SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Oickle, 2010 NSSC 182

Date: 20100427
Docket: CRH. 308883
Registry: Halifax

Between:

Her Majesty the Queen

v.

Scott Eric Oickle

Editorial Notice

Identifying information has been removed from this electronic version of the judgment. The complainant's name has been replaced with C to protect her identity and her mother has been identified as M and her sister as S.

Restriction on Publication:	Section 486 and 539(1) C.C.C.
Judge:	The Honourable Justice Felix A. Cacchione
Heard:	March 30, 31, and April 27, 2010, in Halifax, Nova Scotia
Written Decision:	May 4, 2010
Counsel:	Jennifer A. MacLellan, for the Crown Mark F. Dempsey and Curtis C. Palmer, for the Defendant

By the Court:

[1] The accused, Scott Eric Oickle, is charged with sexually assaulting C on April 25th, 2008. In order to obtain a conviction the Crown must prove beyond a reasonable doubt that there was a touching, that it was of a sexual nature and that it was done without the complainant's consent. It must also prove an intention to touch and knowledge, recklessness, or willful blindness with regards to the lack of consent.

[2] The principles I have just stated come from **R. v. Ewanchuk**, [1990] 1 S.C.R. 330; 131 C.C.C. (3d) 481.

[3] I am also mindful that an assault of a sexual nature need not appear hostile as it is most often the case with assaults of a non-sexual nature. Sexual assault is an offence of general intent. The Crown is not required to prove a specific intent, vis-a-vis the sexual nature of the assault, since it forms part of the physical element of the offence. The totality of the circumstances surrounding the events alleged to constitute the sexual assault must be examined. What took place before, during and after the event is relevant to whether the conduct was of a sexual nature and whether such conduct violated the complainant's sexual integrity.

[4] The Supreme Court of Canada judgment in **R. v. Litchfield** (1993), 86 C.C.C. (3d) 97 directs that unnecessary barriers to a consideration of all the circumstances surrounding the impugned conduct ought not be created especially when the complainant has, as in the present case, consented to some touching not of a sexual nature.

[5] In determining whether a sexual assault has taken place I must consider many factors including the part of the body touched, the nature of the contact, any words or gestures accompanying the conduct, the situation in which such conduct occurred and the accused's purpose or intent including the presence or absence of sexual gratification; **R. v. V.(K.B.)** (1993), 82 C.C.C. (3d) 382 (S.C.C.) affirming (1992), 71 C.C.C. (3d) 65 (Ont. C.A.); **R. v. Higginbottom** (2001), 156 C.C.C. (3d) 178 (Ont. C.A.).

[6] The test to be applied in determining whether the conduct alleged has the required sexual nature is objective. Sexual gratification, as previously stated, is a factor to consider in deciding whether the conduct was sexual.

[7] In the case of **R. v. Taylor** (1985,) 44 CR. (3d) 263 the Alberta Court of Appeal held that sexual assault is a term which includes an act that is intended to degrade or demean another person for the purpose of sexual gratification. It is with these principles in mind that I have considered the evidence.

[8] The accused testified on his own behalf. I have considered his evidence in accordance with the direction given by Cory, J. in **R. v. W(D)** (1991), 63 C.C.C. (3d) 397 S.C.C. and most recently with the Supreme Court of Canada's decision in **R. v. Laboucan**, [2010] S.C.J. No. 12.

[9] The accused is presumed innocent and has no burden of proving his innocence or explaining the allegations made against him. Having testified, his credibility is assessed in the same fashion as that of any Crown witness. The Crown bears the burden of proving guilt beyond a reasonable doubt. The benefit of any reasonable doubt accrues to the accused. Suspicion of guilt or the probability of guilt is not good enough. It is not proof beyond a reasonable doubt to suspect guilt.

[10] The following facts emerge from the evidence presented.

