IN THE PROVINCIAL COURT OF NOVA SCOTIA
Cite as: R. v. S.A.W., 2002 NSPC 40

HER MAJESTY THE QUEEN

vs.

S. A. W.

DECISION

Restriction on Publication: Ban on Publication under s. 486(3) C.C.

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 December 18th, 2002**

Counsel: **Christopher Nicholson, Crown Attorney**
David J. Bright, Q.C., Defence Attorney

Introduction

In the year 2001 and, at all material times, the accused, S. A. W., and the complainant, C. W., were married to each other for eleven years but were then experiencing continuing unhappy and irreconcilable differences. Since June, after an argument, the complainant declined to sleep in and to occupy the same bed as the accused. She also then informed him that she would no longer have sex with him. Subsequently, she arranged and established her sleeping space within the rec-room in the basement. However, they continued to occupy the matrimonial home, in the Halifax Regional Municipality, with their two sons who, at the time of trial, were eight years and three years old.

Between August and October, two significant incidents occurred that bring the private lives of this unhappy couple into the public arena and before this court. First, the complainant asserted that, in August, the accused, against her wishes and without her consent, and after a physical and verbal altercation, forcibly had sexual contacts with her. These contacts involved the accused forcibly prying open her closed and locked legs, putting his mouth on her vagina and performing oral sex. In addition, the accused, after the oral sex, with his closed fist used the heel of his hand and "rammed" her in her vagina two or three times.

On the other incident, the complainant averred that in September, after he had moved out of the matrimonial home, the accused returned ostensibly to discuss a separation proposal that he had prepared. In her view, it was not a proposal, and she put the document in her pocket. The accused wanted it back and this resulted in a dispute that involved a physical altercation. She declared that the accused, in anger, pulled her by the hair, threw her up a flight of three or four stairs and grabbed and twisted her nose, all without her consent. Further, he insisted that she read the document and return it to him. After she complied with his demands, he left.

It would appear that the complainant, in confidence, reported these incidents only to her counselor. It would also appear that her counselor informed the police who subsequently contacted the complainant. As a result, the complainant gave a statement to the police. Eventually, the police arrested the accused and charged him with assaulting and sexually assaulting the complainant.

Summary of Relevant Evidence

(*a) for the Crown*

In her testimony the complainant related that she and the accused were married for eleven years and, at the time of the allegations, were in the process of a marriage separation. They have two children, who, at the time of the trial, were eight years and three years old. Additionally, they all lived together in the matrimonial home in the Halifax Regional Municipality. In June, after a quarrel, she informed the accused that she would not have any more sex with him and, as a result, she started to sleep in the rec-room in the basement. Nonetheless, the accused did not leave the matrimonial home

until September 2001. In any event, sometime in early August 2001, a neighbour and friend, invited her and the accused to a party. At the party, she consumed alcoholic beverages while the accused did not. However, the accused was in a sullen mood and left, for home, at 2300 hours.

When she returned home at 2330 hours, she entered the master bedroom where the accused was awake and laying on the bed with the older child, who was asleep. She unsuccessfully attempted to take the sleeping child, whom the accused had in his arms, from the room. He would not allow her to do so and they exchanged insults. Then, she went into the younger child's bedroom, took him out of the bed and, with him in her arms, went downstairs where she intended they would sleep on an air mattress.

The accused was upset. He followed her downstairs and demanded that she return upstairs as he wanted to speak to her. She informed him that because it was late she did not wish to engage in any discussions. Thereupon, he grabbed her by the arm and pulled her upstairs. They were now in the kitchen and he was demanding that she should look at him. Holding her by the face to compel her to look at him, he gave her a hard slap once in the face. The child whom she had taken downstairs came back upstairs when he heard the slap and she again took him downstairs. With the child in her arms the complainant lay on the inflatable mattress and crossed her legs, locking them. Coming downstairs the accused approached her and said: "Well it's over. One last time." She responded: "No, not now. Not in front of [the child]." Ignoring her wishes and without her consent, the accused placed his left elbow between her thighs and forcibly pried open her locked legs. Likewise, he put his mouth on her vagina and commenced to have oral sex.

