

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hutchinson*, 2013 NSCA 1

Date: 20130103
Docket: CAC 370497
Registry: Halifax

Between:

Craig Jaret Hutchinson

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on publication: Section 486.4(1) of the *Criminal Code of Canada*

JUDGE:

MacDonald, C.J.N.S.
Farrar, J.A. (Dissenting)

APPEAL HEARD:

June 4, 2012, in Halifax, Nova Scotia

SUBJECT: Criminal Law; sexual assault; consent; meaning of “sexual activity in question”- s. 293.1(1) of the *Criminal Code*; principles of sentencing

SUMMARY: The appellant tried to trick his partner into becoming pregnant by poking holes in the condoms they used during intercourse. He knew full well that she did not want to become pregnant. In fact, she insisted on him wearing the condoms for that very reason. For these actions, the appellant was charged with sexual assault.

Pursuant to s. 273.1(1) of the *Criminal Code*, the Crown had to prove that the Complainant did not consent to the “sexual activity in question”. At trial, the issue involved whether, for the purposes of s. 273.1(1), the “sexual activity in question” was simply sexual

intercourse (which was consented to and therefore would have lead to an acquittal) or unprotected sexual intercourse which was not consented to. The trial judge chose the latter and convicted the appellant. He was sentenced to 18 months in jail.

ISSUE: The appellant challenges both the conviction and the sentence.

RESULT: MacDonald, C.J.N.S.: (for the majority)
The judge was correct to conclude that the “sexual activity in question” [as envisaged in s. 273.1(1) of the *Criminal Code*] was unprotected sex which the complainant did not consent to. With all other elements of the offence made out, the appeal against conviction should therefore be dismissed.

The sentence was not demonstrably unfit, nor did it reflect an error in principle. Therefore, the appeal against sentence should also be dismissed.

Farrar, J.A.: (dissenting)
The trial judge erred in finding there was no consent under s. 273.1(1) of the *Criminal Code*. The proper approach would have been to determine whether consent was vitiated under s. 265(3)(c) by fraud. The appeal should be allowed and a new trial ordered.

<p>This information sheet does not form part of the court’s judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 74 pages.</p>
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