PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. A.J.D.*, 2016 NSPC 74

Date: 2016-12-05
Docket: 2496126, 2496127
Registry: Halifax

Between:

Her Majesty the Queen

v.

A.J.D.

Restriction on Publication: s. 486.4 of the Criminal Code of Canada

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Judge Paul Scovil
Heard:	August 8, 2016 and October 18, 2016, in Bridgewater, N. S.
Decision	December 6, 2016
Charge:	Sections 151 and 271(1) of the Criminal Code of Canada
Counsel:	Michelle MacDonald, for the Public Prosecution Robert Chipman, for the Accused

s. 486.4 CC – A bon on publication of any information that would disclose the identity of the victim and/or complainant

By the Court:

[1] The laws of Canada regarding sexual activity with someone under the age of 16 are there to protect our children from sexual activity which our society has conceded someone under the age of 16 does not have the capability and maturity to consent to sex with someone who is more than five years older than they are. There is the defense of an accused who has taken all to ascertain the age of a complainant and they honestly believe the complainant is an age at which they can consent to sex. This does not amount to defence of 'don't ask, don't tell'. For the reasons below I find that A. D. did not take all reasonable steps to ascertain the age of the complainant and I have found him guilty of the offences for which he is charged.

Facts:

[2] S.L. was born on October […], 1996. At the time of these offences she was 15 years of age. She attended […] area middle school and was in grade 8. She usually went to school by bus.

[3] S.L. as introduced to Mr. D. by mutual friends. She met him prior to Christmas of 2011 at a time when she was 14. She testified that she and D. spent a

lot of time together several days each week. Sometime between February and the end of March 2012 the relationship became sexual.

[4] S.L. described talking about everything in her life with Mr. D.. These conversation included their respective ages. She described having sex, both at Mr. D.'s home and at Mr. D.'s sister's home. She described Mr. D. as having said, prior to her turning 16 but after having sex, that they should have waited until she was 16. She testified that they engaged in sex even after Mr. D. said they should have waited.

[5] The complainant indicated the police became involved, not by her reporting the matter, but rather health authorities after she had sought treatment for a sexually transmitted disease. When she spoke to police she denied having had sex with the accused during the time from the incident. She testified she was not truthful to the police as she was scared, was trying to protect D. and she had been threatened. She felt she loved the accused.

[6] She described how Mr. D. and a friend had to drive her to her school after she had missed the bus while staying at his home.

[7] Under cross-examination, she agreed she hung out with older friends. These were acquaintances she shared with the accused. She also agreed that she drank alcohol while with these same people.

[8] S.L. agreed that in her statement to the police she advised them the accused thought that she was 16. She denied that she ever led the accused mother, L. C. to believe she was 16. Further, that C. knew she attended […] School.

[9] In re-direct, she confirmed that what she had told the police was not truthful as she did not want the accused to get in trouble.

[10] As part of the Crown's case, they introduced the statement of A. D. which he provided to the police. In his statement he admitted sexual intercourse with S.L. during the time frame of the information but that he thought she was 16 years of age.

[11] He stated the more he got to know S.L. the more that he found out she was 15. He further added that he and S.L. had sex before he found out how old she was. He stated however, "Every time friends would say she was 15 I'd look at her and she would shake her head".

[12] Mr. D. admitted to having sex with S.L. and stated it was in February or the beginning of March, 2012. At the end of the statement the investigating officer

advised Mr. D. that ‘you need to be sure of these things’. D. replied, “I’m going to start asking”.

[13] A. D. called his mother, L. C. to testify. She hired S.L. to work […] of Nova Scotia. S.L.’s employment began in […] and ended in […]. Ms. C. stated she told her she was 16 but that she never requested proof of age. C. also advised S.L. appeared mature for her age.

[14] Mr. D.’s sister took the stand. A. D. is 23 and lives in the […] area. S.L. attended the same parties and hung around with her. Ms. D. reported seeing S.L. consuming alcohol. Ms. D. testified that S.L. never mentioned her age; that she believed S.L. was 16; that she most likely told her she was 16 and that she and S.L. never discussed S.L.’s age. Ms. D. denied ever having driven S.L. to school.

[15] A. D. took the witness stand on his own behalf. He was born on September […], 1990. He was 21 when the offences occurred.

[16] He admitted having sexual intercourse with S.L. on only one occasion. He stated he never paid attention to age laws and never had a discussion with S.L. about her age. He indicated he saw S.L. regularly over the period covered by these charges.

[17] D. testified he thought S.L. was over 16 because she drank, smoked marijuana and had developed breasts. He also knew she worked for his mother.

[18] When asked in direct evidence, he agreed with the contents of the statement he had given police and which was entered as Exhibit Number 1.

[19] D. stated in his direct evidence that S.L. was not telling him anything and that she did not tell him she was 16.