Soon after, he stood and began to undo his pants. She was fearful that he was then going to have sexual intercourse with her with the child still in her arms. Instead, however, the accused closed his fist and with the palm of his hand "rammed" her, two or three times in her vagina. This act made her sore for "a couple of days afterwards," but she did not seek any medical attention. After he stopped striking her in the vagina, the accused went upstairs into the kitchen from where the complainant heard a loud crash. Fearing for her safety, she called a mutual friend and neighbour who came promptly to their home. The complainant and the children left the home for the remainder of the night. She returned the next day and along with the mutual friend she and the accused discussed separation and him looking for a place to live.

One evening in September, after the accused had moved out the matrimonial home, she called him, on a cell phone, to discuss budget and the children. She requested him to bring the proposal and suggested that he could drop it off after 2100 hours, "as the kids would be asleep." She also informed him that she would read it and return it to him the following day. He informed her that he would have to go home to get it. However, when he arrived, he entered and sat at a table in the kitchen. He put the document on the table, which, to her, was not a proposal as it began with the words: "Dear C. it is with great sadness . . . " At trial, she could not recall any details of the document. In any event, she folded and put it in her pocket.

The accused wanted her to read the document and return it to him. However, she was not going to read it or give it back to him. She went upstairs with her purse and the accused remained in the

foyer. Returning downstairs she closed the blinds. Going back upstairs, she went into the bathroom to remove her makeup. Again, she went downstairs and the accused still wanted the document. Then, the accused, telling her to get the document, pulled her by the hair and threw her, three or four steps, up the stairs. Realizing that the accused would not leave without her reading the document, the complainant agreed to read it and would contact him the next day.

Unsatisfied with this arrangement, the accused went upstairs, rummaged through her purse and removed her glasses, cell phone and keys and returned downstairs. During the ensuring argument back and forth the accused grasped and twisted her nose. Their noisy conduct awoke the children and the complainant decided to read the document if the accused would return the items that he took from her purse. She instructed him to wait outside while she read the document. The accused went outside; the complainant read the document. She handed it to him through the door. Reentering the home the accused went from room to room looking for something before he finally left.

(b) for the Accused

The accused, a businessperson, related that since May the marriage was "pretty rough." Additionally, he suffered from depression. Arguing from time to time he and the complainant usually said harsh words to each other. He confirmed that the complainant moved out of the master bedroom and described her as "no shrinking violet," "pretty hard to deal with," resorted to sex as a controlling mechanism and "could turn mean, pretty cold fast." He also described her as "pretty difficult to communicate with." In any event, he confirmed that they went to the neighbour's party where he sat by himself and confided to a mutual friend that he thought that "his marriage was over." Requesting the friend to act as a mediator he asked him to speak to the complainant. After speaking to the complainant the friend informed the accused that the marriage was indeed over. Receiving this information, the accused left the party and went home.

When the complainant returned home, he was dressed in his pyjamas laying in bed with one child asleep in his arms. The complainant entered the master bedroom and tried to take the child out of his arms. She slurred her speech and he felt that she was intoxicated. He told her to leave the child alone as he was asleep. Walking out of the door she called him "a jerk" and went into the other child's bedroom. Removing this child, who was asleep, from his bed she took him downstairs. The accused recalled that the complainant returned to the master bedroom, went to the closet, and then the upstairs bathroom. She came out of the bathroom dressed and ready for bed, put her clothes in the hamper and went downstairs to the kitchen.

Hoping to speak to her, because " lots [were] said and done," and with hopes of reconciliation, if possible, the accused went into the kitchen. The complainant walked into the family room and he followed her trying to talk to her. He denied that he seized her to pull her into the kitchen, grabbed her hair, her face, or slapped her. Also, he asserted that the child whom she had taken into the rec-room was asleep on an air mattress across the room from a two-seat couch on which she sat. When he was speaking to her, seated on the bigger couch, (see Exhibit 1), the complainant leaned back in her chair, spread open her legs and said: " Here, this is what you want. This is what you always

wanted." As oral sex was a normal activity in which they had engaged during happier times and believing that she was inviting him to do so, he knelt, put his mouth on her vagina, fulfilling oral sex. The fact that their son was in the same room did not preclude oral sex between him and the complainant as they were accustomed to "have sneaks." In any event, the child was asleep.

