

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**  
(Cite as: **R. v. A. S., 2002 NSPC 027**)

**HER MAJESTY THE QUEEN**

**vs**

**A. S.**

**DECISION**

**Editorial Notice**

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

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

**Decision: Delivered orally July 31, 2002**

**Counsel: Mr. P. Carver, Crown Attorney**

**Mr. B. Sarson, Defence Attorney**

**Introduction**

Twenty-three-year-old A. S., the accused, was a close friend of family members of the complainant, B. G., age sixteen years. He would often be at her sister's home where he would stay over for the night in a spare bedroom. Located in this bedroom was a pullout bed and a computer. Late one evening, in the summer of 1999, the accused, B., dressed in pyjamas, and her brother were in the spare bedroom. The young men were using the computer and all were sitting on the pullout bed. At one point her brother left the room to make a telephone call, and she, now laying on the bed,

continued to talk with the accused. She, however, has asserted that when her brother was absent from the room, the accused, over her clothing and without her consent, felt and rubbed her vagina. The police subsequently charged the accused with sexual assault.

### **Summary of Evidence**

The complainant declared that she entered the bedroom at her sister's home when the accused and her brother were already engaged in playing on the computer. On her entry, they opened the pullout bed so that all could sit. She was dressed in her pyjamas and began speaking generally to the accused. When her brother left the room to make a telephone call she and the accused were laying on the bed. However, they were about a foot apart without any physical contact and were talking. The accused smoked a cigarette and afterwards, to her astonishment and without her consent, he touched and rubbed her vagina. Expressing her disapproval by clearing her throat, she got up and left the room.

She agonized on the incident to the extent that she felt compelled to express and to record her feelings on paper that was tendered as Exhibit No.1. She admitted that, in the past, she had joked around with the accused that involved some physical contacts. However, such contacts were never of a serious nature and she never acted as if she were romantically infatuated with him. In addition, she admitted that a Valentine card, tendered as Exhibit No.2, addressed to the accused in endearing terms, was sent in a jocular context that the accused also understood to be in the same mood and not to be taken seriously.

On the other hand, the accused admitted to an ambiguous, vague, accidental and an indistinct local touching of the complainant. The complainant and her brother were in the room playing on the computer when he entered feeling tired and wanted to go to bed. Consequently, they shut down the computer, left the room and he prepared for and went to bed. The room was dark with the door opened and he had some difficulties falling asleep. Fifteen minutes after he had been in bed, the complainant re-entered the room and without them saying anything to each other she got onto the bed and laid down closely beside him. She was dressed in pants and he could feel her moving around with her leg, at times, touching him. However, she was talking to him in a normal manner.

Wanting to get up to obtain a cigarette from the night table he put his hand down to push himself up. When he did that, he heard the complainant clear her throat. He then realized that he had placed his hand on her body and had touched her. He, however, was not sure about exactly where he had placed his hand. Nonetheless, he grudgingly admitted that he believed that he had touched her leg. Still, he denied emphatically that he had, in fact, touched her vagina. Notwithstanding, he apologized to her for touching her. After obtaining a cigarette he smoked it and they conversed for about an hour before the complainant left the room.

### **Evidential Findings of Facts**

On my observations and assessments of the witnesses as they testified and in assessing and weighing the total evidence I find that the relevant and material facts are:

1. The accused, age twenty-three years, was a close friend of family members of the complainant, age sixteen years, and regularly stayed overnight at her sister's home.
2. Late one summer evening in 1999 the accused, the complainant and her brother were together in the spare bedroom at the complainant's sister's home. The young men were playing on a computer while the complainant was watching and talking to the accused. The complainant was dressed in her pyjamas.
3. The complainant's brother departed temporarily from the bedroom and the accused was then alone with the complainant. They were laying on the bed without any physical contact and were talking generally.
4. The accused, without her consent, felt and rubbed the complainant's vagina.

### **Issue**

Was the accused's touching of the complainant innocuous and accidental, as he averred, or was it intentional as contended by the Crown?

### **Analysis**

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.

I am mindful of the words of Finlayson J.A. in *R. v. S.(W)*, (1994) 29 C.R. (4<sup>th</sup>) 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.

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.

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.

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 joked around. The accused was also a good friend of the complainant's brother, sister and brother-in-law. He has suggested that the complainant had a juvenile infatuation with him as evidenced by Exhibit No.2. However, he has disavowed any interest in her because of their difference in age. She considered him only as a

trusted family friend and had no romantic interest in him.

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 spare bedroom that the accused used when he stayed over at the complainant's sister's home. This he had done often. It was also a room that contained a computer and a pull out bed. Both parties agree that the computer was being used. On the evidence I accept that it was the accused and his friend the complainant's brother who were using it. Both parties agree that all three were in the room together at one point in time.

On the critical issue of reliability, I examined each version of the event for its consistency with the surrounding probabilities and whether it 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." First, I noted it was late and the complainant was dressed for retirement for the night. Second, it was an evening with no tensions where the accused and the complainant's brother were playing on the computer and she was watching them and speaking generally. I accept that her brother left the room to make a phone call and that she was then laying on the bed with no physical contact with the accused. He also was laying on the bed smoking a cigarette.

On the other hand, I have the scenario of a restless accused trying to sleep in a darkened room with its door opened. Into this room entered the complainant and, without any invitation or admonitions from the accused, she lay on the bed closely beside him touching him with her leg. She expressed no words of endearments and she spoke only "in a normal manner." They spoke for a while and, in attempting to obtain a cigarette, he put his hand down for support. However, in executing this manoeuvre his own bodily sensations did not detect that he has placed his hands on another person's body laying closely beside him.

When I considered the description of the event as portrayed by the complainant, I concluded that it had contextual enhancements. It also had coherency. Further it was in a context that a practical and informed person would readily recognize as reasonable and probable in the circumstances. She was laying in her night clothes on the bed near the accused whom she considered a trusted family friend. Her brother had left the room. She was now alone with the accused and he took the opportunity, in the absence of her brother, and to her surprise, touched and rubbed her vagina over her clothing. She showed her surprise and disapproval by clearing her throat and his immediate reaction and inquiry whether he had "bugged" her and her response revealed their states of mind. In addition, recording her feelings, as tendered in Exhibit No.1, I think, supported her emotional distress and discomfit concerning the incident.

In my view, the description that the accused gave lacked internal coherency. Logic and common sense when applied to those facts caused me to be cautious in fully accepting them on their face value. He has admitted touching the complainant but professed not to be consciously aware of what part of her body he touched. Nonetheless, he has admitted, reluctantly, that he "believed" that he touched her leg. However, as I observed him testify and assessed his testimony, he impressed me as a quick-minded witness, shrewd and adept in "the half-lie," skillfully exaggerating the facts

with a partial suppression of the truth. Further, there were too many inconsistencies in his own testimony and between his testimony and the testimony of other witnesses. All these inconsistencies when I evaluated and assessed them with the total evidence, led me to conclude that the accused's testimony was not sufficiently credible to persuade me that his recounting of the event was either accurate or reliable. In short, his testimony did not raise in my mind a reasonable doubt. **R. v. W.(D)**, [1991] 1 S.C.R.742.

### **Conclusion**

On the evidence before me I accept and find that the accused did touch and rub the complainant's vagina without her consent. I find that his touching the complainant with his hand was intentional, opportunistic and not accidental. On the evidence that I accept I determined that it was a wilful and unwarranted interference with the sexual integrity of the complainant. Therefore, on the total evidence, I am satisfied that the Crown has proved beyond a reasonable doubt that the accused committed a sexual assault on B. G.. I find him guilty as charged and I will enter a conviction on the record.