IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. C.L.S., 2007 NSPC 21

Date: 2007/05/02
Docket:1627655
Registry: Halifax

Her Majesty the Queen

v.

C.L.S.

Restriction on publication:	As provided by S. 486 of the Criminal Code of Canada, a publication and broadcast ban has been made concerning the identity of the complainant
Judge:	The Honourable Judge Castor H. Williams
Decision:	May 2, 2007
Charge:	**Section 271(1)(a) Criminal Code**
Counsel:	Terry Nickerson, for the crown Chandra Gosine, for the defendant

Introduction

[1] By an Information sworn on the 7th day of March 2006, the police have charged the accused young offender, CLS, with a sexual assault on TL that allegedly happened between 1st day of December 2004 and the 1st day of February 2005. TL informed that she consented to play a game with CLS where she permitted him to handcuff her arms behind her back while seated and she would attempt to escape. She would have the opportunity to do the same to him, which she did. However, from her perspective, the game escalated to the point where he not only handcuffed her arms securely to the chair but he also tied her feet and also handcuffed them to the chair and temporarily blindfolded her. All this made her feel uncomfortable and afraid.

[2] TL claimed that she withdrew her consent which CLS ignored and that while in her seated immobile position he poked at her vagina with the handle of a screwdriver. CLS claimed that the game was consensual and that all contact with TL was also consensual. Therefore, apart from the issue of

credibility of the parties this case raises the issue of consent and the mistaken belief of consent.

Summary of the Relevant Evidence

[3] In my opinion, the material and relevant evidence was from TL and her friend RL who attended the same school and knew each other for about two and one half years. Additionally, there is the testimony of CLS and his mother. Essentially, the youths knew each other as they all attended the same school. CLS met TL through some mutual friends and a friendship developed to the point that CLS began to have romantic feelings for TL. However, it was not clear from the evidence whether the romantic feelings were reciprocated but, all the same, TL considered CLS as a trusting friend.

[4] The youths had a mutual friend who was sick and whom they each wanted to visit. TL had intended to go with another friend but as this person had already paid a visit, CLS, who had also planned to go, suggested that they could visit together. She agreed and arranged to meet him at his home. When TL arrived at CLS's home and, upon inquiry, they learned that their

mutual sick friend was not at home. Thereupon, CLS invited her to stay at his home and to “hang out.” She agreed.

[5] After introducing her to his mother and some chit chat, CLS took TL on a tour of his home and then invited her to go to an attached garage to play a game where they would take turns to handcuff each other. She agreed as she thought that it would be fun to be tied up. They went to the garage and entered a loft that was located inside and which acted as a recreation room for CLS. In this room were an old television set, chairs, a couch and other items. TL sat on the couch and CLS produced six to eight sets of handcuffs from a play kit.

[6] The challenge of the game was to secure each other hands and feet to a chair with handcuffs and to see who first could escape. TL agreed to be the first to be secured. Consequently, she sat on a metal chair and CLS proceeded to handcuff her arms behind her back and secured them to the rung of the chair. He then put on her feet, an oversized pair of boots that was available, to which she passively acquiesced. Next, he tied her feet with a rope and also put handcuffs over the rope and secured her feet by handcuffs

to the chair. TL was frightened and confused as she did not know what to further expect.

[7] CLS asked her to try and get out of the handcuffs and she responded that she could not. She then requested to be released. CLS looked at her but said nothing and went out of the loft and returned with a screwdriver that he used and poked at her vagina over her clothes. She asked him to stop and he did. He then got a sweater and started to roll it. She screamed at him not to touch her with it as she feared that he was going to blindfold her. Nonetheless, he blindfolded her and she could sense him standing watching her saying nothing. She was screaming for him to take it off which he did.

[8] She asked him if she could now be released. He released and took off some of the handcuffs, but tossed the handcuff keys away from her and told her that if she could get the keys she would be released. TL stood up and hobbled to the keys' location. As she was going to pick them up, he picked her up with her hands still handcuffed behind her back. He, however, stumbled and fell. She landed in his lap and in doing so her hand touched his penis which she felt was erect. He then removed the handcuffs and freed

her.

