IN THE PROVINCIAL COURT OF NOVA SCOTIA
R. v. S.O.D. 2012 NSPC 61

Date: June 29, 2012
Docket:2145266
2145267
2145268
Registry:Halifax

Between:

Her Majesty the Queen

v

S.O.D.

DECISION

Judge: **The Honourable Judge Castor H.F. Williams**

Heard: **August 8, 9, 15; Sept 22, 2011; March 9, June 29, 2012**

Decision: **June 29, 2012**

Charges: **271(1)(a); 279(2); 151 Criminal Code**

Counsel: **Robert Kennedy, for the Crown**

Brian Smith, for the Defendant

Introduction

[1] The complainant, OG, was age 15 years at the time of the alleged occurrences. She lived with her parents at a distance of about five minutes walk from a local community centre where, on the night in question, she was on her way, ostensibly, to watch a basketball game. Walking on the highway and facing the approaching traffic to attend, she was about two minutes walk from her home when a motor vehicle, a gold Sunfire, on the same side, stopped and the operator, whom she knew only by reputation as a "dangerous man," but now identified as the accused SOD, invited her to enter.

[2] Without any threats, urging or coercion from him she volitionally opened the passenger side door of the vehicle, entered and sat in the passengers' seat. Likewise, without engaging in any consequential conversations that she subsequently recollected, SOD drove her to a secluded area. There, he allegedly grabbed her breasts, sat on her and forced her to have unprotected sexual intercourse with him.

[3] OG reported this occurrence to neither her parents nor the authorities. However, she disclosed it to two of her cousins. One of them, concerned for her welfare, persuaded her to go to the hospital which she did, with some reluctance, four days after the alleged incident. As a result of this visit, public officials became involved and, after an investigation, the police charged SOD with the sexual assault of OG; confining her and touching her for a sexual purpose.

[4] At trial, however, SOD neither testified nor called any evidence on his own behalf. He, nonetheless, pointed to evidential inconsistencies and the testimonial fragilities of the Crown witnesses, particularly that of OG as it relates to her credibility and reliability. In short, he has submitted that the Crown has not proved beyond a reasonable doubt his guilt of the offences as charged.

[5] This case is therefore a determination of whether, on the total evidence presented, the Crown has proved beyond a reasonable doubt the guilt of the accused on all the charges as laid.

Synopsis of the Trial Evidence

[6] Basically, OG testified that on the night in question she was on her way to the local Recreation Centre to meet her cousin CT and to watch a basketball game. She casually knew SOD. This knowledge was based on his ownership of a distinctive gold coloured Cutlass motor vehicle with Lamborghini-style doors that opened upwards. She associated him with this vehicle which she, on two or three occasions, had seen him driving. However, the vehicle that he was driving on the night in question was a gold coloured 4-door Sunfire. In addition, she knew his children who also attended her school.

[7] She could not explain her reasons for volitionally entering the vehicle of a semi-stranger when close to the security of her home. Nonetheless, on her entering the vehicle, SOD drove her to a secluded area. When he

stopped his vehicle, he immediately started to touch and to grab her breasts. She told him to stop this activity and tried to push him away. Also, he climbed over the driver's seat and sat on her. Her legs were closed and his knees were on either side of her legs. With one hand he held both of her hands above her head and with the other he pulled down her pants and underwear to her knees and also his pants. In this position, and without her consent, he inserted his penis into her vagina. Later, he dropped her off at the Recreation Centre.

[8] CT is one of OG's cousins. She was waiting for OG at the Recreation Centre. She testified that she saw OG arrive in a gold four-door Sunfire car. A man whom she did not know and whom she had not seen since that night, got out and opened the rear passenger side door from which OG exited the vehicle. As well, she subsequently observed that OG was shaking and crying. OG eventually told her that she had non-consensual sexual intercourse with SOD and that it was he who had dropped her off at the Recreation Centre.

[9] AG is another cousin. He testified that OG texted him on the night in question. The text message was a query of whether it was, "rape if someone has sex with you without your consent?" He replied that it was rape and asked what had taken place. He recalled that she did not want to inform her parents but eventually disclosed to him that SOD was the person involved. She was also reluctant to go to the hospital but he persuaded her to do so and took her there four days after the alleged event.

