PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Carson*, 2020 NSPC 58

Date: 20201029
Docket: 8271278
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Glen Carson

Restriction on Publication: s. 486.4 *Criminal Code*

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	April 18; Nov. 23; Nov. 29, 2019; Oct. 14, 2020, in Bridgewater, Nova Scotia
Decision	October 29, 2020
Charge:	s. 271 *Criminal Code*
Counsel:	Roland Levesque, for the Crown Michael Power, Q.C. for the defendant

Order restricting publication — sexual offences

- **486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

    (a) any of the following offences:

        (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

        (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

    (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court (orally):

Overview:

[1] Mr. Carson, a restaurant manager, is charged with sexual assault contrary to section 271 of the *Criminal Code of Canada*, arising from placing his hand on the buttock of a female employee. Mr. Carson does not dispute the touching but says it was his knuckle, not his hand, that accidentally grazed her. It was certainly not, he says, done for a sexual purpose.

[2] Two restaurant cooks claim to have witnessed the incident and described it as inconsequential contact rendered almost inevitable in the close quarters of the restaurant.

[3] This case was in many respects quite straightforward. There were appropriate concessions by the defence including identity, date, and jurisdiction. The Crown called two witnesses in the case in chief, the arresting officer, Cst. Sparrow, and Mrs. A., the complainant. The defence led a robust case with seven witnesses including Mr. Carson. They called restaurant cooks Michael McNeary, Andrea Witzke, Genieve Boislard, and Kirsten Stewart, and waiter, Ethan May-Denee, as well as Ms. Wilma Raymaakers, Mr. Carson’s business partner.

[4] After hearing the defence case, the Crown was granted leave to call rebuttal evidence from two former employees who testified that touching was *not* inevitable in the restaurant.

Issues:

[5] The Crown and defence appear to agree there are three essential issues for the Court to consider:

1. Determine the nature of the touch,
2. Was it done for a sexual purpose,
3. Determine if it occurred through accident without the necessary *mens rea*.

General Criminal Trial Principles:

[6] Mr. Carson benefits from the presumption of innocence. The Crown bears the heavy burden of proving his guilt beyond a reasonable doubt. That onus never shifts to Mr. Carson, asking him to instead prove that he did not commit the offence.

[7] That said, proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or

frivolous doubt" (*R. v. Lifchus*, [1997] 3 S.C.R. 320) Instead, the burden of proof lies "much closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, [2000] 2 S.C.R. 144).

[8] Finally, a "reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt". (*R. v. J.M.H.*, 2011 SCC 45)

[9] The Court cannot assess the evidence in a piecemeal fashion, rather it must consider the whole of the evidence. The Court cannot reduce a trial to a credibility contest simply preferring one side to that of the other.

[10] I can accept some, none or all of what any witness says and will do so through the lens of reliability and credibility assessments. There is an important distinction between these two concepts. Credibility assessments ask the Court to consider the veracity or truth of witness testimony, while reliability assessments consider the accuracy of testimony.

[11] More particularly, accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If a witness' evidence on an issue is not credible, she cannot provide reliable evidence on points in issue. However, a

credible witness may give evidence that is unreliable, as in the case of mistaken eye-witness identification observation, where circumstances such as having only a brief opportunity to observe render an honest belief unreliable.

[12] The analysis must of course focus on the nature of the charge.

The Law:

[13] Section 265(1) of the *Criminal Code* says an assault occurs when a person, without the consent of another person, applies force intentionally to that other person directly or indirectly. Case law has clarified the hallmarks of assault. It arises from the least touching, the strength of which is immaterial, it must not be done by accident or through honest mistake, and it must relate to the application of the force or the manner in which the force is applied. (*R. v. Dawydiuk*, 2010 BCCA 162, *R. v. Palombi*, 2007 ONCA 486, *R. v. Ewanchuk* , 1999 SCC 711, *R. v. George*, [1960] S.C.R. 871, and *R. v. Burden* (1981), 25 CR (3d) 283 (BCCA)).