[9] It was now CLS' turn to be handcuffed and be secured to the chair. TL did the very same things that he did to her. She also told him to try and escape. He, however, had secreted a key in his hand which she detected and took away from him. Without the key he could not escape and she eventually had to release and free him.

[10] Having completed the game they returned to the main part of the home and passed the time watching television. After a while, TL's sister called to enquire whether she was ready for a pick up and came and took TL home. However, it would appear that when TL's sister called she arrived with her boyfriend and them along with TL and CLS went out to see a movie. Further, it would also appear that CLS's mother who was present at the main house and who could normally hear any disturbances in the loft did not hear any screaming coming from that location and neither did she observe any change of mood when TL and CLS re-entered the house.

Position of the Parties

[11] Counsel for CLS submitted that most of the Crown' case was presented by witnesses who presented oath-helping testimony designed to bolster the credibility of TL. The contacts between the young offender and TL were consensual and if anything, in the alternative, there was an honest mistaken belief in consent. TL consented to be handcuffed as part of a game and all that occurred was in furtherance of the game. The incident happened one year before TL disclosed its occurrence and her credibility and motive is suspect particularly when with her apparent detailed recall of events she could not recall that she did go the movies immediately after the incident with CLS and her sister and her sister's boyfriend. Considering the principles of in ***R.v. W.(D.),*** [1991] 1 S.C.R. 742 the Crown has failed to prove beyond a reasonable doubt the charge against CLS.

[12] On the other hand Crown counsel submitted that there was an intentional application of force with knowledge that TL was not consenting to such application of force. TL was not consenting and CLS was sexually aroused by his touching and lifting up TL. CLS received sexual gratification

from his encounter with TL and he controlled the situation for is own sexual gratification. Considering the principles in ***R.v. Ewanchuk***, [1999] 1 S.C.R. 330, he did not make the necessary enquiries to rely upon the defense of mistaken belief in TL consent.

Analysis

[13] Credibility is the paramount issue. Here, as in most cases of sexual assault I have the testimonies of the only persons who were present when the allegations occurred. Both have testified to their versions of the incident. Here, I have two articulate and mature persons with impressive versions of the event. However, as I opined in ***R. v. O.J.M.***,[1998] N.S.J. No.362 at para.35:

> Overall, a witness' statement is considered true until there is some particular reason to doubt it. This may come about by circumstances of the inherent unreasonableness of the testimony itself, or by imputations extracted in cross-examination of the witness to infer, for example, the incredibility of a fact that reveals obvious errors. In addition, extrinsic evidence, or lack of it, may point to errors or inaccuracies in a witness' testimony and if never corrected to rehabilitate the credit of the witness, that testimony would have little or no probative value.

[14] I am also mindful of the words of Finlayson J.A. in ***R. v. S.(W)***, (1994) 29 C.R. (4th) 143**,** 90 C.C.C. (3d) 242 (Ont. C.A.), at p. 250 (C.C.C.) (Leave to appeal to S.C.C., refused 93 C.C.C. (3d) vi).

> We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record.

[15] Also in mind are the words of Rowles J.A., in ***R. v. R.W.B.***, [1993] B.C.J. No. 758 (B.C.C.A.), at para. 28:

> It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether the witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered. Where, as here, the case for the Crown is wholly dependant upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all the other evidence presented.

[16] Further, on the issue of credibility, as was put by O'Halloran J.A., in ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth

[17] Additionally, in assessing reliability and trustworthiness, I recall the words of Estey J., in ***R. v. White***, [1947] S.C.J. No. 10, [1947] S.C.R. 268:

> Eminent judges have from time to time indicated certain guides that have been of the greatest assistance, but so far as I have been able to find there has never been an effort made to indicate all the possible factors that might enter into the determination. It is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his powers to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biassed, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

[18] In further addition, as this Court opined in ***R. v. Killen***, [2005] N.S.J. No.