[11] The complainant, C, was 22 years old at the time of the alleged incident. She met the accused as a result of her mother, M, chatting with the accused on a dating website called Plenty of Fish.

[12] The complainant's mother had been exchanging emails with the accused on this website. She had posted a picture of herself and her daughter, the complainant, on this site. As a result of the accused inquiring of M who the beautiful girl in the picture was, M gave the complainant the accused's email address. This inquiry should have, but did not, sound alarm bells for the complainant's mother.

[13] The accused listed his age as 27 years old on the website when in fact he was 36 years of age.

[14] C and the accused exchanged emails for approximately one or two weeks. Some of the emails may have been, and perhaps were, flirtatious in nature. This exchange of correspondence led the complainant to call the accused on the telephone. They agreed to meet on April 25th, 2008 to go play billiards.

[15] The accused picked up the complainant at the apartment she shared with her mother and her * sister, S . He picked her up at approximately 9:30 p.m. He returned her to the same location less than two hours later. The accused went into the apartment while waiting for the complainant to get ready and met S, A.B. and J.M.. The complainant's sister, S, in her direct evidence described the accused, upon first meeting, as very gentlemanly.

[16] The complainant and the accused then proceeded in the accused's vehicle to Dooley's on Spring Garden Road to play pool. As a result of not finding any on-street parking, the accused suggested that he park his vehicle in the parking lot at his residence on Morris Street, a short distance away. He did so. Both he and the complainant walked back to Spring Garden Road to Dooley's.

[17] No pool tables were available there or at another location across the street. The complainant made the suggestion that they go bowling. The accused suggested that they call the bowling venue from his residence before driving there to determine the availability of bowling lanes and so as to avoid an unnecessary trip. The complainant agreed. Both then proceeded to the accused's residence.

[18] The complainant, as a result of the exchange of emails with the accused, believed that he lived with five other roommates. She did not expect the accused to be living in a rooming house, which is where he resided.

[19] The accused apparently made a call to the bowling lanes and told the complainant that no lanes were available and that the venue would be closing in a short while. He suggested that she sit on his bed and stay awhile. The complainant agreed.

[20] The room was sparsely furnished. It had a mattress on the floor, a small desk and chair and a stereo above the mattress.

[21] The complainant sat on the bed and conversed with the accused who was lying on his back on that bed. She described him as being relatively quiet. The accused asked the complainant to move closer to him or to cuddle with him and so the complainant lay on her stomach. She showed him tattoos on her shoulders and asked if he had any tattoos.

[22] The accused asked her if he could touch her skin because he had been told that Native people had soft skin. The complainant let him do that.

[23] The accused then asked her about the colour of her eyes. She told him that they were green. He asked her to sit up and to look at the light because he wanted to see if in fact they were green. The complainant sat up and the accused then kissed her. The complainant's evidence was that she did not mind this at first. In her evidence she stated "I was okay with that at first". This was a normal closed mouth kiss. The kiss at some point turned into an open mouth kiss. The complainant told the accused that that was enough. The accused continued to kiss her face, her neck and then manoeuvred his leg on top of her. The complainant ended up on her back. The accused attempted to put his hands up her shirt but she pushed them off. She told the accused to stop but he did not. She said this in a voice loud enough for the accused to hear.

[24] The accused then moved himself up her body and had the complainant's arms pinned to her sides with his knees. He somehow removed his penis from his pants and began masturbating. He ejaculated. His semen went on the complainant's clothes, her face, her neck and her hair.

[25] The accused then got off the bed, went to his desk, wiped himself off with a Kleenex and brought some Kleenex over to the complainant. She, however, told him not to touch her. She put on her shoes and her jacket. He asked her where she was going and she told him she was leaving. The accused offered her a ride home which she initially rejected, but then accepted when he offered it again.

[26] The accused drove her home. The complainant was quiet while in the accused' vehicle. When the complainant got out of the vehicle the accused said to her "sorry". The complainant entered her apartment and she was crying and distraught. She was seen by her sister S and friends A.B. and J.M.. The complainant wanted to wash herself because she had dried semen on her face and shirt, but her sister would not allow her to do that.

