IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***Christopher Clark***, 2003 NSPC 030

Date: 20030702
Case No.(s): 1145968
Registry: Halifax

Between:

R.

v.

Christopher Clark

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally July 2, 2003 in Halifax Nova Scotia
Counsel:	John D. Wade, Q.C., for the Crown Terry D. Kelly, for the Defence

BY THE COURT

Introduction

[1] At home and after a social and eventful evening at a local drinking establishment, in the Halifax Regional Municipality on December 8, 2001, the accused, Christopher Clark, and the complainant, his girlfriend Elaine Tulk, were having an emotional squabble over an earlier incident. She was adamant that he had been flirting with another female at the bar and he was endeavouring to assure her that he had not done so and that she was mistaken. Attempting to express his commitment to her the accused put his hands on the arm and hip of the complainant who antipathetically rebuffed his overtures of endearment. Upset and in anger she declared that their relationship was ended. When the accused refused to leave, on her demand, she left the home, barefooted, and called the police asserting that the accused had assaulted her. Subsequently, the police charged the accused with assaulting the complainant.

Relevant Evidence

(a) for the Crown

[2] At the time of this event, the complainant was thirty-two years old and was dating the accused for five years. When they arrived at the local bar at about 2345 hours on December 8, 2001, the complainant observed another young lady continuously attempting to get the accused's attention. Nonetheless, it was the accused who became annoyed and upset with the complainant because she, the complainant, did not inform the young lady that he was with her.

[3] Returning to her trailer-home at about 0245 hours, and when the complainant entered the kitchen, the accused, who was intoxicated, approached her and, in a rage, grabbed her by the arm, spun her around and called her names. Likewise, he pulled her by her long hair and threw her onto the floor. Concerned by his conduct, the complainant attempted to call 911, but he ripped the telephone cord from the wall. Further, holding on to her arm he would not let her leave the home. In any event, she threw a coffee cup at him that missed and hit the wall, and, leaving the home, barefooted, she went to a neighbour and called the police.

[4] When the police arrived at the home, they found only the accused present. He was cooperative but abrupt. They made no observation about his sobriety but observed that the interior of the trailer was in complete disarray with a table and several chairs "knocked over". Later, in the morning, at 0315 hours, when they interviewed the complainant and she gave them a written statement, the police noted that she was upset and tearful, but observed

no bruises or other visible injuries on her.

(b) for the accused.

[5] The accused testified. He stated that the complainant was his girlfriend for five years. However, it was a relationship that he characterized as one of frequent arguments that were usually provoked by the complainant due to her feelings of insecurity arising from a troubled past. When he arrived at her home to take her out for the evening she was trying on several dresses that she discarded in a disorderly manner on the floor after she had tried them on. Additionally, before they left the trailer-home, they had consumed two beers each.

[6] When they arrived at the local bar, the complainant consumed four more beers and became upset when she observed another young lady flirting with him. She was displeased and, for a while, argued with him about it. On the way home the argument recommenced but with more intensity and each shouted obscenities at the other. Arriving home, they were still arguing and she told him to leave or she would call the police.

[7] In any event, she went into the bathroom and he into the kitchen for he wanted to attempt, as in past similar occurrences, a reconciliation. When she emerged from the bathroom into the kitchen she went to the counter and with her back toward him she began to open a can of tuna. He denied that he pulled her hair. However, he stated that he approached her, from behind on her left side and, with the intent of reconciliation, he placed his hand through her long hair on her left arm and his right arm on her right hip to turn her around to face him. She pushed him away and said that it was " . . . too late for that. Get away from me." He stumbled backward into a chair. They started to argue again and, holding on to the chair for support, because of his impaired motor skills, he applied so much pressure in his grip that he snapped it. She threw a mug at him that glanced off his shoulder and fell to the floor.

[8] Still in a huff, she indicated that she was going to call the police. He, however, did not care if she did. Thereupon, she picked up the phone but quickly hung up and he took it away from her. Still piqued, she stormed out of the home and the accused went to bed. Later, the police awoke him and he told them what had happened. The complainant returned the next day and they continued to cohabit.

Findings and Analysis

[9] On the evidence, I do not doubt that the accused and the complainant were living in a domestic relationship. **R.** v. **S.A.W.**, [2002] N.S.J. No.533, 2002 NSPC 40. However, the accused, in argument, relied upon **R.** v. **Peniston** [2003] N.S.J. No. 29, 2003 NSPC 2, and submitted that, in the case at bar, the de minimus defence was applicable. He further submitted that as there was no potential to cause serious bodily harm, in the circumstances, the accused conduct did not warrant the imposition of criminal sanctions.

[10] Here, we have a situation where it seems to me that because of the issues raised by the accused there always must be a careful balancing between the intentional and deliberate touching of, or the application of force to another, without consent, no matter how minimum the "force" applied or the reason for the touching, and, whether the "force" applied, enhanced by the emotional connotations associated with it and when connected with the circumstance in which it was applied, whether such touching, or the application of "force" should be actionable at the instance of the criminal law. Generally, however, it seems to follow that touching, no matter how gentle, subject to the maxim of de minimus non curat lex, would be considered criminal. See: **R.** v. **Burden** (1981), 25 C.R. (3d) 283 (B.C.C.A.), **R.** v. **Matsuba**, [1993] A.J. No.93 (Alta. Prov. Ct.), **R.** v. **Shand**, [1997] N.S.J. No.524 (S.C.), **R.** v. **Jobidon**, [1991] 2 S.C.R.714, **R.** v. **Robart**, [1997] N.S.J. No.149 (C.A.), at para.10, **R.** v. **Hinchey**, [1996] 3 S.C.R.1128 at para.69.