He stood and pulled his pyjamas to his knees. When he did that, the complainant kicked him in the chest area causing him to lose his balance and fall back. When he stood up, she called him " worthless." He denied that he took his fist and with the heel of his hand jammed at her vagina. Feeling upset, he went upstairs into the kitchen, screamed, took a flashlight and smashed it on the floor. After he smashed the flashlight on the floor, he heard the complainant calling the mutual friend. Almost immediately, the mutual friend entered the house. After packing some essentials, the complainant and the children left the home for the remainder of that night.

The following day the complainant returned to the home and with the help of the mutual friend, acting as a mediator, they discussed a separation plan that also required the accused to move out of the matrimonial home. Nevertheless, he continued to live in the matrimonial home and for a period in September was also living at a rooming house. In any event, accepting that his marriage was at an end he had discussions with the complainant concerning a separation process and that he would prepare a document that would not involve the expense of a lawyer. One evening in September as he was driving home the complainant telephoned him and informed him that she wanted to discuss the separation proposal that evening. He advised her that the proposal was at the rooming house where he stayed and as he would have to go and get it, suggested that they could discuss the matter at another time. She, however, insisted that she wanted to discuss it that night.

After returning to the rooming house to retrieve the required document, the accused went with it to the matrimonial home. Arriving at the matrimonial home, he entered and placed the document before the complainant on a table in the kitchen. She took the document, put it in her pocket and informed him that she would read it later. He reminded her that she had insisted that he bring the document over for them to discuss it. Nonetheless, making no attempt to read the document and repeating that she would read it later, the complainant left the kitchen and went upstairs into the master bedroom.

The accused started to walk toward the foyer when the complainant was returning downstairs. He asked her to give back the document and that he would leave. Responding that she did not have the document, the complainant tried to force her way past him. Uninjured, he picked her up, in a bear-like hug and walked her up six or seven stairs into the master bedroom. When he put her down, she immediately tried to kick him in the groins. She also commenced swinging at him. Putting his hand out to hold her back he, in a reflex motion grabbed and tweaked her nose. Screaming and holding her nose, she ran into the bathroom. He entered the bathroom, got beside her, and yelled at her to give him back the document. Thereupon, she gave him a sharp jab to his nose. That calmed him down and, as one child now entered the room, the altercation abated. He denied that anytime he pulled her by her hair.

The accused then walked back into the kitchen and took from a counter the complainant's glasses,

cell phone and car keys. As the complainant now was coming down the stairs, he informed her that if she gave him back the document he would give her the items that he had taken. She agreed that she would read the document but as she did that he would have to go outside onto the porch. He went onto the front porch, as part of the agreement, and waited while she read the document. Eventually, after ten minutes, she gave him the document and he returned her possessions. However, realizing that he had no clothing, the accused reentered the house and went from room to room collecting his possessions. Without any further incident, he left.

Findings and Analysis

Here, credibility is the paramount issue. With respect to the sexual assault, I have two diametrically opposed stories, one alleging lack of consent and the other consent. Both agree that the accused had oral sex but differ in their description and interpretation about whether the activity was consensual. Here, there is evidence from the accused supporting his assertion of honest belief. However, has he raised sufficient evidence to give his defence an air of reality? ***R. v. Osolin***, [1993] 4 S.C.R.595.

Therefore, I think that relevant to the inquiry under s. 271 are the provisions of s. 265(4) which states:

> Where an accused alleges that he believed that the complainant consented to the conduct that is the subject matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Except, on the testimony of the complainant, for the child in her arms, I have the testimonies of the only persons who were present when the events unfolded. Both, whom I find to be articulated and mature persons, have testified impressively as to their versions of the event. In ***R. v. O.J.M.***,[1998] N.S.J. No. 362, this court opined 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 also mindful of the perceptive words of O'Halloran J.A., on the issue of credibility, as he expressed, 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 assessing the credibility of both parties, I also considered the following extract from the judgment of Estey J., in ***White v. The King*** (1947), 89 C.C.C. 148 (S.C.C.), at p.151:

> The general integrity and intelligence of the witness, his power 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 biased, 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.

Also on the point is this extract from the decision of Rowles J.A. in ***R v. R.W.B.,*** [1993] B.C.J. No.758 (B.C.C.A.), at para.28:

> 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.

