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IN THE PROVINCIAL COURT OF NOVA SCOTIA

R

v.

W. K.
Cite as R v. W.K., 2001 NSPC 21

DECISION

The Honourable Judge C. H. F. Williams , JPC

Counsel: Mr. R. McCarroll, Crown Attorney
Mr. D. Bright, Defence Attorney

Delivered orally September 19th, 2001

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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Introduction

The accused, W. Gerard K., stands charged that he, in the Halifax Regional Municipality on 3rd September, 2000, unlawfully committed sexual assault on P. N. K..

Summary of Evidence

According to the complainant, P. N. K.**,** she was raised in the military and had served in the "Reserves." On 2nd September 2000 she left her home at about 2030 hours with the intention to meet some friends at the Liquor Dome in the Halifax Regional Municipality. She arrived between 2030 hours and 2100 hours, went to the bar, got herself a drink and sat and spoke with a visiting member of the U.S. Coast Guard. She left the bar together with the visitor, whom she did not know, and went to the Apple Barrel, a restaurant, also in the Halifax Regional Municipality, where they arrived at 0030 hours. She drank coffee until 0300 hours when the visitor had to leave to return to his vessel. However, she did consume between 2000 hours and 2230 hours three beers.

At about 0315 hours, she saw, in the Apple Barrel, the accused, whom she recognised from a time when she had volunteered to work in the "Tattoo" in 1990. She called him over to her table to "shoot the breeze," which she admitted that the ensuing conversation was replete with sexual innuendoes. They conversed until about 0410 hours when she accepted his invitation to accompany him to his residence located in *, also in the Halifax Regional Municipality. Arriving at * by taxi, at about 0420 hours, they entered the accused's room where she sat on the bed "relaxing," after he had given her "a little tour" of his eight feet by six feet room. After ten to fifteen minutes on arrival, the accused who was on the left side of the bed leaned over and tried to kiss her. She rebuffed his advance but admitted she gave him a non- passionate peck on the lips. He then ran his hands up on the outside of her upper thigh. She told him to stop as she was not interested but was there only "to have a good time."

She told him to "back off," and, getting "fed up" with his advances, she assumed an upright sitting fetal position. The accused then informed her that he only wanted to perform the act of cunnilingus. She did not want him to do so. He then "reached down to feel me up, . . . and tried to get on top of me." The complainant put her hand out to stop him, kicked him in the groins, got up, retrieved her shoes and said that she was leaving. However, because the accused was apologetic, she decided to remain and to "give him a second chance."

She sat in a corner of the room in a fetal position, smoked a cigarette, but denied that it was a "joint of dope," and suggested to him that they could watch a movie. She was unclear on whether he also

tuned his television to the “Playboy” channel and she also does not recollect whether they shared a joint of dope. In any event, the accused produced a pornographic videotaped movie entitled “Dreams Desire” which they watched together. At one point, she denied that she discussed with him the movie while watching it but later admitted that she might have discussed it although not in any detail. Nonetheless, during the viewing of the movie the accused attempted to feel her vagina through her clothing and attempted to grab her breasts, all without her consent or acquiescence. She rebuffed his advances, decided to leave and got her shoes. The accused was apologetic and attempted to hug her but she pushed him aside, opened the door and ran, declining his subsequent offer to call a cab for her.

In the building corridor she met a man talking on his “cell” but she did not say anything to him. Running to the nearby Military Police Station she reported an “incident of sexual assault.” The police took notes and she reported that she had been drinking, smoked a cigarette and had watched with the accused a pornographic videotaped movie.

M/Cpl Robert Hallett was a Military Police on duty. He recalled that at 0618 hours one of his colleagues notified him that the complainant had reported an incident of sexual assault. He took some information from her and observed that she was shaken and distraught. However, he admitted that he did not record in his note book, at the time or soon thereafter, his important observations of her demeanour. Significantly, however, he recalled that the complainant informed him that she had gone to the accused's room “ for drinks and smokes.” In addition, she also advised him that she had consumed three beers earlier but nothing to drink after midnight. Further, she did not mention that she had watched, with the accused, any pornographic video tape, or at all.

