

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. W.J.W.*, 2003 NSPC 52

Date: 20031030
Case No.(s): 1139417
1139418
Registry: Halifax

Between:

R.

v.

W. J. W. - No. 2

Editorial Notice

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

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

Heard: Decision rendered orally on October 30, 2003,
in Halifax Nova Scotia

Counsel: Eric R. Woodburn, for the Crown
Michael S. Taylor, for the Defence

BY THE COURT

Introduction

- [1] The accused, W. J. W., and the complainant C. A., after an amicable discussion, decided to go together to a secluded and less traveled area of a local hospital where they were both employed. She averred that, from the discussion, he wanted to show her a dirty joke from his pocket although it would not have been necessary to go to the area to see whatever he wanted to show her. He, on the other hand was confident, from the discussion, that they were going to the area “to fool around” as an agreed upon objective. In any event, without any coaxing or coercion by one or the other of them, they trekked through empty corridors, traversed less-traveled stairs and eventually secluded themselves under a stairwell where some intimate physical contacts occurred.
- [2] The complainant asserted that the accused, against her wishes and without her consent, kissed her and touched her breasts and vaginal area. On the other hand, the accused avowed that his responsive touching of the complainant was a mutually agreed upon activity and, in the circumstances, he reasonably and honestly believed that she consented to those physical contacts. Nonetheless, the police have charged him with the sexual assault and confinement of the complainant. Since he has raised the defence of consent, this case is therefore a consideration of whether the accused had reasonable grounds for an honest belief that there was consent.

Summary of Relevant Evidence

(a) For the Crown

- [3] The complainant, almost thirty-five years old, was acquainted with the accused through employment related communications. As she was a *, on a term contract, and he worked in *, their employment roles and activities brought them in contact with each other on a regular basis. However, during these contacts they would also at times engaged in flirtatious conversations as she felt comfortable speaking to him. On the day in question when she was on her cafeteria break, and near the cafeteria, the complainant encountered the accused and during a cursory conversation he intimated that he had something to show her. Despite the fact that she had no need to go anywhere with the accused, however, without asking him what he had to show her but thinking that it was some “dirty joke” that he had in his pocket, with her in the lead, at all times, and him following, they went down a flight of stairs and, without saying anything to each other, travelled to a secluded dimly-lit area of the hospital, surroundings with which she was unfamiliar.

[4] At this location, the complainant, on her own volition, and followed by the accused, entered under a stairwell and then turned to face him. The accused turned her around to face a wall that was five to six feet away and pushed her toward it. When her body made contact with the wall he turned her around to face him and she pushed her hands behind her and against the wall to escape from him but was unable to do so as he pressed his body against her. She felt afraid, but said nothing. Likewise, she did not wish to be there and although she was not consenting to his actions she did not express her discomfort or displeasure to him.

[5] He commenced to grab and squeeze her breasts. He also kissed her on her lips and neck and touched her vaginal area. At all times her hands were behind her back and she repeatedly said “no” to his conduct but did not try to get away, struggled, screamed, yelled or told him to stop. He also asked her several times for oral sex which she declined to do so. While all this was happening and hearing a sound of someone on the stairway, the accused put his hand over her mouth so that she could not say anything. Telling her not discuss with anyone what had happened, as there would be hell to pay, the accused left the area and she followed him out and went to the cafeteria. She, however, discussed with her colleagues what occurred and eventually made a complaint to the police.

(b) For the accused

[6] The accused was fifty-two years old and married for sixteen years. He was acquainted with the complainant through his employment at a local hospital. They would “joke around” and she was flirtatious. On the day in question as he was on his break, he met the complainant and, as was usual, they “carried on.” He pointed to a nearby stairwell and remarked that it was a good place to “fool around.” She agreed that it was. He then asked her whether she had any secret places and she responded that she did. Asking her if she would like to go, as she was standing on the stairwell, she replied, “Yes, let’s go,” and commenced walking down the stairwell. He followed her.

[7] Hardly saying anything more to each other, they trekked through less travelled corridors of the institution, traversed separate stairwells, went through various doors until they reached a secluded stairwell that would suit their purpose. They went underneath the stairwell, embraced each other and kissed on the lips. He felt her vaginal area and her breasts and by her physical responses to these intimate touches, to him, she appeared to be savoring the moment. Breaking off the kiss, he again caressed her breasts and her groins and they kissed each other deeply, a French kiss. Again, she was responding well and acted as if she were accepting favorably these physical activities. He, however, felt “grossed out” by the French kiss and signalled to her that it was time to leave.