Thus, on my observations of the witnesses as they testified and my assessment of their testimonies, considering the total evidence, I concluded that overall, I should view the complainant's testimony with great caution. First, concerning the allegation of sexual assault I note, that on her testimony, at the time of the occurrence, she had in her arms their young son. According to her testimony, it is reasonable to infer and I do, that he was awake. After all, he had just walked upstairs and she had taken him back downstairs when at the same time the accused followed her. She still had the child

in her arms and was laying on the air mattress when the accused approached her. Therefore, the activities that she described, the accused forcibly prying open her legs, putting his mouth to her vagina, striking her in the vagina and her fear of him having sexual intercourse when he stood, on her testimony, the young child was still in her arms and awake.

On the other hand, the accused testified that the child was asleep on the air mattress. The complainant was seated on a couch across the room. She, without any contact or coercion on his part, spread open her legs and by her words and conduct invited him to perform cunnilingus. He did. The sleeping child was not an inhibition as they have had "sneaks" in the past and oral sex was a common activity between them. When he stood up and dropped his pyjamas to his knees the evidence was not clear whether it was for her to do an act of fellatio or for him to perform full sexual intercourse. Whatever was his intention she rebuffed him by kicking him backwards and called him worthless. Quite upset, he went upstairs into the kitchen and expressed his frustration and anger by smashing a flashlight onto the floor.

In weighing the testimonies considering the total evidence and examining them for their consistencies with the probabilities that surrounded the existing conditions, I concluded that the complainant's recollection of the event was "not 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". I recalled that she, in June told him she would have no more sex with him. Also, I recalled that he stated that she sexually controlled him. Accepting these two factors and given the personal interrelations and the dynamics that were unfolding that evening: his belief that his marriage might be over; his attempt to discuss issues with her and following her around the house; it is reasonable to conclude, and I do, that the testimony and recollection of the accused of the evening's events did not only have an air of reality but it was also "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."

In my opinion, as I observed her testify, I formed the impression that the complainant's narrative of the event appeared scripted and lacked internal coherency and context. First, it did not contain background details such as how she was dressed, whether he removed clothing or she sustained injuries consistent with the force required to pry open her locked legs with a child in her arms. Likewise, it lacked relevant information, for example the presence of the child in her arms and her bodily sensations, facts about which one might expect someone who had experienced the event would know. Second, as I observed her and assessed her testimony in light of the total evidence, I noted her long deliberate pauses; her lack of spontaneity; her lack of memory on important factors; and, her evasive, measured and guarded responses to critical questions both in direct and in cross-examinations. These observations, in my mind, did not enhance her credit. Third, I felt, there were unexplained disconnects in her narrative. By way of example only, I felt that it was an intriguing factor that she did not tell, or show the trusted mutual friend whom she urgently and specifically called, ostensibly to rescue her from the accused's violence, about the physical assaults, as she averred in testimony. Thus, overall, my impressions were that she might be inventing an

experience rather than actually recalling the experience. I felt that she was skillfully and shrewdly combining exaggerations "with partial suppression of the truth."

Considering the details of the incident as she described them both in direct and cross-examination, and in light of the total evidence, I concluded that there were elements of her testimony that diminished its reliability. 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. ***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. In the result, I concluded, considering the total evidence that, overall, the frailties and the inherent weaknesses in her testimony, on the events of the evening and, in particular, the issue of the sexual assault, rendered it unpersuasive. Additionally, in my view, it did not meet the threshold of reliability.

Having heard the accused, I accept that the complainant was seated on a couch alone. I accept that the child was asleep on the air mattress. Further, I accept that the complainant, on her own volition, spread open her legs and at the same time uttered words when combined with her overt conduct could, in the circumstances, reasonablely be interpreted by the accused as an invitation for sexual contact. When he stood, I accept that he pulled his pyjamas to his knees and she kicked him backwards. It was a negative reaction to his overtures. I think that he rationalized that her present conduct was a rebuff. I accept that he withdrew from a negative environment rather than behaving aggressively. Further, I accept that he became emotional but that he reacted in a nonviolent aggressive manner toward the complainant.

Through his testimony and on my observations of him as he testified, the accused impressed me as an individual who had learnt to adapt to his environment. In his upsetting and emotionally exasperated state, I think that he was still able to have rational control that made a difference between acting impetuously and hot-headed or more subdued and mature. That was a significant factor in my concluding that the violence that the complainant described, the slapping of her face and the blows with his hand to her vagina, was, in the circumstances and in my view, a fanciful account that embellished the true story and diminished her testimony of any air of reality. In my view, on these issues, the Crown never rehabilitated the complainant's testimonial credit. In the end, on the evidence that I accept, I conclude that there was sufficient evidence to give the accused reasonable grounds honestly to believe that the complainant was consenting to him having oral sex with her.