The Military Police did no investigation although the accused's apartment was only two blocks away. They had conversations with the complainant that they did not record. However, they made her comfortable called the Halifax Regional Municipality Police and between 0618 hours and 0815 hours, the time when the Halifax Regional Municipality Police arrived, they “chitchatted “ with her. No notes were made of these conversations.

Although Constable Carolyn Smith of the Halifax Regional Municipality Police stated that on speaking to the complainant she observed that the complainant was “upset and red in the face,” the Constable admitted that she did not, at the time or soon thereafter, record her observations concerning the complainant’s demeanour and could not give any explanation for not doing so. She did not seek permission from the military personnel to interview the accused. Neither did she make notes of what the military police reported to her nor did she, as part of her investigation, attempt to locate the man whom the complainant saw in the corridor, try to ascertain the existence of the videotaped pornographic movie, look at or photograph the crime scene.

The accused testified. At all material times he was a member of the Canadian Armed Forces living at [*editorial note- address removed*]. His room measured eight feet by six feet and contained a bed that took up most of the wall, a desk with chair, light stand, closet and a digital television. As he was in the process of packing , on being discharged, he had stored away his VCR. However, he subscribed to digital cable.

On 3rd September 2000 at about 0315 hours, he entered the Apple Barrel, to purchase something to

eat, after spending time at other drinking establishments where he had consumed alcohol. The complainant, whom he did not see at first, called out to him and invited him to sit at her table. He recalled meeting her at the 1990 "Tattoo" where she had "goosed" him when he was part of the *. She was known to him as * and he also recalled that during the Tattoo she had driven him home on two occasions. Sitting at her table he consumed his meal and they conversed on subjects that were replete with sexual innuendoes.

Eventually, she accepted his invitation to accompany him to his apartment to smoke a joint where he felt that with the conversation they had at the table there was a good chance that he would "get lucky." They took a taxi to the barracks and entered his room where they both sat on the desk and both smoked a marijuana cigarette for about twenty minutes. He turned on the television to the Playboy Channel and she went over to the bed and laid down. Going over to the bed, he first sat beside her then laid besides her and they were both commenting on the sexually explicit scenes that they were watching. They commenced to caress and kiss each other. For a while, she was receptive to his kisses and caresses but after five to ten minutes she "got freaky," slid to the end of the bed , stating that she could "not do this," she could not "do this anymore," put on her shoes and left. She only left or decided to leave this one time and she was at his apartment between forty-five minutes and one hour. He wanted to call a taxi for her but she declined his offer.

He denied that she ever kicked him in the groin, or at all. Further, he asserted that when she said "no" he desisted from having any further physical contact with her. In addition, although he possessed two videotaped pornographic movies neither were entitled "Dreams Desire" and, furthermore, he did not play any of those tapes as his VCR was packed away.

Evidential Finding of Facts

Here, credibility is the paramount issue. Further, as in most cases of sexual assault, I have the testimonies of the only two parties that were present when the allegation occurred and they have testified to their recollection of what happened. As this court opined in ***R v. C.R.B***. [1999] N.S.J. No.217 at para. 10:

> Although I do not require corroboration of the complainant's testimony, common sense requires me, as affirmed in ***R v. Vetrovec*** [1982] 1 S.C.R. 811, to be cautious as to the weight I give to her unsupported testimony. Such supportive evidence would be, I think, evidence that would persuade me that she is telling the truth and strengthens my belief in her creditworthiness and reliability. It need not confirm that the event occurred. I refer to ***R v. Marquard*** [1993] CanRepOnt 127, 87 C.C.C. (3d) 193, [1993] 4 S.C.R. 223 per. McLachlin J., at paras. 19-20.