The Essential Elements of the Offence of Sexual Assault

[14] Sexual assault is a general intent offence. Quite simply, it is an assault with additional elements. The Supreme Court of Canada's decision in *R. v. Ewanachuk* remains the leading case on the elements of the offence of sexual assault. The

Crown must prove beyond a reasonable doubt the “two basic elements”, (1) that the accused committed the *actus reus* of unwanted sexual touching, and (2) that he had the necessary *mens rea*, intention to touch the complainant knowing she did not consent. (para. 23)

[15] The *actus reus* is assessed through an objective lens. An absence of consent is subjectively assessed. (para. 25)

[16] Whether touching was intentional requires the Court to consider all the circumstances surrounding the touching including: where the touching occurred, the nature of the contact, any words or gestures that accompanied the touching, and evidence indicating the accused’s state of mind at the time the touching occurred. An objective assessment of whether touching was sexual in nature must also consider the part of the body touched.

[17] It is worth recalling, as stated in *Ewanchuk,* “[c]ases involving a true misunderstanding between parties to a sexual encounter infrequently arise” (para 66).

Consent:

[18] I can dispense with the issue of consent. There is no suggestion Mrs. A. consented to Mr. Carson's touching and no suggestion by him that she did so. There is, however, the interesting underlying suggestion in this trial that somehow working in a tight restaurant renders touching inevitable. While an interesting statement, I will say that in my opinion, there can be no credible suggestion that a waitress in a tight work environment should generally expect to be touched, and certainly not on her buttocks by the hand of her employer. Rather, all employees should expect to go about their workday with others actively respecting their personal space.

The Evidence:

The Restaurant:

[19] Mrs. A. worked as a waitress for four weeks in a local restaurant owned and operated by Mr. Carson. She quit the day after the incident.

[20] After hearing her testify and considering her evidence, I assess this witness as careful and clear in her account. She was indignant and direct about what she says occurred between her and Mr. Carson. Overall, I accept her as credible.

[21] Only after reviewing her testimony and considering that of the other witnesses, did I find her also a reliable witness. Her recollection of events waivered only minutely and while the words she used to describe the touch changed slightly, “grabbed”, “touched”, “brushed”, their import remained the same and conveyed unwanted touching of her buttock that upset her. I now set out the details that form the foundation for reaching my conclusions.

[22] Mrs. A. testified that the restaurant was “usually disorganized”, noting June 24, 2018 was a “really, really busy” day. She says the staff were busy and she recalls Kirsten Stewart was nearby prepping food in the food prep area outside the kitchen, Dylan was cooking, and RD (Mr. Carson’s nickname) was out front with customers. They were all “flying around doing their thing” when the assault occurred.

[23] She drew a map of the restaurant interior to aid her testimony. That drawing was entered as an exhibit and the other witnesses used it to better situate their various work areas, describe the size of the place, and locate various things such as the cash register, refrigerators, the coffee station, and food preparation areas.

The Assault:

[24] Mrs. A. testified that she was in the back of the restaurant coffee area, facing the countertop, drying the silver when Mr. Carson came up behind her. While her back was to him, he reached above her body towards an upper shelf where the glasses were kept. As he did so, she felt his breath and, "just his body next to my body".

[25] She felt his hand grab her right buttock cheek. She said "RD!", and he quietly replied, "Oh, I just touched your butt, are you gonna call the Labour Board?" She said, "Labour Board? It's not the Labour Board you have to worry about RD, it's my husband". She thought Ms. Stewart may have been near enough to hear but was unsure.

Testing Mrs. A.'s recollection:

[26] On cross-examination Mrs. A.'s words changed slightly, Mr. Carson said "I grabbed your butt. You going to tell the Labour Board?", which differs somewhat from what she said on direct examination – suggestive that grab and touched may be synonymous in her mind.

[27] Asked to clarify whether she could distinguish between a "full hand grab", as suggested by her testimony, versus "touched my butt" as she purportedly told the officer in her statement, she replied, "his full hand was on my butt, I could feel

it", further suggesting it was inconsequential to relaying the event whether it was described by her as a grab or a touch.