[27] S , the complainant's sister, was angry at what she saw. S called the police after the complainant told her what had happened. Initially S suspected that her sister had been raped because of the emotional state C was in. She asked C if she had been raped. C responded "no".

[28] S also called the accused's telephone number and left a message on his voice mail in which she cursed and may have said some threatening things. S also had it in mind that if her sister would not press charges, then she, S, would.

[29] C's emotional state was corroborated by the witnesses A.B. and J.M. who both testified that she was crying and upset when she returned to the apartment. J. M. saw what appeared to her to be a dried liquid around C's ear, her neck and under her ear.

[30] I do not accept A.B. 's evidence that the complainant tore off her shirt and threw it. I accept Constable Kennedy's evidence that the complainant was wearing a white shirt and a purple shirt when she, Constable Kennedy, initially met the complainant. After interviewing the complainant alone in a separate room Constable Kennedy requested the shirts that C was wearing. B then took off the white shirt, exhibit 3, and the purple shirt, exhibit 4 and gave them to Constable Kennedy. During Constable Kennedy's interview of the complainant in a separate room, she obtained information from the complainant about what had allegedly occurred and where.

[31] Approximately two and a half hours after returning home in a distraught condition C went with Constable Kennedy and showed her the building where this had occurred.

[32] Constable Kennedy also testified that when she met the complainant and during her dealings with her, the complainant was crying, distraught and embarrassed. Constable Kennedy also observed a dried substance on C's neck, face and clothes. I accept the evidence of Constable Kennedy as it relates to the complainant being shaken and rather uncommunicative when she spoke to her. I also accept that the complainant wanted to wash herself but was prevented from doing so by both her sister and Constable Kennedy.

[33] It was only when it was evident to Constable Kennedy that the Forensic Identification Unit of the Halifax Regional Police Service, which she had requested to attend the complainant's residence, would not attend and because of the complainant's distraught condition that Constable Kennedy allowed the complainant to wash herself.

[34] The accused testified on his own behalf. His evidence, concerning how he met the complainant on line, her telephone call to him, their meeting to go out on a date and the circumstances which led them to return to his apartment mirrored that of the complainant.

[35] The accused's version of what took place in his room differed from that of the complainant's. The accused's evidence was that the complainant was the sexually aggressive one. She was the one who lay on top of him. She was the one who kissed him for approximately a minute or more. She was the one who rolled off him and then pulled him on top of her. According to the accused the complainant took his hand and put it on her breast and then did the same with his other hand. It was the complainant, according to the accused, who pulled up her shirt, put the accused's head to her breasts and told him not to stop kissing her breasts. It was the complainant who rubbed his penis over his pants and it was the complainant who took his penis out of his pants and masturbated him for approximately one minute until he, unaware that he was about to ejaculate, ejaculated. The complainant at this point was on her back and the accused was over her in what he described as a "jackknife position". According to the accused it was when he looked and saw the ejaculate coming from his penis that he lost his balance and fell forward causing his ejaculate to get on the complainant's clothing, her neck and stomach. The complainant told him, according to his evidence, that his sudden ejaculation was "no big deal" and not to worry about it.

[36] The accused testified that he felt embarrassed by his sudden ejaculation and asked the complainant if she wanted him to drive her home. She agreed and he drove her home. He testified that she was pretty quiet on the drive back to her residence.

[37] The accused also testified that the complainant gave him no reason to believe that she was not consenting to this sexual activity. He stated that the complainant had "hundreds of chances to hit him or kick him" but she did not.

[38] I am mindful of the Supreme Court of Canada's direction in **R. v. W(D)**: If I believe Mr. Oickle I must acquit him. If I do not believe his evidence, but his evidence leaves me in a state of reasonable doubt I must acquit. Even if I do not believe his evidence and it does not leave me in a state of reasonable doubt I must consider on the evidence which I do accept whether the Crown has proven its case beyond a reasonable doubt.