Position of the Parties

(a) *The Crown*

[10] Essentially, the Crown submitted that OG knew the accused SOD when he stopped to pick her up in his Sunfire vehicle. SOD drove OG to a secluded area and then, against her wishes, started to touch her breasts. She told him to stop and she was too scared to yell for help. He climbed over the driver's seat and straddled her as she sat in the passenger's seat. He had his knees on either side of her legs and her arms pinned over her head. In that position he had sexual intercourse with her without her consent. Also OG could not get out of the vehicle because of the engaged childproof locks.

[11] In all the circumstances, the heart of the case was the credibility and reliability of OG's testimony. This is so, as a result of her demeanour when she testified. As well, there was an element of her testimony that, on its face, would appear to have a commonsensical improbability. However, this factor could be rationalized and be explained because of her youth and her inability to trust others. It also did not destroy her credit to the point that her whole testimony was unbelievable. Therefore, on the total evidence, the Crown has proved beyond a reasonable doubt the guilt of the accused as charged.

(b) *The Defence*

[12] On the other hand, counsel for SOD submitted that because of the range of circumstances which arose in the trial there were critical inconsistencies that would reasonably leave one with the conclusion that OG's evidence was unreliable. There were inconsistent testimonies as to the

vehicle in question and whether OG exited it from the rear or front passenger side. Further inconsistencies arose as to the time she stayed at the Recreation Centre after the incident and whether or not her cousin CT accompanied her all the way home and was then driven to her own home by one of OG's parents.

[13] Additionally, OG's reluctance to go to the hospital was promoted more by fear of forensic confirmation that no sexual intercourse had occurred rather than fear of contracting a sexually transmitted disease. In short, OG was untruthful and even if her testimony was distraught there were too many unanswered questions that raised reasonable doubts to ground a solid foundation for any convictions.

Findings of Facts and Analysis

[14] I am mindful that the offence of sexual assault is an assault within the definition stated in the ***Criminal Code*** s.265. This type of assault is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. In ***R.v. Ewanchuck*** (1999), 131 C.C.C (3d) 481 (S.C.C.), the Supreme Court of Canada formulated the constituent elements of sexual assault at paras. 23 and 25 as follows:

> 23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being

> reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.
>
> 25 The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any mens rea with respect to the sexual nature of his or her behaviour: see R. v. Litchfield, [1993] 4 S.C.R. 333, and R. v. Chase, [1987] 2 S.C.R. 293.

[15] Further, the third element is stated in para. 26 as follows:

> 26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see R. v. Jensen (1996), 106 C.C.C. (3d) 430 (Ont.C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, R. v. Park, [1995] 2 S.C.R. 836, at p. 850, per L'Heureux-Dubé J., and D. Stuart, Canadian Criminal Law (3rd ed. 1995), at p. 513.

[16] In argument, both counsel submitted and strongly suggested that the main issue to be determined was one of the credibility and reliability of OG's narrative of the event. In ***R.v. O.J. M,*** [1998] N.S.J. No.362, concerning the credibility of witnesses, this Court opined para.35 as follows:

> 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.

[17] Also on the point, as was expressed 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.

[18] I reiterate the fundamental principle in all criminal cases as was stated in ***O.J. M,*** supra. , at paras: 31-32:

> 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 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.

[19] Here, it seems to me that from OG's narrative, things were either what she said had occurred or they were not. Also, they neither were as she related it nor appeared to be or they were as she related it and do not appear to be. Further, they were not as she related it but appeared to be. I say so as I find that through it all there was a sequence of events, as she described them, that were "in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions" and therefore evoked an air of reality.

[20] I am reinforced in this view as overall her testimony is considered to be true. This becomes pertinent as, here, in the absence of any evidence to the contrary or any other credible evidential opposing viewpoints, balancing and weighing her narrative solely on its own for its own credibility and reliability was at best tenuous as there were not available for analysis any discrepancies between versions of opposing sets of facts. Further, in my view, the strong reliance on the inherent unreasonableness of one set of facts that revealed an obvious error that was never corrected, to sustain the total unreliability of

her narrative, does not logically follow that all that OG related was untrue.