I now consider the allegation of assault in September. First, in light of the recent decision in ***R. v. Downey*** [2002] N.S.J. No.442 (S.C.), a case dealing with the concept of "domestic assault," or "domestic violence," nomenclatures that incorporate the same policy concerns, and, because of the frequency of these issues in the Provincial Court, I think that, for clarity, I ought to take a more incisive view of these occurrences within the context of the ***Criminal Code*** s.265. Second, I bear

in mind that neither "domestic assault" nor "domestic violence" unlike assault, aggravated assault, assault causing bodily harm and sexual assault, has a legislative definition. Nor, as I am aware, the concept has had any judicial interpretation or analysis. Briefly, and without attempting to formulate one, the concept, in Nova Scotia, appears to have had its genesis in a policy initiative, in the political and social contexts, aimed at protecting the physical integrity and protecting and promoting the physical and personal autonomy of partners in a domestic relationship. Its application would be to foster forbearance and greater respect for the physical and emotional well being of partners in a domestic relationship. Therefore, in principle, the nomenclature "domestic violence" or "domestic assault" is applied when the prosecution, because of policy directives, submits that, an assault has occurred in situations where the parties have been living within the status of a domestic relationship. See, Government of Nova Scotia, Department of Justice, publication: "***Framework for Action Against Family Violence.***" - April 1999. Nonetheless, it seems to me that, given the public nature of this syndrome, absent any Parliamentary fiat, the operation of such a policy, I think, must be in harmony with the general and established principles applicable to the criminal law.

Having said that, the next question is: what is a "domestic relationship?" For the purposes of my analysis, applicable to the issues before me, I adopt the principled approach that a "domestic relationship" could be found in cases where the prosecution has proved beyond a reasonable doubt that the parties involved, at the time of the allegation of assault, were living together and through cohabitation had created a household or a family.

Applying that principle to the case at bar and on the evidence that I accept, I do not doubt that the parties were estranged and living apart. I do not doubt that the accused, at the time of the allegation of assault in September, had moved out of the matrimonial home and had established and was consolidating his own separate and independent living arrangements. Further, on the evidence that I accept, reasonable doubt exists on the issue of whether they were still a family unit or a household. I accept and do not doubt that the separation agreement, drafted by the accused, and presented to the complainant, did address the financial issues; the custody and access to the children and the sale of the matrimonial home. Thus, I do not think that, on the evidence before me, the crown has established beyond a reasonable doubt that the parties were in a domestic relationship so that this allegation of assault would fall within the category of a "domestic assault."

In assessing the issue of the assault and weighing their testimonies in light of their own conducts, I think, as a backdrop, it is important that I bear in mind the emotional dynamics, that existed between the parties, as disclosed by the evidence. Additionally, on the evidence, it is reasonable to infer and I do, that both parties had created for each other a negative and emotionally unhealthy environment. He suffered from deep depression and with whom, from her perspective, it was difficult to get along. She, from his perspective, was cold, mean, and with whom it was difficult to communicate. From the evidence, it is reasonable to infer and I do, that deep tensions and emotions existed below the facade of civility showed by both parties. Further, any small irritating behaviour by either one in the eyes of the other could easily exacerbate that delicate and sensitive balance. Thus, on my assessment and weighing of their testimonies the events that unfolded in

September were, I think, an illustration of the flare-up of these tensions.

I accept that the complainant called the accused to bring to her, for discussion that evening, the separation agreement that he had drafted. Further, I do not doubt that he informed her that he did not have it with him, as he was driving on the highway, and, on her insistence he went and obtained it from the place where he was staying. However, instead of reading the document as the accused anticipated, the complainant refused to do so and put it into her pocket. I accept that she ignored him by walking away from him by going into the master bedroom and performing other tasks without any intention of reading the document. These activities, I accept, annoyed the accused, but I also accept that he acted with restrain.