[39] The complainant presented as a petite, soft spoken, shy, young women who did not appear to me to be wise in the ways of the world. She is small in stature. I accept that at the time of these events she weighed under 90 pounds and was 5'3" tall.

[40] I found the complainant to be a credible witness. She did not appear to exaggerate her evidence. She acknowledged that she communicated online with the accused and based on these communications they eventually, after about one or two weeks, decided to meet in person. She admitted that she was the one who initiated the telephone contact with the accused and that they then agreed to meet in person. She admitted, as I said previously, that there was some online flirting go on between the two of them. She admitted in her evidence that the initial kissing and touching was consensual. She admitted that she was okay with the activity which was taking place until the accused started to French kiss her and reach for her breasts and got on top of her.

[41] I accept her evidence that she did not cry out for help because she believed no one else was in the building and that she did not run away because she feared what would happen if she did and if the accused caught up with her.

[42] I make nothing of the fact that the complainant had taken kickboxing classes. No evidence was led as to the nature of her training, nor was she cross-examined on her abilities in this sport.

[43] The accused is a much bigger person standing approximately 5'9" tall and weighing at the present time 192 pounds, although his evidence was that at the time of this incident he weighed under 160 pounds.

[44] The complainant’s demeanour after the event was witnessed by her sister S and some friends. These witnesses confirmed that the complainant was crying and distraught when she returned to her apartment. It is noteworthy that this date which had been in the making for a few weeks, lasted less than two hours, and that included travel time each way.

[45] Constable Kennedy noted a distraught and crying C.

[46] The Crown witnesses B, M and S also noticed a white crusty substance on the complainant's face and clothing. The substance found on the complainant's shirts worn that evening was anyalyzed and the substance was found to be the accused's semen.

[47] There were some inconsistencies in the complainant's evidence between her evidence at trial and a video taped statement which she gave to the police approximately one week after the event. At trial she could not remember which hand the accused used to masturbate himself, however she did remember in her statement that it was his right hand. She said in her statement that he pushed her down with his left hand, however later on in that statement she said that his other hand was holding his privates.

[48] At trial she testified and denied saying "whatever" in response to her sister being upset when she returned home. She did acknowledge, however, that she told the police that what she had said to her sister was "well whatever" in response to S being upset.

[49] At trial C testified that her arms were pinned to her side when the accused got on top of her. In her statement to the police she referred to her arms being free when the accused first got on top of her. I am not satisfied that the complainant at trial was referring to the same time period described in her statement.

[50] Although there were inconsistencies in some of the complainant's evidence, I am not satisfied that those were in an effort to mislead the court, nor am I satisfied that these inconsistencies were fatal to her credibility.

[51] I do not accept the accused's evidence and it does not raise a reasonable doubt.

[52] The accused was dishonest from the first time he ever had contact with the complainant or her mother. He led the complainant to believe, through his profile on the dating website, that he was 27 years old when in fact he was 36. He testified that he was not having much success on the dating website as a 36 year old so he therefore changed his profile to show his age as being 26.

[53] The accused was interviewed by the police shortly after this incident. The defence admitted that his statement was freely and voluntarily given and that his

Charter rights had been observed. The accused, when being interviewed by the police denied to them that he lied about being 27 years old, but rather told them that he had made a typographical error on his website profile. He testified that he was not forthcoming about his age with the police because he was intimidated by the police which is inconsistent with the admission made that the statement he gave was free and voluntary and in compliance with Charter requirements. It is noteworthy that when he sent emails to the complainant and her mother the police were not involved, yet he told these women that he was 27 years old.