[20] In cross-examination the accused denied any conversation with S.L. in which she gave her age. He did say that he told her they should wait until she was 16 to have sex. Later in his cross-examination, he stated S.L. told him "right off the bat" that she was 16.

Law:

[21] As indicated, the accused is charged under both section 151 and 271 of the Criminal Code regarding the sexual activity he had with the complainant. The accused argues that he has a defence of honest but mistaken belief that the complainant was 16 years of age or older.

[22] Section 151.1(4) of the **Criminal Code** states as follows:

> (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

[23] Here the accused argues that the had an honest but mistaken belief that S.L. was 16 years of age at the time of the sexual encounter and further that he had taken all reasonable steps to ascertain the age of the complainant.

[24] The defence, as put forward by the accused, was examined by Justice Laskin of the Ontario Court of Appeal in *R. v. Duran*, 2013 ONCA 343. There Justice Laskin stated:

> **51** The trial judge should first have told the jury it was the appellant's position that he honestly believed the complainant was over 16 years of age; and the trial judge should have reviewed the evidence for and against that position: see *R. v. Wasser*, 2010 ONCA 429, at para. 13. But, as the appellant's subjective belief was not determinative, the trial judge should then have instructed the jury on whether the accused's belief was objectively reasonable and specifically on whether the accused took all reasonable steps to ascertain the complainant's age.
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> **52** What constitutes "all reasonable steps" depends on the context of the circumstances. There is no automatic checklist of considerations applicable to every case. Indeed, in some cases, an accused's visual observation of the complainant may be enough to constitute reasonable steps.
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> **53** In this case, the trial judge should have instructed the jury to determine whether what the appellant knew and observed about the complainant were all the steps a reasonable person needed to take or whether a reasonable person ought to have made further inquiries. In making that determination, the jury should have been told to take account of the following considerations and the evidence on them: the accused's observation of the complainant; the complainant's appearance and behaviour; the information the complainant told the appellant about

> herself, including any information about her age; and the age differential between the appellant and the complainant.

[25] The defense was further considered by the Ontario Court of Appeal in *R. v. Saliba*, 2013 ONCA 661, at paras. 27 and 28. There Justice Doherty stated:

> **27** Under generally applicable criminal law principles, a belief that a person is old enough to consent, or, more accurately, a reasonable doubt as to the existence of that belief, would be enough to lead to an acquittal, assuming the complainant had been a willing participant in the sexual activity. Parliament, however, by enacting s. 150.1(4), has limited the availability of the "honest belief" defence to cases where the accused has taken "all reasonable steps" to ascertain the age of the complainant.
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> **28** As explained in *R. v. Dragos* (2012), 291 C.C.C. (3d) 350, at paras. 29-33 (Ont. C.A.), s. 150.1(4) mandates an inquiry akin to a due diligence inquiry. The trier of fact must compare the steps, if any, taken by an accused to determine the true age of a complainant with the steps that a reasonable person would have taken in those circumstances. Of course, unlike the more familiar due diligence inquiry, the s. 150.1(4) analysis does not place any onus on the accused. The onus is on the Crown to prove beyond a reasonable doubt that all reasonable steps were not taken: *Duran*, at para. 54.

[26] In *R. v. Tannas*, 2015 SKCA 61, the Saskatchewan Court of Appeal considered s. 150.1(4) of the **Criminal Code** as follows:

> **21** Fifthly, to invoke the defence of mistake of facts, the defendant must meet the minimum evidentiary burden of establishing the defence has an "air of reality" to it: *R v Pappajohn*, [1980] 2 SCR 120 at 133. Where a defendant's act would be lawful according to the facts as the defendant believed them to be, the defendant does not have the necessary criminal mind *(mens rea)* and ought not be punished for that act. In this way, the defence of mistake of fact is more properly seen as a negation of guilty intention *(mens rea)* than as affirmation of a positive defence: *R v Pappajohn, per* Dickson J. (as he then was) at p. 148. On this point, the judge found Mr. Tannas had held an *honest belief* C.W. was at least 16 years old and the Crown has not taken serious issue with that finding.

> While this might logically seem to end the matter, it does not - - by reason of s. 150.1(4) - - rather, this is where the analysis must begin.