When the complainant came from the master bedroom, she told the accused, when he requested her to give him the document, that she no longer had it. I think that it is reasonable to infer and I do, that the accused assumed that she had left it in the master bedroom or another place upstairs. Nonetheless, in the same peremptory mood that the complainant was displaying toward the accused, I accept that she attempted forcibly to push past him as he stood in the foyer. I think that he must have reasoned and concluded that if she were not going to read the document and had no interest in it then she ought to return it to him as it was his property. Thus, to get her to retrieve his property he held her in a bear-like hug and took her into the master bedroom where, it is reasonable to infer, he surmised that she had placed it. All he wanted was his document if she were not going to read it.

I accept that when he put her down, the complainant retaliated by attempting to kick him in the groins. Additionally, I accept that the situation escalated and both engaged in an angry exchange of mutual physical contacts. I accept that she commenced to swing at him and he, in response, and in reflex, tweaked her nose. As I observed the complainant as she testified, and on the total evidence, I felt that, lacking persuasive supportive evidence such as bodily sensations, she had embellished the facts. Consequently, I do not accept that the accused pulled her by her hair and threw her three or four steps up the stairs. In my view, that part of her narrative was not "in harmony with the preponderance of the possibilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The issues however remain: (a) Was the accused action by holding the complainant and taking her upstairs, in the circumstances, an assault within the meaning of s.265 ***Criminal Code***? (b) In addition, during the altercation when the accused tweaked the complainant's nose did he commit an assault within the meaning of s. 265 ***Criminal Code***?

The relevant statutory provisions are s.265 ***Criminal Code*** which state:

> (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force

> intentionally to that other person, directly or indirectly;
>
> ...
>
> (2) ***<u>This section applies to all forms of assault,</u>*** including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault. [Emphasis added]

The jurisprudence is clear that any unwanted touching by another, no matter how minimum the force applied, is criminal. The prohibited physical acts range from a punch to the face to placing one's hand on a person's thigh on a bus: see ***R. v. Burden*** (1981), 25 C.R. (3d) 283 (B.C.C.A.). Here, there is no suggestion, based on the evidence, that the complainant consented to the touches, to her person, by the accused. Further, there is no doubt that the accused applied force directly to the person of the complainant. However, the question is: was the force intentional and if so, in the circumstances, should I apply criminal sanctions?

In ***R. v. Matsuba,*** [1993] A.J. No.93 (Alta. Prov. Ct.), after commenting on the Common Law notions of "assault" and "battery" incorporated in the definition of assault in s.265 ***Criminal Code***, Jones, Prov. Ct. J., noted:

> It is not simply enough that there be an intentional deliberate touching, without consent, but it is necessary, in order to conclude that the particular touching constitutes "force" within the meaning of the statutory provision, that there be a connotation of anger, revengefulness, rudeness, or insolence, or at least some like behaviour to the touching performed before it can be said that there is the "force" which completes the legal definition of assault. It seems to me that this must be so, otherwise any deliberate application of physical contact that exhibited nothing more than the general intent to intentionally touch the victim without the victim's consent would be actionable at the instance of the criminal law. Thus it would seem to follow that, for example, if one jostled a little bit at a bus stop in order to get on ahead of other persons in very close physical proximity, it might be argued, subject to the maxim de minimus non curat lex dilemma, that the person doing the jostling would be guilty of assaulting each of the other persons whom he or she had deliberately bumped in the course of the jostling no matter how gentle the bumping might be, because it would be deliberate bumping or the application of force, without the consent of each of the other persons being touched. I do not think that the criminal law can be contemplated as envisioning this in the ordinary case of such jostling although there is no doubt but that a person could be so violent

> during the course of committing such jostling that properly he could be charged with assault.

In ***R. v. Shand,*** [1997] N.S.J. No. 524 (S.C.), MacDonald J, (as he then was), in effect opined that the proposition established in ***R. v. Jobidon,*** [1991] 2 S.C.R. 714, as affirmed in ***R. v. Cuerrier,*** [1998] 2 S.C.R. 371 at para 39, "the common law can supplement the provisions of the Code . . . the Criminal Code, s.265(3), is a restatement of the common law and not an expansion of it." In short, concerning the limits on the legal effectiveness of consent, the Code did not intend to remove the existing body of common law which had for centuries formed part of the criminal law in England and Canada: see ***Jobidon***, at p.739. As reasoned in ***Shand***, MacDonald J., only proposed that, on the grounds of public policy, consent was vitiated in cases where "domestic assaults have only the potential of creating non-trivial harm". Thus, where there is a case of the "potential to cause severe bodily injury" consent is no defence to a charge of "domestic assault." On this reasoning it would appear that available common law defences remain unaltered even for trivial, if this is sensible, "domestic assault".