[21] Even if I were to find that her narrative concerning the physical act of sexual intercourse, as she described it, appeared to be physically improbable from a commonsensical point of view and which was never corrected to rehabilitate her credit on that point, the fact remained that she, nonetheless, described an act of non-consensual sexual touching which was not contradicted. The degree of the touching is immaterial. Thus, I think that there appears to be a rational connection between OG's contact with SOD, as she described, and the observations made of her by her cousin, CT - crying and shaking - after she arrived at the Recreation Centre.

[22] Nevertheless, although OG's testimony does not need corroboration I also think that there ought to be evidence from some other source that would persuade me that she is telling the truth and which strengthens my belief in her truthfulness. It need not confirm that the events took place. See: ***R.v. Vetrovec***, [1982] 1 S.C.R.811; ***R.v. Marquard***, [1993] 4 S.C.R. 223 at paras: 19-20. Here, however, I find that the observations of her cousin, CT, and her report to her after arriving at the Recreational Centre, were consistent with someone who had experienced an emotional event, and this piece of evidence, in my opinion, would satisfy the established rule.

[23] I should say, further, that in my opinion, her described details of the physical act of him putting his penis into her vagina were 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." Moreover, when I considered this factor with her unexplained reluctance to seek medical intervention, evaluation and assessment, and, coupled with her lack of cooperation when her cousin, AG, eventually, four days later, took her to the hospital, I think, from a practical and informed viewpoint, was inconsistent with the action of an individual who, in those set of circumstances, had experienced the violation of her sexual integrity and who would be concerned about its probable consequences. Even so, I think that to view, in its entirety, her testimony as negative and stereotypical because of these apparent internal incongruities is wrong in principle. See: ***R.v. W(D)***, *supra*.

[24] Furthermore, in my opinion, a reasonable inference that could be drawn from the set of circumstances of SOD inviting OG into his vehicle and to drive her to a dark and secluded location, at that time of night, was that his intention was to engage in an activity away from any probable interference. It is further reasonable to conclude, in the absence of any evidence to the contrary, that the commonsensical presumption would be that he intended the natural and probable consequences of his acts.

[25] Thus, I conclude and find that, on the night in question, OG was neither unopposed to nor uninterested in SOD's invitation to enter his vehicle. Nonetheless, I accept and find that she was, in the circumstances, nervous but was neither afraid nor terrified. SOD's intentions for the invitation were

clear and can readily and reasonably be inferred from OG's testimony. Here, OG testified that when they stopped SOD started to touch her under her shirt and over and under her bras and grabbed her breasts. She told him to stop and pushed him away but he insisted. She was shocked and confused but did not change her mind throughout the encounter. She was firm that she did not want to be touched but he suppressed her resistance to his sexual advances by forcibly pinning her hands above her head. Thus, I conclude and find that she did not consent freely to SOD touching her in a sexual manner.

[26] Having said that, however, her consent to any sexual activities, if at all, as a result of the ***Criminal Code*** s. 150.1, cannot be considered, in law, as a defence to these allegations. SOD neither testified nor called any evidence on his behalf. Nonetheless, it must be clear that he is not obligated to do so and that I have drawn no adverse inferences from him not testifying. He not only has the right to remain silent but also the onus is and remains with the Crown to prove his guilt beyond a reasonable doubt. On the face of it, however, the defences of consent and as well that of the mistaken belief that OG was more than sixteen years of age, even though not raised explicitly, or at all, but tacitly suggested and which could be inferred from the total circumstances, I find has limited or no application to the sexual activities that are the subject -matter of these charges.

[27] It is my opinion that, on the evidence, it has been established, and, I accept and find that at the time of the complained of events OG was fifteen years old and SOD is more than five years older than her and in not married

to her. Additionally, there was no direct evidence concerning SOD's belief with respect to OG's age. Thus, those defences, if at all were to have been submitted, directly or inferentially, I conclude and find would have had no applicable efficacy.