[28] She elaborated, describing how the touch occurred, saying he reached above her with his left hand and touched her with his right hand.

[29] Pressed further on the language Mr. Carson used, she was asked if she recalled describing the touch as "a brush". She could not. Providing more detail, she could not remember telling the officer "when he brushed his hand, like he put his hand against my butt". But when her statement was played, she readily adopted same, agreeing she did say that.

[30] Asked if she told the interviewing officer that Mr. Carson prefaced his comment with "Oops, I grabbed your butt", she agreed. Asked if "oops" means sorry, she replied it depends on the situation.

[31] She also reconfirmed on cross-examination that RD lowered his voice when he quietly said, "Are you gonna call the Labour Board".

[32] The defence counsel was of course successful in establishing that the exact words spoken may not be relied upon as reported by Mrs. A., however, I find the general nature of the sentiment remained unchanged on direct and cross-

examination – an acknowledgement of touching with the hand and a comment about the Labour Board.

[33] Asked about her testimony that she "felt his body heat", she reconfirmed same, and when asked quickly thereafter if Mr. Carson actually did retrieve a glass, she said, "He sure did", and started to cry. She appeared quite overwhelmed, and while watching her carefully as she testified, I conclude her physical reaction related to the previous question about feeling his body heat.

[34] She confirmed to defence counsel that the reaching, touching, and talking all occurred simultaneously.

[35] Despite what other witnesses would say, Mrs. A. testified that she had never heard him use that phrase. She agreed he said it "jokingly" but added he should not have been in her space.

The Size of the Work Area in the Location of the Assault:

[36] Mrs. A. did not accept the defence suggestion that touching in the coffee area could be accidental or inevitable. While agreeing the coffee area was small, she testified she was not touched by other people who worked there. Nor did she witness bumping between staff in the restaurant.

[37] Her testimony was largely unchallenged in any meaningful way, leaving the Court to conclude as I said above, that she was conveying events as she recalled them credibly and reliably.

Testimony of other Witnesses:

[38] Since the defence rests on accident, defence spent considerable time on this issue.

[39] Accident, for the purposes of the offence of assault, as defined in section 265(1)(a) of our *Criminal Code*, the defence of accident, and this applies as well to s. 271(1) sexual assault, the defence of accident, or unintentional touching is simply a denial of having the necessary *mens rea*, or mental element, for the offence. As a result, there is no onus on Mr. Carson to prove the defence.

[40] Defence witnesses testified about the ability of the staff to negotiate the area behind the dining room and specifically the coffee area. The map drawn by Mrs. A. was generally accepted by all the witnesses as well as the labelled descriptions of the work carried out in various spots.

[41] The coffee area is located behind the cash register and just out of view of customers. This was the location of the assault.

[42] Mike McNeary testified describing the restaurant. His initial answer was interesting and is set out fully here:

> Q. Yes. Can you briefly describe the area that you would have worked in and the other area that...apart from where the public would have been seated... or had access to, could you describe that area to the Court?
>
> A. It's all very close quarters. It's a, a small restaurant with a very small kitchen, small workspaces, so it is very tight quarters. It's very open. The public, the customers can see everything that we're doing. There's very little room that, that's kind of private, out of public view, kind of where we do some of the prep work and the fridges. But there's very close quarters like, to walk.
>
> In the coffee area, there was a little bit more room and you could comfortably work there with two people, but it's still fairly close quarters. You, you still have to say like, I'm here. The other person might be there. You might still be, you know, bumping elbows or excuse me or reach around ...

[43] Asked about the coffee area where the assault is alleged to have occurred, he testified "the coffee area was one area customers could not really see". He also said he "could see it from the kitchen".

[44] Asked about staff contact, he testified as follows:

> [I]t was fairly common and just kind of incidental contact. You'd brush elbows, hips, anything. You'd just kind of brush against each other and, and for the most part it was to the point where you don't even acknowledge it. A lot of times... unless you really kind of bumped someone or they'd give you a look. But, yeah, you would brush against each other or have to kind of... dance and shimmy around sometimes.