[27] They went onto say:

> **23** In *R v Levigne*, 2010 SCC 25 at para 31, [2010] 2 SCR 3, when considering a parallel provision under s. 172.1(4) of the *Criminal Code*, the Supreme Court said the 'reasonable steps' requirement "was enacted by Parliament to foreclose exculpatory claims of ignorance or mistake that are entirely devoid of an objective evidentiary basis". In *R v Slater*, 2005 SKCA 87 at para 23, 201 CCC (3d) 85, in reference to the parallel provision under s. 150.1(5), Jackson J.A. said it "was added to test the foundation of an honest belief". What this means is that if a defendant's honestly-held but mistaken belief as to a consenting complainant's age is *objectively* reasonable on the evidence before the court (*i.e.*, because the defendant has taken all reasonable steps to ascertain the complainant's age), then the defendant's mistake as to the complainant's age effectively negates the *mens rea* element of the offence.
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> **24** In ordinary terms, this means the evidence must bear out a defendant's honest belief that the complainant was over 16 years of age (*i.e.*, legally able to consent). If it does, then it cannot be said the defendant *intended* to have sex with a minor.
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> **25** In terms of trial, the court's inquiry into the nature of a defendant's belief plays out as a procedural onus on the Crown to prove beyond a reasonable doubt that the defendant has filed to take all reasonable steps to ascertain the complainant's age (see: *R v Mastel*, 2011 SKCA 16 at para 14, 268 CCC (3d) 224, and *R v Slater*, at paras. 14-15). If the Crown fails to prove this, then the defendant is entitled to an acquittal: *R v Osborne* (1992), 17 CR (4th) 350 at 360 (Nfld CA). As one might expect, exactly what constitutes 'all reasonable steps' will vary from case to case depending on context and circumstances: *R v Duran*, 2013 ONCA 343 at para 52, 306 OAC 301; *R v. Dragos*, 2012 ONCA 538 at para 32, 291 CCC (3d) 350. But, in *R v Mastel* at para. 21, Lane J.A., relying on R v Osborne, said, "[t]he requirement the accused take all reasonable steps is 'more than a casual requirement. There must be an earnest inquiry or some other compelling factor that obviates the need for an inquiry'". The goal being to determine whether there is a reasonable doubt as to the defendant's belief or as to whether the defendant took all reasonable steps to ascertain the complainant's age.

> **26** In its assessment of this, a court will look to the circumstances and measure the steps that were taken by the defendant to ascertain the complainant's age against the steps that a reasonable person would have taken to do so in the same circumstances: *R v L.T.P.* (1997), 113 CCC (3d) 42 at para 20; *R v Saliba* at para. 28; and *R v Dragos* at paras. 29-33. And, if the court finds a *reasonable* step was not taken by the defendant, the defence of mistake of fact will not be available to the defendant, even though it might have an 'air of reality' to it. What this means- -in practical terms- -is that anyone intending to engage in sexual activities with someone who *might* be under 16 years of age must earnestly consider and then take all steps that might be reasonable in the circumstances to ascertain that person's age.

[28] The provisions of section 150.4 were further considered by His Honour Judge Hewson of the British Columbia Provincial Court in *R. v. Hubert*, 2016 BCPC 288 whom stated:

> **33** The British Columbia Court of Appeal considered the defence of honest but mistaken belief that a complainant was of the **age** of consent, in circumstances where section 150.1 (4) applied, in the decision of R. v. L.T.P., [1997] B.C.J. No. 24 (BCCA). At the time of that decision, the **age** of consent was 14. At paragraph 19, the Court held that for the defence to succeed, the accused must point to evidence which raises a reasonable doubt that the accused held the requisite belief and in addition, evidence which gives rise to a reasonable doubt that the accused took all reasonable steps to ascertain the complainant's **age**. In paragraph 20, the Court considered what evidence might give rise to such a reasonable doubt. It said:
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> > 20 In considering whether the Crown has proven beyond a reasonable doubt that the accused has not taken all reasonable steps to ascertain the complainant's **age,** the Court must ask what steps would have been reasonable for the accused to take in the circumstances. As suggested in R. v. Hayes, supra, sometimes a visual observation alone may suffice. Whether further steps would be reasonable would depend upon the apparent indicia of the complainant's **age**, and the accused's knowledge of same, including: the accused's knowledge of the complainant's physical appearance and behavior; the ages and appearance of others in whose company the complainant is found; the activities engaged in either by the complainant

> individually, or as part of a group; and the times, places and other circumstances in which the complainant and her conduct are observed by the accused. The Court should ask whether, looking at those indicia, a reasonable person would believe that the complainant was 14 years of **age** or more without further enquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her **age**. Evidence as to the accused's subjective state of mind is relevant but not conclusive because, as pointed out in R. v. Hayes at page 11, "[a]n accused may believe that he or she has taken all reasonable steps only to find that the trial judge or jury may find it differently".

34 In R. v. Osborne, [1992] N.J. No. 312 (Nfld C.A.) at paragraph 62, the Newfoundland Court of Appeal concluded,

> ... Parliament requires more than an **honest belief**; it requires a belief resulting from the taking of "all reasonable steps to ascertain the **age** of the complainant". Parliament made the act a crime and expects of citizens engaging in sexual activity with young people to make a reasonable effort to ascertain the age of prospective partners. It is more than a casual requirement. There must be an earnest enquiry or some other compelling factor that obviates the need for an enquiry.