[28] SOD has raised an issue surrounding his identification. He attempted, through counsel, to show, through her cross-examination, that OG was mistaken as to his identity on the night in question. This was so as the vehicle that she described differed to that which she saw and associated him with on other occasions. (Tendered as Exhibit No. 2). There were also some issues concerning what, if any description she gave to the police concerning SOD to view a forensic photographic line-up. She stated that she could not remember what she told the police. However, it seems to me that this point was vitiated by the prior agreements between the parties concerning the submission into evidence of the photographic line-up photographs, without need of proof, and that which was numbered 4 was a photograph of SOD.

[29] In any event, OG, however, in my opinion, was not shaken in her description of and the certainty of the car that she entered. Likewise, she was certain that it was the accused who was driving and who invited her into the vehicle and who engaged in the activities of which she has complained. There was no contrary credible evidence, or at all. Thus, I accept and find accordingly.

[30] Admittedly OG was a difficult witness. I find that she tended to be

disputative, rude and contentious. Likewise, I find that she was reluctant and unresponsive to critical questions and even was unintentionally misleading on an ancillary fact to support her narrative of the events. True, she was inconsistent on some details but I find that those inconsistencies did not impair or diminish unduly the creditworthiness of, even under vigorous cross-examination, her core testimony of what she related did occur. In all the circumstances, I find that, notwithstanding its somewhat discontinuous delivery, her testimony when considered and assessed with the total evidence disclosed an incontrovertible sequence of events that resonated with an air of reality and overall was reliable. I so find. In any event, it seems to me and I find that the total evidence is consistent with the conclusion that SOD and OG did engage in some sexual activities.

[31] From the total evidence, I am satisfied that there is no reasonable doubt and I accept and find that it was the accused SOD who picked up the complainant OG in a vehicle on the night in question. Additionally, I do not doubt and I accept and find that SOD drove his vehicle to a dark and secluded area and that he, against OG's wishes, intentionally touched her under her shirt on the top and under her bra and grabbed her breasts, in circumstances that a practical and informed person would readily and reasonably recognize and conclude was sexual in nature. As a result, I conclude and find that this intentional touching violated OG's sexual integrity.

[32] The Crown, in argument, suggested that OG had "no axe to grind," and consequently she was truthful. However, I am mindful of the words of Rowles

J.A., in ***R.W.B.***, [1993] B.C.J. No.758 (B.C.C.A.), at para 28:

> 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 a 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 of the other evidence presented

[33] Likewise, this Court opined in ***R.v. D.A.B.***, [2002] N.S.J.No.512, 2002NSPC 35 at para. 11:

> 11 Here, I think that we should also remind ourselves that evidence of a complaint of sexual assault is never evidence of the facts complained of as the complaint cannot support the complainant's testimony. From this proposition I think that the best that the prosecution can expect is that I accept the complainant's prior statement only as part of her narrative and nothing more. R. v. Ay (1994) 93 C.C.C. (3d) 456 (B.C.C.A.), R. v. O.B. [1995] N.S.J. No. 499 (C.A.).

[34] As I observed OG as she testified I formed the impression that she did not want to relate or to testify about the incident. Hence her demeanour as I have described. The fact of whether or not he put his penis into her vagina I find, on her own testimony to be troubling. Her testimony, on that point, in my view, had commonsensical and obvious errors or inaccuracies that were never corrected by further questioning to clarify or to explain it and which, without the presentation of further extrinsic evidence, would have little or no probative value. She related that they were in a Sunfire motor car and that he climbed

over the driver's seat and sat on top of her while she was still seated in the front passenger's seat. Her legs were, "like, closed, and he had his knees, like, on either side of my legs." He was holding both her arms with one hand over her head and with the other hand he pulled her jogging pants and underwear, at the same time, to or just past her knees. Likewise, he pulled his own pants down in the same fashion. All this, on the evidence, while he was sitting on top of her with his knees on the outside of her closed legs and holding her hands in the air and she was still seated.