[54] Mr. Oickle's evidence was inconsistent within itself. He testified that he closed his profile on the dating website soon after April 25th, 2008. His profile which had been on that website for approximately five years. He allegedly closed it because he had been threatened by S , however he never told the police about this alleged threat. The website profile was closed four to eight days after receiving the threats, not immediately after the threats were made.

[55] Mr. Oickle presented as a witness who had an answer or an explanation for anything and everything. He struck me as someone who is always looking for someone or something else to blame for things that he himself has done. For example, he did not admit to the police that he consciously changed his age on the website, rather he told them that it was a typo. He initially denied lying to the police but then said that he had because the police intimidated him. Again, not his fault.

[56] Mr. Oickle testified and gave his version of the events on direct examination. On cross-examination he added things to his testimony which he had not referred to before in his direct examination, such as that the complainant told him on the drive home "Hey, I wish that it didn't happen" referring to his premature ejaculation and that he told the complainant that he did not want to have anything more to do with her. When it was pointed out to him that he had not said this in direct examination he blamed his counsel.

[57] Another example concerns his evidence about all his alleged physical ailments and how his shoulder problem caused him to ask the complainant to move her head from his shoulder because it was so painful. He failed to mention any of these physical ailments to the police when they were interviewing him. These physical limitations did not, however, prevent him from assuming the position

which he described as a “jackknife” over the complainant when she was supposedly masturbating him.

[58] These problems with his back, his hands, his feet and his shoulders did not prevent him from obtaining a Bachelor’s Degree in Physical Education, nor of completing a course in massage therapy.

[59] Mr. Oickle was also argumentative with counsel in cross-examination. An example of this can be seen in his responses to questions about learning to wrestle when he was in Teachers’ College. Initially he denied learning how to wrestle when he was at Teachers’ College. He then admitted, reluctantly, that he had taken an introductory course in wrestling where he did some wrestling. When asked by the police about wrestling he told them that he had not pinned anyone down since he did wrestling in Teachers’ College.

[60] At times during his cross-examination Mr. Oickle responded to questions being asked of him with questions of his own, such as “What do you mean by wrestling?”, or “What is the definition of dating?”.

[61] There are two pieces of after the fact conduct which bears some comment. They have been raised in part in counsel’s argument. The first is Mr. Oickle parking his vehicle in a different location from his usual parking spot at the rear of his rooming house after these events. And the second concerns his closing of the website profile. Both are pieces of circumstantial evidence.

[62] Parking his vehicle in a different location is consistent not only with blameworthiness, but also with a fear of threats made to him by S . I attach no weight to this piece of evidence.

[63] Closing the website account which he had for approximately five years where his age was misrepresented is more troublesome. It cannot be explained away by saying that he did it because of threats since Mr. Oickle knew, and I find that he was certainly more computer literate than he held out to be, that he could block anyone from his website if he chose to do so. Yet, he chose to close it instead. This is a piece of evidence that bears some, but not great weight.

[64] Mr. Oickle was not an impressive witness. At first he testified that C was quiet all the way home. In cross-examination he then said that she spoke during the

second half of the drive by saying “I wish that didn’t happen”, meaning his ejaculating on her face. He testified that she thanked him for the drive home, but later in his evidence said that she was disappointed and angry. If she was angry, why would she thank him?

[65] He testified that he knew C was upset when he dropped her off and also testified that he told her he did not want to have anymore contact with her. I think his words were anything more to do with her. If in fact he did say this, why would she thank him for the drive home.

[66] On the evidence which I do accept I am satisfied that although the complainant consented to kissing and touching, some of which may have had sexual overtones, she did not consent to the accused masturbating over her and ejaculating in her face. She communicated this lack of consent to the accused.

[67] I am also satisfied that the complainant’s sexual integrity was violated. The accused’s ejaculation attests to his purpose that evening, that being his sexual gratification.

[68] Based on the foregoing reasons I am satisfied that the Crown has proven the accused’s guilt beyond a reasonable doubt. Accordingly, I find the accused guilty as charged.

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Felix A. Cacchione