Further, I stated at para.11, which I now reiterate:

> Overall, it seems to me that a witness' testimony is considered true

> until there is some particular reason to doubt it. Doubts may arise from the inherent unreasonableness of the testimony itself. Doubts may also arise from the cross-examination of the witness. Such cross-examination may show that a fact is incredulous because of commonsensical inaccuracies that reveals obvious errors. In addition, extraneous 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. (See also, R v. W.D. [1991] 1 S.C.R. 742).

Also on point and very applicable to the assessment of credibility here is ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.) where O'Halloran J.A. stated 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 skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The Crown asserts that the complainant's testimony is compelling. She had a better recollection of times and that the accused's attitude was a negative stereotypical view of women. On the evidence, because a woman speaks about sex, smoked dope or lay on a bed with you does not necessarily mean that she was consenting to sexual intimacy. Crown Counsel infers that, in the circumstances, the defendant acted predatorily by grabbing her breasts, attempting to touch her vagina, all without her consent, and uttering lewd suggestions to her. Further, he even tried to induce her cooperation by tuning into the Playboy Channel that displayed pornographic images.

On the other hand, the defence argues that all physical contacts were consensual and ceased when the complainant said "no." Further, he posits that the complainant's story does not have the ring of reality. Her testimony, according to this approach, was internally inconsistent and was not in "harmony with the preponderance of probabilities which a practical and informed person would

readily recognize as reasonable in that place and in those conditions."

Nonetheless, as I observed the witnesses as they testified, particularly the complainant and the accused, and when I evaluate their testimonies, and assessed their testimonies with the total evidence, and in the light of the cited authorities, I accept and find the material and relevant facts to be as follows:

1. The complainant who was once a member of the "Reserves" and the accused were acquainted with each other having met at the Tattoo in 1990 where she worked as a volunteer and he was part of the *.

2. On 3rd September 2000, the accused was still a member of the Canadian Armed Forces and resided in a residential unit at [*editorial note- address removed*], Halifax Regional Municipality. This residential unit measured eight feet by six feet. It contained a bed that took up most of the wall, a desk with chair, light stand, closet and a digital television.

3. On 3rd September 2000, at about 0315 hours, both parties met on a chance encounter at the Apple Barrel Restaurant in the Halifax Regional Municipality. The complainant had drunk three beers earlier in the evening and was now awaiting to take the early morning scheduled public transportation to carry her home. The accused had entered to purchase a meal.

4. On her invitation, they sat together and had discussions which were replete with sexual innuendoes. Eventually, at about 0400 hours, she accepted his invitation for her to accompany him to his residence where they could "smoke some joint" and perhaps "they could get lucky." They arrived at his residence by taxi at about 0420 hours.

5. In his residence they smoked together a joint of marihuana, kissed each other, watched a pornographic movie and had some other physical contacts.

6. The complainant, after about forty-five minutes to one hour in the room, feeling uncomfortable with the prevailing activities, disassociated herself from any further contact with the accused and left his room at about 0600 hours. On the way from his room, in the corridor, she met a man but told him nothing about her experiences.

7. She went to the Military Police station which was two blocks away and reported an incident of sexual assault. The Military Police interviewed her, made her "comfortable" and "chitchatted" with her from 0618 hours to 0815 hours when the Municipal Police arrived on the scene.

Analysis

There are troubling aspects of this case on which I feel compelled to comment. First, it should be

clear that evidence of a complaint is never evidence of the facts complained of as the complaint cannot corroborate the complainant's evidence. ***R v. Ay*** [1994] B.C.J. No. 2024, 93 C.C.C. (3d) 456,(B.C.C.A.), ***R v. O.B.*** [1995] N.S.J. No.499 (C.A.) Second, the defence, with some justification, points to the paucity of the investigation and the apparent reliance of the authorities solely on the complaint of the complainant without any evidence acquired through a proper or any investigation that was warranted in such a serious allegation.