[45] The Court summarizes his evidence with respect to the coffee area as follows:

1. It is a little more open than the kitchen.

2. It is out of the public view for the most part.
3. Two people could walk comfortably there “but it is still fairly close quarters”.
4. You still have to say, “like I’m here”.
5. You might still be “bumping elbows or excuse me or a reach around and do stuff”, so there was not a whole lot of room.

[46] Andrea Witzke testified that the coffee area was probably wide enough for her to lie between the cash register and the coffee counter, noting she is 5ft 6 inches.

[47] Colby Brooks described the back of the restaurant generally as “tight”.

[48] Ms. Boislard testified that the back of the restaurant was “close quarters”.

[49] Kirsten Stewart testified that it was a small workplace and sometimes people bumped.

[50] Ms. Raymaakers put in evidence photographs of the restaurant but there was no picture of the coffee area, leaving the Court without a sufficient photographic depiction, so I rely on the various descriptions in the witness testimony.

[51] I find it is fairly noncontentious that the area was small, but there was enough space to work and not be forced to touch another merely by virtue of the size of it. It is important to note that Mrs. A. does not suggest in any event that the touching of her buttock occurred by accident. She believes it was intentional, based on her perception of the flavour of her relationship with Mr. Carson, noting he has said things that she considered suggestive, and how he leaned in and over her into her personal space.

What if anything did the staff observe?

[52] Mr. McNeary and Ms. Stewart testified that they actually saw the touching incident.

[53] Mr. McNeary testified as follows:

1. He “caught a glimpse” of what occurred, noting he does not usually watch everybody to see what they are doing.

2. Believes Mr. Carson was carrying a big grey bus pan “for holding big things”.

3. Mr. Carson walked behind Mrs. A.

4. “And to my understanding, that as he walked behind her, because of close quarters where she was standing, that he did make contact, and brush, I believe, his arm or the back of his hand against her”.

5. He (Mr. Carson) said “Oh, sorry don’t call the Labour Board”.

6. On cross-examination he added both Mrs. A. and Mr. Carson used the words Labour Board.

7. He did not hear “oops, I touched your butt”.

8. Agreed on cross-examination, Mrs. A. said, “not the labour board, my husband”.

9. Described the tub Mr. Carson was carrying as two feet by two feet.

10. Did not agree Mr. Carson reached over Mrs. A. to get a glass.

[54] Kirsten Stewart testified:

1. She saw the incident from the kitchen.

2. Mrs. A. was facing the drink/coffee station, doing something, “I could not see what she was doing. It is irrelevant.”

3. This occurred in the early afternoon.

4. Mr. Carson, “was just walking around and he came right through. He went sideways and I believe she might have turned around a little bit as well. And all I recall is the back of his hand *possibly* grazing her hip at that passing at that time”.

5. His hand may have grazed the side of her.

6. She heard Mr. Carson jokingly say, “call the labour board”, something along those lines or “HR or something”.

7. Says Mrs. A. did nothing, thinks she may have chuckled a bit, but that was it. There was no reaction.

8. Also, on direct examination says she may be mixing two bumping incidents and the witness got emotional. Thinks there were two separate days.

9. Says she, Mrs. A., Mr. Carson, and Mr. McNeary were there in the restaurant that day but knows Mr. McNeary “is not involved in this.”

10. On cross-examination says she saw Mr. Carson go by but “cannot say microscopically if the back of his hand touched the

fabric" of Mrs. A.'s clothes. Adding, "its hard to tell if, you know, that much space is between somebody or not. That's why I said, "its possible".

11. She cannot recall anything in Mr. Carson's hands, but definitely not a large tray, as "he would not be able to get through".

12. Asked if Mrs. A. said, 'not the labour board you need to worry about", she agreed to hearing that, but not a part about Mrs. A.'s husband.

13. She interpreted what she saw as light-hearted joking, agreeing Mrs. A. said something at the end that she did not hear.

Use of the phrase 'Call the Labour Board' and bumping:

[55] All the defence witnesses, except Ms. Raymaakers who was not asked, agreed that this was a phrase frequently used by Mr. Carson in jest. Mr. McNeary says he may have said it himself. Mr. May says he never used it but heard it used jokingly at the workplace.

