IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. W.H. A., 2011 NSSC 232

Date: 20110613
Docket: CRAT 336695
Registry: Antigonish

Between:

Her Majesty the Queen

v.

W. H. A.

Editorial Notice

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

Restriction on publication: Section 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski.

Heard: May 4, 2011, in Antigonish, Nova Scotia

Counsel: Catherine Ashley and Darlene Oko, for the Provincial Crown
Coline Morrow, for the Accused

By the Court:

Introduction

[1] Mr. A., who did not testify, was charged with two counts of sexual assault against K.F. This decision will address whether I should have put in my charge to the jury, the defence of honest but mistaken belief in consent. Mr. A.'s counsel argues that it ought to be included. The Crown argues that there is no air of reality to the defence and therefore it should not be put to the jury.

[2] Prior to them making their closing arguments, I had asked counsel to consider whether there is an air of reality in the evidence in this case which would require me to put to the jury a defence of honest but mistaken belief in consent, so that my charge will be consistent with those arguments.

[3] "Consent" is defined in s. 273.1 of the *Criminal Code*. Lack of "consent" by a complainant is an essential element of the offence of sexual assault, which the Crown must prove beyond a reasonable doubt. In this case, the evidence of K.F. was that A. did not wear a condom during the alleged "rape" incident. As to the interpretation of "consent" and specifically the requirement for "informed

consent", which may include a specific requirement for consent to unprotected sexual intercourse, see *R v. Hutchinson* 2010 NSCA 3. Nevertheless an accused is under no obligation to show that there is an air of reality to its position that there is "consent" in this case. Whether there is "consent", is a question of fact determined by the complainant's subjective state of mind at the time of the events.

[4] On the other hand, honest but mistaken belief in consent, is in essence a denial of the *mens rea* or guilty mind of the accused. It is a claim that he acted under a mistaken belief in a set of facts, which if true, would render him not guilty.

[5] Before I instruct a jury that they may consider honest but mistaken belief in consent, I must conclude that there is an air of reality to the evidence that would support such a position by the Defence. Essentially the question is whether the evidence put forward in the case is reasonably capable of supporting the inferences required to acquit the Accused, on the basis of an honest but mistaken belief in consent.

[6] In the *Law of Evidence*, Fifth Edition, 2008, Irwin Law Inc., Toronto Ontario Canada, David Paciocco and Lee Stuesser provide a helpful summary on the nature and extent of the "air of reality" test:

> The air of reality test used to determine whether a defence is put into issue, asks "whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit." As with the prima facie evidence standard, and for identical reasons, the judge applying the air of reality test is to assume that the evidence is true and that the witnesses are providing reliable information. While the judge is not to concern herself with whether the defence is likely to succeed the judge is, in cases of circumstantial evidence, to engage in the same kind of limited weighing that the prima facie case requires:
>
> > [A]uthorities ... support a two-pronged question for determining whether there is an evidential foundation warranting that a defence be put to a jury. The question remains whether there is (1) evidence (2) upon which a properly instructed jury could acquit if it believed the evidence to be true. The second part of the question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused.
>
> In general, "the judge has to say whether any facts have been established by evidence from which [the matter in issue] *may be reasonably inferred*; the jurors ought to say whether, from those facts [the matter in issue] *ought to be inferred*.
>
> The fact that there are different burdens and standards of proof attached to different defences complicates the air of reality test. Is it necessary to take the standard of proof associated with the relevant defence into account in judging whether a reasonable trier of fact "could acquit," or "conclude in favour of the accused"? It would seem so intuitively, and this was the position taken in *R v. Stone*. There is also clear dictum supporting this view in *R. v. Cinous* and in *R. v. Fontaine,* the Supreme Court of Canada insisted that the air of reality test is the same for all defences. The apparent conflict is reconciled if what the Court meant was that the same test is to be used for all defences but that it applies differently depending upon the relevant standard of proof associated with the defence.