Here, however, as in all criminal cases, as stated by this court in ***R v. O.J.M.*** [1998] N.S.J. No. 362 at paras. 31 and 32:

> 31 I am guided by the principle of the presumption of innocence that essentially mandates that before I can find the accused guilty as charged, I must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence. Reasonable doubt may arise from the evidence, a conflict in the evidence or a lack of evidence. Further, a criminal trial is not a credibility contest. After I have considered all the evidence before me, reasonable doubt is also applied to the issue of credibility of the witnesses. In short, it is not an either/or choice between the versions of facts. In addition, I paraphrase the words of Cory, J. in R v. W.D. [1991], 1 S.C.R. 742 at 747 (quoting the trial judge).
>
> 32 Essentially, I am entitled to believe all of what a witness said, some of it or none of it. After hearing all the evidence in the case I am entitled to reject a witness' testimony if it is inconsistent and unreasonable in all the circumstances of the case, considering among things, as here, the witness' evidence of the events.

The accused denies the events occurred as narrated by the complainant. As stated in ***W(D)***, *supra*., if I believe him I must acquit. If I do not believe him but I am left in doubt by his testimony I must acquit. If I still do not believe him I must ask myself, whether from the evidence that I accept, I am convinced beyond a reasonable doubt of all the elements of the offence.

In assessing the reliability of the conflicting testimonies, in my opinion, certain significant factors become apparent. First, the reason and the objective for them to go together voluntarily to the accused's room was to smoke dope and perhaps "get lucky." Second, their conversations at the Apple Barrel, although not detailed in evidence, was however characterized in general terms as being replete with sexual innuendoes. It is therefore reasonable to conclude, and I do accept and find that they were both of the same mind exploring the possibility of a sexual encounter. Third, on arrival at his room they lost no time in preparing a marihuana cigarette and sharing it together. The smoking objective was achieved. Fourth, they viewed a pornographic movie together and I accept that when watching the movie they commented on the scenes and were kissing and caressing each other. Thus, it is reasonable to infer and I do so infer that the mood was now set for them, with mutual consent, to achieve the "get lucky" objective.

As I observed the complainant as she testified, I concluded that she was an articulate, quick minded

and a confident witness. However, in my opinion, she appeared to be calculating particularly in her recollection of details of the events that occurred in the accused's room. In my view, her narrative appeared to contain only enough details, at first sight, to implicate the accused, but was vague or inconsistent on important information that would have given some support to enhance her credibility. By way of example only, I refer to what she was prepared to admit she smoked when in the room given the purpose that I found that she went in the first place. Furthermore, she reluctantly admitted that she kissed him on the lips and denied other consensual contacts when on the other hand she admitted that she was laying relaxed on his bed and went there to have a good time.

When I analysed her testimony and combined it with all the evidence and considering the authorities cited above, I was concerned with its internal consistency and reliability. The absence of supportive investigative evidence such as, for example, the alleged pornographic videotape and the lack of relevant, material and contemporaneous notes recorded by the police to accurately refresh their memories, regretfully made it difficult to adequately assess her testimony. Therefore, given that the burden of proof always remains with the Crown and that it has a duty to present evidence essential to the narrative, in my opinion, her description of the events when evaluated and assessed with the total evidence was not sufficiently credible to persuade me that her recounting of the events was either accurate or reliable.

The accused denied, in part, the narrative as related by the complainant. He, however, impressed me as being sincere and frank in his testimony. Thus, in my opinion, his version of events "was in 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."

There is no doubt in my mind , on the evidence that I accept, that the accused and the complainant went to his room to smoke marihuana and to "get lucky" which is another way of saying to engage in sexual intimacy. There is no doubt that they did smoke together a marihuana cigarette, were laying together on his bed and were watching a pornographic movie. I do not doubt that they kissed and caressed each other and that when the complainant slid off the bed and by her explicit statements she had changed her mind about any further and continuing intimacies. I accept and find, on the evidence adduced, that the accused ceased all physical contact with the complainant when she expressed her desire not to be intimate anymore. I further accept and find that all the physical contacts between the accused and the complainant, in his room, were consensual.

Accordingly, I find and conclude that the Crown has not satisfied me beyond a reasonable doubt, on the evidence adduced, that the accused unlawfully committed a sexual assault on P. N. K.. I find him not guilty as charged and will enter an acquittal on the record.