[35] There was no evidence that she had shifted her position in the seat or that he forced her closed legs open. The evidence was conspicuous for its lack of details and bodily sensations that a person with OG's knowledge, as disclosed by the Crown's evidence, and which, in my opinion, neither infringed nor violated the ***Criminal Code*** s.276, who had undergone the experience would easily and readily recount. Furthermore and significantly, her first text message to her cousin, AG, who was also her confidant, was a query rather than a complaint that she was sexually assaulted.

[36] Thus, in all the sets of circumstances and on the total evidence, and applying ***W(D),*** and other authorities on the issue of credibility, I am uncertain whether penile penetration did occur. With all respect, I find that aspect of her testimony lacked congruence and perhaps was an unintentional exaggerated suppression of the truth. Nevertheless, on the evidence presented, I find that the Crown has not proved this fact beyond a reasonable doubt.

[37] The evidence concerning her inability to get out of the vehicle covered only the time when she arrived at the Recreation Centre. This was after the events before and at the secluded location. She testified that she was unable to get out of the vehicle and the door would not open because: “It was like child lock.” As a result, SOD “came around and opened it,” and she got out and went to meet her cousin, CT. She also stated that she did not try to get out of the vehicle on any previous occasion before SOD dropped her off at the Recreation Centre. However, in cross-examination, she stated that she tried once to open the door and it was locked and that she was not, “going to try to keep opening it . . . if it didn’t open once.”

[38] In ***R.v. Gratton,*** [1985] O.J. No 36 (Ont. C.A.), the Court endorsed a definition of unlawful confinement as follows:

> Reliance was placed upon Regina v. Dollan and Newstead (1980), 53 C.C.C. (2d) 146 at p. 154 where Dupont J. stated:
>
> > Without attempting to define the interpretative interpretative limits of the term, I have concluded that a total physical restraint, contrary to the wishes of the person restrained, but to which the victim submits unwillingly, thereby depriving the person of his or her liberty to move from one place to another, is required in order to constitute forcible or unlawful confinement. Such confinement need not by way of physical application of bindings.
>
> This definition of confinement is excellent with on reservation. In my view the word "total" should be deleted, for there is nothing in s. 247(2) which would require the total physical restraint of the victim in order to constitute the offence.

[39] Here, the Crown's theory was that OG could not escape because SOD had engaged the child-lock to deliberately prevent her from leaving the vehicle. I noted that when she was observed getting out of the vehicle it was from the rear passenger side and that child-locks are usually on the rear doors of vehicles. In her direct examination she stated that she neither made any attempts to open the car's doors nor to leave the vehicle or that she was prevented from doing so by any actions of SOD when they were at the secluded location. Her statement during cross-examination was not only inconsistent but it also left me in doubt as to her truthfulness on this point.

[40] Furthermore, she never said that she felt confined by being unable to open the door because the child-lock was presumably engaged. It should also be noted that SOD did let her out of the vehicle, from the rear passenger side, when she could not open the door from the inside. Thus, I am not persuaded by OG's testimony that she felt at anytime to be confined against her will. Therefore, on the evidence before me, I conclude and find that the Crown has not proved this fact beyond a reasonable doubt.

Conclusion

[41] On the total evidence and on the above analyses I conclude and find as follows:

(1) Count 1 - sexual assault of OG contrary to s.271 (1) (a). The intentional touching and grabbing of OG's breasts against her will in a sexual manner and which interfered with her sexual integrity was a sexual assault. I therefore find SOD guilty of this offence as charged.

(2) Count 2 - unlawful confinement of OG contrary to s. 279 (2). The Crown has not proved this offence beyond a reasonable doubt. I therefore find SOD not guilty as charged.

(3) Count 3 - sexual touching of OG a person under the age of sixteen years contrary to s. 151. It is the same conduct that forms the basis for the conviction and punishment under s.271 (1) (a). There is a factual and legal nexus between the offences. I will therefore apply the ***Kienapple*** rule [1975] 1 S.C.R. 729, and enter a conditional stay on this count.

[42] That is the decision of this court.

J.