[7] In this case the Accused did not testify. Regarding that issue the Ontario Court of Appeal stated in *R v. Pittiman* [2005] O.J. No. 2672 at para. 48:

> In order to raise the defence of honest but mistaken belief in consent an accused need not necessarily testify. Support for the defence may arise from any evidence before the court including the Crown's case in chief and the testimony of the complainant: R. v. Robertson, [1987] 1 S.C.R. 918 at 933-36; R. v. Ewanchuk, [1999] 1 S.C.R. 330 at paras. 29-30, 55-58. That said, in the circumstances of this case there was no evidence that the appellant believed that A.F. communicated consent to engage in sex with him because of her prior sexual activity. As stated in R. v. Darrach, [2000] 2 S.C.R. 443 at 478:
>
> > **To make out the defence, the accused must show that "he believed that the complainant *communicated consent to engage in the sexual activity in question"*** (Ewanchuk, supra, at para. 46 (emphasis in original)). [My emphasis added]

[8] In *Pittiman*, the basis for the Defence submission that honest but mistaken belief in consent should be put to the jury is similar to the Defence position in the case at Bar - para. 46 *Pittiman*. The Ontario Court of Appeal agreed with the trial judge who concluded that the defence should not be put to the jury.

[9] In *R v. Ewanchuck*, [1999] 1 SCR 330 Justice Major for the Majority (as cited in *Pittiman* supra) stated:

> The defence of mistake in simply a denial of *mens rea*... it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the Court including, the Crown's case in chief and the testimony of the complainant.

[10] Most significantly, he went on to say:

> However, as a practical matter, this defence will usually arise in the evidence called by the accused.

[11] Major, J. also cited approvingly Dickson, J. (as he then was) who said while dissenting in the result in *Pappajohn v. R.* [1980] 2 SCR 120 at p. 148:

> Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.
>
> - Para. 43 *Ewanchuk*

[12] These references point out the practical difficulty that an accused who does not testify faces when arguing the defence that he did not have a guilty mind because he honestly, but mistakenly believed the complainant was consenting to sexual intercourse.

[13] In *Ewanchuck*, Major, J. also makes an important distinction regarding the use of the concept of “consent”:

> **48** There is a difference in the concept of "consent" as it relates to the state of mind of the complainant vis-à-vis the actus reus of the offence and the state of mind of the accused in respect of the mens rea. For the purposes of the actus reus, "consent" means that the complainant in her mind wanted the sexual touching to take place.
>
> **49** In the context of mens rea - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.

[14] The latter concept of consent derives from the common law and not from s. 273.2 of the *Criminal Code*. However, s. 273.2 is relevant **after** the air of reality test has been met - *Ewanchuk* at para. 52 and 60 per Major, J. (in contrast to L'Heureux-Dubé, J. at para. 99) and s. 265(4) of the *Criminal Code* to similar effect. **If the air of reality test is met, then,** even if the accused may have honestly believed the complainant had affirmatively communicated by words or conduct her agreement to sexual intercourse with Mr. A., **and only then, must the trier of fact consider** whether the belief was reckless, wilfully blind, and the accused took "reasonable steps in the circumstances known to [him] at the time, to ascertain that the complainant was consenting" - see s. 273.2(a) and (b) of the *Criminal Code* and *R v. J.A.* 2011 SCC 28, where the Majority per McLachlin CJ., held that as a matter of law "the only relevant period of time for the complainant's consent is while the touching is occurring" (para. 46) and that since parties to sexual activity must be

"able to evaluate each and every sexual act committed" (para. 43) and revoke their consent at any time, the parties to sexual activity must have an operating mind throughout the entire duration of the sexual activity.

[15] At this stage, Mr. A. only bears an evidentiary burden to show an air of reality to this defence. That is, I must consider whether there is any evidence that A. honestly believed that K.F. affirmatively communicated her consent (by words and / or conduct) to have sexual intercourse with him at the time thereof.

[16] I must therefore turn my attention to the evidence put forward in the case.

