for a man in his position. It is certainly the case that he caused the complainant considerable and ongoing distress. However, that notwithstanding, there remains doubt that what Mr. Laxton did amounted to a sexual assault. This being a criminal prosecution where the standard of proof is beyond a

reasonable doubt, Mr. Laxton is entitled to the benefit of that doubt. I find Mr. Laxton not guilty of the charge of sexual assault.

[39] Having concluded that no sexual assault has been proven, it is necessary to consider the included offence of common assault since the Crown sought a conviction on the included offence.

[40] There were applications of force to the complainant and there was no consent. However, based on the history between the parties and the accused's proclivity for kissing female friends, I find that he honestly but mistakenly believed he had consent.

[41] In the context of a sexual assault, the defence would be unavailable since the accused did not take the reasonable steps to ascertain whether the complainant was consenting as required by s. 273.2(b) of the *Criminal Code*. However, in the case of a common assault, the defence is not so proscribed and is available so long as the belief in consent was honestly held and not the product of recklessness or wilful blindness.

[42] Another way to look at the matter is to ask, as I did in *R. v. Elek*, [1994] Y.J. No. 31 (T.C.), whether the conduct of the accused is: "sufficiently serious that it should properly be stigmatized as criminal."

[43] The Crown urged that if Mr. Laxton were not convicted of common assault at least, the court would be declaring "open season" on women, or would be fostering an

assumption that “women are walking around in perpetual state of consent”. Anyone drawing such conclusions from this decision would be utterly and completely wrong.

[44] I also find the accused not guilty of the included offence of common assault.

FAULKNER T.C.J.