41, 2005 NSPC 4 at paras. 19 and 20:

> 19 ... that in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in R. v. Vetrovec [1982] 1 S.C.R. 811 and R. v. W.(D.) [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue. See also R. v. O.J.M., [1998] N.S.J. No. 362 at para. 35.
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> 20. Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in Faryna v. Chorny [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, and by Cory J., in W.(D.) at p. 747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in my view, "it is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

[19] In my view the relationship between the parties is critical and must be weighed with the total evidence. Both parties alluded that they were just friends who at times hang out together or with other friends. The accused would do her small favors at school and would daily give her sweets which she would accept. He would also hug her when they greet at school. The accused had indicated that he had a romantic interest in TL. However TL

appears to consider him as a trusty and solid friend without any romantic interest.

[20] Further, the location of the offence is significant and must also be weighed with the total evidence. I bear in mind that it was a recreation room in a loft in the attached garage where CLS would usually take his friends when they visit him. This he appeared to have done often. It was also a room that was perhaps used to store household items. Both parties agree that they went to the loft to engage in game playing. On the evidence, I accept and find that it was a mutually agreed upon anticipated activity.

[21] Upon hearing both parties testify I was impressed by their intelligence, articulation and clarity in expressing their version of events. However the guiding principle here is that a criminal trial is not a credibility contest and I must consider the total evidence and apply the principle of reasonable doubt to the issue of credibility of the relevant witness and the facts as I have found.

[22] Frankly, I was troubled by aspects of the evidence. Nonetheless, here, I reiterate what I said in ***R. v. D.A.B.*** [2002] N.S.J. No. 512, 2002

NSPC 35, at para. 11:

> ...we should also remind ourselves that evidence of a complaint of sexual assault is never evidence of the facts complained of as the complaint cannot support the complainant's testimony. From this proposition I think that the best that the prosecution can expect is that I accept the complainant's prior statement only as part of her narrative and nothing more. R. v. Ay (1994) 93 C.C.C. (3d) 456 (B.C.C.A.), R. v. O.B. [1995] N.S.J. No. 499 (C.A.).

[23] Although I found the complainant as articulate and that she appeared to have a good recollection of what she alleged happened, I was concerned about her capacity to relate consistently her recollection. Further, although she appeared willing to relate the essence of what was alleged, in my view, she appeared somewhat scripted and lacked background details such as bodily sensations as one might expect from someone who experienced the ordeal would know about. By way of example only, there was no evidence of how she was dressed when seated such as whether she was wearing a dress or jeans. Additionally, there was no evidence of whether her legs were tied close together or apart. Likewise, there was no evidence of how CLS, in fact, achieved the physical act of having access to her vagina when she was seated with her legs bounded and secured to a chair. She gave much details about the surrounding environment but no details about her own bodily sensations or his physical movements when he allegedly poked her with a

screwdriver. These factors go toward assessing reliability.

[24] Additionally, much has been made of TL's emotional state at the time of her disclosure a year after the alleged event. There was evidence that her grades in school had faltered and that she was morose, withdrawn and not her usual self. Likewise, there was some evidence that she was seen by a mental health professional with some positive results. The problem, however, was that no mental health professional who saw and assessed TL ever testified to establish a nexus, if any existed, between the allegation and her emotional state. If the Crown wanted to rely upon the emotional state of TL, as observed, it was incumbent that it present proper psychiatric evidence in support.

[25] In my view, however, there was no nexus established between the emotional state of the complainant, as observed and described, and the alleged assault. Her emotional state, as relevant to the alleged assault, therefore, in my view, is mere conjecture. In the result, I adopt the words of Finlayson, J.A. in ***R v. F (J.E.)*** (1993), 85 C.C.C.(3d) 457 para 44:

> I think that it was incumbent upon the Crown to lead an expert witness who would be in a position to relate the emotional trauma, if such it was, to the sexual assaults alleged. Left the way it was, it was no probative value...