[11] Applying that principle to the case at bar and on the evidence that I accept, I do not doubt that both parties had consumed alcohol before they left the trailer-home and also at the bar. Additionally, I accept and find that as it is consistent with the probabilities that surrounded the existing conditions, that they both were feeling the effects of the consumption of alcohol. Furthermore, I accept and find that at the bar, it was the complainant who was upset with the accused because another young lady was flirting with him.

[12] These findings are based upon my assessment of the total evidence and on my impressions of the witnesses as they testified. Some of my impressions were that the complainant was evasive and unresponsive to critical questions, particularly in cross-examination. Also, I noted her deliberate pauses; her lack of spontaneity; her lack of background details and relevant information concerning her bodily sensations, as for example when he pulled her hair and threw her to the ground, facts about which one would expect someone who experienced the trauma would know and describe. When I weighed her testimony with the total evidence I was left with the impression, and it was my view, that there were several exaggerated disconnects, internal inconsistencies and lack of contextual coherency that made me cautious in fully accepting her story at face value.

[13] Further, I think that her premise that it was the accused who was annoyed with her because she did not confront the flirtatious young lady at the bar and that her failure to do so caused him later to engage her in a violent and passionate argument, when weighed and assessed with the total evidence, in my view, was " not in harmony with the preponderance of the probabilities which a practical and informed person would readily accept as reasonable in that place and in those conditions." Additionally, in her written statement to the police that she swore was true and accurate, she did not inform them that the accused had thrown her to the ground as she averred that he did, in testimony. Also, she did not inform them of any injuries, as she swore to in testimony had been occasioned by the accused holding her arm. Likewise, the police did not observe any injuries. These unsupported assertions, given the total evidence and my impression of her as she testified, in my view, did not enhance her testimonial creditworthiness. As a result, I was left with the impression that she was

shrewdly combining exaggerations with the partial truth.

[14] Having heard the accused I accept that they had a relationship that was interspersed with continuous squabbles over slights or grievances as perceived by the complainant. Given the emotional dynamics that underlaid their relationship, I find that it is reasonable to infer and I do infer and find, as it is reasonable in that place and under those conditions, that, at the bar, it was the complainant who was upset and piqued by her perceived conduct of the accused and the unknown flirtatious young lady. I accept and find that she did express her displeasure with the accused at the bar and that they then did argue briefly.

[15] Thus, in weighing their testimonies in light of their own conduct, and, given their emotional make up and state of sobriety, I think that it is reasonable to infer and find that, as it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the circumstances, the incident at the bar was still a simmering and unfinished business. Consequently, I accept and find that on the way home they recommenced arguing over the same incident and shouted obscenities at each other. In short, I also accept and find that they were both in a foul and disrespectful mood toward each other.

[16] I therefore think that it was in this atmosphere of temporary mutual disrespect and intense emotions that it is reasonable to conclude and I do conclude and find, as it is in harmony with the preponderance of the probabilities that an informed person would readily recognize as reasonable in that place and in those circumstances given the history of the parties, that the accused, as in past similar occasions, touched the complainant in an act of reconciliation. I accept that they were still being unkind to each other when she was opening the can of tuna in the kitchen. Further, I accept that the accused honestly thought that, given past experiences born from familiarity and with no prior overt objections from the complainant, he could put one hand through her hair unto her arm and the other on her hip in order to turn her to face him. I accept and find that his then touching without her consent, was not in anger, revenge, rudeness, or insolence but could be characterized to be the prelude of an anticipatory reconciliation that was readily recognized by the complainant and which evoked her immediate response, " . . . too late for that. Get away from me." I also accept and find that, to emphasize her then continuing displeasure, she threw a mug at him.

[17] I therefore think that in that context, both the complainant and the accused were knowledgeable of mutual past experiences and each was referring to those experiences but with different assumptive conclusions. The accused assumed that he could make an overture of reconciliation; the complainant was still piqued and was not yet ready to reconcile. On a careful analysis, I conclude and find that she did not object to him touching her before he did so. It was, in the circumstances, something that apparently happened when they were in a tiff. Thus, before he touched her, he was assuming that she would not object to his touch. Furthermore, before he touched her, I found that she was not antipathetic toward him doing so. Therefore, overall and in the context of the subsequent verbal engagement, it was

significant that after he touched her and she expressed her views, even with a historical familiarity, he did not attempt to violate her physical integrity and he respected fully her personal autonomy. In short, I find that he complied with her wishes and neither created nor did anything that had the potential to cause severe bodily injuries.

[18] Moreover, when I considered the total evidence, I do not accept nor find that he pulled her hair or threw her to the ground as alluded to by the complainant. Having heard the accused and assessing his testimony with the total evidence he impressed me as honest and straightforward and, on those points, applying the principles stated in **R.** v. **W.(D.)**, [1991] 1 S.C.R.742, I believed him. Thus, in the circumstances, and on the evidence that I accept, I conclude and find that his touching her was an exceptional case of innocuous behaviour and without the potential to cause severe bodily harm. See: **Robart; Shand**. Consequently, here, I would apply the maxim of de minimus non curat lex to the conduct of the accused.

Conclusion

[19] On my assessment of the total evidence and on my observations of the witnesses as they testified, and weighing each testimony with the total evidence, I conclude and find that the accused did apply force intentionally to the person of the complainant. Nonetheless, I find that in the context and circumstances of the touching, it was innocuous and based upon assumptions historically made in similar situations. Moreover, I find that the touching, in the circumstances, also did not have the potential to cause severe bodily harm and was not done in anger, vengeance, rudeness or insolence. Further, in my view, the conduct of the accused was not so egregious that, in the circumstances of this case, it would warrant the imposition of criminal sanctions. As a result, and, in the circumstances, I will apply the maxim de minimus non curat lex to the conduct of the accused and find him not guilty as charged.