35 More recently, in the case of R. v. Saliba, 2013 ONCA 661, the Ontario Court of Appeal underlined the importance of maintaining a distinction between the accused's state of mind with respect to the **age** of the complainant, and the steps that a reasonable person would have taken in the circumstances to ascertain the complainant's **age**.

[29] In addition to the above noted comments regarding 150.4 of the **Code**, I must also keep in mind the matter before this also depends on the law relating to credibility. Wrapped up in that is an examination of credibility of both the accused ant the complainant.

[30] It is fundamental in this case, as in all cases before the criminal courts, that the burden of proving the guilt of the accused rest squarely on the prosecution.

Before any accused can be convicted of an offence the court must be satisfied beyond any reasonable doubt of the existence of all the essential elements of the offence. (see *R. v. Vaillancourt*, [1987] 2 S.C.R. 636). This principle of reasonable doubt applies to the issues of credibility as well as it does facts. (see *R. v. AY*, [1994] B.C.J. No. 2024 B.C.C.A.)

[31] It is imperative, as well, that the trier of fact in these type of cases to keep at the forefront of his mind the definition of reasonable doubt as set out by the Supreme Court of Canada in *R. v. Lifchus*, [1991] 2 S.C.R. 320.

[32] In cases such as this, the Court must not view it as being simply an either or choice between the evidence of the complainant and that of the accused. To do that would be abandoning the principles of ensuring that the Crown prove each and every element of the offence beyond a reasonable doubt.

[33] I must also apply, in this case, those principles set out in *R. v. W.D.*, [1991] 1 S.C.R. 742. If I believe the accused in his denial of sexual activity with S.L. I must acquit him. If I am left unsure of whether I believe the accused or S.L., I must acquit. If I disbelieve the accused but his evidence or that of the other defense witnesses leave me with a reasonable doubt, then I must acquit. If I reject the

whole of the evidence of the accused, even then I can convict, I must be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence.

[34] In turning to the assessment of credibility of the witnesses, I must keep in mind the test as set out in *R. v. Faryna and Chorney* [1952] 2 D.L.R. 354 where Justice O'Halloran of the British Columbia Court of Appeal stated:

> 'The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of 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 the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions."

Analysis:

[35] In examining the evidence of the accused, I do not find it credible nor does it give an air of reality to his defence of an honest but mistaken belief of the age of S.L. being 16 when he had sexual contact with her.

[36] In his statement to the police, the accused stated the more he got to know S.L. the more he found out that she was 15. He added that he and S.L. had engaged in sex before he found out how old she was. This, of course underlines the fact that he did not her age before have sex. His statement that, "every time

friends would say she was 15, I'd look at her and she would shake her head", give no support to any theory put forward by the defence of honest but mistaken belief in S.L. being 16 at the time of sexual intercourse. This flies in the face of his testimony that he felt she was 16 and his admission that they should wait until she was 16 to have sex.

[37] Not only is there no air of reality to Mr. D.'s defence there is no evidence that he took any steps to determine her age. While he stated friends had said S.L. was 15, Mr. D. in cross-examination, denied any conversation with S.L. in which she gave her age. Any reasonable person confronted with friends telling them their sexual partner was only 15 would take the further step of having conversations with that partner and ascertain her age.

[38] I am further satisfied that the Crown has proven beyond any reasonable doubt that Mr. D. took no reasonable steps to ascertain S.L.'s age. It is particular important to note that in his statement to police, Mr. D. when advised that, "he needed to be sure of these things", he answered, "I'm going to start asking". This makes it very clear he had not asked before about age.

[39] The evidence of elicited by the accused at trial relating to S.L. working for his mother and that she must therefore be 16 is of little or no impact as S.L.'s

employment at his mother's […] only started after his sexual encounters. Additionally, Mr. D.'s mother stated she only employed kids if they were in school would imply that at least his mother knew that she was in school and which school was being attended.

[40] While the accused testified as to S.L. looking 16 and while other witnesses described S.L. as looking and acting mature for her age, I am satisfied that the accused knew S.L. to be 15 when they were sexually involved.

[41] I still must look at all the evidence before me and determine if any evidence raise reasonable doubt.

[42] In relation to the evidence of the complainant S.L., I find her highly credible. Her demeanor was one where it was clear she was testifying in a straight forward manner. It makes sense that she and the accused would have had many conversations, or as she said, "talked about everything". I accept her evidence that she and the accused during those conversations would have at some point discussed their respective ages.

[43] I also accept her evidence that she and the accused engaged in sex after Mr. D. said they should have waited until she was 16. Mr. D., in cross-examination,

confirmed this conversation. Where S.L.'s evidence conflicts with those of other witnesses, I accept that evidence given by S.L.

[44] In conclusion, I am left with no doubt regarding the guilt of Mr. D. and I convict him on all charges.

Paul Scovil, JPC