[26] The only person who saw her immediately after the allegation, CLS's mother, testified that when TL and CLS returned to the house from the loft she observed no change in mood in TL and that TL and CLS watched television and later went together to see a movie with TL's sister and boyfriend. Additionally, she heard no screaming emanating from the loft. The garage door was open and she normally hears noises from the loft when CLS and his friends were present. TL testified that she screamed at the top of her lungs for ten minutes. These were critical factors, in my view, in assessing the reliability of the parties.

[27] I was also concerned about the independence of her revelation, and the apparent advice that she received from close family friends who were police officers. However, considering the details of the incident as she described them both in direct and cross-examination, and in light of the total evidence, logic and commonsense when applied to those facts made me cautious in fully accepting them on their face value. Although I do not require

corroboration of her testimony, common sense required that, in weighing and assessing it, I look for supportive evidence capable of persuading me to entertain a rational belief that she was telling the truth and which would strengthen my belief that she was truthful.

[28] In my opinion, her narration of events did not remain consistent and I looked for such supporting evidence on the central issues but found that such evidence was either lacking or unpersuasive. ***R. v. Vetrovec*** (1982), 67 C.C.C. (2d) 1 (S.C.C.), ***R. v. Boss*** (1989), 46 C.C.C. (3d) 523 (Ont. C.A.), ***R. v. Marquard*** [1993] 4 S.C.R. 223 at paras. 19 and 20. I however should note that her minor inconsistencies did not diminish unduly her credit. It was the cumulative effect of inconsistencies on critical issues that was consequential and caused me to doubt her reliability. In the result, I concluded considering the total evidence that, overall, the frailties and the inherent weaknesses in her testimony rendered it unpersuasive.

[29] After hearing the accused and observing him as he testified and on assessing his testimony with the total evidence, and the evidence that I accept, I conclude and find that TL freely gave her consent, to participate in

game playing that she knew involved her being handcuffed and secured to a chair. The challenge was for her to escape. Given the youthfulness of both parties the game may well have sexual overtones and fantasies but there was no direct evidence that it was anything overtly sexual. Apart from the time that she fell in his lap and felt his penis erect TL does not describe any sexual overtures towards her by CLS. They both considered it to be an innocent game that they would enjoy playing. Even when he lifted her up the touching, from both their testimonies was not a sexual touching but rather CLS attempting to prolong and control the game.

[30] Her assertion of lack of consent when assessed with the total evidence including her ambiguous conduct of continuing to participate in the game by doing the same acts to CLS and her subsequent behavior and mood, as observed, raises doubt, at least in my mind, about her assertion of withdrawing her consent. There is no evidence that she told CLS that she wanted to stop playing the game, as distinct that some elements of the game she did not want him to do. He complied when she told him to. Thus, her words and actions as observed by MLS and, as he has testified, raised a reasonable doubt, as she now asserts that in her mind she did not want to

participate in the game. He denied that he touched her vagina with a screwdriver in a sexual way or at all. I am not convinced either way whether or not he did. Thus, he receives the benefit of the doubt. Therefore on the total evidence, in my view, the totality of her conduct was inconsistent with her claim of non-consent.

Conclusion

[31] On my assessment of the total evidence and on my observation and assessment of the witnesses as they testified I conclude and find that the totality of TL's conduct was inconsistent with her claim of non- consent. Considering the principles in **WD** and **Ewanchuk** I am satisfied that the totality of TL's words and actions as observed by CLS would have raised a reasonable doubt in him that she did not want to participate or continue to participate in the game.

[32] Therefore, I am not satisfied, on the totality of the evidence before me and that which I find and accept, that the Crown has proved beyond a reasonable doubt the charge of sexual assault on TL by CLS. Accordingly,

I find him not guilty as charged and an acquittal will be entered on the record.

J.