[56] Some defence witnesses thought bumping at work was inevitable, although only two agreed that buttock-area bumping occurred. None agreed that Mr. Carson

had ever touched them on the butt. Mr. McNeary said, “bumping elbows and hips was common and kind of incidental”, adding he bumped people.

[57] Ms. Witzke says if Mr. Carson brushed her butt it would be of little consequence. She said she left the workplace because he fired her.

[58] Mr. May says people bump into each other in restaurants.

[59] Mr. Brooks agreed and said, “Labour Board” was used jokingly at that place.

[60] Ms. Boislard testified she had slapped workers’ butts while turning around, just apologized and move on. She thinks it happens in every kitchen, and more often when busy. She has heard the labour board comment but did not use it herself. She says she quit the restaurant because of Mrs. A. but offered no elaboration other than to say Mrs. A. was “not professional”.

Assessing the evidence of Mr. McNeary:

[61] After carefully listening, reviewing my notes and the transcript, I cannot accept this witness as credible. His testimony, I found, focused on downplaying the allegation, appearing to shamelessly support Mr. Carson. It appeared surprisingly rehearsed, almost practiced, and it was certainly vague. For example, his broad and detailed answer to describing the restaurant was singularly focused on creating an

impression of people constantly bumping into each other that was not borne out by the testimony of all the witnesses.

[62] That he saw the incident is also suspect. His account did not accord with that of Ms. Stewart, Mrs. A. or even surprisingly that of Mr. Carson. Placing a large tub in Mr. Carson's hand was singularly disturbing, none of the others did so. It is a significant issue to get wrong because it rules out the reaching that Mr. Carson and Mrs. A. say occurred at the time of the touching.

[63] That alone is enough to render his testimony lacking in credibility. I cannot but conclude that he is mistaken on important details because he paid so little attention and therefore did not produce a reliable account, or he was recalling a different incident.

[64] I also found him to be a witness who was focused on protecting Mr. Carson because of the way he answered questions. He says he "caught a glimpse" but does not explain how he could have done so through Mr. Carson's body as he leaned over Mrs. A. to reach up for the glass. I would have to accept that Mr. Carson and Mrs. A. were mistaken to render Mr. McNeary able to see what he claims he saw. This based on his testimony and my observations of the drawing.

[65] As a *caveat* I will say that I should not, at this point in my analysis, and my comments are based on a full analysis of all the evidence, be taken to say that I have rejected what Mr. Carson testified to by making these comments about Mr. McNeary's ability to see.

[66] Mr. McNeary also did not place his memory in context such as saying I saw this the day before Mrs. A. loudly quit and stomped out. Finally, Mr. Carson was still his boss after she left. I simply cannot rule out that he was an interested witness with reason to shade the truth.

[67] Finally, his language was peculiar, "and to my understanding" prefacing his glimpse ultimately rendering his account unreliable. He also did not say why such an inconsequential act, a glimpse, would register so well in his memory.

[68] He was also quick to add on cross-examination for the first time that he heard Mrs. A. say labour board and something about her husband, to the Crown's suggestion.

[69] Mrs. A.'s testimony cannot support the presence of a large tray any more than that of Mr. McNeary. I was almost left to wonder if the incident Mr. McNeary says he observed occurred with a different person or on a different occasion. His choice of words left the Court wondering whether he was relying on a report given

to him or speaking from his own knowledge. In any event, I do not accept his testimony as truthful or reliable.

Assessing Ms. Stewart's testimony:

[70] Ms. Stewart's evidence suffered from some of the same frailties and concerns as that of Mr. McNeary. I was most concerned about the location from which she says she observed the incident. Mrs. A. placed her in the cutting/prep food area off to her left, but Ms. Stewart says she was in the kitchen, presumably with Mr. McNeary, who did not testify about where Ms. Stewart was located. I must wonder how both see the incident, from the small kitchen, at the same time, based on the drawing of the kitchen. I would have to accept they were standing beside each other, watching in a busy restaurant, and saw different things.