Likewise, in ***R. v. Robart***, [1997] N.S.J. No. 149 (C.A.). , where in a struggle over car keys the complainant sustained cuts and bruises, Roscoe J.A., observed at para 10:

> The totality of the surrounding circumstances of this case clearly distinguish it from those exceptional cases of innocuous behaviour where the de minimis maxim was found to be applicable.

Again, this reasoning affirmed that, in a proper case, the common law defence of de minimus non curat lex is applicable. Thus, common law defences, in Nova Scotia, remained intact.

Applying those principles in the case at bar, I accept that when the complainant went upstairs with the document she had no intention to read it. Given the situation, I accept that her behaviour annoyed the accused but that he was constrained. Therefore, on the evidence that I accept, I find that the complainant's conduct, by attempting to push past the accused, on the foyer, was a deliberate physical contact that exhibited a characteristic rudeness, incivility or contempt toward him. I find that her conduct was the intentional application of force within the meaning of s.265 ***Criminal Code***. Further, I find that, in the circumstances she was the aggressor. Likewise, although she did not consent, when she attempted to push past him forcibly, still ignoring him and the reason that he was present, his picking her up and taking her back upstairs where he presumed she had left the document, I think, in the circumstances, the accused was merely attempting to recover what he considered his property. She was the only one who knew what she had done with it. Additionally, from this holding, she suffered no injuries. Thus, I find that his action, in picking her up and carrying her up the stairs, in the circumstances, was "innocuous" and "without the potential to cause severe bodily injuries". Consequently, in the circumstances of this case, I would

apply the maxim of de minimus non curat lex to this conduct of the accused. See also, ***R. v. Hinchey,*** [1996] 3 S.C.R. 1128 at para. 69.

As I have reasoned, this is not a case that I would consider as one of "domestic assault". In the result, here, both parties applied deliberate and intentional force to each other. In my view, it was a mutual recrimination. However, on the evidence there was no serious bodily harm to vitiate consent and, in any event, the accused testified that the tweaking of her nose was a reflex action on his part: see ***Jobidon***; ***R. v. Wolfe*** (1974), 20 C.C.C. (2d) 382 (Ont.C.A.). Even if I am wrong concerning the nature of the squabble, given the total history of these parties, as disclosed by the evidence, and what I accept on the events of September, in my opinion, the accused has raised reasonable doubts concerning his conduct: see ***R. v. W.(D)***, [1991]1 S.C.R. 742.

Conclusions

In resolving the issues before me and on a consideration of the whole case, for the reasons stated, I was not assured that the complainant's testimony concerning the sexual assault, where lack of consent was the issue, was adequate to the task of determining the guilt of the accused beyond a reasonable doubt. Put another way, I was satisfied that there was sufficient evidence to give the accused reasonable grounds honestly to believe that the complainant was consenting to him having oral sex with her. In short, I was not satisfied that the Crown has proved beyond a reasonable ground that the accused, S. A. W., did between August 1, 2001 and October 1, 2001, sexually assaulted C. W.. I find him not guilty as charged and will enter an acquittal on the record.

In assessing and weighing the assault allegation, on the evidence before me and on my analysis, I find and conclude that the complainant's credit worthiness was never fully rehabilitated on her embellishments of the facts. In any event, I was satisfied, on all the evidence, that when the accused lifted the complainant and took her upstairs, in the circumstances, his conduct was innocuous and trivial. It was also in the context of the complainant's aggression and his attempt to recover his property. I was satisfied and concluded that, here, animus or ill-will did not motivate his conduct. Further, it was not, in my view, sufficiently egregious to amount to criminal misconduct.

Additionally, I was satisfied, on the evidence that I accept, that his tweaking of her nose was within the framework of a consensual recrimination that the complainant initiated. In addition, I accept that it was a reflex action on his part, that did not result in any serious bodily harm. In short, I was not satisfied that the Crown has proved beyond a reasonable doubt that the accused, S. A. W., did between August 1, 2001 and October 1, 2001, assault C. W.. I find him not guilty as charged and will enter an acquittal on the record.