[8] When they left the area they walked together toward the cafeteria and while in the corridor he asked her if she would perform oral sex. She was noncommittal and they

parted amicably. He denied that he told her that he had something to show her before they started on their short odyssey. She did not express any displeasure and neither was she upset nor told him to stop. Additionally, he did nothing to prevent her from leaving if she wanted to do so and he did not put his hand over her mouth to prevent her from shouting if she was so inclined to do so.

Findings and Analysis

- [9] Here, two main issues arise. The first is the credibility of the accused and the complainant and the second is whether, in the circumstances, the accused had reasonable grounds for an honest belief that the complainant was consenting to the intimate activities. I have two versions of the event that initially presented a mutual consensual activity that ended from one perspective as non-consensual conduct and from the other perspective as consensual. Further, there is evidence from the accused that, if believed, could support his assertion of honest belief of consent. The test however is whether that evidence is sufficient to give his defence an air of reality. *R. v. Osolin*, [1993] 4 S.C.R.595, *R. v. S.A.W.*, [2002] N.S.J. No.533, 2002 NSPC 40 (Prov. Ct.). On the other hand, as the case for the Crown depends wholly upon the complainant's testimony I think that her credibility and reliability must be tested in the light of all the evidence presented. *R. v. R.W.B.*, [1993] B.C.J. 758 (B.C.C.A.).
- [10] I find that both the complainant and the accused were articulate, confident and mature persons who testified impressively as to their versions of the event. However, on the issue of credibility this court stated 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 very 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.

- [11] Also on the point is the following extract from the decision of O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at p.357:

The test [for credibility] must reasonably subject his [her] story to an examination of its consistency with the probabilities that surrounding 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 those conditions.

- [12] Thus, on my observations of the witnesses as they testified and on my assessment of their testimonies, and on my consideration of the total evidence, I concluded that overall, I should exercise great caution in accepting fully the version of the event as related by the complainant. First concerning the reason why they went to the secluded area, I note that on her testimony she went because she thought that he wanted to show her a dirty joke from his pocket. However, she resisted the assertion that she was flirtatious with him. Yet, she was prepared to go and to lead the way to somewhere secluded, when it was not necessary or required to do so, to view a joke. Further, she never asked him what, if anything, he possessed that was so peculiar that in order to view it such privacy was obligatory. Although he did not coerce her in any manner to enter beneath the secluded stairwell, she entered first and never questioned where they were going or why they ended up at this particular location.
- [13] On the other hand, the accused testified that they flirted with each other, in the past, and the discussion that day was flirtatious in nature and content. He did not tell her that he had a joke or anything to show her. Rather, they talked about secret places “to fool around” and each insinuated that they could seek out and explore the possibility of such a location within the hospital. With that view in mind and without saying much more to each other, they set about seeking out a secluded area to consummate what they were both thinking of and the reason why they were looking for a location, “to fool around.” Underneath the stairwell was ideal. It was out of the way, dimly lit and it was unlikely that they would be discovered or be disturbed. She entered first but he went past her and then assisted her to come under it.
- [14] In weighing their testimonies and considering the total evidence and examining them for their consistencies with the existing probabilities, I concluded that the complainant’s version of events, in the circumstances as described, was not “in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable.” I think that given the personal interrelationships and the dynamics that were unfolding, it seems to be an incongruity, from a practical point of view, for her to go to this secluded location just to see a joke from someone whom she declared she hardly knew and with whom she did not flirt. I accept and find that there was a flirtatious relationship as it gave the prevailing interpersonal relationship and dynamics an effectual context and lend an air of reality to the accused’s testimony which, in the circumstances and in my view, was “in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable.”