[71] I note the location of the grill/stoves would place them back-on to Mrs. A. if they were facing the fryers and the flattop, but face-on if they were cooking. There was no evidence with respect to what they were doing at the time. In any event they saw different things. Ms. Stewart says there was no large tub in Mr. Carson's hands. She says he was just walking, and Mrs. A. may have turned sideways, but she too does not mention the glass or reaching that Mrs. A. and Mr. Carson do.

[72] Her upset was also somewhat inexplicable, and her worry that she was mixing two incidents a bit bizarre and not explained. I heard one trial involving Mrs. A. If there was another, I know nothing of it. But her conflating two events strongly suggested unreliable testimony. I find so.

[73] She also testified as one trying to defend Mr. Carson, her employer. She says Mrs. A. chuckled – nobody else except Mr. Carson said that. Then on cross-examination she is "reminded of Mrs. A. saying something about her husband". This seems incongruous with her direct evidence and contrived to accord with the event she was trying to speak about. I found her lacking credibility. Her reliability is suspect given I cannot accept she was in a position to observe.

[74] I should say that if Ms. Stewart was in the prep area where Mrs. A. places her, she would have had her back to the coffee/drinks area. The other witnesses, as I say, did not see the incident.

[75] Overall, I find it difficult to believe that Ms. Stewart was looking at Mr. Carson and Mrs. A. at the exact moment the brief touching occurred because of the manner in which she spoke of it. I do not accept her testimony that she heard almost exactly what Mrs. A. says she told Mr. Carson at the time.

[76] I am left to conclude that she did not see actual touching. She may have seen the end of an incident when the conversation was continuing and, perhaps, caught her attention at that point when the labour board comment was spoken.

[77] I can find her testimony not inconsistent with an assault occurring as briefly described by Mrs. A., but I find that even if she was present at the time, her misunderstanding over where she was standing, what she may have heard, leads me to believe that the circumstance has allowed her memory to harden into believing that an assault did not occur.

[78] Once again, her crying also caused concern for her veracity. It was inexplicable in the context of an employee who no longer works in a restaurant and seeing such a minor incident as described by her.

Assessing the Evidence of Genevie Boislard:

[79] She says she has bumped other people's butts when turning with something in her hand. She described Mr. Carson as making jokes such as "don't call the labour board", which in her opinion was simply joking around and nothing more. Her evidence suggests it was not unusual to bump into people in the crowded back end of the restaurant. I note she worked in the kitchen area. Of course, bumping into her is not Mrs. A.'s testimony.

[80] She said she wanted to leave her employment of six months because Mrs. A. was unprofessional. But I sense she left for better employment and did not in any event specify what was unprofessional about Mrs. A.'s behaviour at work. Ultimately, she agreed she left sooner than she might have, but for Mrs. A.

[81] I assess this witness as interested and somewhat focused on protecting Mr. Carson. Her vague testimony denigrating Mrs. A.'s work was not supported by examples, so rendered it concerning. Overall, this witness lends little to the case but to point out the close quarters at the back of the restaurant, and that I certainly accept. I assess her evidence as of little weight and not credible.

Assessing the Testimony of Mr. Carson:

[82] Mr. Carson testified and as a result I must apply the three-step test in *R. v. W.D.*, [1991] 1 SCR 742 when assessing his credibility. It is as follows:

i. First, if I believe the evidence of Mr. Carson, obviously I must acquit.

ii. Second, if I do not believe the testimony of Mr. Carson but am left in reasonable doubt by it, I must acquit.

iii. Third, even if I am not left in doubt by the evidence of Mr. Carson, I must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of Mr. Carson.

[83] That three step test was clarified and explored in elaborate detail in an excellent and oft-cited article prepared by Justice David Paciocco of the Ontario Court of Appeal – *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment"* (2017) 22 Can. Crim. L. Rev. 31. At paragraph 72 Justice Paciocco wrote as follows, clarifying the test:

> 1. If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;
>
> 2. If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;
>
> 3. You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and
>
> 4. Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the

> evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

[84] Glen Carson's evidence was short, brief and to the point. It was a busy day, and he was beside Mrs. A. "standing very close to each other", right beside each other basically, in the coffee area. He listed all the many things that were kept there such as creamers, cups, sugar.