The evidence in the case

[17] The Crown argues that there is no air of reality to this defence. It suggested that much of the Defence position is based on stereotypical views of sexual assault complainants, and the evidence of other contact between K.F. and A. is not proximate to the two instances of sexual assault alleged - i.e. the afternoon groping and the middle of the night sexual intercourse. Moreover, there is no evidence that A. misunderstood that K.F. was **not** consenting.

[18] The Defence argues that there is, and draws my attention to the following:

1. That the evidence shows Mr. A. did a number of things which K.F. testified made her feel uncomfortable, however by staying at Mr. A.'s residence, she sent the signal to him that she did accept them (agree to them) and that there is an air of reality to Mr. A.'s position that he could have had an honest but mistaken belief based on such "signals";

2. That these "signals" included the following:

   A) Mr. A. thrust his pelvis into her while hugging her in the afternoon – and said words to the effect that "I'll check up on you later" to which she said nothing in response;

   B) Mr. A. brushed his hand between her legs (over her pants) while she had her back to him in the kitchen (K.F. testified that she recoiled from him saying: "what are you doing?");

C) When she made reference to taking a shower Mr. A. commented “I’ll join you”, and she said nothing in response;

D) In the afternoon while they were downstairs on the couch, Mr. A. tried to unzip K.F.’s pants and touch her. K.F.’s testified that she told him she did not want this. A. then masturbated to ejaculation, while encouraging K.F. to perform oral sex on him. K.F. went upstairs, to get a drink for herself, yet returned to the downstairs. Even thereafter she left the premises, but returned with her overnight bag to stay the night;

E) Mr. A. heard K.F. being offered to sleep upstairs overnight beside his wife’s bedroom, yet she insisted on sleeping downstairs on the couch in the smoking basement room, where the earlier sexual activity had occurred, and where Mr. A. was known to go to smoke cigarettes in the house (and I note it was winter time);

F) That when Mr. A. came down in the early morning hours to the basement, he was fulfilling his earlier in the day comment that he would “check up on” K.F. “later”;

G) That A. did rub K.F.'s leg while waiting for C. A. to come downstairs (approximately a minute or two later) in the evening;

H) That when C. A. was present in the basement, before everyone went to bed, she testified that she observed a physical flirtation by K.F. which involved K.F. rubbing her foot on Mr. A.'s back;

I) That K.F., who had smoked with Mr. A. in the afternoon downstairs, later had a beer and shared at least two marijuana cigarettes with A. and C. A. in the basement before they all went to bed;

J) That K.F. agreed with the suggestion that C. A. seemed "suspicious" or "off", and this acknowledgment supports an inference that there was an illicit sexual atmosphere that C. sensed between A. and K.F.;

K) That there is a real question about whether K.F. communicated her lack of consent to Mr. A. before and during the alleged "rape"; i.e. that whenever K.F. said (during the alleged "rape") "no" or "don't" A. would place his finger to her mouth and "shh" her;

L) That (during the alleged “rape”) although K.F. was initially resistant by her words and actions, she testified in direct: “He would not take ‘no’ for an answer... I eventually just gave up.”

M) K.F. was shown her police statement in which the following exchange took place:

> Question: How may times you expressed to him verbally that you… Answer – at least like 10 times. I didn’t say much because like I said, like I didn’t express, say anything because I was too scared to.
>
> Question: Yeah;
>
> Answer: Like, I have to admit like **even when he finds out about me telling you guys this, he’s going to be like, “oh, she didn’t say anything”**, but like I didn’t want to say anything, because I was just… Couldn’t believe this was happening… But like even he could tell, because of my body motion, like, moving away from him and everything it was mostly like me telling him physically.” – [Pages 75 – 76.]

[19] On cross-examination K.F. adopted this as an accurate statement of what she said, although throughout her testimony she qualified upon it and elaborated.