- [15] As I observed the complainant as she testified, my impressions were that she was a shrewd witness who was attempting to blend a skillful exaggeration of the facts with half-truths. She appeared to recognize the incredibility of her testimony that revealed obvious errors both in logic and commonsense and, in cross-examination, acknowledged that her version of the event lacked internal coherency and context and did not make much sense. Moreover, I find that her testimony on the reason why she went to the stairwell was not credible. In my opinion, she was inconsistent and self contradictory and, I felt that there were unexplained disconnects in her narrative which did not enhance her credit.
- [16] When I considered the details of the incident as she described it, both in direct and in cross-examination and in the light of the total evidence, I concluded that there were parts of her testimony that undermined its overall reliability. By way of example only, she claimed that her hands were behind her back, not by force, at all times and she neither struggled, offered any physical resistance to his advances, attempted to escape nor to raise an alarm although she was aware that help was nearby. Also, as I assessed her testimony, I noted her lack of spontaneity, lack of memory, her inconsistencies on important factors and her evasive guarded responses to critical questions both in direct and cross-examination. Although, I do not need corroboration of her testimony, common sense required that in weighing and assessing it I look for supportive evidence that was capable of persuading me to entertain a rational belief that she was telling the truth and would have strengthened 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. I looked hard but found nothing to persuade me.
- [17] Having heard the accused, I accept and find that he fondled her breasts and her vaginal area and also that they became enthralled in mutually French kissing each other. However, from his comments that the kissing “grossed me out” it would appear that it might have stirred his conscience. Everything had happened on a whim and I accept that he was somewhat nervous about the predicament in which he found himself. Abruptly, he had lost interest. I accept and find that he no longer wanted to be there, that he became worried and hinted to her that they should leave. I accept and find that he also told her not to tell anyone or it will be hell to pay.
- [18] I think, however, that on a closer analysis and with an appreciation of the context in which the whole episode developed, from his perspective, it would appear that his sensation of the kiss established in his mind that something was indeed happening. He might have wished for it, or fantasized about it by their earlier discussions of “fooling around” and going to a secluded place to do so. Now, however, it was actually happening. His thinking, as expressed, suggested that he recognized the significance of what this incident would mean to him personally as he did not want his wife to know about what he now considered to be a foolish misadventure. His quandary appeared to have some foundation by the fact that he currently is in marriage counseling. It also appears that he must have felt that the value of this tryst was not worth the problems that it could generate

in the workplace and its effects upon the integrity of both himself and the complainant. This appears to be evidenced by his peer disapproval and his subsequent request to transfer to another work site. It therefore seemed that his physical sensations, feelings and thoughts of the moment about what he was engaged in, on a whim, made him uncomfortable and he concluded that he did not want to continue the intimate encounter.

- [19] Through his testimony and on my observations of him as he testified, the accused impressed me as an individual who enjoyed the flirtatious attention but naively did not foresee its consequences nor considered the emotional repercussions and other ramifications that his selfish and impetuous conduct could generate. In my view, however, his story had an air of reality that was “in harmony with the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.” Although I do not fully believe him, his testimony has raised, in my mind, some doubt. *R. v. W (D.)*, [1991] 1 S.C.R. 742. In short, I am satisfied and therefore conclude that there was sufficient evidence to give him reasonable grounds honestly to believe that the complainant was consenting to all his intimate touches and contacts. In other words, I am not satisfied beyond a reasonable doubt that he sexually assaulted the complainant. Given my reasons and findings on the sexual assault, on the issue of the unlawful confinement, I am not satisfied beyond a reasonable doubt that he unlawfully confined the complainant.

Conclusions

- [20] In the resolution of the issues before me and for the reasons stated, the complainant’s testimony did not engender in me that confidence or assurance that she was a credible or reliable witness. She was not only self-contradictory and inconsistent but her testimony was also inconsistent with the testimony of other witnesses and her creditworthiness was never rehabilitated. In my view, the accused testimony had an air of reality and although I did not fully believe him his testimony raised, in my mind, some doubts.
- [21] Additionally, there was sufficient evidence to support his contention that she did consent. 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 all his physical touches and contacts. I therefore find him not guilty of sexual assault. With respect to the unlawful confinement allegation, in my opinion, given my reasons on the sexual assault allegation, there was not an iota of evidence to support this offence. I therefore find him not guilty as charged.
- [22] Accordingly, on the charges on the Information tried before me, I am not satisfied, that the Crown has proved beyond a reasonable doubt that the accused, W. J. W., sexually assaulted or unlawfully confined the complainant, C. A.. I find him not guilty, as charged, and will enter acquittals on the record.