[85] He says he was reaching for something and he guesses he moved, and the back of his hand "did touch her buttocks, just the knuckles, for a split second".

[86] He said, "don't call the FBI, the labour board" or "oops sorry, that was the back of my hand". He says she laughed a bit, and he recalls no response.

[87] He says it was an ongoing joke in the restaurant, he said it, and he thinks she laughed a bit. He does not recall her saying anything. He says it was nothing out of the usual, just a busy day.

[88] He touched her with his right hand because he was standing "to her left". Asked about hearing any words from her, he says he did not, but adds he may have taken a few steps away.

Assessing Mr. Carson's testimony:

[89] I assess his credibility through the *WD* lens. His evidence was overall less than clear about what he was reaching for when he touched Mrs. A. I found that peculiar only because it was not fleshed out just where he was reaching. He was not asked if he was reaching under the counter, or over the counter, or even on the counter. I recognize he does not recall exactly *what* he reached for, but surely if he could offer an explanation of the area he reached into this would assist the Court in understanding the nature of the movement of his arm, from his perspective, when he was close and next to Mrs. A.

[90] He does not agree there was a tray in his hand during the touch, but speculated if he had one, he might have set it down before he reached.

Context:

[91] Making a joke after a sexual assault is not something that rules out a sexual assault. Rather, I must look at the words and the context. Mr. Carson says he makes this type of joke all the time, and some employees agreed. Mrs. A. worked at the restaurant for four short weeks and said she never heard it, other than after the incident.

[92] It is a peculiar joke to make, as calling the labour board certainly, objectively, suggests a problem to be addressed. It can certainly also suggest a

certain arrogance about an action, as perceived by Mrs. A., who brought her husband into her reply. Both are objectively reasonable in my opinion.

[93] The suggestion that this occurred in full view of patrons I reject as nobody testified to such. I do not rule out a certain arrogance in committing such a minor sexual assault with risk of being caught. I cannot conclude this necessarily colours an act accidental. Looking at the context of a minor sexual assault of being this nature and the joking atmosphere portrayed by Mr. Carson, it can apply in either case – joke or suggestive of downplaying an assault.

[94] I cannot lose sight of the fact that Mr. Carson is the employer and Mrs. A. the vulnerable employee. She was aware of firings in this workplace, and so am I, based on the testimony of defence witnesses.

[95] I do not believe Mr. Carson's evidence. His testimony was not reliable for the reasons stated. There was no accepted evidence of a reason to connect with Mrs. A.'s body other than general reaching.

[96] My sense was he did not view incidents of touching in the workplace as troublesome. Having said I do not believe his evidence, it does not leave me in a reasonable doubt. He does place himself in the situation described by Mrs. A. but only differently characterizes what occurred there. Other witnesses support the

language he used, and her reaction. It seems to me unsupportable that he recalls a brief touching but not the language surrounding it from Mrs. A. Afterall he was aware of the charge the next day and says he can recall a brief knuckle touch.

[97] Based on careful consideration of all the evidence, but I will say not that of the two rebuttal witnesses, out of an abundance of caution, I find the touch was not an accident. It occurred with his hand, not his knuckle, and it was done for a sexual purpose in the context of a power imbalance between employer and employee.

[98] In reaching this conclusion, I confined myself, because hindsight caused me concern about what could be arguably considered similar fact evidence as led in rebuttal. So, I did not consider the evidence of the rebuttal witnesses […] as I was concerned that there is a need to be fair to Mr. Carson. So, the evidence and the findings of fact that this Court focused on was the evidence called by the Crown in chief and the evidence called by the defence.

[99] After considering all the evidence, as mentioned, assessing the reliability and credibility of each witness, applying the *WD* analysis to the evidence of Mr. Carson and that of the other witnesses, I accept that Mrs. A. was touched in the manner she described and for sexual purpose.

[100] I find you guilty Mr. Carson.