[20] I should point out that *Ewanchuk* was primarily a case about consent and honest but mistaken belief in consent, and **not** about whether there was an air of reality to honest but mistaken belief in that Judge alone trial - para. 55. Nevertheless some of Justice Major's comments about honest but mistaken belief **after** there has been a finding of an air of reality, are still useful in assessing when one can conclude there is an air of reality to that defence.

[21] For example, as Major, J. stated for the Majority in *R v. Ewanchuk* [1999] 1 SCR 330, a case in which an accused engaged the 17 year old female complainant, in a series of progressively more intimate sexual advances:

> Speaking of the mens rea of sexual assault in *Park*, supra, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:
>
> > . . . the mens rea of sexual assault is not only **satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes"**.
>
> Para. 45 [My emphasis added].

[22] ...and...

> What matters is whether the accused believed that **the complainant effectively said "yes" through her words and/or actions**... In the context of mens rea - specifically for the purposes of the honest but mistaken belief in consent - "consent" means that **the complainant had affirmatively communicated by words or conduct her agreement** to engage in sexual activity with the accused.
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> Paras. 47 and 49 [My emphasis added]

[23] To similar effect he reiterated (although those comments cannot be used to assess whether there is an air of reality to that defence) - see para. 60 *Ewanchuk*:

> (b) Limits on Honest but Mistaken Belief in Consent
>
> **Not all beliefs upon which an accused might rely will exculpate him**. Consent in relation to the mens rea of the accused is limited by both the common law and the provisions of ss. 273.1(2) and 273.2 of the Code, which provide that:
>
> 273.1 . . .
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) **the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or**

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

273.2 **It is not a defence** to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, **where**

(a) **the accused's belief arose from the accused's**

(i) self-induced intoxication, or

(ii) **recklessness or wilful blindness; or**

(b) **the accused did not take reasonable steps**, in the circumstances known to the accused at the time, **to ascertain that the complainant was consenting.**

For instance, **a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law**, and provides no defence: see R. v. M. (M.L.), [1994] 2 S.C.R. 3. **Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact**

constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:

> One "No" will do to put the other person on notice that there is then a problem with "consent". **Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner.** [Emphasis in original.]

I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, **the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters".** Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In R. v. Esau, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

> An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: Criminal Code, s. 273.2(a)(ii).

Paras. 50 - 52 [My emphasis added].

[24] I recognize that a judge should be very reluctant to withdraw from the jury a potential defence. However the law demands that there be an air of reality to any

defence that is put to the jury for their consideration in judging whether the Crown has proved beyond a reasonable doubt the essential elements of the offence.

[25] I am not to decide whether the argument of honest but mistaken belief in consent is unlikely, likely, somewhat likely or very likely to succeed at the end of the day. The question for me is whether the evidence discloses a real issue to be decided by the jury. In this case, the Defence argues that the evidence could allow a jury to infer from the circumstances that A. honestly believed that K.F. had affirmatively communicated her consent by words and / or actions.

[26] I bear in mind that the indictment contains two counts of sexual assault. My sense is that one count relates to the alleged “rape”; the second relates to the afternoon sexual activity which includes the brushing of the inside of her vagina / buttock area over her pants.

Conclusion

[27] Almost all of the Defence suggestions above noted are patently without merit as a basis for their position that there is an air of reality to honest but

mistaken belief in consent. They presume that Mr. A. is entitled to rely on K.F.'s failure to vociferously and expressly reject his repeated sexual overtures, as a basis for his mistaken belief that K.F. **later** consented to sexual intercourse. There is no evidence that K.F. at any time favourably reacted to **any** of Mr. A.'s sexual overtures. Not only were those overtures not proximate in time or otherwise logically tied to the alleged "afternoon" groping incident, or the "rape" incident, they are also not reasonably capable of supporting the inference that Mr. A. honestly yet mistakenly believed K.F. was consenting to his afternoon groping of K.F. **or** his sexual intercourse with K.F. in the middle of the night, **at the time those events happened**.

[28] Turning then to the two specific allegations:

> 1. <u>The afternoon sexual activity</u>
>
> In relation to the afternoon sexual activity, there is no air of reality to a claim of honest and mistaken belief in consent. K.F. had her back to him, and there is no evidence that Mr. A. had any basis at that time to honestly believe that K.F. was going to / did consent to his touching between her legs. It was an unexpected and relatively brief groping, and there is no evidence capable of supporting an inference that K.F.

had affirmatively communicated her consent by words and / or actions to Mr. A..

2. The alleged rape

As to the alleged "rape", Mr. A. claims that the evidence that lends an air of reality to his honest but mistaken belief in consent includes: (i) C. A.'s testimony that K.F. used her foot to rub the back of Mr. A. while on the couch in the presence of C. A. just before they all went to bed [and while they were smoking marijuana and drinking]; (ii) that C. A. seemed "suspicious"about whether anything was going on between K.F. and Mr. A.; and (iii) the matter of K.F.'s comment to the police, that Mr. A. might say to them: "oh, she didn't say anything", as well as her testimony that she eventually did "give up" to his persistent efforts at sexual intercourse in the early morning.

[29] K.F.'s **opinion** that C. A. may have been "suspicious" about whether something was going on between A. and K.F. is pure speculation. Even if C. A. was acting differently, the reasons therefore could be many, and bear no relation to K.F.'s conduct in any way. C. A.'s testimony that the foot/back rubbing incident struck her as odd, (which incident K.F. denied occurred), does not rise to the level of creating an air of reality to an honest and mistaken belief in consent. C. A. testified that she dismissed any concern about it at the time since K.F. was family

and Mr. A. was her husband. Even if it did happen, it was not proximate to the sexual intercourse several hours later and nothing else intervened which it could be argued provided a basis for an honest but mistaken belief in consent by Mr. A..

[30] Similarly K.F.'s **opinion** of what Mr. A. **might** say to police and have thought, is irrelevant and speculation. To the extent that an argument was made suggesting that even K.F. considered the possibility that Mr. A. might have reasons to argue, "she didn't say anything", because of the circumstances of the encounter, I keep in mind that: (i) K.F.'s opinion of whether the circumstances might support an air of reality to honest but mistaken belief is also irrelevant - K.F. is to testify as to facts, not to give opinions about whether a particular legal threshold has been met; (ii) K.F. may have had in mind and considered his post-intercourse demeanor the next day (i.e. his acting "normal") in her assessment in that regard; or (iii) perhaps what she meant was that A. would say... "but she did not say anything"..., because he meant she had not reported the incident until January 24, which was two days **after** the incident.

[31] More importantly, however, the evidence reveals that he did not say anything to her, or otherwise communicate his thoughts to her in this respect in any

way. There is no direct evidence about what Mr. A. thought - and specifically whether he thought mistakenly that K.F. was consenting to his sexual advances **at the time of that activity**. There is also no indirect evidence to support the Defence position that Mr. A. had received a "yes" communication from K.F. to the sexual activity at the time of that activity. The evidence from K.F. is to the contrary - she not once affirmatively communicated by words or conduct her agreement to engage in sexual activity with Mr. A..

[32] In my opinion the foot/back rubbing incident is not evidence that, as put forth, individually or cumulatively with other evidence, is reasonably capable of supporting the inference that Mr. A. therefore, hours later in the middle of the night, mistakenly thought he had received a "yes" from K.F.

[33] Similarly, that K.F., eventually "gave up" physically and verbally resisting A. in the basement between 1:00 a.m. and 3:00 a.m. January 22, 2010, is not individually or cumulatively with other evidence, sufficient to conclude that there is an air of reality to the Defence claim that Mr. A. honestly but mistakenly believed K.F. was consenting to sexual intercourse.

[34] For all those reasons, I find there is no air of reality to a claim of an honest but mistaken belief in consent in this case, and as such I refuse to instruct the jury to consider this defence.

J.